

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BONITA COVE, LLC,
A Florida Limited Liability Company,

Petitioner,

vs.

FHFC Case No. 2008-056UC
Application No. 2008-091CS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in the captioned proceeding on August 27, 2008 in Tallahassee, Florida.

APPEARANCES

For Petitioner:

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For Respondent:

Jeffrey Pomeranz
Qualified Representative
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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application met threshold requirements with regard to the availability of infrastructure, specifically water and sewer, as of the application deadline date.

PRELIMINARY STATEMENT

Prior to the hearing, Florida Housing filed a request for representation by a qualified representative, pursuant to Rule 28-106.106(2)(a), Florida Administrative Code. Without objection, this request was granted.

At the commencement of the informal hearing, the parties submitted a Joint Stipulation of Facts and Exhibits. The Joint Stipulation basically describes the application process and the circumstances regarding the scoring of Petitioner's application. It was marked and received as Joint Exhibit 1, is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order. Joint Exhibits 2 through 7 were received into evidence. Petitioner's Exhibits 1 through 5, consisting of various exhibits from its own application, were also received into evidence.

The parties timely filed Proposed Recommended Orders subsequent to the hearing, and those have been fully considered by the undersigned.

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, BONITA COVE, LLC., submitted an application for financing in the 2008 Universal Cycle, seeking Competitive Housing Credits, a SAIL loan and a Supplemental Loan to help finance the construction of a 60-unit high-rise development for the homeless in Miami, Florida.

2. Part III.C.3 of the Universal Application Instructions required that applicants provide evidence of infrastructure availability on or before the application deadline. This requirement is deemed a threshold item. According to the Instructions, applicants are permitted to submit a Verification of Availability of Infrastructure form included within the Application Package or a letter from the entity providing the service verifying availability of the infrastructure for the proposed development. Such verifications are to be provided behind designated tabs in the application. Tab 28 is to contain evidence of availability of electricity; Tab 29 is to contain evidence of availability of water; Tab 30 is to contain evidence of availability of sewer, package treatment or septic tank; and Tab 31 is to contain evidence of availability of roads.

3. The Application Instructions, at Part III.C.3, specifically provide that, “whether provided by the Application Deadline or by the date that signifies the end of the cure period,” each form or letter “confirming infrastructure availability must demonstrate availability on or before the Application Deadline.”

4. The parties have stipulated that the Application Deadline was April 7, 2008.

5. In its originally filed application, Petitioner provided no evidence of the availability of water or sewer. (Joint Exhibit 2).

6. In its preliminary scoring of Petitioner’s application, Respondent Florida Housing awarded Petitioner 66 points out of a possible 66 points, and 7.5 points of 7.5 possible tie-breaker points for geographic proximity to certain services and facilities. However, Florida Housing determined that Petitioner failed the threshold requirement regarding availability of water and sewer. (Joint Exhibit 2)

7. In response to the preliminary scoring, Petitioner submitted two Cure Forms, one for Exhibit 29 (water) and one for Exhibit 30 (sewer). These exhibits were comprised of an identical letter from Miami-Dade County dated June 4, 2008. These letters state that water and sewer services are available for the Petitioner’s proposed development. The second page of the letter explains that the right to connect the property to the sewer system is subject to the terms, covenants and conditions set forth in a Settlement Agreement between the Florida Department of

Environmental Protection (“DEP”) and the County dated July 27, 1993, as well as amendments thereto, certain Consent Decrees with the United States Environmental Protection Agency (“EPA”) and other current and future agreements, court orders, judgments, consent orders with the EPA, the DEP and/or any other governmental entity. As noted above, the two identical letters are dated June 4, 2008, and do not specifically state that water and/or sewer services were available as of the date of the application deadline. (Joint Exhibits 3 and 4) 8.

Rule 67-48.004, Florida Administrative Code, which governs this proceeding, sets forth the application and selection process for developments. Subsection 6 of that rule allows applicants to “cure” their application after initial scoring by submitting “additional documentation, revised pages and such other information as the applicant deems appropriate” to address the issues raised in preliminary scoring.

Those rules further provide that:

A new form, page or exhibit provided to the Corporation during this period shall be considered a replacement of that form, page or exhibit if such form, page or exhibit was previously submitted in the Applicant’s Application. 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.

Rule 67-48.004(6), Florida Administrative Code.

9. Other portions of Petitioner's application demonstrated that electricity and road infrastructure was available at the time of the application deadline (Petitioner's Exhibits 2 and 3), that the project qualified as urban in-fill development (Petitioner's Exhibit 1), that a grocery store and supermarket were located in close proximity to the proposed development (Petitioner's Exhibit 4) and that a Phase I environmental site assessment of the property was conducted on December 17, 2007 (Petitioner's Exhibit 5). 10. In its final scoring of Petitioner's application, Florida Housing determined that Petitioner failed to meet threshold requirements regarding the availability of water because

As a cure for Item 2T, the Applicant provided a June 4, 2008 letter from Miami-Dade Water and Sewer Department relative to availability of water service to the site. The cure is deficient because the letter does not specifically state that the service was available to the site on or before the Application Deadline (April 7, 2008) as required by the 2008 Universal Application Instructions.

