

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

RELIANCE-CYPRESS GROVE
ASSOCIATES, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2004-031-UC
APPLICATION NO. 200-082S

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECOMMENDED ORDER

Pursuant to Notice, an informal administrative hearing was scheduled for this case in Tallahassee, Florida, before Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba. In lieu of a hearing, the parties filed a joint proposed recommended order. The 14-day notice prescribed in sec. 120.569(2)(b), Fla. Stat., has been waived by agreement of the parties.

APPEARANCES

The representatives for the parties at the hearing are as follows:

For Petitioner:

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For Respondent:

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WITNESSES

There were no witnesses for either party.

STATEMENT OF THE ISSUE

The issue in this case is whether Florida Housing Finance Corporation (“Florida Housing”) erred when it scored Petitioner’s application for a SAIL program loan in the 2004 Universal Cycle program. Specifically, Petitioner whether failed to demonstrate contractor experience and sources of financing for its proposed project.

PRELIMINARY STATEMENT

On or before March 31, 2004, Petitioner submitted an application to Florida Housing for a loan from the State Housing Incentive Loan (“SAIL”) program in the 2004 Universal Cycle program. Florida Housing sent Pre-Appeal Scores and a Notice of Rights to Petitioner on July 22, 2004. The Notice of Rights notified Petitioner that it could contest Florida Housing’s actions by requesting an informal hearing before a contracted hearing officer. Petitioner timely requested an informal hearing and submitted its Petition for Hearing on August 2, 2004. There are no disputed issues of material fact.

FINDINGS OF FACT

1. On or before March 31, 2004, Petitioner, Reliance-Cypress Grove Associates, Ltd. (“Petitioner”), submitted an Application to Florida Housing Finance Corporation (“Florida Housing”) housing in the 2004 Universal Cycle for the award of funds from the State Apartment Incentive Loan (“SAIL”) program of for the development of an affordable housing rental project known as Sandalgrove Apartments in Broward County.

2. Petitioner is a Florida Limited Partnership, located at 516 N.E. 13th Street, Fort Lauderdale, Florida 33304. Reliance Housing foundation is a non-profit entity under R. 67-48.002, Fla. Admin.Code, and is the sole member of Reliance-Cypress Grove LLC, a Florida limited liability company, Petitioner's general partner.

3. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to administer the financing and refinancing of projects which provide housing affordable to persons and families of low, moderate and middle income in Florida.

4. Florida Housing receives its funds for the SAIL program from an allocation of documentary stamp tax revenue and publishes a Notice of Funding Availability announcing the amount of SAIL funding, which in the 2004 Universal Cycle was \$45,000,000.00. Florida Housing received requests from all applicants for SAIL loans in the 2004 Universal Cycle.

5. SAIL funds are apportioned among the counties, grouped as most, medium, and the least populated counties, and according to set-asides and special targeting goals set forth in the statute for the elderly, commercial fishing workers and farmworkers and families. (See Section 420.5087 (3), Fla. Stat.)

6. Florida Housing has established by rule a process (the "Universal Cycle") in which applicants for any of the above-referenced Florida Housing multi-family rental programs submit a single application (the "Universal Cycle Application") by which projects are evaluated, scored, and competitively ranked. (*See*, Section 420.507(22)(f), Fla.Stat., and Rule Chapter 67-48 Fla. Admin. Code)

7. The 2004 Universal Cycle Application, adopted as Form UA1016 (Rev. 3-04) by R. 67-48.002(111), Fla. Admin.Code, consists of Parts I through VI and instructions, some of which are not applicable to every Applicant. 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. 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.

8. After Petitioner submitted its 2004 Universal Cycle Application, on or before April 15, 2004, Florida Housing’s staff commenced scoring the Application pursuant to Part V, Chapter 420, Fla.Stat., and Rule Chapter 67-48, Fla. Admin. Code. Florida Housing completed the scoring process on May 13, 2004.

9. After performing preliminary scoring, Florida Housing’s staff notified Petitioner of the results. 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”).

10. Florida Housing reviewed each NOPSE that was timely received. On June 10, 2004, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants and Florida Housing’s position on any NOPSE.

11. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any 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, 2004 (the “cure period”).

12. 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. Florida Housing then reviewed each NOAD and made a determination on each NOAD.

