STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

NAUTILUS DEVELOPMENT
PARTNERS, LLLP,

Petitioner,

vs.

FHFC CASE NO.: 2006-023UC
Application No.: 2006-090S

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, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on June 26, 2006.

APPEARANCES

For Petitioner:

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For Respondent:

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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue in this proceeding is whether Petitioner's application demonstrated a firm commitment for financing of the proposed project.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 3. Petitioner's Exhibits 1, 2 and 4 and Respondent's Exhibits 1 through 3 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 issue in dispute. The Prehearing Stipulation 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. Petitioner, NAUTILUS DEVELOPMENT PARTNERS, LLLP, submitted to the Respondent its application for a SAIL loan to help finance the construction of a 167-unit multifamily apartment building in Bay County, Florida. Petitioner proposed that $12.0 million of its construction and permanent financing would come from first mortgage financing provided by the Housing Finance Authority of Bay County through the issuance of tax-exempt and taxable bonds.

2. In its initial application, Petitioner failed to provide any documentation of its proposed first mortgage financing. Accordingly, in its initial Scoring Summary, Respondent determined that Petitioner failed to meet threshold with regard to financing because

> The Applicant failed to provide any documentation of the first mortgage financing at Exhibit "56" as referenced in the Development Cost Pro Forma.

This defect also resulted in a shortfall of construction and permanent financing, both

of which are threshold failures. (Joint Exhibit 2)

3. As part of its cure documentation, Petitioner submitted a letter from the Chairperson of the Housing Finance Authority of Bay County, stating that:

> 1. Private activity tax-exempt bond allocation has been approved for the Project (up to $10,500,000 tax exempt and $1.500,000 taxable) by the Authority and shall be reserved upon application of the Authority to the Florida Division of Bond Finance.
>
> 2. All approvals precedent to the authorization of the issuance of the Bonds under the Authority's implementing ordinance have been obtained.
>
> 3. All fees currently due to the Authority from the Owner in connection with the Project have been paid.
>
> 4. The Authority has executed a firm commitment in favor of the Project with respect to its intent to issue the proposed Bonds.

(Joint Exhibit 3)

4. No Notices of Alleged Deficiency were filed against Petitioner's application.

5. In its final scoring, Respondent rejected Petitioner's application for failure to meet threshold with regard to firm first mortgage financing, and construction and permanent financing shortfalls. In pertinent part, the Respondent found that the commitment from the Housing and Finance Authority of Bay County states that the bond allocation "has been approved"

> and shall be reserved upon application of the Authority to the Florida Division of Bond Finance. Page 65 of the 2006 Universal Application Instructions states that in order to be considered a firm commitment the Applicant must provide "affirmation that the tax-exempt allocation has been reserved." Since the allocation has not yet been reserved, the commitment cannot be considered a firm source of financing.

(Joint Exhibit 2) This conclusion also affected scoring issue 9S, the Local Government Contribution. The Respondent concluded that since the allocation from the Housing and Finance Authority of Bay County "has not yet been reserved, the commitment cannot be considered a firm source of financing and no points will be awarded." (Joint Exhibit 2) The parties have stipulated that the determination of the tax-exempt bond financing threshold issue (Item 2T) will also resolve the scoring issue of the Local Government Contribution (Item 9S). (Joint Exhibit 1, paragraph 18)

6. Petitioner produced evidence that in the 2002 Universal Cycle, Respondent accepted as proof of firm financing documents which did not expressly reserve allocation for the development. Instead, in that case involving the Heron Pond Apartments, Ltd., the agreement of the Lee County Housing Finance Authority to issue bonds was conditioned upon and subject to the Authority's determination "in its sole and absolute discretion at a date in the future" that it is in the best interests of the Authority, residents and other housing finance authorities and counties to use the

tax-exempt volume cap allocation potentially available to the Authority. (Petitioner's Exhibit 1)

7. Petitioner also introduced into evidence an application by Christine Cove Apartments from the 2004 Universal Cycle which stated that the State Division of Bond Finance "has made available . . . tax-exempt carry forward bond volume allocation that would be available for the Jacksonville Housing Finance Authority . . . (Christine Cove Apartments)" (Petitioner's Exhibit 2) Petitioner urges that this commitment does not state that the bond allocation "has been reserved" for the Christine Cove project, yet, in that case, Respondent asserted no threshold failure.

8. Respondent presented evidence that the developer of the Nautilus Cove Apartments previously applied for funding in the 2004 and 2005 Universal Application cycles based on funding commitments from the Housing Finance Authority of Bay County in the form of tax-exempt bond allocations. In both applications, the Housing Finance Authority of Bay County represented that "private activity tax-exempt bond allocation has been reserved for the Project . . . upon application of the Authority to the Florida Division of Bond Finance." (Respondent's Exhibits 1 and 2) Another certification from the Housing Finance Authority of Bay County appearing in an application submitted in the 2004 Universal Application cycle states that "the Authority has requested and received and has reserved tax exempt

bond allocation in the amount of . . . to finance the proposed Project." (Respondent's Exhibit 3)

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.

