

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

TWIN LAKES AT LAKELAND, LLLP

Petitioner,

vs.

FHFC CASE NO.: 2012-005UC
Application No. : 2011-107C

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 June 8, 2012. 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), Florida Administrative Code. After a review of the record and being otherwise fully advised in these proceedings, this Board finds:

Twin Lakes at Lakeland, LLLP, (“Petitioner”) timely submitted its 2011 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.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della M. Harvey /DATE: 6/8/12

Petitioner timely filed its Petition for Review, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the “Petition”) challenging Florida Housing’s scoring of its Application. The issue for determination was whether Florida Housing properly interpreted and applied its rules when it determined that an inconsistency as to the number of units in the proposed development created by Petitioner’s cure for a financial commitment letter, resulted in a failure to meet a threshold requirement.

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 May 10, 2012, in Tallahassee, Florida, before Florida Housing’s designated Hearing Officer, Diane Tremor. Petitioner and Respondent timely filed Proposed Recommended Orders.

The Hearing Officer issued a Recommended Order on May 23, 2012, which recommended that Florida Housing enter a Final Order determining that Petitioner met the threshold requirements for non-corporation funding commitments, and reversing Florida Housing’s rejection of Petitioner’s Application. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.”

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 “Response to Florida Housing

Finance Corporation's Argument in Opposition to Recommended Order," a copy of which is attached hereto as "Exhibit C."

**FLORIDA HOUSING'S ARGUMENT IN OPPOSITION
TO THE RECOMMENDED ORDER**

Petitioner's Application stated that the development would be 88 units; the Revised Exhibit 47 non-corporation funding commitment letter provided on cure said that there would be 144 units in the development. Based on this inconsistency, Florida Housing correctly determined that Petitioner's application failed the threshold requirement for non-corporation funding commitments and thus requiring the Application be rejected.

Florida Housing adopted a new provision Part V. D.1 of the 2011 Universal Application Instructions (the "Instructions") in order to provide clear guidance to the applicants and Corporate staff, that a firm commitment, proposal or letter of intent will not be considered if any information contained in the document (which includes any attachments thereto) is inconsistent with information stated elsewhere within the document or elsewhere in the application. This provision is clear and unambiguous and must be enforced as written. This provision in the Instructions amplifies and emphasizes the language of 67-48.004(6), Florida Administrative Code regarding inconsistencies; it does not undo, modify, or render the rule inapplicable here.

Florida Housing rules do not distinguish between material and immaterial information submitted in an application, nor do they allow for Corporate staff to ignore 'gratuitous' information once submitted. Instead the rules require that each page and exhibit of the Application must be accurately completed.

In order for staff to find the funding commitment to have met threshold, staff would have had to ignore information provided by the applicant in its application. Florida Housing's rules do not allow Corporation staff to ignore any information once it is submitted.

**PETITIONER'S RESPONSE TO
FLORIDA HOUSING'S ARGUMENT IN OPPOSITION
TO THE RECOMMENDED ORDER**

Petitioner urges that the Board adopt every Conclusion of Law of the Recommended Order, which would add new criteria and standards to the Instructions requiring scorers to weigh the materiality of an inconsistency and determine whether information was gratuitous.

Petitioner's assertion that the materiality of the inconsistency be taken into account when scoring is without merit. This type of scrutiny would create a new standard in the rule. It would require staff to determine which inconsistencies are material, and which are not. Without adequate rules to govern this type of evaluation, staff would be forced to speculate and make subjective and possibly arbitrary decisions.

Petitioner further attempts to distinguish the facts in this case from the cases cited in Florida Housing's Written Argument. Petitioner states that unlike in the instant case, in all of those cases cited, the inconsistent information was material to the application and thus required rejection. Petitioner asserts that because the number of units was not required to be provided, it should have been ignored when scored by staff. Petitioner further alleges that had the information not been provided, then the funding commitment would have passed threshold. While this may be correct, Florida Housing lacks the authority under the rules to ignore information once it is submitted in application materials.

Petitioner's assertion that the Conclusion of Law at page 9 of the Recommended Order was well reasoned given the *intent* of the specific Universal Application section requirements is incorrect and inapplicable. The rule language is plain; there is no need to parse its intent. *See, Holly v. Auld*, 450 So.2d 217 (Fla. 1984)

Petitioner cites Tuscany Village Associates Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2002-048 (Final Order October 10, 2002) and Finlay Interests 35, Ltd. vs. Florida Housing Finance Corporation, FHFC Case No. 2005-019UC (Final Order August 25, 2005) to persuade the Board that these Final Orders support the idea of ignoring 'gratuitous' information. These cases, which addressed what were clearly typographical errors, and have been superseded. The

most recent and binding Final Order which supersedes those orders is APD 20 Housing Partners, LP, vs. Florida Housing Finance Corporation, FHFC Case No. 2009-067UC (Final Order February 26, 2010), which rejected the argument that one can glean the intent of an applicant by looking at the totality of the circumstances and ignore certain information. It provided,

Florida Housing is not permitted to disregard its rules and score Petitioner's Application based on inference and speculation...Under Florida Housing's rules, the Petitioner is responsible for the accurate completion of "each page and applicable exhibit of [its] Application" and Florida Housing is not permitted to assist the Petitioner in that process. 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.

