STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VILLAGES AT DELRAY, LTD.,

Petitioner,

vs.

FHFC CASE NO.: 2006-024C
Application No.: 2006-032C

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 19, 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 issues for determination in this proceeding are whether Petitioner met the threshold requirements for zoning approval, site plan approval and/or environmental safety.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 13. Petitioner's Exhibits 1, 2 and 4 were received into evidence. Respondent's Motion in Limine with respect to Petitioner's proffered Exhibit 5 was granted on the basis that such Exhibit was not submitted during the application process. Joint Exhibit 1 is a Prehearing Stipulation containing Stipulated Facts and a listing of Joint 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 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, VILLAGES AT DELRAY, LTD., submitted to the Respondent its application for housing tax credits to help finance the construction of a 192-unit garden high rise apartment complex in Delray Beach, Florida.

2. Submitted with its initial application was a Purchase and Sale Agreement, executed on January 31, 2006, for the purchase of approximately 9 acres of land "located near Auburn Circle West, Delray Beach," as more particularly described in a metes and bounds description attached to that Purchase and Sale Agreement. The total purchase price for the 9 acres was $6.5 million. (Joint Exhibit 6)

3. Petitioner's initial application contained a "Local Government Verification of Status of Site Plan Approval for Multifamily Developments" indicating that the site plan for a development located at Auburn Avenue and 8th Street, Delray Beach was reviewed by "Paul Doring " on January 17, 2006. (Petitioner's Exhibit 1)

4. In its Scoring Summaries dated March 1, 2006 and March 27, 2006, the Respondent determined that Petitioner had not met threshold requirements with regard to site plan approval because the form calls for a "legally authorized body" to approve/review the site plan, and not an individual as indicated on Petitioner's form. (Joint Exhibits 2 and 3)

5. As a part of its initial application, Petitioner submitted its form entitled "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations." This submission, dated January 26, 2006, states that the "development location" is "Auburn Avenue and 8th Street, Delray Beach," and that, on or before January 26, 2006, the zoning designation for the development site is RM. The completed form further states that the number of units allowed for this development site is up to 12 units per acre. Attached to the form was a letter from the City Attorney of Delray Beach stating, in part, that a new Workforce Housing Ordinance to be put before the City Commission the first part of March would increase the density to up to 18 units per acre, with the actual density dependent upon the site and other amenities required by code. (Joint Exhibit 8)

6. In its Scoring Summaries dated March 1, 2006 and March 27, 2006, the Respondent concluded that Petitioner failed to meet threshold requirements for zoning since only 12 units per acre is currently allowed and the Petitioner's

application indicates that the site consists of 9 acres more or less, thus allowing construction of only 108 units, as opposed to Petitioner's proposed 192 unit project. (Joint Exhibits 2 and 3)

7. As a part of its initial application, Petitioner submitted a completed form entitled "Verification of Environmental Safety, Phase I Environmental Site Assessment." This form states the "development location" to be "Auburn Avenue and 8th Street, Delray Beach," and represents that a Phase I ESA "of the above referenced Development location" was conducted as of January 27, 2006. (Joint Exhibit 9)

8. The Respondent's initial Scoring Summaries of Petitioner's application raise no issues concerning the Petitioner's this Environmental Safety form. (Joint Exhibits 2 and 3)

9. As a part of its cure documentation, Petitioner submitted a new "Local Government Verification of Status of Site Plan Approval for Multifamily Developments" stating that the site plan was reviewed by a legally authorized body, in lieu of an individual. According to this form, the site plan was reviewed by that body on March 22, 2006, and the certification date on the form is March 27, 2006. (Joint Exhibit 10) The form indicates that the "development location" is "Auburn Avenue and 8th Street, Delray Beach."

10. Petitioner also submitted as part of its cure documentation an Amended and Restated Purchase and Sale Agreement. This Amended Agreement, executed on April 6, 2006, and to be effective as of January 31, 2006, states that the Petitioner could purchase "as much of the approximately 30 acres owned by the Seller," as more particularly described as "Tracts A, C and D, Auburn Trace, according to the Plat thereof recorded in Plat Book 64, Pages 184, 185 and 186 of the Public Records of Palm Beach County," "as are necessary for the construction of 192 residential units together with related amenities." This Amended Agreement further provides that:

> Based upon current RM 12 zoning the amount of the land that will be conveyed would be approximately 16 acres. The land is in the process of being included under Delray Beach's Workforce Housing Ordinance which would increase the allowable density from a maximum of 12 units per acre to 18 units per acre, and if that should happen the amount of land conveyed hereby would be approximately 11 acres. In all cases, Seller acknowledges that the tract of land to be conveyed to Purchaser shall be designated by Purchaser (and Seller hereby agrees to convey the land as designated by Purchaser), it being understood that the tract of land conveyed to Purchaser (a) shall be sufficient to meet density requirements to construct 192 units on such property as of the Closing Date; (b) shall encompass the Tie-Breaker Measurement Point designated by Purchaser in its 2006 Universal Cycle Application submitted to Florida Housing Finance Corporation, and (c) shall not change the Location of the Development Site (Auburn Avenue and 8th Street, Delray Beach, FL 32444), as indicated in the Purchaser's 2006 Universal Cycle Application submitted to Florida Housing Finance Corporation.

