

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

**FINLAY INTERESTS 35, LTD.,**

**Petitioner,**

**v.**

**FLORIDA HOUSING FINANCE  
CORPORATION,**

**Respondent.**

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**FHFC CASE NO. 2005-019UC  
Application No. 2005-090CS**

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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 15, 2005.

**APPEARANCES**

For Petitioner, Finlay Interests  
35, Ltd.:

Michael P. Donaldson, Esquire  
Carlton Fields, P.A.  
P. O. Drawer 190  
Tallahassee, FL 33202-0190

For Respondent, Florida Housing  
Finance Corporation:

Matthew A. Sirmans, Esquire  
Assistant General Counsel  
Florida Housing Finance Corporation  
227 North Bronough Street, Suite 5000  
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### **STATEMENT OF THE ISSUES**

There are no disputed issues of material fact. The three issues in this proceeding are (1) whether Petitioner's application met the threshold requirements regarding its general contractor or principal of general contractor; (2) whether Petitioner's application met the threshold requirements regarding site control; and (3) whether Petitioner is entitled to tie-breaker points for the proximity of the proposed project to a grocery store, a public school and/or a pharmacy.

### **PRELIMINARY STATEMENT**

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9. Petitioner's Exhibits 1, 2 and 3 were also received into evidence, and official recognition was taken of a Certificate of Status regarding "Finlay Interests 35 LLC" issued by the Florida Department of State. Joint Exhibit 1 is a Joint Stipulation of Facts and Exhibits. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with

regard to the issues in dispute. The Joint Stipulation of Facts and Exhibits is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted their 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, Finlay Interests 35, Ltd., submitted its Application Number 2005-090CS for housing credits and the award of funds from the State Apartment Incentive Loan (SAIL) program in connection with a proposed 96-unit apartment complex in Okeechobee County, Florida.

2. As a result of final scoring of Petitioner's application, Petitioner was awarded 66 points and 3.75 proximity tie-breaker points, but its application was rejected for failure to meet threshold requirements regarding its general contractor and site control. (Joint Exhibit 5)

### **General Contractor Issue**

3. In its initial application, Petitioner submitted, as Exhibit 13, a General

Contractor or Principal of General Contractor Certification Form. This form requires a signed certification by the general contractor stating, in part, that he or she is a General Contractor “licensed in the State of Florida with the requisite skills, experience and credit worthiness” and that he or she has “been the General Contractor on at least two completed developments” of similar category and type, as evidenced by an accompanying prior experience chart. The form submitted by Petitioner listed “Finlay Construction, LLC” as the name of the General Contractor, “Christopher C. Finlay” as the name of principal of General Contractor, CGC062870 as the Florida License Number and contained the signature of Christopher C. Finlay. Attached was a “chart of Finlay Construction, LLC’s prior experience in the industry.” (Joint Exhibit 2(a))

4. A Notice of Potential Scoring Error (NOPSE) revealed that License Number CGC062870 is assigned to a Bruce James Moffat doing business as Finlay Properties, Inc. (Joint Exhibit 6) Respondent concluded that Petitioner’s application failed to meet threshold requirements for General Contractor, giving the following two reasons in its Scoring Summary dated April 14, 2005:

The person that signs the General Contractor or Principal of General Contractor Certification form must be the same person that the Florida license number stated on the form was assigned to. The Applicant submitted a General Contractor or Principal of General Contractor Certification form with a Florida license number that is assigned to Bruce James Moffat, but the form is signed by Christopher C. Finlay. The form has the incorrect signatory for the Florida license number provided

and, therefore, is not acceptable.

The General Contractor's Prior Experience Chart provided is for Finlay Construction, LLC, not for Bruce James Moffat, DBA Finlay Properties, Inc. whose General Contractor's license number was provided on the General Contractor Certification Form.

(Joint Exhibit 4)

5. In response, Petitioner submitted a "cure" containing a new General Contractor or Principal of General Contractor Certification Form and an attached chart entitled "Tax Credit Projects." The Certification Form lists the name of the general contractor as "Summit Contractors, Inc.," and leaves blank the space entitled "Name of principal of General Contractor, if applicable." The Florida License Number provided on the form is "CGC001271," and the person who signed the certification as "General Contractor's Signature" is Paul Sowders. (Joint Exhibit 7(a)) The chart entitled "Tax Credit Projects" which was attached to this form contains a date of April 18, 2005, but bears no additional identifying information. It does indicate a facsimile transmission stamp containing the name of "Summit Contractors." (Joint Exhibit 7(a))

6. A Notice of Alleged Deficiency (NOAD) filed by a competing applicant provided information that the identified license number (CGC 001271) contained on the form provided in Petitioner's "cure" belongs to Robert Louis Fleckenstein, doing business as Summit Contractors Inc. (Joint Exhibit 8)

7. As a part of its “cure,” Petitioner provided no additional information regarding Robert Louis Fleckenstein or Paul Sowders.

