STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

AVALON RESERVE, LTD.,

Petitioner,

v.

FHFC CASE NO. 2002-0050
Application No. 2002-151BS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

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, Chris H. Bentley, held an informal hearing in Tallahassee, Florida, in the above styled case on September 20, 2002.

APPEARANCES

For Petitioner, Avalon Reserve, Ltd.:	Michael P. Donaldson, Esq. Carlton Fields P. O. Drawer 190 Tallahassee, FL 32302-0190
For Respondent, Florida Housing Finance Corporation	Laura J. Cox Assistant General Counsel Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The issue in this case is whether the Petitioner created inconsistencies as a result of information provided pursuant to Subsection 67-21.003(6), Florida Administrative Code with regard to Part III.A.11. on Page 8 of the Universal Application, which inconsistencies justify a reduction of 2.5 tie-breaker points in the Petitioner's score.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 8. Joint Exhibit 1 is a PREHEARING STIPULATION which contains 24 paragraphs of STIPULATED FACTS to which the parties have agreed. The PREHEARING STIPULATION, Joint Exhibit 1, is attached to this Recommended Order as Attachment A, and the facts recited therein in Paragraphs 1 through 24 of the Stipulated Facts are herein incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted 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. STIPULATED FACTS 1 through 24 in the PREHEARING STIPULATION, Joint Exhibit 1, are hereby adopted as FINDINGS OF FACT as though set forth in full herein.

2. Petitioner is a Florida for-profit Limited Partnership. Petitioner is in the business of providing affordable rental housing units.

3. Petitioner timely requested a formal hearing by filing a PETITION FOR REVIEW on August 13, 2002. After reviewing the PETITION FOR REVIEW, the Respondent determined that no disputed issues of material fact existed and appointed the undersigned Hearing Officer to conduct an informal hearing pursuant to Section 120.57(2), Florida Statutes.

4. At the final hearing, pursuant to Chapter 120.57(2), Florida Statutes, there were no disputed issues of material fact raised by either party.

5. The Universal Application in Part III.A.11, beginning at Page 8, requests information regarding tie-breaker issues. The Universal Application asks for the distance between the proposed development and various services, including a grocery store and a City/County public bus or metro-rail stop.

6. The Universal Application Instructions at Part III.A.11.a(1)(a) defines "Grocery Store" for purpose of tie-breaker points as: "...a self-service retail market

that sells food and household goods and has at least 4,500 square feet of air conditioned space."

7. The Universal Application Instructions do not define a City/County public bus stop or metro-rail stop.

8. In an attempt to gain the maximum tie-breaker points available, Petitioner, in its initial Application, in Part III.A.11.b(1) on Page 8 of the Universal Application identified the "Ideal Food Store" as the name of the grocery store on which it would base its attempt to gain tie-breaker points. The Petitioner also submitted within its initial Application a "SURVEYOR CERTIFICATION" at Exhibit 21 of its Application, which indicated that the Ideal Food Store was located within a mile of the proposed development and that 1.25 tie-breaker points should be awarded.

9. The Petitioner indicated in its initial Application at Part III.A.11.b(4) that the proposed development was greater than zero and less than or equal to 0.1 mile from a public bus stop or metro-rail stop.

10. In its preliminary scoring, Respondent awarded Petitioner 1.25 points each for its proximity to a grocery store and a public bus stop.

11. During the NOPSE phase of the scoring process a NOPSE correctly pointed out that the Ideal Food Store did not meet the definition of a grocery store as set forth in the rules. Additionally, during the NOPSE process, it was alleged that no bus service was available at the proposed development site.

12. As a result of the NOPSE process, Respondent reduced the tie-breaker points it had preliminarily awarded Petitioner for its proximity to a grocery store and bus stop.

13. In response to the rescoring with regard to the grocery store, Petitioner submitted a CURE. The CURE submitted was a Revised Exhibit 21 to Petitioner's Application. The original Exhibit 21 to Petitioner's Application was the "SURVEYOR CERTIFICATION" with regard to the Ideal Food Store. The Revised Exhibit 21 submitted as a CURE is a "SURVEYOR CERTIFICATION" for a grocery store named "Winn Dixie Marketplace."

