

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

PLAZA LA ISABELA, LLC,

Petitioner,

vs.

FHFC CASE NO.: 2006-022UC
Application No.: 2006-027C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

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, Chris H. Bentley, held an informal hearing in Tallahassee, Florida, in the above styled case on June 21, 2006.

APPEARANCES

For Petitioner:

Gary J. Cohen, Esq.
Shutts & Bowen, LLP
1500 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131

For Respondent:

Hugh R. Brown, Esq.
Deputy General Counsel
Florida Housing Finance
Corporation
227 North Bronough St., Suite 5000
Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUES

The issues in this proceeding are whether Petitioner's application failed to meet threshold requirements with regard to its equity commitment letter, its zoning form and its surveyor certification form and whether its Surveyor Certification form is illegible so as to preclude an award of proximity tie-breaker points.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9. Petitioner's Exhibits 1 and 2 were also received into evidence. Joint Exhibit 1 is a Prehearing Stipulation containing Stipulated Facts. The Stipulated Facts basically describe 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 is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

During the hearing, disputes of fact arose over the nature of marks appearing on a Surveyor's Certification form and the legibility of parts of that form. By an *ore*

tenus stipulation, the parties agreed to have these issues determined by the Hearing Officer in this informal hearing rather than removing the case to the Division of Administrative Hearing.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Order.

FINDINGS OF FACT

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

1. Petitioner, PLAZA LA ISABELA, LLC, submitted its application to the Respondent for an allocation of housing tax credits to assist in the construction of a 160-unit high rise apartment building in Miami, Florida.

2. In its initial scoring, and as relevant to the issues herein, Respondent found that Petitioner failed to meet threshold requirements with respect to equity commitment and zoning, and that Petitioner was not entitled to any proximity tie-breaker points. The reasons for such findings was that Petitioner failed to provide evidence of a syndication commitment, failed to provide the required "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations" form, and failed to provide a Surveyor's Certification form in

connection with the proximity tie-breaker points. (Joint Exhibit 2)

3. As a cure for its equity commitment, Petitioner timely submitted a letter from Related Capital Company. No other statement or document accompanied this form. (Joint Exhibit 5)

4. In its final Scoring Summary, Respondent concluded that Petitioner failed to meet threshold requirements for firm financing in connection with Petitioner's equity commitment for the reason that Petitioner:

failed to include the required reference letter for the syndicator. As stated on page 66 of the 2006 Universal Application Instructions, "Applicants using a syndicator must provide at least one signed statement from a general partner of the ownership entity of a completed development which confirms that the syndicator (Purchaser of the credits) has performed its obligations under the partnership agreement and is not currently in default with that agreement. Failure to provide such statement(s) will cause an equity commitment not to be scored firm."

(Joint Exhibit 4) Due to the failure of the equity commitment letter to be considered firm, Respondent found that Petitioner also failed threshold due to a construction/permanent financing shortfall. (Joint Exhibit 4)

5. As a cure for its zoning defect, Petitioner submitted a form entitled "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations," executed by the Zoning Administrator. This form leaves blank the space listing the zoning designation for the referenced development site. (Joint Exhibit 6) Another form entitled "Local Government Verification of Status of Site

Plan Approval for Multifamily Developments” executed by the same Zoning Administrator was also submitted by Petitioner as part of its cure documentation. This form did identify the zoning designation for the development location as R-4. (Joint Exhibit 7) The Certifications on both forms are dated February 1, 2006.

6. In its final Scoring Summary, Respondent concluded that Petitioner failed to meet threshold with regard to zoning because, while the “Local Government Verification that Development is Consistent with Zoning and Land Use Regulations” form was provided, “the form is incomplete because the zoning designation is not stated at Item (2).” (Joint Exhibit 4)

7. As a cure regarding proximity tie-breaker points, Petitioner submitted a Surveyor Certification form. As a result of a white line running down the left side of the page (probably the result of telecopying), one of the digits of the degrees entry for the location of the closest bus stop is obscured. It is impossible to determine what that digit is without guessing. In addition, the same Surveyor Certification form submitted by Petitioner contains faint numerical markings which appear to be corrections or white-outs in connection with several of the numbers used to identify the longitude and latitude of the services designated for tie-breaker points. (Joint Exhibit 8 and 9) At the bottom of the Surveyor Certification form, the following printed language appears:

If this certification contains corrections or 'white-out', or if it is scanned, imaged, altered, or retyped, the Application will not receive proximity tie-breaker points and will fail to meet threshold and will be rejected.

