STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HARRIS COVE PARTNERS, LTD.,

Petitioner,

v.

FHFC CASE NO. 2004-033-UC
Application No. 2004-121S

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 this matter on August 31, 2004.

APPEARANCES

For Petitioner, Harris Cove Partners, Ltd.:	M. Christopher Bryant, Esquire Oertel, Fernandez, Cole & Bryant P. O. Box 1110 Tallahassee, FL 33202-1110
For Respondent, Florida Housing Finance Corporation (Florida Housing):	Hugh R. Brown, Esquire Deputy 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 sole issue is whether Petitioner, Harris Cove Partners, Ltd., demonstrated that the proposed Development site is appropriately zoned and consistent with local land use regulations in accordance with Part III.C.4 of the Universal Application Instructions.

PRELIMINARY STATEMENT

The parties entered into a Joint Stipulation of Facts and Exhibits, which has been marked as Joint Exhibit 1 in this proceeding. In addition, Joint Exhibits 2, 3, 4 and 6 were admitted. With regard to Joint Exhibit 5, it was agreed by the parties (Tr. page 13) that the page marked "Exhibit C" and attached to Joint Exhibit 5 is not and should not be considered part of Joint Exhibit 5. Although Joint Exhibit 5 is marked as a Joint Exhibit, Petitioner, in fact, objected to the Exhibit so that it is not a matter of fact and law a Joint Exhibit though it is marked "Joint Exhibit 5". Joint Exhibit 5 is admitted for the sole purpose of showing what NOAD was submitted by a competitor but not for the truth of any matter contained therein. Petitioner's Exhibits 1 through 5 were admitted. Petitioner's Exhibits 6 and 7 were not admitted, but were proferred and marked so that they could be attached to the record.

Petitioner filed Petitioner's Request for Official Recognition of Agency Final Orders with Regard to the Final Orders of the Florida Housing Finance Corporation

entered in the cases of The Landings on Millennia Blvd. v. FHSC, FHSC Case No. 2002-0057, and New Port Sound Partners, Ltd. v. FHSC, FHSC Case No. 2002-0058.

FINDINGS OF FACT

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

1. Harris Cove is a Florida for-profit limited partnership with its address at 1551 Sandspur Road, Maitland, Florida 32301-1329, and is in the business of providing affordable rental housing units.

2. Florida Housing 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, Fla. Stat.; Rule 67-48, Fla. Admin. Code).

3. Florida Housing allocates several forms of financing for affordable housing development, including Low-Income Housing Tax Credits (LIHTC), State Apartment Incentive Loans ("SAIL"), and Multi-Family Mortgage Revenue Bonds ("MMRB"). Applicants compete for the award of these forms of financing, which provide more favorable financial terms than would be available through conventional financing sources. In exchange for the receipt of such financing from Florida Housing, applicants enter into long-term agreements to set aside all or a portion of the

residential units within such developments to low-income residents and provide for certain amenities, depending on the requirements of the particular funding program.

4. All three of the above-named forms of financing were combined into a single "Universal Application Cycle") for 2004. Financing for any of these programs is sought through the use of a joint Universal Application form. SAIL and LIHTC applicants are subject to Florida Housing Rule Chapter 67-48, Fla. Admin. Code, while MMRB applicants are subject to Florida Housing Rule Chapter 67-21, Fla. Admin. Code. The Universal Application form is incorporated by reference into Florida Housing's rules, as are exhibit forms to be used with the applications and a 102-page Universal Application Instruction document, designated "UA1016 (Revised 3/04)."

5. The 2004 Universal Application consists of Parts I through V and instructions, some of which are not applicable to every Applicant. Some of the parts include "threshold" items, examples of which include site control, zoning, and infrastructure availability. 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, including "tie-breaker" points; however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

6. Harris Cove timely submitted its 2004 SAIL application (the "Application") to Florida Housing on March 31. 2004. Florida Housing preliminarily reviewed and scored the 2004 Universal Application Cycle applications, including Harris Cove's, and advised Harris Cove on or about April 28, 2004, that its application did not meet certain "threshold" requirements, but also that if such requirements had been met, the Harris Cove application would receive a score of 61 of 66 points and 5.75 of a possible 7.5 "tie-breaker" points.

