STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

OLIVE GROVE APARTMENTS
LIMITED PARTNERSHIP,

Petitioner,

vs.

Case No: 2010-017UC
FHFC Applic. #2009-191C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
/

AMENDED PETITION FOR
INFORMAL ADMINISTRATIVE PROCEEDING

Petitioner, OLIVE GROVE APARTMENTS LIMITED PARTNERSHIP ("Olive Grove"), pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Rules 28-106.301 and 67-48.005(5), Florida Administrative Code ("F.A.C."), hereby requests an informal administrative proceeding to challenge the incorrect scoring and ranking by Respondent, the FLORIDA HOUSING FINANCE CORPORATION ("FHFC"), of a competing application for funding in the 2009 Universal Cycle. The challenged actions resulted in FHFC denying Olive Grove its requested federal tax credit funding and funding derived from the American Recovery and Reinvestment Act of 2009. In support of its Petition, Olive Grove states as follows:

1. The name and address of the agency affected by this action are:

Florida Housing Finance Corporation
City Center Building, Suite 5000
227 N. Bronough Street
Tallahassee, Florida 32301-1329

2. The address and telephone number of the Petitioner are:

Olive Grove Apartments Limited Partnership
2206 Jo-An Drive
Sarasota, FL 34231
Telephone No. (941) 929-1270

3. The name, address, telephone number, and fax number of the Petitioner's attorney, which will be the Petitioner's address for service purposes during the course of this proceeding, are:

Warren H. Husband
Metz, Husband & Daughton, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909
Telephone No. (850) 205-9000
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The Low-Income Housing Tax Credit Program

4. The United States Congress has created a program, governed by Section 42 of the Internal Revenue Code ("IRC"), by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of affordable low-income housing for families. These tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax

liability, which can be taken for up to ten years if the project continues to satisfy all IRC requirements.

5. The tax credits allocated annually to each state are awarded by state "housing credit agencies" to single-purpose applicant entities created by real estate developers to construct and operate specific multi-family housing projects. The applicant entity then sells this ten-year stream of tax credits, typically to a "syndicator," with the sale proceeds generating much of the funding necessary for development and construction of the project. The equity produced by this sale of tax credits in turn reduces the amount of long-term debt required for the project, making it possible to operate the project at below-market-rate rents that are affordable to low-income and very-low-income tenants.

6. Pursuant to section 420.5099, Florida Statutes, FHFC is the designated "housing credit agency" for the State of Florida and administers Florida's low-income housing tax credit program. Through this program, FHFC allocates Florida's annual fixed pool of federal tax credits to developers of affordable housing.[1]

7. On February 17, 2009, President Barack Obama signed the American Recovery and Reinvestment Act of 1990 (ARRA, Public Law 111-5), which

[1] FHFC is a public corporation created by law in section 420.504, Florida Statutes, to provide and promote the financing of affordable housing and related facilities in Florida. FHFC is an "agency" as defined in section 120.52(1), Florida Statutes, and is therefore subject to the provisions of Chapter 120, Florida Statutes.

allowed FHFC and allocating agencies in other states "exchange" their federal tax credits for cash grants from the U.S. Treasury that can be used to finance the construction of affordable housing. Under this program, Florida was expected to receive at least $578,701,964 in funding from the U.S. Treasury, part of which FHFC is using to provide additional funding to tax credit applicants in the 2009 Universal Application Cycle.

The 2009 Universal Application Cycle

8. Because FHFC's available pool of funding each year is limited, proposed affordable housing projects must compete for this financing. To assess the relative merits of proposed developments, FHFC has established a competitive application process pursuant to Chapter 67-48, F.A.C. As set forth in Rules 67-48.002-.005, F.A.C., FHFC's application process for 2009 consisted of the following:

a. the publication and adoption by rule of a "Universal Application Package," which applicants use to apply for a variety of FHFC-administered funding programs, including federal tax credits and SAIL loans;

b. the completion and submission of applications by developers;

c. FHFC's preliminary scoring of applications;

