

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

URBAN EDGE FAMILY, LTD.,)
)
 Petitioner,)
)
 vs.) Case No. 12-1615
)
 FLORIDA HOUSING FINANCE)
 CORPORATION,)
)
 Respondent.)
)
 _____)
 URBAN EDGE APARTMENTS, LTD.,)
)
 Petitioner,)
)
 vs.) Case No. 12-1616
)
 FLORIDA HOUSING FINANCE)
 CORPORATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on June 21, 2012, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioners: M. Christopher Bryant, Esquire
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For Respondent: Hugh R. Brown, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether the applications of Urban Edge Family, Ltd. (Application No. 2011-236C), and Urban Edge Apartments, Ltd. (Application No. 2011-235C), are entitled to Proximity Tie-Breaker Points with regard to a "medical facility," as defined in the 2011 Universal Cycle Instructions.

PRELIMINARY STATEMENT

Each of the Petitioners is an applicant for funding under programs administered by Florida Housing Finance Corporation ("Florida Housing"). On March 28, 2012, Florida Housing published its Final Scoring Summaries indicating how each applicant for competitive funding fared in the process. Based upon the scores they received, each of the Petitioners (referred to jointly hereinafter as "Urban Edge") filed petitions for formal administrative hearings which were assigned to the undersigned.

At the final hearing, Petitioners called two witnesses: Jay Brock, executive vice-president of Southern Affordable Services, Inc., the sole member of the limited partnership owning Urban Edge; and Jean Salmonsens, a housing development manager for Florida Housing. Petitioners' Exhibits 1 through 4 and 8

through 11 were admitted into evidence. Florida Housing recalled Ms. Salmonsens and called one additional witness: Steve Auger, executive director of Florida Housing. Florida Housing's Exhibits 1 through 3 were admitted into evidence. The parties offered 15 joint exhibits, each of which was admitted into evidence.

A transcript of the final hearing was ordered by the parties. The Transcript was filed at the Division of Administrative Hearings on June 26, 2012. By rule, the parties were allowed ten days to submit proposed recommended orders (PROs), but requested an expedited schedule, agreeing to submit PROs on or before June 29, 2012. Each party timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Findings of Fact 1 through 29 were stipulated to by the parties and appeared in their Prehearing Stipulation.

1. Each Petitioner is a Florida limited partnership with its address at 700 West Morse Boulevard, Winter Park, Florida 32789. Each 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.

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, Fla. Stat., 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 Florida Administrative Code Rule 67-48, F.A.C.; and
- b. HOME Investments Partnerships (HOME) Program pursuant to section 420.5089, and Rule 67-48.

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 Florida Administrative Code Rule 67-48.004(1)(a).

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 Florida Administrative Code Rule 67-48.

Specifically, Florida Housing's application process for the 2011 Universal Cycle, as set forth in Rule 67-48.001 through 67-48.005, 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 Cures and 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;

- 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.

6. Petitioners timely submitted their two applications for financing in Florida Housing's 2011 Universal Cycle. In Application No. 2011-236C (DOAH Case No. 12-1615), Petitioner Urban Edge Family, Ltd., applied for \$1.46 million in annual federal tax credits to help finance the development of its project, a 64-unit multi-family apartment complex in Pinellas County, Florida, known as Urban Edge--Phase II. In Application No. 2011-235C (DOAH Case No. 12-1616), Petitioner Urban Edge Apartments, Ltd., applied for \$1.66 million in annual federal tax credits to help finance the development of a second project, an 80-unit multi-family apartment complex in Pinellas County, Florida, known as Urban Edge Apartments.

7. For both applications, Petitioners initially submitted for Proximity Tie-Breaker Points medical facility coordinates purporting to be an entrance to Bayfront Medical Center in

Pinellas County, Florida. Petitioners' applications were initially awarded the full 4.0 Proximity Tie-Breaker Points for proximity to Bayfront Medical Center.

8. Subsequently, competing applicants submitted NOPSEs asserting that the coordinates submitted for Bayfront Medical Center were, in fact, located at the nearby All Children's Hospital (the "Hospital").