(Joint Exhibits 8 and 9)

8. In its final Scoring Summary, Respondent did not award Petitioner any proximity tie-breaker points on the grounds that parts of the Surveyor Certification form were illegible and the form contains corrections and must be rejected per the instructions on the form. In addition, the Respondent determined that since the form appears to contain corrections, the Petitioner failed to meet threshold per item 6 of page 68 of the Universal Application Instructions. (Joint Exhibit 4)

CONCLUSIONS OF LAW

9. Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Rules 67-48.005 and 28-106.301, 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.

10. The issues in this proceeding are whether Petitioner's application failed to meet threshold requirements with respect to equity commitment, zoning and the Surveyor's Certification form and whether Petitioner is entitled to proximity tie-

breaker points. Each of these issues is directly and specifically addressed in Respondent's rules, which incorporate by reference the 2006 Universal Application Package including the instructions, exhibit forms and the uncompleted Application. See Rule 67-48.004(1)(a), Florida Administrative Code.

The Universal Application Instructions provide, at page 2:

It is important that each Application be legible and in proper order to ensure accurate scoring by the Corporation. Each page and applicable exhibit of the Application must be accurately completed, and Applicants must provide all requested information. Failure to provide the requested information and documentation shall result in failure to meet threshold for threshold items and/or failure to achieve maximum points for point items.

11. Pages 67 through 69 of the Application Instructions list threshold requirements that Applicants must meet to avoid rejection of their application. These requirements include, in pertinent part:

2. All applicable pages and exhibit forms of the Application must be completed.

...

6. The Application cannot be submitted on exhibit forms or pages . . . that contain corrections or 'white-out' or have been scanned, imaged, retyped, or otherwise altered.

...

10. Ability to proceed must be demonstrated by submission of the required certifications or documentation, as the case may be, of site plan/plat approval, . . . zoning approval, . . .

...

17. Other items specifically designated “Threshold” in the Universal Application Package.

Part V of the 2006 Universal Application Instructions designates the financing of a project a threshold requirement, and provides at page 66, in relevant part:

Applicants using a syndicator must provide at least one signed statement from a general partner of the ownership entity of a completed development which confirms that the syndicator (Purchaser of the credits) has performed its obligations under the partnership agreement and is not currently in default with that agreement. Failure to provide such statement(s) will cause an equity commitment not to be scored firm. Insert documentation behind the provided equity commitment.

Pages 27-28 of the Application Instructions designate evidence of appropriate zoning as a threshold requirement and state that in order to demonstrate that the proposed development site is appropriately zoned, the applicant must provide the appropriate verification form behind a tab labeled “Exhibit 32.”

Rule 67-48.004, Florida Administrative Code, provides further guidance. Subsection (1)(b) of that rule provides that “all Applications must be complete, legible and timely . . .” and also prohibits Respondent from assisting any applicant by “copying, collating, or adding documents to an Application.” Subsection (2) of Rule 67-48.004 provides as follows:

Failure to submit an Application completed in accordance with the Application instructions and these rules will result in the failure to meet threshold, rejection of the Application, a score less than the maximum available, or a combination of these results in accordance with the instructions in the Application and this rule chapter.

And, finally, Rule 67-48.004(13)(b) and (c), Florida Administrative Code, requires Respondent to reject an application if:

(b) the applicant fails to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions; [or]

(c) the applicant fails to file all applicable Application pages and exhibits which are provided by the Corporation and adopted under this rule chapter.

12. Measuring Petitioner's application submittals with respect to financing, zoning and the Surveyors Certification against the above-cited rules renders it clear that Respondent appropriately concluded that Petitioner failed to meet threshold requirements.

