STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MCP I, LTD., as applicant for MODEL CITY APARTMENTS--Application No. 2009-257C

Petitioner,

v.

FHFC 2009-061UC
Application No. 2009-257C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice, an informal Administrative Hearing was held in this case in Tallahassee, Florida, on January 14, 2010, before Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

Appearances

For Petitioner:

J. Stephen Menton
Rutledge, Ecenia & Purnell, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

For Respondent:

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

PRELIMINARY STATEMENT

At the informal hearing the parties agreed to file a Stipulation including proposed findings of fact on which the parties agree, and such Stipulation was filed contemporaneously with Respondent's Proposed Recommended Order.

Petitioner submitted Exhibits P-1 through P-3, all of which were admitted into evidence. Respondent submitted Exhibit R-1, which was admitted into evidence. The parties jointly submitted Exhibits J-1 through J-7, all of which were admitted into evidence.

In addition to the above Exhibits, Petitioner presented the testimony of Todd Fabbri, corporate representative of MCP I, Ltd.

Petitioner is referred to below as "Petitioner" or "Model City" and Respondent is referred to as "Respondent" or "Florida Housing."

STATEMENT OF THE ISSUE

The issue in this case is whether Florida Housing correctly scored the Tax Credit Application submitted by Model City in the 2009 Universal Cycle by assessing a ½ point Ability to Proceed Tie Breaker penalty regarding Model City's cure of Exhibit 26 to the Application, the Local Government Verification of Status of Site Plan Approval for Multifamily Developments (hereinafter, the "Site Plan Form").

There are no disputed issues of material fact.

WITNESSES

For Petitioner:

Todd Fabbri
MCP I, Ltd.
580 Village Blvd., Suite 360
West Palm Beach, FL 33409

FINDINGS OF FACT

Based upon the stipulated facts agreed to by the parties and exhibits received into evidence at the hearing, the following relevant facts are found:

1. Petitioner is a Florida limited partnership whose address is 580 Village Blvd., Suite 360, West Palm Beach, Florida 33409, and is engaged in the development of affordable housing in the State of Florida.

2. Florida Housing is a public corporation created by Section 420.504, Florida Statutes, to administer the governmental function of financing or refinancing affordable housing and related facilities in Florida. Florida Housing's statutory authority and mandates appear in Part V of Chapter 420, Florida Statutes. Florida Housing's address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329.

3. On August 20, 2009, Petitioner timely submitted Application No. 2009-257C (the "Application") in Florida Housing's 2009 Universal Cycle application process. The Application sought an allocation of low income housing tax credits ("Tax Credits") to provide equity capital to construct a 100-unit family apartment complex ("Model City Plaza") in Miami-Dade County, Florida.

4. Florida Housing is the allocating agency and administers the federal low income housing tax credit program (the "Tax Credit Program") established in Florida under the authority of Section 420.5093, Fla. Stat.

5. The Tax Credit Program was created in 1986 by the federal government. Every year since 1986, Florida has received an allocation of federal Tax Credits to be used to fund the construction of affordable housing. Tax Credits are a dollar for dollar offset to federal income tax liability.

6. Developers who receive an allocation of Tax Credits get the awarded amount every year for ten years. The developer will often sell the future stream of tax credits to a

syndicator, who, in turn, sells them to investors seeking to shelter income from federal income taxes.

7. Low income housing tax credits come in two varieties: competitively awarded "9%" tax credits and non-competitively awarded "4%" tax credits. The "9%" and "4%" designations relate to the approximate percentage of a development's eligible cost basis that is awarded in annual tax credits. The 4% tax credits are "non-competitive" in the sense that developers do not directly compete for an award. Instead, the 4% tax credits are paired with tax exempt mortgage revenue bonds. The 9% Tax Credits are competitively awarded.

8. Each year the federal government allocates to every state a specific amount of 9% Tax Credits using a population-based formula. Developers in Florida directly compete for an award of 9% credits through the Universal Cycle process.

9. Since 2002, Florida Housing has administered several programs, including the Tax Credit Program, through a combined competitive process known as the "Universal Cycle."

10. Florida Housing has adopted rules which incorporate by reference the application forms and instructions for the Universal Cycle as well as general policies governing the allocation of funds from the various programs its administers.

