STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

APD HOUSING PARTNERS 20, LP,
a Florida limited partnership

Petitioner,

v. FHFC CASE NO.: 2009-067UC
Application No. : 2009-214C

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 February 26, 2010. The matter for consideration before this Board is a recommended order pursuant to Section 120.57(2), Florida Statutes, and Rule 67-48.005(2), F.A.C.

APD Housing Partners 20, LP, ("Petitioner") timely submitted its 2009 Universal Cycle Application ("Application") to Respondent, 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 timely filed its Petition for Review, pursuant to

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
Della M Harrell /DATE: 2/26/10

Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring of its Application. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition did not raise disputed issues of material fact. An informal hearing was held in this case on January 13, 2010, in Tallahassee, Florida, before Florida Housing's designated Hearing Officer, David E. Ramba. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order determining that Petitioner met the threshold requirements for site control, and reversing Florida Housing's rejection of Petitioner's Application.

Florida Housing timely filed its Argument in Opposition to the Recommended Order, a copy of which is attached hereto as "Exhibit B" and made a part hereof by reference. Petitioner filed its Motion to Strike Respondent's Argument in Opposition to the Recommended Order, a copy of which is attached hereto as "Exhibit C."

Upon consideration of the foregoing, the Board enters this as its Final Order in this matter.

RULING ON PETITIONER'S MOTION TO STRIKE

This Board has not, and cannot, chosen to delegate *final* order authority to the designated hearing officer. The matter for consideration before this Board is a recommended order pursuant to Rule 67-48.005(2), F.A.C. ("At the conclusion of any administrative hearing, a *recommended* order shall be entered by the designated hearing officer which will then be *considered* by the Board.") And, while in the vast majority of cases no exception is taken to the recommended order entered by the designated hearing officer, this Board is not constrained by its rules to accept the recommended order as its final order. To the contrary, there is precedent not only for this Board's rejection of conclusions of law (or recommendations) in a recommended order but for the very procedure objected to by Petitioner here, namely the filing of an argument in opposition to the recommended order by Florida Housing's legal staff.

Petitioner correctly asserts that Rule 67-48.005(3), F.A.C., provides a procedure for an Applicant to challenge the findings of a recommended order entered pursuant to an informal hearing, and that the rule is silent in terms of a procedure for Florida Housing as a party litigant to challenge the findings of a recommended order. However, the rule cannot, and does not, limit this Board's absolute right to advice of counsel on any matter properly before it, including the recommended orders entered by its designated hearing officers.

Even when adopting the recommended order *in toto*, this Board does so based upon advice of counsel, in the form of a recommendation by its legal staff. And, on those few occasions where the Board has previously rejected conclusions of law or recommendations made by its informal hearing officer in a recommended order, it has done so based upon the recommendation of its legal staff, communicated to the Board in the form of written arguments in opposition to the recommended order. *See, e.g.*, Catholic Charities Housing, Inc. (a/k/a San Jose Mission, Catholic Charities, Inc.) v. Florida Housing Finance Corporation, FHFC Case No. 2004-019-UC (this Board, in its final order, rejected a recommendation made by the hearing officer in the Recommended Order); Merry Place at Pleasant City Associates, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2005-018UC, (this Board, in its final order, rejected certain of the informal hearing officer's conclusions of law). Each of these actions was based upon a Written Argument in Opposition to the Recommended Order filed by Florida Housing's legal staff.

This Board views the Argument in Opposition to Recommended Order filed in this case as a recommendation made by its legal staff and the Board elects to treat it as such. In fact, it is an exhibit to the staff recommendation included in the Board agenda for this meeting. That Florida Housing staff chose the procedure available to an Applicant under Rule 67-48.005(3), F.A.C., is a matter of

fundamental fairness in that it afforded Petitioner advance notice of those recommendations and the opportunity for Petitioner to register its objections in advance of today's Board meeting. One alternative, which would not have violated the rule, would have been for Florida Housing legal staff to only let its recommendations or advice to the Board regarding the recommended order be known during the Board meeting.

As a matter of procedure, the Board finds that Florida Housing's filing of Written Argument in Opposition to the Recommended Order does not in any way work to the disadvantage of the Petitioner, or to the advantage of Florida Housing.

The substantive issues raised by Petitioner in its motion are addressed below.

Accordingly, Petitioner's Motion to Strike is denied.

RULING ON THE RECOMMENDED ORDER

1. The findings of fact set out in the Recommended Order are supported by competent substantial evidence.

2. The conclusions of law in paragraphs 1 through 6 of the Recommended Order are supported by competent substantial evidence.

3. The conclusions of law or interpretations of the administrative rules governing this matter as set forth in paragraphs numbered 7 through 10 on page 10 of the Recommended Order are contrary to Florida Housing's rules and applicable

law for the reasons stated in Respondent's Argument in Opposition to the Recommended Order and as otherwise implicit in the substituted conclusions in paragraph 8 below.

4. The conclusions of law or interpretations of the administrative rules governing this matter as set forth in paragraph 8 of this Final Order are substituted in place of the rejected conclusions.

5. The substituted conclusions of law or interpretations of the administrative rules governing this matter are found to be as or more reasonable than the conclusions of law that were rejected or modified hereby.

