

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

**ISLAND HORIZONS HOUSING
LIMITED PARTNERSHIP,**

Petitioner,

v.

**FHFC CASE NO. 2005-017UC
Application No. 2005-023C**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

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FINANCE CORPORATION**

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on July 15, 2005.

APPEARANCES

For Petitioner, Island Horizons
Housing Limited
Partnership:

Greg Will, Director
Tax Credit Development
National Church Residences
2335 North Bank Drive
Columbus, OH 43220

For Respondent, Florida Housing
Finance Corporation:

Wellington Meffert II
General Counsel
Florida Housing Finance Corporation
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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue in this proceeding is whether Petitioner is entitled to an award of proximity tie-breaker points due to the proximity of its proposed development to a grocery store.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 6. Joint Exhibit 1 is a “Joint Stipulation of Facts and Exhibits.” That Joint Stipulation basically describes the application process, and the circumstances regarding the scoring of Petitioner’s application with regard to the issue in dispute. The Joint Stipulation of Facts and Exhibits is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. Along with other competing applicants, Petitioner, Island Horizons Housing Limited Partnership, submitted Application No. 2005-023 C for housing credits in connection with a proposed 72-unit garden style apartment complex in Brevard County, Florida.

2. Petitioner sought the award of tie-breaker points due to the proposed project's proximity to a grocery store. In order to be awarded such points, the Universal Application Instructions (UA 1016 (Rev. 2-05)) require a Surveyor Certification form reflecting the grocery store's latitude and longitude coordinates, stated in degrees, minutes and seconds. The Surveyor Certification Form, Exhibit 25, specifies, in relevant part, that

The latitude and longitude coordinates for each service must represent a point that is on the doorway threshold of an exterior entrance that provides direct public access to the building where the service is located.

(Joint Exhibit 2) The Universal Application Instructions contain this same requirement. (Joint Exhibit 6, at page 16) The Instructions also require that

Additionally, for each latitude and longitude coordinate provided for a service housed within a building, the

Applicant must provide a sketch depicting the location of the exterior public entrance used for the latitude and longitude coordinates for each service.

(Joint Exhibit 6, page 16)

3. Petitioner's initial application contained a Surveyor Certification form certifying the proximity of a grocery store, Albertson's Supermarket, to the proposed project. The coordinates specified were Latitude = N-28 degrees, 21 minutes, 38.6 seconds; Longitude=W-80 degrees, 41 minutes, 52.8 seconds. (Joint Exhibit 2) As a result of preliminary scoring, Petitioner received no tie-breaker points for proximity to a grocery store because Petitioner did not provide the required sketches. (Joint Exhibit 3)

4. During the time allowed for applicants to "cure" any items for which less than the maximum score was initially obtained, Petitioner submitted a sketch to attain tie-breaker points for its proximity to Albertson's Supermarket. This sketch lists the same latitude and longitude coordinates contained in the Surveyor Certification Form, and demonstrates that the coordinates were not taken at the front door of Albertson's. (Joint Exhibit 5)

5. Petitioner and Respondent have stipulated that the surveyor's latitude and longitude coordinates for Albertson's were determined using the surveyor's Global Positioning Satellite ("GPS") system directly in front of the door and as close as

possible (about 8 to 10 feet distant from the door) for reception of the satellite signal due to a canopy covering of the entrance. (Joint Exhibit 1)

6. In its final scoring of Petitioner's application, Respondent awarded no tie-breaker points for Petitioner's proximity to a grocery store, stating as grounds:

Applicants are to provide the latitude/longitude coordinates for an exterior public entrance to the service. The sketch provided in an attempt to cure Item 1P appears to show a point that is not on a public entrance doorway threshold.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

The sole issue in this proceeding is whether Petitioner is entitled to tie-breaker points due to the proximity of its proposed project to a grocery store. More specifically, the issue is whether the latitude and longitude coordinates provided by Petitioner for the Albertson's Supermarket represent "a point that is on the doorway threshold of an exterior entrance that provides direct public access to the building,"

as required by the Universal Application Instructions and the Surveyor Certification form required to be submitted for the award of proximity tie-breaker points.

The Universal Application Package, or UA 1016 (Rev. 2-05), which includes both its forms and instructions, is adopted as a rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Accordingly, both the Respondent and the Petitioner are bound by its terms.

Both the instructions and the Surveyor Certification form clearly require that the longitude and latitude coordinates provided for a given service represent a point “that is on the doorway threshold.” A “door” is defined in *Merriam-Webster’s Collegiate Dictionary, Tenth Edition* as a “swinging or sliding barrier by which an entry is closed and opened,” and a “doorway” is defined as “the opening that a door closes; *esp.* an entrance into a building or room.” The same Dictionary defines “threshold” as “the plank, stone, or piece of timber that lies under a door” or a “gate, door.” Here, it is undisputed that the Petitioner’s surveyor did not obtain his latitude/longitude coordinates at the door which provides the entrance to Albertson’s. Indeed, the parties stipulated that the surveyor’s coordinates represent a location about 8 to 10 feet away from said door.