9. In response to the NOPSEs filed against Petitioners' applications, Florida Housing rescinded its preliminary scoring with regard to the medical facility and awarded Petitioners zero points for proximity to a medical facility.

10. Petitioners subsequently submitted Cures to their applications providing different medical facility coordinates, this time for the Hospital emergency department and asserting that the emergency room of the Hospital met Florida Housing's definition of "medical facility" for purposes of awarding Proximity Tie-Breaker Points.

11. In response to the submitted Cures, competing applications filed NOADs disputing the status of the Hospital as a medical facility under the definition included in the 2011 Universal Cycle Instructions.

12. After review of the submitted Cures and NOADs regarding the status of the Hospital emergency room as a "medical facility," Florida Housing again rejected the Hospital emergency

room as a medical facility and awarded zero Proximity Tie-Breaker Points to both applications for this service.

Urban Edge (235C) Application Status and Scoring

13. The Urban Edge application (2011-235C) meets all threshold requirements for consideration for funding.

14. The Urban Edge application (2011-235C) is entitled to 79.00 points (excluding all Tie-Breaker points).

15. The Urban Edge application (2011-235C) is entitled to 6.00 Ability to Proceed Tie-Breaker Points.

16. The coordinates provided by Urban Edge on the Exhibit 25 (Surveyor Certification form), submitted with its Cure for a medical facility, represent a point on the doorway threshold of an exterior entrance that provides direct public access to the emergency department at the Hospital.

17. The coordinates provided by Urban Edge on the Exhibit 25 submitted with its Cure for the Tie Breaker Measurement Point (TBMP) were unchanged from its original TBMP, and they represent a point that is on the Urban Edge development site.

18. The coordinates provided by Urban Edge for a medical facility in the Exhibit 25 submitted with its Cure represent a point that is within .25 miles of the Urban Edge TBMP.

19. If the medical facility designated by Urban Edge on the Exhibit 25 submitted with its Cure qualifies as a medical

facility under Florida Housing's rules, then Urban Edge is entitled to 4.0 Proximity Tie-Breaker Points for a medical facility; and Urban Edge would be entitled to a total of 34.75 Proximity Tie-Breaker Points.

20. If Urban Edge had relied on the alleged location of the exterior entrance to Bayfront Medical Center as stated in NOPSE No. 519, then it would have received only 3.5 Proximity Tie-Breaker Points for a medical facility, for a total Proximity Tie-Breaker Point score of 34.25.

Urban Edge II (236C) Application Status and Scoring

21. The Urban Edge II application (2011-236C) meets all threshold requirements for consideration for funding.

22. The Urban Edge II application (2011-236C) is entitled to 79.00 points (excluding all Tie-Breaker points).

23. The Urban Edge II application (2011-236C) is entitled to 6.00 Ability to Proceed Tie-Breaker Points.

24. The coordinates provided by Urban Edge II on the Exhibit 25 submitted with its Cure for a medical facility represent a point on the doorway threshold of an exterior entrance that provides direct public access to the emergency department at the Hospital.

25. The coordinates provided by Urban Edge II on the Exhibit 25 submitted with its Cure for the TBMP was unchanged

from its original TBMP, and they represent a point that is on the Urban Edge II development site.

26. The coordinates provided by Urban Edge II for a medical facility on the Exhibit 25 submitted with its Cure represent a point that is within .25 miles of the Urban Edge II TBMP.

27. If the medical facility designated by Urban Edge II on the Exhibit 25 submitted with its Cure qualifies as a medical facility under Florida Housing's rules, then Urban Edge II is entitled to 4.0 Proximity Tie-Breaker Points for a medical facility, and Urban Edge II would be entitled to a total of 34.00 Proximity Tie-Breaker Points.

28. If Urban Edge II had relied on the alleged location of the exterior entrance to Bayfront Medical Center as stated in NOPSE No. 515, then it would have received only 3.5 Proximity Tie-Breaker Points for a medical facility, for a total Proximity Tie-Breaker Point score of 33.50.

29. Urban Edge II timely filed its Petition contesting Florida Housing's scoring of its application, whereupon Florida Housing forwarded the matter to the Division of Administrative Hearings.

