

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

ABILITY OAKLAND II, LLC

Petitioner,

vs.

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

FHFC Case No. 2012-041UC

Application No. 2011-146C

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**RECOMMENDED ORDER**

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, and Rule 67-48.005(5), Florida Administrative Code, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in the above captioned proceeding in Tallahassee, Florida on August 21, 2012.

**APPEARANCES**

For Petitioner:

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For Respondent:

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## **STATEMENT OF THE ISSUES**

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Florida Housing erroneously scored and ranked Application Number 2011-145C (“University Plaza Apartments” or “University Plaza”) as it relates to Ability to Proceed tie-breaker points.

## **PRELIMINARY STATEMENT**

At the informal hearing, the parties filed a Prehearing Stipulation which stipulated to the admission into evidence of Joint Exhibits 1 through 8. Petitioner’s Exhibits 1, 2 and 3 were also received into evidence. The Prehearing Stipulation also contains Stipulated Facts which basically describe the application process and the circumstances regarding the scoring of University Plaza’s Application Number 2011-145C with regard to the issues in dispute. The Prehearing Stipulation is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties submitted their Proposed Recommended Orders, which have been fully considered by the undersigned.

## **FINDINGS OF FACT**

Based upon the undisputed facts and documents received into evidence at the hearing, as well as the parties’ Prehearing Stipulation, the following relevant facts are found:

1. The Petitioner, Ability Oakland II, LLC, submitted Application Number 2011-046C in Florida Housing's 2011 Universal Cycle. Based upon Florida Housing's Final Ranking dated June 8, 2012, Petitioner would have been in the funding range, but for Florida Housing's scoring of University Plaza's Application Number 2011-145C. (Attachment A)

2. The Universal Cycle Application and Application Instructions, at Part III(A)(2)(c), require an applicant to disclose, as a threshold requirement, whether its proposed development will consist of Scattered Sites by providing specified documentation. A "Scattered Site" is defined in Florida Housing's Rule 67-48.002(105), Florida Administrative Code, as non-contiguous property, including property separated by a roadway or street easement. If a proposed development consists of Scattered Sites, an applicant is required to provide specific information for each of the Scattered Sites.

3. The Application and Instructions allow applicants to receive up to six (6) Ability to Proceed tie-breaker points (one point each) for Site Plan/Plat Approval, Infrastructure Availability (electricity, water, sewer and roads) and Appropriate Zoning by submitting certain verifications as Exhibits 26, and 28 through 32 in the Application. If an applicant initially fails to meet threshold regarding any of these six elements, but successfully cures such failure during the cure period, the applicant will be awarded only one-half point in lieu of one-point

for that element. (Application Instructions, Part III, Section C). The Instructions clearly provide that if a development consists of Scattered Sites, the information required on Exhibits 26 and 28 through 32 must be demonstrated for each of the Scattered Sites. This can be accomplished by:

- (i) Listing all of the Scattered Site addresses on each verification/certification form, or (ii) providing a separate verification/certification form for each of the Scattered Sites, or (iii) attaching a list behind each of the verification/certification forms showing the address of each of the Scattered Sites.

(Petitioner's Exhibit 3, page 3, Question 15)

4. In its initially submitted application, University Plaza responded "No" to the question "Will the Development consist of Scattered Sites," and did not submit an Exhibit 19 which is required for developments consisting of Scattered Sites. Its Ability to Proceed verification forms simply referred to the "development location" as "719 Venus Mars Court, Jacksonville, FL 32209." (Joint Exhibit 1) In Florida Housing's Preliminary Scoring, University Plaza received the full 6 Ability to Proceed Tie-Breaker Points. (Joint Exhibit 2)

5. A Notice of Possible Scoring Error ("NOPSE") pointed out that University Plaza's Development Site met the definition of a Scattered Site based upon an existing roadway or street. (Joint Exhibit 3) Florida Housing agreed, and determined that University Plaza failed threshold since it failed to provide the address, total number of units and latitude and longitude coordinates for each of

the Scattered Sites. (Joint Exhibit 4) In addition, Florida Housing rescinded all 6 Ability to Proceed Points because the verifications did not address all the Scattered Sites. (Joint Exhibit 4)

6. In response to this revised scoring, University Plaza submitted Cure documentation. Among the submissions were a revised excerpt to the Application conceding that the proposed Development Site does consist of Scattered Sites and an Exhibit 19 which identified two sites by the same address, the number of units present on each site and the coordinates for each site. (Joint Exhibit 5) In lieu of submitting any revisions to its previous verification forms regarding local government approval and the availability of electricity, water, sewer and roads, University Plaza submitted letters from the City of Jacksonville acknowledging that the site was technically considered a Scattered Site under Florida Housing's definition, but also stating that the City does not consider the site "scattered" in a practical sense. The City confirmed that its prior verification forms regarding Site Plan Approval status, Zoning Status and Roads Availability Status for the 719 Venus Mars Court location (comprising both Scattered Sites) were correct. Documentation was also provided that Jacksonville Electric Authority (which provides electrical, water and sewer service) considers the University Plaza site located at 719 Venue Mars Court to have a single address. (Prehearing Stipulation and Joint Exhibit 5) Notices of Alleged Deficiencies ("NOADs") were filed.

