

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

PINE BERRY SENIOR
LIMITED PARTNERSHIP,

Petitioner,

vs.

FHFC CASE NO. 2008-101UC
(Application No. 2008-019C)

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, as well as Rule 67-48.005(5), Florida Administrative Code, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above captioned proceeding on February 16, 2009.

APPEARANCES

For Petitioner:

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For Respondent:

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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The issues for determination in this proceeding are whether four applications for funding should have been rejected because the General Contractor was not correctly identified in the application and whether a fifth application should have been rejected because a new contractor Certification Form was not submitted at the time a revised Prior Experience Chart was submitted on cure.

PRELIMINARY STATEMENT

At the commencement of the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 11. Petitioner's Exhibits 1 and 2 and Respondent's Exhibits 1 and 2 were also received into evidence.

Joint Exhibit 1 is a Prehearing Statement, attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated into this Recommended Order. The Stipulated Facts in the Prehearing Statement basically describe the application process and the circumstances regarding the scoring of the five applications at issue in this proceeding. The Stipulated Facts within the Prehearing Statement establish that Petitioner herein has standing to bring this action. (Joint Exhibit 1, Paragraph 25)

Subsequent to the final hearing, the parties timely submitted their Proposed Recommended Orders, which have been fully considered.

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 Pine Berry Senior Limited Partnership (“Pine Berry”) (Application No. 2008-019C), as well as the Portland (Application No. 2008-182C), the Sacramento (Application No. 2008-183C), the Lansing (Application No. 2008-189C), the Austin (Application No. 2008-192C), and Burlington Senior Residences (Application No. 2008-283C), filed applications with the Florida Housing Finance Corporation (“Florida Housing”) for funding in the 2008 Universal Application Cycle. Had the Portland, Sacramento, Lansing, Austin and Burlington Senior Residences applications been rejected for failure to meet threshold requirements regarding general contractor documentation, the Petitioner Pine Berry would have been awarded its requested federal tax credits. (Joint Exhibit 1)

2. As a threshold item, applicants in the 2008 Universal Cycle were required to provide certain information regarding the General Contractor for

their proposed developments. Part II, B, 3 of the Application Instructions require the following documents to be provided:

- a. Provide the completed General Contractor or Qualifying Agent of General Contractor Certification form behind a Tab labeled "**Exhibit 13.**"
- b. Prior Experience Chart – The General Contractor or Qualifying agent of General Contractor must demonstrate experience in the construction of at least two completed housing developments of similar development category and development type . . . by providing a prior experience chart behind a tab labeled "**Exhibit 13**".

(Petitioner's Exhibit 1) The Instructions go on to explain the information required on the Prior Experience Chart and require that the name of the General Contractor or qualifying agent of General Contractor be stated.

(Petitioner's Exhibit 1). The Certification form referenced in paragraph "a" above requires the name, address, telephone number and Florida License Number of the General Contractor, as well as the expiration date of the License. The form also requires the signature of the General Contractor or qualifying agent, along with the date of that signature, certifying, among other things, that he/she is a licensed General Contractor in the State of Florida and that he/she has been the General Contractor on at least two completed developments of similar category and type, at least one of which consisted of no less than 50 percent of the number of units in the

development proposed in the instant application. More specifically, the Certification form provides for a certification that “I have been the General Contractor on at least two developments of similar development category and development type . . . , as evidenced by the prior experience chart provided in this Application.” (Petitioner’s Exhibit 2)

The Portland, Sacramento, Lansing and Austin Applications

3. In their initially filed applications, the Portland, Sacramento, Lansing and Austin applicants submitted the General Contractor Certification form, identifying their General Contractor as “Batson-Cook Construction”, and providing the name and signature of the qualifying agent (Donald W. Farris), the address, telephone number and Florida License number of the General Contractor or qualifying agent and the expiration date of the license. (Joint Exhibit 2) A Prior Experience Chart was also submitted by these same four applicants, identifying the name of the General Contractor as “Batson-Cook Company.” (Joint Exhibit 2)

4. In its preliminary scoring, Florida Housing determined that the above four applicants had not met threshold requirements because the names of the General Contractor on the Certification form was different than the

name of the General Contractor on the Prior Experience Chart.¹ (Joint Exhibit 3)