It would be unreasonable to create new criteria which would force Corporate staff to speculate the intent of the applicant rather than to simply enforce the plain language of the rules as written. After review of the post-hearing submittals of the parties, Petitioner's Response to Florida Housing Finance Corporation's Written Argument in Opposition to the Recommended Order, requesting the Board to adopt the entire Recommended Order is rejected; Florida Housing's Written Argument in Opposition to the Recommended Order is adopted.

Florida Housing is free to reject or modify the Conclusions of Law of a Recommended Order where its substituted conclusion of law is as or more

reasonable than that which was rejected or modified. The expertise of an agency in interpreting its rules will not be overturned unless clearly erroneous. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983).

RULING ON THE RECOMMENDED ORDER

1. Petitioner's Argument in Opposition to the Recommended Order is accepted. Respondent's Response to Argument in Opposition to the Recommended Order is rejected.

2. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence.

3. The Conclusions of Law on pages 5 through 8 of the Recommended Order are supported by competent substantial evidence.

4. The Conclusion of Law in the first full paragraph on page 9 of the Recommended Order is 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 below.

5. The Conclusion of Law set forth below in this Final Order is 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 foregoing, the Recommendation in the Recommended Order is contrary to Florida Housing's rules and applicable law, and is rejected.

ORDER

In accordance with the foregoing, it is hereby found and ordered:

1. 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.

2. The Conclusions of Law on pages 5 through 8 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.

3. The Conclusion of Law on page 9 of the Recommended Order is 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 set forth in the substituted conclusions below.

The following Conclusion of Law substituted in place of the rejected Conclusion of Law found in the first full paragraph on page 9 of the Recommended Order:

Petitioner's Application stated that the development would be 88 units; the commitment letter provided on cure said that there would be 144 units in the development. Although Florida Housing does not require an applicant to provide this number of units as part of its non-corporation funding commitment, the Applicant did so in the cure letter. Once provided, Florida Housing cannot ignore this information. Nothing in the Instructions or rules allows Florida Housing to ignore information in an application. Nothing in the Instructions or rules allows Florida Housing to weigh or to determine the materiality of an inconsistency. Instead, as demonstrated, Florida Housing's rules state at Part V.D., **any** inconsistency will be grounds for a threshold failure. Florida Housing cannot add or read in these new criteria and standards of materiality and selectively ignoring materials submitted in the application scoring process without having gone through the rule adoption process. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (1ST DCA 1996)

The burden is on the Petitioner to ensure accuracy and completeness when submitting documents. *See, e.g., Plaza La Isabela, LLC v. Florida Housing Finance Corporation*, FHFC Case No. 2006-022UC Final Order July 26, 2006). The burden is not on Florida Housing to assist applicants by ensuring the accuracy and completeness of their submitted documents.

This type of evaluation suggested by Petitioner would effectively have Florida Housing staff assist an applicant in the submittal of its application, in violation of Florida Housing's rules. It would not be feasible to undertake this type of scoring and maintain the integrity of the process. See 67-48.004, Fla. Admin. Code; APD Housing Partners 20, LP v. Florida Housing Finance Corporation, Case No. 2009-067UC (Final Order February 26, 2010).

When evaluating the Cure commitment letter, all of Florida Housing's rules must be applied. These rules at Part V.D. 1, mandate that,

“Each page and applicable exhibit of the Application must be accurately completed, and Applicants must provide all requested information; and unless stated otherwise in these instructions, a firm commitment, proposal or letter of intent will not be considered if **any** information contained in the document (which includes any attachments thereto) is inconsistent with information stated elsewhere within the document or elsewhere within the Application. (*Emphasis added*)

The plain language of the Instructions clearly requires the Applicant to provide all the information requested, and that all information provided must be consistent with every other part of its application.

Rules have the force and effect of a statute, and rules of statutory construction apply. Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954). When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory

interpretation and construction; the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So.2d 217 (Fla. 1984)

The number of units found on the face of Revised Exhibit 47, the non-corporation funding commitment letter provided as a cure, was inconsistent with the number of units provided elsewhere in Petitioner's application. Based on this inconsistency, Florida Housing correctly determined that Petitioner's application failed the threshold requirement for non-corporation funding commitments and properly rejected the Application.

IT IS HEREBY ORDERED that Petitioner's Application No. 2011-107C is **REJECTED** for failure to meet the threshold requirements relating to non-corporation funding commitments.