The issue in this proceeding is whether the Housing Finance Authority of Bay County provided a firm commitment of tax-exempt bond financing for Petitioner's proposed project. More specifically, the issue is whether the words "shall be reserved upon application of the Authority to the Florida Division of Bond Finance" meets the threshold requirements for a firm financing commitment.

The 2006 Universal Application Instructions, which are adopted as a rule (see Rule 67-48.004(1)(a), Florida Administrative Code), specifically address the requirements necessary to demonstrate a firm commitment for financing through a local government's issuance of bonds. Pages 64-65 of those Instructions state:

> If the first mortgage financing is to come from non-Corporation-issued Multifamily Bonds, evidence of the following items must be included to receive a firm commitment:

1. Local Government Issuance of Bonds: Letter signed by the Chairperson of the local County Housing Finance Authority or Public Housing Authority, as applicable, which is development-specific and includes the following:

a. affirmation that the tax-exempt allocation **has been reserved**;
b. affirmation that all approvals precedent to the funding of the bonds have been obtained;
c. affirmation that a commitment has been executed; and,
d. affirmation that appropriate fees have been paid.

(Emphasis supplied)

Here, the commitment letter from the Housing Finance Authority of Bay County submitted as a cure to Petitioner's application, as recited in Finding of Fact Number 3 above, satisfies subsections (1)(b), (c) and (d) of the threshold requirements for a firm commitment as set forth in the Application Instructions. However, the letter does not state that a tax exempt allocation "has been reserved." Instead, it states that the allocation "has been approved" by the Authority "and shall be reserved upon application of the Authority to the Florida Division of Bond Finance." A plain and common reading of the quoted language indicates that while approval has occurred as of the date of the letter, a reservation of the bond allocation has not yet occurred and that the allocation will only be reserved after application is made to the Division of Bond Finance. Use of the words "shall be reserved upon application" implies a future event. Had the Housing Finance Authority of Bay

County intended to convey the premise that the allocation was reserved as of the date of its letter, it would have used the words "has been reserved" as it did in prior application cycles.

The fact that Respondent may have approved in a prior cycle another applicant's (Heron Pond Apartments, Ltd.) financing commitment as a firm commitment when the same was clearly not "firm" in accordance with Respondent's rules simply demonstrates a mistake or oversight on Respondent's part, and does not serve as precedent for a clear disregard of the controlling rules. It is not clear that the Issuer's Certification in the Christine Cove Apartments application, which was approved by Respondent, did not meet the Application Instructions for a firm commitment.

Petitioner's reliance upon rules adopted by the Respondent for its Rental Recovery Loan Program (RRLR) as guidance for interpreting the applicable rules is unpersuasive. The RRLP is an entirely different program with different purposes, rules and application instructions. Indeed, the fact that the RRLP allows various options for demonstrating a firm financing commitment only strengthens the Respondent's position that no such options or flexibility appear in the rules which govern the SAIL program.

It should be noted that Petitioner does not contend or argue that the Housing

Finance Authority of Bay County had, in fact, actually reserved the stated allocation for Petitioner's use. Instead, Petitioner urges that the Respondent has not put applicants on notice that local Housing Finance Authorities must secure the allocation of tax -exempt bonds from the Division of Bond Finance prior to the completion and curing of a Universal Cycle application. In the first place, it is not clear that Respondent has taken that position in this case. Instead, it has simply concluded that the allocation at issue herein was dependent upon a future event, i.e., the filing of an application with the Division of Bond Finance. This position is consistent with Respondent's determinations regarding firm financing commitments in prior cycles with regard to this very development. This position, while not the sole possible interpretation of the rule, constitutes a reasonable interpretation of the rules contained within the Application Instructions regarding firm financial commitments. It appears that Petitioner's prime quarrel with the requirement that a firm commitment be evidenced by an affirmation that the allocation "has been reserved" is, in reality, a challenge to the rule itself. Such a challenge in the context of this proceeding is inappropriate.

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

threshold requirements regarding firm financial commitments.

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

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PREHEARING STIPULATION

Petitioner, NAUTILUS DEVELOPMENT PARTNERS, LLLP ("Nautilus") 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 9:00 am, June 26, 2006, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

ATTACHMENT A

STIPULATED FACTS

1. Nautilus is a Florida limited liability limited partnership, whose address is 1551 Sandspur Road, Maitland, Florida 32751, and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. (Section 420.504, Fla. Stat.; Rule 67-48, Fla. Admin. Code).

3. 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 made 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., the "Universal Cycle."

6. Florida Housing has established by rule a single application (the "Universal Cycle Application") by which multifamily housing projects seeking various forms of funding in the Universal Cycle are evaluated, scored, and competitively ranked. (*See,* Section 420.507(22)(f), Fla. Stat., and Rule Chapter 67-48 Fla. Admin. Code)

7. The 2004 Universal Cycle Application, adopted as Form UA1016 (Rev. 1-06) by R. 67-48.004(1)(a), Fla. Admin. Code, consists of Parts I through VI 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.