6. Based upon the substituted conclusions of law or interpretations of the administrative rules governing this matter, the Recommendation in the Recommended Order is contrary to Florida Housing's rules and applicable law.

ORDER

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

5. The findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

6. The conclusions of law in paragraphs 1 through 6 of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

7. The conclusions of law in paragraphs numbered 7 through 10 on page 10 of the Recommended Order are rejected as contrary to Florida Housing's rules and applicable law for the reasons stated in Respondent's Argument in Opposition to the Recommended Order and as otherwise implicit in the substituted conclusions in paragraph 8 below.

8. The following conclusions of law or interpretations of the administrative rules governing this matter are substituted in place of the rejected conclusions:

> S-1. Relevant here are the instructions governing a "Qualified Contract" found at Part III.C.2.a. of the Application Instructions. One of the requirements for a Qualified Contract is that **"...the buyer MUST be the Applicant unless a *fully executed* assignment of the Qualified Contract which assigns all of the buyer's rights, title and interest in the Qualified Contract to the Applicant, is provided."** *(Emphasis added)*
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> S-2. In its original application, the Petitioner ("APD 20") attempted to demonstrate site control by providing a Contract for Purchase and Sale of Real Property (the "Contract") between Mederos-T.M. Alexander Acquisitions, LLC, as "Seller," and The American Opportunity Foundation, Inc., and Allied Pacific

Development, LLC, as "Buyer." The Petitioner, APD 20, was not a party to the Contract. (*Exhibit J-5*)

S-3. At preliminary scoring, Florida Housing determined that Petitioner's Application failed to satisfy the threshold requirements for site control because the "August 17, 2009 Purchase and Sale Agreement does not reflect the Applicant as the buyer and no assignment was provided." *(Exhibit J-2)*

S-4. During the cure period, APD 20 provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property (the "Assignment and Assumption Agreement"). The Assignment and Assumption Agreement on its first page purports to be a tri-party agreement entered into by the Seller and the original Buyer under the Contract, and by APD 20, as the new buyer, or assignee. Under its terms, the original Buyer assigns its rights, title and interest under the Contract to the new buyer; the new buyer agrees to assume and perform the obligations of the original Buyer under the Contract; the Seller consents to the assignment and assumption of the Contract; and, the parties purportedly agree to amend the Contract. (*Exhibit J-6*)

S-5. While the Assignment and Assumption Agreement was executed by the original Buyer under the Contract, neither the Seller under the Contract, Mederos-T.M. Alexander Acquisitions, LLC, nor the Petitioner, APD Housing Partners 20, LP, executed the agreement. Instead, the Assignment and Assumption Agreement was executed by an entity named Mederos-Civic Acquisitions, LLC, as the seller, and an entity named APD Housing Partners 19, LP, as the new buyer. (*Exhibits J-5 and J-6*)

S-6. Given the nature of the Universal Cycle Application process, the site control documentation provided by an Applicant must be facially sufficient to demonstrate site control in the name of the Applicant in accordance with the governing rules and instructions. As with other application requirements, Florida Housing's rules do not permit site control to be demonstrated circumstantially or by inference.[1]

S-7. Acceptance of an assignment by an assignee is an essential element to a valid assignment.[2] Implicit in the Application

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[1] *E.g.*, see Bonita Cove, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2008-056UC (2008) (Florida Housing'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...of demonstrating the availability of water and of sewer as of the application deadline.") (Final Order adopting Recommended Order, pgs. 9-10)

[2] *See*, Essential Workforce Housing, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2008-022CW (2008) and the cases cited therein (Acceptance of an assignment by an assignee is an essential element to a valid assignment)

Instructions requirement of a "***fully executed*** assignment of the Qualified Contract" is that the assignment be signed by the Applicant in order to demonstrate that essential element, i.e., that the assignment was accepted by the Applicant.[3]

S-8. Here, the only document purporting to demonstrate site control in the name of the Petitioner, APD 20, is the Assignment and Assumption Agreement. *(Exhibit J-6)* It is clear based on the face of the signature page that the Assignment and Assumption Agreement was not executed in the name of the Petitioner, APD 20. In fact, APD 20's name does not appear on the signature page at all. Instead, the name appearing on the signature line and identified as the new buyer is APD Housing Partners 19, LP, a separate and distinct entity. *(Exhibit P-2)* The Assignment and Assumption Agreement provided by APD 20 does not on its face establish that APD 20 accepted the assignment. Nor does it establish on its face that APD 20 assumed the obligations of the original Buyer (which is stated as an affirmative obligation of the new buyer) under the specific terms of the Assignment and Assumption Agreement. And, making the document

[3] There is no question that the Qualified Contract itself must be executed by the Applicant as the buyer where the contract is relied upon to demonstrate site control in the name of the Applicant. The same requirement governs the execution of the assignment of the Qualified Contract by the Applicant as the assignee under the assignment of that contract.

even more problematic is that it was not signed by the seller named in the underlying Contract but instead by a different legal entity.[4] *(Exhibits J-5 and J-6)*

