

THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING FINANCE CORPORATION

CLARCONA HILLS, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

FHFC Application No. 2003-116C

FHFC Case No. 2003-0044

**PETITION FOR FORMAL ADMINISTRATIVE HEARING INVOLVING DISPUTED
ISSUES OF MATERIAL FACT**

Petitioner, Clarcona Hills, LLC, through its undersigned counsel and pursuant to §120.57(2) and §120.569, Fla. Stat., and Rules 28-106.301 and 67-48.005, F.A.C., files this Petition for Formal Administrative Hearing Involving Disputed Issues of Material Fact, and says as follows:

I. PARTIES AND NOTICE

1. Petitioner is Clarcona Hills, LLC (“Clarcona”), whose address is 1103 West Hibiscus Blvd., Suite 408, Melbourne, Florida 32901, and whose telephone number is 321-723-9200. For purposes of these proceedings, Clarcona’s address and telephone number shall be that of its undersigned counsel.

2. The affected agency is Respondent, Florida Housing Finance Corporation (“the Corporation”), 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329. The Corporation’s identification number for this matter is 2003-116C.

3. Clarcona received notice of the Corporation's decision by way of a memorandum and scoring summary from the Corporation dated July 21, 2003, and received by Clarcona on July 22, 2003, by FedEx delivery.

II. ULTIMATE FACTS ALLEGED

A. The State Housing Tax Credit Program

4. Clarcona is a Florida limited liability company and was formed for the purpose of constructing apartments for low-income tenants.

5. The Corporation is a public corporation within the Department of Community Affairs and is engaged in financing and refinancing of housing and related facilities in Florida. Pursuant to §420.5093(2), Florida Statutes, the Corporation administers the State Housing Tax Credit Program. Under the program, developers submit competitive applications for an allocation of tax credits in return for constructing or substantially rehabilitating low-income housing.

6. The application process requires developer applicants to provide information about their proposed developments, such the developer's experience, a description of the development, the services to be provided, the method of proposed financing, and other information.

7. The Corporation scores the applications and ranks the applicants by total score. The Corporation awards tax credits to the applicants with the highest scores and continues in descending order until all of the available tax credits are exhausted.

8. In order to distinguish between applications with tied scores, the Corporation awards tie-breaker points to applicants based on the proximity of each applicant's proposed

development to certain services, such as the nearest grocery store, school or public bus stop. In brief, the applicant selects a single point on the proposed development site called a tie-breaker measurement point (“TBMP”), and then measures the distance to various services utilizing map software or a surveyor, depending on the circumstances. Pursuant to Rule 67-48.002(108), F.A.C., the applicant’s TBMP must be located “within 100 feet of a residential building existing or to be constructed as part of the proposed Development.” The closer the proposed development is to the listed services, the greater the number of tie-breaker points that will be awarded.

B. Clarcona’s Application and Location of the Tie-breaker Measurement Point

9. On or before April 8, 2003, Clarcona submitted an application to the Corporation for the Housing Credit Program for the 2003 cycle. In the application, Clarcona proposed to construct a low-income housing development in Orlando, Florida. After reviewing Clarcona’s application, the Corporation gave Clarcona a “perfect” final score of 66 points and awarded 7.5 tie-breaker points (the maximum available) for proximity to various services.

10. Pursuant to Rule 67-48.004(4), F.A.C., the Corporation allows applicants to advise the Corporation of alleged scoring errors on competing applications by filing a “Notice of Possible Scoring Error” (“NOPSE”).

11. After preliminary scoring, another applicant, Hoffner Club Apartments (Application No. 2003-063C), filed a NOPSE against Clarcona’s application regarding the location of Clarcona’s tie-breaker measurement point and other issues. The NOPSE alleged that Clarcona’s TBMP “could not be located within 100 feet of a residential building . . . because the point is within a large existing drainage easement, which contains an existing stormwater

retention facility.” The NOPSE further alleged that the drainage easement is held by Orange County and the Clarcona Groves Property Owners Association. Attached to the NOPSE was a purported plat of the development site showing the location of the drainage easement, and a purported copy of a conceptual site plan for Clarcona’s proposed development allegedly showing the proposed locations of residential buildings on the site.

12. In response to the NOPSE, the Corporation deducted all tie-breaker points from Clarcona’s score. On the Scoring Summary sheet for Clarcona, the Corporation stated that the “Tie-Breaker Measurement Point [is] not located within 100 feet of a residential building existing or to be constructed as part of the proposed Development.”