DONE and ORDERED this 8th day of June, 2012.

FLORIDA HOUSING FINANCE
CORPORATION

By: _____

Chair



Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

TWIN LAKES AT LAKELAND LLLP,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

FHFC Case No. 2012-005UC

Application No. 2011-107C

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above captioned proceeding on May 10, 2012.

APPEARANCES

For Petitioner:

Michael P. Donaldson
Carlton Fields, P.A.
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215 S. Monroe St., Suite 500
Tallahassee, FL 32302

For Respondent:

Matthew Sirmans
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUES

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application met threshold requirements regarding the financing of its proposed project.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 6. Petitioner's Exhibit 1 was also received into evidence.¹ Joint Exhibit 1 is a Joint Stipulation of Facts and Exhibits. That document basically describes the application process and the circumstances regarding the scoring of Petitioner's application with regard to the issues in dispute. The Joint Stipulation of Facts and Exhibits (Joint Exhibit 1) 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 timely 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, the following relevant facts are found:

¹ Respondent's objection to Petitioner's Exhibit 2, a document prepared after the close of the application process, was sustained.

1. The Petitioner, Twin Lakes at Lakeland, LLLP, submitted Application Number 2011-107C in Florida Housing's 2011 Universal Cycle seeking \$1,155,000 in annual federal tax credits to help finance the development of an 88-unit apartment complex in Lakeland, Florida, known as Twin Lakes at Lakeland. (Joint Exhibit 1)

2. Part V of the 2011 Universal Application Instructions require an applicant to demonstrate, as a threshold requirement, the financing of its project through the submission of certain documentation. For non-corporation funding commitments, the Instructions set forth the criteria which must be met for firm commitments. These include a document containing the terms, the proposed interest rate of the construction loan and the permanent loan, specific reference to the Applicant, a statement that the commitment does not expire before nine months after the Application Deadline, and the signature of all parties. The Instructions further state that a commitment letter will not be considered if any information contained in the document is inconsistent with information stated elsewhere within the document or elsewhere within the Application. No specific form is prescribed and the documentation is to be inserted behind a tab labeled as "Exhibit 47."²

(Joint Exhibit 6, pages 102 and 103)

² There is some confusion created by the documents submitted into evidence, in that the documentary evidence references an "Exhibit 49" as opposed to the Exhibit 47 referenced in the rules. However, the actual Exhibit number on the documents submitted into evidence has no bearing on the issues for determination in this proceeding.

3. In response to this requirement, Petitioner submitted, as Exhibit 49 to its initial application, a letter from the Housing Authority of the City of Lakeland, Florida. This letter references the “88 elderly tax credit units as further described” in the Petitioner’s “Application (the “Project”)”, and sets forth the terms, including the loan amount, interest rates, the period of the loan, debt service, repayment and the term of the commitment. The typewritten signature block on the letter states “John Calcagni, Interim Executive Director, Housing Authority of the City of Lakeland, Florida.” However, the signature itself is absent. Following the signature block is another signature block for Petitioner Twin Lakes at Lakeland, LLLP, and that block bears the signature of John Calcagni, with the typewritten words “John Calcagni, Secretary of GP of Applicant.” (Petitioner’s Exhibit 1).

4. In its preliminary scoring of Petitioner’s application, Florida Housing concluded that the loan from the Housing Authority of the City of Lakeland could not be considered a source of financing because the commitment letter is not signed by the lender. (Joint Exhibit 3, at page 3)

5. In response to this preliminary scoring, Petitioner submitted a Cure attaching a revised Exhibit 49, which was a fully executed loan commitment letter from the Housing Authority of the City of Lakeland, Florida. This letter is identical to the initially submitted Exhibit 49, with two exceptions. It is fully executed but, in the opening paragraph it makes reference to “144 elderly tax credit

units as further described” in the Petitioner’s “Application (the “Project”).” (Joint Exhibit 4)

6. In its final scoring of Petitioner’s application, Florida Housing concluded that Petitioner failed to meet threshold requirements for demonstrating adequate financing because the revised commitment letter from the Housing Authority of the City of Lakeland “is for 144 elderly tax credit units, whereas the Application states the total number of proposed units is 88.” (Joint Exhibit 5, page 3)

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 a failure to meet a threshold requirement, Petitioner’s substantial interests are affected by Florida Housing’s proposed agency action.

The issue for determination in this proceeding is whether Petitioner met threshold requirements regarding the financing of its proposed project. More specifically, the issue is whether the revised financing loan commitment letter provided by The Housing Authority of the City of Lakeland, Florida was deficient

because it referenced a 144-unit project, as opposed to Petitioner's application for an 88-unit project.