13. The Respondent's rules clearly require that applicants using a syndicator provide at least one reference letter or statement confirming that the syndicator has performed its obligations and is not currently in default. Applicants are specifically advised that failure to provide such a reference "will cause an equity commitment not to be scored firm." (Application Instructions, page 66) Petitioner did not provide a reference along with its equity commitment letter from Related Capital Company. In spite of the clear instructions contained within Respondent's rules, Petitioner takes the unique position that its chosen syndicator, Related Capital Company, is one of the largest syndicators of low income housing tax credits in the United States, and,

therefore, there can be no doubt as to its qualifications or ability to perform. Petitioner asserts that Respondent recognizes this fact as evidenced by its scoring of two other applicants in this year's competitive cycle who submitted a commitment letter from Related Capital Company. Petitioner's own Exhibit 1 demonstrates that the proper syndicator reference letters were included with these two other applications. Respondent's rules clearly require that the reference document be submitted with each application. Respondent may not ignore its own rules on this subject, nor may Respondent assist Petitioner by relying on its own institutional knowledge or documents submitted by other applicants. Respondent properly concluded that Petitioner's equity commitment could not be considered a firm source of financing, thereby resulting in shortfalls in construction and permanent financing and causing a failure to meet threshold requirements.

14. Petitioner failed to fill in the blank for the zoning designation on its form entitled "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations." The application forms and exhibits constitute rules, and this pertinent information was required on the zoning verification form. Petitioner argues that the zoning designation was included on another form entitled "Local Government Verification of Status of Site Plan Approval for Multifamily Developments," certified by the same public official, and, therefore, the Respondent

was in possession of the exact same information as required on the zoning form. To accept Petitioner's argument would be to ignore and violate Respondent's precise rules. As indicated above, Respondent's rules require that each application page and exhibit be completed and that applicants must provide all requested information. The zoning form requested information relating to the designated zoning for the development site. Respondent may not assist Petitioner by referring to other exhibits to ascertain that pertinent information.

15. Petitioner relies upon three previous Orders of Respondent from different universal cycles to support its position that missing information on an exhibit may be found elsewhere within the same application. Those cases cannot be read for the proposition that Respondent is required to ignore its clear and unambiguous rules. Moreover, those cases do not serve as precedent because the rules under which they were decided are no longer in effect. Respondent's current rules specifically address Petitioner's failure to complete the zoning form, and Respondent cannot ignore its own rules on that subject.

16. With regard to the Surveyor's Certification form, Petitioner's argument is primarily one of disagreement with the factual findings that parts of the form are illegible and that the form contains corrections, both of which are grounds for rejection of the form. A review of the form submitted by Petitioner supports these

factual findings. One number is illegible and other numbers appear to be corrections to the completed form. Indeed, during the informal hearing, Petitioner argued that a number obscured by a white line running down the page could be read as either a 5 or a 6. (Transcript, page 36) Respondent is not permitted to guess what numbers were intended by an applicant. That is the reason for the rule requiring that data entered upon forms be legible. This requirement is perhaps even more important with respect to tie-breaker points, the purpose of which is to distinguish competing applicants who have identical scores.

17. Petitioner further argues that the prohibition against corrections on the Surveyor Certification form only applies to the pre-printed portions of the form. While this may be one interpretation of the prohibition against corrections, the Respondent has interpreted this rule to include the completed portions of the form. This is a reasonable interpretation to assure that nothing is changed between the time the licensed surveyor signs the form and the time the form is submitted as part of the application. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. Legal Environmental Assistance Foundation, Inc., v. Board of County Commissioners of Brevard County, 642 So.2d 1081 (Fla. 1994). Respondent's rejection of the Surveyor Certification form at issue was supported by Respondent's rules.

18. In summary, each of the issues raised in this proceeding is governed by a specific provision of the rules which are to be applied to the Universal Application process. Respondent has no discretion to deviate from or ignore those rules. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (Fla. 1st DCA 1996), rev. denied, 695 So.2d 701 (Fla. 1997). Respondent properly applied its rules in scoring Petitioner's application.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED that Petitioner's application be rejected for failure to meet threshold requirements with respect to financing, zoning and Surveyor Certification form.

