

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

FOUNTAIN TERRACE APARTMENTS
LIMITED PARTNERSHIP,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECEIVED
2008 OCT 20 PM 12:30
FLORIDA HOUSING FINANCE CORPORATION
Case No: 2008-102UC-Ranking
FHFC Applic. #2008-018CS

**PETITION FOR
INFORMAL ADMINISTRATIVE PROCEEDING**

Petitioner, FOUNTAIN TERRACE APARTMENTS LIMITED PARTNERSHIP (“Fountain Terrace”), pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Rules 28-106.301 and 67-48.005(5), Florida Administrative Code (“F.A.C.”), hereby requests an informal administrative proceeding to challenge the incorrect scoring and ranking by Respondent, the FLORIDA HOUSING FINANCE CORPORATION (“FHFC”), of a competing application for funding in the 2008 Universal Cycle. The challenged actions resulted in FHFC denying Fountain Terrace its requested federal tax credit funding and its requested loans from the State Apartment Incentive Loan (“SAIL”) program. In support of its Petition, Fountain Terrace states as follows:

1. The name and address of the agency affected by this action are:

Florida Housing Finance Corporation
City Center Building, Suite 5000
227 N. Bronough Street
Tallahassee, Florida 32301-1329

2. The address and telephone number of the Petitioner are:

Fountain Terrace Apartments Limited Partnership
2206 Jo-An Drive
Sarasota, FL 34231
Telephone No. (941) 929-1270

3. The name, address, telephone number, and fax number of the Petitioner's attorney, which shall be the Petitioner's address for service purposes during the course of this proceeding, are:

Warren H. Husband
Metz, Husband & Daughton, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909
Telephone No. (850) 205-9000
Facsimile No. (850) 205-9001

The Low-Income Housing Tax Credit Program

4. The United States Congress has created a program, governed by Section 42 of the Internal Revenue Code ("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 all IRC requirements.

5. 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.

6. Pursuant to section 420.5099, Florida Statutes, FHFC is the designated “housing credit agency” for the State of Florida and administers Florida’s low-income housing tax credit program. Through this program, FHFC allocates Florida’s annual fixed pool of federal tax credits to developers of affordable housing.¹

¹ FHFC is a public corporation created by law in section 420.504, Florida Statutes, to provide and promote the financing of affordable housing and related facilities in Florida. FHFC is an “agency” as defined in section 120.52(1), Florida Statutes, and is therefore subject to the provisions of Chapter 120, Florida Statutes.

The SAIL Program

7. The State of Florida also provides loans through its State Apartment Incentive Loan (“SAIL”) program to encourage private developers to build and operate affordable rental housing for low-income Florida residents. Pursuant to section 420.5087, Florida Statutes, the SAIL program is administered by FHFC.

8. The source of funds for loans through the SAIL program is an annual allocation of documentary stamp tax revenue. These funds are the source of below-market-rate loans to applicants that reduce the amount of income required for debt service on the development, making it possible to operate the project at rents that are affordable to low-income tenants.

The 2008 Universal Application Cycle

9. Because FHFC’s available pool of federal tax credits and SAIL dollars each year is limited, proposed affordable housing projects must compete for this funding. To assess the relative merits of proposed developments, FHFC has established a competitive application process pursuant to Chapter 67-48, F.A.C. As set forth in Rules 67-48.002-.005, F.A.C., FHFC’s application process for 2008 consisted of the following:

- a. the publication and adoption by rule of a “Universal Application Package,” which applicants use to apply for a variety of FHFC-administered funding programs, including federal tax credits and SAIL loans;

- b. the completion and submission of applications by developers;
- c. FHFC's preliminary scoring of applications;
- d. an initial round of administrative challenges in which an applicant may take issue with FHFC's scoring of another application by filing a Notice of Possible Scoring Error ("NOPSE");
- e. FHFC's consideration of the NOPSE's submitted, with notice to applicants of any resulting change in their scores;
- f. an opportunity for the applicant to submit additional materials to FHFC 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. FHFC's consideration of the NOAD's submitted, with notice to applicants of any resulting change in their scores;
- i. an opportunity for an applicant to challenge, via informal or formal administrative proceedings, FHFC's evaluation of any item in their own application for which the applicant received less than the maximum score;
- j. final scores, ranking, and allocation of tax credit funding to applicants, adopted through final orders; and
- k. an opportunity for applicants to challenge, via informal or formal administrative proceedings, FHFC's final scoring and ranking of competing applications where such scoring and ranking resulted in a denial of FHFC funding to the challenger.²

² This Petition initiates such a challenge. Notably, when the challenger in such a proceeding is successful, FHFC 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 "off-the-top" from the next available funding allocated to FHFC. Rule 67-48.005(7), F.A.C.

