

**BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

TOWN PARK CROSSING, L.P.,

Petitioner,

vs.

FHFC No. 2010-018UC
Application No. 2009-255C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

AMENDED PETITION FOR ADMINISTRATIVE HEARING

Pursuant to Section 120.569 and .57, Florida Statutes (F.S.) and Rule 67-48.005(5), Florida Administrative Code (F.A.C.), Petitioner, TOWN PARK CROSSING, L.P. ("TPC") requests an administrative hearing to challenge FLORIDA HOUSING FINANCE CORPORATION's ("Florida Housing") scoring actions concerning Universal Cycle Application No. 2009-144C, 2009-146C, 2009-097C, 2009-121CH and 2009-123C. In support of this Petition, TPC provides as follows:

1. TPC is a Florida limited partnership with its address at 8380 Resource Drive, West Palm Beach, Florida 33404. TPC is in the business of providing affordable rental housing units.

2. Florida Housing is the state agency delegated the authority and responsibility for administering and awarding funds pursuant to Chapter 420, F.S., and Rules 67-21 and 67-48, F.A.C.

Nature of the Controversy

3. On August 20, 2009, TPC applied to Florida Housing for funding pursuant to the Low Income Housing Tax Credit Program (LIHTC). The purpose of the requested funds was to finance the construction of a 100 unit affordable housing apartment complex in Davie, Florida, named Town Park Crossing.

4. Pursuant to section 420.5099, Florida Statutes, Florida Housing is the designated "housing credit agency" for the State of Florida and administers Florida's low-income housing tax credit program. Through this program, Florida Housing allocates Florida's annual fixed pool of federal tax credits to developers of affordable housing.

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 develop specific multi-family housing projects. An applicant entity will then sell 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 rents that are affordable to low-income and very-low-income tenants.

6. 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 encourage private developers to build and operate 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.

The 2009 Universal Application Cycle

7. Because Florida Housing's available pool of federal tax credits each year is limited, qualified projects must compete for this funding. To assess the relative merits of proposed projects, Florida Housing has established a competitive application process pursuant to Chapter 67-48, F.A.C. Specifically, Florida Housing's application process for 2009, as set forth in Rules 67-48.002-.005, F.A.C., involves the following:

- (a) The publication and adoption by rule of an application package;
- (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 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 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 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 received less than the maximum score; and
- (j) Final scores, ranking, and allocation of tax credit funding to applicants through the adoption of final orders.

8. At the completion of this process a Final Score is assigned to each Application. Based on these Final Scores, and a series of Tie Breakers, Applications are then ranked. Funds are awarded to applicants starting with applicable preferences and set asides and the highest scoring applicants, until the available funds are exhausted. Applicants compete for funds, in large part, against other applicants in the same county size group, and against other applicants seeking to provide housing to the same demographic group. TPC is an applicant for Development in the Large County Geographic Set-Aside.

TPC's Application

9. Based on a review of Florida Housing's Final Ranking dated February 26, 2010, TPC received a final score of 70 out of a possible 70 points for its application. TPC received 6.0 Ability-To-Proceed and 7.5 Proximity Tie-Breaker points, and was deemed to have passed threshold. This score would place TPC in the funding range in the Large County Geographic Set-Aside, but for Florida Housing's scoring of Applications 2009-144C, 2009-146C, 2009-097C, 2009-121CH and 2009-123C. Florida

Housing's scoring actions concern whether the development sites for Application 2009-144C, 2009-146C, 2009-097C, 2009-121CH and 2009-123C are "scattered sites" as that term is defined by Rule 67-48.002(106), F.A.C., and whether 2009-123C has a funding shortfall which was not corrected.

10. As will be explained more fully below, Florida Housing's scoring actions in those cases, specifically how all "scattered sites" cases were resolved uniformly, even though the facts were not the same in each case, is erroneous.

Substantial Interests Affected

11. As an applicant for funds allocated by Florida Housing, TPC's substantial interests are adversely affected by the scoring decisions here. The final scoring actions of Florida Housing resulted in TPC's application being displaced from the funding range for Large County Developments. Since the purpose of the tax credit program in general is to provide funding to developers of apartment projects for low income residents, then TPC's interests are adversely and substantially affected by the loss of funding. Indeed, without the requested funding, TPC's ability to provide much needed affordable housing units will be severely jeopardized.

