STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MBCDC: VILLA MARIA, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

FHFC CASE NO.: 2005-005UC
Application No. 2005-089S

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on August 25, 2005. On or before February 16, 2005, Petitioner, MBCDC: Villa Maria LLC ("Petitioner") submitted its 2005 Universal Cycle Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for funding/allocation from the State Apartment Incentive Loan Program ("SAIL"). Petitioner timely filed its Petition for Informal Administrative Proceeding, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. An informal hearing was held in this case on July 6, 2005, in Tallahassee, Florida, before Florida Housing's designated 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

rejected for failure to meet the threshold requirements for permanent financing for its proposed project, pursuant to Rule 67-48.004(13), Florida Administrative Code.

RULING ON THE RECOMMENDED ORDER

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

ORDER

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

1. The "Written Argument" filed by the Petitioner is hereby **REJECTED**.

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

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

IT IS HEREBY ORDERED that Petitioner's Application is hereby rejected for failure to meet the threshold requirements for permanent financing for its proposed project, pursuant to Rule 67-48.004(13), Florida Administrative Code.

DONE and ORDERED this 25th day of August, 2005.

FLORIDA HOUSING FINANCE CORPORATION

By: 

Copies to:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
337 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Stephen P. Auger
Deputy Development Officer
Florida Housing Finance Corporation
337 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Warren H. Husband, Esquire
Florida Bar No. 0979899
Metz, Hauser, Husband & Daughton, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909

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.

STATE OF FLORIDA
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_____/

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 July 6, 2005.

APPEARANCES

For Petitioner, MBCDC: Villa Maria LLC:	Warren H. Husband, Esquire Metz, Hauser, Husband & Daughton P. O. Box 10909

For Respondent, Florida Housing Finance Corporation:

Hugh R. Brown
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 for determination in this proceeding is whether Petitioner's application met the threshold requirements regarding the provision of adequate funding commitments to cover the total cost of its proposed project. More specifically, the issue is whether Petitioner provided sufficient documentation of a source of funding commitments during the permanent phase, as opposed to the construction phase, of its project.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 5. Joint Exhibit 1 is a Prehearing Stipulation containing Stipulated Facts. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with regard to the

Order.

Subsequent to the hearing, a transcript was filed and 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. Along with other competing applicants, Petitioner submitted its Application No. 2005-089S for a $900,000 SAIL loan to help finance its project – the acquisition and rehabilitation of a 34-unit garden-style apartment building located in Miami Beach, Florida.

2. Among the materials submitted by Petitioner during the time allowed for applicants to "cure" any items for which less than the maximum score was initially obtained, Petitioner submitted documentation regarding two sources of financing and a revised Pro Forma detailing the total cost of the project and the sources of financing to fund those costs. Petitioner submitted a recorded Mortgage and Security Agreement and a Promissory Note from Neighborhood Development, Ltd., in the

3. The closed Neighborhood Development, Ltd. first-mortgage loan was included in Petitioner Villa Maria's revised Pro Forma as a source of funds during both the construction phase of the project and the permanent, or post-construction, phase of the project. (Joint Exhibit 3)

4. Petitioner also submitted a loan commitment letter from Plus International Bank in the principal amount of $820,000. The Bank refers to that $820,000 loan as the "facility." The terms and conditions of that loan commitment include a section entitled "AMOUNT OF FACILITY AND PURPOSE." After describing the amount at $820,000, the commitment letter states:

> Funds drawn on the Facility shall be used solely by the Borrower to finance the rehab of the 34-unit property located at 2800 Collins Avenue in Miami Beach, known as "Villa Maria".

The closing date of that loan is no later than December 31, 2005. The term of the Plus International Bank loan is for 18 months, with an option to extend for an additional 12 months. The optional 12-month extension provision reads, in part, as follows:

> Upon prior request of Borrower, and provided that Borrower is in full compliance with all provisions of the Loan Documents and performances required, the Lender

The terms of the loan also include an origination fee of 1.00% flat ($8,200.00), payable at the time of execution of the loan documents, and, if a 12-month extension is approved, a renewal fee in the amount of 1.00% ($8,200.00) prior to the commencement of the renewal term. (Joint Exhibit 4)

5. The $820,000 Plus International Bank loan was included in Petitioner's revised Pro Forma as a source of funds during both the construction and the permanent phases of the project. Petitioner also listed on its revised Pro Forma the sum of $8,200 as "permanent loan origination fee." (Joint Exhibit 3)

6. The parties stipulated at the hearing that Petitioner's application states that the "placed in service" date for this project is June 30, 2007.