d. an initial round of administrative challenges in which an applicant may take issue with FHFC's scoring of another application by filing a Notice of Possible Scoring Error ("NOPSE");

e. FHFC's consideration of the NOPSE's submitted, with notice to applicants of any resulting change in their scores;

f. an opportunity for the applicant to submit additional materials to FHFC 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. FHFC's consideration of the NOAD's submitted, with notice to applicants of any resulting change in their scores;

i. an opportunity for an applicant to challenge, via informal or formal administrative proceedings, FHFC's evaluation of any item in their own application for which the applicant received less than the maximum score;

j. final scores, ranking, and allocation of tax credit funding to applicants, adopted through final orders; and

k. an opportunity for applicants to challenge, via informal or formal administrative proceedings, FHFC's final scoring and ranking of competing applications where such scoring and ranking resulted in a denial of FHFC funding to the challenger.[2]

9. On or about August 20, 2009, numerous applications were submitted to FHFC seeking tax credit and ARRA funding. Olive Grove (FHFC Applic. #2009-191C) applied for $1,510,000 in annual tax credits and for $4,100,000 in

[2] This Petition initiates such a challenge. Notably, when the challenger in such a proceeding is successful, FHFC funding is not taken away from the applicant who was scored or ranked in error and given to the challenger. Instead, the applicant keeps its funding, and the challenger receives its requested funding "off-the-top" from the next available funding allocated to FHFC. Rule 67-48.005(7), F.A.C.

ARRA funding to help finance the development of its project, an 85-unit apartment complex in Ormond Beach, Volusia County, Florida. Olive Grove committed 90% of its project to serving families earning 60% or less of the area median income ("AMI"), with 10% dedicated to housing families earning 40% or less of AMI.

10. On February 26, 2010, FHFC's Board adopted final scores and rankings.[3] The Olive Grove project met all of FHFC's threshold application requirements, received the maximum application score of 70 points, the maximum "ability-to-proceed" tie-breaker score of 6.0 points, and the maximum proximity tie-breaker score of 7.5 points, and competed for tax credits in the Medium County Geographic Set-Aside.[4]

11. Olive Grove would have received its requested tax credit and ARRA funding if not for FHFC's erroneous scoring of the following application, which, like Olive Grove, proposed a project located in Volusia County: Laurel Villas (FHFC Applic. #2009-228C).[5]

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[3] On or about March 1, 2010, Olive Grove received formal notice from FHFC of the final rankings and scores, along with notice of its rights under Chapter 120 to challenge them. This Petition is timely filed in response to that notice.

[4] Aside from applicants proposing projects targeted to specific tenant populations (e.g., the Homeless) or located in specifie areas (e.g., the Florida Keys), applicants generally compete against each other for funding within Geographic Set-Asides (Large, Medium, and Small) based upon the population of the county in which their project is located.

[5] The location of Olive Grove and Laurel Villas in Volusia County is of special significance. In an effort to distribute its available tax credits across the state, FHFC uses a Set-Aside Unit Limitation" ("SAUL") that restricts the number of units it will fund in any given county. Thus,

The Laurel Villas Application

12. Like Olive Grove, the Laurel Villas application competed for funding in the Medium County Geographic Set-Aside. Pursuant to FHFC's ranking methodology, including application of the SAUL for Volusia County, there were only enough tax credits available in the Medium County Geographic Set-Aside to fund one Volusia County application – Laurel Villas (FHFC Applic. #2009-228C).

13. As explained below, if FHFC had properly scored and rejected the Laurel Villas application, then Olive Grove would have received its requested tax credit and ARRA funding. Olive Grove's substantial interests are therefore materially and adversely affected by FHFC's improper actions, and Olive Grove has standing to challenge those actions in this proceeding.

Equity Commitment Letter
- Syndicator Purchasing Greater Percentage of Tax Credits Than Is Owned by the Applicant's Limited Partner -

14. Effective August 6, 2009, FHFC adopted by reference in its rules the Universal Application Package for FHFC's 2009 Universal Cycle, which includes both the Application and Exhibits to be completed by developers and submitted to FHFC, as well as a set of Application Instructions. *See* Rule 67-48.004(1), F.A.C.

