STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CEC TIMBER TRACE, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

______________________________/

FHFC CASE NO.: 2007-030UC
APPLICATION NO. 2007-101 BS

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on September 21, 2007. On or before April 10, 2007, CEC Timber Trace, LLC, ("Petitioner"), submitted its 2007 Universal Cycle Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for State Apartment Incentive Loan ("SAIL") funding, Multifamily Mortgage Revenue Bond "(MMRB") funding, Supplemental Extremely Low Income ("ELI") funding and an allocation of the non-competitive 4% Low Income Housing Tax Credit Program. Petitioner timely filed its "Petition for Formal Administrative Hearing," (the "Petition") challenging Florida Housing's scoring on parts of the Application. The parties stipulated to the facts at issue. Accordingly, an informal hearing was held before Florida Housing Finance Corporation's appointed Hearing Officer

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
[signature] /DATE: 9-21-07

Diane D. Tremor, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, on August 22, 2007. A Recommended Order was filed on September 5, 2007.

A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Recommended Order recommends that Florida Housing enter a Final Order finding that:

1. Petitioner's 2007 Universal Application should be deemed to have met threshold requirements with respect to the five dwelling units per building rule.

RULING ON THE RECOMMENDED ORDER

The findings and conclusions of the Stipulation are supported by competent substantial evidence in the record.

ORDER

In accordance with the foregoing, it is hereby **ORDERED:**

1. The Findings of Fact of the Recommended Order are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

2. The Conclusions of Law of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

Accordingly, it is found and ordered that Petitioner's Application is scored as follows:

1. Petitioner's Application is deemed to have met threshold requirements with respect to the five dwelling units per building rule.

IT IS HEREBY ORDERED that Petitioner's Application is scored as having met threshold requirements with respect to the five dwelling units per building rule.

DONE and ORDERED this 21st day of September, 2007.

FLORIDA HOUSING FINANCE CORPORATION

By: ______________________
Chairperson

Copies to:

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General Counsel
Florida Housing Finance Corporation
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Vicki Robinson
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CEC TIMBER TRACE, LLC,

Petitioner,

vs.

FHFC CASE NO. 2007-030UC
Application No. 2007-101BS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
________________________________/

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 August 22, 2007.

APPEARANCES

For Petitioner: Michael P. Donaldson, Esq.
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For Respondent: Matthew A. Sirmans
Assistant General Counsel
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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue for determination in this proceeding is whether Petitioner's application met the threshold requirements regarding the number of dwelling units per building for its proposed development.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9, and Exhibit A. Joint Exhibit 1 is a Prehearing Stipulation containing Stipulated Facts and a listing of the Joint Exhibits. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with regard to the issues in dispute. The Prehearing Stipulation 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 applicants, Petitioner, CEC TIMBER TRACE, LLC., submitted its application for financing in Florida Housing's 2007 funding cycle. Petitioner applied for MMRB funding, SAIL funding, HC equity funding and ELI funding to help finance the acquisition and rehabilitation of a proposed 116-unit affordable apartment complex in Tampa, Hillsborough County, Florida.

2. Respondent's rules require that multifamily residential rental properties and SAIL developments be comprised of one of more buildings, each containing five or more dwelling units. Rules 67-21.006(2) and 67-48.002(96), Florida Administrative Code.

3. In its initial application, Petitioner categorized its development as "Acquisition and Rehabilitation/Substantial Rehabilitation (Acquisition plus less than 50% of the units are new construction)." In answer to the application question at Part III, Section A.3.b: "Will each residential building consist of 5 or more dwelling units?", Petitioner stated "Yes." As noted above, the Respondent's rules and also its Universal Application Instructions require five or more dwelling units in each residential building. In question 4, Petitioner described its "development type" as "Garden Apartments." Question 5 of Part III, Section A of the application reads: "Number of buildings with dwelling units." Petitioner answered "36." The following

question 6 reads: "Total number of units:", to which Petitioner answered "116." (Joint Exhibit 5)

