

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

PINNACLE AT HAMMOCK SQUARE,
LLC,

Petitioner,

v.

FHFC CASE NO.: 2010-006UC
Application No. 2009-140C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on April 30, 2010. Pinnacle at Hammock Square, LLC (“Petitioner”), timely submitted its 2009 Universal Cycle Application (“Application”) to Florida Housing Finance Corporation (“Florida Housing”) to compete for an allocation of competitive housing credits under the Housing Credit (HC) Program administered by Florida Housing. Petitioner’s application met all of Florida Housing’s threshold application requirements, received the maximum application score, the maximum proximity tie-breaker points and ability to proceed points. However, based on its ranking order relative to other applications under Florida Housing’s ranking

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Debra M. Hassell / DATE: 5/4/2010

methodology, Petitioner's application was not among those included in the funding range in the final rankings. Thereafter, Petitioner timely filed a Petition for an Administrative Proceeding pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Rule 67-48.005(5), Florida Administrative Code, in which it challenged Florida Housing's scoring of one or more competing applications ranked above it, alleging in its Petition that but for Florida Housing's erroneous scoring of those applications, Petitioner's application would have received its requested HC allocation.

The Board has before it for consideration a Consent Agreement agreed to by Florida Housing staff and Petitioner, which if adopted, will resolve the matters raised by Petitioner in its Petition. A true and correct copy of the Consent Agreement is attached hereto as "Exhibit A."

RULING ON THE CONSENT AGREEMENT

After due consideration and upon the recommendation of Florida Housing staff, the Board approves and adopts the terms of the Consent Agreement.

ORDER

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

1. The facts in the statement of the case set forth in the Consent Agreement are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

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

3. The stipulated disposition as set forth in the Consent Agreement is adopted and, accordingly:

(a) Florida Housing shall allocate Petitioner's requested HC allocation from the next available allocation as provided in Rule 67-48.005(7), F.A.C.; and

(b) Florida Housing shall provide Petitioner with an award of Exchange funds under the terms of RFP 2010-04 (the "RFP"), subject only to satisfaction of the requirements in the RFP.

DONE and ORDERED this 30th day of April, 2010.



FLORIDA HOUSING FINANCE CORPORATION

By: 
Chairperson

Copies to:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
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Tallahassee, FL 32301

Kevin Tatreau
Director of Multifamily Development Programs
Florida Housing Finance Corporation
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Tallahassee, FL 32301

Gary J. Cohen
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

**PINNACLE AT HAMMOCK SQUARE,
LLC,**

Petitioner,

v.

**FHFC CASE NO.: 2010-006UC
Application No. 2009-140C
2009 Universal Cycle**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

CONSENT AGREEMENT

Petitioner, Pinnacle at Hammock Square, LLC (“Petitioner” or “Pinnacle”), and Respondent, Florida Housing Finance Corporation (“Respondent” or “Florida Housing”), by and through undersigned counsel, hereby present this Consent Agreement for consideration by the Florida Housing Board of Directors.

STATEMENT OF THE CASE

1. Petitioner applied for \$980,000.00 in annual tax credits in the 2009 Universal Application Cycle pursuant to Application No. 2009-140C to help finance the development of its project, a 100-unit garden apartment complex in Bay County, Florida. Petitioner’s application met all threshold requirements and received the maximum application score, the maximum proximity tie-breaker

measurement points, and the maximum ability to proceed tie-breaker points. However, under Florida Housing's ranking procedures, Petitioner's application was not among those in the funding range in the final rankings adopted by Florida Housing.

2. Rule 67-48.005(5), Florida Administrative Code ("F.A.C."), provides an entry point and a procedure pursuant to which an applicant in the Universal Application Cycle may file an administrative petition contesting the final rank or score of a competing applicant, subject to certain conditions. The rule is designed to provide a means of redress to an otherwise eligible universal cycle applicant whose application was not ranked in the funding range in the final ranking adopted by Florida Housing due to an error made by Florida Housing in its scoring of a competing application. The rule requires that the petitioner allege facts in its petition sufficient to demonstrate that "but for" a specifically identified error(s) made by Florida Housing in scoring or ranking the challenged application, the petitioner's application would have been in the funding range at the time Florida Housing issued its final rankings.

3. Petitioner timely filed its petition (the "Petition") challenging Florida Housing's scoring of the following applications (collectively, the "challenged applications") submitted during the 2009 Universal Application Cycle:

Renaissance Preserve Phase II, Application No. 2009-151C

Sunrise Park Apartments, Application No. 2009-153C

Magnolia Gardens, Application No. 2009-162C

4. Petitioner raises several issues regarding the scoring of the challenged applications. Relevant here is the Petitioner's allegation that Florida Housing erred in not rejecting the equity commitment letter provided on cure by each of the applicants because, in each case, the percentage of credits proposed to be purchased under the terms of the commitment letter exceeded the percentage of ownership interest held by the limited partner or member of the applicant entity.

CHRONOLOGY OF EVENTS

5. Each of the applicants in the challenged applications provided an equity commitment letter in its originally submitted application.

6. In its preliminary scoring of the challenged applications, Florida Housing determined that each of the equity commitment letters was deficient and failed threshold. However, the deficiencies identified by Florida Housing were unrelated to the matters now challenged by Petitioner.

7. No NOPSEs were filed with respect to any of the equity commitment letters regarding Florida Housing's preliminary scoring.

8. In response to Florida Housing's preliminary scoring, each of the applicants submitted a cure in the form of a revised equity commitment letter.