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an application ranked higher than applications in other counties may nonetheless be skipped over for funding if the SAUL for its county has been exceeded under FHFC's rules.

15. Rule 67-48.004(2), F.A.C., makes clear that the failure of an application to be completed in accordance with the Application Instructions 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.

16. Part V of the Application Instructions addresses financing, and the entire part is designated as a threshold requirement. Pages 73 and 74 of the Application Instructions address the anticipated sale of the tax credits to an investor or syndicator for the purpose of raising equity for the development. These pages set forth requirements for the submission of an equity commitment, proposal, or letter of intent regarding the tax credit purchase, which is a threshold item. This document must include "all terms and conditions of the commitment, proposal or letter of intent" and "the percentage of the anticipated amount of Housing Credit allocation being purchased." *Application Instructions*, Part V.D.2(a) (pp. 73-74).

17. In addition, a further threshold requirement for such equity commitments is stated as follows:

> The percentage of credits proposed to be purchased must be equal to or less than the percentage of ownership interest held by the limited partner or member.

Application Instructions, Part V.S.2(b) (p. 74).

18. In response to Preliminary Scoring Item 2T, the Laurel Villas applicant submitted a revised equity commitment letter from RBC Capital Markets, dated August 14, 2009. This revised equity commitment letter, however, fails to meet the above-referenced threshold requirements.

19. The opening paragraph of the revised equity commitment letter states as follows:

> RBC Tax Credit Equity, L.L.C., or an assignee (the "Limited Partner") will acquire a 99.99% limited partnership interest, **and** RBC Tax Manager II, Inc. (the "Special Limited Partner", and sometimes collectively with the Limited Partner, "RBC") will acquire a .001% special limited partnership interest (collectively, the "LP Interest") in the Partnership.[6]

20. Thus, the first RBC entity will acquire a 99.99% ownership interest in the Laurel Villas applicant, and in addition, the second RBC entity will acquire another .001% ownership interest. Together, these two interests constitute the "LP interest" to be acquired. RBC proposes the same percentage allocation of the Laurel Villas tax credits, with the first RBC entity allocated 99.99% and the second RBC entity allocated an additional .001%, leaving .009% for the general partners of the Laurel Villas applicant. *Commitment Letter*, §4(a) (p.2).

21. As specified in Exhibit 9 of the original Laurel Villas application, however, the general partners together own a .01% interest in the Laurel Villas

[6] All emphasis in quoted material is supplied by the undersigned unless otherwise indicated.

applicant, while the initial limited partner owns a 99.99% interest. According to page 74 of the Application Instructions quoted above, the percentage of credits proposed to be purchased must therefore be equal to or less than 99.99% (the percentage of ownership interest held by the limited partner). But the revised equity commitment letter specifies that the collective limited partnership interest to be acquired by the two RBC entities totals 99.991% (99.99% plus .01%). *Commitment Letter*, ¶1 (p.1). The revised equity commitment letter also specifies that 99.991% of the tax credits will be allocated to the two RBC entities. *Commitment Letter*, §4(a) (p.2).

22. This stated percentage (99.991%) is impermissible under the quoted Application Instruction because it is **more** than, not less than or equal to, the percentage of ownership interest in the Laurel Villas applicant held by the limited partner (99.99%) as disclosed in Exhibit 9.

23. The ownership structure of the Laurel Villas applicant could not have been changed to address this inconsistency, because the Application Instructions require the applicant to specify its ownership structure as of the application deadline, and that ownership structure cannot be unilaterally changed thereafter. *Application Instructions*, Part II.A.2.c(1) (p.6).

24. Because the Laurel Villas applicant failed to supply an equity commitment letter satisfying FHFC's requirements -- a threshold item, rejection of

the Laurel Villas application was required under Rule 67-48.004(13), F.A.C.