10. On or about April 7, 2008, numerous applications were submitted to FHFC seeking tax credit and SAIL funding. Fountain Terrace (FHFC Applic. #2008-018CS) applied for \$1,070,000 in annual tax credits, a SAIL loan of \$3,378,004, and a SAIL Extremely Low Income (“ELI”) Supplemental Loan of \$595,000 to help finance the development of its project, a 72-unit garden-style apartment complex in Sebring, Florida. Fountain Terrace selected the Farmworker/Commercial Fishing Worker Demographic Commitment for this project, establishing it as a Farmworker project committed to renting at least 40% of its units to such households. Of its 72 units, 80% are dedicated to housing families earning 60% or less of the area median income, with 20% of the units dedicated to housing families earning 40% or less of the area median income.

11. Importantly, FHFC has targeted its available tax credits to fund specific types of projects, including projects dedicated to housing certain hard-to-serve populations, like farmworkers and the elderly. To this end, FHFC committed to fund two Farmworker projects in the 2008 Universal Cycle, over and above any Farmworker projects that might be funded in Special Set-Asides.³ *Application*

³ Each year, FHFC establishes certain “Special Set-Asides” in which a pool of funding is available for competition among only a limited number of qualified applicants with projects targeted to specific tenant populations (e.g., the Homeless) or located in specific areas (e.g., the Florida Keys). Outside of these Special Set-Asides, applicants generally compete against each other for funding within Geographic Set-Asides (Large, Medium, and Small) based upon the population of the county in which their project is located.

Instructions, pp. 96-97; *Qualified Allocation Plan*, ¶7.

12. On September 26, 2008, FHFC's Board adopted final scores and rankings.⁴ The Fountain Terrace project was the highest scoring Farmworker project, meeting all of FHFC's threshold application requirements and receiving the maximum possible application score of 66 points and the maximum tie-breaker score of 7.5 points.

13. As the highest scoring Farmworker project, Fountain Terrace would have received its requested tax credit and SAIL funding (including its ELI Supplemental Loan), in partial satisfaction of FHFC's commitment to fund two Farmworker projects, if not for FHFC's erroneous scoring and award of SAIL funding to another application – the one submitted by SP Winter Haven Gardens LP ("Winter Haven") for a project called "Gardens at Winter Haven" (FHFC Applic. #2008-109S).

The Gardens at Winter Haven

14. Winter Haven, while also proposing a Farmworker project, sought only SAIL funds and therefore chose to compete within a SAIL-only Special Set-Aside created for such applications. Winter Haven was the only applicant competing in this Special Set-Aside, so it was designated to receive its requested

⁴ On or about September 29, 2008, Fountain Terrace received formal notice from FHFC of the final rankings and scores, along with notice of its rights under Chapter 120 to challenge them. This Petition is timely filed in response to that notice.

SAIL loan of \$2.6 million.

15. The available SAIL funds for Farmworker projects competing in the 2008 Universal Cycle, however, was just \$3.25 million. FHFC's funding of Winter Haven in the Special Set-Aside left only \$650,000 in SAIL funds for all other Farmworker projects. FHFC will not award an applicant a SAIL loan if there are not enough SAIL funds left within the application's Demographic Commitment Category and its Geographic Category to award an applicant at least 60% of their requested loan amount. *Application Instructions*, pp. 90-91. As a result, while there were sufficient tax credits and SAIL funds left in the Small County Category to fully fund Fountain Terrace's request, the \$650,000 in SAIL funds left for projects in the Farmworker Demographic Category was insufficient to fund 60% of Fountain Terrace's SAIL loan request of \$3,378,004.

16. If FHFC had not improperly scored the Winter Haven application and awarded Winter Haven its requested SAIL loan, as explained below, Fountain Terrace would have received its requested tax credit and SAIL funding (including its ELI Supplemental Loan) as the highest scoring Farmworker project. Fountain Terrace's substantial interests are therefore materially and adversely affected by FHFC's improper actions, and Fountain Terrace has standing to challenge those actions in this proceeding.