The total purchase price, $6.5 million, remained the same no matter how many acres

were ultimately purchased by Petitioner.

11. Petitioner did not submit a revised "Local Government Verification that Development is Consistent with Zoning and Land Use Regulation" form as a part of its cure documentation.

12. Petitioner did not submit a revised "Verification of Environmental Safety, Phase I Environmental Site Assessment" form as a part of its cure documentation.

13. Ordinance No. 17-06, which apparently increases the density of Petitioner's project site to up to 18 units per acre, was adopted on April 4, 2006. While this Ordinance was received into evidence at the informal hearing as Petitioner's Exhibit 2, it does not appear that this Ordinance was submitted to the Respondent as a part of Petitioner's cure documentation.

14. Notices of Alleged Deficiency (NOADs) were filed by competing applicants with regard to Petitioner's documentation relating to zoning consistency, site plan approval and environmental safety. (Joint Exhibits 10, 11, and 12) These NOADs were based primarily on the premise that the Petitioner's site plan approval and environmental assessment necessarily applied only to the 9 acres subject to the initial Purchase and Sale Agreement, and not to the expanded acreage to be purchased under the Amended Agreement entered into after the dates on the forms relating to site plan approval and environmental safety. Questions were also raised with regard

to the zoning issue since it was not known which or how much of the 30 acres would be purchased under the Amended and Restated Purchase and Sale Agreement.

15. In its Final Scoring Summary, Respondent concluded that Petitioner failed to meet threshold requirements with regard to verifications of zoning, site plan approval and environmental safety. As to zoning and site plan approval, the Respondent found that under the terms of the Amended Purchase and Sale Agreement, it was not clear as to which portion or all of the 30 acres would comprise the development site and, therefore, it was unclear what site was reviewed for the zoning and the site plan approval verifications. Similarly, the Respondent concluded that the Environmental Site Assessment failed to meet threshold because it was performed prior to the increase in the size of the development and it is unknown whether the entire development meets the required environmental standards. (Joint Exhibit 4)

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 prime issue in this proceeding is whether the Petitioner's new Amended and Restated Purchase and Sale Agreement dated April 6, 2006, whereby Petitioner agreed to purchase as much acreage of the Seller's 30 acres as was necessary for construction of 192 residential units together with related amenities (to wit: 16 acres under the limitation of 12 units per acre, or 11 acres under a new Ordinance allowing 18 units per acre), required an updating of the prior verifications regarding zoning, site plan approval and environmental safety, all of which were executed prior to the execution date of the Amended Agreement and at a time when only 9 acres were to be purchased for this project. Petitioner argues that the prior verifications continue to be valid since the actual physical location of the proposed project (Auburn Avenue and 8th Street) never changed. Respondent's position is that there is no way to determine whether either local government or the firm which performed the environmental safety assessment were aware that additional acres, or the amount thereof, were being added to the development site at the time the zoning verification (January 26, 2006), the site plan approval verification (March 27, 2006), or the environmental safety verification (January 27, 2006) were certified. Respondent contends that since these verifications were all certified prior to the Amended Purchase and Sale Agreement, it must be assumed that they contemplated that the

development site consisted of only 9 acres, as defined in the meets and bounds description contained in the original Purchase and Sale Agreement.

The 2006 Universal Application Instructions, which are adopted as a rule (see Rule 67-48.004(1)(a), Florida Administrative Code), require all applicants to demonstrate their ability to proceed with their proposed project. This requirement is fulfilled, in part, through verifications from local government demonstrating site plan approval and appropriate zoning for the project, as well as a verification of environmental safety which requires an assessment of the presence or absence of asbestos and lead-based paint on the development site. (Joint Exhibit 13, pages 19 and 20) Evidence of site plan approval, appropriate zoning (which includes consistency with local land use regulations regarding density and intended use) and environmental site assessment are deemed threshold requirements in the application process. (Joint Exhibit 13, pages 25 - 28, 67, 68)

Here, the verification forms submitted by Petitioner for the purpose of fulfilling these threshold requirements all predate the Amended and Restated Purchase and Sale Agreement which, contrary to the initial Purchase and Sale Agreement, would allow Petitioner to comply with the density requirements for RM zoning by purchasing additional acres. Such verifications were necessarily based only upon the 9 acres originally intended for purchase by Petitioner. There is simply no way to determine

if local government would have approved a site plan which contained 11 acres or more (up to 30) or whether appropriate zoning existed for the 11 acres or the 16 acres or the 30 acres. Parenthetically, since the purchase price under the Amended Agreement was the same ($6.5 million) whether 9 acres or 30 acres were purchased by Petitioner, and since the amount of land purchased was to be designated solely by the Petitioner, it seems reasonable that Petitioner would elect to purchase the entire 30-acre parcel.