Scoring Issue

12. The Universal Application at Part III asks an applicant to provide information concerning the proposed development. Specifically, at Part III, Section A.2.b., the Application requires the Applicant to disclose whether the proposed project site is a "scattered site." If a site is a scattered site, then documentation, including

availability of infrastructure, environmental assessments, etc., for each designated site is required.

Application # 2009-144C

13. In its original submittal, Application 2009-144C, Dr. Kennedy Homes, indicated that its project site was not a "scattered site" and submitted documentation accordingly. Florida Housing scored the site as a single site in the preliminary scoring round. In response to a NOPSE however Florida Housing found as follows:

Based on information provided by a NOPSE, it appears that the Development site is divided one or more easements and thus meets the definition of "scattered sites" (see subsection 67-48.002(106), F.A.C.). The Applicant failed to correctly answer the question at Part III.A.2.b of the Application.

14. In a cure, the Applicant submitted various documents to address the "scattered sites" issue. After conducting its final review of the Application, cures and all applicable NOADS, Florida Housing maintained its prior position that the development site was a "scattered site" and found as follows:

In its cure materials for Items 2S, 5S, 10S, 11S, 1T through 9T, 1A through 6A, 1C and 2C, the Applicant provided an affidavit from a licensed surveyor and various documents in an effort to demonstrate that the existing easements do not make the proposed Development site a Scattered Site. However, documentation and an affidavit from a licensed surveyor provided by a NOAD support the original determination that the site is divided by one or more easements and thus meets the definition of "scattered sites".

15. As a result of a challenge filed by the Applicant, Florida Housing has now subsequently changed its position to conclude that the development site is not a "scattered

site.” This change in position allows Application No. 2009-144C to be ranked in the funding range ahead of TPC. While TPC also benefited from a Florida Housing concession concerning a “scattered site” issue, the facts involving the Ehlinger application are not the same as with Application No. 2009-144C.

Application # 2009-146C

16. In its original submittal, Application 2009-146C, Ehlinger Apartments indicated that its project site was not a “scattered site” and submitted documentation accordingly. Florida Housing scored the site as a single site in the preliminary scoring round. In response to a NOPSE however Florida Housing found as follows:

Based on information provided by a NOPSE, it appears that the Development site is divided one or more easements and thus meets the definition of “scattered sites” (see subsection 67-48.002(106), F.A.C.). The Applicant failed to correctly answer the question at Part III.A.2.b of the Application.

17. In a cure, the Applicant submitted various documents to address the “scattered sites” issue. After conducting its final review of the Application, cures and all applicable NOADS, Florida Housing maintained its prior position that the Ehlinger site was a scattered site and found as follows:

In its cure materials for Items 2S, 5S, 10S, 11S, 1T through 9T, 1A through 6A, 1C and 2C, the Applicant provided an affidavit from a licensed surveyor and various documents in an effort to demonstrate that the existing easements do not make the proposed Development site a Scattered Site. However, documentation and an affidavit from a licensed surveyor provided by a NOAD support the original determination that the site is divided by one or more easements and thus meets the definition of “scattered sites”.

18. As a result of a challenge filed by the Applicant, Florida Housing has now subsequently changed its position to conclude that the development site is not a "scattered site." This change in position allows Application No. 2009-146C to be ranked and is also ahead of TPC in the ranking.

Application # 2009-097C

19. In its original application, the Applicant, Lodges of Pinellas Park, indicated that its site was not a "scattered site" and submitted documentation accordingly. Florida Housing scored the site as a single site in the preliminary scoring round.

20. As allowed by the Universal Cycle process, a NOPSE was filed by a competing applicant claiming that the site was a "scattered site". After conducting its preliminary review of the Application and all NOPSEs, Florida Housing, as to the "scattered sites" issue, found as follows:

Based on information provided by a NOPSE, it appears that the Development site is divided by one or more easements and thus meets the definition of "scattered sites" [see subsection 67-48.002(106), F.A.C.]. The 2009 Universal Application instructions require that site plan approval be demonstrated for all sites if the proposed Development consists of "scattered sites". Although site plan approval has been demonstrated for the site located at 6721 Park Boulevard, it has not been demonstrated for the other site(s).

21. In response to Florida Housing's preliminary scoring decision, the applicant provided cure documents, including an affidavit from a licensed surveyor that explained why the proposed development site was not a scattered site.

22. In response to the Cures and a NOAD which raised the scattered site issue, Florida Housing on December 3, 2009, concluded as follows:

In its cure materials for Items 2S, 5S, 10S, 11S, 4T, 5T, 7T through 13T, 1A through 6A, 1P, 2P, 5P and 6P, the Applicant provided an affidavit from a licensed surveyor and various documents in an effort to demonstrate that the proposed Development site is not divided by the utility easement. However, documentation and affidavits from two (2) licensed surveyors provided by a NOAD support the original determination that the site is divided by an easement and thus meets the definition of "scattered sites".