S-9. As a result, the Assignment and Assumption Agreement is on its face insufficient to demonstrate site control in the name of the Petitioner, APD 20, as required by Florida Housing's rules. Furthermore, because the assignment is signed by neither the seller under the contract which it purports to assign or by the Petitioner as the purported assignee, its enforceability on its face as a matter of contract law against either is questionable.[5]

S-10. Petitioner argues that there is no confusion that the proper parties signed the Assignment and Assumption Agreement and that the "error" in the signature lines does not change that fact; an argument apparently recognized in the Recommended Order's

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[4] *See,* Shepherd's Court, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2007-029UC (2007) (Assignment was not effective to amend the underlying agreement where the assignment was not signed by one of the parties to the underlying agreement); Tidewater Revitalization, Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2002-0023 (2002) (Amendment to contract could not be specifically enforced against a seller who did not sign the amendment)

[5] *See,* Socarras v. Claughton Hotels, Inc., 374 So. 2d 1057 (Fla. 3d DCA 1979) (To be an enforceable land sales contract, statute of frauds requires contract to be embodied in a written memorandum signed by the party against whom enforcement is sought); Sill v. Ocala Jewelers, Inc., 210 So. 2d 458 (Fla. 1st DCA 1968) (Phrase "party to be charged" as used in the statute of frauds applies to person against whom liability is asserted, whether person is alleged vendor or purchaser); Tidewater Revitalization, Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2002-0023 (2002) (Amendment to contract could not be specifically enforced against a seller who did not sign the amendment)

The enforceability of the conttact against the seller is also of significance under Florida Housing's rules in that one of the requirements for a Qualified Contract is that the buyer must have the remedy of specific performance against the seller. The lack of that remedy alone is grounds for rejection of the Assignment and Assumption Agreement. See, Part III.C.2.a. of the Application Instructions.

summary conclusion in Paragraph 10 that, "Based on the totality of the application and the cure materials, Florida Housing can readily ascertain the correct signatories and parties to the assignment, and the title above the signature lines does not change the terms or the validity and enforceability" of the Assignment and Assumption Agreement. This conclusion ignores both the applicable requirements for demonstrating site control in the name of the applicant a by Florida Housing's rules as well as the framework within which the Universal Application Process functions.[6] Here, the entities named on the signature lines go to the very issue of whether or not the Petitioner demonstrated site control in the name of APD 20 as required by Florida Housing's rules. Florida Housing is not permitted to disregard its rules and score Petitioner's Application based on inference and speculation.[7] Moreover, the notion that Florida Housing is required to determine Petitioner's compliance with site control requirements based on the "totality of the application" is contrary to Florida

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[6] Bonita Cove, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2008-056UC (2008) ("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.") (Final Order adopting Recommended Order, p. 11).

[7] *See* Bonita Cove, *supra* (In rejecting petitioner's argument that water and sewer availability was demonstrated elsewhere in petitioner's application, Hearing Officer found that "While that may be a logical inference, the acceptance of this argument wonld require both speculation and a complete disregard of the Application Instructions...") (Final Order adopting Recommended Order, p. 9)

Housing's requirement in Part III.C.2.a. of the Application Instructions that all documentation evidencing site control be provided in one specific place in the application.[8] Part III.C.2.a. of the Application Instructions provides in relevant part:

> **Evidence of Site Control (Threshold)**
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> **...The <u>required documentation</u>, including any attachments or exhibits referenced in any document, must be attached to that document <u>regardless of</u> whether that attachment or exhibit has been provided as an attachment or exhibit to another document or <u>whether the information is provided elsewhere in the Application</u> or has been previously provided. Such documentation...<u>must be provided behind a tab labeled "Exhibit 27."</u>...** *(Emphasis added)*

S-11. Here, it is true that Florida Housing undoubtedly knew the names of the parties that <u>should</u> have appeared on the signature lines of the Assignment and Assumption Agreement in order to meet the applicable rule requirements. (*Emphasis added*) That, however, does not excuse the Petitioner's failure to comply with those rules. Under Florida Housing's rules, the Petitioner is responsible for the accurate completion of "each page and applicable exhibit of [its]

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[8] *See*, <u>Bonita Cove</u>, supra. (Petitioner's argument that water and sewer availability was demonstrated elsewhere in its application was rejected as contrary to Florida Housing's instructions which "explicitly require and provide for the means and methods (including the designated exhibit number) of demonstrating the availability of water and sewer as of application deadline.") (Final Order adopting Recommended Order, p. 10)

Application" and Florida Housing is not permitted to assist the Petitioner in that process.[9] The Universal Application Cycle is a competitive application process in which the applications are scored objectively based not upon what an applicant may have intended to provide (or should have provided) in its application in order to satisfy the applicable rule requirements but, rather, upon the information actually provided in its application, including the exhibits and cure materials.

