

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

ESSENTIAL WORKFORCE HOUSING,
LLC,

Petitioner,

vs.

FHFC CASE NO. 2008-022CW
CWHIP Application No. 2007-049W

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Chris H. Bentley, held an informal hearing in Tallahassee, Florida, in the above styled case on June 24, 2008.

APPEARANCES

For Petitioner:

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For Respondent:

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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The issue in this case is whether Essential Workforce Housing, LLC (Essential) provided Florida Housing Finance Corporation (FHFC) with sufficient documentation in its application including the cure process to establish site control. Specifically, the issue for determination is whether Essential demonstrated site control by providing a valid assignment of the Qualified Contract.

PRELIMINARY STATEMENT

The parties entered into a PRE-HEARING STIPULATION which has been marked and admitted as Joint Exhibit 1 in this proceeding. Pursuant to the parties' Stipulation, Joint Exhibit 2, was admitted. Petitioner's Exhibits 1 and 2 were admitted at hearing. Respondent's Exhibits 1, 2, 3 and 4 were admitted. Testimony was taken from Mr. Lawton Chiles, III, a witness for the Petitioner, subject to an objection with regard to relevance by Respondent.

FINDINGS OF FACT

Based upon the undisputed facts and exhibits received into evidence at the hearing, the following relevant facts are found:

1. Essential is a Florida limited liability corporation whose business address is P.O. Box 15528, Tallahassee, Florida 32317-5528.

2. FHFC is a public corporation, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. Section 420.504, Florida Statutes; Rule 67-48, Florida Administrative Code.

3. The Community Workforce Housing Innovation Pilot ("CWHIP") Program was created in 2007 to address some of the affordable housing challenges the State currently faces. The competitive program will award funds through a competitive application process to public-private entities seeking to build affordable housing for Florida's workforce.

4. The CWHIP program, set forth in Chapter 67-58 of the FHFC's rules, promotes the creation of public-private partnerships to finance, build, and manage workforce housing. This endeavor requires the coordinated efforts of all levels of government, as well as private sector developers, financiers, business interests, and service providers.

5. On or about January 29, 2008, Essential, and others, submitted applications for financing in FHFC's 2008 CWHIP program. Essential (Application #2007-049W,

Jt. Ex. 2) applied for an allocation of \$5,000,000 to help finance the construction of ninety-four (94) units of workforce housing in Leon County, Florida.

6. FHFC established a competitive application process pursuant to rule 67-58.003, Florida Administrative Code, which incorporates by reference an Application and Instructions to the Application. See, Section 420.5095, Florida Statutes.

7. The Instructions, Application, and scoring of the Applications involve the following actions:

- a. the publication and adoption by rule of an application package;
- b. the completion and submission of applications by developers;
- c. FHFC's preliminary scoring of applications;
- d. an opportunity for the applicant to submit additional materials to FHFC to "cure" any items for which the applicant received less than the maximum score;
- e. an opportunity for applicants to challenge, via informal or formal administrative proceedings, the scores arrived at by FHFC with respect to an applicant's own application and those of competing applicants; and
- f. final scores, ranking, and allocating funding to successful applicants as well as to those who successfully appeal through the adoption of final orders.

8. Under the 2008 CWHIP program, FHFC has approximately \$61,152,000

in CWHIP funds available after a 2% administrative fee is applied.

9. On or about March 3, 2008, FHFC issued its Preliminary Scores to the forty-nine (49) CWHIP applicants, pursuant to rule 67-58.003, Florida Administrative Code.

10. During its preliminary scoring of Essential's application, FHFC noted that the Qualified Contract required by the Application Instructions was not in the name of the Applicant and an assignment of the Qualified Contract was not provided. Specifically, FHFC, in its March 3, 2008, Scoring Summary Report stated: "The December 12, 2007 Option to Purchase does not reflect the Applicant as the buyer and no assignment was provided." (Essential Ex. 2, Tab 2).

11. The Qualified Contract is an OPTION TO PURCHASE between Town & Country Management Company, Inc., as "Owner" and Thomas C. Proctor, Sr., Agent as "Option Holder." Essential does not appear as a party to the Qualified Contract.

12. The Qualified Contract, dated December 12, 2007, requires that the Option Holder execute a note payable to Town & Country Management, Inc., in the amount of \$200,000. That note was apparently executed on December 12, 2007.