8. In its final scoring, the Respondent again concluded that Petitioner failed to meet threshold requirements regarding its general contractor, and provided two explanations for its conclusion:

The person that signs the General Contractor or Principal of General Contractor Certification form must be the same person that the Florida license number stated on the form was assigned to. As a cure for Item 10T, the Applicant submitted a General Contractor or Principal of General Contractor certification form with a Florida license number that is assigned to Robert Louis Fleckenstein, but the form is signed by Paul Sowders. The form has the incorrect signatory for the Florida license number provided and, therefore, is not acceptable.

The General Contractor Prior Experience Chart, provided with the Applicant’s cure, represents the experience of Paul Sowders, the person who signed the General Contractor or Principal Contractor Certification Form. The requirement is that the General Contractor Prior Experience Chart represent the experience of the licensed General Contractor that signed the General Contractor or Principal Contractor Certification Form. As the Florida license number provided on the General Contractor Certification form was not assigned to Paul Sowders, it cannot be determined that the Prior Experience Chart provided reflects the experience of a properly licensed General Contractor. As such, it cannot be accepted.

(Joint Exhibit 5)

9. During the informal hearing, Petitioner presented a certification from the State Department of Business and Professional Regulation stating that Summit Contractors

Inc. has a Certificate of Authority as a Contractor Qualified Business in Florida, that its license number is QB 0018242, and that Robert L. Fleckenstein, CGC 001271, is the primary qualifier for this company. (Petitioner's Exhibit 1) Also, during the informal hearing, Petitioner presented a 2005 Annual Report form filed with the Secretary of State by Summit Contractors, Inc., indicating, in part, under the column entitled "officers and directors" that Paul D. Sowders is "COO" for Summit Contractors, Inc. (Petitioner's Exhibit 2) Neither of these documents were included within Petitioner's "cure" submittals.

### **Site Control Issue**

10. The Universal Application Instructions, starting on page 25, requires Applicants to demonstrate, as a threshold requirement, site control by providing specified documentation. (Joint Exhibit 9(b))

11. In its initial application, Petitioner provided an "Assignment and Assumption of Agreement of Sale" entered into on February 16, 2005, between Finlay Acquisitions, LLC., the assignor, and Finlay Interests 35, Ltd., the assignee. Prior to the signature line for the assignee, the assignee is identified as "FINLAY INTERESTS 35, Ltd., a Florida limited partnership, followed by a listing of three other entities preceded by the word "By." One of the three entities listed is "Finlay Interests 35,

LLC, a Florida limited liability company, its general partner.” ((Joint Exhibit 2(b))

The Organizational Structure for the applicant, Finlay Interests 35, Ltd., shows no entity named “Finlay Interests 35, LLC,” though it does show an entity named “Finlay Interests GP 35, LLC.” (Joint Exhibit 2(c)) The “Assignment and Assumption of Agreement of Sale” purports to assign a Purchase and Sale Agreement dated February 16, 2005 between Frank Altobello, Trustee and Finlay Acquisitions, LLC. The “Agreement for Purchase and Sale” between Altobello and Finlay Acquisitions, LLC, as submitted in Petitioner’s initial application, is incomplete, undated and unsigned. (Joint Exhibit 2(b))

12. Respondent concluded that Petitioner’s application failed threshold requirements for site control, stating two reasons. Both reasons related to the incomplete Agreement for Purchase and Sale between Frank Altobello, Trustee and Finlay Acquisitions, LLC, which was the subject of the Assignment and Assumption of Agreement of Sale. (Joint Exhibits 3 and 4)

13. As a “cure” concerning site control, the Petitioner submitted a replacement “Assignment and Assumption of Agreement of Sale” dated April 15, 2005, referencing an Agreement for Purchase and Sale “dated April 15, 2005.” This Assignment was executed in the same manner as the Assignment submitted with Petitioner’s initial application. As pertinent herein, the Assignment contains an identification and



signature line for the assignee Finlay Interests 35, Ltd., which includes a line reading “BY: “Finlay Interests 35 LLC.” (Joint Exhibit 7(b)) The Agreement for Purchase and Sale submitted with the “cure” states that its “effective date” “shall be the date upon which the last party to execute this Agreement has executed this Agreement.” The signature page on that document states that “the parties have executed this Agreement as of the day and year last below written.” That signature page, in addition to signature lines for the seller and the buyer, also contains an Escrow Agent acknowledgment below the signature lines for the seller and the buyer. The Petitioner’s “cure” Agreement for Purchase and Sale shows that it was signed by the Seller on February 15, 2005, by the buyer on February 2 (or perhaps February 5) 2005, and by the escrow agent on April 15, 2005. (Joint Exhibit 7(b))

14. In its final scoring, Respondent determined that Petitioner failed to meet threshold requirements for site control, stating as its reasons:

The Applicant provided a copy of an Assignment and Assumption of Agreement of Sale (Assignment) dated 15<sup>th</sup> day of April, 2005 in an attempt to cure the deficiency identified in Item 2T. The Assignment provided is not properly executed. Finlay Interest 35, LLC executed the Assignment as the general partner of the Applicant (i.e., the limited partnership Finlay Interests 35, Ltd.). However, the organizational structure of the Applicant noted the managing general partner as Finlay Interests GP 35, Ltd. With the Agreement for Purchase and Sale not being in the Applicant’s name and the Assignment not being acceptable, the Applicant does not have site control.