S-12. The fact that the individuals who signed the Assignment and Assumption Agreement on behalf of Mederos-Civic Acquisitions, LLC, and APD Housing Partners 19, LP, respectively, may also be authorized to sign on behalf of Mederos-T.M. Alexander Acquisitions, LLC, and APD Housing Partners 20, LP, in no way changes the names of the entities identified as the seller and the new buyer clearly shown on the signature lines on the face of the signature page and on whose behalf those individuals signed. The seller named on the signature page, Mederos-Civic Acquisitions, LLC, and, the

[9] "Each page and applicable exhibit of the Application must be accurately completed, and Applicants must provide all requested information. Failure to provide the requested information and documentation shall result in failure to meet threshold for threshold items ..." 2009 Universal Application Instructions, p.2.
See, also Marian Manor, Inc. v. Florida Housing Finance Corporation, FHFC Case No. 2006-019UC (2006) ("Rule 67-48.004(1)(b), F.A.C., provides, in pertinent part, that "all applications must be complete..." and also prohibits Florida Housing from assisting an applicant with its application.")

new buyer named on the signature page, APD Housing Partners 19, LP, are existing entities, and the individuals who signed on their behalf are authorized signatories for those entities as well. *(Exhibit P-2)* Importantly, and in the context of scoring the Petitioner's Application, no documents were submitted to Florida Housing during the application process, including the cure period, demonstrating that the individuals who signed on the signature page to the Assignment and Assumption Agreement did so on behalf of any entity other than the entity named on the signature line appearing above that individual's signature as reflected on the face of the signature page. To now conclude that those individuals, in signing on behalf the entities named on the signature line, instead bound a different entity (in this case, the Petitioner, APD 20, and the original seller) to the terms of the Assignment and Assumption Agreement is not only speculative but contrary to the face of the signature page itself. The entities named on the signature lines cannot be ignored as meaningless, particularly when the entity name itself is at the very core of the issue as it is here where the rules require that site control be demonstrated in the name of the applicant.[10]

[10] See, Savannah Springs Apartment II, Ltd. v. Florida Housing Finance Corporation, FHFC Case Nos. 2007-048UC

S-13. Unlike cases relied on by Petitioner, the issue here is not merely an obvious misspelling of a word (e.g., "Michaels Developmetn Co. I, L.P." instead of "Michaels Development Co. I, L.P.") or a typographical error in the name of the development ("Clarcona Groves" instead of "Clarcona Grove"). Instead, the issue here involves an assignment of a contract which on its face is executed by a seller and an assignee, themselves legal entities, who are strangers to the transaction. Mederos-Civic Acquisitions, LLC, the entity identified on the signature page as the seller, and APD Housing Partners 19, LP, the entity identified on the signature page as the new buyer, exist as legal entities; those names are not the result of a spelling error.[11] *(Exhibit P-2)* Under these circumstances (where both the assignee and seller named on the signature page are strangers to

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and 2007-049UC (Final Order, adopting Recommend Order, August 8, 2008) (Where identity of developer at issue, Florida Housing is not allowed to disregard the entity named in the application at deadline even though "natural persons" responsible for the operations of that entity and the entity at issue on cure were identical at all times) ; see also, Finlay Interests 35, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2005-019UC (2005)(Had the applicant's name on the signature line of the assignment "been misspelled or misstated, that may have constituted grounds for rejection of the document since it would not be clear that the 'applicant' was the recipient of the assignment.")

[11] Finlay, *supra*, recognized that even a misspelling of the applicant's name on the signature line of the assignment may be grounds for rejection of the assignment.

It should be noted that there is no provision in the rules and instructions governing the Universal Application Cycle by which a scrivener's error operates to excuse a threshold failure. According to Black's Law Dictionary (8th ed. 2004) the Doctrine of Scrivener's Error is a "rule permitting a typographical error in a document to be reformed by parol evidence, if the evidence is precise, clear, and convincing." Such is at odds with the Universal Cycle Application process in that, by definition, the doctrine depends on parol evidence offered to reform a document. In the context of the Universal Application Cycle that would imply (incorrectly) that an Applicant is afforded another cure opportunity, following final scoring, in which to offer additional (parol) evidence not presented in its application or on cure.

the transaction), it is reasonable to conclude that the signature page at issue here was never intended as the signature page for this Assignment and Assumption Agreement in the first place but, instead, represents the signature page intended for an entirely different agreement involving the parties named on the signature lines. In other words, the signature page and the parties named on the signature lines are not the result of an "error" at all but are exactly what was intended as far as the particular signature page itself; the problem is that the signature page wound up attached to the wrong agreement – a case of the "right" agreement but "wrong" signature page. Having never been intended as the signature page for the Assignment and Assumption Agreement at issue here, it cannot now be recast to serve that very purpose.

S-14. In Essential Workforce Housing, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2008-022CW, a case that arose under Florida Housing's Community Workforce Housing Innovation Pilot (CWHIP) Program, the issue was whether the petitioner, Essential Workforce Housing, demonstrated site control by providing a valid assignment of the Qualified Contract. There, as here, the assignment at issue was not executed by the Applicant. The CWHIP

Program requirements for demonstrating site control at issue in *Essential* were the same as those at issue here. And, like the 2009 Universal Application Cycle, the CWHIP Program involved a competitive application process. In rejecting the assignment, the Hearing Officer in *Essential* concluded that:

> 27. During the Cure Period, Essential timely provided an Assignment of the Qualified Contract. The Assignment purports to assign the Qualified Contraet to Essential. However, in the documents submitted to FHFC, ineluding the Assignment, there is no indication, statement or conclusive evidence that Essential had accepted the Assignment.
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> 31. The Assignment provided by Essential during the Cure Period docs not, on its face, establish that Essential accepted the Assignment. One could infer from the terms of the Qualified Contract and the Assignment that Essential accepted, or intended to accept the Assignment. However, such an inference would neccssarily be speculative and improper on thc part of FHFC in the context of the CWHIP Program.
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> *******
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> 33. The CWHIP Program is a competitive application process requiring that FHFC objectively assess each individual application based on the information and documentation prcsented during the application process including the Cure Pcriod. There is no dispute that the Assignment presented during the Cure Process hy Essential, is the document it purports to be. What is missing, howevcr, is evidence within the application process including thc Cure Period to establish that the Assignment was accepted by Essential and to establish that the conditions in the Assignment have been met. To allow additional evidence and/or documentation to establish those matters subsequent to thc end of the Cure Period would be to, in effect, allow a second Cure Process. Such is not the nature of the proccss nor is it allowed by FHFC's rules.
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> ********
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> 37. It is concluded as a matter of law that the Applicant failed to establish that the Assignment to Essential had been accepted and that the obligations upon which thc Assignment was based had been mct.

S-15. The Hearing Officer's observations and conclusions noted above are equally applicable here. As was the case in *Essential,* the Assignment and Assumption Agreement provided by Petitioner, APD 20, does not on its face establish that APD 20 accepted the assignment. Neither does the Assignment and Assumption Agreement establish on its face that APD 20 "...assumes and agrees to pay and perform the obligations of purchaser under the Contract," an affirmative obligation as stated paragraph 1 of the agreement. And, like *Essential*, what is missing here is evidence within the application process including the cure period to establish that the Assignment and Assumption Agreement was accepted by APD 20 and to establish that APD 20 agreed to assume the obligations of the purchaser under the Contract. There is no meaningful distinction between *Essential* and this case that would warrant a different result here. If anything, the Assignment and Assumption Agreement at issue this case is more problematic than the assignment in *Essential*. Here, on its face, the Assignment and Assumption Agreement not only fails to establish that it was accepted by the Petitioner but, to the contrary, affirmatively establishes that it was accepted by a completely different entity.

S-16. The case of Finlay Interests 35, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2005-019UC, also involved site control and an assignment of the contract. Unlike here where the assignment was executed by an entity other than the Applicant, in *Finlay*, the Applicant's name was on the signature line. Instead, the issue in *Finlay* concerned the name of the general partner entity who signed on behalf of the Applicant. While the Hearing Officer ultimately determined that Finlay's application satisfied the site control requirements,[12] the Hearing Officer observed that the outcome would have been different had the issue involved the misspelling or misstatement of the applicant's name on the signature line of the assignment:

> First, the name of the applicant in this case is "Finlay Interests 35, Ltd.," a Florida limited partnership. That is the name listed on the Assignee signature line of the Assignment. *Had that name been misspelled or misstated, that may have constituted grounds for rejection of the document since it would not be clear that the "applicant" was the recipient of the assignment.* (Emphasis added)

[12] Finlay may have had a different result regarding the site control issue had the issue with the name of the general partner been raised at preliminary scoring. As it was, Florida Housing's so-called "gotcha" rule (Rule 67-48.004(9)) was a determining factor in that case. In Finlay, the original assignment contained the same deficiency in the name of the general partner as the assignment presented on eure. Because Florida Housing failed to raise the issue regarding the name of the general partner at preliminary scoring, the Hearing Officer determined that under Florida Housing's "gotcha" rule the same issue could not be raised for the first time at final scoring.

S-17. Florida Housing is not permitted to assist Petitioner or any other applicant in completing its application.[13] Moreover, as recognized by the Hearing Officer in *Essential*, even if Florida Housing could somehow infer (from the names of the individual signers or the relationship of the parties) that APD 20 accepted and assumed, or intended to accept and assume, the Assignment and Assumption Agreement "such an inference would necessarily be speculative and improper on the part of" Florida Housing in the context of the Universal Application Cycle.

S-18. Florida Housing's scoring decision in the instant case is consistent with its rules and Application Instructions. To have reached a different result would have required Florida Housing to ignore the plain meaning of those rules and instructions. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation.[14] The interpretation should be upheld even if the agency's interpretation is

[13] Marian Manor, *supra*.

[14] Legal Environmental Assistance Foundation, Inc., v. Board of County Commissioners of Brevard County, 642 So.2d 1081 (Fla. 1994); Miles v. Florida A & M University, 813 So.2d 242 (Fla. 1st DCA 2002).

not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation.[15]

S-19. In the instant case, and in the context of a competitive funding process, Florida Housing has reasonably interpreted its rules and incorporated instructions and forms, and properly determined that Petitioner's Application should be rejected because it failed to satisfy applicable threshold requirements pertaining to site control.

9. The substituted conclusions of law or interpretations of the administrative rules governing this matter as set out above are found to be as or more reasonable than the conclusions of law that were rejected or modified hereby.

10. Based upon the substituted conclusions of law or interpretations of the administrative rules governing this matter, the Recommendation in the Recommended Order is rejected as contrary to Florida Housing's rules and applicable law.

11. It is determined as a matter of law that Florida Housing reasonably interpreted its rules and incorporated instructions and forms, and properly determined that Petitioner's Application should be rejected because it failed to satisfy applicable threshold requirements relating to site control.