Petitioner argues that due to the walkway overhang in front of the Albertson’s door which blocked the satellite reception to the GPS receiver, the coordinates

provided are the only proper coordinates available to locate the position of the main public entrance to the store. That may be true with regard to the capability of the GPS. However, apparently no attempt was made to extrapolate the extra 8 to 10 feet into the proper coordinates required by rule (i.e., the application forms and instructions). The rule clearly requires that the proper measurement to be taken is at the “doorway threshold” and not at a location 8 to 10 feet from the “doorway threshold,” and not on a “walkway” in front of that “doorway threshold.” It should also be noted that had Petitioner properly submitted its sketch, as required by rule, at the time of filing its initial application, the error could possibly have been corrected during the “cure” period.

Petitioner further argues that his surveyor, Mr. Packard, stated that a deviation of 8 to 10 feet would not alter the coordinates. This constitutes hearsay which is not substantiated by any competent, substantial evidence.

Petitioner argues that “the parties must stipulate to the fact” that the latitude and longitude coordinates provided lie well within one mile of the proposed development, and therefore Petitioner is entitled to the full 1.25 proximity tie-breaker points. In fact, the parties did not stipulate to such a fact. And, even if that fact were the subject of a stipulation, it is not dispositive of the issue of whether the Respondent properly refused to award Petitioner proximity tie-breaker points under the grocery

store category due to Petitioner's failure to comply with the rules which govern the award of such points.

As agreed in the parties' Stipulation, the purpose of tie-breaker points is to provide a means of determining which applicant should rank higher when all threshold requirements are met and application scores are identical. Given the very competitive nature of the housing credit award process, it is reasonable and appropriate for Respondent to very strictly construe and apply the terms and conditions for an award of tie-breaker points. While there may be some room for interpretation in many of the requirements set forth in the forms and instructions which constitute the Universal Application Package, the requirements set forth for the award of tie-breaker points, particularly as to the designation of latitude/longitude coordinates, are very specific and clear. Neither an applicant nor the Respondent can deviate from those requirements, absent a change made through the rulemaking process. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (Fla. 1st DCA 1996); rev. denied, 695 So.2d 701 (Fla. 1997).


In summary, Petitioner did not comply with the rules governing the award of proximity tie-breaker points. The Respondent's interpretation of its rules is consonant and consistent with the plain language of the rule. Having properly and

reasonably applied its rules to Petitioner's application, the Respondent's decision not to award proximity tie-breaker points for the grocery category should be upheld.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered determining that Petitioner receive no tie-breaker points for the proximity of its proposed development to a grocery store.

Respectfully submitted and entered this 9th day of August, 2005.



DIANE D. TREMOR
Hearing Officer for Florida Housing
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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

All parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages. Written arguments must be filed with Florida Housing Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on August 16, 2005. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.

ST. EX.

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Application No. 2005-023C

FLORIDA HOUSING FINANCE
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Respondent.

_____ /

**JOINT STIPULATION
OF FACTS AND EXHIBITS**

The parties, ISLAND HORIZONS HOUSING LIMITED PARTNERSHIP, (“Island Horizons”), and FLORIDA HOUSING FINANCE CORPORATION (“Florida Housing”), hereby stipulate for purposes of expediting the informal hearing scheduled for 10:00 a.m., July 11, 2005, in Tallahassee, Florida, and agree to the following facts and exhibits:

1. Island Horizons timely submitted an Application to Florida Housing for housing credits in the 2005 Universal Cycle in connection with a proposed 72-unit garden style apartment complex in Brevard County, Florida.

2. To encourage the development of low-income housing for families, Congress in 1987 created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar-for-dollar reduction of the holder’s federal tax liability,

which can be taken for up to ten years if the project satisfies the Internal Revenue Code's requirements for each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for construction of the development.

3. Florida Housing is a public corporation organized pursuant to section 420.504, Florida Statutes, to provide and promote financing of affordable housing and related facilities in Florida. Florida Housing is an agency as defined in section 120.52, Florida Statutes, and, therefore, is subject to the provisions of Chapter 120, Florida Statutes.

4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of low-income Tax Credits (also known as housing credits) in Florida. See section 420.5099, Florida Statutes. In this capacity, Florida Housing determines which entities will receive housing credits for financing the construction or rehabilitation of low-income housing.

5. Housing credits are allocated by Florida Housing through a competitive application process. Applications for housing credits are submitted to Florida Housing through a once-a-year process referred to as the Universal Cycle, which is governed by chapter 67-48, Florida Administrative Code.

6. The Universal Cycle is a single-application process for the housing credit program operated by Florida Housing pursuant to section 420.5099, Florida Statutes, and Section 42 of the Internal Revenue Code, the Florida Housing-administered SAIL program under section 420.5087, Florida Statutes, and the Home Investment Partnership

Program operated by Florida Housing pursuant to section 420.5089, Florida Statutes, and federal Housing and Urban Development regulations.