Citing the same reason, Florida Housing also determined that Petitioner failed to meet the threshold requirement regarding the availability of sewer. (Joint Exhibit 5)

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 Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because

Florida Housing determined that Petitioner was ineligible for funding due to failure to meet the threshold requirements of demonstrating the availability of water and sewer services, the Petitioner's substantial interests are affected by Florida Housing's proposed agency action. Accordingly, Petitioner has standing to bring this proceeding.

The issue for determination in this proceeding is whether Petitioner properly demonstrated that water and sewer services were available for its proposed project as of April 7, 2008, the application deadline, as required by Respondent's rules.

Petitioner urges that the issue to be determined is whether Florida Housing "could have determined from the Application" that infrastructure was available on or before the application deadline. That statement of the issue fails to recognize that the burden of proof is upon the Applicant to demonstrate compliance with the rules which govern the application process. Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996).

It is Petitioner's position that its application adequately demonstrated the availability of water and sewer infrastructure as of the application deadline for three reasons. First, Petitioner contends that the June 4, 2008 letter submitted as a "cure" for its initial failure to provide evidence of the availability of water and sewer as of the application date does, in fact, evidence such availability. Petitioner urges that the second page of that letter, referencing a 1993 Settlement Agreement

and other documents to which Petitioner's right to connect the property to the sewer system is subject, demonstrate that water and sewer services were available to the proposed project as of the application deadline of April 7, 2008. No such inference can be drawn from that June 4, 2008 letter. Moreover, the documents to which that letter makes reference were not attached to Petitioner's cure materials. Rule 67-48.004(6), Florida Administrative Code, requires that documents executed by third parties must be submitted in their entirety, "including all attachments and exhibits referenced therein."

Petitioner's second reason for a reversal of its final scoring is that the Application Instructions only require that the availability of infrastructure as of the application deadline be "demonstrated," and that there is no requirement that the documentation showing such availability "specifically state" that infrastructure is available on a specific date. The undersigned agrees with that general statement. Indeed, it is apparent from Petitioner's Exhibit 3 that its evidence of the availability of electricity did not "specifically state" that electricity was available as of the application deadline. However, the letter evidencing such availability is dated prior to the application deadline and states that electric service is available "at the present time." Petitioner was not deemed to have failed to meet the threshold requirement with regard to electricity. On the other hand, the cure letter relating to water and sewer is dated June 4, 2008, and there is no indication in that

letter that water and sewer infrastructure was available as of April 7, 2008, the application deadline.

Finally, Petitioner urges that since other portions of its application demonstrated the availability of electricity and roads, that the project qualified as urban in-fill development (defined by Rule 67-48.002(109), Florida Administrative Code, as a site in an area that is already developed and part of an incorporated area or existing urban service area), and that other development was in close proximity, its application therefore demonstrated the availability of water and sewer services as of the application deadline. While that may be a logical inference, the acceptance of this argument would require both speculation and a complete disregard of the Application Instructions and Application Forms which are adopted as rules. See Rule 67-48.004(1)(a), Florida Administrative Code.

The Instructions and Forms require that evidence of the availability of water be set forth behind a specific tab labeled "Exhibit 29," and that evidence of the availability of sewer be set forth behind a specific tab labeled "Exhibit 30." The availability of other forms of infrastructure are to be demonstrated in other exhibit numbers. Indeed, it is apparent that Petitioner understood this requirement since it submitted the same letter behind both Exhibits 29 and 30. Respondent's rules do not permit water and sewer availability to be demonstrated circumstantially or by inference. Instead, the Instructions explicitly require and provide for the means

and methods (including the designated exhibit number) of demonstrating the availability of water and of sewer as of the application deadline. The Instructions require that “[v]erification of the availability of **each** type of infrastructure on or before the Application Deadline must be provided,” and that “**each**” letter confirming infrastructure availability must demonstrate availability on or before the Application Deadline.” (Application Instructions, Part III.C.3) Other portions of the application and specific exhibit numbers are included for their own particular purposes which are unrelated to water and sewer infrastructure. Moreover, those other exhibits included within Petitioner’s Exhibits 1 through 5 do not specifically and conclusively demonstrate that water and/or sewer were available to Petitioner’s proposed development as of April 7, 2008, the application deadline.