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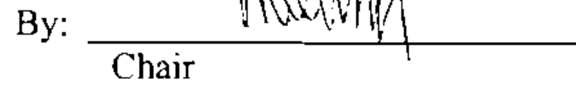
[15] Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995).

IT IS HEREBY ORDERED that Petitioner's Application be rejected for failure to meet the threshold requirements relating to site control.

DONE and ORDERED this 26th day of February, 2010.

FLORIDA HOUSING FINANCE CORPORATION

By: 
Chair

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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.

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FLORIDA HOUSING
FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

APD Housing Partners 20, LP,
a Florida limited partnership

Petitioner,

v.

FHFC 2009-067UC
Application No. 2009-214C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, an informal Administrative Hearing was held in this case in Tallahassee, Florida, on January 13, 2010, before Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

Appearances

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Tallahassee, FL 32301-1329

PRELIMINARY STATEMENT

Pursuant to notice and Sections 120.569 and 120.57(2), Fla. Stat., Florida Housing Finance Corporation ("Florida Housing"), by its duly designated Hearing Officer, David E. Ramba, held an informal hearing in Tallahassee, Florida, in the above-styled case on January 13, 2010.

At the informal hearing the parties filed a Joint Stipulation of Facts and Exhibits ("Joint Stipulation"). Joint Exhibits 1 through 11 were stipulated into evidence, consisting of the following documents:

Exhibit J-1	Joint Stipulation of Facts and Exhibits
Exhibit J-2	Preliminary Scoring Summary 9/21/2009
Exhibit J-3	NOPSE Scoring Summary 10/22/2009
Exhibit J-4	Final Scoring Summary 12/2/2009
Exhibit J-5	Contract for Purchase and Sale dated August 17, 2009, submitted as Exhibit 27 to APD 20's original application.
Exhibit J-6	First Amendment to and Assignment and Assumption Agreement of Contract for Purchase and Sale of Real Property submitted by APD 20 on cure.
Exhibit J-7	Equity Commitment dated August 17, 2009 from Alliant Capital, Ltd., submitted as Exhibit 56 to APD 20's original application.
Exhibit J-8	Construction or Rehab Analysis excerpted from APD 20's original application.
Exhibit J-9	Equity Commitment dated August 17, 2009 from Alliant Capital, Ltd., submitted by APD 20 on cure.
Exhibit J-10	Revised Construction or Rehab Analysis submitted by APD 20 on cure.
Exhibit J-11	Excerpted pages from APD 20's original application showing the amount of Competitive HC (annual amount) requested at Part V.A.1.

In addition, Petitioner offered into evidence the following three documents, the first two were received over Respondent's objections of relevancy, the third document ruling was deferred upon until this order, and Respondent's objections to Exhibit P-3 are SUSTAINED, as the information is irrelevant and was not within the four corners of the application or cure material that was available to Florida Housing in the scoring process.

Exhibit P-1 Selected pages from APD 20's application.

Exhibit P-2 Printout from online records of the Florida Department of State, Division of Corporations.

Exhibit P-3 Letter dated December 23, 2009 by Jorge C. Mederos and December 21, 2009 signed by Philip Kennedy.

Petitioner is referred to below as "Petitioner" or "APD 20" and Respondent is referred to as "Respondent" or "Florida Housing."

STATEMENT OF THE ISSUE

The original petition had two issues to be determined during this informal hearing. Prior to the hearing Florida Housing conceded the threshold item relating to the construction financing shortfall, so the remaining issue in this case is whether Florida Housing erred in determining the APD 20 failed to meeting the applicable threshold requirements regarding site control.

There are no disputed issues of material fact.

WITNESSES

No witnesses were called by either party.

FINDINGS OF FACT

Based upon the stipulated facts agreed to by the parties and exhibits received into evidence at the hearing, the following relevant facts are found:

1. APD 20 is a Florida limited partnership with its address at 1700 Seventh Avenue, Suite 2075, Seattle, Washington 98101-1394, 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.

3. Florida Housing administers various affordable housing programs including the Multifamily Mortgage Revenue Bonds (MMRB) Program pursuant to Section 420.509, Fla. Stat., and Rule 67-21, Fla. Admin. Code, and the Housing Credit (HC) Program pursuant to Sections 420.507 and 420.5099, Fla. Stat., and Rule Chapter 67-48, Fla. Admin Code.

4. The 2009 Universal Cycle Application, through which affordable housing developers apply for funding under various affordable housing programs administered by Florida Housing is adopted as the Universal Application Package or UA1016 (Rev. 5-09) by Rule 67-48.004(1)(a), Fla. Admin. Code, respectively, and consists of Parts I through V with instructions.

5. Because the demand for an allocation of Housing Credit and MMRB funding exceeds that which is available under the HC and MMRB Programs, 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 Universal Cycle pursuant to Rule 67-21 and Rule 67-48, Fla. Admin. Code, respectively. Specifically, Florida Housing's application process for the 2009 Universal Cycle is set forth in Rule 67-21.002-.0035 and 67-48.001-.005, Fla. Admin. Code.

6. As discussed in more detail below, Florida Housing scores and competitively ranks the applications to determine which applications will be allocated MMRB funds or an allocation of Housing Credits.