7. Respondent awarded Petitioner's application the maximum score of 66 points, as well as the 7.25 tiebreaker proximity points. However, Petitioner's application was deemed to have failed to meet threshold requirements due to a financing shortfall during the permanent or post-construction phase of the project. Specifically, in its final scoring, Responded stated:

> The Applicant listed as a permanent financing source a $820,000 loan from Plus International Bank. The commitment for the loan though states: " ... shall be used soley [sic] by the Borrower to finance the rehab of the 34-

> construction financing source and not a permanent financing source.

(Joint Exhibit 2)

8. The Universal Application Instructions (UA1016 (Rev. 2-05)), at page 77, contain the following requirements with regard to funding commitments:

> Provide documentation of all commitments from both the construction and the permanent lender(s), the syndicator or other sources of funding. The commitments must state whether they are for construction financing, permanent financing, or both.

9. Among the threshold requirements for all applicants, as stated on page 83 of the Universal Application Instructions (UA 1016 (Rev. 2-05)), are that an applicant's financing documents reflect that all commitments be considered firm and that total sources equal or exceed uses.

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 informal proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation

The sole issue in this proceeding is whether Petitioner's loan commitment from Plus International Bank in the principal amount of $820,000 qualifies as "permanent" financing for Petitioner's proposed project. The Respondent has taken the position that the $820,000 loan commitment cannot be considered as a source of "permanent," as opposed to "construction," financing because the terms of the commitment provide that the funds are to be used "solely . . . to finance the rehab of the 34-unit property" and the term of the commitment is for only 18 months, which, in this case, terminates on the date selected by the applicant as the "placed in service" date -- June 30, 2007. Respondent further takes the position that the terms of the commitment relating to an option to extend for an additional 12 months is not a firm commitment because the approval of such an option is at the sole discretion of the lender. In support of its position, Respondent relies upon language contained within its Universal Application Instructions, UA1016 (Rev. 2-05), as set forth in Paragraphs 8 and 9 of the Findings of Fact above.

The Universal Application Package, or UA 1016 (Rev. 2-05), which includes its forms and instructions, is adopted as a rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Unfortunately, neither the Universal Application instructions

The Instructions and forms do, however, require that an applicant demonstrate "firm" sources of both construction and permanent financing. They further require that financing commitments "state whether they are for construction financing, permanent financing, or both." In reality, it does not appear that Respondent strictly enforces the literal meaning of the words of this latter requirement, but instead examines the documentation provided by an applicant to determine whether firm commitments have been provided for both construction and permanent financing, as such financing is represented on the applicant's Pro Forma.

Petitioner offers three arguments to support its position that the Plus International Bank loan commitment's statement that the $820,000 "shall be used solely by the Borrower to finance the rehab of the 34-unit property" is not fatal to a consideration of that loan as a source of financing during the permanent phase of its project. First, Petitioner notes that its development has a "placed in service" date of June 30, 2007 and, thus, the construction phase ends on that date and the permanent phase begins. The Plus Bank loan term is 18 months, with a 12-month optional extension. Using the closing date of December 31, 2005, Petitioner contends that the term of that loan would not end until June 30, 2008 – one full year after completion

loan documents, Respondent may not presume that Petitioner will not fulfill its loan obligations so as to prevent a 12-month extension of its terms. Second, Petitioner contends that the $8,200 renewal fee for the 12-month extension was reflected on its revised Pro Forma.