23. As a result of a challenge filed by the Applicant, Florida Housing conceded that the scattered site issue without need for hearing. This change in position allows Application No. 2009-097C to be ranked ahead of TPC.

Application # 2009-121CH

24. In its original application, the Applicant indicated that its site was not a "scattered site" and submitted documentation accordingly. Florida Housing scored the site as a single site in the preliminary scoring round.

25. As allowed by the Universal Cycle process, a NOPSE was filed by a competing applicant claiming that the site was a "scattered site".

26. After conducting its preliminary review of the Application and all NOPSEs, Florida Housing, as to the "scattered sites" issue, found as follows:

Based on information provided by a NOPSE, it appears that the Development site is divided by a street and thus meets the definition of "scattered sites" (see subsection 67-48.002(106), F.A.C.).

27. In response to Florida Housing's preliminary scoring decision, the applicant provided cure documents, including an affidavit from a licensed surveyor that explained why the proposed development site was not a scattered site.

28. In response to the Cures and a NOAD which raised the scattered site issue, Florida Housing on December 3, 2009, concluded as follows:

In its cure materials for Items 1S, 2S, 3S, 5S, 8S, 10S, 11S, 5T, 7T, 9T through 18T, 1A through 6A, 1P, 2P, 5P and 6P, the Applicant provided an affidavit from a licensed surveyor concerning the abandonment of Mayfair Village Road by the City of Jacksonville. However, documentation and an affidavit from a licensed surveyor provided by a NOAD demonstrates that although the road was vacated and abandoned as a public road by Ordinance No. 95-1032-593, the ordinance provided that "there is hereby reserved unto the City of Jacksonville a perpetual, unobstructed easement for all public utilities . . . , over, under, through and across the property . . ." Thus, even though the road was vacated, the development site nevertheless remains divided by the easement reserved over that same property by the City. Because it is divided by an easement, the site meets the definition of Scattered Sites.

29. As a result of a challenge filed the Applicant, Florida Housing conceded that the scattered site issue without need for hearing. This change in position allows Application No. 2009-121CH to be ranked ahead of TPC.

30. It is important to recognize that this petition addresses four cases that were all decided based on an identical issue - the interpretation of the "scattered sites" definition in Florida Housing's rules. When Final Scores were released on December 3, 2009, each of the above applications failed threshold requirements and did not achieve

maximum scores in several areas for a single reason. The reason, given by Florida Housing in the final scoring summaries for each development, was as follows:

Based on information provided by a NOPSE [or NOAD], it appears that the Development site is divided by one or more easements and thus meets the definition of "scattered sites" (see subsection 67-48.002(106), F.A.C.).

31. Each applicant filed petitions with Florida Housing seeking an administrative hearing concerning Florida Housing's determination that the rule 67-48.002(106) (the "scattered sites rule") applied to their Applications. Before each scheduled hearing took place, Florida Housing's attorney entered into a Consent Agreement with attorneys for each Applicant. In each of the Consent Agreements, Florida Housing reversed its earlier scoring decision and determined that there were in fact easements on each development site but that the easements did not "divide" the property.

32. Each of the Consent Agreements was presented to the Florida Housing Board of Directors on February 26, 2010. In each case, Florida Housing entered a Final Order adopting the Stipulated Findings of Fact and Stipulated Conclusions of Law in the Consent Agreements and determined that each Applicant had received a perfect score, achieved maximum ability to proceed tie-breaker points, and maximum proximity tie-breaker points.

33. TPC also benefited from a Consent Agreement and believes based on its particular facts that Florida Housing acted correctly in entering into the Consent

Agreement and reversing the final scoring decision concerning the "scattered sites" rule as to TPC. However, the facts do not support the result in the other cases. Nor do the facts support Florida Housing's actions in basically conceding all "scattered sites" cases.

34. The Petition in this case is being filed because competing Applicants in the 2009 Universal Cycle have made clear that they intend to challenge, and in fact have challenged Florida Housing's decision to enter into the Consent Agreements relating to the "scattered sites" rule interpretation and to issue Final Orders adopting those agreements through the other after-the-fact challenge process.