13. In its timely response during the cure period, Essential submitted an assignment signed by Thomas C. Proctor, Sr. which purported to assign the Qualified Contract to Essential. The Assignment is not executed by Essential. The Assignment does not reflect its acceptance by Essential. No other pertinent documents were submitted during the cure period demonstrating conclusively that Essential accepted the Assignment. (Essential Ex. 2, Tab 3).

14. The Assignment, contained in Petitioner's Exhibit 2, states:

The rights under this option to purchase are Assigned (sic) without recourse, to ESSENTIAL WORKFORCE HOUSING, LLC, SUBJECT TO the Assignee assuming all obligations under this Agreement, including but not limited to the obligation to pay all principal and interest payments under a note dated December 12, 2007 to Town and Country Management Company, Inc.

15. The Assignment was executed on the 29th day of January, 2008, by the OPTION HOLDER, Thomas C. Proctor, Sr., Agent.

16. On May 1, 2008 Florida Housing issued a Scoring Summary Report after all applicants had an opportunity to Cure their respective applications. Essential's Scoring Summary Report states, in pertinent part, "Applicant failed to provide sufficient evidence of site control as a Cure." The report continues, "[t]he Assignment of the December 12, 2007 Option to Purchase provided by the Applicant is not properly executed. The Assignee did not sign accepting the assignment of the property."

17. At the conclusion of the cure review process, FHFC awarded Essential's application an Innovation score of 90 points, an overall score of 164 points, and determined that Essential's application failed to meet the threshold requirement for adequately demonstrating site control.

18. The Assignment references the Option to Purchase. In the Option to Purchase contract, Paragraph 1 states,

"Contemporaneous with executing this agreement, each Option Holder shall execute a note payable to Owner in the amount of \$200,000.00. Said note shall accrue interest at 7.5% per annum, with a balloon date of June 30, 2008, or the closing of the sale as stated below, whichever shall occur first."

19. Neither the Option to Purchase nor the Assignment include written evidence that Essential accepted the conditional assignment.

20. 2007 CWHIP Program Application Instructions (®-4) state, in pertinent part:

"Each page and applicable exhibit of the Application must be accurately completed, and Applicants must provide all requested information. Failure to provide the requested information and required Documents shall result in failure to meet threshold for threshold items..."

21. In accordance with FHFC instructions for CWHIP applications, Essential provided a Qualified Contract with its application. The Qualified Contract expressly recognized that Thomas C. Proctor, Sr. would be involved in forming Essential to pursue CWHIP funding for the project. (Joint Ex. 2, Essential CWHIP Application).

22. Essential timely filed its Petition for Hearing to contest FHFC's determination that Essential failed to demonstrate site control.

CONCLUSIONS OF LAW

23. Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction over the

parties to this proceeding.

24. The Petitioner's substantial interests are affected by the Proposed Agency Action of the Respondent. Therefore, Petitioner has standing to bring this proceeding.

25. FHFC requires each Applicant to demonstrate site control. Site control is a "threshold" requirement. If an applicant fails to achieve a "threshold" requirement, its application must be denied.

26. The 2007 COMMUNITY WORKFORCE HOUSING INNOVATION PILOT (CWHIP) PROGRAM APPLICATION INSTRUCTIONS have been adopted as a rule. Part III.E., entitled "Evidence of Site Control (Threshold)" requires that an applicant must provide a "Qualified Contract." It is not disputed in this proceeding that the Applicant, Essential, has provided a "Qualified Contract." Part III.E. further provides that "...the buyer MUST be the Applicant unless a fully executed assignment of the Qualified Contract which assigns all of the buyer's rights, title and interest in the Qualified Contract to the Applicant, is provided."

27. During the Cure Period, Essential timely provided an Assignment of the Qualified Contract. The Assignment purports to assign the Qualified Contract to Essential. However, in the documents submitted to FHFC, including the Assignment, there is no indication, statement or conclusive evidence that Essential had accepted the Assignment.

28. Further, the terms of the Assignment submitted by Essential during the Cure Period make it subject to the purported Assignee, Essential, assuming all obligations under the Qualified Contract including an obligation to pay all principal and interest on what is apparently a \$200,000 note dated December 12, 2007, to Town & Country Management Company, Inc.

29. There were no documents or other conclusive evidence submitted to FHFC during the application process, including the Cure Period, from which FHFC could determine that the condition in the Assignment had been met by Essential.