The following Findings of Fact are based on testimony and documentary evidence presented at final hearing:

30. Florida Housing defines medical facilities, for purposes of determining Proximity Tie Breaker Points, as

"[A] hospital, state or county health clinic or walk-in clinic (that does not require a prior appointment) that provides general medical treatment or general surgical services at least five days per week to any physically sick or injured person." (This definition is found on page 34 of the Florida Housing Instructions portion of the application.)^{1/}

31. All Children's Hospital is licensed by the State of Florida as a Class II hospital with 162 acute care beds, 35 neonatal intensive care unit (NICU) Level 2 beds, and 62 NICU Level 3 beds. The Hospital is classified as a specialty hospital for children and is known as a pediatric health care facility. Emergency services at the Hospital are provided through an on-site emergency department. The emergency department, per the federal Emergency Medical Treatment and Active Labor Act (EMTALA), must provide emergency services to any person, regardless of age, who presents in an emergent state.

32. The emergency department at the Hospital is within .25 miles of the sites proposed for Petitioners' projects.

33. Florida Housing contends that the emergency department of the Hospital is not a medical facility as defined by Florida Housing's rules. Because the emergency department is part of a specialty hospital which serves only children, Florida Housing takes the position that the medical facility selected by Petitioners does not provide services to "any" physically sick or

injured persons. Florida Housing's director, Mr. Auger, stated that no distinction is made between a hospital and its emergency room, i.e., if a hospital holds a specialty license, then the entire hospital is considered a specialty hospital. He did not opine as to the impact of EMTALA on that statement. Mr. Auger did, however, address the correlative situation of a specialty grocery store (as grocery stores are another place which can provide tie-breaker points to an applicant in close proximity). If an ethnic grocery was located near a proposed project, it could be counted for proximity points if it also met all the rule requirements for a grocery store, e.g., sufficient square footage, appropriate air conditioning, necessary food products, etc. Presumably, a specialty hospital could also satisfy the proximity requirements, so long as it met all other requirements for a medical facility.

34. Petitioners provided a letter from the Hospital in its Cure documents which stated in full: "This letter confirms that the Emergency Center at All Children's Hospital is open 24/7 and will treat all patients in accordance with EMTALA." The letter was written by Tim Strouse, the Hospital's vice-president of facilities and support services. Mr. Strouse is not a physician. Mr. Strouse did not know the Hospital's protocol for handling non-pediatric patients in its emergency center. He was of the opinion that generally such a patient would be sent across the

street to Bayfront Medical Center. However, he did believe that essentially all services offered in the Hospital were available in the emergency center.

35. Two expert witnesses testified, in the abstract, concerning the process for treating patients who present to an emergency room.^{2/} It is clear that once a person appears at a specialty hospital's emergency room, there is an initial triage performed to determine the level of treatment needed. If the person requires medical care to stabilize his or her condition, such care must be provided by the emergency room under EMTALA. It does not matter whether the person would be a candidate for admission to the specialty hospital after stabilization; any and all care the hospital is authorized to provide can be given to that patient in order to resolve the emergency situation.

36. There was no testimony provided by a physician or other health care worker from the Hospital concerning how it handled emergency center patients. Absent such testimony, it is not possible to ascertain exactly how the Hospital complies with EMTALA requirements. If, as Mr. Strouse believed, an adult patient would merely be transferred 130 feet across the street to Bayfront Medical Center without further treatment, then there would not seem to be any provision of medical services. However, if the medical experts who testified were correct and stabilization of patients involved the provision of medical

services, then the Hospital may be a medical facility under the Florida Housing rules.

37. The Hospital representative was provided several scenarios involving the treatment of different kinds of patients presenting with various and sundry ailments. In each case, the representative, who was not a physician, attempted to suggest how the Hospital might treat those individuals. The representative could not opine, however, as to whether general medical treatment would be provided in any of the scenarios.

38. From the evidence presented, the Hospital provides an extensive array of services to its pediatric patients, including, but not limited to: cardiology, cardiovascular surgery, colon and rectal surgery, endocrinology, gastroenterology, hematology, internal medicine, nephrology, neurology, obstetrics, ophthalmology, orthopedics, plastic surgery, pulmonary medicine, radiology, thoracic surgery, and urology. It must be presumed that those same services could theoretically be provided in the emergency department as well.