The Assignment and Assumption of Agreement of Sale references an Agreement for Purchase and Sale dated April 15, 2005. However, the Agreement for Purchase and Sale provided by the Applicant has an effective date of February 15, 2005. No Agreement for Purchase and Sale with an effective date of April 15, 2005 has been provided.

### **Proximity Tie-Breaker Points**

15. The Universal Application Instructions, beginning at page 12, allow an applicant to be awarded tie-breaker points for the proximity of its project to certain eligible services. In order to be entitled to such proximity tie-breaker points, applicants are required to submit a Surveyor Certification form designating the eligible service and containing the latitude and longitude coordinates of the designated service. For a grocery store, public school, medical facility or pharmacy, those coordinates must represent a point that is “on the doorway threshold of an exterior entrance that provides direct public access to the building where the service is located.” (Joint Exhibit 9(c), at page 16). This same instruction is contained on the Surveyor Certification form, which is Exhibit 25 of the application. (Joint Exhibit 2(d)) Along with the completed Surveyor Certification form, Applicants are also required to provide a sketch depicting the location of the exterior public entrance used for the latitude and longitude coordinates for each service. (Joint Exhibit 9(c), page 16)

16. In its initial application, Petitioner submitted a blank Surveyor Certification

form. (Joint Exhibit 2(d))

17. In preliminary scoring, Respondent awarded Petitioner no tie-breaker points for proximity to a grocery store, public school or a medical facility on the ground that Petitioner did not provide a completed Surveyor Certification Form or sketches. (Joint Exhibits 3 and 4)

18. In response to that scoring, Petitioner submitted “cure” materials containing a Surveyor Certification form designating a grocery store, a public school and a pharmacy, and providing the latitude and longitude coordinates for each such service. Petitioner also submitted a sketch for each designated service. The sketch for the grocery store indicates that the GPS for the coordinates is located 62 feet east of the entrance. The sketch for the public school indicated that the GPS measurement was taken 25 feet east of the entrance. The sketch for the pharmacy indicates that the GPS measurement was taken 40 feet south of the entrance. (Joint Exhibit 7(c))

19. A NOAD filed by a competing applicant contained an affidavit from a licensed professional surveyor stating that the coordinates listed in the Petitioner’s Surveyor Certification form may not represent points on the doorway thresholds of the grocery store, the public school and the pharmacy. That affidavit attached sketches showing a difference, although slight, between the seconds measurements of the coordinates listed by Petitioner’s surveyor at the locations indicated on that

surveyor's sketches and measurements taken at the doorway threshold of the services chosen by Petitioner for tie-breaker points. (Joint Exhibit 8)

20. In its final scoring, Respondent awarded Petitioner no proximity tie-breaker points for its proximity to a grocery store, a public school or a pharmacy. In explanation for each such service, Responded stated that Applicants are to provide the latitude/longitude coordinates for an exterior public entrance to the service, and the sketch provided shows a point that is not on a public entrance doorway threshold. (Joint Exhibit 5)

### **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 proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

There are three issues in this proceeding. The first is whether Petitioner's application met the threshold requirement regarding its development team. More specifically, the issue here is whether Petitioner properly completed Exhibit 13 of the application (the General Contractor or Principal of General Contractor Certification

Form) and a Prior Experience Chart showing the experience of the general contractor or principal of general contractor. The second issue is whether Petitioner's application met the threshold requirement of demonstrating site control. Specifically, this issue is whether the Assignment and Assumption of Agreement of Sale and the Purchase and Sale Agreement submitted by Petitioner in its "cure" satisfies the evidence of site control required by Respondent's rules. And, the third issue is whether Petitioner is entitled to an award of proximity tie-breaker points for a grocery store, a public school and/or a pharmacy. That issue is more specifically stated as whether the latitude/longitude coordinates provided by Petitioner for each of those services represent a point which is "on the doorway threshold of an exterior entrance that provides direct public access to the building," as required by Respondent's rules.

The Universal Application Package, or UA 1016 (Rev. 2-05), which includes both its forms and instructions, is adopted as a rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Accordingly, along with Respondent's other duly adopted rules, both the Respondent and the Petitioner are bound by their terms.

