

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

BONITA COVE, LLC,

Petitioner,

v.

FHFC CASE NO.: 2010-008UC

Application No. : 2009-077CH

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. Bonita Cove, 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 and for a loan under the HOME Investment Partnerships (HOME) 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

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della M. Farrell DATE: 5/4/2010

order relative to other applications under Florida Housing’s ranking 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 and HOME funding.

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.;

(b) Florida Housing shall provide Petitioner's requested HOME funding from the next available funding as provided in Rule 67-48.005(7), F.A.C.; and

(c) 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
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Kevin Tatreau
Director of Multifamily Development Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Gary J. Cohen
Shutts & Bowen, LLP
201 Biscayne Blvd., Ste. 1500
Miami, Florida 33131

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**

BONITA COVE, LLC,

Petitioner,

v.

**FHFC CASE NO.: 2010-008UC
Application No. 2009-077CH
2009 Universal Cycle**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

_____ /

CONSENT AGREEMENT

Petitioner, Bonita Cove, LLC (“Petitioner” or “Bonita Cove”), 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 \$1,572,513.00 in annual tax credits and a \$4,000,000.00 HOME loan in the 2009 Universal Application Cycle pursuant to Application No. 2009-077CH to help finance the development of its project, a 60-unit apartment complex in Miami-Dade 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 application submitted during the 2009 Universal Application Cycle: Ability Mayfair II, LLC, (Mayfair Village Apartments), Application No. 2009-121CH ("Mayfair Village").

4. Specifically, the scoring issue raised by Petitioner is whether Mayfair Village's development site constitutes a "Scattered Site" development as that term is defined in Rule 67-48.002(106), F.A.C. Petitioner alleges that Florida Housing incorrectly determined that Mayfair Village's development site did not constitute a Scattered Site.

5. To the extent Petitioner raises in its Petition issues regarding Mayfair Village's application other than that identified in Paragraph 4 above and subject to Paragraph 20 below, Petitioner hereby withdraws such allegations and its Petition shall be deemed amended accordingly with the effect that the only scoring decision being challenged by Petitioner in this proceeding is the one described in Paragraph 4.

BACKGROUND - THE ½ POINT REDUCTION

6. In an attempt to encourage applicants in the 2009 universal cycle to submit more complete applications at application deadline, certain deficiencies that were curable in the past without affecting an applicant's score, for the first time were assessed a ½ point reduction in the applicant's score if a cure was filed. Not surprisingly, those deficiencies became the focus of applicants when scrutinizing competing applications for potential NOPSE and NOAD filings. As a result, deficiencies that would have been cured by an applicant in the past (regardless of whether the applicant may have agreed or disagreed with Florida Housing's

underlying scoring decision), for the first time took on greater importance. In some cases, rather than acknowledge the deficiency and provide a cure with its attendant ½ point reduction, the applicant elected to take issue with the underlying scoring determination itself.

7. Among the cures affected by the ½ point reduction were some of those necessary to address deficiencies flowing from a scoring determination that an applicant's development site was a Scattered Site (in those cases where the applicant failed to recognize its site as a Scattered Site and complete its application accordingly). Instead of attempting to cure those deficiencies, affected applicants in the 2009 universal cycle instead chose to contest the determination that its site was a Scattered Site. As a result, the definition of Scattered Sites became the focus of intense scrutiny, particularly that part of the definition which makes a development a scattered site if it is divided by an easement. For the first time, issues were raised regarding the type, nature and size of the easement involved and whether that easement "divided" the site within the contemplation of the rule, issues that had not been contested or litigated in the past.

THE MAYFAIR VILLAGE APPLICATION

8. In scoring Mayfair Village's application, Florida Housing determined that the development site was divided by an easement and, thus, constituted a Scattered Site within the literal rule definition which defines a Scattered Site as

“...a Development consisting of real property in the same county...(ii) any part of which is divided by a street or easement...” See Rule 67-48.002(106), F.A.C.

9. While bound by the literal language in the rule for purposes of scoring Mayfair Village’s application, Florida Housing recognized that Mayfair Village’s development site, despite the presence of the easement in question, was not intended to be captured within the Scattered Site definition.

10. Subsequently, when Mayfair Village filed its petition contesting Florida Housing’s scoring determination that its development site was a Scattered Site, Florida Housing reconsidered that scoring determination and agreed that the easement in question did not divide the development site within the *intended* meaning of a Scattered Site as defined in Rule 67-48.002(106). Emphasis added. That agreement is evidenced by a consent agreement between Florida Housing and the Applicant, and adopted by Final Order (the “Mayfair Village Final Order”).¹

11. Florida Housing intends to consider revisions to the definition of Scattered Sites and related rules as part of the rule making in connection with its next universal application cycle. In the meantime, Florida Housing is of the opinion that the disposition of Mayfair Village’s petition as set forth in the Mayfair Village Final Order is fair, reasonable and proper under the particular facts and

¹ Ability Mayfair II, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2009-070UC (Final Order February 26, 2010). In actuality, the decision represented by this Final Order is the scoring decision being challenged by the Petitioner in this proceeding.

circumstances involved. However, Florida Housing recognizes that the determination set forth in the Mayfair Village Final Order is inconsistent with the manner in which it scored Mayfair Village's application based on the literal language in the rule definition. The determination made by Florida Housing in the Mayfair Village Final Order effectively forced Petitioner's application out of the funding range, a position it would have otherwise occupied based on Florida Housing's initial scoring of the Mayfair Village application. Because of the facts and circumstances unique to the Mayfair Village development site and for purposes of the Petition filed by Petitioner, Florida Housing agrees that the ranking of Petitioner's application should not be adversely impacted as a result of Florida Housing's subsequent determination that the easement in question did not divide the Mayfair Village development site within the *intended* meaning of a Scattered Site as defined in Rule 67-48.002(106).

CONCLUSIONS OF LAW

12. 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.

13. Petitioner has standing to challenge the scoring of the Mayfair Village application pursuant to Rule 67-48.005(5), F.A.C.

14. Because of the facts and circumstances unique to the Mayfair Village development site and for purposes of the Petition filed by Petitioner, Florida Housing agrees that the ranking of Petitioner's application should not be adversely impacted as a result of Florida Housing's subsequent determination that the easement in question did not divide the Mayfair Village development site within the *intended* meaning of a Scattered Site as defined in Rule 67-48.002(106).

15. Petitioner's application would have been in the funding range of the 2009 universal cycle final ranking but for that determination.

16. Petitioner's Petition shall be deemed amended to the extent provided in Paragraph 5 above.

STIPULATED DISPOSITION

17. 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.

18. Florida Housing shall provide Petitioner's requested HOME funding from the next available funding as provided in Rule 67-48.005(7), F.A.C.

19. 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

20. 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.

21. 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.



Gary J. Cohen
Florida Bar No.: 353302
Shutts & Bowen, LLP
201 Biscayne Blvd., Ste. 1500
Miami, Florida 33131
Attorney for Petitioner, Bonita Cove, LLC



Robert J. Pierce, Assistant General Counsel
Florida Bar No.: 0194048
Florida Housing Finance Corporation
227 N. Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
Attorney for Respondent, Florida Housing