(Joint Exhibit 6) Thereafter, Florida Housing rescinded its previous score and awarded University Plaza 6 Ability to Proceed tie-breaker points and deemed the Application to have passed threshold requirements. (Joint Exhibits 7 and 8)

7. Florida Housing's scoring decisions regarding University Plaza's Application Number 2011-045C resulted In Petitioner's Application Number 2011-046C falling outside the funding range. (Prehearing Stipulation)

### **CONCLUSIONS OF LAW**

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because Florida Housing determined that Petitioner was ineligible for funding due to its scoring of University Plaza's application, Petitioner has standing to bring the instant proceeding. Rule 67-48.005(5), Florida Administrative Code. If the application submitted by University Plaza had been scored as alleged by Petitioner, Petitioner would have been deemed eligible for funding.

The issue for determination in this proceeding is whether University Plaza's application was entitled to receive 6 Ability to Proceed tie-breaker points. More specifically, the issue is whether University Plaza's initial application or its efforts to cure its Application by changing the designation of its Development Site from a single Development Site to a Scattered Site and its related documents pertaining to

the Scattered Sites entitled it to the 6 tie-breaker points under the Ability to Proceed category.

It is Petitioner's contention that either the Cure documents submitted by University Plaza were inappropriate, thus resulting in an award of zero tie-breaker points, or, even if such documents were appropriate, University Plaza should have received only 3 tie-breaker points ( $\frac{1}{2}$  point for each of the six elements) because they were submitted in the Cure stage of the application process. In either event, contends Petitioner, Florida Housing erroneously scored University Plaza's application.

It is Respondent's position that an erroneous designation of a Development Site as a non-Scattered Site is curable without penalty, and that it is only the Ability to Proceed tie-breaker points which bear a  $\frac{1}{2}$  point penalty if cured. Respondent urges that the initially submitted verification forms regarding the six Ability to Proceed elements (Exhibits 26 and 28 through 32) were valid, did not need a "cure" and were thus entitled to receive the full 6 Ability to Proceed tie-breaker points.

There is no dispute in this case that University Plaza's Development Site consists of two Scattered Sites, and that this fact was not properly acknowledged in University Plaza's initially submitted application. University Plaza cured this defect. Standing by itself, that cure does not result in a point reduction. However,

the designation of a Development Site as Scattered Sites does not stand by itself. A Scattered Sites designation has other ramifications, including the requirement that each of the Scattered Sites has site plan approval, appropriate zoning and the availability of electricity, water, sewer and roads as of the date of the Application Deadline. (Application Instructions, Part III, Section C)

A careful scrutiny of Florida Housing's rules and additional information provided to applicants on the subject of Scattered Sites results in the conclusion that the information initially submitted by University Plaza required a "cure" to render a determination of whether University Plaza met the criteria in the Ability to Proceed category for each of the two Scattered Sites. Indeed, until Exhibit 19 was submitted as a Cure document, there was no way for Florida Housing to even determine that the two Scattered Sites bore the same address. The information initially provided by University Plaza did not demonstrate that both Scattered Sites satisfied the information required in the verification/certification forms submitted as Exhibits 26 and 28 through 32. As such, Florida Housing's award of the full 6 tie-breaker points in that category was erroneous.

The fact that the two Scattered Sites bear an identical postal address was not even known until Cure materials were submitted. Moreover, that fact is not, by itself, determinative of compliance with the Ability to Proceed criteria without some further explanation or documentation that plat approval, zoning and the



availability of infrastructure is satisfied for each individual site. That documentation was not presented until the submission of University Plaza's cure materials.