14. With regard to the grocery store, the Petitioner did not, during the CURE process, submit a revised Page 8 to his Application.

15. There is on the face of the Application an inconsistency with regard to Part III.A.11.b(1). The Application with revisions received in the CURE process, states that the name of the grocery store upon which Petitioner purports to rely for tie-breaker proximity points is the "Ideal Food Store." However, Revised Exhibit 21 to the Application, as revised in the CURE process, states that the "Winn Dixie Marketplace" is the grocery store upon which Petitioner relies for tie-breaker proximity points.

16. The Universal Application and Universal Application Instructions have been adopted as rules.

17. The Universal Application Instructions provide that to be considered for tie-breaker points in the 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.

18. During the CURE process, the Applicant submitted a Revised Exhibit 21 to its Application showing coordinates for a bus stop. With the Revised Exhibit 21 submitted in the CURE process, the Petitioner included a letter from the Central Florida Regional Transportation Authority Vanpool Program. That letter is dated June 17, 2002. That letter states in pertinent part:

> "Welcome to LYNX's Vanpool Program, a service that we have offered the Central Florida community for the past seven years. This letter will confirm that through LYNX Vanpool program, public transportation services will now be available to residents of Avalon Reserve apartment project. We understand that this vanpool shuttle service will originate its daily trip(s) from the project's clubhouse and building 15 and provide transportation to the residents and other general public individuals to existing LYNX fixed-route bus service on State Road 50 (link 32) with continued service to the LYNX Central Terminal in downtown Orlando or other employment centers.... Thank you for providing us the opportunity to implement public transportation services to the Avalon Reserve Apartment residents. We look forward (sic) working with you on similar opportunities in the future."

19. A reasonable interpretation of the June 17, 2002 letter included with Revised Exhibit 21 is that the public transportation service addressed in the letter and Revised Exhibit 21did not exist prior to June 17, 2002.

CONCLUSIONS OF LAW

20. Pursuant to Sections 120.569 and 120.57(2), Florida Statutes and Chapter 67-48 and 67-21, 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. Therefore, Petitioner has standing to bring this proceeding.

21. There being no disputed issues of material fact, this matter is properly conducted as an informal proceeding pursuant to Section 120.569 and 120.57(2), Florida Statutes.

22. The applicable rules to this proceeding are Chapters 67-21 and 67-48, Florida Administrative Code. With regard to the issues involved in this case, the two chapters are essentially identical in their requirements.

23. Chapter 67-48 and Chapter 67-21, F.A.C., define "Application Deadline" as meaning "...5:00 p.m., eastern time, on the final day of the Application Period." Section 67-48.002(10) and Section 67-21.002(9), F.A.C. The two rules define "Application Period" as meaning "...a period during which Applications should be

accepted as posted on Florida Housing's website and with a deadline no less than 30 days from the beginning of the Application Period." Sections 67-48.002(11) and 67-21.002(10), F.A.C.

24. The Posted time line on Florida Housing's website has been adopted by reference as a rule. Section 67-48.002(11) and 67-21.002(10), Florida Administrative Code. The posted "Rule Time Line" shows in part that the "Cycle opens" on March 15, 2002 and that the "Cycle closes" on April 15, 2002. Thus the "Application Deadline" ended at 5:00 p.m. Eastern time on April 15, 2002.

25. There is no evidence in this case establishing that the bus stop, which is the subject of this proceeding, was in existence as of April 15, 2002.

26. With regard to the issue concerning tie-breaker points for proximity to a grocery store, the evidence in this case shows that Petitioner's response to Part III.A.11.b(1) in its Application sets forth the "Ideal Food Store" as the grocery store for which Petitioner seeks proximity tie-breaker points. That is inconsistent with the Revised Exhibit 21 submitted by Petitioner during the CURE period which shows that the grocery store for which Petitioner seeks proximity tie-breaker points is the "Winn Dixie Marketplace."

27. The applicable rules require that:

> Where revised or additional information submitted by the Applicant creates an inconsistency with another item in that Application, the Applicant shall also be required in its submittal to make such other

changes as necessary to keep the Application consistent as revised. Sections 67-21.003(6) and 67-48.004(6), F.A.C.