4. With regard to Questions 4, 5 and 6 described above, the Universal Application Instructions, in part, require applicants to "select the one Development Type that best describes the **proposed** Development," to "state the number of buildings with dwelling units," and to "state the total number of units in the **proposed** Development." (Joint Exhibit 9)

5. In its initial scoring summary, Petitioner was not deemed to have failed threshold requirements with regard to the above questions. (Joint Exhibit 2)

6. Subsequently, a Notice of Possible Scoring Error ("NOPSE") was filed pointing out that Petitioner's application stated that "36 buildings would be provided" and that "116 units would be provided," while answering that there would be at least 5 units per building. (Joint Exhibit 6)

7. In its next scoring summary, Respondent found that Petitioner had failed to meet threshold requirements inasmuch as its application indicated that "the Development will consist of 36 buildings and 116 total units which equates to 3.22 units per building." (Joint Exhibit 3)

8. As a result, Petitioner submitted a Cure Form, explaining, in part:

. . . Applicant concurs that the current configuration of the building does

> not consist of 5 units per building. However, the Application question asked "will" and not "does" the building consist of 5 units per building. The rehabilitation scope of work anticipated for the project will connect the buildings and henceforth enable the number of units per building to meet the program requirements . . .

(Joint Exhibit 7) Petitioner's cure documentation did not include revised pages for Part III, Section A, questions 3 through 6.

9. In Exhibit 26 of its application, entitled "Local Government Verification of Status of Site Plan Approval for Multifamily Developments," Petitioner represented that its Development "is rehabilitation without any new construction and does not require additional site plan approval or similar process." At the time Petitioner filed its initial application and its subsequent Cure Form, no site plan or other final development plan had been prepared for the proposed development. Petitioner was not required to file a site plan with its funding application.

10. A Notice of Alleged Deficiency ("NOAD") was filed with respect to Petitioner's "Cure," discussed in Paragraph 8 above. The NOAD complains that despite the explanation given in the "Cure" document, Petitioner failed to submit changes to revise the number of buildings after the rehabilitation process, thus failing to comply with Rule 67-48.004(6), Florida Administrative Code. (Joint Exhibit 8) That rule prohibits inconsistencies between Cure information and the initial application information. In fact, there was no inconsistency between those two

documents, and the Respondent did not rely on such rationale as grounds for its final scoring.

11. In its final scoring, Respondent declined to rescind its former conclusion of a failure to meet threshold with regard to the requirement that each residential building consist of 5 or more dwelling units. (Joint Exhibit 4)

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapters 67-21 and 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 prime issue in this proceeding is whether Petitioner presented sufficient information that its proposed development would consist of five or more dwelling units in each residential building. Stated differently, the issue is whether Petitioner was required to state, either in its initial application or its Cure, the number of buildings it proposed in order to demonstrate that each building would contain no less than five dwelling units.

At the time of filing its initial application, Petitioner had not yet determined how

many buildings would result from its proposed rehabilitation efforts, but had determined that each building would contain at least five dwelling units. As noted above, Petitioner was not required to have or present a site plan in connection with its application for funding. Petitioner did indicate in its initial application that each residential unit would consist of five or more dwelling units. Petitioner further indicated that the total number of units in the proposed development would be 116. As to question 5, "number of buildings with dwelling units," Petitioner answered "36" because that was the number of buildings which currently existed and because it did not yet know the number of buildings which would result from the proposed rehabilitation. Petitioner explained in its Cure that it concurred that the current configuration of the buildings did not meet the five units per building rule, but that the scope of work anticipated would connect the buildings to meet the number of units per building required by Respondent's rules.

Petitioner asserts that it accurately completed its application and that Respondent erred in its final scoring. As grounds for this position, Petitioner asserts that:

(1) Respondent ignored Petitioner's response to question (3)(b) of Part III.A which affirmatively stated that each residential building will consist of five or more dwelling units, and instead performed a mathematical calculation between the numbers

36 and 116 to determine what would ultimately be built;

(2) Petitioner provided additional information in its Cure to demonstrate that the buildings would not contain less than five dwelling units, and there should have been no confusion on Respondent's part regarding compliance with the rule.