By failing to submit any evidence of the availability of water and sewer infrastructure with its initial application, Petitioner forfeited the opportunity of a “second chance” to show compliance with the rules which govern this proceeding. While the result reached herein may seem harsh in light of the **probable** reality that water and sewer infrastructure were available to Petitioner’s proposed development as of the application deadline, any other result would require speculation on the part of Florida Housing and a complete disregard of Respondent’s adopted rules, by which all applicants, as well as Florida Housing

itself, are bound. As agreed by both parties, the demand for funding far exceeds that which is available under the programs administered by Florida Housing, and qualified affordable housing developments must compete for that funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive and detailed application process. Just as Florida Housing is bound in its scoring of applications by the rules governing that process, applicants are likewise bound to submit information in accordance with those rules.

Here, the rules required that the availability of water and sewer infrastructure be demonstrated as of the application deadline and in specified Exhibit Numbers 29 and 30. Petitioner's Exhibits 29 and 30, submitted as a "cure," standing by themselves (as they must) did not demonstrate that water and sewer were available to the project site as of the application deadline. Accordingly, Petitioner failed to satisfy the threshold requirements set forth in Part III.C.3 of the Application Instructions. Rule 67-48.004(13)(b), Florida Administrative Code, requires that Florida Housing reject an application if the applicant fails to achieve the threshold requirements as defined in the Application Instructions. Accordingly, Florida Housing properly rejected Petitioner's application for funding on that ground. See Brownsville Manor Apartments v.

Florida Housing Finance Corporation, FHFC Case No. 2004-029-UC (October 14, 2004).

RECOMMENDATION

Based upon the *Findings of Fact and Conclusions of Law* stated above, it is RECOMMENDED that Florida Housing's final scoring of Petitioner's application be upheld, and that Petitioner's application be rejected for failure to establish the threshold requirement that water and sewer infrastructure be available to the project site as of the application deadline.

Respectfully submitted this 8th day of September, 2008.


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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, 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 September 15, 2008. 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.

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

BONITA COVE LLC,
a Florida limited liability company

Petitioner,

v.

FHFC CASE NO.: 2008-056UC
Application No. 2008-091CS

FLORIDA HOUSING FINANCE
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_____ /

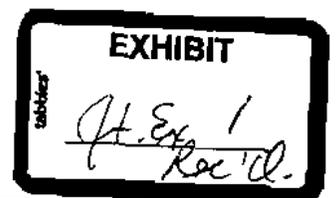
JOINT STIPULATION OF FACTS AND EXHIBITS

Petitioner, Bonita Cove LLC, ("Bonita Cove") 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 2:00 pm, August 27, 2008, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

STIPULATED FACTS

1. Bonita Cove is a Florida limited liability company with its address at 150 SE 2nd Ave., Suite 1202, Miami, Florida 33131, 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 refinancing housing and related facilities in the State of Florida. (Section 420.504, Fla. Stat.; Rule Chapter 67-48, Fla. Admin. Code).



3. Florida Housing administers various affordable housing programs including the following relevant to these proceedings:

(a) the Housing Credit (“HC”) Program pursuant to Section 42 of the Internal Revenue Code (IRC) and Section 420.5099, Fla. Stat., under which Florida Housing is designated the Housing Credit agency for the State of Florida within the meaning of Section 42(h)(7)(a) of the IRC and Rule Chapter 67-48, Fla. Admin. Code;¹ and

(b) the State Apartment Incentive Loan (SAIL) Program pursuant to Sections 420.507(22) and 420.5087, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

4. The 2008 Universal Cycle Application, through which affordable housing developers apply for funding under various affordable housing programs administered by Florida Housing, including the HC Program and the SAIL Program, is adopted as the Universal Application Package or UA1016 (Rev. 3-08) by Rule 67-48.004(1)(a), Fla. Admin. Code, and consists of Parts I through V and instructions.

5. Because the demand for Competitive Housing Credits and SAIL funding exceeds that which is available under the HC Program and the SAIL 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 Chapter 67-48, Fla. Admin. Code. Specifically, Florida Housing’s application process for the 2008 Universal Cycle, as set forth in Rules 67-48.001-.005, Fla. Admin. Code, involves the following:

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

¹ The HC Program awards developers and investors a dollar for dollar reduction in income tax liability through the allocation of tax credits in exchange for development of affordable rental housing units.

- b. the completion and submission of applications by developers;
- c. Florida Housing's preliminary scoring of applications;²
- 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 for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score; and
- j. final ranking scores, ranking of applications, and allocation of Housing Credits and 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 7, 2008, Bonita Cove and others timely submitted applications for financing in Florida Housing's 2008 Universal Cycle. Bonita Cove, pursuant to Application #2008-091CS (the "Application"), applied for an allocation of Competitive Housing Credits in the amount of \$9,293,600, a SAIL loan in the amount of

² Certain items in the application are designated threshold items (the failure to satisfy which will result in the rejection of the application), while other items, if satisfied, result in the award of points.