CONCLUSIONS OF LAW

39. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).^{3/}

40. The applicant seeking funding has the burden of proving, by a preponderance of evidence, the material allegations concerning the viability of its application. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

41. Florida Housing's definition of medical facility does not further describe what is meant by "general medical treatment" or "general medical services." Nor does the definition prescribe a requirement that tenants of the proposed housing projects actually avail themselves of services at the medical facility. It is clear that a medical facility can be something as minimal as a walk-in clinic or county health clinic, i.e., it need not be a full-fledged hospital. Thus, a hospital's emergency room may suffice as a medical facility if it meets all basic requirements as set forth in the rule.

42. This case turns on the question of whether the Hospital emergency room provides general medical treatment to any physically sick or injured person, specifically, whether the emergency room provides medical treatment to persons other than patients under the age of 18.

43. Under EMTALA, every hospital in the United States that receives any federal payments must provide "an appropriate medical screening examination within the capability of the hospital's emergency department, to determine whether or not an emergency medical condition . . . exists." 42 U.S.C. § 1395dd.

That is, the emergency center must triage and then stabilize the patient, as necessary. EMTALA goes on to define "stabilize" as meaning "[t]o provide such medical treatment of the condition as may be necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility" or to deliver a baby if the mother cannot be safely transferred. 42 U.S.C. § 1395e.

44. Florida has also codified the requirement that hospitals provide medical treatment in their emergency centers. Under Florida law, "[e]very general hospital which has an emergency department shall provide emergency services and care for any emergency medical condition. . . ." § 395.1041(3)(a), Fla. Stat. The statute goes on to say that "[e]very hospital shall ensure the provision in its emergency department of all services within the service capability of the hospital, at all times." Id. at (3)(d). In subparagraph (a), the Legislature addresses general hospitals; in subparagraph (d), it simply references hospitals. In the definitions portion of the law, section 395.002(12), hospital is defined as any establishment that:

- (a) Offers services more intensive than those required for room, board, personal services, and general nursing care, and offers facilities and beds for use beyond 24 hours by individuals requiring diagnosis,

treatment, or care for illness, injury, deformity, infirmity, abnormality, disease, or pregnancy; and

(b) Regularly makes available at least clinical laboratory services, diagnostic X-ray services, and treatment facilities for surgery or obstetrical care, or other definitive medical treatment of similar extent, except that a critical access hospital, as defined in s. 408.07, shall not be required to make available treatment facilities for surgery, obstetrical care, or similar services as long as it maintains its critical access hospital designation and shall be required to make such facilities available only if it ceases to be designated as a critical access hospital.

45. The statute then defines general hospital as a hospital meeting the definition in subsection (12) that offers all of its services to the general population. A specialty hospital must also meet the definition in subsection (12), but is expected to serve only a designated class of patients based on age, condition, or other factors.

46. Whether the Legislature meant to include all hospitals under section 395.002 in its emergency room provisions is, therefore, not clear. Reading the entire statute in pari materia, it must be concluded that any hospital with an emergency department must make all of its services available to anyone. Under EMTALA, the Hospital would be required to provide any service it is capable of providing to any person who presents in an emergent state.

47. Inasmuch as Florida Housing does not distinguish between a hospital and its emergency department, the fact that the Hospital, which serves pediatric patients, has an emergency department allows the Hospital to fulfill the role of a medical facility under Florida Housing's rule.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by Respondent, Florida Housing Finance Corporation, finding that Petitioners, Urban Edge Family, Ltd., and Urban Edge Apartment, Ltd's, applications satisfy the requirements for all four Proximity Tie-Breaker Points relating to proximity to a medical facility.

DONE AND ENTERED this 9th day of July, 2012, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of July, 2012.

ENDNOTES

^{1/} Neither party mentioned at final hearing or in its Proposed Recommended Order exactly where the definition was codified in rule, but it was apparently adopted by reference as part of the application.

^{2/} Neither of the experts were employed by, nor had worked at, the Hospital.

^{3/} Unless specifically stated otherwise herein, all references to the Florida Statutes will be to the 2011 version.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.