### **General Contractor Issue**

The Respondent's Application Instructions, at page 7, require, as a threshold item, the completion of a General Contractor or Principal of General Contractor

Certification Form (Exhibit 13) and a prior experience chart showing that the general contractor or its principal have experience in the construction of at least two completed similar developments. The Certification Form requires the designation of a Florida license number, and further requires the signatory to certify, among other things, that he/she is a general contractor licensed in the State of Florida and has the requisite skill, experience and credit worthiness to successfully produce the units proposed and has completed at least two similar developments, as evidence by an accompanying prior experience chart.

In both its initial application and its “cure” documents, Petitioner provided a General Contractor or Principal of General Contractor Certification form (Exhibit 13) wherein the Florida contractor’s license number designated on the form did not match the name of the person who signed the certification. It is concluded that the Respondent properly determined that neither the Certification form nor the Prior Experience Chart submitted in Petitioner’s “cure” documents were acceptable to meet threshold requirements.

Due to the mismatch between the license number and the signatory who provided the certification, Respondent was unable to determine who Petitioner was naming as its general contractor or whose prior experience was being provided. Moreover, Petitioner was unable to determine whether the signatory of the certification

on the “cure” form, Paul Sowders, was even a licensed general contractor eligible to sign that form.

Petitioner argues that, as indicated by the title of the Certification form itself, a “principal” of the general contractor may sign the form, and a principal includes an officer or director of the general contractor. There are several problems with this argument. The first is that the form contains a line with the words “Name of principal of General Contractor, if applicable.” This line was left blank on Petitioner’s “cure” Exhibit 13. There was no way for Respondent to determine that Paul Sowders was signing the document in the capacity of a “principal” of the general contractor. Petitioner’s Exhibit 2 offered at the hearing showing Paul D. Sowders as a COO of Summit Contractors, Inc., was not a part of Petitioner’s “cure” documentation. Moreover, Mr. Sowders provided certifications “as a licensed general contractor,” but the documentation provided by Petitioner allowed no verification of that fact. And, as Respondent correctly concluded, there was no way for Respondent to determine whether the untitled Prior Experience Chart pertained to Mr. Sowders, Mr. Fleckenstein (the person who holds the general contractor’s license designated on the form), or to Summit Contractors, Inc. The fact that such document bore a facsimile transmission stamp bearing the words “Summit Contractors” indicates nothing more than the fact that it was faxed from that office.

A reasonable construction of Florida law regarding general contractor requirements (Chapter 489, Florida Statutes), as well as the Respondent's Instructions and forms, which constitute rules, leads to the conclusion that the individual who should have signed the General Contractor or Principal of General Contractor Certification was Robert Fleckenstein, who holds the Florida general contractor's license identified on the form and who, as indicated by Petitioner's Exhibit 1 and Joint Exhibit 8, is the primary qualifier for Summit Contractors Inc. This reasonable interpretation of the pertinent law was made known to Petitioner as a result of preliminary scoring of its initial application, wherein Petitioner made the same error of providing a general contractor's Florida license number which did not correspond to the signatory of the Certification form.

### **Site Control Issue**

An applicant is required to demonstrate its ability to proceed with its proposed project, including evidence of site control. The Application Instructions, at page 25, allows a demonstration of site control through the provision of a qualified contract. In that instance, the Instructions provide that "the buyer MUST be the Applicant unless a fully executed assignment of the qualified contract which assigns all of the buyer's rights, title and interests in the qualified contract to the Applicant, is



provided.”

Here, Petitioner submitted an Assignment and Assumption of Agreement and Sale, with an attached Agreement for Purchase and Sale. These documents were rejected in preliminary scoring because the Agreement for Purchase and Sale was incomplete, unsigned and undated. As a “cure,” Petitioner submitted an updated Assignment and Assumption of Agreement, containing the same information on the signature lines as that appearing on the initially submitted Assignment, and a new and complete Agreement for Purchase and Sale. The Respondent rejected these documents because the signature line for the Assignee (the Applicant herein) included an entity which did not appear on its organization structure chart and because the Assignment referred to an Agreement for Purchase and Sale “dated April 15, 2005” whereas the “effective date” of that Agreement was February 15, 2005. The undersigned concludes that Respondent’s rejection of these documents was unreasonable for several reasons.

First, it is true that the signature line for the Assignee (the Applicant herein) does include an entity called “Findlay Interests 35, LLC,” while the Organizational Structure provided by Petitioner provides the name of the company as “Finlay Interests GP 35, LLC.” For two separate reasons, it is concluded that the omission of the letters “GP” from the name “Finlay Interests 35, LLC,” should not be deemed fatal to a finding of

compliance with the threshold requirement of site control. First, the name of the applicant in this case is “Finlay Interests 35, Ltd.,” a Florida limited partnership. That is the name listed on the Assignee signature line of the Assignment. Had that name been misspelled or misstated, that may have constituted grounds for rejection of the document since it would not be clear that the “applicant” was the recipient of the assignment. The other entities were apparently included, perhaps unnecessarily, only to show the entities that comprise Finlay Interests 35, Ltd., the applicant. It was clear that the Applicant, Finlay Interests 35, Ltd., is the entity to whom the Agreement for Purchase and Sale was assigned.