The Universal Application Package or UA 1016 (Rev. 2-11), which includes the application forms and the Application Instructions, is adopted by rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Also pertinent to this proceeding are Rule 67-48.004(6), Florida Administrative Code, pertaining to Cure documents, and Rule 67-48.004(14), Florida Administrative Code, listing certain items that cannot be revised, corrected or supplemented after the Application Deadline. The former rule provides that when Cure documents create an inconsistency with another item in the Application, the Applicant must make such other changes as necessary to keep the Application consistent as revised. Rule 67-48.004(14)(i) lists the "total number of units" as one of the items that cannot be changed after the Application Deadline.

The evidence in this case is undisputed that the Cure document submitted by Petitioner as documentation showing non-corporate financing contains all the information required by the Application Instructions. The problem is that the Cure document contains a statement in its opening paragraph referencing the development of "144 elderly tax credit units as further described in the Partnership's FHFC 2011 Universal Application (the "Project")," as opposed to the 88-unit project described in Petitioner's application.

It is Petitioner's position that because the number of units in a proposed project is not required to be provided in a financing commitment letter under Part V.D of the Application Instructions, the fact that the number of units referenced in the commitment letter is different than the number of units referenced in the Application should not be considered as "material" in determining whether an Applicant has met threshold requirements. Petitioner further contends that the revised commitment letter, by referencing the 144 units "as further described" in the Petitioner's application demonstrates that the Application would control any inconsistency created in the commitment letter. Petitioner urges that Florida Housing's position that **any** inconsistency in a financing commitment letter results in a threshold failure is unreasonable, particularly where the complained of information was not a financing requirement set forth by Florida Housing's rules.

Respondent Florida Housing relies upon the Application Instruction providing that a firm commitment letter "will not be considered if any information contained in the document (which includes any attachments thereto) is inconsistent with information stated elsewhere within the document or elsewhere within the Application," (Joint Exhibit 6, at page 102, at Paragraph D) Florida Housing also relies upon Rule 67-48.004(6), requiring that when Cure documentation creates an inconsistency with another item in the Application, the Applicant is required to make such other changes as necessary to keep the Application

consistent as revised. Florida Housing asserts that there is no provision in its rules by which Florida Housing is permitted to weigh the materiality of an inconsistency as a means to excuse a threshold failure.

The undersigned acknowledges that Florida Housing's rules contain no definition of "consistency" or "inconsistency," nor do they address the materiality of an inconsistency. However, this does not mean that Florida Housing's scoring decisions must not be reasonable and comport with the overriding intent of its published rules. Unlike many of Florida Housing's other rule requirements, such as those pertaining to Ability to Proceed, no form is prescribed to demonstrate non-corporation funding commitments. Instead, only a "firm commitment, proposal or letter of intent" containing six items of information is required. (Joint Exhibit 6, at page 103, paragraph (a)) While those items include specific reference to the Applicant as the borrower or direct recipient, they do not require a description of the project by the number of units proposed. Here, the Petitioner's commitment letter's description of the project as containing 144 units was gratuitous, and its "inconsistency" with the Application's description of an 88-unit project is immaterial to the loan commitment.

The purpose of Petitioner's Cure commitment letter from a third party was not to alter the number of units proposed in its Application, nor did the commitment letter request such a change. Indeed, such a change in the number of

units could only be made after the Applicant had been invited to enter credit underwriting, subject to a written request “of an Applicant” to Florida Housing’s staff and approval of the Corporation. See Rule 67-48.004(14)(i), Florida Administrative Code.

Here, while there was an “inconsistency” between the number of units referenced in the commitment letter and the number of units referenced in the Petitioner’s application, such an inconsistency does not rise to the level of a failure to meet threshold requirements regarding financing. There is nothing in the Application Instructions requiring that the amount of the loan commitment be based upon the number of units set forth in the Application, nor is there a requirement that a per-unit computation be attached to the commitment letter. The “inconsistency” relied upon by Florida Housing to determine a failure to meet threshold requirements was immaterial to the requirements set forth for non-corporation funding commitments, and its decision was unreasonable and unsupported by its rules.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner’s Application be determined to meet the threshold requirements regarding non-corporation funding commitments.

Respectfully submitted this 23rd day of May, 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(3), 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**

TWIN LAKES AT LAKELAND LLLP

Petitioner,

vs.

FHFC CASE NO.: 2012-005C

Application No. : 2011-107C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

JOINT STIPULATION OF FACTS AND EXHIBITS

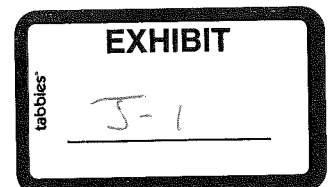
Petitioner, Twin Lakes at Lakeland, LLLP (“Petitioner”), and Respondent, Florida Housing Finance Corporation (“Florida Housing”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 9 am, May 10, 2012, in Tallahassee, Florida, and agree to the findings of fact and to the admission of the exhibits described below.