35. If those Applicants are successful in challenging Florida Housing's interpretation of the "scattered sites" rule in one or more of the Consent Agreements and Final Orders, then they will be in funding range. This is especially true given that Florida Housing has apparently again conceded all "scattered sites" challenges in the after-the-fact proceedings. TPC wishes to obtain the same benefit of that ultimate agency action. The only way to accomplish that objective is by filing this Petition.

36. With the above explanation, Florida Housing's scoring decisions are erroneous. The Easements in the above referenced Applications, do divide the development sites and fall squarely within the definition of Rule 67-48.002(106), F.A.C., which defines "'Scattered Sites" for a single Development as follows:

Means a development consisting of real property in the same county [i] any part of which is not contiguous ("non-contiguous parts") or [ii] any part of which is divided by a street or easement ("divided parts") and [iii] it is readily apparent from the proximity of the non-contiguous parts or the divided parts of the real property, chain of

title or other information available to the Corporation (Florida Housing) that the non-contiguous parts or the divided parts of the real property are part of a common or related scheme of development.”

37. Part III Section A.2.b. of the Florida Housing Application Instructions for the 2009 Universal Cycle (the “Instructions”), which are incorporated into Rule 67-48.002(106), F.A.C. by reference, states

If the Development will consist of “scattered sites”, for each of the non-contiguous parts or divided parts (“sites”), provide behind a Tab labeled “**Exhibit 20**”, the Address, total number of units, and latitude and longitude coordinates, determined in degrees, minutes and seconds truncated after one decimal place, located anywhere on the site. If requesting Competitive HC, for the site where the tie breaker Measurement Point is located, only the Address and total number of units is required. This information should be provided behind a tab labeled “**Exhibit 20**”. If the Applicant indicates that the proposed Development will consist of “scattered sites”, but fails to provide the required information for each of the sites, the Application will fail threshold.

MMRB & HC Applications – To be eligible to apply as a Development with “scattered sites”, a part of the boundary of each site must be located within ½ mile of the site with the most units.

38. The Easements when combined with other easements clearly divides the property as explained in the NOPSE’s NOADS attached to this Petition as Exhibit C.

Application # 2009-123C

39. Because the Applicant did not properly cure the equity commitment deficiency identified by Florida Housing at preliminary scoring, a construction and permanent financing shortfall remains which should have resulted in a threshold failure. The Applicant has committed to sell more of its partnership than it actually owns. The

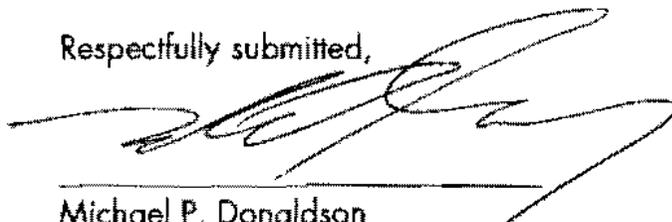
issue was identified by Florida Housing in the Preliminary Scoring Summary Report for Progresso Point, which stated: "The Application has a construction financing shortfall of \$13,211,469" and "The Application has a permanent financing shortfall of \$13,211,469." The Instructions provide that "[t]he 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." Instructions, p. 74 (Part V.D.2.(b)).

40. The issue is the Application was reiterated in a NOAD. Because of the inconsistency between Applicant's equity commitment letter and its ownership interests, its housing credit equity cannot be considered as a source of financing. Thus, the shortfalls persist, and the Application should have failed threshold.

WHEREFORE, TPC requests that it be granted an administrative proceeding to contest Florida Housing's erroneous scoring decisions. To the extent there are disputed issues of fact, this matter should be forwarded to the Division of Administrative Hearings. Ultimately, TPC requests the entry of a Recommended and Final Order which finds that: Florida Housing's scoring decision as to Application No. 2009-144C, No. 2009-146C, No. 2009-097C, 2009-121CH and 2009-123C and were erroneous and but for those erroneous scoring decisions TPC would have been funded. TPC would also request that it

be funded from the next available allocation.

Respectfully submitted,



Michael P. Donaldson
FL Bar No. 0802761
CARLTON FIELDS, P.A.
P.O. Drawer 190
215 S. Monroe St., Suite 500
Tallahassee, FL 32302
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

Counsel for Applicant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been filed by Hand Delivery with the Agency Clerk, Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301; and a copy furnished to Wellington H. Meffert, II, Esq., Florida Housing Finance Corporation, 227 N. Bronough St., Suite 5000, Tallahassee, FL 32301, this 23rd day of April, 2010.



MICHAEL P. DONALDSON