Respectfully submitted and entered this 14th day of July, 2006.



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

Copies furnished to:

Sherry M. Green, 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
Tallahassee, FL 32301-1329

Gary J. Cohen, Esq.
Shutts & Bowen, LLP
201 S. Biscayne Boulevard, Suite 1500
Miami, FL 33131

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(3), Florida Administrative Code, 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 July 21, 2006. 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**

PLAZA LA ISABELA, LLC,

Petitioner,

v.

FHFC CASE NO.: 2006-022UC
Application No. 2006-027C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

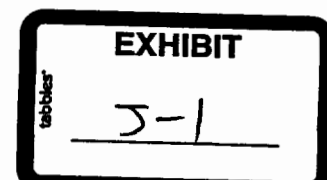
PREHEARING STIPULATION

Petitioner, Plaza La Isabela, LLC (“Plaza La Isabela”), 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, June 21, 2006, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

STIPULATED FACTS

1. Plaza La Isabela is a Florida limited liability corporation with its address at c/o Greater Miami Neighborhoods, Inc., 300 NW 12th Avenue, Miami, Florida 33128, 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

ATTACHMENT A



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

3. Plaza La Isabela has applied for an allocation of competitive 9% low-income housing tax credits under the Low Income Housing Tax Credit (“HC”) program administered by Florida Housing, as authorized by the U.S. Department of the Treasury. The HC program is set forth in Section 42 of the Internal Revenue Code of 1986, as amended, and it awards developers and investors a dollar for dollar reduction in income tax liability through the allocation of tax credits in exchange for construction of affordable rental housing units.

4. The 2006 Universal Cycle Application, through which affordable housing developers apply for funding under the HC program, is adopted as Form UA1016 (Rev. 01-06) by R. 67-48.004(1)(a), Fla. Admin. Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant.

5. Because Florida Housing’s annual available pool of HC funding 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, Fla. Admin. Code. Specifically, Florida Housing’s application process for 2006, as set forth in Rules 67-48.001-.005, Fla. Admin. Code, 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 (“NOPSE”);

- e. Florida Housing’s consideration of the NOPSE’s submitted, with notice to applicants of any resulting change in their preliminary scores;
- 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 1, 2006, Plaza La Isabela and others submitted applications for financing in Florida Housing’s 2006 funding cycle. Plaza La Isabela (Application #2006-027C) applied for \$2,435,000 in HC equity funding to help finance the construction of a 160-unit high rise apartment building in Miami, Florida.

7. Plaza La Isabela received notice of Florida Housing’s initial scoring of the Application on or about March 2, 2006, at which time Florida Housing awarded Plaza La Isabela a preliminary score of 62 points out of a possible 66 points, and 0 of 7.5 possible “tie breaker” points (awarded for geographic proximity to certain services and facilities). Florida Housing also concluded that the Plaza La Isabela application failed threshold requirements for various reasons, most of which are not material to the instant case.

8. On or before April 10, 2006, Plaza La Isabela timely submitted its cure materials to Florida Housing to correct threshold and scoring deficiencies in its preliminary application, most of which are not material to the instant case, along with documentation contending that Florida Housing should add 4 points to its primary score for local government incentives, and that Florida Housing should grant Plaza La Isabela 7.5 tie breaker points.

9. On or about May 4, 2006, Florida Housing issued its final scoring summary, determining that the equity commitment from Related Capital Company could not be considered a firm source of financing, due to failure to include a reference letter for the syndicator. Due to the failure of the equity commitment letter to be considered firm, Florida Housing found that the Plaza La Isabela to have also failed threshold due to a construction/permanent financing shortfall. Florida Housing determined that Plaza La Isabela's cure documentation for its zoning form was deficient because the zoning designation was not stated on the "Local Government Verification that Development is Consistent With Zoning and Land Use Regulations" form ("Zoning Form"), and that the Surveyor Certification Form submitted as part of the cure documentation caused Petitioner's application to fail threshold because it contained corrections. Florida Housing also determined that as a result of the Surveyor's Certification Form containing corrections and, with respect to the public bus stop, due to the illegibility of the Surveyor's Certification Form, Plaza La Isabela should receive -0- of a possible 3.75 proximity tie breaker points for proximity to the above-referenced services.