THE PARTIES

1. Petitioner is a Florida limited liability limited partnership with its address at 430 Hartsell Avenue, Lakeland, Fl 33815, and is in the business of providing affordable rental housing units in the State of Florida.

2. 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, F.S.

BACKGROUND



3. 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.

4. 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.

5. 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;¹
- 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.

PETITIONER’S APPLICATION AND SCORING ISSUES

6. The Petitioner timely submitted its application for financing in Florida Housing’s 2011 Universal Cycle. The Petitioner, pursuant to Application #2011-107C,

¹ This proceeding is the subject of such a challenge.

applied for \$1,155,000 in annual federal tax credits² to help finance the development of its project, an 88-unit apartment complex in Lakeland, Florida, known as Twin Lakes at Lakeland.

7. As part of its Application, Petitioner stated that that the total number of units in the Development was 88 (*Exhibit J-2*).

8. In its preliminary scoring of the Petitioner’s Application, Florida Housing identified certain deficiencies, including a letter from the Housing Authority of the City of Lakeland, Florida (*Exhibit J-3*):

| | | | | | |
|----|----|----|----|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1T | V. | D. | 1. | Non-Corporation Funding | The Applicant submitted a loan commitment letter from the Housing Authority of the City of Lakeland, Florida. However, the commitment letter is not signed by the lender. Therefore, the loan could not be considered a source of financing. |
|----|----|----|----|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

9. The Petitioner timely submitted cures in response to these scoring deficiencies, including a new letter from The Housing Authority of the City of Lakeland, Florida, at Exhibit 49 (*Exhibit J-4*).

10. Following submission of cures, Florida Housing scored the Petitioner’s Application and issued its final scoring summary dated March 27, 2012 (*Exhibit J-5*), in

² The United States Congress has created a program, governed by Section 42 of the IRC, by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of 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 IRC requirements. 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 construct and operate specific multi-family housing projects. The applicant entity then sells 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 below-market-rate rents that are affordable to low-income and very-low-income tenants. Pursuant to section 420.5099, F.S., Florida Housing is the designated “housing credit agency” for the state of Florida and administers Florida’s tax credit program under its Housing Credit (HC) Program. Through the HC Program, Florida Housing allocates Florida’s annual fixed pool of federal tax credits to developers of affordable housing under its annual Universal Cycle application process.

which Florida Housing concluded that the Petitioner failed to meet threshold requirements for demonstrating adequate financing.

11. Specifically, the threshold failure identified by Florida Housing regarding financing its final scoring summary are as follows:

| | | | | | |
|----|----|----|----|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 5T | V. | D. | 1. | Non-Corporation Funding | The Applicant attempted to cure Items 1T and 4T by submitting a signed loan commitment letter from the Housing Authority of the City of Lakeland, Florida. However, the commitment letter is for 144 elderly tax credit units, whereas the Application states the total number of proposed units is 88. Therefore, the loan could not be considered a source of financing. |
|----|----|----|----|-------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

12. The Petitioner timely filed its Petition contesting Florida Housing’s scoring of its Application whereupon Florida Housing noticed the matter for an informal hearing.

OFFICIAL RECOGNITION OF RULES

13. 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.

14. 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.

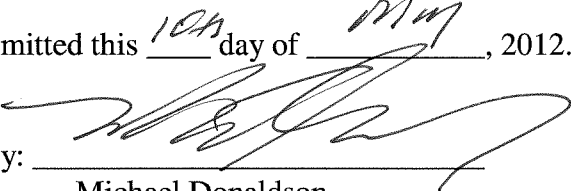
EXHIBITS

15. 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:

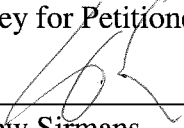
- Exhibit J-1: This Joint Stipulation of Facts and Exhibits.
- Exhibit J-2: Excerpt from Petitioner's Application.
- Exhibit J-3: 2011 Universal Cycle Scoring Summary Report (Preliminary), dated January 19, 2012.
- Exhibit J-4: Petitioner's Cure for Exhibit 49 to Application.
- Exhibit J-5: 2011 Universal Cycle Scoring Summary Report (Final), dated March 27, 2012.
- Exhibit J-6: Excerpts from the 2011 Universal Cycle Application Instructions: Part V.D.

Respectfully submitted this 10th day of May, 2012.

By: _____


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By: _____


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STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING
FINANCE CORPORATION

TWIN LAKES AT LAKELAND, LLLP

Petitioner,

vs.

FHFC CASE NO.: 2012-005C

Application No. : 2011-107C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

**FLORIDA HOUSING FINANCE CORPORATION'S
ARGUMENT IN OPPOSITION TO RECOMMENDED ORDER**

The Conclusions of Law of the Recommended Order at p.9 are without basis under Florida Housing's rules and are contrary are contrary to case precedent. The Recommended Order would have the Board ignore the Instructions that govern the 2011 Universal Cycle and ignore its previous interpretations referenced below regarding inconsistencies in Applications, where the applicable rule has not changed. See Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So.2d 11237 (Fla. 1st DCA 1996).