\$2,200,000, and a Supplemental Loan³ in the amount of \$510,000 to help finance the construction of a 60-unit High-Rise development in Miami, Florida for the homeless, named Bonita Cove.

7. Pursuant to Part III.C.3. of the Universal Application Instructions, as a threshold item, Bonita Cove and the other applicants in the 2008 Universal Cycle were required to provide evidence demonstrating that certain types of infrastructure (electricity, water, sewer and roads) were available for their proposed developments on or before the Application Deadline. Application Deadline for the 2008 Universal Application Cycle was April 7, 2008.

9. Bonita Cove received notice of Florida Housing's initial (preliminary) scoring of its Application by scoring summary dated as of May 7, 2008, at which time Florida Housing awarded Bonita Cove a preliminary score of 66 points out of a possible 66 points, and 7.5 points of 7.5 possible "tie breaker" points (awarded for geographic proximity to certain services and facilities). Florida Housing also concluded that Bonita Cove failed the threshold requirements regarding availability of water and sewer for the following reasons:

- (a) The Applicant failed to provide the required evidence of availability of water. (Exhibit J-2)
- (b) The Applicant failed to provide the required evidence of availability of sewer. (Exhibit J-2)

10. Bonita Cove timely submitted cure materials to Florida Housing in response to the threshold failures. This cure documentation corresponds to:

³ With limited exception, Applicants requesting Competitive HC and SAIL who commit to ELI Household set-asides above the minimum threshold requirements may be credited with a Supplemental Loan Amount as provided in Part V.A.2. of the Universal Application Instructions.

- (a) Part III, Section C, Sub-Section 3.b. Exhibit 29 which consists of a 2008 Cure Summary Form, a 2008 Cure Form, and a letter from Miami-Dade Water and Sewer Department to Mr. Gonzalo DeRamon dated June 4, 2008. (Exhibit J-3)
- (b) Part III, Section C, Sub-Section 3.b. Exhibit 30 which consists of a 2008 Cure Summary Form, a 2008 Cure Form, and a letter from Miami-Dade Water and Sewer Department to Mr. Gonzalo DeRamon dated June 4, 2008. (Exhibit J-4)

11. On or about July 16, 2008, Florida Housing issued its final scoring summary, determining that the Application failed the threshold requirement for availability of water noting that:

As a cure for Item 2T, the Applicant provided a June 4, 2008 letter from Miami-Dade Water and Sewer Department relative to availability of water service to the site. The cure is deficient because the letter does not specifically state that the service was available to the site on or before the Application Deadline (April 7, 2008) as required by the 2008 Universal Application Instructions. (Exhibit J-5)

12. On or about July 16, 2008, Florida Housing also determined, in its final scoring summary, that Bonita Cove failed the threshold requirement regarding evidence of availability of sewer noting that:

As a cure for Item 3T, the Applicant provided a June 4, 2008 letter from Miami-Dade Water and Sewer Department relative to availability of sewer service to the site. The cure is deficient because the letter does not specifically state that the service was available to the site on or before the Application Deadline (April 7, 2008) as required by the 2008 Universal Application Instructions. (Exhibit J-5)

13. Along with the final scoring summary Florida Housing provided Bonita Cove a Notice of Rights, informing Bonita Cove that it could contest Florida Housing's actions by requesting a hearing.

14. Bonita Cove timely filed its Petition for Review contesting Florida Housing's scoring of its Application together with an Election of Rights in which it elected an informal hearing.

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

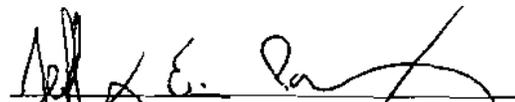
EXHIBITS

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 Joint Stipulation of Facts and Exhibits.
- Exhibit J-2: Preliminary Scoring Summary for Application #2008-091CS (Bonita Cove) dated May 7, 2008.
- Exhibit J-3: Cure materials submitted by Bonita Cove regarding Item 2T from Exhibit J-2, comprised of a 2008 Cure Summary Form, a 2008 Cure Form, and a letter from Miami-Dade Water and Sewer Department dated June 4, 2008.
- Exhibit J-4: Cure materials submitted by Bonita Cove regarding Item 3T from Exhibit J-3, comprised of a 2008 Cure Summary Form, a 2008 Cure Form, and a letter from Miami-Dade Water and Sewer Department dated June 4, 2008.
- Exhibit J-5: Final Scoring Summary for Application #2008-091CS (Bonita Cove) dated July 16, 2008.
- Exhibit J-6: Part III.C.3. of the 2008 Universal Application Instructions entitled Evidence of Infrastructure Availability (Threshold).
- Exhibit J-7: 2008 Universal Application Timeline

Respectfully submitted this 27 day of August, 2008.


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