7. Florida Housing's scoring and evaluation process for applications is set forth in Rules 67-21.003 and 67-48.004, Fla. Admin. Code. Under these Rules, the applications are preliminary scored based upon factors contained in the application package and Florida Housing's rules. After the preliminary scoring, Florida Housing issues preliminary scores to all applicants.

8. Following release of the preliminary scores, competitors can alert Florida Housing of an alleged scoring error concerning another application by filing a writing Notice of Possible Scoring Error ("NOPSE") within a specified time frame. After Florida Housing considered issues raised in a timely filed NOPSE, it notifies the affected application of its decision by issuing its NOPSE scoring summary.

9. Applicants then have an opportunity to submit "additional documentation, revised pages and such other information as the Applicant deems appropriate ('cures') to address the issues" raised by preliminary or NOPSE scoring. See Rules 67-21.003 and 67-48.004(6), Fla. Admin. Code. In order words, within parameters established by the rules, applicants may cure certain errors and omissions in their applications pointed out during preliminary scoring or raised by a competitor during the NOPSE process.

10. After affected applicants submit their "cure" documentation, competitors can file a Notice of Alleged Deficiency ("NOAD") challenging the sufficiency of an applicant's cure. Following Florida Housing's consideration of the cure materials and its review of the NOADS, Florida Housing issues final scores for all the applications.

11. Rules 67-21.0035 and 67-48.005, Fla. Admin. Code, establish a procedure through which an applicant can challenge the final scoring of its application. The Notice of Rights that accompanies an applicant's final score advises an adversely affected applicant of its right to appeal Florida Housings scoring decision.

12. APD 20 timely submitted its application for financing in Florida Housing's 2009 Universal Cycle. Pursuant to Application No. 2009-214C (the "Application"), APD 20 applied for an allocation of Housing Credits in the amount of $1,405,417 *(Exhibit J-11)* to help finance the construction of a 151-unit affordable housing rental complex in Miami, Florida, named TM Alexander.

13. In its preliminary scoring of the APD 20 Application *(Exhibit J-2)*, Florida Housing identified certain deficiencies, including the following site control and financing issues relevant to these proceedings *(Exhibits J-5 and J-7, respectively)*:

Site Control

1T	III	C	2	Site Control	The August 17, 2009 Purchase and Sale Agreement does not reflect the Applicant as the buyer and no assignment was provided.	Preliminary

Financing

2T	V	D	2	HC Equity	The Applicant submitted an equity commitment from RBC Capital Markets. However, the sum of the equity installment payments does not equal the total amount of equity reflected in the commitment. As a result, the commitment is not considered a source of financing.	Preliminary
3T	V	D	2	HC Equity	Per page 74 of the 2009 Universal Application Instructions, the percentage of credits being purchased must be equal to or less than the percentage of ownership interest held by the limited partner or member. The Applicant stated at Exhibit 9 of the Application that the limited partner's interest in the Applicant entity is 99.98%. However, the equity commitment at Exhibit 55A states the 99.99% of the HC allocation is being purchased. Because of this inconsistency, the HC equity cannot be considered a source of financing.	Preliminary
6T	V	B		Construction/Rehab Analysis	The Applicant has a construction financing shortfall of $17,082,722	Preliminary

14. APD 20 timely submitted cures in response to these scoring deficiencies. In response to the site control failure, APD 20 provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property *(Exhibit J-6)*; and in response to the financing failures, a revised equity commitment letter from Alliant Capital, Ltd., and a revised Construction or Rehab Analysis. *(Exhibits J-9 and J- 10, respectively)*

[1] Item # 2T: The equity commitment provider was Alliant Capital, Ltd., not RBC Capital Markets. The error in the name was corrected on the NOPSE scoring summary *(Exhibit J-3)*.

14T	V	D	2	HC Equity	The Applicant submitted an equity commitment from Alliant Capital, Ltd. However, the sum of the equity installment payments does not equal the total amount of equity reflected in the commitment. As a result, the commitment is not considered a source of financing.	NOPSE

15. Following submission of cures, Florida Housing scored APD 20's Application and issued its final scoring summary dated December 2, 2009 *(Exhibit J-4)*, in which APD 20 was awarded maximum total points, maximum ability to proceed tiebreaker points and maximum proximity tie-breaker measurement points. However, Florida Housing concluded that APD 20 failed to meet threshold requirements for site control and financing.

16. Specifically, the threshold failures identified by Florida Housing regarding site control and financing in its final scoring summary are as follows:

Site Control

15T	III	C	2	Site Control	In an attempt to cure Item 1T, the Applicant provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property; however the cure was deficient because the Amendment was signed on behalf of Mederos-Civic Acquisitions, LLC and not the Seller (Mederos-T.M. Alexander Acquisitions, LLC).	Final
16T	III	C	2	Site Control	In an attempt to cure Item 1T, the Applicant provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property; however the cure was deficient because the Amendment was signed on behalf of APD Housing Partners 19, LP and not the Applicant (APD Housing Partners 20, LP).	Final

Financing

17T	V	B		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of $910,360.	Final
7C	V	B		Construction/Rehab. Analysis	The Applicant attempted to cure item 6T by providing a revised Construction and Permanent Analysis that shows $7,920,133 of HC equity as a source of financing during the construction period. The revised equity commitment letter from Alliant Capital, Ltd indicates that only $7,009,773 will be paid during the construction period. Therefore, the Applicant will have a construction financing shortfall of $910,360 (see item 17T).	Final

17. APD 20 timely filed its Petition contesting Florida Housing's scoring of its Application whereupon Florida Housing noticed the matter for an informal hearing.