**Winter Haven's Inadequate Documentation
of Local Government Bond Financing**

17. As a threshold requirement, FHFC mandates that all applicants must document in their applications firm funding commitments in an amount that equals or exceeds the project's Total Development Cost. *Application Instructions*, p. 75.

18. In its preliminary scoring, FHFC determined that the Applicant failed threshold for several reasons, among them:

Although the Applicant listed Bonds from Polk County HFA in the amount of \$4,250,120 for construction and permanent financing (with evidence to be provided at Exhibit 56), no commitment for this has been provided. Therefore, the Bond amount cannot be counted as a source of financing.

FHFC Scoring Summary, Item 5T. The absence of a firm commitment resulted in a funding shortfall and threshold failure. *FHFC Scoring Summary*, Items 1T & 2T.

19. To document a firm commitment for this type of bond financing, page 71 of the Application Instructions makes clear that the applicant "must" provide a letter signed by the chairperson of the local county housing finance authority ("HFA") containing four specific affirmations, the last of which states as follows:

Affirmation that the Tax-exempt Bond allocation has been reserved or that the HFA has agreed to award the necessary allocation when available.

See Appendix A (Application Instructions, p. 71).

20. In response to this requirement and FHFC's preliminary scoring, Winter Haven provided in its cure materials as Exhibit 55 a letter from the Polk County HFA. *See Appendix B.*

21. Although this letter contains statements from the Polk County HFA parroting the specific language of the first three affirmations required by FHFC, the Polk County HFA specifically does not affirm, as required by FHFC, "that the Tax-exempt Bond allocation has been reserved or that the HFA has agreed to award the necessary allocation when available." Instead, this letter merely states that the Polk County HFA "intends to prioritize Gardens at Winter Haven in its request for not to exceed \$4,500,000 in 2009 volume cap allocation." *See Appendix B.*

22. In spite of the HFA's obvious knowledge of FHFC's requirements, as evidenced by its careful recitation of the first three affirmations required by FHFC, the HFA chose not to affirm that bond allocation "has been reserved" for Winter Haven or that the HFA "has agreed to award the necessary allocation" to Winter Haven. Instead, the HFA chose to hedge its bets, conditionally stating only that it "intends to prioritize" Winter Haven's request. This statement does not evidence a firm and legally enforceable commitment to award bond financing to Winter Haven. By contrast, other applicants with firm commitments for bond financing appear to have no problem producing letters that facially comply with FHFC's

requirements. *See Appendix C.*

23. Winter Haven failed to adequately evidence a firm commitment for bond financing in compliance with FHFC's express requirements. As such, Winter Haven did not demonstrate firm commitments sufficient to fund its Total Development Cost and failed this threshold requirement.

24. FHFC received two NOAD's pointing out this fatal flaw in Winter Haven's financing documents, including one from Fountain Terrace.

25. In response to these NOAD's, FHFC initially agreed that the Polk County HFA letter did not constitute a firm commitment in compliance with FHFC's rules:

As a cure for Item 5T, the Applicant provided a letter from the Polk County Housing Finance Authority showing a firm commitment for bond financing. However, the letter does not contain affirmation that the tax-exempt bond allocation has been reserved or that the HFA has agreed to award the necessary allocation when available as required by the 2008 Universal Application Instructions. Therefore, the bond amount cannot be counted as a firm source of financing.

FHFC Scoring Summary, Item 7T. The absence of a firm commitment resulted in a funding shortfall and threshold failure. *FHFC Scoring Summary*, Items 8T & 9T.

26. Winter Haven filed a petition challenging FHFC's determination. Prior to the hearing on that petition, FHFC abruptly reversed course and decided to concede the issue to Winter Haven, finding that the letter from the Polk County

HFA complied with all of FHFC's requirements for a firm commitment.

27. Respectfully, there is no basis in law or in fact for FHFC's abrupt about-face – the letter from the Polk County HFA supplied by Winter Haven plainly does not contain all of the elements specifically required by FHFC for a firm commitment. Winter Haven did not demonstrate firm commitments sufficient to fund its Total Development Cost and therefore failed this threshold requirement. If FHFC had correctly scored the Winter Haven application and determined the existence of threshold failure, Fountain Terrace would have received its requested tax credit and SAIL funding (including its ELI Supplemental Loan).