9. NOADs were filed by various competing applicants challenging the revised equity commitment letters submitted on curc. The NOADs raised several issues regarding the revised equity commitment letters, including the following:

The equity syndicator was purchasing and being allocated an aggregate of 99.991% of the tax credits generated by the applicant (as indicated in Section 4(a) of each letter). As such, the equity syndicator was proposing to purchase a percentage of credits (i.e., 99.991%) which was greater than the percentage ownership interest held by the limited partner as reflected on Exhibit 9 (i.e., 99.99%), in violation of the threshold requirement for a qualifying equity commitment set forth in subsection (b) on Page 74 of the Universal Application Instructions which requires that “(b) The percentage of credits proposed to be purchased must be equal to or less than the percentage of ownership interest held by the limited partner or member.” Emphasis added.

10. The original equity commitment letters that were provided in the challenged applications contained the same deficiency as that identified by the NOADs regarding the revised equity commitment letters provided on cure. Despite the presence of that same deficiency in the original letters, no NOPSEs were filed in response to Florida Housing’s failure to identify that specific deficiency in its preliminary scoring of the challenged applications.

11. Because the original commitment letters contained the same deficiency and the issue was not raised at preliminary or NOPSE scoring, Florida Housing was precluded by its so-called “gotcha rule”¹ from assessing a threshold failure for that same issue for the first time at final scoring, when there is no opportunity to cure it.

12. At final scoring, Florida Housing determined that the revised equity commitment letters were sufficient to cure the (unrelated) deficiencies identified at preliminary scoring, and, as a result of the “gotcha rule,” was precluded from assessing the failures raised for the first time in the NOADs.

SCORING ERROR AND AMENDMENT TO PETITION

13. For purposes of the Petition filed by Petitioner, Florida Housing agrees that an error was made in scoring the challenged applications with respect to the issue regarding the equity commitment letters described in Paragraph 9 of this Consent Agreement to the extent that the percentage of credits proposed to be purchased in the equity commitment letters (99.991%) was greater than the percentage of ownership interest held by the limited partner or member as shown on Exhibit 9 (99.99%), which is contrary to the 2009 Universal Application Instructions requirement that “[t]he percentage of credits proposed to be purchased

¹ Rule 67-48.004(9), F.A.C.

must be equal to or less than the percentage of ownership interest held by the limited partner or member.” Emphasis added.

14. To the extent Petitioner alleges in its Petition that Florida Housing committed scoring error(s) in scoring the challenged applications other than that identified in Paragraph 13 above and subject to Paragraph 22 below, Petitioner hereby withdraws such allegations and its Petition shall be deemed amended accordingly with the effect that the only scoring error being challenged by Petitioner in this proceeding is the one described in Paragraph 13.

CONCLUSIONS OF LAW

15. Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Florida Administrative Code Chapter 67-48, the Board has jurisdiction over the parties to this proceeding.

16. Petitioner has standing to challenge the scoring of the challenged applications pursuant to Rule 67-48.005(5), F.A.C.

17. For purposes of the Petition filed by Petitioner, Florida Housing agrees that an error was made in scoring the challenged applications with respect to the issue regarding the equity commitment letters described in Paragraph 9 of this Consent Agreement to the extent that the percentage of credits proposed to be purchased in the equity commitment letters (99.991%) was greater than the percentage of ownership interest held by the limited partner or member as shown

on Exhibit 9 (99.99%), which is contrary to the 2009 Universal Application Instructions requirement that “[t]he percentage of credits proposed to be purchased must be equal to or less than the percentage of ownership interest held by the limited partner or member.” Emphasis added.

18. Petitioner’s application would have been in the funding range of the 2009 universal cycle final ranking but for that error.

19. Petitioner’s Petition shall be deemed amended to the extent provided in Paragraph 14 above.

STIPULATED DISPOSITION

20. Florida Housing shall allocate Petitioner’s requested HC allocation from the next available allocation as provided in Rule 67-48.005(7), F.A.C.

21. In addition, Florida Housing shall provide Petitioner with an award of Exchange funds under the terms of RFP 2010-04 (the “RFP”), subject only to satisfaction of the requirements in the RFP.

BOARD APPROVAL AND FINAL DISPOSTION

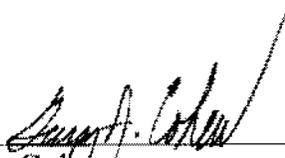
22. This Consent Agreement is conditioned upon approval by Florida Housing’s Board of Directors, such approval to be evidenced by the Board’s issuance of a Final Order adopting the terms and conditions of this Consent Agreement. If the Board has not issued such Final Order by April 30, 2010, this Consent Agreement shall be deemed automatically null and void without further

notice or action by either party, whereupon Petitioner may pursue its Petition unaffected by this Consent Agreement.

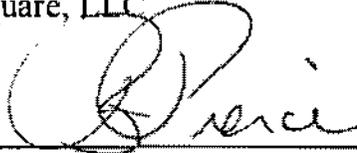
23. The adoption of this Consent Agreement by Final Order of the Board shall represent final disposition of all claims made by Petitioner with respect to the matters raised in its Petition. Upon issuance of a Final Order adopting the terms of this Consent Agreement, Petitioner agrees to dismiss its Petition with prejudice. The parties waive all right to appeal this Consent Agreement and the Final Order adopting same, and each party shall bear its own costs and attorney's fees in connection with the matters addressed in this Consent Agreement and the Petition.

[SIGNATURES FOLLOW]

Respectfully submitted, this 22nd day of April, 2010.



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