7. Specifically, Florida Housing reported in its April 28, 2004 preliminary Universal Scoring Summary that Harris Cove failed to meet threshold requirements for several reasons no longer pertinent to the instant case. One of these items, designated "5T", indicated an alleged failure within Part III, Section C, Subsection 4 of the Application, "Zoning", on the grounds that "Applicant failed to provide the required Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form."

8. Subsequent to the issuance of "preliminary" scores on April 28, 2004, all applicants were provided the opportunity to notify Florida Housing of possible scoring errors in other applications by filing a Notice of Possible Scoring Error ("NOPSE"). No NOPSE's were filed against the Harris Cove application.

9. Following the submission of NOPSE's, Florida Housing issued a

subsequent Universal Scoring Summary, on or about May 19, 2004. This Scoring Summary again showed that the application would have received a score of 61 but for the previously described threshold failure regarding zoning, and also reflected an award of 5.75 total tie-breaker points.

10. Pursuant to Rule 67-48.004(6), Fla. Admin. Code, Harris Cove took the opportunity to provide additional documentation to Florida Housing to address Harris Cove's failure to "meet threshold". This additional documentation is generally referred to as a "cure," and was submitted by Harris Cove on June 10, 2004. Harris Cove's cure on the zoning issue (threshold item 5T) included an Exhibit 32 to the Application (Joint Exhibit 4 in this proceeding), "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations", signed by an appropriate local government official.

11. The "Cure" submitted by Petitioner (Joint Exhibit 4) was Exhibit 32 to the Application entitled "Local Government Verification that development is consistent with zoning and land use regulations." It is in the form prescribed by rule by Respondent. The verification is certified according to the requirements of Respondent. In pertinent part, the certification states:

> On or before 03/30/04, the zoning designation for the referenced Development site is C-3 CUP.

12. The Harris Cove development site is located within a "C-3" zoning district in the City of Leesburg. The City of Leesburg's C-3 zoning district allows multifamily dwellings as a "conditional use", for which a conditional use permit ("CUP") must be obtained. The procedure and requirements for obtaining a CUP in the City of Leesburg are set out in the City's zoning code, and require approval of an application by the City of Leesburg Planning and Zoning Commission.

13. As of Florida Housing's Application Deadline (March 31, 2004), Harris Cove had not obtained approval from the City of Leesburg Planning and Zoning Commission for a CUP for multifamily dwellings on its development site. As of Florida Housing's cure deadline (June 10, 2004), Harris Cove had obtained approval from the City of Leesburg Planning and Zoning Commission for a CUP for multifamily dwellings on its development site.

14. Subsequent to the submittal of "cures", each applicant was allowed the opportunity to provide a Notice of Alleged Deficiency ("NOAD") with respect to the revised documentation submitted by competing applicants. A NOAD was filed against the Harris Cove application alleging that Harris Cove did not obtain proper zoning for the development site as of the Application Deadline as defined by Rule 67-48.002(10), Fla. Admin. Code. This NOAD also included other allegations not pertinent to the instant case.

15. On or about Friday, July 9, 2004, Florida Housing released "final" (post-NOAD) Universal Scoring Summaries for all applicants. (Although designated as "final," the scoring summaries are accompanied by points of entry to request formal or informal administrative hearings in which applicants may challenge the scoring of their applications).

16. Florida Housing's final Scoring Summary for Harris Cove states that the Application does not meet threshold requirements. The Scoring Summary rescinded threshold failure item 5T (as described in paragraph 7 above), but contained a new threshold failure item "6T", which, as with item 5T, reflects an alleged failure within Part III, Section 9, Subsection 4 of the Application, described as "Zoning". The explanation provided in the July 8, 2004, Scoring Summary read as follows:

> The Applicant submitted a completed Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form as a cure for Item 5T, but the cure is deficient because the form was executed on May 28, 2004, indicating that the Development site was zoned C-3 CUP on or before March 30, 2004, but evidence provided in a NOAD indicates that the proposed Development site was not appropriately zoned for the intended use until the approval of a conditional use permit to allow multifamily residential apartments in a C-3 (Highway Commercial) district. Such approval was granted by the City of Leesburg Planning Commission at its May 20, 2004 meeting. Therefore, the Development site was not appropriately zoned for the intended use as of the Application Deadline.

17. The July 8, 2004, Scoring Summary also reflected as final score for the Harris Cove Application of 66 points, which, based on score alone, ties it with about 110 of the approximately 130 Universal Cycle applications submitted and still pending for the 2004 Universal Cycle. The final scoring summary also reflects a tie-breaker score of 5.75 points.