13. Pursuant to Rule 67-48.004(6), F.A.C., the Corporation allows applicants to “cure” certain items in their applications after the NOPSE process.

14. On or about June 19, 2003, Clarcona submitted a cure to address the Corporation’s deduction of Clarcona’s tie-breaker points. In the cure, Clarcona advised the Corporation that the conceptual site plan attached to the NOPSE was a 1999 site plan that did not accurately reflect the current proposed development. Thus, the Corporation made its decision on the basis of a document that was not the correct and current site plan for Clarcona’s proposed development.

15. Clarcona also advised the Corporation that “nothing in the Application requires an Applicant to demonstrate its ability, practical or legal, to construct buildings in a particular location on the development site.”

16. Out of an abundance of caution, Clarcona stated in the cure its intent to relocate the drainage easement and retention pond to another portion of the development site in order to

allow for the construction of a residential building within the area of the current easement, thus meeting the 100 foot requirement in Rule 67-48.002(108), F.A.C. Among other information, Clarcona submitted letters from Orange County and the Clarcona Groves Property Owners Association advising Clarcona that they would consent to the relocation of the retention pond. Clarcona also submitted letters from the two adjacent individual property owners advising Clarcona that they would consent to the relocation of the retention pond.

17. Notwithstanding the fact that Clarcona cured any questions regarding the location of its TBMP and the nearest proposed residential building, the Corporation denied Clarcona's cure and all tie-breaker points. On July 21, 2003, the Corporation issued its scoring memorandum and final scoring summary sheet. The scoring summary sheet states in relevant part that:

The Applicant attempted to cure items 1P, 2P, 5P, and 6P, but the cure was deficient [sic] because the third-party letters submitted in the cure did not provide sufficient evidence that the Applicant has obtained or will be able to obtain abandonment of easement in order to build residential building within 100 feet of the Tie-Breaker Measurement Point. As a result, the Tie-Breaker Measurement Point is invalid.

18. The application instructions do not require an applicant to demonstrate the practical or legal ability to relocate supposed obstacles to the construction of buildings in particular locations or the ability to construct a building within 100' of the applicant's TBMP.

19. In fact, relocating drainage facilities is a routine practice in the development of real property and is easily accomplished. Clarcona faces no greater requirements to relocate the drainage easement than the same routine permitting requirements that all applicants face when constructing new buildings and drainage facilities.

20. Clarcona's cure contained sufficient evidence that it would be able to obtain the relocation of the drainage easement.

21. On information and belief, the Corporation has no process to verify whether each successful applicant actually constructs a residential building within 100 feet of its TBMP and makes no effort to ensure that each successful applicant constructs a building within 100 feet of its TBMP.

C. Practical Ability to Move the Drainage Easement

22. In the NOPSE, Hoffner Club also alleged that it "doubts" that the retention pond could be moved to another location "[g]iven the topography of the site."

23. The Corporation did not give Clarcona any notice of: i) whether it agreed with this assertion, ii) whether Clarcona needed to demonstrate the practical ability to move the drainage easement, or iii) that Clarcona's cure did not sufficiently address the allegation that the topography of the site would not allow relocation of the drainage easement. Therefore, the Corporation has waived any right to assert that Clarcona must demonstrate the practical ability to move the drainage easement.

D. Proximity Tie-Breaker Points for Nearest Grocery Store

24. The Corporation awards applicants 1.25 tie-breaker points for a grocery store that is less than one mile from the applicant's TBMP and 1.0 tie-breaker points for a grocery store that is greater than one mile but less than two miles from the applicant's TBMP. The distance is measured from the applicant's TBMP to the "main entrance to the building used by the general public." (Section III.A.11.b of the application instructions.)

25. In its application, Clarcona stated that the nearest grocery store was less than one mile from Clarcona's TBMP and provided a certification from a registered surveyor of the latitude and longitude coordinates of the nearest grocery store, the "More-4-Less Grocery Store" on Pine Hills Road, Orlando, Florida.

26. After preliminary scoring, Clarcona had 7.5 proximity tie-breaker points. Of the 7.5 points, 1.25 points were for proximity to the nearest grocery store.

27. In its NOPSE against Clarcona, Hoffner Club Apartments alleged, among other issues, that the latitude and longitude coordinates in Clarcona's application were not the correct coordinates for the main entrance to the More-4-Less Grocery Store.

