

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

CP DEVELOPMENT GROUP 2, LLC,
a Florida limited liability company

Petitioner,

v.

FHFC CASE NO.: 2009-065UC
Application No. : 2009-114C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on February 26, 2010. The matter for consideration before this Board is a recommended order pursuant to Section 120.57(2), Florida Statutes, and Rule 67-48.005(2), F.A.C.

CP Development Group 2, LLC, (“Petitioner”) timely submitted its 2009 Universal Cycle Application (“Application”) to Florida Housing Finance Corporation (“Florida Housing”) to compete for an allocation of competitive housing credits under the Housing Credit (HC) Program administered by Florida Housing. Petitioner timely filed its Petition for Review, pursuant to Sections

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Nella M. Hassell / DATE: 2/26/10

120.569 and 120.57(2), Florida Statutes, (the “Petition”) challenging Florida Housing’s scoring of its Application. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition did not raise disputed issues of material fact. An informal hearing was held in this case on January 13, 2010, in Tallahassee, Florida, before Florida Housing’s designated Hearing Officer, David E. Ramba. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.” The Hearing Officer recommended Florida Housing enter a Final Order determining that Petitioner met the threshold requirements relating to its housing credit equity commitment letter.

Respondent timely filed its Argument in Opposition to the Recommended Order, a copy of which is attached hereto as “Exhibit B,” and made a part hereof by reference. Petitioner filed its Motion to Strike Respondent’s Argument in Opposition to the Recommended Order, a copy of which is attached hereto as “Exhibit C.”

Upon consideration of the foregoing, the Board enters this as its Final Order in this matter.

RULING ON PETITIONER'S MOTION TO STRIKE

This Board has not, and cannot, chosen to delegate *final* order authority to the designated hearing officer. The matter for consideration before this Board is a recommended order pursuant to Rule 67-48.005(2), F.A.C. (“At the conclusion of any administrative hearing, a *recommended* order shall be entered by the designated hearing officer which will then be *considered* by the Board.”) And, while in the vast majority of cases no exception is taken to the recommended order entered by the designated hearing officer, this Board is not constrained by its rules to accept the recommended order as its final order. To the contrary, there is precedent not only for this Board’s rejection of conclusions of law (or recommendations) in a recommended order but for the very procedure objected to by Petitioner here, namely the filing of an argument in opposition to the recommended order by Florida Housing’s legal staff.

Petitioner correctly asserts that Rule 67-48.005(3), F.A.C., provides a procedure for an Applicant to challenge the findings of a recommended order entered pursuant to an informal hearing, and that the rule is silent in terms of a procedure for Florida Housing as a party litigant to challenge the findings of a recommended order. However, the rule cannot, and does not, limit this Board’s absolute right to advice of counsel on any matter properly before it, including the recommended orders entered by its designated hearing officers.

Even when adopting the recommended order *in toto*, this Board does so based upon advice of counsel, in the form of a recommendation by its legal staff. And, on those few occasions where the Board has previously rejected conclusions of law or recommendations made by its informal hearing officer in a recommended order, it has done so based upon the recommendation of its legal staff, communicated to the Board in the form of written arguments in opposition to the recommended order. *See, e.g., Catholic Charities Housing, Inc. (a/k/a San Jose Mission, Catholic Charities, Inc.) v. Florida Housing Finance Corporation, FHFC Case No. 2004-019-UC* (this Board, in its final order, rejected a recommendation made by the hearing officer in the Recommended Order); *Merry Place at Pleasant City Associates, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2005-018UC*, (this Board, in its final order, rejected certain of the informal hearing officer's conclusions of law). Each of these actions was based upon a Written Argument in Opposition to the Recommended Order filed by Florida Housing's legal staff.

This Board views the Argument in Opposition to Recommended Order filed in this case as a recommendation made by its legal staff and the Board elects to treat it as such. In fact, it is an exhibit to the staff recommendation included in the Board agenda for this meeting. That Florida Housing staff chose the procedure available to an Applicant under Rule 67-48.005(3), F.A.C., is a matter of

fundamental fairness in that it afforded Petitioner advance notice of those recommendations and the opportunity for Petitioner to register its objections in advance of today's Board meeting. One alternative, which would not have violated the rule, would have been for Florida Housing legal staff to only let its recommendations or advice to the Board regarding the recommended order be known during the Board meeting.

As a matter of procedure, the Board finds that Florida Housing's filing of Written Argument in Opposition to the Recommended Order does not in any way work to the disadvantage of the Petitioner, or to the advantage of Florida Housing.

The substantive issues raised by Petitioner in its motion are addressed below.

Accordingly, Petitioner's Motion to Strike is denied.

RULING ON THE RECOMMENDED ORDER

1. The findings of fact set out in the Recommended Order are supported by competent substantial evidence.

2. The conclusions of law in paragraphs 1 through the first paragraph number 7¹ of the Recommended Order are supported by competent substantial evidence.

¹ There are two paragraphs consecutively numbered 7 in the Conclusions of Law section of the Recommended Order.

3. The conclusions of law beginning with the second paragraph numbered 7 through paragraph 10 on pages 8 and 9 of the Recommended Order are contrary to Florida Housing's rules and applicable law for the reasons stated in Respondent's Argument in Opposition to the Recommended Order and as otherwise implicit in the substituted conclusions in paragraph 8 below.

