STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MARINA DEL RAY APARTMENTS,
Petitioner,

v.

FHFC CASE NO.: 2002-0024

FLORIDA HOUSING FINANCE CORPORATION,

APPLICATION NO.: 2002-026CS

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 October 10, 2002. On or before April 15, 2002, Petitioner submitted its Application to Florida Housing Finance Corporation ("Florida Housing") to compete for an allocation of housing tax credits and SAIL funds. Petitioner timely filed a Petition for Review, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(c), Florida Statutes, and determined that there were no disputed issues of material fact. An informal hearing was held in this case on September 20, 2002, in Tallahassee, Florida, before Florida Housing appointed Hearing Officer, Diane D. Tremor. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and

correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order awarding Petitioner 1.25 tie-breaker points for proximity to a bus stop.

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

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

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

2. The conclusions of law of the Recommended Order are adopted in full as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Final Order.

3. The Hearing Officer's recommendation that a Final Order be entered awarding Petitioner 1.25 tie-breaker points for proximity to a bus stop is approved and accepted as the appropriate disposition of this case. Accordingly, Petitioner is awarded 1.25 tie-breaker points for proximity to a bus stop

DONE and ORDERED this 10th day of October, 2002.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chairperson

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.

Copies to:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MARINA DEL RAY APARTMENTS,

Petitioner,

v.

FHFC CASE NO. 2002-0024
Application No. 2002-026CS

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, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on September 20, 2002.

APPEARANCES

For Petitioner, Marina Del Ray Apartments:	Michael P. Donaldson, Esq. Carlton Fields P. O. Drawer 190 Tallahassee, FL 32302-0190
For Respondent, Florida Housing Finance Corporation:	Matthew A. Sirmans Assistant General Counsel Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, FL 32301-1329

EXHIBIT
A

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue is whether Petitioner is entitled to 1.25 proximity tie-breaker points for a bus stop.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9. At the commencement of the hearing, the parties filed 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 issue in dispute. The Joint Stipulation of Facts and Exhibits is attached to this Recommended Order as Exhibit 1, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

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

1. Petitioner timely submitted its application to obtain funding to assist in the construction of a 100-unit affordable housing apartment complex in Citrus County, Florida.

2. The Universal Application Package, which includes both the application forms and the instructions, is adopted as a rule and is incorporated by reference in the Respondent's Rule 67-48.002(116), Florida Administrative Code.

3. In the 2002 Universal Application cycle, tie-breaker points may be awarded to applicants upon a showing that their existing or planned development is within a certain distance to various services, including grocery stores, public schools, medical facilities and public bus stops or metro-rail stops. The number of points to be awarded is based upon the distance between the designated tie-breaker measurement point on the proposed development site and the claimed tie-breaker service. With respect to bus stops, 1.25 tie-breaker points are awarded when the distance is less than or equal to one-tenth of a mile; 1.0 point for two-tenths of a mile; .75 points for three-tenths of a mile; .5 points for four-tenths of a mile; and .25 points for one-half a mile.

4. In its initial application, among other claimed tie-breaker points for proximity services, Petitioner sought 1.25 points for a bus stop. In support of this claim, Petitioner's application contained a surveyor's map with the following notation:

Public Transit System Note:

> According to Brenda Garcia of the Citrus County, Transit System, Citrus County is a 'para transit system.' This means they will pick you up at your doorstep. Since there are no existing buildings on project site, the Regions Bank has been used as location for public bus pick up.

In its preliminary scoring of Petitioner's application, Respondent awarded Petitioner 1.25 tie-breaker points for a bus stop.

5. After review of Notices of Potential Scoring Errors ("NOPSEs"), Respondent awarded Petitioner no (0) points for its proximity to a bus stop. The reason provided by Respondent was that "Dial-A-Ride type transportation services do not qualify as a public bus or metro-rail stop for the purposes of the 2002 Universal Application."