Second, the omission of the letters “GP” from the name of “Finlay Interests 35, LLC” occurred with the same exhibit submitted in Petitioner’s initial application. That omission was never stated by Respondent as a reason for rejecting Petitioner’s evidence of site control, nor was that omission raised by a NOPSE filed by a competing applicant. Rule 67-48.004, Florida Administrative Code, sets forth the specific application and selection procedures for developments. Subsection (9) of Rule 67-48.004, Florida Administrative Code, provides that applications may not be rejected or receive a point reduction as a result of any issue not previously identified in initial, preliminary and NOPSE scoring. Had Petitioner not included this same omission in its initial application, the inconsistency first created by the “cure” might

be justification for rejection or reduction of points. However, Petitioner's initial application did provide the same information. If notified of that typographical error, Petitioner could have corrected it in its "cure." Respondent is prohibited by Rule 67-48.004(9) from rejecting Petitioner's site control documents based upon identical language appearing in a prior document, to which no issue was raised.

Finally, as to the "date" of the Agreement for Purchase and Sale, as referenced in the Assignment and Assumption of Agreement of Sale, the Respondent did not reasonably interpret or apply its rules. The Assignment refers to an Agreement for Purchase and Sale "dated April 15, 2005." It does not state "effective date of April 15, 2005," nor is there any requirement in the Application Instructions or other rules that the only way to identify a contract is by a reference to an "effective date." The Agreement for Purchase and Sale was attached to the Assignment, and the "date" of April 15, 2005 is the date the escrow agent signed the acknowledgment form on the signature page of that document. The attached Agreement was accordingly easily identifiable and, since it was not identified in the Assignment by "effective" date, there should have been no source of confusion on the part of Respondent. Petitioner's documentary evidence regarding site control should not have been rejected by the Respondent.

### **Proximity Tie-Breaker Point Issue**

The Application Instructions and the Surveyor Certification Form, both of which constitute rules, clearly require that the latitude and longitude coordinates stated in the application “must represent a point that is on the doorway threshold of an exterior entrance that provides direct public access to the building where the service is located.” Petitioner presented no information regarding proximity points for a grocery store, public school or pharmacy in its initial application. Instead, documentation was first provided during the “cure” process. On their face, the sketches submitted by Petitioner demonstrate that the coordinates provided on the Surveyor Certification form were taken at a point some distance from the doorway thresholds of the entities chosen by Petitioner for the award of proximity tie-breaker points. For the grocery store, that distance was 62 feet east of the entrance. For the public school, the distance was 25 feet east of the entrance. For the pharmacy, that distance was 40 feet south of the entrance. Distances located between 25 and 62 feet from the entrance does not comply with the requirement that the measurements of latitude and longitude represent “a point that is on the doorway threshold” of an entrance providing direct public access to the building.

Petitioner argues that the requirement is that the measurement point be at the public entry “threshold,” and that this choice of wording leads to the conclusion that

a degree of flexibility exists. Petitioner urges that had Respondent intended that the point only be at the public entrance, it could have said so.

Contrary to Petitioner's argument, the words used in the Instructions and Surveyor Certification form are "on the doorway threshold," and not at the "public entry threshold." While the words "on the doorway threshold" are not further defined, common sense dictates that the measurement point should not be between 25 and 62 feet away from the door of the exterior entrance of the building. A "door" is defined in *Merriam-Webster's Collegiate Dictionary, Tenth Edition* as a "swinging or sliding barrier by which an entry is closed and opened," and a "doorway" is defined as "the opening that a door closes; *esp.* an entrance into a building or room." The same Dictionary defines "threshold" as "the plank, stone, or piece of timber that lies under a door" or a "gate, door." Here, the evidence demonstrates that the Petitioner's surveyor did not obtain his latitude/longitude coordinates at the door which provides the entrance to the grocery store, the elementary school or the pharmacy. Had Petitioner submitted its Surveyor Certification form and its sketches at the time of filing its initial application, these errors could possibly have been corrected during the "cure" period.

Finally, Petitioner argues that even if the proximity points (presumably, Petitioner means the measurement points) were moved a "few feet back" to the actual

public entrance, it does not appear that the distance between the proposed project and the listed service would change. It is the Applicant's responsibility to comply with the Application Instructions and forms, and Respondent is not required to "guess" what the appropriate latitude and longitude coordinates would be if appropriate measurements were taken. Moreover, the Respondent was presented an affidavit from a surveyor, via a competing applicant's NOAD, stating that the coordinates would indeed change, albeit slightly, if the correct measurement points were utilized.