11. Rule 67-48.004, Fla. Admin. Code, sets forth the process used by Florida Housing to review the Universal Cycle applications and to determine funding allocations from the various programs. That process is summarized as follows:

a) Developers submit applications by a specified date.

b) Florida Housing staff reviews all applications to determine if certain threshold and scoring requirements are met.

c) Applications are awarded points based on a variety of features as programs for tenants, amenities of the development as a whole and of the tenants' units, local government contributions to the specific development, and local government ordinances and planning efforts that support affordable housing in general.

d) After Florida Housing's initial review and scoring, a list of all applications, along with Florida Housing's threshold determinations, initial scoring and tiebreaker points, is published on Florida Housing's website (the "Preliminary Scores").

e) Following the issuance of Preliminary Scores, the applicants are then given a specific period of time to alert Florida Housing of any errors they believe were made in the Preliminary Scores with respect to competitors' applications. These potential scoring errors are submitted through a Notice of Possible Scoring Error or "NOPSE."

f) After Florida Housing staff has reviewed the NOPSEs, a revised scoring summary (the "NOPSE Scores") is published.

g) Following the issuance of the NOPSE Scores, Applicants can "cure" their applications by supplementing, correcting or amending the application or its supporting documentation. Certain items are specified in Florida Housing's rules that cannot be "cured." A deadline is established after which no cures can be submitted.

h) After all cures have been submitted, an applicant's competitors have an opportunity to comment on the attempted cures by filing a Notice of Alleged Deficiency or "NOAD."

i) Florida Housing staff reviews all of the submitted cures and NOADs and prepares its "final" scoring summary for all applications.

12. Florida Housing's "final" score for each application sets forth the staff's position on threshold issues, scoring and tiebreaker points. The "final" scores represent preliminary agency action which is accompanied by a point of entry for an applicant to request a formal or informal administrative proceeding on the scoring of its own application. An appeal procedure for challenging the final scores assigned by Florida Housing is set forth in Rule 67-48.005, Fla. Admin. Code.

13. Following the completion of informal appeal proceedings under Section 120.57(2), Fla. Stat., Florida Housing publishes final rankings which delineate the applications that are within the "funding range" for the various programs. In other words, the final rankings determine which applications are preliminarily selected for funding.

14. The applicants ranked in the funding range are then invited into the "credit underwriting" process. The Credit Underwriting review of a development selected for funding is governed by Rule 67-48.0072, Fla. Admin. Code.

15. Because of the likelihood that many applications will achieve a "perfect score," Florida Housing has built into its scoring and ranking process a series of "tiebreakers" to determine the final ranking of applicants and to decide which projects get funded. The tiebreakers are utilized to differentiate between competing applicants that have all achieved the maximum highest score. The tiebreakers are written into the Application Instructions which, as indicated above, are incorporated by reference into Florida Housing's rules.

16. The final tiebreaker for those applicants that achieve a perfect score and maximum tiebreaker points is a randomly assigned lottery number.

17. For the 2009 Universal Cycle, Application Deadline was August 20, 2009.

18. On or about September 8, 2009, Florida Housing issued the Preliminary Scores for the applications submitted in the 2009 Universal Cycle. As part of the Preliminary Score for Model City's Application, Florida Housing determined that the Application was entitled to a full point for site plan/plat approval element of the "ability to proceed" tiebreaker.

19. On or about October 1, 2009, another applicant in the 2009 Universal Cycle (the "Opposing Applicant") submitted a Notice of Possible Scoring Error ("NOPSE") challenging the scoring of Petitioner's Application. The NOPSE alleged that the Application did not meet threshold requirements because Petitioner failed to comply with Part III, Section C, Subsection (1) of the 2009 Universal Application Instructions (requiring a verification of site plan/plat approval for multi-family developments). The NOPSE contended that Petitioner did not meet threshold requirements because there had not been a local government Zoning Board meeting on the date noted on the Local Government Verification Form.

20. On October 26, 2009, Florida Housing issued its NOPSE Scores for all applications in the 2009 Universal Cycle. The NOPSE Score for Petitioner's Application indicated that the Application did not meet threshold requirements due to the purported failure to provide verification of site plan approval by the local government.

21. In response to the NOPSE Score for its Application, the Petitioner submitted a "cure" on November 3, 2009, in accordance with Rule 67-48.004(6), Florida Administrative Code.

22. On December 3, 2009, Florida Housing issued its Final Scores and Notice of Rights (the "Final Scoring"). Petitioner received notice of the Final Scoring through the publication by Florida Housing on December 3, 2009.