5. As cures for the inconsistencies in the names of their General Contractor, the Portland, Sacramento, Lansing and Austin applicants each submitted a different, expanded Prior Experience Chart identifying “Batson-Cook Construction” as the General Contractor, thereby matching the name appearing on the General Contractor Certification form initially submitted, which was resubmitted as part of the cure. (Joint Exhibit 4)

6. Notices of Alleged Deficiencies (“NOADs”) were filed contesting the cures regarding the name of the General Contractor for the Portland, Sacramento, Lansing and Austin proposed development projects. These NOADs explained that there is no company registered in Florida under the name “Batson-Cook Construction.” The NOADs attached copies of documents from the Florida Secretary of State, Division of Corporations showing that a “Batson-Cook Company” was registered in Florida, and documents from the Department of Business and Professional Regulation showing that a “Batson-Cook Company” and a Donald Wayne Farris with the same address hold the same license number with the same expiration

¹ The reason provided by Florida Housing on the preliminary scoring sheet reverses the names appearing on the two documents (Joint Exhibit 3), but the fact remains that the names were different on the two documents.

date as listed in the four applicants' General Contractor Certification form submitted initially and resubmitted with the cure documents. (Joint Exhibit 5).

7. In its final scoring, Florida Housing rescinded its prior determination that applicants Portland, Sacramento, Lansing and Austin failed to meet threshold requirements with regard to their General Contractor. (Joint Exhibit 6)

The Burlington Senior Residences Application

8. The project proposed in the Burlington Senior Residences ("Burlington") application was a high-rise development. In its initial application, Burlington provided a completed General Contractor Certification form identifying Hardin Construction Company, LLC as the General Contractor and Page W. McKee, who signed and dated the form, as the qualifying agent of the General Contractor. A Prior Experience Chart listing five developments, only one of which was a high-rise development type, was also filed with the initial application. (Joint Exhibit 7)

9. Florida Housing's initial scoring of the Burlington application on June 4, 2008, determined a threshold failure in connection with its General Contractor because its' "prior experience chart is incomplete as it does not

reflect at least two (2) completed housing developments of similar development type as required by the 2008 Universal Application Instructions.” (Joint Exhibit 8)

10. As a cure, Burlington submitted a revised Prior Experience Chart listing six developments. One new high-rise development was added to the previously filed Chart and one previously listed project was changed from mid-rise to high-rise, resulting in the listing of three high-rise development types. The Chart submitted by Burlington as a cure was not signed or dated, nor was there any indication that the revised Chart came from the originally designated General Contractor or its qualified agent. (Joint Exhibit 9) A revised General Contractor form was not submitted as a part of this cure.

11. A Notice of Alleged Deficiency was filed regarding Burlington’s alleged “cure.” This NOAD complained that the failure to include with the revised Prior Experience Chart a new General Contractor Certification form results in a failure to meet threshold requirements. (Joint Exhibit 10)

12. In its final scoring, Florida Housing rescinded its prior determination that the Burlington application failed to meet threshold requirements with regard to its General Contractor. (Joint Exhibit 11)

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, specifically Rule 67-48.005(5), the Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. If the five applications at issue in this proceeding had been rejected for failure to comply with threshold requirements regarding General Contractor documentation, then Petitioner Pine Berry would have had the highest scoring application from Pinellas County in the Large County Geographic Set-Aside category and would have been awarded its requested federal tax credits.² Accordingly, Petitioner Pine Berry has standing to bring the instant proceeding. (Joint Exhibit , paragraph 25)

The issues for determination in this proceeding are whether (1) the Portland, Sacramento, Lansing and Austin applications failed to meet threshold requirements because their General Contractor was not properly identified and/or qualified, and (2) whether the Burlington application failed to meet threshold requirements with regard to the experience of the General

² The parties have stipulated that while Pine Berry would have been entitled to federal tax credits, it would not have been awarded its requested Supplemental Loan because funding for Supplemental Loans had been depleted prior to funding any applications in the Large County Geographic Set Aside category. (Joint Exhibit 1, Paragraph 25)

Contractor because the revised Prior Experience Chart submitted as a cure was not accompanied with a new, updated Certification form.