CONCLUSIONS OF LAW

18. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rules 28-106.301 and 66-48.005, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

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

20. The 2004 Universal Application Package including instructions, exhibit forms and an uncompleted application are incorporated as a rule by reference by Rule 67-48.002(111), Fla. Admin. Code.

21. Rule 67-48.004(13)(b) states that Florida Housing shall reject an Application if, following the submission of the additional documentation, revised pages and other information as the Applicant deems appropriate "The Applicant fails

to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions . . . ."

22. FHFC has incorporated by reference into agency rules a 102 page Universal Application Instructions document. In regards to completing the "Evidence of Appropriate Zoning" section of the application, the Instructions state, in pertinent part, as follows:

> To demonstrate that the proposed Development site is appropriately zoned and consistent with local land use regulations regarding density and intended use or that the proposed Development site is legally non-conforming, the Applicant must provide the appropriate verification form behind a tab labeled "Exhibit 32." Evidence of appropriate zoning must be demonstrated for all property locations if the proposed Development has Scattered Sites. The verification must demonstrate that the zoning designation for the Development site was effective on or before the Application Deadline.

Pages 25-26 of the Universal Application Instructions, copy admitted into evidence as Petitioners Exhibit 2. (emphasis added).

23. In addition to adopting the Universal Application Form into its rules, FHFC has also incorporated exhibit forms to be completed and returned as a part of an applicant's application. The prescribed form relating to zoning is entitled "LOCAL GOVERNMENT VERIFICATION THAT DEVELOPMENT IS CONSISTENT WITH ZONING AND LAND USE REGULATIONS;" a copy of that

form, as completed and submitted by Harris Cove in its "cure," was admitted into evidence as part of Joint Exhibit 4. The form is designed to be signed by a specified local government official. In pertinent part, the form states:

> On or before _____ (month/day/year), the zoning designation for the referenced Development site is _____.
>
> The intended use is consistent with current land use regulations and the referenced zoning designation ... To the best of my knowledge, there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density described therein ...

24. Of these sources of instruction regarding zoning, the only reference to approval which must exist as of the FHFC Application Deadline is the "zoning designation" for the site, according to the Universal Application Instructions (Petitioner's Exhibit 2). There is no requirement that the Applicant demonstrate that it was in compliance with land use regulations other than zoning as of the Application Deadline.

25. The zoning verification form (part of Joint Exhibit 4) quoted above does not state that there can be no land use regulation hearings or approvals after the Application Deadline. The fact that an additional hearing was necessary to obtain approval of a conditional use permit (which, as explained below, is not a zoning or rezoning action) does not disqualify the Harris Cove application, as the parties have

stipulated that the CUP was issued prior to the cure deadline. The application, as cured, demonstrated not only that the proper zoning classification, allowing multi-family housing, was in place as of the Application Deadline, but also that an additional non-legislative, administrative/quasi-judicial approval was in fact obtained for this development.

26. In Harris Cove's case, the stated basis for rejecting the application is that the zoning designation applicable to the site requires a conditional use permit (CUP) for the Harris Cove's intended use as multi-family housing. Even assuming this is true, this does not mean that the property was not zoned for multi-family use as of the Application Deadline.

27. Zoning decisions of local government are fundamentally different than many other types of land use approvals given by local governments, including conditional use permits. Zoning is a legislative act of local government. See Board of County Commissioners of Brevard County v. Snyder, 627 So. 2d 469, 474 (Fla. 1993).

28. The issuance of conditional use permits and special exceptions are not legislative acts. They are, typically, either administrative or quasi-judicial acts. They are granted to applicants provided they demonstrate compliance with certain factors set out in the local government ordinances.

29. A "conditional use" has been described as a use that is "appropriate to the zoning classification, but depends upon factual findings prior to issuance of the permit." Bay View Investments, Inc. v. Grigsby, 219 So.2d 760, at n.2 (Fla. 2nd DCA 1969).

30. A conditional use permit is, in essence, a "special exception" created by the zoning ordinance itself. See, 7 Fla. Jur. 2d Building, Zoning and Land Controls, Section 224. A special exception is a permitted use to which an applicant is entitled, unless the zoning authority determines, according to standards set forth in the zoning ordinance, that such use would adversely affect public interest. Rural New Town, Inc. v. Palm Beach County, 315 So. 2d 478 (Fla. 4th DCA 1975).