Relevant to the issue in this case are the instructions that govern non-corporation funding commitments at Part V.D.1. of the Instructions, which state:

Unless stated otherwise in these instructions, a firm commitment, proposal or letter of intent will not be considered if *any information* contained in the document (which includes any attachments thereto) is *inconsistent* with information stated elsewhere within the document or elsewhere within the Application. (**Emphasis Added.**)

The Calcagni Cure Letter provided that there would be 144 units in the development. The number of units is not required as part of the non-corporation funding commitment. Once it was provided, Florida Housing was not free to ignore that information, as nothing in the Instructions or rules allows Florida Housing to ignore inconsistent information in an application. Temple Terrace v. Florida Housing Finance Corporation, FHFC Case No. 2002-003UC¹. Further, as acknowledged by the Hearing Officer, nothing in the Instructions or rules allows Florida Housing to or to determine the materiality of an inconsistency. Instead, as demonstrated, Florida Housing's rules state at Part V.D., *any inconsistency* will be grounds for a threshold failure. An agency must enforce its rules. Department of Revenue v. Rice, 743 So.2d 169 (Fla. 1st DCA 1999); Marion Manor, Inc. v. Florida Housing

¹ It held in part, "For the Respondent to try to divine in some subjective manner the "real intent" of an Applicant would necessarily lead to inconsistent and debatable conclusions. When an Application is inconsistent on its face because of actions of the Applicant, as is this Application, the burden and responsibility of that inconsistency must fall upon the Applicant."

Finance Corporation, FHFC Case No. 2006-019 UC (Florida Housing cannot ignore its clear and unambiguous rules.) Florida Housing instructed the Applicant by rule to be consistent throughout its Application. Petitioner failed to comply with this rule when it provided inconsistent information in the Calcagni Cure Letter.

The burden is on the Petitioner to ensure accuracy and completeness when submitting documents. See Brownsville Manor Apartments v. Florida Housing Finance Corporation, FHFC Case No. 2004-029UC; Fifth Avenue Estates v. Florida Housing Finance Corporation, FHFC Case No. 2002-025UC; Plaza La Isabela, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-022UC. The burden is not on Florida Housing to assist the applicant by ensuring accuracy and completeness when they submit documents. These Final Orders have not been overturned and are still controlling precedent.

The Recommended Order would create a new standard in the rule; it would require staff to determine which inconsistencies are material, and which are not. The Recommended Order gives no direction whether the materiality is applied to the document itself or to the application taken as a whole. While results of the present rule are harsh, the injection of

materiality would be worse. Staff would be forced to speculate and make subjective and possibly arbitrary decisions.

The Hearing Officer's approach conflicts with another Recommended Order from this same cycle concerning the same Instructions and similar facts. In W 76 Street, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2012-022UC, the Hearing Officer determined that information contained in the non-corporation funding commitment letter (the same exhibit as in the instant case) was inconsistent with information contained in a Local Government Verification of Contribution Loan form that was submitted along with the funding commitment letter. The applicant in that case was not required to submit both documents to demonstrate a non-corporation funding commitment. It chose to submit both documents. That Recommended Order did not recommend that Florida Housing ignore some of the information because it was not required to be provided. The Hearing Officer held that Part V.D.1. of the Instructions mandates Florida Housing determine there was a threshold failure. This Recommended Order is consistent with Florida Housing's rules and previous Final Orders interpreting those rules.

Florida Housing's interpretation and application of all of its rules to the scoring of Petitioner's application is consistent with its previous Final

Orders and is preferable to a Recommended Order that would have Florida Housing selectively enforcing its rules to the benefit of one applicant over all of the other applicants.

An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. American World Airways Inc., v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). Even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. Golfcrest Nursing Home v. Agency for Health care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995). The courts must ...defer to the expertise of an agency in interpreting its rules. State Contracting and Engineering Corp. v. Dept. of Transportation, 709 So.2d 607 (Fla. 1DCA 1998).

The courts have clearly held that so long as there *a* reasonable interpretation, it will be upheld. Florida Housing interpreted its rules consistently and reasonably throughout the scoring process and these written exceptions should be granted.

WHEREFORE, Respondent would respectfully request that Florida Housing should enter a Final Order rejecting the Recommended Order's Conclusion of Law at p.9 and the Recommendation of the Recommended

Order, and deem the Petitioner's application to have failed the threshold requirement for non-corporation funding commitments under Part V.D of the Instructions, dismissing the Petition.