18. The original HC equity commitment *(Exhibit J-7)* included in APD 20's original Application contained the same equity pay-in structure as the revised HC equity commitment letter provided by APD 20 on cure. In both the original and revised letters, the equity pay-in was scheduled in 4 installments, with only the first 2 installments being paid during construction. The third payment was conditioned upon factors which would result in its payment only after

completion of construction; thus, the amount of the third equity installment was not eligible to be considered as equity proceeds paid prior to completion of construction on the Construction or Rehab Analysis. Nevertheless, that amount was included (along with the amounts representing the first 2 equity installments) in the total amount of "HC Equity Proceeds Paid Prior to Completion of Construction ..." shown on line B.3. of not only the revised Construction or Rehab Analysis provided by APD 20 on cure (which, as explained in the comment at Item # 7C, resulted in the threshold failure at Item # 17T), but in the original Construction or Rehab Analysis *(Exhibit J-8)* included in APD 20's original Application as well. As a result, a construction shortfall (in the amount of the third equity installment shown on the original HC equity commitment) existed at the time of preliminary scoring due to the same equity pay-in structure that resulted in the $910,360 shortfall described at Item # 17T (and as explained in Item #7C) of the final scoring summary. While a construction shortfall failure was determined to exist at preliminary scoring, the reasons for the shortfall described in the preliminary scoring summary were based on other deficiencies unrelated to the issue involving the equity pay-in structure in the HC equity commitment.

Because the issue involving the equity pay-in structure was not identified or otherwise alluded to during preliminary or NOPSE scoring, Florida Housing is precluded by rule[2] from assessing a threshold failure for that same issue for the first time at final scoring. Accordingly, the threshold failure for the construction financing shortfall of $910,360 described at Item # 17T in the final scoring summary of the ADP 20 Application is rescinded.

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[2] Subject to exceptions not germane here, Rule 67-48.004(9), F.A.C., provides in relevant part that "... no Application shall fail threshold or receive a point reduction as a result of any issues not previously identified in [the preliminary or NOPSE scoring processes]."

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding.

2. As requested by the parties during the informal hearing, official recognition is taken of Respondent's rules, particularly Rule Chapters 67-21 and 67-48, Fla. Admin. Code, as well as the Universal Application Package or UA1016 (Rev. 3-08), which includes the forms and instructions.

3. The Universal Application Package, or UA1016 (Rev. 3-08), which includes both its forms and instructions, is adopted as a rule. *See*, Rule 67-48.004(1)(a), Fla. Admin. Code, and Section 120.55(1)(a)4., Fla. Stat. The forms and instructions are agency statements of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of Florida Housing and therefore meet the definition of a "rule" found in Section 120.52, Fla. Stat. As such, the instructions and forms are themselves rules.

4. As a threshold item, an applicant in the 2009 Universal Cycle is required to demonstrate site control by providing documentation pursuant to Part III.C.2 of the Application Instructions. If an applicant fails to properly demonstrate this or other threshold issues, Florida Housing's rules mandate that the application be rejected.

5. In its original application, APD 20 demonstrated site control by providing a Contract for Purchase and Sale of Real Property between Mederos-T.M. Alexander Acquisitions, LLC, as the "Seller" and The American Opportunity Foundation, Inc. and Allied Pacific Development, LLC, as "Buyer." APD 20 was not a party to the agreement submitted in the original application.

6. At preliminary scoring, Florida Housing determined that APD 20's application failed threshold requirements for site control because the agreement submitted does not reflect APD 20 as the buyer and no assignment was provided. (Exhibit J-2)

7. During the cure period, APD 20 provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property. This document properly documented the Assignment in the terms of the agreement, although titles on the signature lines of the agreement did not reflect the parties to the agreement.

8. Despite the error in the titles of the signature lines, Florida Housing did not contend that the signatures were invalid or were not the authorized signatories to the agreement. In reviewing the entirety of the stipulated and received exhibits in the APD 20 application, the individuals required to sign the assignment match the parties for an appropriate Assignment and Assumption of Contract for Purchase and Sale of Real Property.

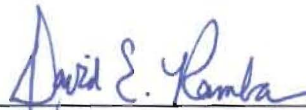
9. There is no question in the assignment submitted as a cure who the seller and new buyer are, and the plain reading of the assignment confirms and explains the relationship between the listed companies.

10. Based on the totality of the application and cure materials, Florida Housing can readily ascertain the correct signatories and parties to the assignment, and the title above the signature lines does not change the terms or the validity and enforceability of the First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, in is hereby RECOMMENDED that Florida Housing enter a Final Order finding that APD 20 has achieved threshold for site control, and reversing Florida Housing's rejection of Petitioner's application.

Respectfully submitted this 4th day of February, 2010.



David E. Ramba, Hearing Officer

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