The purpose of tie-breaker points is to provide a means of determining which applicant should rank higher when all threshold requirements are met and application scores are identical. Given the very competitive nature of the award process, it is reasonable and appropriate for Respondent to very strictly construe and apply the terms and conditions (i.e., the rules as set forth in the Instructions and forms) for an award of proximity tie-breaker points. While there may be some room for interpretation in many of the requirements set forth in the forms and Instructions, the requirements set forth for the award of tie-breaker points, particularly as to the measurement point of the latitude/longitude coordinates, are very specific and clear. Neither an applicant nor the Respondent can deviate from those requirements, absent a change made through the rulemaking process. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration 679 So.2d 1237 (Fla. 1<sup>st</sup> DCA 1996); rev.

denied, 695 So.2d 701 (Fla. 1997).

**RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered determining that Petitioner met threshold requirements relating to site control, but did not meet threshold requirements regarding its general contractor and is not entitled to tie-breaker points for proximity to a grocery store, a public school or a pharmacy.

Respectfully submitted and entered this 9<sup>th</sup> day of August, 2005.



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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 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.

**STATE OF FLORIDA**  
**FLORIDA HOUSING FINANCE CORPORATION**

FINLAY INTERESTS 35, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2005-019UC  
Application No. 2005-090CS

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**JOINT STIPULATION**  
**OF FACTS AND EXHIBITS**

The parties, FINLAY INTERESTS 35, LTD., (“Finlay”), and FLORIDA HOUSING FINANCE CORPORATION (“Florida Housing”), hereby stipulate for purposes of expediting the informal hearing scheduled for 2:00 p.m., July 15, 2005, in Tallahassee, Florida, and agree to the following facts and exhibits:

1. Finlay timely submitted an Application to Florida Housing for housing credits and the award of funds from the State Apartment Incentive Loan (“SAIL”) program in the 2005 Universal Cycle in connection with a proposed 96-unit apartment complex in Okeechobee County, Florida.

2. To encourage the development of low-income housing for families, Congress in 1987 created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar-for-dollar reduction of the holder’s federal tax liability,



which can be taken for up to ten years if the project satisfies the Internal Revenue Code's requirements for each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for construction of the development.

3. Florida Housing is a public corporation organized pursuant to section 420.504, Florida Statutes, to provide and promote financing of affordable housing and related facilities in Florida. Florida Housing is an agency as defined in section 120.52, Florida Statutes, and, therefore, is subject to the provisions of Chapter 120, Florida Statutes.

4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of low-income Tax Credits (also known as housing credits) in Florida. See section 420.5099, Florida Statutes. In this capacity, Florida Housing determines which entities will receive housing credits for financing the construction or rehabilitation of low-income housing.

5. Florida Housing administers the SAIL program which provides funds in the form of low interest mortgage loans to be utilized for the development of affordable rental housing. See section 420.5087, Florida Statutes.

6. Florida Housing is governed by a Board of Directors appointed by the Governor with the Secretary of the Department of Community Affairs sitting ex-officio.

7. Housing credits and SAIL funds are awarded by Florida Housing through a competitive application process. Applications for housing credits and SAIL funds are submitted to Florida Housing through a once-a-year process referred to as the Universal Cycle, which is governed by chapter 67-48, Florida Administrative Code.

8. The Universal Cycle is a single-application process for the housing credit program, the Florida Housing-administered SAIL program under section 420.5087, Florida Statutes, the Home Investment Partnership Program operated by Florida Housing pursuant to section 420.5089, Florida Statutes, and federal Housing and Urban Development regulations, and the Multifamily Mortgage Revenue Bond Program.

9. Florida Housing uses a scoring process for the award of housing credits and SAIL funds outlined in rule 67-48.004, Florida Administrative Code, and a Qualified Allocation Plan (QAP). The provisions of the QAP are adopted and incorporated by reference in rule 67-48.025, Florida Administrative Code.

10. Pursuant to the QAP, housing credits are apportioned among the most populated counties, medium populated counties, and least populated counties. The QAP also establishes various set-asides and special targeting goals.

11. 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 commercial fishing workers and farm workers, families, homeless persons, and elderly persons. See section 420.5087(1) and (3), Florida Statutes.

12. The 2005 Universal Cycle Application, adopted as Form UA1016 (Rev. 2-05) by rule 67-48.004(1)(a), Florida Administrative Code, consists of Parts I through V 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. Site plan approval, infrastructure availability, zoning approval and environmental site assessment are among the threshold items.

13. To provide a means of determining which applicant should rank higher when all threshold requirements are met and application scores are identical, Florida Housing awards "tie-breaker" points for proposed developments which are in close proximity to certain services, such as a Grocery Store, Public School, and Public Bus Stop or Metro-Rail Stop.