8. As part of the Application, Applicants are required to demonstrate that a number of threshold criteria have been satisfied, such that

the proposed development is reasonably positioned to proceed, including a requirement that Applicants demonstrate that they have in place firm financing commitments for all sources of financing other than Florida Housing.

9. On or about February 1, 2006, Nautilus and others submitted applications for financing in Florida Housing's 2006 funding cycle. Nautilus (Application #2006-090S) applied for a $4,000,000 SAIL loan to help finance its project, the construction of a 168-unit multi-family apartment building in Bay County, Florida. Nautilus proposed to set aside 70% of these units for housing families earning 60% or less of the area median income, further, that $12.0 million of its construction and permanent financing would come from first mortgage financing provided by the Housing Finance Authority of Bay County through the issuance of tax-exempt and taxable bonds.

10. After Petitioner submitted its Application, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code. Florida Housing completed the preliminary scoring process on March 1, 2006.

11. After performing preliminary scoring, Florida Housing's staff notified Petitioner of the results on March 2, 2006. Any applicant could question the scoring of Petitioner's Application if it believed Florida Housing had made a scoring error, within ten calendar days after the date the applicant received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE"). No NOPSE's were filed against Petitioner's application.

12. Florida Housing determined that Petitioner failed application threshold requirements in that the Application did not demonstrate that first mortgage financing was in place, which resulted in a shortfall of construction and permanent financing, both of which are threshold failures. Nautilus received notice of Florida Housing's initial scoring of the Application on March 5, 2006.

13. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any issue raised in preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before April 10, 2006 (the "cure period").

14. Nautilus timely submitted its cure materials to Florida Housing, to correct the financing shortfall as well as other deficiencies in its preliminary application which are not material to the instant case. In its cure materials, Nautilus included a commitment letter from the Housing Finance Authority of Bay County regarding the issuance of tax-exempt and taxable bonds to provide financing for both the construction phase of the project and the "permanent," or post-construction, phase of the project.

15. Following the submission of cure materials, any applicant could file a Notice of Alleged Deficiency ("NOAD") directed to another application, to raise scoring or threshold issues allegedly created by a cure submitted to address such issues related to that Application. No NOAD's were filed against Petitioner's Application.

16. At the conclusion of the NOPSE and NOAD processes, Florida Housing awarded the Nautilus Application the score of 55 points, as well as the 2.25 tiebreaker proximity points to which it was entitled. At the same time, however, Florida Housing rejected the Nautilus Application for an alleged construction and permanent financing shortfall due to a lack of firm first mortgage financing. In doing so, Florida Housing stated its specific

grounds for the rejection, which Florida Housing designated as threshold issue 5T on its "Final Scoring Summary," as follows:

> As a cure for Item 2T, the Applicant submitted a first mortgage financing commitment from the Housing and Finance Authority of Bay County. The commitment states "Private activity tax-exempt bond allocation ***has been approved*** for the Project (up to $10,500,000 tax-exempt and $1,500,000 taxable) by the Authority and ***shall be reserved*** upon application of the Authority to the Florida Division of Bond Finance. Page 65 of the 2006 Universal Application Instructions states that in order to be considered a firm commitment the Applicant must provide "affirmation that the tax-exempt allocation ***has been reserved***." Since the allocation has not yet been reserved, the commitment cannot be considered a firm source of financing. (*Emphasis added.*)

17. This rejection also affected scoring issue 9S, the Local Government Contribution, as noted on the Final Scoring Summary:

> In an attempt to cure Item 2T, which would also Cure the defieciency at item 9S, the Applicant submitted a first mortgage financing commitment from the Housing and Finance Authority of Bay County. The commitment states "Private activity tax-exempt bond allocation has been approved for the Project (up to $10,500,000 tax-exempt and $1,500,000 taxable) by the Authority and shall be reserved upon application of the Authority to the Florida Division of Bond Finance. Page 65 of the 2006 Universal Application Instructions states that in order to be considered a firm commitment the Applicant must provide "affirmation that the tax-exempt allocation has been reserved." Since the

> allocation has not yet been reserved, the commitment cannot be considered a firm source of financing and no points will be awarded.

18. Thus, the determination of the tax-exempt bond financing threshold issue 2T will also resolve the scoring issue of the Local Government Contribution at 9S.

19. Nautilus' substantial interests are affected by Florida Housing's scoring decision.

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 #2006-090S (Nautilus) dated March 1, 2006, and May 3, 2006 (composite).

Exhibit J-3: A loan commitment letter dated April 7, 2006, from the Housing Finance Authority of Bay County, submitted by Nautilus as part of its cure.

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).

ISSUE FOR DECISION

Whether Florida Housing acted properly in scoring Nautilus' application for funding.

Respectfully submitted this _____ day of June, 2006.

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