30. Under Florida Law, it appears that neither an assignment nor its acceptance by an assignee, absent specific statutory requirements, are required to be in writing. The existence of an assignment and the existence of acceptance by the assignee of that assignment can be demonstrated by written instruments, parole evidence, actions or other mechanisms. An assignment exists when there is intent to make an assignment and the acceptance of that assignment by the assignee. Acceptance of an assignment by an assignee is an essential element to a valid assignment. Magnum v. Sasser, 764 So.2d 653 (Fla. 1st DCA 2000); Boulevard National Bank of Miami v. Air Metals Industries, 176 So.2d 94 (Fla. 1965); Jenkins v. City Ice & Fuel Company, 160 So. 215 (Fla. 1935).

31. The Assignment provided by Essential during the Cure Period does not, on

its face, establish that Essential accepted the Assignment. One could infer from the terms of the Qualified Contract and the Assignment that Essential accepted, or intended to accept the Assignment. However, such an inference would necessarily be speculative and improper on the part of FHFC in the context of the CWHIP Program.

32. In addition, the record before FHFC through the Cure Period failed to establish that a condition of the Assignment, assumption of a \$200,000 note, had been met. Thus, even if the cure documents had established acceptance of the Assignment by Essential, the existence of a valid Assignment would nevertheless not be established. By its terms, the Assignment is not effective unless and until the Assignee meets the conditions of the Assignment which include assumption of a \$200,000 debt. It would be inappropriate and speculative for FHFC to assume or infer, based on the documentation before it through the Cure Period, that the conditions of the Assignment, including the assumption of the \$200,000 debt, had been met.

33. The CWHIP Program is a competitive application process requiring that FHFC objectively assess each individual application based on the information and documentation presented during the application process including the Cure Period. There is no dispute that the Assignment presented during the Cure Process by Essential, is the document it purports to be. What is missing, however, is evidence within the application process including the Cure Period to establish that the Assignment was

accepted by Essential and to establish that the conditions in the Assignment have been met. To allow additional evidence and/or documentation to establish those matters subsequent to the end of the Cure Process would be to, in effect, allow a second Cure Process. Such is not the nature of the process nor is it allowed by FHFC's rules.

34. The Petitioner presented the testimony of Lawton Chiles, III. Mr. Chiles purported to testify with regard to acceptance by Essential of the Assignment. That testimony was presented subject to objection by Respondent on the grounds of relevancy. It is hereby found as a matter of law that the testimony of Mr. Chiles is rejected as irrelevant to the matters presently before this tribunal. Mr. Chiles' testimony was in the nature of additional information which could have been presented at the time of the cure and was not.

35. Petitioner has cited the Final Order of FHFC in Creative Choice Homes XXX, Ltd., Petitioner, v. Florida Housing Finance Corporation, Respondent, FHFC Case No. 2004-027-UC, in support of its argument. It is found as a matter of law that the Final Order in Creative Choice Homes, involves a factual situation different in its essence than that faced here. In Creative Choice Homes, it was found that the Applicant provided proper documentation as a cure that did not require any inference or assumption to be made by Respondent.

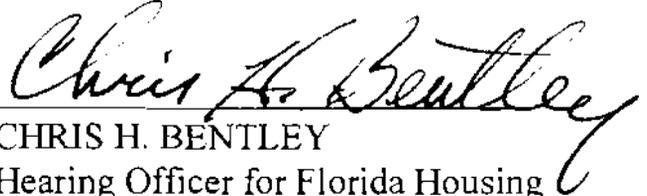
36. Petitioner also cited the Final Order in Finlay Interests 35, Ltd., Petitioner, v. Florida Housing Finance Corporation, Respondent, FHFC Case No. 2005-019UC, in support of its argument. That case also involved site control and an Assignment. That case is factually different than the case presently before that tribunal. In the Finlay case, there was a written acceptance of the Assignment, which acceptance contained what was in essence a typographical error. The Final Order found that in those circumstances acceptance had been adequately established without the level of inference or speculation that would need to be made in this case.

37. It is concluded as a matter of law that the Applicant failed to establish that the Assignment to Essential had been accepted and that the obligations upon which the Assignment was based had been met.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered determining that Petitioner has failed to meet threshold requirements relating to site control.

Respectfully submitted this 14th day of August, 2008.

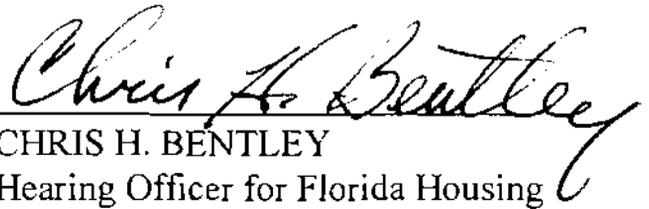

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