14. Preliminary scores for all applicants were released by Florida Housing on March 18, 2005. Following consideration of comments submitted by other applicants and further review of applications pursuant to rule 67-48.004(4) and (5), Florida Administrative Code, Florida Housing released Notice of Possible Scoring Error (NOPSE) scores on April 15, 2005. Applicants were then permitted to submit "cures" to problems identified in the preliminary and NOPSE scores. See rule 67-48.004(6), Florida Administrative Code. Applicants also were allowed to comment on the "cures" submitted by competitor applicants by filing Notices of Alleged Deficiencies (NOADs). See rule 67-48.004(7), Florida Administrative Code.

15. After review of cures and NOADs, final scores were released by Florida Housing on May 25, 2005, through a final scoring summary dated May 24, 2005. Each applicant received its own final scoring summary.

## GENERAL CONTRACTOR ISSUE

16. The Universal Application Instructions at Part II, B, 3, on page 7, requires Applicant to provide the completed General Contractor or Principal of General Contractor Certification Form behind a tab labeled Exhibit 13.

17. In response to this requirement, Finlay, in its initial application submitted (at Exhibit 13 to the application), a General Contractor or Principal of General Contractor Certification Form.

18. Florida Housing received a timely filed NOPSE that stated that Finlay failed to meet threshold requirements by improperly executing the General Contractor or Principal of General Contractor Certification Form.

19. After reviewing the NOPSE's filed against Finlay's Application, Florida Housing concluded that Finlay failed to meet threshold requirements for General Contractor, giving the following explanation in the Scoring Summary dated April 14, 2005:

The person that signs the General Contractor or Principal of General Contractor Certification form must be the same person that the Florida license number stated on the form was assigned to. The Applicant submitted a General Contractor or Principal of General Contractor Certification form with a Florida license number that is assigned to Bruce James Moffet, but the form is signed by Christopher C. Finlay. The form has the incorrect signatory for the Florida license number provided and, therefore is not acceptable.

20. In addition, Florida Housing concluded that Finlay failed to meet threshold requirements that the General Contractor or principal of General Contractor must demonstrate the requisite experience in the construction of housing developments, giving the following explanation in the Scoring Summary dated April 14, 2005:

The General Contractor's Prior Experience Chart provided is for Finlay Construction, LLC, not for Bruce James Moffet, DBA Finlay Properties, Inc., whose

General Contractor's license number was provided on the General Contractor Certification Form.

21. In response to Florida Housing's review and the specific comments found in the Scoring Summary, Finlay submitted as a cure a 2005 Cure Form, Brief Explanation form, General Contractor or Principal of General Contractor Certification Form and a Prior Experience Chart.

22. A NOAD was filed by a competing applicant which alleged that the "cure" submitted by Finlay should be rejected.

23. On May 24, 2005, Florida Housing issued its Final Scoring Summary which again concluded that Finlay had failed to meet threshold, and provided the following explanation:

The person that signs the General or Principal of General Contractor Certification form must be the same person that the Florida licensee number stated on the form was assigned to. As a cure for Item 10T, the Applicant submitted a General Contractor or Principal of General Contractor with a Florida license number that is assigned to Robert Louis Fleckenstein, but the form is signed by Paul Sowders. The form has the incorrect signatory for the Florida license number provided and, therefore, is not acceptable.

24. Florida Housing also concluded that Finlay failed to meet threshold for its cure for the Prior Experience Chart and provided the following explanation:

The General Contractor Prior Experience Chart provided with the Applicant's cure, represents the experience of Paul Sowders, the person who signed the General Contractor or Principal of General Contractor Certification Form. The requirement is that the General Contractor Prior Experience Chart represent the experience of the licensed General Contractor that signed the General Contractor or Principal of General Contractor Certification Form. As the Florida license number provided on the General Contractor Certification Form was not assigned to Paul Sowders, it cannot be determined that the Prior Experience Chart provided reflects the experience of a properly licensed General Contractor. As such, it cannot be accepted.

## SITE CONTROL ISSUE

25. The Universal Application Instructions at Part III, C, 2, starting on page 25, requires Applicant to demonstrate site control behind a tab labeled Exhibit 27.

26. In response to this requirement, Finlay, in its initial application submitted (at Exhibit 27 to the application), an Assignment and Assumption of Agreement of Sale and an Agreement for Purchase and Sale.

27. After conducting its preliminary review, Florida Housing concluded in its initial scoring summary that Finlay failed to meet threshold requirements for site control, giving the following explanation in the Scoring Summary dated March 17, 2005:

“The Applicant failed to provide a contract that meets the requirements of a qualified contract as stated in the Universal Application Instructions. The document submitted by the Applicant is an incomplete, unsigned and undated Agreement for Purchase and Sale that appears to be a draft.”