23. The Final Scoring for the Application rescinded the determination in the NOPSE Scores that the Application failed to meet threshold because of the purported failure to comply with Part III, Section C, Subsection (1) of the 2009 Universal Cycle Application Instructions. However, the Final Scoring only awarded 1/2 point to the Applicant for the site plan/plat approval element of the "ability to proceed" tiebreaker.

24. As a result of the 1/2 point reduction, Petitioner's Application failed to achieve the maximum tie-breaker points available for "ability to proceed" and, consequently, the Application is currently ranked outside the funding range for an allocation of Tax Credits in the 2009 Universal Cycle.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding.

2. As requested by the parties during the informal hearing, official recognition is taken of Respondent's rules, particularly Rule Chapters 67-21 and 67-48, Fla. Admin. Code, as well as the Universal Application Package or UA1016 (Rev. 3-08).

3. The Universal Application Package, or UA1016 (Rev. 3-08), which includes both its forms and instructions, is adopted as a rule. *See*, Rule 67-48.004(1)(a), Fla. Admin. Code, and Section 120.55(1)(a)4., Fla. Stat. The forms and instructions are agency statements of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of Florida Housing and therefore meet the definition of a "rule" found in Section 120.52, Fla. Stat. As such, the instructions and forms are themselves rules.

4. Florida Housing bases its decision to award the Model City Application ½ of an Ability to Proceed Tie-Breaker Point on the language and the chart found at page 29 of the 2009 Universal Application Instructions, in pertinent part:

C. Ability to Proceed

For Applications requesting Competitive HC, during the preliminary and NOPSE scoring process described in subsections 67-48.004(3), (4) and (5), F.A.C., Applicants may be eligible for Ability to Proceed tie-breaker points for the following Ability to Proceed elements: Site Plan/Plat Approval, Infrastructure Availability (electricity, water, sewer and roads), and Appropriate Zoning. The Applicant will either

(i) Achieve the full 6 Ability to Proceed tie-breaker points if it meets the threshold requirements for all of the following elements: site plan/plat approval, availability of electricity, availability of water, availability of sewer, availability of roads, and appropriate zoning, or

(ii) Achieve 1 Ability to Proceed tie-breaker point for each of these elements which pass threshold and zero Ability to Proceed tie-breaker points for each of these elements which fail threshold. Then during the cure period described in subsection 67-48.004(6), F.A.C., if a threshold failure is successfully cured the Application will be awarded ½ Ability to Proceed tie-breaker point for each cured Ability to Proceed element.

Ability to Proceed tie-breaker points will be awarded as follows:

Competitive HC Ability to Proceed Tie-Breaker Points			
Ability to Proceed Element	**Preliminary and NOPSE Scoring**		**Cure Period**
	Pass Threshold – Tie-Breaker Point Value for each Element	**Fail Threshold – Tie-Breaker Point Value for each Element**	**Pass Threshold – Tie-Breaker Point Value for each Element**
Site Plan/Plat Approval	1	0	½
Availability of Electricity	1	0	½
Availability of Water	1	0	½
Availability of Sewer	1	0	½
Availability of Roads	1	0	½
Appropriately Zoned	1	0	½
Total Available Tie-Breaker Points	6	0	3

5. Essentially, the above provisions and accompanying chart award a full point to those Applicants that submit the listed items correctly and who are not required to cure. Those applicants who are required to cure these items are awarded ½ point if the cure is successful. Those applicants that submit cures that are not successful receive no points, in addition to failing threshold requirements.

6. In the instant case, there is no dispute that Model City submitted a cure for the Site Plan Form, and no dispute that Florida Housing ultimately determined that the cure was successful and that the Model City Application passed threshold with regard to the Site Plan Form. Based upon these undisputed facts, the plain language of the Instructions and accompanying chart indicate that Model City should receive only ½ of an Ability to Proceed Tie-Breaker Point for the Site Plan Form.

7. Likewise, there is no dispute that information originally provided on the Site Plan Form was incorrect, in that it indicated that that the local Zoning Board had met on "07/09/2009" to approve the site plan for the Model City development, where information in a NOPSE demonstrated that no such meeting took place on that date. (*Exhibits J-3, J-5*) As the information presented on the originally submitted Site Plan Form was in error, Model City was required to cure it.