The Universal Application Package, which includes both its instructions and its forms, constitutes a rule of the Florida Housing Finance Corporation. Rule 67-48.004(1)(a), Florida Administrative Code. Along with other rules promulgated by Florida Housing, it is binding upon all applicants for funding, as well as upon Florida Housing in its determinations of eligibility for funding.

The Portland, Sacramento, Lansing and Austin Applications

With regard to the documentation required to demonstrate the qualifications of an applicant's General Contractor, the Application Instructions require a Certification form and a Prior Experience Chart. The Certification form requires an identification of the General Contractor and its qualifying agent, the Florida License Number of the General Contractor and its expiration date, and the address and telephone number of the General Contractor. The form must be signed and dated by the General Contractor or qualifying agent. In addition, the General Contractor or its qualifying agent must certify on the same form that

. . . I am a General Contractor . . . and licensed in the State of Florida with the requisite skills, experience and credit worthiness to successfully produce the units proposed by this Application and that I have been the General Contractor on at

least two completed developments of similar development category and development type, . . . as evidenced by the prior experience chart provided in this Application. . . . I further certify . . . that the information provided above is true and correct.

(Petitioner's Exhibit 2)

In their initial applications, the name of the General Contractor on the Certification form (Batson-Cook Construction) did not match the name on the Prior Experience Chart (Batson-Cook Company), which listed five prior developments, with two falling within the high-rise development type. (Joint Exhibit 2) In its cure material, the four applicants resubmitted their initial Certification form dated February 18, 2008, naming Batson-Cook Construction as the General Contractor, along with a new Prior Experience Chart which changed the name of the General Contractor to Batson-Cook Construction, and listed twelve prior developments, nine of which were high-rise development types. (Joint Exhibit 4)

Documentation provided to Florida Housing through Notices of Alleged Deficiencies revealed that there is no company registered in Florida under the name "Batson-Cook Construction," although there is a "Batson-Cook Company" registered in Florida. Likewise, the General Contractor's License Number stated on the applicants' Certification forms, as shown by documentation from the Department of Business Regulation, belongs to

“Batson-Cook Company” and not to a “Batson-Cook Construction.” Accordingly, the information provided to demonstrate the qualifications of the General Contractor was erroneous on both the initially submitted Certification form, and the later submitted Prior Experience Chart.

The same documentation presented in the NOADs shows that the address, license number, license expiration date and qualified agent listed in the Certification form for a General Contractor named “Batson-Cook Construction” is the same as the address, license number, license expiration date and qualified agent appearing on licensure records maintained by the Department of Business Regulation for a “Batson-Cook Company.” However, the address appearing for Batson-Cook Company on the documents from the Florida Department of State, Division of Corporations is not the same address listed for Batson-Cook Construction listed on the Certification form.

Counsel for Florida Housing, while acknowledging that there was no company registered or licensed in Florida under the name Batson-Cook Construction, argues that the NOADs cured that deficiency by submitting licensing documents from the Department of Business Regulation which resolved the issue concerning the identity of the General Contractor. It is urged that Florida Housing was able to resolve the issue, not by stepping

outside the application process and completing the applications for the applicants, but by information provided to it through the NOADs as part of the application process.

While an agency's reasonable interpretations of its own rules will normally be upheld, this principle does not apply when the agency's interpretation is clearly erroneous and deviates from its established rules. See Eager v. Florida Keys Aqueduct Authority, 580 So.2d 771 (Fla. 3d DCA 1991). Florida Housing has several unambiguous existing rules which govern the issue here. First, the Application Instructions and application forms, which constitute rules, clearly and unambiguously require that the qualifications and past performance record of an applicant's development team, which includes its General Contractor, be demonstrated as a threshold matter. The Certification form accordingly requires that the General Contractor be identified (an unambiguous requirement) and be "licensed in the State of Florida" (another unambiguous requirement) with the requisite skills, experience and credit worthiness to successfully produce" the proposed project. (Petitioner's Exhibit 2) If an applicant fails to identify its General Contractor or identifies a General Contractor which is not licensed in Florida, Florida Housing can not determine that the General Contractor possesses the requisite skills, experience and credit worthiness to perform

the promises set forth in the application. Under such circumstances, threshold requirements are not met.