28. The applicable rules also provide that "...inconsistencies created by the Applicant as a result of information provided pursuant to Subsection (6) above will still be justification for rejection or reduction of points as appropriate." Sections 67-21.003(9) and 67-48.004(9), F.A.C.

29. Based on the foregoing rules and the facts of this case, it is apparent that the Petitioner has created an inconsistency in its application with regard to the identity of the grocery store for which it seeks tie-breaker proximity points. Therefore, it is reasonable to reduce the points preliminarily awarded to Petitioner by 1.25 with regard to proximity tie-breaker points for a grocery store.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that:

Petitioner's preliminary score be reduced by 1.25 points with regard to tie-breaker points for proximity to a grocery store and further be reduced 1.25 points with regard to tie-breaker points for proximity to a bus stop.

Respectfully submitted and entered this 23 day of October, 2002.

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PREHEARING STIPULATION

The Parties, by and through undersigned counsel, submit this Prehearing Stipulation for purposes of expediting the informal hearing scheduled for 2:00pm, September 20, 2002, in Tallahassee, Florida, and state as follows:

STIPULATED FACTS

The parties, AVALON RESERVE, LTD. ("Petitioner"), and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing"), hereby stipulate and agree to the following facts:

1. On or before April 15, 2002, Petitioner submitted its Application to Florida Housing for an award of funds from the Multi-Family Mortgage Revenue Bond (MMRB) program and an award from the State Apartment Incentive Loan ("SAIL") program in the 2002 Universal Cycle.

2. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing

ATTACHMENT A

EXHIBIT
tabbies
1

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.

3. To encourage the development of affordable rental housing for low-income families, Florida Housing provides low-interest mortgage loans to developers of qualified multi-family housing projects. In exchange for an interest rate lower than conventional market rates, the developer agrees to "set-aside" a specific percentage of the rental units for low-income tenants.

4. Through its MMRB program, Florida Housing funds these mortgage loans through the sale of tax-exempt and taxable bonds. Applicants then repay the loans from the revenues generated by their respective projects.

5. Through the SAIL program, Florida Housing funds low-interest mortgage loans to developers from various sources of state revenue, which are generally secured by second mortgages on the property.

6. Because Florida Housing's available pool of tax-exempt bond financing and SAIL funds is limited, qualified projects must compete for this funding. To determine which proposed projects will put the available funds to best use; Florida Housing has established a competitive application process to assess the relative merits of proposed projects.

7. Pursuant to statutory mandate, Florida Housing has established by rule an application process to evaluate, score and competitively rank all applicants. (See Section 420.507 (22) (f) Fla. Stat., Fla. Admin. Code R. 67-21 *et. al.* and 67-48 *et. al.*) Awards for the

MMRB and SAIL programs are included in a single application process (the "Universal Application") governed by Fla. Admin. Code R. 67-21 *et. al.* and 67-48 *et. al.*

8. The 2002 Universal Application, parts I through VI, and accompanying instructions are incorporated as form "UA1016" by reference into Fla. Admin. Code R. 67-21.002(97), and 67-48.002(116). Some of the parts include "threshold" items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application, regardless of numeric score. Other parts allow applicants to earn points, however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

9. Florida Housing's staff commenced scoring the Petitioner's Application pursuant to Chapter 420, Fla. Stat. Fla. Admin. Code R. 67-21 *et. al.* and 67-48 *et. al.* Florida Housing completed the scoring process on May 13, 2002.

10. After performing preliminary scoring, Florida Housing's staff notified Petitioner of the results by letter that its preliminary score was 71 out of a possible 71, and had earned 7.5 proximity tie-breaker points. Any applicant could question the scoring of Petitioner's Application if it believed Florida Housing had made a scoring error, within ten calendar days after the date the applicant received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE").

11. Florida Housing reviewed each NOPSE that was timely received. On June 10, 2002, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants and Florida Housing's position on any NOPSE.

12. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any curable issue raised in any NOPSE, Florida Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June 26, 2002 (the "cure period").