25. Indeed, with respect to other applications, FHFC has applied its rules and Application Instructions to reject equity commitment letters when the ownership interests to be acquired and tax credits to be allocated exceed the limited partner's ownership percentage in the applicant as disclosed in Exhibit 9. In the 2009 Universal Cycle, FHFC rejected no less than six equity commitment letters in preliminary and/or final scoring for failing this threshold requirement. For example, the equity commitment letter for Palm Lake Apartments (Applic. #2009-118C) was rejected for this reason:

> Per page 74 of the 2009 Universal Application Instructions, the percentage of credits being purchased must be equal to or less than the percentage of ownership interest held by the limited partner or member. The Applicant stated at Exhibit 9 of the Application that the limited partner's interest in the Applicant entity is 99.98%. However, the equity commitment at Exhibit 55 states that 99.99% of the HC allocation is being purchased. Because of this inconsistency, the HC equity cannot be considered a source of financing.

26. FHFC must consistently apply its rules, including the Application Instructions incorporated by reference. This fatal defect in the revised equity commitment letter for Laurel Villas should have led FHFC to reject the Laurel Villas application and remove it from further funding consideration.

27. If FHFC had correctly scored the Laurel Villas application, then Olive Grove would have received its requested tax credit and ARRA funding.

28. In fact, on May 4, 2010, a Final Order in the case of *NVC-Spring Hill, Ltd. v. FHFC*, FHFC Case No. 2010-013UC, was filed with the FHFC clerk. In this Final Order, executed on April 30, 2010, by the chairperson of FHFC's Board of Directors, FHFC approves and adopts a Consent Agreement with the petitioner in that case. In the Consent Agreement, FHFC concedes that it incorrectly scored five different applications in the 2009 Cycle with the same defect in their equity commitment letters as described above. In fact, per this Consent Agreement, one of the five applications that FHFC admits to incorrectly scoring was the application of Laurel Villas (FHFC Applic. #2009-228C). *Consent Agreement*, ¶¶3, 17.

General Contractor Experience
- Incorrect Development Type -

29. Effective August 6, 2009, FHFC adopted by reference in its rules the Universal Application Package for FHFC's 2009 Universal Cycle, which includes both the Application and Exhibits to be completed by developers and submitted to FHFC, as well as a set of Application Instructions. *See* Rule 67-48.004(1), F.A.C.

30. With respect to Item III.A.4. in the Application, page 14 of the Application Instructions state:

> Applicants must select the one Development Type that best describes the proposed Development. For mixed-type Developments, indicate the type that will comprise 50 percent or more of the units in the Development. . . .
>
> • Garden Apartments
> • Townhouses
> • High Rise (a building comprised of 7 or more stories)
> • Single Family Rental
> • Duplexes
> • Quadraplexes
> • Mid-Rise with Elevator (a building comprised of 4 stories)
> • Mid-Rise with Elevator (a building comprised of 5 or 6 stories)
> • Single Room Occupancy (SRO)
> • Other – Specify the type in the addenda

31. In response to this item, the Applicant for Laurel Villas identified its Development Type in its original Application as "Townhouses."

32. Pages 9 and 10 of the Application Instructions require applicants to provide a properly completed General Contractor Certification form in Exhibit 13, along with a Prior Experience Chart demonstrating the general contractor's experience in constructing developments like the one proposed in the Application.

33. Importantly, this is a "threshold" item, and the failure of a General Contractor to properly document its experience in compliance with FHFC's requirements mandates rejection of the application, eliminating it from further funding consideration.

34. In particular, pages 9 and 10 of the Application Instructions make clear that the General Contractor selected by the applicant "must demonstrate experience in the construction of at least two completed housing developments of similar development category and development type, at least one of which consists of a total number of units no less than 50 percent of the total number of units in the proposed Development."

35. Indeed, the FHFC form in question requires the General Contractor to specifically certify "that I have been the General Contractor on at least two completed developments of similar development category and development type, at least one of which consists of a total number of units no less than 50 percent of the total number of units in the Development proposed in this Application, as evidenced by the prior experience chart provided in this Application."

36. Page 10 of the Application Instructions requires that this chart contain several pieces of information about each of the developments listed by the General Contractor, including the Development Category (New Construction or Rehabilitation/Substantial Rehabilitation) and the "Development Type: garden, townhouses, highrise, duplex, quadraplex, midrise w/elevator, single family, SRO, or other (specify type)."