Rule 67-48.004, Florida Administrative Code, clearly prohibits Florida Housing from relying upon documentation submitted by competing applicants to cure failures to meet threshold requirements regarding the identity and prior experience of another applicant's General Contractor. Subsection (2) of that rule states that "[f]ailure to submit an Application completed in accordance with the Application instructions and these rules will result in the failure to meet threshold, . . ." The Portland, Sacramento, Lansing and Austin applications all failed to identify their General Contractor and thus failed to complete their application. Rule 67-48.004(1)(b) further provides that: [All applications must be complete . . . Corporation staff may not assist any Applicant by copying, collating, **or adding documents to an Application** . . ." (Emphasis supplied) Only "Applicants" are permitted to submit additional documentation during the cure process to address issues raised during preliminary scoring. Rule 67-48.004(6). And, the purpose of a NOAD filed by a competing applicant with respect to cure documentation is simply to "describe the alleged deficiencies in detail." Rule 67-48.004(7), Florida Administrative Code. These provisions in Florida Housing's existing rule describing the

application and selection procedures for developments seeking funding make it abundantly clear that information lacking or deficient in the application itself cannot be “cured” through information furnished by a competing applicant. To allow Florida Housing to utilize and rely upon such information would require it to actually change the challenged applicant’s information by supplying or adding information not originating from the applicant. This would constitute a clear violation of Florida Housing’s Rule 67-48.004, Florida Administrative Code. Agencies are bound to follow the terms of their substantive rules, and the Portland, Sacramento, Lansing and Austin applications should have been deemed to have failed threshold requirements regarding their General Contractor.

The Burlington Senior Residences Application

The Burlington applicant initially submitted a General Contractor’s Certification form identifying Hardin Construction Company, LLC as its General Contractor and signed by its agent Page W. McKee on March 12, 2008, certifying that it had been the General Contractor on at least two completed developments of similar development category and development type “as evidenced by the prior experience chart provided in this Application.” The initially submitted Prior Experience Chart listed five

developments, but only one development was of a type similar to that proposed in Burlington's application (a high-rise). Burlington attempted to cure that deficiency by submitting a revised Prior Experience Chart showing six developments, three of which were high-rises. One development was added to the previous list of five, and one of the five developments previously listed was changed from mid-rise to high-rise, resulting in a listing of three completed high-rise developments. No new General Contractor Certification form was submitted along with the revised Prior Experience Chart, nor was there any indication that the revised Chart originated from or was otherwise known to or verified by the General Contractor or qualified agent identified by the applicant in its initial application. Thus, there was no certification or verification that the General Contractor had completed the sixth project added to the list and no certification or verification from the General Contractor or its agent that one previously identified project was indeed a high-rise instead of a mid-rise, as initially represented and verified by the General Contractor's qualifying agent.

It is apparent from the Application Instructions and the face of the General Contractor's Certification form, both of which are adopted rules, that Florida Housing is requiring assurance that the General Contractor

identified by an applicant has prior experience in the construction of at least two completed housing developments of similar development category and type as that proposed by the applicant. The form and instructions do not allow anyone other than the General Contractor or its qualified agent to certify or verify such prior development experience. The Certification form dated March 12, 2008, attached as an exhibit to Burlington's initial application, verified the accuracy of the Prior Experience Chart provided in the initial application. However, it cannot be relied upon as a verification of a changed (and contradictory as to one listed project) Prior Experience Chart submitted over three months later.

Florida Housing's existing Rule 67-48.004(6), Florida Administrative Code, which governs cure materials, provides in relevant part as follows:

Pages of the Application that are not revised or otherwise changed may not be resubmitted, **except that** documents executed by third parties must be submitted in their entirety, including all attachments and exhibits referenced therein, even if only a portion of the original document was revised. Where revised or additional information submitted by the Applicant creates an inconsistency with another item in that Application, the Applicant shall also be required in its submittal to make such other changes as necessary to keep the Application consistent as revised.