6. Petitioner timely submitted cure documentation regarding its tie-breaker points for a bus stop. Petitioner submitted a Service Directory published by Citrus County Transit. This brochure states that Citrus County Transit originated in 1978, and, with regard to "daily bus services," states that Citrus County Transit operates a shared ride, door-to-door service Monday through Friday, excluding holidays. It explains that its service is based on reservations (due by noon one business day in advance) and pre-set schedules. The pick-up and return times are provided. The brochure states that services are available for passengers in wheelchairs, and that daily services are available at no cost to low income households, upon proof of income. With respect to transportation services for local veterans traveling to the VA Hospital in Gainesville, the brochure states that bus stops are located throughout the

County. Petitioner's cure documentation also included the statement that "the applicant has used an existing landmark, a bank located to the north of the property, as a stop of which Citrus County Transit does make, to the general public, as of the application deadline."

7. There is no definition of a "bus stop" in Chapter 67-48, Florida Administrative Code. Respondent's application instructions and forms, which are also rules, do not define a "bus stop." The only qualifications regarding a "bus stop" contained within the application instructions and forms are that the stop "be in existence and available for use by the general public as of the Application Deadline," and that the latitude and longitude coordinates of the bus stop must be stated on the Surveyor Certification Form. Neither of these requirements was stated as a basis for Respondent's rejection of Petitioner's claimed bus stop. Indeed, in the Parties' Joint Stipulation of Facts and Exhibits, attached hereto as Exhibit 1, the parties stipulated, at paragraph 17, that "in its initial application, Petitioner identified a bus stop to be located within .01 mile of the proposed development," and, at paragraph 18, "Petitioner stated in its Cure, that applicant has used an existing landmark, a bank located to the north of the property as a stop of which Citrus County Transit does make to the general public."

8. Joint Exhibit 9 is a document entitled "2002 Universal Application Q & A." Question and Answer 10 read as follows:

Q. If a county or city has door-to-door public transportation where residents call and are picked up from their location and taken to their chosen destination, is that considered a public bus stop?

A. No.

No evidence was received as to the date of Exhibit 9. No evidence was received as to whether Petitioner had knowledge of this document. It does not appear that Exhibit 9 has been promulgated, adopted or incorporated by reference as a rule by the Respondent. No further evidence was presented to explicate a reason for excluding door-to-door or "dial-a-ride" type transportation services from consideration for tie-breaker points, particularly where a bus stop available to the general public is identified.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

The sole issue in this proceeding is whether Petitioner is entitled to 1.25 proximity tie-breaker points for a bus stop. More specifically, the issue is whether a door-to-door service based upon reservations automatically excludes an award of

tie-breaker points even though a bus stop is identified which is available to the general public.

In choosing to award tie-breaker points for existing bus stops available for use by the general public, it must be assumed that the Respondent intended to reward developments in close proximity to public transportation services, specifically bus services. It is difficult to imagine a more proximate and convenient location for such services than door-to-door. No rationale has been provided by Respondent, either in its rules or through evidence adduced at the hearing, as to why a public transportation entity which provides door-to-door services should be excluded from consideration, particularly where, as here, the applicant has also designated a bus stop which is available to the general public.

While the application instructions do define the other services for which proximity tie-breaker points are available, such as grocery stores, public schools, medical facilities and the FHFC Development Proximity List, it has not, by rule, defined a "bus stop," except to require that it be "in existence and available for use by the general public as of the Application Deadline." Petitioner has identified such a bus stop in its application, and no evidence was adduced to dispute that identified bus stop. As noted above, Exhibit 9 entitled "2002 Universal Application Q & A"

has not been adopted as a rule.[1] Accordingly, it is not entitled to any presumption of correctness and it is not binding upon applicants.

Although not articulated by any evidence adduced at the hearing, it is assumed that Respondent's concern revolves around the fact that residents must call the public bus service and reserve a ride in advance. Counsel for Respondent argues in his Proposed Recommended Order that its staff interprets "bus stop" to have its plain meaning; to wit: a predetermined locale where a public transit makes routine stops. It would have been a simple matter for Respondent to have defined a "bus stop" in that manner. It did not. There simply is no limitation in Respondent's rules which prohibit the use of a bus service like the one provided in Citrus County for purposes of proximity tie-breaker points. Since tie-breaker points are based upon proximities between the development and the services specified, it is logical for applicants to believe that proximity points could be awarded for door-to-door services. In any event, Petitioner did identify a distinct bus stop, and Respondent stipulated that that stop is made available to the general public.