7. Florida Housing uses a scoring process for the award of housing credits outlined in rule 67-48.004, Florida Administrative Code, and a Qualified Allocation Plan (QAP). The provisions of the QAP are adopted and incorporated by reference in rule 67-48.025, Florida Administrative Code.

8. Pursuant to the QAP, housing credits are apportioned among the most populated counties, medium populated counties, and least populated counties. The QAP also establishes various set-asides and special targeting goals.

9. The 2005 Universal Cycle Application, adopted as Form UA1016 (Rev. 2-05) by rule 67-48.004(1)(a), Florida Administrative Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant. Some of the parts include “threshold” items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application. Other parts allow applicants to earn points; however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant’s overall score. Site plan approval, infrastructure availability, zoning approval and environmental site assessment are among the threshold items.

10. To provide a means of determining which applicant should rank higher when all threshold requirements are met and application scores are identical, Florida Housing awards “tie-breaker” points for proposed developments, according to the development’s proximity to certain services, such as a Grocery Store, Public School, or Public Bus Stop or Metro-Rail Stop.

11. Preliminary scores for all applicants were released by Florida Housing on March 18, 2005. Following consideration of comments submitted by other applicants and further review of applications pursuant to rule 67-48.004(4) and (5), Florida Administrative Code, Florida Housing released Notice of Possible Scoring Error (NOPSE) scores on April 15, 2005. Applicants were then permitted to submit “cures” to problems identified in the preliminary and NOPSE scores. See rule 67-48.004(6), Florida Administrative Code. Applicants also were allowed to comment on the “cures” submitted by competitor applicants by filing Notices of Alleged Deficiencies (NOADs). See rule 67-48.004(7), Florida Administrative Code.

12. After review of NOADs, final scores were released by Florida Housing on May 25, 2005, through a final scoring summary dated May 24, 2005. Each applicant received its own final scoring summary.

13. A NOPSE was filed by a competing applicant (Application No. 2005-031C) who alleged that the Grocery Store listed on the Location Sketch in connection with proximity tie-breaker points did not meet the proximity requirements for a Grocery Store as defined in the Universal Application Instructions.

14. As the result of preliminary and NOPSE scoring, Island Horizons was awarded no proximity tie-breaker points out of a possible 1.25 tie-breaker points for its proximity to a Grocery Store.

15. In response to the preliminary and NOPSE scoring, Island Horizons submitted cure materials relating to the proximity tie-breaker points. Included among the cure materials submitted in connection with the proximity tie-breaker points was a sketch

provided in an attempt to cure Item 1P, which appears to show a point that is not a public entrance doorway threshold.

16. In its final scoring summary dated May 24, 2005, Florida Housing found that Island Horizons should not receive any tie-breaker points for proximity to a Grocery Store because, according to the scoring summary, "Applicants are to provide the latitude/longitude coordinates for an exterior public entrance to the service. The sketch provided in an attempt to cure Item 1P appears to show a point that is not on a public entrance doorway threshold."

17. The latitude and longitude coordinates for Albertson's public entrance doorway were determined directly in front of the door which was clearly labeled on the sketch provided in the Cure Application provided to Florida Housing. The location coordinates depicted on the sketch were determined using the surveyor's Global Positioning ("GPS") system.

18. The surveyor determined the latitude and longitude coordinates as close as possible to the exterior public entrance as the canopy covering the entrance would allow for reception of the satellite signal by the GPS receiver (about 8 to ten feet distant from the door).

19. Along with the final scoring summary Florida Housing provided Island Horizons a Notice of Rights, informing Island Horizons that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

20. Island Horizons timely requested a hearing by filing its Petition for Informal Administrative Hearing on June 16, 2005.

The parties offer the following JOINT EXHIBITS into evidence:

Exh. 1. Joint Stipulation.

Exh. 2. Island Horizons Application and Exhibit 25.

Exh. 3. Preliminary Scoring Summary dated 3/17/05.

~~Exh. 4. NOPSE Scoring Summary dated 4/14/05.~~

Exh. ⁴~~3~~. Final Scoring Summary dated 5/24/05.

Exh. ⁵~~7~~. "Cure" regarding Item 1P (proximity) submitted by Island Horizons in response to preliminary and NOPSE scoring.

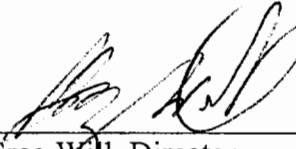
Exh. ⁶~~8~~. The 2005 Universal Cycle Application Instructions, Pages 1-2 and 12-22.

Petitioner's Exhibits:

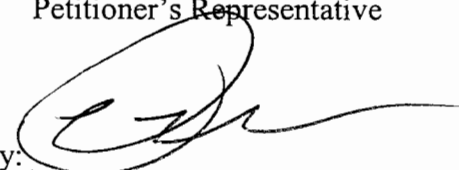
Exh. 1 (For demonstrative purposes) Photos of Albertson's Grocery Store

Respectfully submitted this _____ day of July, 2005.

By: _____


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