13. After Petitioner submitted its cures, all applicants had an opportunity to review Petitioner's cures. Any applicant could submit to Florida Housing a Notice of Alleged Deficiencies ("NOAD") to challenge the Petitioner's cures.

14. Following this process, Florida Housing on July 22, 2002, sent Final Scores and a Notice of Rights to Petitioner, informing Petitioner that it could contest Florida Housing's actions in accordance with the provisions of Section 120.569 and 120.57 Fla. Stat.

15. Petitioner timely requested an informal hearing by filing its "Petition for Informal Proceeding in Accordance with Sections 120.569 and 120.57(2), Florida Statutes", on August 13, 2002.

16. Due to the possibility of applicants receiving a perfect score of 71 in this highly competitive arena, Florida Housing created a number of tie-breaker points. Two of the tie-breaker points pertain to how close a grocery store is located to the proposed housing development and how close a public bus or metro rail stop is located to the proposed housing development.

17. Generally, the closer the grocery store is to the proposed development, the higher the points, or fraction of a point. If the grocery store is within a mile, the proximity tie-breaker

point awarded would be 1.25; within one to two miles, the proximity tie-breaker point would be 1; within two to three miles, the proximity tie-breaker point would be .75; within three to four miles, the tie-breaker point would be .5; and within four to five miles, the tie-breaker point would be .25.

18. In its initial scoring, Florida Housing awarded 1.25 proximity tie-breaker points to Petitioner for a grocery store. Several challenges to this grocery store were made during the NOPSE process and Florida Housing determined that Petitioner was ineligible for proximity tie-breaker points for the grocery store.

19. Similarly, 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 1.25; within .01 and .02 miles, the proximity tie-breaker point would be 1; within .02 to .03 miles, the proximity tie-breaker point would be .75; within .03 to .04 miles, the tie-breaker point would be .5; and within .04 to .05 miles, the tie-breaker point would be .25.

20. In its initial scoring, Florida Housing awarded 1.25 tie-breaker points to Petitioner for a bus stop. Several challenges to the bus stop store were made during the NOPSE process and Florida Housing determined that Petitioner was ineligible for proximity tie-breaker points for the bus stop.

21. In response, Petitioner submitted cure materials including a revised Surveyor Certification to indicate a Winn Dixie Market Place was located within 1 mile, coordinates for the bus stop, and a letter from the Central Florida Regional Transportation Authority LYNX Vanpool Program.

22. The information in the cure materials for the grocery store differed from the original Application. As Petitioner submitted the Winn Dixie Market Place in its cure, there was no opportunity to correct any mistakes or inconsistencies in the cure itself.

23. Florida Housing determined that Petitioner was ineligible for proximity tie-breaker points for the grocery store because the "Applicant did not revise Application to change grocery store, but submitted a revised surveyor certification. The new surveyor certification did not provide an address for the grocery store but provided location coordinates for a store that was not in the Application".

24. Florida Housing determined that Petitioner was ineligible for proximity tie-breaker points for the bus stop because the "The LYNX Vanpool service stop referenced in the Application and its cure was not in existence and available for use by the general public as of the Application Deadline as required by the Application Instructions".

JOINT EXHIBITS

The parties proffer the following joint exhibits:

Exhibit 1: Prehearing Stipulation.

Exhibit 2: Part III, Section A.11 (b) (1) and (4) on pages 8 and 9 of Petitioner's initial Application (#2002-151BS).

Exhibit 3: Exhibit 21 of Petitioner's initial Application. (2 pages total).

Exhibit 4: Cure materials filed by Petitioner pertaining to Part III, Section A.11 (b) (1) and Exhibit 21 of the Application. (4 pages total).

Exhibit 5: Cure materials filed by Petitioner pertaining to Part III, Section A. 11 (b) (4) and Exhibit 21 of the Application. (4 pages total).

Exhibit 6: 2002 Universal Scoring Summary for Petitioner's Application dated July 22, 2002.

Respectfully submitted this 20th day of September, 2002.

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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

All parties 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. Written arguments must be filed with Florida Housing's Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Monday, October 7, 2002. Submission by facsimile will not be accepted. 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.