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[1] It is noted that the Universal Application Package adopted and incorporated by reference in Rule 67-48.002(116) is the Package "effective on the date of the latest amendment to this rule chapter," which appears to be March 17, 2002. As noted above, there is no date on Exhibit 9. While the application instructions do appear to adopt other items by reference, such as the FHFC Development Proximity List available on FHFC's web site, there is no such references to the undated "2002 Universal Application Q & A."

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner be awarded 1.25 tie-breaker points for proximity to a bus stop.

Respectfully submitted and entered this 1st day of October, 2002.

DIANE D. TREMOR
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STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

MARINA DEL REY APARTMENTS
Petitioner,

v.

FHFC CASE NO.: 2002-00243
App No.: 02-026CS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

JOINT STIPULATION OF FACTS AND EXHIBITS

The parties, MARINA DEL REY APARTMENTS and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing"), hereby stipulate for purposes of expediting the informal hearing scheduled for 10:00 am, September 20, 2002, in Tallahassee, Florida, and agree to the following facts and exhibits:

1. Petitioner, Creative Choice Homes, XXVIII, LTD, ("Marina"), is a Florida for-profit limited partnership in the business of developing affordable housing units in the state of Florida. Marina's address is 4243 Northlake Blvd., Suite D, Palm Beach Gardens, FL 33410.

2. Florida Housing is a public corporation organized under Chapter 420, F.S., to provide and promote the public welfare by administering the governmental function of financing, and refinancing houses, and related facilities in Florida in order to provide decent, safe, and affordable housing to persons and families of low, moderate, and middle income.

EXHIBIT 1

EXHIBIT 1

3. Florida Housing receives a finite amount of federal low income housing tax credits ("Housing Credits") for allocation to developers to assist in the building and maintenance of low and moderate housing units. The process of allocating the Housing Credits is competitive, and there are more requests for Housing Credits than are available.

4. Florida Housing receives its funding for the SAIL program from an allocation of documentary stamp revenues. The apportionment of funds is grouped according to the most populated to the least populated counties. Availability of funding to developers is further affected by specialized targeting goals, and set-aside funding issues, that may pertain to the elderly, farm workers, and commercial fishing workers. The SAIL funding process is highly competitive, and there are more requests for SAIL funding than are available funds.

5. Pursuant to statutory mandate, Florida Housing has established, by rule, a competitive application process to evaluate, score, and competitively rank all applicants. Section 420.507 (22)(f), F.S., and Fla. Admin. Code R. 67-48 *et. al.* Awards for Housing Credits and SAIL funding are included in a single application process ("Universal Cycle") governed by rule, Fla. Admin. Code R. 67-48 *et. al.*

6. The 2002 Universal Application ("Application") and accompanying instructions are incorporated as form, "UA1016," by reference in Fla. Admin. Code R. 67-48.002(116). Some of this portion includes "threshold" items. Failure to properly include a threshold item or to satisfy a threshold requirement shall result in the rejection of the application. Other parts of the application allow applicants to earn points. The

failure to provide complete, consistent, and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

7. On or before April 15, 2002, Marina submitted an Application to Florida Housing for SAIL financing and an allocation of Housing Credits for Marina Apartments, a proposed development of affordable rental housing in the 2002 Universal Cycle.

8. After Marina submitted its Application, Florida Housing's staff began scoring the Application pursuant to Part V, Chapter 420, Fla. Stat., and Fla. Admin. Code R. 67-48 *et. al.* Florida Housing completed the preliminary scoring process on May 13, 2002.