Here, the Certification form is a document executed by a third party (the General Contractor or its qualified agent), and it specifically references the Prior Experience Chart provided in the application. The Prior Experience

Chart is an integral part of the Certification form because the General Contractor is required to certify that it accurately reflects the General Contractor's prior, specific construction experience relative to the applicant's project under review. Accordingly, under Rule 67-48.004(6), Burlington was required to submit an updated Certification form verifying the accuracy of the revised Prior Experience Chart submitted as a cure. Such an updated Certificate was particularly important here because the originally submitted Prior Experience Chart was changed with respect to one development previously listed and a new project was added to the list.

Counsel for Florida Housing argues that Rule 67-48.004(6) is not applicable here because the Prior Experience Chart is not referenced in the Certification form as an "attachment" or "exhibit", but instead is referenced as a chart "provided in this Application." It is further pointed out that there is no requirement that the Chart be executed by a third party, and that the Chart itself makes no reference to the Certification form. Therefore, counsel argues that the two documents are separate and distinct, and that Burlington was not required to submit a new Certification form from its General Contractor when it submitted a revised Prior Experience Chart as a cure.

It is true there is no requirement that the Prior Experience Chart be "executed" by the General Contractor. However, the facts contained within

the Chart must be verified by the General Contractor. The initial March 12, 2008 Certification form verified that the General Contractor or its agent, Mr. McKee, had the experience evidenced by the Chart “included in this Application.” The only Chart which was included in the Application at the time Mr. McKee verified its accuracy was the initial Chart, which later was demonstrated to be inaccurate by the revised Chart submitted as a cure. That revised Chart required an up to date Certificate from the General Contractor as to its accuracy.

Florida Housing counsel’s reliance upon Cypress Senior Village, LLC. v. Florida Housing Finance Corporation, FHFC Case No. 2006-027UC (Final Order, July 31, 2006), is to no avail. That case involved a form entitled “Local Government Verification of Contribution Fee Waiver.” (See Respondent’s Exhibit 1) The printed language at the top of the form required that the computations by which the total amount of each waiver is determined accompany the verification form. However, the form itself required verifications only of the amount of the fee waived and that no consideration or promise of consideration has been given with respect to the fee waiver. There was no space on the form requiring that the “computations” by which the fee waiver amount was determined also be verified.

Here, the General Contractor Certification form requires a verification of the accuracy of the Prior Experience Chart provided in the application. That fact distinguishes this case from the Cypress Senior Village case. In essence, whether the words used to describe another document be “attachment,” “exhibit,” “accompanies,” or “as provided in this Application,” the issue of whether both the Certificate and another document must be included in a cure is dependent upon the matter being certified or verified. Here, the matter being certified is the General Contractor’s prior experience in completing a project similar in type to the project under review, as reflected on a Prior Experience Chart. The revised Chart (no matter who actually prepared it) submitted subsequent to the Certification form required an updated Certification form to verify its accuracy. Any other interpretation would be illogical and unreasonable.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law stated above, it is RECOMMENDED that Florida Housing enter a Final Order holding that the Portland, Sacramento, Lansing, Austin and Burlington Senior Residences applications were scored in error with regard to the threshold requirements pertaining to those applicants’ General Contractor

for their respective projects, and awarding Petitioner Pine Berry Senior Limited Partnership its requested tax credits from the next available allocation.

Respectfully submitted this 31st day of March, 2009.



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**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

PINE BERRY SENIOR LIMITED PARTNERSHIP,

Petitioner,

vs.

FHFC CASE NO.: 2008-101UC-
Ranking
Application No. 2008-019C

FLORIDA HOUSING FINANCE
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Respondent.

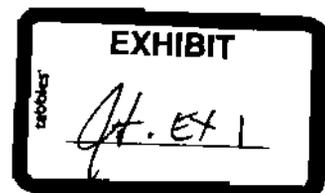
JOINT STIPULATION OF FACTS AND EXHIBITS

Petitioner, Pine Berry Senior Limited Partnership ("Pine Berry"), and Respondent, Florida Housing Finance Corporation ("Florida Housing"), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 10:00 am, February ¹⁶~~9~~, 2009, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

STIPULATED FACTS

1. Pine Berry is a Florida limited partnership with its address at 2206 Jo-An Drive, Sarasota, Florida 34231, and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. Section 420.504, F.S.