(3) Applicants are required to provide accurate responses in their applications. Since Petitioner did not know how many buildings would exist as a result of its rehabilitative efforts, Petitioner, rather than leaving this question blank, responded with the number of existing buildings currently on the project site.

(4) The words used in the Universal Application Instructions justified responding to question 5 as "36", which is the current number of buildings on site. In this regard, Petitioner points out that the Instructions for questions 3, 4 and 6 each make reference to a **proposed** development, while question 5 simply asked for "the number of buildings with dwelling units."

(5) Had Respondent wanted a final number of buildings during the application process, it should have required a site plan or some final development document. It did not.

In response, Respondent argues that it was unreasonable for Petitioner to interpret question 5 as requiring the number of **existing** buildings on site, because Florida Housing was only soliciting information pertaining to the proposed

development for which funding was being sought. Respondent asserts that the number of buildings for the proposed development must be provided so that Respondent can verify that the proposed project will meet the five units per building requirement. However, Respondent does not point to any requirement which necessitates that applicants performing rehabilitation on an existing project have their final plans for such rehabilitation formulated at the time of the application process. While the Respondent's rules do require applicants to include and not change the total number of **units** proposed for development, there is no similar requirement as to the number of **buildings** which will result after rehabilitation is completed. See Rules 67-21.003(14)(j) and 67-48.004(14)(j), Florida Administrative Code. Moreover, if Respondent were only interested in the number of buildings in the proposed development, it could have added the word "proposed" to either question 5 on the application or in its Instructions regarding that question, as it did with questions 4 and 6 of the application.

In its initial application, Petitioner affirmatively indicated that its proposed project would comply with the five units per building rule. If assurance of such a requirement could only be ascertained by multiplying the answer to question 5 ("Number of buildings with dwelling units") by the number 5 (representing 5 units per building), question A.3.(b) of the application ("Will each residential building consist

of 5 or more dwelling units?") would be unnecessary and duplicative. While Petitioner could, and perhaps should, have explained in its initial application its answer to question 5 with an asterisk or footnote, as allowed by the Universal Application Instructions (page 2), it did provide such explanation in its Cure documentation, which again affirmed its intent to comply with the five units per building rule.

At best, question 5 of Part III.A of the application is ambiguous. Given the facts that there was no requirement that an applicant have a site plan or other final development document for its rehabilitation project and the nuances of the questions, as amplified in the Instructions, it was not unreasonable for Petitioner to answer question 5 with the number of buildings currently on site. While it may have been more appropriate to answer question 5 with "unknown at this time" or provide an explanation for its number "36", the explanation ultimately provided in Petitioner's Cure was sufficient to provide Respondent with assurance that the number of units in each building would be at least five.

As a final argument, Respondent asserts that Petitioner's Cure did not provide a sufficient explanation of how Petitioner would accomplish compliance with the five units per building rule through rehabilitation. Again, Petitioner was not required to possess or impart this knowledge at the time of the application process. Respondent

further urges that the mere connection of the buildings, as expressed in Petitioner's Cure explanation, is insufficient and, in fact, would constitute "new construction" as opposed to "rehabilitation," as represented in the application. This latter concern was never raised as a scoring issue, and cannot be grounds for determining a failure to meet threshold after the time for submitting a Cure has elapsed. See Rules 67-21.003(9) and 67-48.004(9), Florida Administrative Code.

In summary, if Respondent intended applicants who propose rehabilitation of an existing development to know and divulge during the application process the configuration or number of buildings proposed, it could have explicitly required such information. It did not. Given the nuances of the language used in the application and/or the Instructions, both of which constitute rules, regarding questions in Part III.A.3 through 6, there was ambiguity as to the proper interpretation of those rules. While applicants are held to strict compliance with the clear requirements of Respondent's rules, ambiguities in those rules must be decided in favor of the applicant. See Cypress Senior Village, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-027UC. It is concluded that Respondent was provided reasonable assurances that Petitioner would comply with the five dwelling units per building rule in both the initial application and again in the Cure, and that rejection of Petitioner's application was unreasonable and erroneous.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED that a Final Order be entered finding that Petitioner's application met threshold requirements regarding the five dwelling units per building rule.