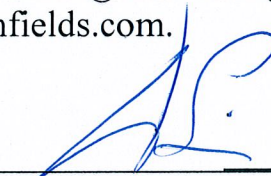
Respectfully Submitted,



Matthew A. Sirmans
Assistant General Counsel
Florida Housing Finance Corporation

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Proposed Recommend Order has been furnished this 29th day of May, 2012 by electronic mail to Diane Tremor at dtremor@rsbattorneys.com; and to Michael Donaldson at mdonaldson@carltonfields.com.



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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

TWIN LAKES AT LAKELAND LLLP

Petitioner

FHFC 2012-005UC

v.

Application No. 2011-107C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent

**RESPONSE TO FLORIDA HOUSING FINANCE CORPORATION'S
ARGUMENT IN OPPOSITION TO RECOMMENDED ORDER**

Petitioner, TWIN LAKES AT LAKELAND LLLP, ("Petitioner or Twin Lakes"), hereby responds to FLORIDA HOUSING FINANCE CORPORATION'S ("Respondent or Florida Housing") Argument in Opposition to Recommended Order (the "Argument") filed in the above-referenced proceeding on May 29, 2012, and provides as follows:

1. This matter comes before the Board for final agency action following an informal hearing conducted under the authority of Section 120.57(2), Florida Statutes ("F.S."), and Rule 67-48.005, Florida Administrative Code ("F.A.C."). The informal hearing was conducted on May 10, 2012, before Diane D. Tremor, Esq., Hearing Officer designated by Florida Housing.

2. The informal hearing process was designed to allow Applicants like Twin Lakes whose substantial interests have been affected by Florida Housing's scoring actions to challenge those actions before a neutral unbiased decision maker designated by Florida Housing. The job of the informal Hearing Officer is to hear argument and assist Florida Housing in ultimately developing the best agency action based on the specific facts of the case. In essence it is the Hearing Officer's responsibility to determine if Florida Housing's scoring actions are the best and most reasonable actions in light of the factual circumstances presented.

3. On May 23, 2012, after considering the arguments made by both parties at informal hearing and the Proposed Recommended Orders submitted by both parties, the Hearing Officer entered a Recommended Order which concluded that Petitioner had, contrary to Florida Housing's scoring decision, met the threshold requirements for its Non Corporation Funding commitment letter. Specifically the Hearing Officer concluded that Florida Housing's strict interpretation of its "any inconsistency" rule was unreasonable under the facts of the instant case.

4. On May 29, 2012, Florida Housing filed its Argument which in essence reargues the issues raised and argued to the Hearing Officer during the informal hearing. Based on these same arguments, Florida Housing requests that the well reasoned findings and conclusions of law reached by Florida Housing's own designated Hearing Officer be ignored and rejected. Petitioner requests that the

Board take no such action but instead adopt the Recommended Order in toto, as it routinely does in these situations.

5. Florida Housing makes three arguments in its request to overturn the Recommended Order:

- a) the Recommended Order is inconsistent with Instructions;
- b) the Recommended Order is inconsistent with past precedent; and
- c) the Recommended Order creates a new standard of reviews.

6. When considering Florida Housing's arguments, first it is important at the outset to note that the operative Universal Application language at issue concerning any inconsistency was added to the Financing Section of the Universal Application this year and Florida Housing has already announced publicly that it plans to revise the Financing section in next year's Universal Application Instructions to specifically change the Commitment Letter requirements. Given that the operative language at issue in this proceeding will be revised it is clear that this case will not open the flood gates as implied by Florida Housing. Moreover, nothing in the Instructions prohibit Florida Housing from waiving technical errors when such waiver would be reasonable given the circumstances. By adopting the Recommended Order the Board will not be "ignoring" its 2011 Universal Cycle Application Instructions. Rather the Board will be following the well reasoned recommendation of its designated Hearing Officer who reviewed the alleged inconsistent information in a manner that was reasonable given the intent of the

specific Universal Application section requirements. The Hearing Officer specifically concluded that all inconsistencies do not rise to the level of rejection specifically where the information is "gratuitous" and not even required by the Application section. This conclusion is not unlike numerous other Final Orders adopted by this Board. For example in the case *Tuscany Village Associates Ltd v. Florida Housing Finance Corporation* FHFC Case NO. 2002-0048 (Final Order entered October 10, 2002), an error resulted in a letter including a date that was inconsistent with other information in the Application. The Hearing Officer determined that a penalty was not warranted because the error was a typo and not material. Similarly in the case of *Finlay Interests 35, Ltd. vs. Florida Housing Finance Corporation* FHFC Case No. 2005-019C (Final Order entered August 25, 2005) an inconsistency in the name of a party on the signature line of a Site Control document did not warrant the penalty imposed by Respondent. The mere fact that an inconsistency existed did not equate to a threshold failure.