28. Florida Housing also concluded that Finlay failed to meet threshold requirements for site control because the Assignment and Assumption of Agreement of Sale referenced the Purchase and Sale Agreement that was not complete and executed.

29. In response to Florida Housing’s initial review and the specific comments found in the Scoring Summary, Finlay submitted as a cure a 2005 Cure Form, Brief Explanation form, Assignment and Assumption of Agreement of Sale and a Purchase and Sale Agreement.

30. A NOAD was filed by a competing applicant which alleged that the “cure” submitted by Finlay should be rejected.



31. On May 24, 2005, Florida Housing issued its Final Scoring Summary which again concluded that Finlay had failed to meet threshold, and provided the following explanation:

The Applicant provided a copy of an Assignment and Assumption of Agreement of Sale (Assignment) dated 15<sup>th</sup> day of April, 2005 in an attempt to cure the deficiency identified in Item 2T. The Assignment provided is not properly executed. Finlay Interests 35, LLC executed the Assignment as the general partner of the Applicant (i.e. the limited partnership Finlay Interests 35, Ltd.). However, the organizational structure of the Applicant noted the managing general partner as Finlay Interests GP 35, Ltd. With the Agreement for Purchase and Sale not being in the Applicant's name and the Assignment not being acceptable, the Applicant does not have site control.

32. Florida Housing also determined Finlay failed to meet threshold requirements of Site Control by stating:

The Assignment and Assumption of Agreement of Sale references an Agreement for Purchase and Sale dated April 15, 2005. However, the Agreement for Purchase and Sale provided by Applicant has an effective date of February 15, 2005. No Agreement for Purchase and Sale with an effective date of April 15, 2005 has been provided.

#### **TIE-BREAKER POINT ISSUE**

33. The Universal Application Instructions at Part III, A, 10, starting at page 12, states that proximity tie-breaker points may be awarded to an Application for the proximity of its Development's Tie-Breaker Measurement Point to an eligible service.

34. The Universal Application at Part III, A, 10, that an Applicant provide the Surveyor Certification Form behind a tab labeled, "Exhibit 25," and indicate the service that the Applicant is seeking proximity tie-breaker points for.

35. In response to this requirement, Finlay, in its initial application submitted (at Exhibit 25 to the application), a Surveyor Certification form that was incomplete.

36. When preliminary scores were released by Florida Housing on March 17, 2005, Finlay was awarded no proximity tie-breaker points out of a possible 1.25 tie-breaker points for its proximity to a Grocery Store, Public School and a Medical Facility. In its explanation for the scoring, Florida Housing stated that “Applicant did not provide a completed Surveyor Certification Form. Applicant did not provide required sketches.”

37. In response to the Preliminary Scoring Summary, Finlay submitted “cure” materials relating to the proximity tie-breaker points consisting of the following: 2005 Cure Form, Brief Statement of Explanation, Surveyor Certification form, and sketches depicting the location of the exterior public entrances used for the latitude and longitude coordinates for each service.

38. A NOAD was filed by a competing applicant which alleged that the “cures” submitted by Finlay should be rejected.

39. When final scores were released in Finlay’s Final Scoring Summary, Florida Housing again awarded Finlay no proximity tie breaker points for its proximity to a Grocery Store, a Public School, and a Pharmacy. In explanation, Florida Housing stated:

Applicants are to provide the latitude/longitude coordinates for an exterior public entrance to the service. The sketch provided in an attempt to cure Item 1P appears to show a point that is not on a public entrance doorway threshold.

Applicants are to provide the latitude/longitude coordinates for an exterior public entrance to the service. The sketch provided in an attempt to cure Item 2P appears to show a point that is not on a public entrance doorway threshold.

Applicants are to provide the latitude/longitude coordinates for an exterior public entrance to the service. The sketch provided appears to show a point that is not on a public entrance doorway threshold.

40. Along with the final scoring summary Florida Housing provided Finlay a Notice of Rights, informing Finlay that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

41. Finlay timely requested a hearing by filing its Petition for Informal Administrative Hearing on June 16, 2005.

The parties offer the following JOINT EXHIBITS into evidence:

- Exh. 1. Joint Stipulation.
- Exh. 2. Finlay Application and Exhibits.
- Exh. 3. Preliminary Scoring Summary dated 3/17/05.
- Exh. 4. NOPSE Scoring Summary dated 4/14/05.
- Exh. 5. Final Scoring Summary dated 5/24/05.
- Exh. 6. NOPSE filed by Application No. 2005-124C.
- Exh. 7. "Cure" submitted by Finlay in response to preliminary and NOPSE scoring.
- Exh. 8. NOAD filed by Application No. 2005-124C against 090CS.
- Exh.9. The 2005 Universal Cycle Application and Instructions.

Respectfully submitted this 15<sup>th</sup> day of July, 2005.

By: 

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