31. The fact that an applicant must obtain a conditional use permit or special exception for a particular use does not mean that the property is not properly "zoned" for that particular use. To the contrary, the listing of conditional uses and special exception uses within a zoning classification demonstrates that the legislative body of the local government has already determined that the listed uses are appropriate to the zoning district, and that the landowner must simply comply with the permitting process and provide evidence of complying with the conditional use permit standards set forth in the ordinances. If the desired use is not listed in the zoning classification, then it cannot be granted by conditioned use or special exception. See, Baker v.

Metropolitan Dade County, 774 So. 2d 14 (Fla. 3rd DCA 2001) (county zoning appeals board could not, under "special exception or unusual use" provision, permit use of lot in residential zone for commercial parking, as the County Code listed only "non-commercial parking" as an allowable type of unusual use).

32. The case law in Florida instructs that a conditional use permit is the same as a special exception. It is an entitlement of an applicant, once the applicant presents a prima facie case that it satisfies the standards set out in the zoning code for obtaining the conditional use permit. In the case of Irvine v. Duval County Planning Commission, 466 So.2d 357(Fla. 1st DCA 1985), Judge Zehmer, in dissent, quoted with approval the Fourth District's decision in Rural New Town Inc., v. Palm Beach County, 315 So.2d 478 (Fla. 4th DCA 1975):

> A special exception is a permitted use to which the applicant is entitled unless the zoning authority determines according to the standards in the zoning ordinance that such use would adversely affect the public interest.

466 So.2d at 364.

33. Judge Zehmer proceeded to quote from "a leading treatise on the subject of zoning" as follows:

> ...the conditional use or special exception, as it is generally called, is a part of the comprehensive zoning plan sharing the presumption that as such it is in the interest of the general welfare and, therefore, valid... The special

> exception is a valid zoning mechanism that delegates to an administrative board unlimited authority to permit enumerated uses that legislature has determined can be allowed, properly albeit prima facie, absent any fact or circumstance negating the presumption.

466 So.2d at 364, quoting Yokley, 3 Zoning Law and Practice, Section 20-1, pages 212-213 (4th Ed. 1979)

34. On conflict review of the Irvine decision, the Florida Supreme Court reversed the majority opinion of the First District, and agreed with Judge Zehmer's dissent. Irvine v. Duval County Planning Commission, 495 So.2d 167 (Fla. 1986). On remand, the First District adopted Judge Zehmer's earlier dissent as its majority opinion. Irvine v. Duval County Planning Commission, 504 So.2d 1265 (Fla. 1st DCA, 1986).

35. Other courts have agreed with the First District on the nature of a special exception, which, again, is the same as a conditional use permit. The Third DCA noted:

> ...a special exception is a permitted use to which the applicant is entitled unless the zoning authorities determine that the use would adversely affect the public interest and ...once the applicant demonstrates compliance with the applicable legislative criteria, there is a presumption that the use applied for is permitted and the burden shifts to those who oppose the exception to demonstrate by substantial competent evidence that the proposed use is adverse to the public interest.

Metropolitan Dade County v. Section 11 Property Corporation, 719 So.2d 1204, 1205 (Fla. 3rd DCA 1998).

36. Further, the Second District Court of Appeal, as early as 1969, noted:

> A conditional use is not the same as a variance, which permits a use elsewhere authorized to be made where the ordinance prohibits it, upon a showing of hardship. [citation omitted] The use involved here is appropriate to the zoning classification, but depends upon factual findings prior to issuance of the permit.

Bay View Investments, Inc., v. Grigsby, 219 So.2d 760, 762, at note 1 (Fla. 2nd DCA 1969).

37. Clearly, then, the case law in Florida establishes that, rather than being a use that is inappropriate to a zoning district, a use allowed by conditional use is an authorized use to which an applicant is entitled. The legislative body of the local government, in adopting the zoning code, has recognized the appropriateness of the use by listing it as a conditional use. For Florida Housing to take the position that a use authorized as a conditional use is one not within the "zoning classification" is simply incorrect as a matter of law. Since Florida Housing's only requirement as to the timing of zoning approval is that the "zoning classification" had to be in place as of the Application Deadline, then a zoning classification which allows multifamily

residential use as a conditional use, if such zoning classification was in place as of the Application Deadline, satisfies Florida Housing's requirement.