28. The Corporation apparently concurred with the NOPSE and deducted Clarcona's tie-breaker points for proximity to the nearest grocery store.

29. Like the issue regarding the location of Clarcona's TBMP, Clarcona timely submitted a cure for the grocery store coordinates.

30. In the final scoring summary sheet, the Corporation did not give Clarcona any notice that its cure did not correct the alleged deficiency in the grocery store coordinates. However, the Corporation did not reinstate any tie-breaker points for proximity to the nearest grocery store and did not provide any reason to Clarcona for refusing to reinstate the points.

31. Because the Corporation has not given Clarcona any notice that its cure for the grocery store coordinates was not sufficient to cure the alleged deficiency, Clarcona assumes that it has cured any problems with its grocery store coordinates. Based on the scoring summary sheet, Clarcona believes that its tie-breaker points for the grocery store were not reinstated because, as discussed above, the Corporation had determined that Clarcona could not construct a

building within 100 feet of its TBMP, and therefore no tie-breaker points were awarded for proximity to any services, including the grocery store.

32. To the extent that the Corporation takes the position that Clarcona has not cured the coordinates for the grocery store, Clarcona asserts that the Corporation has waived any right to assert such a position.

III. DISPUTED ISSUES OF MATERIAL FACT

Disputed issues of material fact include, but are not limited to, the following:

33. Whether Clarcona's TBMP is located within 100' of a residential building to be constructed as part of the proposed Development.

34. Whether Clarcona has the ability to relocate the retention pond to another location on the Development site.

35. Whether the Corporation relied on the conceptual site plan submitted with the Hoffner Club NOPSE in making its decision to deny tie-breaker measurement points to Clarcona.

36. Whether the conceptual site plan submitted with the Hoffner Club NOPSE was the correct and current site plan for Clarcona's proposed development.

37. Whether, at the application stage, the Corporation requires each applicant to prove that it can construct a building within 100' of the applicant's TBMP.

38. Whether, after notice of award of tax credits to applicants, the Corporation has any process to verify whether the buildings are actually constructed within 100' of the applicant's TBMP.

39. Whether, after construction has begun, the Corporation has allowed applicants to construct developments with no residential buildings located within 100' of the applicants' TBMPs.

40. Whether the Corporation accepted Clarcona's cure for the location coordinates of the main public entrance to the nearest grocery store.

41. Whether the Corporation has waived its right to assert that Clarcona's cure for the location coordinates of the main public entrance to the nearest grocery store was insufficient.

42. Whether, if the Corporation did not accept Clarcona's cure for the location coordinates of the main public entrance to the nearest grocery store, Clarcona's location coordinates are located at the main public entrance to the nearest grocery store.

Clarcona may discover additional disputed issues of material fact during discovery and reserves the right to amend this list.

IV. RULES AND STATUTES WHICH REQUIRE REVERSAL OR MODIFICATION OF THE CORPORATION'S PROPOSED ACTION

43. Clarcona is entitled to relief pursuant to the provisions of §§120.569, 120.57(2), and 420.5093, Florida Statutes; Rules 67-48.002, 67-48.004, and 67-48.005, Florida Administrative Code; the application and instructions adopted by reference in Rule 67-48.002, F.A.C.; together with established decisional law of Florida courts and administrative agencies.

IV. SUBSTANTIAL INTERESTS

44. Clarcona's substantial interests are affected by the Corporation's proposed final score because Clarcona is the developer entity and applicant for the development. Clarcona will

incur damages, including lost development costs and lost Housing Credits, if the requested tie-breaker points are not awarded.

V. REQUEST FOR RELIEF

WHEREFORE Clarcona requests:

- i) That this matter be referred to the Division of Administrative Hearings and that an Administrative Law Judge be assigned to conduct a formal hearing involving disputed issues of material fact pursuant to Section 120.57(2), Florida Statutes; Chapter 28-106, F.A.C.; and Rule 67-48.005, F.A.C.;
- ii) that recommended and final orders be entered finding that Clarcona should be awarded 7.5 tie-breaker measurement points; and
- iii) such other relief as is appropriate.

Dated this 12 day of August, 2003.



J. Andrew Bertron, Jr. (Fla. Bar No. 0982849)
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Counsel for Clarcona Hills, LLC

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served by **hand-delivery** to the Wellington Meffert, Esq., Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, this 12 day of August, 2003.



Attorney