Petitioner's arguments fail primarily because the 12-month extension is specifically conditioned, not only upon Petitioner's full compliance with the terms of the loan documents, but also upon the sole discretion of the Lender. The terms of the loan specifically state that "the Lender will consider a twelve month extension . . . with Lender's approval to be at its discretion." Accordingly, there is no firm commitment that a 12-month extension will be granted so as to extend the financing beyond the construction phase of Petitioner's project. The undersigned notes that the Universal Application Instructions clearly state, at page 77, that "any commitment subject to committee approval will not be considered a firm commitment." While the Plus Bank has firmly committed to a loan of $820,000 for a period of 18 months, which happens to coincide with the end of construction of this project, it has not firmly committed to an extension of that loan period into the permanent phase of this project.

is also the designated origination fee for the initial 18-month $820,000 loan. And, in fact, Petitioner's Pro Forma includes this $8,200 fee in the space entitled "permanent loan origination fee" and not as a "renewal fee."

Finally, Petitioner argues that Respondent's treatment of the Plus International Bank loan commitment is inconsistent with Respondent's acceptance of the Neighborhood Development loan commitment. The latter was considered by Respondent as a source of permanent financing even though it has a maturity date ending several months prior to the June 30, 2007 "placed in service" date.

Even if it is assumed that the end of the construction phase of a project does not occur until the date listed by an applicant as the "placed in service" date, there are important distinctions between the two loan commitments. The Neighborhood Development commitment is evidenced by a closed, recorded Mortgage and Security Agreement and a Promissory Note, which is a more reliable source than a mere commitment to provide funding. Moreover, and equally as important, there is nothing within the Neighborhood Development documentation which limits the use of the $1.4 million loan for construction purposes only.

Even if Respondent erred in accepting the Neighborhood Development closed

financing was unreasonable or incorrect. Petitioner certainly may not claim prejudice by a claimed erroneous or inconsistent acceptance of the Neighborhood financing commitment as a source of permanent financing. A rejection of the $1.4 million Neighborhood financing would simply result in a greater permanent financing shortfall. The documentation concerning both the Neighborhood and the Plus International Bank financing were submitted by Petitioner at the same time as a part of the "cure" process. Petitioner could not have relied upon or been misled by the Respondent's treatment of the Neighborhood financing as a basis for its submittal of the Plus Bank financing documentation because it learned of the Respondent's treatment of both financing sources at the same time. Moreover, given the application process prescribed by rule, there was no further opportunity for Petitioner to "cure" either of these submissions.

In summary, it is concluded that Respondent reasonably and properly interpreted its rules when it determined that the Plus International Bank loan commitment did not qualify as a source of permanent financing. Accordingly, Petitioner's application demonstrates a permanent financing shortfall, and thereby fails to meet threshold requirements.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's application be rejected for failure to meet the threshold requirements for permanent financing for its proposed project, pursuant to Rule 67-48.004(13), Florida Administrative Code.

Respectfully submitted this 9th day of August, 2005.

Diane D. Tremor

DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Copies furnished to:

Maelene Tyson, Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

Hugh R. Brown
Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000

Warren H. Husband, Esquire
Metz, Hauser, Husband & Daughton
P. O. Box 10909
Tallahassee, FL 32302-2909

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 August 16, 2005. 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.

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_____/

PREHEARING STIPULATION

Petitioner, MBCDC: Villa Maria, LLC ("Villa Maria") and Respondent, Florida Housing Finance Corporation ("Florida Housing"), by and through undersigned counsel, submit this Prehearing Stipulation for purposes of expediting the informal hearing scheduled for 2:00 pm, July 6, 2005, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

STIPULATED FACTS

1. Villa Maria is a Florida limited liability corporation with its address at 945 Pennsylvania Avenue, Miami Beach, Florida 33139, and is in the business of providing affordable rental housing units.

refinancing housing and related facilities in the State of Florida. (Section 420.504, Fla. Stat.; Rule 67-48, Fla. Admin. Code).

3. The State of Florida provides financing through its State Apartment Incentive Loan ("SAIL") program to encourage private developers to build and operate affordable rental housing for low-income Florida residents. Pursuant to section 420.5087, Florida Statutes, the SAIL program is administered by Florida Housing.