Respectfully submitted this 5th day of September, 2007.

DIANE D. TREMOR
Hearing Officer for Florida Housing Finance Corporation
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(3), Florida Administrative Code, 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 September 10, 2007. 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.

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FHFC CASE NO.: 2007-030UC
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______________________________/

PREHEARING STIPULATION

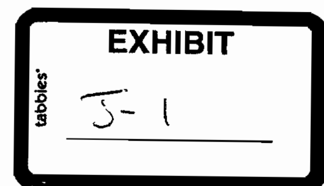
Petitioner, CEC Timber Trace, LLC ("Timber Trace") and Respondent, Florida Housing Finance Corporation ("Florida Housing"), by and through undersigned counsel, submit this Prehearing Stipulation for purposes of expediting the informal hearing scheduled for 2:00 pm, August 22, 2007, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

STIPULATED FACTS

1. Timber Trace is a Florida for-profit limited liability corporation with its address at 151 Summer Street, Somerville, MA, 02143, and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, organized to provide and promote the public welfare by administering the governmental function of financing and

ATTACHMENT A



refinancing housing and related facilities in the State of Florida. (Section 420.504, Fla. Stat.; Rule 67-48, Fla. Admin. Code).

3. Timber Trace has applied for State Apartment Incentive Loan ("SAIL") funding, Multifamily Mortgage Revenue Bonds ("MMRB") Program funding, Supplemental Extremely Low Income ("ELI") funding and an allocation of the non-competitive 4% low-income housing tax credits under the Low Income Housing Tax Credit ("HC") program administered by Florida Housing, as authorized by the U.S. Department of the Treasury.

4. The 2007 Universal Cycle Application, through which affordable housing developers apply for funding is adopted as Form UA1016 (Rev. 3-07) by R. 67-48.004(1)(a), Fla. Admin. Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant.

5. Because Florida Housing's annual available pool of funding is limited, qualified projects must compete for this funding. To assess the relative merits of proposed projects, Florida Housing has established a competitive application process pursuant to Chapters 67-21 and 67-48, Fla. Admin. Code. Specifically, Florida Housing's application process for 2007, as set forth in Rules 67-21.003-.0035 and 67-48.001-.005, Fla. Admin. Code, involves the following:

a. the publication and adoption by rule of an application package;

b. the completion and submission of applications by developers;

c. Florida Housing's preliminary scoring of applications;

d. an initial round of administrative challenges in which an applicant may take issue with Florida Housing's scoring of another application by filing a Notice of Possible Scoring Error ("NOPSE");

e. Florida Housing's consideration of the NOPSE's submitted, with notice to applicants of any resulting change in their preliminary scores;

f. an opportunity for the applicant to submit additional materials to Florida Housing to "cure" any items for which the applicant received less than the maximum score;

g. a second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant's cure materials by filing a Notice of Alleged Deficiency ("NOAD");

h. Florida Housing's consideration of the NOAD's submitted, with notice to applicants of any resulting change in their scores;

i. an opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing's evaluation of any item for which the applicant received less than the maximum score; and

j. final scores, ranking, and allocation of SAIL (or other) funding to successful applicants as well as those who successfully appeal through the adoption of final orders.

6. On or about April 10, 2007, Timber Trace and others submitted applications for financing in Florida Housing's 2007 funding cycle. Timber Trace (Application #2007-101BS) applied for $5,800,000 of MMRB funding, $4,050,000 in SAIL funding, $377,431 in HC equity funding and $1,020,000 in ELI funding to help finance the acquisition and rehabilitation of a 116 -unit affordable apartment complex in Tampa, Hillsborough County, Florida.

7. Timber Trace received notice of Florida Housing's initial scoring of the Application on or about May 9, 2007, at which time Timber Trace was awarded a preliminary score of 61 points out of a possible 66 points, and 3.75 of 7.5 possible "tie breaker" points (awarded for geographic proximity to certain services and facilities).