3. Florida Housing administers various affordable housing programs including the following:

(a) The Multifamily Mortgage Revenue Bonds (MMRB) Program pursuant to Section 420.509, F.S., and Rule Chapter 67-21, F.A.C.;

(b) the State Apartment Incentive Loan (SAIL) Program pursuant to Sections 420.507(22) and 420.5087, F.S., and Rule Chapter 67-48, F.A.C.;

(c) the HOME Investments Partnerships (HOME) Program pursuant to Section 420.5089, F.S., and Rule Chapter 67-48, F.A.C.; and

(d) the Housing Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code and Section 420.5099, F.S., under which Florida Housing is designated as the Housing Credit agency for the state of Florida within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code, and Rule Chapter 67-48, F.A.C.

4. The 2008 Universal Cycle Application, through which affordable housing developers apply for funding under the above-described affordable housing programs administered by Florida Housing, is adopted as the Universal Application Package or UA1016 (Rev. 3-08) by Rules 67-21.003(1)(a) and 67-48.004(1)(a), F.A.C., respectively, and consists of Parts I through V and instructions.

5. Because the demand for MMRB, SAIL, HOME and HC funding exceeds that which is available under the MMRB Program, the SAIL Program, the HOME Program and the HC Program, respectively, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapters 67-21 and 67-48, F.A.C. Specifically, Florida

Housing's application process for the 2008 Universal Cycle, as set forth in Rules 67-21.002-.0035 and 67-48.001-.005, F.A.C., involves the following:

- a. the publication and adoption by rule of a "Universal Application Package," which applicants use to apply for funding under the MMRB, SAIL, HOME and HC Programs administered by Florida Housing;
- 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 NOPSEs submitted, with notice (NOPSE scoring summary) 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 was deemed to have failed to satisfy threshold or 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 NOADs submitted, with notice (final scoring summary) 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 in their own application for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;
- j. final scores, ranking of applications, and award of funding to successful applicants, including those who successfully appeal the adverse scoring of their application; and

- k. an opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing's final scoring and ranking of competing applications where such scoring and ranking resulted in a denial of Florida Housing funding to the challenging applicant.¹

6. Pine Berry and others timely submitted applications for financing in Florida Housing's 2008 Universal Cycle. Pine Berry, pursuant to Application #2008-019C, applied for \$1,396,571 in annual federal tax credits² and was eligible for a Supplemental Loan³ of \$680,000 to help finance the development of its project, an 85-unit apartment complex in Clearwater, Florida.

7. On September 26, 2008, Florida Housing's Board adopted final scores and rankings. The Pine Berry project met all of Florida Housing's threshold requirements, received the maximum application score of 66 points and the maximum tie-breaker score of 7.5 points, and competed for tax credits in the Large County Geographic Set-Aside.

¹ This proceeding is the subject of such a challenge. Notably, when the challenger is such a proceeding is successful, Florida Housing funding is not taken away from the applicant who was scored or ranked in error and given to the challenger. Instead, the applicant keeps its funding, and the challenger receives its requested funding from the next available funding allocated to Florida Housing. *Rule 67-48.005(7), F.A.C.*

² The United States Congress has created a program, governed by Section 42 of the IRC, by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of affordable low-income housing for families. These tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax liability, which can be taken for up to ten years if the project continues to satisfy IRC requirements. The tax credits allocated annually to each state are awarded by state "housing credit agencies" to single-purpose applicant entities created by real estate developers to construct and operate specific multi-family housing projects. The applicant entity then sells this ten-year stream of tax credits, typically to a syndicator, with the sale proceeds generating much of the funding necessary for development and construction of the project. The equity produced by this sale of tax credits in turn reduces the amount of long-term debt required for the project, making it possible to operate the project at below-market-rate rents that are affordable to low-income and very-low-income tenants. Pursuant to section 420.5099, F.S., Florida Housing is the designated "housing credit agency" for the state of Florida and administers Florida's tax credit program under its Housing Credit (HC) Program. Through the HC Program, Florida Housing allocates Florida's annual fixed pool of federal tax credits to developers of affordable housing under its annual Universal Cycle application process.