Petitioner's argument that revised zoning, site plan and environmental safety forms were unnecessary because the actual address of the buildings remained the same is untenable. A "development" is more than the actual building(s). Indeed, in order to determine whether zoning and density requirements are met, it is necessary to look at the entire site (acreage) of the proposed development.

The Respondent was provided information, through a Notice of Alleged Deficiency, that at least a portion of the 30 acres which is the subject of the Amended Purchase and Sales Agreement were encumbered with utility and drainage easements and/or other dedications inconsistent with the use of the property for housing. Since the Amended Purchase and Sale Agreement does not specify which of the 11, 16 or 30 acres were to be purchased by Petitioner and used for its proposed development, there is no way to verify zoning or consistency with land use regulations. Similarly,

the site plan submitted for review was based upon a 9 acre site and did not include the additional acreage which Petitioner will ultimately acquire. The same is true with the environmental assessment of the 9-acre site performed in January of 2006. It simply cannot be assumed that an 11-acre, 16-acre or 30-acre development site would have the same zoning, site plan or environmental assessment as a 9-acre development site.

When it became apparent that Petitioner's originally planned site consisting of 9 acres would not conform with density requirements, it was incumbent upon Petitioner to not only make arrangements for purchase of additional land, but also to update its verification forms to reflect proper zoning, proper site plan approval and an environmental study of the entire development site. Petitioner provided evidence of its ability to proceed with regard to site plan approval and an environmental assessment only with regard to a portion of its development site. With respect to zoning, the verification submitted, having predated the Amended Purchase and Sale Agreement by over two months, indicates that the proposed development is inconsistent with the City's land use regulations with respect to density. This verification form should have been updated during the cure period. The fact that the address of the "development location" did not change as a result of the Amended Purchase and Sale Agreement does not mean that updated verifications regarding zoning, site plan approval and environmental safety were not necessary for the

expanded, entire development site.

In summary, the verification forms submitted by Petitioner predated the Amended Purchase and Sale Agreement. On its face, the zoning/land use consistency verification shows that the then-current density requirements would be greatly exceeded by Petitioner's proposed development of 192 units. Petitioner failed to present evidence that its newly intended purchase of additional acreage, in an undisclosed amount, in order to meet density requirements would also meet other zoning and land use regulation requirements. Petitioner failed to present evidence that a site plan including additional acreage had been or would be approved by local government. And, Petitioner failed to present evidence that an environmental assessment had been performed on the entirely of the project site. Absent the submission of updated verification forms indicating Petitioner's ability to proceed with its intended development, there was no way to determine if local government and the environmental engineer were aware of the additional acreage to be added to the development site. Respondent properly and reasonably interpreted its rules in concluding that Petitioner failed to meet threshold requirements with respect to zoning, site plan approval and environmental safety.

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 failed to meet threshold requirements with respect to zoning, site plan approval and environmental safety.

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

Diane D. Tremor

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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

VILLAGES AT DELRAY, LTD.

Petitioner,

v.

FHFC CASE NO.: 2006-024UC
Application No. 2006-032C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

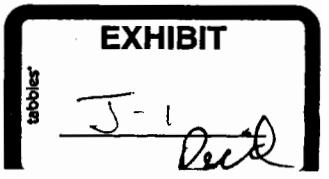
PREHEARING STIPULATION

Petitioner, Villages at Delray, Ltd. ("Delray") 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 19, 2006, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

STIPULATED FACTS

1. Delray is a Florida for-profit limited partnership with its address at 1301 S.W. 10th Avenue, Building J, Delray Beach, Florida 33444, 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. Delray 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) incorporated by reference in 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. 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. Evidence of site plan approval, zoning approval and environmental site assessment are threshold items.

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, Delray and others submitted applications for financing in Florida Housing's 2006 funding cycle. Delray (Application #2006-032C) applied for $2,010,000 in HC equity funding to help finance the construction of a 192-unit garden high rise apartment building in Delray Beach, Florida.