While University Plaza's two Scattered Sites bear a single address, they still constitute separate sites under Florida Housing's rules due to the existence of a roadway or street separating the Development Site. The two sites contain a different number of units and different latitude and longitude coordinates, as shown by University Plaza's Exhibit 19 submitted in its Cure documentation. Florida Housing's rules do not provide that a demonstration of a single address for two or more Scattered Sites satisfies the requirement of a demonstration that all Scattered Sites meet the Ability to Proceed criteria. Had Florida Housing intended such a result, it would have so provided. Instead, Florida Housing has mandated that information be provided to verify that ALL Scattered Sites have site plan approval, available infrastructure and appropriate zoning. (Application Instructions, Part III (C) 1, 3 and 4)

Florida Housing informed applicants that they may demonstrate compliance with the Ability to Proceed criteria by listing all Scattered Site addresses on one form (this assumes that the sites have different addresses), by providing a separate form for each Scattered Site or by attaching a list behind each form showing the address of each Scattered Site (again, this assumes the Sites have different

addresses). (Petitioner's Exhibit 3, Question 15) Even though it was later shown that University Plaza's two sites bore an identical address, it was not clear from its initially-submitted Exhibits 26 and 28 through 32 that those verifications were directed to each individual Scattered Site.

A determination need not be made as to whether all the Cure materials submitted by University Plaza demonstrated compliance with each of the Ability to Proceed requirements. It is sufficient for the purposes of this proceeding that the undisputed evidence demonstrates that University Plaza was not entitled to the full 6 tie-breaker points in the Ability to Proceed category. At best, University Plaza was entitled to receive only one-half that number of points because they were earned only as a result of the Cure materials provided. This result places Petitioner's Application Number 2011-046C within the funding range.

### **RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED that Florida Housing enter a Final Order holding that University Plaza's Application Number 2011-045C was erroneously scored and determining that Petitioner's Application Number 2011-046C is eligible for funding from the next available allocation.

Respectfully submitted this 4<sup>th</sup> day of September, 2012.



DIANE D. TREMOR

Hearing Officer for Florida Housing  
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## **NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT**

In accordance with Rule 67-48.005(6), Florida Administrative Code, Applicants have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages, excluding the caption and certificate of service. Written arguments must be filed with Florida Housing Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, no later than 5:00 p.m. five (5) calendar days from the date of issuance of the Recommended Order. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

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FHFC CASE NO.: 2012-041UC

Application No. : 2011-046C

FLORIDA HOUSING FINANCE  
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**PREHEARING STIPULATION**

Petitioner, Ability Oakland II, LLC (“Petitioner”), and Respondent, Florida Housing Finance Corporation (“Florida Housing”), by and through undersigned counsel, submit this Prehearing Stipulation for purposes of expediting the informal hearing scheduled for August 21, 2012, in Tallahassee, Florida, and agree to the findings of fact and to the admission of the exhibits described below.

**THE PARTIES**

Petitioner is a Florida limited liability company with its address at 76 S. Laura Street, Suite 303, Jacksonville, Florida 32202 and is in the business of providing affordable rental housing units in the State of Florida.

Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. Section 420.504, Fla. Stat.

## **STIPULATED FACTS**

The Parties stipulate to the following Findings of Fact:

### **BACKGROUND**

1. Florida Housing administers various affordable housing programs including the following:

(a) Housing Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code and Section 420.5099, F.S., under which Florida Housing is designated as the Housing Credit agency for the state of Florida within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code, and Rule Chapter 67-48, F.A.C.; and

(b) HOME Investments Partnerships (HOME) Program pursuant to Section 420.5089, F.S., and Rule Chapter 67-48, F.A.C.

2. The 2011 Universal Cycle Application, through which affordable housing developers apply for funding under the above-described affordable housing programs administered by Florida Housing, together with Instructions and Forms, comprise the Universal Application Package or UA1016 (Rev. 2-11) adopted and incorporated by Rule 67-48.004(1)(a), F.A.C.

3. Because the demand for HC and HOME funding exceeds that which is available under the HC Program and HOME Program, respectively, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapter 67-48, F.A.C. Specifically, Florida Housing's application process for the 2011 Universal Cycle, as set forth in Rule 67-48.001-.005, F.A.C., involves the following:

- a. the publication and adoption by rule of a “Universal Application Package,” which applicants use to apply for funding under the HC and HOME Programs administered by Florida Housing;
- b. the completion and submission of applications by developers;
- c. Florida Housing’s preliminary scoring of applications (preliminary scoring summary);
- d. an initial round of administrative challenges in which an applicant may take issue with Florida Housing’s scoring of another application by filing a Notice of Possible Scoring Error (“NOPSE”);
- e. Florida Housing’s consideration of the NOPSEs submitted, with notice (NOPSE scoring summary) to applicants of any resulting change in their preliminary scores;
- f. an opportunity for the applicant to submit additional materials to Florida Housing to “cure” any items for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;
- g. a second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant’s cure materials by filing a Notice of Alleged Deficiency (“NOAD”);
- h. Florida Housing’s consideration of the NOADs submitted, with notice (final scoring summary) to applicants of any resulting change in their scores;
- i. an opportunity for applicants to challenge, by informal or formal administrative proceedings, Florida Housing’s evaluation of any item in their own application for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;<sup>1</sup>
- j. final scores, ranking of applications, and award of funding to successful applicants, including those who successfully appeal the adverse scoring of their application; and
- k. an opportunity for applicants to challenge, by informal or formal administrative proceedings, Florida Housing’s final scoring and ranking of competing applications where such scoring and ranking resulted in a denial of Florida Housing funding to the challenging applicant.

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<sup>1</sup> This proceeding is the subject of such a challenge.

4. At the completion of (a) through (j) 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 against other applicants in large part based upon tie-breaker points and limitations to the number of units to be funded in each county.

### **PETITIONER'S APPLICATION AND SCORING ISSUES**

5. Based on a review of Florida Housing's Final Ranking dated June 8, 2012 Ability received a final score of 79 out of a possible 79 points for its application. Ability received 6 Ability-To-Proceed and 29.5 Proximity Tie-Breaker points, and was deemed to have passed threshold. This score would place Ability in the funding range, "but for" Florida Housing's scoring of another Application, #2011-145C ("University Plaza").

6. As an Applicant for funds allocated by Florida Housing, Ability's substantial interests are adversely affected by the scoring decisions made regarding competing Applications, as described in paragraph 5 above.

### **SCORING OF APPLICATION #2011-145C**

7. The Universal Application at Part III asks an applicant to provide information concerning the proposed development. Specifically, at Part III, Section (A)(2)(c), the Application requires the Applicant to disclose "whether the proposed development will consist of Scattered Sites." "Scattered Sites" is defined at Rule 67-48.002(105), F.A.C. as follows:

(105) "Scattered Sites," as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within Scattered Site Development, a "Scattered Site"). For purposes of this definition "contiguous" means touching at a point or along a boundary. Real property is contiguous if the only



intervening real property interest is an easement, provided the easement is not a roadway or street.

8. If a proposed Development Site is determined to be comprised of Scattered Sites, an Applicant must provide additional information in response to several Universal Application requirements. As it relates to the provision of infrastructure (availability of electricity, water, sewer, and roads), if the proposed Development meets the definition of Scattered Sites the Universal Application Instructions require at Part III, Section (C)(3) that an Applicant provide evidence of the availability of each type of infrastructure for each of the Scattered Sites. Additionally, if the proposed development is Scattered Sites the Universal Application Instructions require that an applicant provide evidence that each of the sites comprising the Scattered Sites has site plan approval and appropriate zoning.

9. The 2011 Universal Application Instructions at Part III, Section (A)(2)(c) provides as follows:

If the Development will consist of Scattered Sites, for each of the Scattered Sites, provide, behind a tab labeled "Exhibit 19", 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 Scattered Site. If requesting Competitive HC, for the Scattered Site where the Tie-Breaker Measurement Point is located only the Address and total number of units is required. If requesting MMRB or non-competitive HC only, for the Scattered Site where the Development Location Point is located only the Address and total number of units is required. If the proposed Development will consist of Scattered Sites, but the Applicant fails to provide the above required information for each of the Scattered Sites, the Application will fail threshold.

10. The 2011 Universal Application Instructions, Part III, Section C also provides:

For Applications requesting Competitive HC, during the preliminary and NOPSE scoring process described in subsections 67-48.004(3), (4) and (5), F.A.C., Applicants may be eligible for Ability to Proceed

tie-breaker points for the following Ability to Proceed elements: Site Plan/Plat Approval, Infrastructure Availability (electricity, water, sewer and roads), and Appropriate Zoning. The Applicant will either:

(i) Achieve the full 6 Ability to Proceed tie-breaker points if it meets the threshold requirements for all of the following elements: site plan/plat approval, availability of electricity, availability of water, availability of sewer, availability of roads, and appropriate zoning, or

(ii) Achieve 1 Ability to Proceed tie-breaker point for each of these elements which pass threshold and zero Ability to Proceed tie-breaker points for each of these elements which fail threshold. Then during the cure period described in subsection 67-48.004(6), F.A.C., if a threshold failure is successfully cured the Application will be awarded ½ Ability to Proceed tie-breaker point for each cured Ability to Proceed element.