8. Florida Housing stated during the informal hearing in this matter that it interprets the language of the Instructions at page 29 as mandating a ½ point penalty for any Applicant that is required to cure one of the indicated forms, including the Site Plan Form, and that per the Instructions it is the *act of curing* a defect that garners an Applicant the ½ point penalty, regardless of whether the Applicant ultimately passed threshold with respect to any issues with a listed form. The plain language of the Instructions on this topic, as well as the chart provided

above that expressly provides for a ½ point penalty for any cured form, regardless of issue, supports Florida Housing's interpretation.

9. Florida Housing further suggested that it would decline to impose such a penalty on an Applicant if that Applicant were to show that Florida Housing erred in determining that a listed form failed threshold in the first place – in other words, if the Applicant could prove that the initial rejection of the form by Florida Housing was in error. Model City cannot demonstrate such a situation here, where it is undisputed that the Site Plan Form contained incorrect information requiring a cure.

10. The change in the Universal Application Package during the 2009 Cycle altered the competitive nature of the Ability to Proceed tie-breaker points by in essence, rewarding those applicants who correctly provided the relevant and correct information the first time.

11. This additional step was included after input from applicants and interested parties in the rule workshops and hearings as an opportunity to cure threshold items which previously were either met or failed, by allowing a cure and a half-point addition to a previously failed threshold item once properly cured.

12. Model City's originally submitted form alleged that a meeting took place on July 9, 2009, and that the Development received some sort of approval at this meeting. A NOPSE subsequently demonstrated that this was impossible, as no such meeting took place on that date. *(Exhibit J-3)* Faced with this evidence in the scoring process, Florida Housing could not know that approval was obtained on some other prior date, but could only conclude that the proposed Development had not received site plan approval, or at the very least, the Applicant had not yet provided proof that it had. Accordingly, Florida Housing could not accept the originally submitted Site Plan Form, and correctly rejected it as failing threshold.

13. Model City vigorously argued, after the completion of the scoring process, that the Hearing Officer find that the error was typographical, citing previous instances where Florida Housing was found to have erred in penalizing Applicants for mere typographical errors. The most pertinent previous Final Order regarding the subject of typographical errors is *Tuscany Village Associates, Ltd. V. Florida Housing Finance Corporation* (FHFC Case No. 2002-048 – hereinafter, "*Tuscany Village*"). A copy of this Final Order is attached hereto as Exhibit A.

14. *Tuscany Village* involved the attempted cure of an infrastructure availability form (roads) that was initially rejected for failing to be properly executed by the appropriate local government official. The Applicant then attempted to cure this defect by submitting a letter from the local government attesting to the availability of roads, but Florida Housing rejected the cure as the letter was not dated within twelve months of Application Deadline. At the informal hearing, Florida Housing conceded that its scoring was in error in that the incorrect date on the letter was obviously a typographical error that could have been seen to be such by examining other parts of the *Tuscany Village* Application.

15. The instant case is distinguishable from *Tuscany Village* as the process has been changed to allow the cure of the failure of threshold items, for whatever reason, but the result is that the Applicant only receives a ½ point instead of a full point as a penalty in the Ability to Proceed Tie-Breaker points. The plain language of the application, and thus the rule, does not allow for any other interpretation unless Florida Housing errantly disqualified factually correct information in the scoring process and the form was correct in the initial application.

16. The plain language of page 29 of the Instructions, as well as its accompanying chart, clearly and unambiguously provide that an Applicant that cures a Site Plan Form is awarded only ½ of a Ability to Proceed Tie-Breaker Point. As Florida Housing is simply

following this plain language and chart, there is no interpretation to be examined or challenged by Model City, and no ambiguity to be resolved. As previously noted, this case is one of first impression and this plain and unambiguous language is not subject to any interpretation found in previous Final Orders of Florida Housing.

17. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation.[1] The interpretation should be upheld even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation.[2] Given that Florida Housing has in this case simply applied the plain language of its Instructions, this Hearing Officer cannot find that its interpretation was clearly erroneous.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, in is hereby RECOMMENDED that Florida Housing enter a Final Order affirming Florida Housing's scoring of Petitioner's application, and denying the relief requested in the Petition.

Respectfully submitted this 2nd day of February, 2010.

David E. Ramba

David E. Ramba, Hearing Officer

[1] Legal Environmental Assistance Foundation, Inc., v. Board of County Commissioners of Brevard County, 642 So.2d 1081 (Fla. 1994); Miles v. Florida A & M University, 813 So.2d 242 (Fla. 1st DCA 2002).
[2] Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995).

Copies furnished to:

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