37. As noted above, in response to Item III.A.4, the Applicant identified its Development Type as "Townhouses." As a consequence, the Applicant's

General Contractor "must demonstrate experience in the construction of at least two completed housing developments of similar . . . development type," i.e., at least two Townhouse developments. *Application Instructions*, pp. 9-10.

38. At Exhibit 13, the Applicant included a Prior Experience Chart for its General Contractor documenting four developments, two of which are identified by the General Contractor as "Garden" and two of which are identified by the General Contractor as "Mid-Rise w/ Elevator." No experience of the General Contractor regarding completion of Townhouse developments was evidenced in the Prior Experience Chart.

39. This defect is a threshold failure, which should have led FHFC to reject the Laurel Villas application and remove it from further funding consideration.[7]

40. If FHFC had correctly scored the Laurel Villas application, then Olive Grove would have received its requested tax credit and ARRA funding.

Satisfaction of FHFC Requirements for Post-Ranking Challenge

41. By rule, FHFC has sought to limit the types of scoring errors that an applicant may challenge via Chapter 120 proceedings. FHFC's rule in this regard, Rule 67-48.005(5)(b), states as follows:

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[7] Olive Grove raised this issue by filing a timely NOPSE against the Laurel Villas application, but FHFC refused to modify its scoring.

> For any Application cycle closing after January 1, 2002, if the contested issue involves an error in scoring, the contested issue must (i) be one that could not have been cured pursuant to subsection 67-48.004(14), F.A.C., or (ii) be one that could have been cured, if the ability to cure was not solely within the Applicant's control. The contested issue cannot be one that was both curable and within the Applicant's sole control to cure. With regard to curable issues, a petitioner must prove that the contested issue was not feasibly curable within the time allowed for cures in subsection 67-48.004(6), F.A.C.

42. In this proceeding, although it would have been possible to submit a cure for the General Contractor Certification form and Prior Experience Chart, such a cure "was not solely within the Applicant's control" because the documents necessarily come from a third party – the General Contractor. With respect to the defect in Laurel Villas' equity commitment letter described above, this defect was one that arose in Laurel Villas' attempted cure to that letter, so the defect could not be cured because no further opportunity to cure was provided under FHFC's rules. Moreover, any cure to the equity commitment letter "was not solely within the Applicant's control" because the letter necessarily must come from a third party – the equity syndicator. As such, these FHFC scoring errors are of the type identified in Rule 67-48.005(5)(b), and may be properly challenged in this proceeding.

WHEREFORE, Petitioner, Olive Grove Apartments Limited Partnership, requests that:

a. FHFC award Olive Grove its requested tax credit and ARRA funding (or an alternative to the ARRA funding of like value);

b. FHFC conduct an informal hearing on the matters presented in this Petition if there are no disputed issues of material fact to be resolved;

c. FHFC forward this Petition to the Florida Division of Administrative Hearings for a formal administrative hearing pursuant to section 120.57(1), Florida Statutes, if there are disputed issues of material fact to be resolved, or if non-rule policy forms the basis of any FHFC actions complained of herein;

d. FHFC's designated hearing officer or an Administrative Law Judge, as appropriate, enter a Recommended Order directing FHFC to award Olive Grove its requested tax credit and ARRA funding (or an alternative to the ARRA funding of like value);

e. FHFC enter a Final Order awarding Olive Grove its requested tax credit and ARRA funding (or an alternative to the ARRA funding of like value); and

f. Olive Grove be granted such other and further relief as may be deemed just and proper.

Respectfully submitted on this 13th day of May, 2010.

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been furnished by hand delivery to Diane D. Tremor, Hearing Officer for the Florida Housing Finance Corporation, Rose, Sundstrom & Bentley, LLP, 2548 Blairstone Pines Drive, Tallahassee, FL, 32301-5915; and to Matthew Sirmans, Assistant General Counsel, Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL, 32301-1329; all on this 13th day of May, 2010.

Attorney