11. In its Scoring Summary dated February 22, 2012, Florida Housing agreed with a NOPSE filed against the University Plaza Application, #2011-145C and determined as follows:

The Applicant indicated that the proposed Development will not consist of Scattered Sites. However, information submitted in connection with a NOPSE provides evidence that the Development meets the Scattered Sites definition per subsection 67-48.002(105), F.A.C. As a result, the Applicant failed to provide the Address, total number of units, and latitude and longitude coordinates for each of the Scattered Sites as required by the Application Instructions.

.Consequently, University Plaza was deemed to have failed threshold and received 0 Ability to Proceed Points at the conclusion of the NOPSE stage of the process.

12. University Plaza chose to “Cure” the Scattered Sites issue. In its Cure, University Plaza submitted a revised excerpt to its Application admitting that the proposed development site consisted of Scattered Sites. Per the Instructions, University Plaza correctly submitted Exhibit 19 which indicates that the proposed Development site is comprised of two sites.

13. Rather than submitting new forms as part of its Cure, University Plaza submitted a letter from the City of Jacksonville concerning site plan approval, zoning and land use consistency, and availability of roads. This letter verified that the Development Site met the Florida Housing definition of Scattered Sites.

14. University Plaza also as a Cure submitted a letter from the Jacksonville Electric Authority concerning availability of sewer, water and electricity to the sites.

15. These scoring issues were raised during the NOAD process. After review of the Cures and NOADs on this issue, Florida Housing rescinded its previous score and awarded University Plaza 6 Ability to Proceed tie-breaker points and deemed the Application to have passed threshold requirements. These scoring decisions resulted in Petitioner's Application falling outside the funding range, as described in paragraph 7 above.

#### **STIPULATED CONCLUSIONS OF LAW**

1. Petitioner has standing to bring this administrative proceeding, pursuant to Rule 67-48.005, Fla. Admin. Code.

2. The Honorable Hearing Officer has jurisdiction over the parties to and subject matter of this proceeding.

3. Petitioners herein challenge an action by the Florida Housing Finance Corporation, a public instrumentality and agency of the State of Florida pursuant to Sections 120.52 and 420.504(2), Florida Statutes.

4. Petitioner bears the burden of proof in these proceedings by a preponderance of the evidence.

5. The 2011 Universal Cycle Instructions, Application, Exhibits and Forms are rules under Section 120.52, Fla. Stat. and are incorporated by reference in Rule 67-48.004(1)(a), Fla. Admin. Code.

6. The 2011 Universal Cycle Instructions, Application, Exhibits, Forms and Rule Chapter 67-48, Fla. Admin. Code, are the rules that govern all issues herein.

### **OFFICIAL RECOGNITION OF RULES**

1. The Parties request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application Package or UA1016 (Rev. 2-11) which includes the forms and instructions.

2. The parties stipulate, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of the Florida Housing Finance Corporation and to any Rules promulgated by the Florida Housing Finance Corporation, including past and present versions of the Universal Cycle Application, Instructions, and any forms and exhibits attached thereto or incorporated by reference therein.

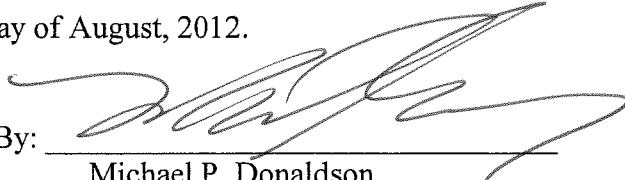
### **EXHIBITS**

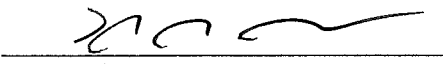
The parties offer the following joint exhibits into evidence and stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

- J-1: Exhibits 26 and 28-32 to Application #2011-145C (University Plaza) submitted for initial scoring (composite).
- J-2: Preliminary Scoring Summary Report for Application #2011-145C (University Plaza) dated January 19, 2012.
- J-3: NOPSE Tracking #526 filed against Application #2011-145C (University Plaza) regarding Scattered Sites issue (excerpt).
- J-4: NOPSE Scoring Summary Report for Application #2011-145C (University Plaza) dated February 22, 2012.

- J-5: Cures submitted for Application #2011-145C (University Plaza) regarding Scattered Sites issue (composite excerpt).
- J-6: NOADs filed against Application #2011-145C (University Plaza) regarding Scattered Sites issue (composite excerpt).
- J-7: Final Scoring Summary Report for Application #2011-145C (University Plaza) dated March 27, 2012.
- J-8: Final Ranking Scoring Summary Report for Application #2011-145C (University Plaza) dated June 8, 2012.

Respectfully submitted this 21st day of August, 2012.

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