9. Following the issuance of preliminary scores, applicants are provided an opportunity to challenge the scoring of any competing application through the filing of a Notice of Possible Scoring Error ("NOPSE"). Florida Housing considers each NOPSE filed, and provides each applicant with notice of any resulting change in their preliminary scores (the "NOPSE scores").

10. Following the issuance of NOPSE scores, Florida Housing provides an opportunity for applicants to submit additional materials to "cure" any items for which the applicant received less than the maximum score, or for which the application may have been rejected for failure to achieve "threshold."

11. Following the "cure" period, applicants may again contest the scoring of a competing application by filing a Notice of Alleged Deficiencies ("NOAD"), identifying deficiencies arising from the submitted "cure" materials.

12. After considering the submitted NOADs, Florida Housing provides notice to applicants of any resulting scoring changes. The resulting scores are known as "pre-appeal' scores.

13. Applicants may appeal and challenge, via formal or informal hearings, Florida Housing's scoring of any item for which the applicant received less than the maximum score, or for any item that resulted in the rejection of the application for failure to meet "threshold."

14. Due to the possibility of applicants receiving a perfect score of seventy three (73), Florida Housing created a number of tie-breaker points. One of the tie-breaker points pertains to a public bus or metro rail stop and its proximity to the proposed housing development.

15. In the Instructions to the Application it states: "To be considered for tie-breaker points in this Application...the public bus stop or metro-rail stop must be in existence and available for use by the general public as of the Application Deadline." It further states: "Location of the closest public bus stop or metro-rail stop. The latitude and longitude coordinates must be stated (in degrees and minutes truncated after three decimals) on the Surveyor Certification Form and provided behind a tab labeled "Exhibit 21".

16. Generally, the closer the public bus stop or metro-rail stop is to the proposed development, the higher the points, or fraction of a point. If the bus stop/rail stop is within .01 mile, the proximity tie-breaker point awarded would be one and a quarter of a point (1.25); within .01 and .02 miles, the proximity tie-breaker point would be one (1); within .02 to .03 miles, the proximity tie-breaker point would be three

quarters of a point (.75); within .03 to .04 miles, the tie-breaker point would be a half point (.5); and within .04 to .05 miles, the tie-breaker point would be a quarter of a point (.25).

17. In its initial application, Petitioner identified a bus stop to be located within .01 mile of the proposed development. In its preliminary score, Florida Housing awarded Petitioner one and a quarter (1.25) tiebreaker points for proximity to a bus stop. Several challenges to this bus stop was made during the NOPSE process.

18. In its Cure, Petitioner stated its position, in response to the NOPSE, that the Citrus County Transit operates door-to-door daily bus transportation. Additionally, Petitioner stated in its Cure, that applicant has used an existing landmark, a bank located to the north of the property as a stop of which Citrus County Transit does make to the general public. Florida Housing determined that the door-to-door daily bus transportation is not a public bus stop or metro-rail in existence and available for use by the general public. Florida Housing withdrew the (1.25) tiebreaker point for the bus stop.

19. Several NOADs were filed in response to Marina's cure material identifying deficiencies pertaining to the use of the Citrus County Transit to qualify for tie-breaker points as a bus stop or metro rail stop. Again, Florida Housing determined that Citrus County Transit was not a public bus stop or metro-rail in existence and available for use by the general public and did not award any tie-breaker points to Marina.

The parties offer the following JOINT EXHIBITS into evidence:

Exh. 1. Joint Stipulation.

Exh. 2. Instructions to the Universal Application

Exh. 3. Excerpt from Marina's application

Exh. 4. NOPSE filed against Marina application pertaining to Citrus County Transit

Exh. 5. Cure filed by Marina pertaining to Part III, Section A, Subsection 11.b.4

Exh. 6 NOADs filed against Marina application pertaining to Citrus County Transit

Exh. 7. 2002 Final Universal Scoring Summary for the Marina application dated July 22, 2002

Exh. 8. Surveyor Certification Form for Marina Del Ray Apartment

Exh. 9. 2002 Universal Application Q & A

Respectfully submitted this 20th day of September, 2002

By: _____

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