38. Florida Housing's rules contain no definition of "zoning," land use regulation," or "conditional use permit." In the absence of rule definitions, affected persons, such as applicants are entitled to rely on the common or plain and ordinary meaning of the language used in the rules. Cole Vision Corp. v. Department of Business and Professional Regulation, Board of Optometry, 688 So.2d 404 (Fla. 1st DCA 1997); Boca Raton Artificial Kidney Center, Inc., v. Department of Health and Rehabilitative Services, 493 So. 2d 1055 (Fla. 1st DCA 1986). "Zoning designation," the term used in FHFC's instructions, can only reasonably mean the designation given to the zoning district in which an applicants site is located. In this case, that site was within a C-3 zoning district at the time of Application Deadline, which allows multifamily residential use by conditional use permit, a permit obtained by this applicant prior to the cure deadline.

39. By specifying in its instructions (which are rules) that the zoning verification form "must demonstrate that the zoning designation for the Development site was effective on or before the Application Deadline," Florida Housing has not alerted applicants that any other land use approval must be in existence as of the Application Deadline. Florida Housing could have included in its rules an instruction

that other forms of land use approval, such as conditional use permits, had to also be in place as of the Application Deadline, but it did not do so.

40. By its own Final Orders, Florida Housing recognizes that it and applicants are bound by the terms of Florida Housing's rules. In Recommended Orders which were adopted as Final Orders in the cases of The Landing on Millenia Blvd. v. FHFC, FHFC Case No. 2002-057 (FHFC Final Order entered October 10, 2002) and Newport Sound Partners, Ltd. v. FHFC, FHFC Case No. 2002-0058 (FHFC Final Order entered October 10, 2002), the Hearing Officer stated:

> As clearly enunciated in the cases of Cleveland Clinic Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (Fla. 1st DCA 1996); Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services, 493 So.2d 1055 (Fla. 1st DCA 1986); and Central Florida Regional Hospital, Inc. v. Department of Health and Rehabilitative Services, 582 So. 2d 1193 (Fla. 5th DCA 1991), rev. denied, 592 So. 2d 679 (Fla. 1991), an agency must follow its own rules. It cannot apply one set of rules during the application process and then apply a different set of rules after the applicants have already relied upon the agency's announced policies and requirements. If the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, absent such amendment, expedience cannot be permitted to dictate its terms. Applicants are entitled to plan, predict and compete for scores they receive on the basis of the clear rules which govern the competitive application process.

Landings on Millenia Recommended Order at pages 8-9; Newport Sound Recommended Order at pages 8-9. The Findings of Fact and Conclusions of Law from those Recommended Orders were adopted in full and incorporated by reference by Florida Housing "as though fully set forth in this Final Order."

41. Respondent, in its Proposed Recommended Order, argues that Joint Exhibit 5 should be admitted as hearsay for proof of certain facts asserted therein. It should be noted that Joint Exhibit 5 has not been admitted for the proof of any matter contained therein. Respondent is incorrect in its argument that, absent a stipulation to the truth of the matters contained therein, Joint Exhibit 5 is admissible for the proof of the truth of facts asserted therein. First, Petitioner has objected to Exhibit 5. Thus, if Respondent persisted in asserting that the facts should be considered, the Hearing Officer would be required to determine that an issue of disputed material fact had arisen and that this matter should be sent to the Division of Administrative Hearings for a formal hearing pursuant to Chapter 120, Florida Statutes. The Hearing Officer does not make such a finding in this case. Second, just because a document might be hearsay, and hearsay might be otherwise admissible according to the Rules of Evidence, that does not waive the evidentiary requirement that such a document must be at least first authenticated and then identified in order to be accepted as evidence of the truth of any facts asserted therein, even if only at the level of hearsay evidence.

There has been no attempt at such authentication or identification and Petitioner has not stipulated to the authenticity or identification of the documents therein. It appears from the record that the documents were submitted by a competitor of Petitioner's in an attempt to defeat Petitioner's competitive Application. Such, by itself, is not enough to establish the fact of the matters asserted in the documents.