³ Applicants in the 2008 Universal Cycle applying for MMRB, SAIL and Competitive HC funding are eligible for a Supplemental Loan based on \$85,000 per unit for each Extremely Low Income (ELI) unit committed to be set aside for ELI Households above the minimum number of such units required to meet threshold for the applicable program. *Application Instructions, page 65.*

8. Pursuant to Florida Housing's ranking methodology, including the application of a Set Aside Unit Limitation (SAUL), there were not enough tax credits available in the Large County Geographic Set-Aside to fund the Pine Berry project.

9. Pine Berry timely filed its petition challenging Florida Housing's scoring of five (5) competing applications. In its petition, Pine Berry alleges that its application would have received its requested funding if Florida Housing had not improperly scored the five (5) challenged applications.

10. The parties request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, F.A.C., as well as the incorporated Universal Application Package or UA1016 (Rev. 3-08).

THE CHALLENGED APPLICATIONS

11. Pine Berry challenges Florida Housing's scoring of the following applications:

- (a) The Portland (Application No. 2008-182C);
- (b) The Sacramento (Application No. 2008-183C);
- (c) The Lansing (Application No. 2008-189C);
- (d) The Austin (Application No. 2008-192C); and
- (e) Burlington Senior Residences (Application No. 2008-283C).

GENERAL CONTRACTOR REQUIREMENTS

12. As a threshold item, an Applicant in the 2008 Universal Cycle is required to include in its application certain information regarding the general contractor for its proposed development. The relevant requirements are set forth in Part II. B. 3. of the Application Instructions which read as follows:

- “3. General Contractor or qualifying agent of General Contractor (Threshold)
 - a. Provide the completed General Contractor or Qualifying Agent of General Contractor Certification form behind a tab labeled “Exhibit 13.”
 - b. Prior Experience Chart – The General Contractor or qualifying agent of the General Contractor must demonstrate experience in the construction of at least two completed housing developments of similar development category and development type, at least one of which consists of a total number of units no less than 50 percent of the total number of units in the proposed Development, by providing a prior experience chart behind a tab labeled “Exhibit 13.” The chart must include the following information....”

THE PORTLAND, SACRAMENTO, LANSING AND AUSTIN

APPLICATIONS

13. The General Contractor Certification forms and Prior Experience Charts submitted with the Portland, Sacramento, Lansing and Austin Applications (collectively, the “Batson-Cook Applications” or “Batson-Cook Applicants”) all contained identical identifying information regarding the general contractor. (J-2)

14. With their original applications, all of the Batson-Cook Applicants identified “Batson-Cook *Construction*” as the name of the general contractor on their General Contractor Certification forms but listed the name as “Batson-Cook *Company*” on their Prior Experience Charts; in addition, all of the General Contractor Certification forms listed “Donald W. Farris” as the qualifying agent of the general contractor, “101 East Kennedy Blvd., Suite 1750, Tampa, Florida 33602” as the address of the general contractor, “(813) 221-7575” as the telephone number of the general contractor, “CGC058712” as the Florida license number of the signatory, “08/2008” as the expiration of license, and all bore the signature of “Donald W. Farris” on the line provided for the “Signature of General Contractor or qualifying agent.”

15. In its preliminary scoring, Florida Housing found the Prior Experience Charts submitted by the Batson-Cook Applicants deficient because the name of the general contractor shown on the chart, Batson-Cook Company, was not consistent with the name listed on the General Contractor Certification form, Batson-Cook Construction. (J-3)

16. All of the Batson-Cook Applicants elected to cure the inconsistency in the names in the same manner, to wit, by providing a new Prior Experience Chart listing the name of the general contractor as “Batson-Cook Construction,” thereby matching the name of the general contractor as it appeared on the General Contractor Certification form. (J-4)

17. NOADs contesting the cures were filed which, collectively, demonstrated that while there is a construction company registered in Florida under the name “Batson-Cook Company,” there is no company registered in Florida under the name “Batson-Cook Construction.” The NOADs also demonstrated that all of the other identifying information in the General Contractor Certification forms for the Batson-Cook Applications was consistent with the contractor licensing information on file with the Florida Department of Business and Professional Regulation for the company named “Batson-Cook Company.” (J-5)