10. Part III.C.1. of the 2006 Universal Application Instructions is entitled Status of Site Plan Approval or Plat Approval. This section of the application requires an

applicant to provide (in the case of multifamily development) “a properly completed and executed Local Government Verification of Status of Site Plan Approval for Multifamily Developments Form behind a tab labeled ‘Exhibit 26’”.

11. Exhibit 26 to the Plaza La Isabela application is entitled “Local Government Verification of Status of Site Plan Approval for Multifamily Developments” (hereinafter, the “Site Plan Approval Form”).

12. The Site Plan Form includes an item labeled “Zoning Designation” followed by a blank space, wherein applicants are to fill in the zoning designation for the site on which the proposed development is to be constructed. The Site Plan Approval Form submitted by Plaza La Isabela identified “R-4 – (150 units/acre)” as the zoning designation.

13. The Site Plan Approval Form submitted by Plaza La Isabela with the cure materials for their 2006 Universal Cycle Application was completed and executed in accordance with the applicable Universal Application Instructions and rules.

14. The Zoning Administrator for Miami-Dade County, Orlando Toledo, who is authorized to sign the Zoning Form and the Site Plan Approval Form, executed both the Zoning Form and the Site Plan Approval Form.

EXHIBITS

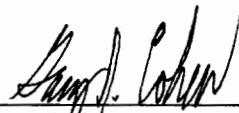
The parties offer the following joint exhibits into evidence. And stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

Exhibit J-1: This Prehearing Stipulation.

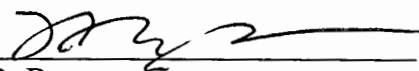
- Exhibit J-2: Scoring summary for Application #2006-027C (Plaza La Isabela) dated March 1, 2006.
- Exhibit J-3: Scoring summary for Application #2006-027C (Plaza La Isabela), dated March 28, 2006.
- Exhibit J-4: Scoring summary for Application #2006-027C (Plaza La Isabela), dated May 4, 2006.
- Exhibit J-5: Cure materials submitted by Plaza La Isabela regarding Item 2T from Exhibit J-3, comprising a cure coversheet, written explanation of the cure materials, and attached equity commitment letter from Related Capital Company dated March 3, 2006.
- Exhibit J-6: Cure materials submitted by Plaza La Isabela regarding Item 11T from Exhibit J-3, comprising a cure coversheet, written explanation of the cure materials, and attached form titled "LOCAL GOVERNMENT VERIFICATION THAT DEVELOPMENT IS CONSISTENT WITH ZONING AND LAND USE REGULATIONS" ("Zoning Form") signed by Orlando Toledo, Zoning Administrator, and dated February 1, 2006.
- Exhibit J-7: Cure materials submitted by Plaza La Isabela regarding Item 5T from Exhibit J-3, comprising a cure coversheet, written explanation of the cure materials, and attached form titled "LOCAL GOVERNMENT VERIFICATION OF STATUS OF SITE PLAN APPROVAL FOR MULTIFAMILY DEVELOPMENTS" signed by Orlando Toledo, Zoning Administrator, and dated February 1, 2006.
- Exhibit J-8: Cure materials submitted by Plaza La Isabela regarding Item 1P* from Exhibit J-3, comprising a cure coversheet, written explanation of the cure materials, and a Surveyor Certification Form with attached surveyor sketches. (*This documentation was also submitted as a cure to Items 2P, 5P and 6P from Exhibit J-3).

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. 1-06).

Respectfully submitted this 21st day of June, 2006.

By: 

Gary J. Cohen
Florida Bar No. 353302
Shutts & Bowen LLP
201 South Biscayne Boulevard
1500 Miami Center
Miami, Florida 33131
(305) 347-7308
(305) 347-7808

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