7. Delray received notice of Florida Housing's initial scoring of the Application on or about March 1, 2006, at which time Delray was awarded a preliminary

score of 61 points out of a possible 66 points, and 7.25 of 7.5 possible "tie breaker" points (awarded for geographic proximity to certain services and facilities). Florida Housing also concluded that the Delray application failed threshold requirements for failure to provide adequate information to satisfy zoning site plan approval requirements, inadequately executed site plan approval form, as well as equity commitment and financing shortage issues. Florida Housing also concluded that the Delray application failed other threshold requirements, which are not material to the instant case.

8. On or before April 10, 2006, Delray timely submitted its cure materials, including an Amended and Restated Purchase and Sale Agreement to Florida Housing, to correct deficiencies in its preliminary application, most of which are not material to the instant case.

9. NOADs were filed by competing applicants which alleged that the "cure" submitted by Delray was not sufficient and should be rejected. One NOAD stated in relevant part, "[T]he site plan submitted for review could not have specifically provided for the amount of acreage which Applicant will ultimately acquire, since the amended purchase contract was not entered into until April 6, 2006, days after the site plan submission. As such, Applicant should be found to have failed the threshold requirement of site plan approval."

10. Another NOAD stated in part, "The environmental company would have surveyed the 9 acre site in January 2006; the new development site consists of between 11 and 16 acres due to the Amended and Restated Purchase and Sale Agreement which was signed on April 6, 2006. As such, Exhibit 33 should have been updated to reflect an environmental study of the entire development site, not just a portion thereof."

11. At the conclusion of the NOPSE, cure review and NOAD processes, Florida Housing awarded the Delray Application the maximum score of 66 points and 7.5 tie-breaker points, but concluded that documents included in Delray's cure materials had caused the application to fail threshold, stating:

> As a cure for Item 1T, the Applicant submitted an Amended and Restated Purchase and Sale Agreement, executed on April 6, 2006, to be effective as of January 31, 2006. This Agreement provides for the purchase of "as much of the approximately 30 acres owned by Seller (more particularly described an [sic] Exhibit "A" attached hereto) . . . as are necessary for construction of 192 residential units . . ." Since it has not yet been determined which portion of the 30 acres will comprise the proposed Development site, it is unclear what site the Local Government Verification That Development Is Consistent With Zoning And Land Use Regulations form, executed by the Director of Planning and Zoning on January 26, 2006, is for.
>
> As a cure for Item 2T, the Applicant submitted a new Local Government Verification of Site Plan Approval for Multifamily Developments form which indicates that the site plan was reviewed by the Site Plan Review and Appearance Board on March 22, 2006. However, as explained in Item 10T above, since it has not yet been determined which portion of the 30 acres will comprise the proposed Development site, it is unclear what site the site plan that was reviewed by the Board on March 22, 2006 was for.
>
> In its cure, the Applicant stated that the size of the Development was increased to up to 30 acres. Since the Environmental Provider performed the Phase I Environmental Site Assessment and executed the Verification of Environmental Safety Phase I Environmental Site Assessment form prior to the increase in the size of the Development, it is unknown whether the entire Development meets the required ESA standards.

12. In a Notice dated May 3, 2006, Florida Housing released its Final Scores and Notice of Rights to Delray, informing Delray that it could contest Florida Housing's actions by requesting an informal hearing before a contracted hearing officer.

13. Delray timely requested a hearing by filing its Petition for an informal Administrative Hearing on May 26, 2006.

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 #2006-032S (Delray) dated March 1, 2006.

Exhibit J-3: Scoring summary for Application #2006-032C (Delray), dated March 27, 2006.

Exhibit J-4: Scoring summary for Application #2006-032C (Delray), dated May 3, 2006.

Exhibit J-5: The Local Government Verification of Status of Site Plan Approval for Multifamily Developments form submitted by Delray with its 'cures,' dated March 22, 2006.

Exhibit J-6: Purchase and Sale Agreement submitted by Delray with its original application, dated January 31, 2006.

Exhibit J-7: Amended and Restated Purchase and Sale Agreement submitted by Delray with its 'cures,' dated April 6, 2006.

Exhibit J-8: The Local Government Verification That Development Is Consistent With Zoning And Land Use Regulations form, submitted by Delray with its original application, dated January 26, 2006.

Exhibit J-9 The Verification of Environmental Safety-Phase I Site Assessment form, submitted by Delray with its original application, dated January 27, 2006.

Exhibit J-10 NOAD filed against Delray's application pertaining to site plan approval.

Exhibit J-11 NOAD filed against Delray's application pertaining to environmental site assessment.

Exhibit J-12 NOAD filed against Delray's application pertaining to zoning approval.

Exhibit J-13 Excerpts from the 2006 Universal Cycle Application and Instructions.

Respectfully submitted this 19 day of June, 2006.

By: _____

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