13. Petitioner’s application was found to be deficient in several respects, all but two of which were found to have been rectified by Petitioner in its cures. At issue in this proceeding are the Contractor Experience requirement, Application Item II(B)(3); and Application Item V(D), dependence on net operating income in its operating pro forma as a commitment to fund or ability to fund.

14. Florida Housing determined that Petitioner failed a threshold requirement in that the Prior Experience Chart (Exhibit 13 to the Application) did not demonstrate that Petitioner’s General Contractor had completed at least two housing developments of similar development type, in this case, mid-rise with elevator, and which are at least 50% the number of units as the development which is the subject of the funding application.

15. Petitioner submitted a cure consisting of a statement and list of projects completed by the General Contractor, which demonstrate that the General Contractor has completed five renovation projects of the Mid Rise with Elevator type, ranging from 90 to 370 units, and has completed eleven renovation projects of the Garden apartment type, ranging from 108 to 464 units.

16. The project involves a substantial rehabilitation of an existing 814 unit property, which at the time of this application, was 92% occupied. Plans call for vacating two buildings (approximately 96 units, or 12% of the total number of units) at a time in the course of the rehabilitation. The assumptions used in calculating the available net operating income are based on 75% occupancy during construction.

17. Petitioner listed net operating income from the property during rehabilitation as the source for \$3,332,040 under its Construction or Rehab Analysis, and \$4,000,000 under its Permanent Analysis, and in the pro forma at exhibit 58 to the Application.

18. Florida Housing disallowed Petitioner's use of net operating income as a funding source. The disallowance of net operating income as a financing source resulted in a threshold failure of Application item V(D).

19. Petitioner had applied for funding during the 2003 Supplemental Bond Application Cycle, including in that Application the same contractor experience as was submitted in its 2004 Universal Cycle Application as issue here. Petitioner also relied in on net operating income as a financing source in its 2003 Supplemental Bond Cycle Application.

20. Contractor experience and funding sources were treated identically in the 2003 Supplemental Bond Cycle Application and in the 2004 Universal Cycle Application.

21. Florida Housing accepted the Petitioner's contractor experience and funding sources in the 2003 Supplemental Bond Application Cycle, and allowed Petitioner to enter Credit Underwriting, which is a post-application review to determine creditworthiness of a project for funding.

22. On December 12, 2003, Florida Housing granted waivers of Rules 67-21.002(97) and 67.48.002(111), Fla. Admin. Code, to allow Petitioners to rehabilitate this 814-unit project, which exceeds the limit of 400 units for MMRB developments.

23. Following this process, Florida Housing on July 22, 2004, sent Pre-Appeal Scores and a Notice of Rights to Petitioner. The Notice of Rights notified Petitioner that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

24. Petitioner timely requested an informal hearing and submitted its Petition for Hearing on August 2, 2004.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and Fla. Admin. Code R. 67-48 *et al.*, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Florida Housing is authorized to institute a competitive application process, for the SAIL program and for the allocation of housing credits, Sec. 420.507 (22)(f), Fla. Stat., and has done so at Fla. Admin. Code R. 67-48.004.

3. Florida Housing's application form and instructions are adopted as Form, UA1016 and incorporated by reference into R. 67-48.002(111), Fla. Admin. Code. The 2003 Supplemental Bond Application instructions appeared at pp. 91-92 of the Instructions, UA1016 (Rev.8/03).

4. The 2003 Supplemental Bond Application Instructions do not prescribe standards for contractor experience nor for income sources which differ from the 2004 Universal Cycle Application Instructions.

5. Florida Housing was bound by its decision to accept the contractor's experience and use of net operating income where the application and the Instructions regarding those same specific items were substantially unchanged between the 2003 Supplemental Bond Cycle and the 2004 Universal Cycle. See, Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237 (Fla. 1st DCA 1996)

6. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation, Legal Environmental Assistance Foundation, Inc., v. Board of County Commissioners of Brevard County, 642 So.2d 1081 (Fla. 1994); Miles v. Florida A. and M. University, 813 So.2d 242 (Fla. 1st DCA 2002),

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is hereby RECOMMENDED that Florida Housing enter a Final Order that Petitioners' application should be scored as satisfying threshold requirements as to contractor experience and that its net operating income is an appropriate "Other source of funding," under the specific facts of this case.

Respectfully submitted this 5th day of October, 2004.



David E. Ramba, Hearing Officer

Copies Furnished to:

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