18. Florida Housing accepted the cures as evidenced by the final scoring summaries issued for the Portland, Sacramento, Lansing and Austin Applications. (J-6)

THE BURLINGTON SENIOR RESIDENCES APPLICATION

19. The Burlington Senior Residences Application provided a completed General Contractor Certification form and a Prior Experience Chart listing five (5) developments with its initial application. (J-7)

20. As the result of a NOPSE, Florida Housing, in its NOPSE scoring of the Burlington Senior Residences Application found the general contractor Prior Experience Chart to be incomplete because it did not reflect at least two (2) completed housing developments of similar development type to the one proposed in the Application (high-rise), as required by the application instructions. (J-8)

21. As a cure, the applicant submitted a revised Prior Experience Chart listing the number and type of housing developments, this time referencing two (2) high-rise developments. (J-9)

22. The applicant did not submit a new General Contractor Certification form as part of its cure.

23. A NOAD was filed alleging that the cure was deficient because the applicant failed to provide a new General Contractor Certification form along with the revised Prior Experience Chart. (J-10)

24. Florida Housing accepted the cure as evidenced by final scoring summary issued for the Burlington Senior Residences Application. (J-11)

STANDING

25. If the five Applications listed in paragraph 11, all of which were located in Pinellas County, had been rejected for their failure to comply with threshold requirements regarding general contractor documentation as Pine Berry alleges in its Petition, then Pine Berry would have had the highest scoring Application from Pinellas County in the

Large County Geographic Set-Aside and would have been awarded its requested federal tax credits. Thus, Pine Berry has standing to initiate the instant proceedings under Rule 67-48.005, Fla. Admin. Code. However, Pine Berry would not have been awarded its requested Supplemental Loan because funding for Supplemental Loans had been depleted prior to funding any Applications in the Large County Geographic Set-Aside.

EVIDENTIARY STIPULATIONS

The parties stipulate, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of the Florida Housing Finance Corporation and to any Rules promulgated by the Florida Housing Finance Corporation, including past and present versions of the Universal Cycle Application, Instructions, and any forms and exhibits attached thereto or incorporated by reference therein.

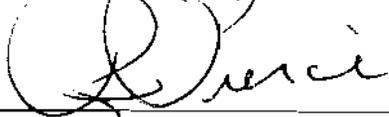
The parties offer the following joint exhibits into evidence:

- Exhibit J-1: This Joint Stipulation of Facts and Exhibits.
- Exhibit J-2: Composite: General Contractor Certification forms and Prior Experience Charts submitted by the applicants in the Portland, Sacramento, Lansing and Austin Applications as Exhibit 13 with their original applications.
- Exhibit J-3: Composite: Preliminary Scoring summaries dated 05/07/2008, prepared by Florida Housing for the Portland, Sacramento, Lansing and Austin Applications.
- Exhibit J-4: Composite: General Contractor Certification forms and Prior Experience Charts submitted by the applicants in the Portland, Sacramento, Lansing and Austin Applications on cure.
- Exhibit J-5: Composite: Total of seven (7) NOADs submitted by other applicants contesting the cures provided by the applicants in the Portland, Sacramento, Lansing and Austin Applications.

- Exhibit J-6: Composite: Final Scoring summaries dated 07/16/2008, prepared by Florida Housing for the Portland, Sacramento, Lansing and Austin Applications.
- Exhibit J-7: General Contractor Certification form and Prior Experience Chart submitted by the applicant in the Burlington Senior Residences Application at Exhibit 13 to its original application.
- Exhibit J-8: NOPSE Scoring summary dated 06/04/2008, by Florida Housing for the Burlington Senior Residences Application.
- Exhibit J-9: Prior Experience Chart submitted by the applicant in the Burlington Senior Residences Application on cure.
- Exhibit J-10: NOAD submitted by competing applicant contesting the cure provided by Burlington Senior Residences.
- Exhibit J-11: Final Scoring summary dated 07/16/2008, by Florida Housing for the Burlington Senior Residences Application.

Respectfully submitted this ¹⁶~~9~~th day of February, 2009.

By: 
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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(6), 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, excluding the caption and certificate of service. 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 April 6, 2009. 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.