4. The source of funds for loans through the SAIL program is an annual allocation of documentary stamp tax revenue. These funds are the source of below-market-rate loans to applicants that reduce the amount of income required for debt service on the development, making it possible to operate the project at rents that are affordable to low-income tenants.

5. Because Florida Housing's available pool of SAIL funds each year is limited, qualified projects must compete for this funding. To assess the relative merits of proposed projects, Florida Housing has established a competitive application process pursuant to Chapter 67-48, F.A.C. Specifically, Florida Housing's application process for 2005, as set forth in Rules 67-48.002-.005, F.A.C., involves the following:

a. the publication and adoption by rule of an application package;

b. the completion and submission of applications by developers;

c. Florida Housing's preliminary scoring of applications;

d. an initial round of administrative challenges in which an applicant may take issue with Florida Housing's scoring of another application by filing a Notice of Possible Scoring Error

f. an opportunity for the applicant to submit additional materials to Florida Housing to "cure" any items for which the applicant received less than the maximum score;

g. a second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant's cure materials by filing a Notice of Alleged Deficiency ("NOAD");

h. Florida Housing's consideration of the NOAD's submitted, with notice to applicants of any resulting change in their scores;

i. an opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing's evaluation of any item for which the applicant received less than the maximum score; and

j. final scores, ranking, and allocation of SAIL (or other) funding to successful applicants as well as those who successfully appeal through the adoption of final orders.

6. On or about February 16, 2005, Villa Maria and others submitted applications for financing in Florida Housing's 2005 funding cycle. Villa Maria (Application #2005-089S) applied for a $900,000 SAIL loan to help finance its project, the acquisition and rehabilitation of a 34-unit garden-style apartment building in Miami Beach, Florida. All of these units are dedicated to housing families earning 60% or less of the area median income.

7. Villa Maria received notice of Florida Housing's initial scoring of the Application on March 21, 2005.

8. After the conclusion of the NOPSE process, Villa Maria submitted its cure materials to Florida Housing on April 26, 2005, to correct deficiencies in its preliminary

April 26, 2005, in the principal amount of $820,000. Villa Maria also submitted a revised Pro Forma for the Application, which details the total cost of the project and the sources of financing to fund those costs. This second-mortgage loan from Plus Bank was included in Villa Maria's revised Pro Forma as a source of funds during both the construction phase of the project and the "permanent," or post-construction, phase of the project.

9. At the conclusion of the NOPSE and NOAD processes, Florida Housing awarded the Villa Maria Application the maximum score of 66 points, as well as the 7.25 tiebreaker proximity points to which it was entitled. At the same time, however, Florida Housing rejected the Villa Maria Application for an alleged financing shortfall during the "permanent," i.e., post-construction, phase of the project. In doing so, Florida Housing stated its specific grounds for the rejection as follows:

> The Applicant listed as a permanent financing source an $820,000 loan from Plus International Bank. The commitment for the loan though states: "...shall be used soley [sic] by the Borrower to finance the rehab of the 34-unit property..." and further states that the term is for 18 months with an option to extend for an additional twelve months. As such, the commitment was only counted as a construction financing source and not a permanent financing source.

EXHIBITS

The parties offer the following joint exhibits into evidence. And stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

Exhibit J-1: This Prehearing Stipulation.

Exhibit J-2: Scoring summaries for Application #2005-089S (Villa Maria) dated March 17, 2005, April 3, 2005, and May 25, 2005 (composite).

Exhibit J-3: A revised Pro Forma submitted by Villa Maria as part of their cure.

Exhibit J-4: A loan commitment letter from Plus International Bank ("Plus Bank"), dated April 26, 2005, in the principal amount of $820,000, submitted by Villa Maria as part of their cure.

Exhibit J-5: A Mortgage and Security Agreement and Promissory Note evidencing a loan in the amount of $1,400,000 from Neighborhood Development, Ltd.

The parties also request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application form and Instructions (Form UA1016 Rev. 2-05).

Respectfully submitted this 6th day of July, 2005.

By: _____
Warren H. Husband

By: _____

Hugh R. Brown
Florida Bar No. 0003484
Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street
Suite 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Facsimile: (850) 414-6548