42. Respondent asserts in its argument that an Agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. That certainly is a basic premise of administrative law in Florida. However, it appears that Respondent misunderstands this statement of the law. By agency interpretation of its own rules, the courts are referring to some form of final agency decision by which it has properly, formally and legally interpreted and articulated that interpretation of its rules. The most often used example of that is a final order of an agency setting forth an interpretation of one of its rules. In this case, to the extent Florida Housing has articulated an interpretation of its own rules in a final order, the principle of law that interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation will be applied. If, however, what Respondent intends as Florida Housing's interpretation of its own rules is the oral or written interpretation of its rules articulated by counsel or staff but not articulated in final order or some other formal action of Florida

Housing the general principle that an agency's interpretation of its own rules will be upheld unless it is clearly erroneous or amounts to an unreasonable interpretation does not and will not apply in this proceeding.

43. The parties have stipulated in Joint Exhibit 1 at paragraph 15 that the sole reason asserted by Florida Housing for failure of a threshold by Petitioner is that ". . . the Development site was not appropriately zoned for the intended use as of the Application Deadline." No other reason has been or can now be asserted by Florida Housing for any alleged failure of Petitioner to meet its requirements. Part III.C.4 of the Universal Application Instructions, rules of Respondent, specifically state in pertinent part that "The verification must demonstrate that the zoning designation for the Development site was effective on or before the Application Deadline." Petitioner's Cure embodied in its Exhibit 32 to the Application, Joint Exhibit 4 in this proceeding, clearly states that "on or before 03/30/04, the zoning designation for the referenced Development site is C-3 CUP sic". There is no dispute in this matter that March 31, 2004 is the Application Deadline. Therefore, Petitioner's Exhibit 32 to its Application (Joint Exhibit 4) clearly demonstrates that the zoning designation for the Development site was effective on or before the Application Deadline.

44. In its Proposed Recommended Order, Respondent argues that the verification form is required to demonstrate that the proposed Development site is

appropriately zoned and consistent with local land use regulations regarding density and intended use. Respondent misses the point. It has stipulated that in its final Scoring Summary, it did not assert that Applicant failed to demonstrate consistency with local land use regulations regarding density and intended use. It stipulated that the alleged failure had to do with the timeliness of zoning. It stipulated that its Scoring Summary explained that the alleged failure of the Applicant was because the form was executed on May 28, 2004, indicating that the Development site was zoned C-3 CUP on or before March 30, 2004 but evidence provided in a NOAD indicated that the site was not appropriately zoned for the intended use until the approval of the conditional use permit was granted on May 20, 2004. Therefore, according to Respondent in its Stipulation, the Development site was not appropriately zoned for the intended use as of the Application Deadline. Joint Exhibit 1, paragraph 15. If Florida Housing had intended to find some flaw with the verification concerning consistency of local land use regulations regarding density and intended use, it should not have stated in the last sentence of the final Scoring Summary, that "Therefore, the Development site was not appropriately zoned for the intended use as of the Application Deadline". As stated above, Joint Exhibit 4 shows that the site was appropriately zoned for the intended use as of the Application Deadline.

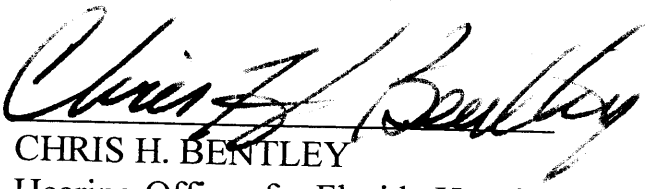
No undisputed admissible evidence was presented in this proceeding to establish that the allegations with regard to the date of zoning set forth in the NOAD submitted by a competitor were true and correct. Indeed, Exhibit B to Joint Exhibit 5, not admitted in this proceeding, which purports to be the minutes a regular meeting of the Planning Commission for the City of Leesburg on May 20, 2004, contained nothing that would suggest that the site was not zoned C3 as of the Application Deadline. The foregoing observation is offered for informational purposes only since Joint Exhibit 5 was not admitted as evidence. The observation merely suggests that even if it had been admitted as evidence it does not contract the verification by the City of Leesburg that the appropriate zoning was in place as of the Application Deadline, March 31, 2004.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED:

1. That a Final Order be entered determining that Petitioner Harris Cove Partners, Ltd.'s Application has met the threshold requirement of zoning set forth in Part III.C.4 of the Universal Application Instructions.

Respectfully submitted and entered this 20th day of September, 2004.



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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 Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on September 25, 2004. 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.