Florida Housing also concluded that the Timber Trace application failed threshold requirements for various reasons, most of which are not material to the instant case.

8. On or about May 17, 2007, Florida Housing received a NOPSE in connection with Timber Trace's application. On or about June 6, 2007, Florida Housing sent Timber Trace any NOPSE relating to its Application submitted by other applicants, Florida Housing's position on any NOPSE, and the effect the NOPSEs may have had on the applicant's score.

9. On or before June 18, 2007, Timber Trace timely submitted its cure materials to Florida Housing to correct deficiencies in its preliminary application, most of which are not material to the instant case.

10. On or about June 26, 2007, Florida Housing received a NOAD in connection with Timber Trace's application. Florida Housing issued its final scores on July 12, 2007.

11. At the conclusion of the NOPSE, cure review and NOAD processes, Florida Housing awarded the Timber Trace Application the maximum score of 66 points, as well as the maximum number of tie-breaker points, but concluded that it failed threshold, stating:

> The Applicant indicated at part III. A.3.b. that each residential building will consist of 5 or more dwelling units. As stated on page 12 of the 2007 Universal Application Instructions, to be eligible for SAIL or MMRB funding the Development must consist of 5 or more dwelling units in each residential building. This is further stated in subsection 67-48.002(96), F.A.C. The Applicant states that the Development will consist of 36 buildings and 116 total units which equates to 3.22 units per building. Therefore, this Development will not qualify for SAIL funding and SAIL will not be counted as a source of funding.
>
> The Applicant indicated at part III. A.3.b. that each residential building will consist of 5 or more dwelling units. As stated on page 12 of the 2007 Universal

Application Instructions, to be eligible for SAIL or MMRB funding the Development must consist of 5 or more dwelling units in each residential building. This is further stated in subsection 67-21.006(2), F.A.C. The Applicant states that the Development will consist of 36 buildings and 116 total units which equates to 3.22 units per building. Therefore, this Development will not qualify for MMRB funding and MMRB will not be counted as a source of funding.

The Applicant has a construction financing shortfall of $6,686,432.

The Applicant has a permanent financing shortfall of $5,656,149.

The Applicant attempted to Cure Items 4T, 5T, 6T and 7T. However, the Applicant's argument does not adequately address the deficiency within the Application.

EXHIBITS

The parties offer the following joint exhibits into evidence. And stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

Exhibit J-1: This Prehearing Stipulation.

Exhibit J-2: Scoring summary for Application #2007-101BS (Timber Trace) dated May 9, 2007.

Exhibit J-3: Scoring summary for Application #2007-101BS (Timber Trace), dated June 6, 2007.

Exhibit J-4: Scoring summary for Application #2007-101BS (Timber Trace), dated July 12, 2007.

Exhibit J-5: Part III.A. of Timber Trace's submitted application.

Exhibit J-6: NOPSE filed against Timber Trace application pertaining to residential buildings.

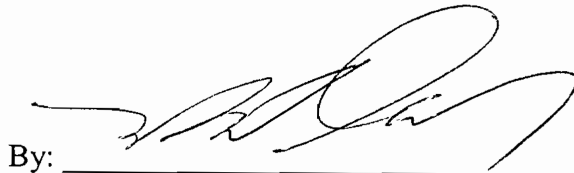
Exhibit J-7: Cure submitted by Timber Trace pertaining to residential buildings.

Exhibit J-8: NOAD filed against Timber Trace application pertaining to residential buildings.

Exhibit J-9: p. 12 of the 2007 Universal Application Instructions (Form UA1016 Rev. 3-07).

The parties also request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapters 67-21 and 67-48, Fla. Admin. Code, as well as the incorporated Universal Application form and Instructions (Form UA1016 Rev. 3-07).

Respectfully submitted this 22 day of August 2007.



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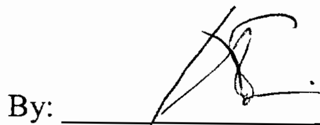

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