7. Second, because this is a case of first impression the cases cited by Florida Housing are of limited precedential value. Indeed any precedential value must be measured by the similarity of the facts and issues in that case to the facts and issues in this case. *Temple Court Partners, Ltd v. Florida Housing Finance Corporation* (FHFC Case No. 2002-0030 Final Order entered October 10, 2002).

8. Because the language at issue in this proceeding is new, there has been no review of that specific language. Florida Housing's reliance on cases from previous Universal Application Cycles for the broad proposition that Florida Housing is not allowed to ignore its own rules is inappropriate. The primary case cited by Florida Housing is *Temple Court*. Florida Housing argues that *Temple Court* is controlling and supports the requested overturning of the Recommended Order here. The *Temple Court* case was specifically provided to the Hearing Officer at informal hearing and argued by Florida Housing in its Proposed Recommended Order. In *Temple Court*, an Applicant in response to the "Demographic or Area Commitment" section of the 2002 Universal Application at Part III selected both "Elderly" and "Urban In-fill" as the chosen demographic. The 2002 Universal Application, however, required that only one demographic area be selected. Florida Housing could not tell what demographic controlled because it was given two inconsistent responses.

9. Ironically, in *Temple Court*, the Hearing Officer concluded that the Applicant's error in selecting two demographics was material because the information was a threshold item that was required to be provided as of the application deadline. It could be argued that had *Temple Court* involved information that was not material as was the case here, it would not have warranted a penalty. In *Temple Court*, the Applicant argued that Florida Housing should

have gleaned the “intent” of the dual response as an Elderly development that could also qualify as Urban In-Fill development. The Hearing Officer in *Temple Court* correctly concluded that the Applicant provided inconsistent material information by selecting two boxes when the threshold requirement was to only select one box. In contrast, the Hearing Officer found that, under the facts of this case, the error was not material. The inconsistency in the instant case was based on gratuitous information provided by the Applicant that was not required by the Financing section of the Universal Application. As the Hearing Officer in the instant case correctly concluded, the *Temple Court* case is not controlling and the Board should not overturn the Recommended Order based on *Temple Court*.

10. None of the other cases cited by Florida Housing in its Argument address the same facts as presented in the instant case. Additionally in each of the cited cases the issue involved inconsistencies concerning required material information. *Plaza LaIsabella, LLC v. Florida Housing Finance Corporation* (2006-022UC) (Applicant failed threshold because it did not submit at least one reference along with its equity Commitment Letter as required by the Application) *Brownsville Manor Apartments v. Florida Housing Finance Corporation* (FHFC Case No. 2004-029C (Ability to Proceed forms which required address of development site had incorrect address as Infrastructure and letter did not have date on or before Application deadline as required by the Application)). *Marian*

Manor, Inc. v. Florida Housing Finance Corporation (FHFC Case No. 2006-019UC) (Applicant failed to include required zoning classification in the Site Plan Approval Form). Nor is the Recommended Order inconsistent with the holding in *W 76 Stuart, LLC v. Florida Housing Corporation* FHFC Case No. 2012-022UC which is a Recommended Order currently pending before the Board. In *W 76 Stuart* the Applicant provided inconsistent information at the Financing Non-Corporation funding section concerning the term of the Commitment. The term of the Commitment is information that must be provided for a Commitment Letter to be scored firm. In other words, if the term was not provided, the letter would not have been scored as firm.

11. In the instant case, the information upon which Florida Housing bases its inconsistency determination (Number of Units) was not required by the Financing section of the Universal Application. If the number of units had not been included, the letter would still be scored as Firm because it meets all the criteria and provides all revised information called for by the Finance section of the Universal Application.

12. Lastly, while Florida Housing asserts that the Recommended Order establishes a new standard of review, it merely reviews for the first time a new Universal Application provision. In essence the Hearing Officer reviewed the "any inconsistency" language so that it makes sense given the intent of the Universal

Application and specifically the Financing section. The Recommended Order also sets a standard that says "gratuitous" information provided by an applicant that is not required by the Universal Application should not be a basis for rejection.

13. The Recommended Order reflects careful analysis of the facts and arguments of the Parties as well as the specific language and intent of the Universal Application. The recommendation reached is well reasoned and should not be overturned and Twin Lakes requests that the Recommended Order be adopted by the Board as its Final Order.

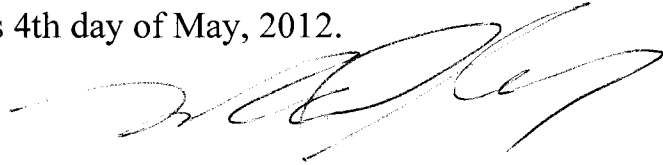


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Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished via electronic mail and hand delivery to Mathew A. Sirmans, Assistant General Counsel, Florida Housing Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301-1329, this 4th day of May, 2012.



MICHAEL P. DONALDSON