Satisfaction of FHFC Requirements for Post-Ranking Challenge

28. By rule, FHFC has sought to limit the types of scoring errors that an applicant may challenge via Chapter 120 proceedings. FHFC's rule in this regard, Rule 67-48.005(5)(b), states as follows:

For any Application cycle closing after January 1, 2002, if the contested issue involves an error in scoring, the contested issue must (i) be one that could not have been cured pursuant to subsection 67-48.004(14), F.A.C., or (ii) be one that could have been cured, if the ability to cure was not solely within the Applicant's control. The contested issue cannot be one that was both curable and within the Applicant's sole control to cure. With regard to curable issues, a petitioner must prove that the contested issue was not feasibly curable within the time allowed for cures in subsection 67-48.004(6), F.A.C.

29. In this proceeding, the contested issue involves the adequacy of a letter supplied by the Polk County HFA and submitted by Winter Haven in its cure materials. Winter Haven provided no letter documenting its bond financing in the original application, so there was no lawful opportunity under FHFC's rules for Winter Haven to "cure" the fatal defects in the Polk County HFA letter. Moreover, even if Winter Haven had been provided with the opportunity to cure this letter, its ability to do so "was not solely within the Applicant's control," because the letter was supplied by a third party – the Polk County HFA. As such, this FHFC scoring error is of the type identified in Rule 67-48.005(5)(b), and may be properly challenged in this proceeding.

WHEREFORE, Petitioner, Fountain Terrace Apartments Limited Partnership, requests that:

a. FHFC award Fountain Terrace its requested tax credit and SAIL funding (including its ELI Supplemental Loan) from the next available allocation;

b. FHFC conduct an informal hearing on the matters presented in this Petition if there are no disputed issues of material fact to be resolved;

c. FHFC forward this Petition to the Florida Division of Administrative Hearings for a formal administrative hearing pursuant to section 120.57(1), Florida Statutes, if there are disputed issues of material fact to be resolved, or if non-rule policy forms the basis of any FHFC actions complained of herein;

d. FHFC's designated hearing officer or an Administrative Law Judge, as appropriate, enter a Recommended Order directing FHFC to award Fountain Terrace its requested tax credit and SAIL funding (including its ELI Supplemental Loan) from the next available allocation;

e. FHFC enter a Final Order awarding Fountain Terrace its requested tax credit and SAIL funding (including its ELI Supplemental Loan) from the next available allocation; and

f. Fountain Terrace be granted such other and further relief as may be deemed just and proper.

Respectfully submitted on this 20th day of October, 2008.



WARREN H. HUSBAND
FL BAR No. 0979899
Metz, Husband & Daughton, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909
850/205-9000
850/205-9001 (Fax)
Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and a true and correct copy of the foregoing document were served via hand delivery to the **CORPORATION CLERK**, Florida Housing Finance Corporation, 227 N. Bronough Street, City Center Building, Suite 5000, Tallahassee, Florida, 32301-1329, on this 20th day of October, 2008.



Attorney

- A commitment by a sophisticated investor to buy the bonds on an unrated basis will be considered a firm commitment to the extent evidence of bond allocation is provided in accordance with the terms and conditions listed below regarding bond financing.
- Grant funds are contributions to the Development, other than equity, which carry no repayment provision or interest rate. A firm commitment for grant funds will be considered a firm commitment for scoring purposes if the commitment is properly executed and, if applicable, evidence of ability to fund is provided.

Non-Corporation-Issued Multifamily Bonds



- If the first mortgage financing is to come from non-Corporation-issued Multifamily Bonds, evidence of the following items must be included to receive a firm commitment:

1. Local Government Issuance of Bonds: Letter signed by the Chairperson of the local County Housing Finance Authority (HFA) or Public Housing Authority, as applicable, which is Development-specific and includes the following:
 - a. Affirmation that the Local HFA has passed an Inducement Resolution for the proposed Development;
 - b. Affirmation that a TEFRA hearing has been held by the Local HFA or designated hearing officer;
 - c. Affirmation that the TEFRA hearing has been approved by the local Board of County Commissioners; and
 -  d. Affirmation that the Tax-exempt Bond allocation has been reserved or that the HFA has agreed to award the necessary allocation when available.
2. Issuance on behalf of 501(c)(3) Organizations:
 - a. Opinion from Applicant's Bond Counsel which states the following:
 - (1) borrower is a tax-exempt entity pursuant to a determination letter from the IRS;
 - (2) the proposed Development is in compliance with the organization's chartered purpose; and,
 - (3) proceeds from the requested bond issue shall be used for the proposed Development.
 - b. Letter signed by the Chairperson of the local County Housing Finance Authority or Public Housing Authority, as applicable, which is Development-specific and includes the following:

**HOUSING FINANCE AUTHORITY
OF POLK COUNTY, FLORIDA**

P. O. Drawer 7608
Winter Haven, FL 33883-7608

June 16, 2008

Florida Housing Finance Corporation
227 North Bronough Street – Suite 5000
Tallahassee, FL 32301

RE: Gardens at Winter Haven, South side of S. Deer Lake Drive,
Approximately 800 feet west of the intersection of S. Lake Deer
Drive and E. Lake Deer Drive, Winter Haven, Florida 33880

Ladies and Gentlemen:

In reference to the above-captioned matter, and at the request of SP Winter Haven Gardens LP (the "Owner"), this letter is supplied to you as part of the Owner's application to the Florida Housing Finance Corporation for funds from the SAIL Program for the development of a multi-family housing project located in Winter Haven (Polk County), Florida (the "Project"). The SAIL loan is to be made in conjunction with the issuance of bonds (the "Bonds") by the Housing Finance Authority of Polk County, Florida (the "Issuer"); the proceeds of which will be loaned to the Owner to finance the Project.

Please be advised of the following:

1. The Housing Finance Authority of Polk County has passed an Inducement Resolution for the proposed Gardens at Winter Haven.
2. A TEFRA hearing has been held by the Housing Finance Authority of Polk County.
3. The TEFRA hearing has been approved by the Polk County Board of County Commissioners, and
4. The Issuer intends to prioritize Gardens at Winter Haven in its request for not to exceed \$4,500,000 in 2009 volume cap allocation;

Very Truly Yours,

HOUSING FINANCE AUTHORITY OF POLK COUNTY, FLORIDA

By: 
Name: Charles W. Johnson
Title: Chairman

#2008-0345



**HILLSBOROUGH COUNTY
HOUSING FINANCE AUTHORITY**

Board Members:

Debra F Koehler, Chairman
Harry S Hedges, Vice Chairman
Mercedes B DiMaio, Secretary
Frank D DeBose
Edward A Busansky
David L Lapidis
David A Hollis

1208 Tech Boulevard, Suite 300
Tampa, Florida 33619
Telephone 813 274 6600
Fax 813 635 8133

April 2, 2008

Mr William T Fabbri
The Richman Group of Florida, Inc
580 Village Blvd, Suite 360
West Palm Beach, FL 33409

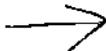
Re Cristina Woods Apartments, South side of Balm Riverview Road, northwest of the intersection of Boyette Road and Balm Riverview Road, Riverview, FL 33569 - Confirmation of Award of Tax-Exempt Bonds for the purpose of Florida Housing Finance Corporation 2008 Universal Application

Dear Mr Fabbri

This letter shall serve as a Confirmation and Firm commitment from Hillsborough County to issue tax-exempt bonds in the amount of Seven Million Four Hundred and Fifty Thousand Dollars (\$7,450,000.00) to Cristina Woods Apartments, Ltd for the construction of the above mentioned property

This letter shall further confirm that

- 1 The Housing Finance Authority of Hillsborough County has passed an Inducement Resolution for the proposed Cristina Woods Apartments,
- 2 A TEFRA hearing has been held by the Housing Finance Authority of Hillsborough County ,
- 3 The TEFRA hearing has been approved by the Hillsborough County Board of County Commissioners, and
- 4 The Tax-exempt bond allocation has been reserved for Cristina Woods Apartments



Cristina Woods Apartments
April 2, 2008

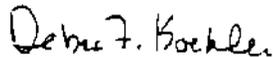
The terms of the loan are as follows

Tax Exempt Bonds

Amount	\$7,450,000 00
All-in rate	5.65% estimated, subject to pricing on closing date
Maturity	35 years
Payments	Interest only semi-annually for first 25 years, afterwards, Principal and Interest semi-annually

If you have any further questions, please contact the Housing Finance Authority of Hillsborough County

Very Truly Yours,



Debra F. Koehler
Chairman
Housing Finance Authority of Hillsborough County