4. The conclusions of law or interpretations of the administrative rules governing this matter as set forth in paragraph 8 of this Final Order are substituted in place of the rejected conclusions.

5. The substituted conclusions of law or interpretations of the administrative rules governing this matter are found to be as or more reasonable than the conclusions of law that were rejected or modified hereby.

6. Based upon the substituted conclusions of law or interpretations of the administrative rules governing this matter, the Recommendation in the Recommended Order is contrary to Florida Housing's rules and applicable law.

ORDER

In accordance with the foregoing, it is hereby **ORDERED**:

5. The findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

6. The conclusions of law in paragraphs 1 through the first paragraph number 7 of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

7. The conclusions of law beginning with the second paragraph numbered 7 through paragraph 10 on pages 8 and 9 of the Recommended Order are rejected as contrary to Florida Housing's rules and applicable law for the reasons stated in Respondent's Argument in Opposition to the Recommended Order and as otherwise implicit in the substituted conclusions in paragraph 8 below.

8. The following conclusions of law or interpretations of the administrative rules governing this matter are substituted in place of the rejected conclusions:

“S-1. Rule 67-48.004(14), Fla. Admin. Code, contains a list of mandatory elements that must be included in the Application, and states in relevant part:

(14) Notwithstanding any other provision of these rules, there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline. Failure to submit these items in the Application at the time of Application Deadline shall result in rejection of the Application without opportunity to submit additional

information. Any attempted changes to these items will not be accepted. Those items are as follows:

(m) Funding Request ...²

(Emphasis added)

S-2. Rule 67-48.004(9), Fla. Admin. Code, provides in part that

...In determining such final scores, no Application shall fail threshold or receive a point reduction as a result of any issues not previously identified ... However, inconsistencies created by the Applicant ... will still be justification for rejection of the Application, threshold failure, or reduction of points, as appropriate. Notwithstanding the foregoing, any deficiencies in the mandatory elements set forth in subsection (14) ... can be identified at any time prior to sending the final scores to Applicants and will result in rejection of the Application...

(Emphasis added)

S-3. Part V.D.2.(f) of the Application Instructions provides in part:

2. Syndication/HC Equity

For purposes of this Application, an equity commitment, proposal or letter of intent must include the following:

(f) If the amount of Competitive Housing Credits requested is less than the anticipated amount of credit allocation stated in the equity/owner/syndication commitment, proposal or letter of intent, the commitment,

² With certain exceptions not applicable here.

proposal or letter of intent will not be considered a source of financing.

(Emphasis added)

S-4. The Petitioner (“CPD”) attempted to document its housing credit equity commitment by providing a letter dated August 11, 2009 from Bank of America. *(Exhibit J-5)* That letter was rejected at preliminary scoring for the reasons stated in the preliminary scoring summary at Item #'s 1T and 2T. *(Exhibit J-2)* On cure, CPD submitted a revised equity commitment letter from Bank of America dated October 22, 2009. *(Exhibit J-6)* At issue here is the revised equity commitment letter submitted on cure.

S-5. Florida Housing's rejection of the revised equity commitment letter for the reasons stated in Item # 9T of the final scoring summary resulted in the additional threshold failures for construction and permanent financing shortfalls described in Items # 7T and 8T of the final scoring summary. *(Exhibit J-4)*

S-6. In its Application, at Part V.A.1., CPD's funding request was for an annual allocation of housing credits in the amount of \$1,103,825.00. *(Exhibit J-7)* Under Rule 67-48.004(14)(m), CPD was not permitted to change the amount of its funding request after Application Deadline. And, if CPD did attempt to change the amount

of its funding request after Application Deadline, the rule states that the attempted change will not be accepted.

S-7. The revised Bank of America equity commitment letter provided by CPD on cure anticipates an annual housing credit allocation in the amount of \$1,470,887. (*Exhibit J-6*) Under Part V.D.2.(f) of the Application Instructions, if the amount of housing credits requested by the Applicant in its Application is less than the amount of housing credits anticipated in the equity commitment, the letter will not be considered a source of financing.

S-8. Here, it is undisputed that the amount of the housing credit allocation requested in CPD's Application (\$1,103,825) is less than the anticipated amount of housing credit allocation stated in the revised Bank of America equity commitment letter (\$1,470,887). If that happens, the consequences are made clear in the Application Instructions: "...the commitment...will not be considered a source of financing."

S-9. CPD's attempt to increase the amount of its funding request to \$1,470,887 by providing a revised page 20 of its Application as part of its cure (*Exhibit P-1*), was in contravention of Rule 67-48.004(14)(m) which provides that the funding request

cannot be changed after Application Deadline. The rule clearly states that any attempted changes to this amount will not be accepted.³

S-10. CPD maintains that Florida Housing's preliminary scoring of the Bank of America commitment letter amounted to a "directive" from Florida Housing to change the housing credit funding request; and, were that not the case, Florida Housing was obligated by Rule 67-48.004(14)(m) to reject CPD's Application without opportunity to cure.

S-11. That position is not supported by the language in the rule or in the preliminary scoring. First, the event that triggers rejection of an Application without opportunity to cure under Rule 67-48.004(14)(m) is the failure to submit any of the listed items (among them, the funding request) at the time of Application Deadline (i.e., "...Failure to submit these items in the Application at the time of Application Deadline shall result in rejection of the Application without opportunity to submit additional information..."). Here, CPD did in fact submit its housing credit funding request in its Application which was filed by the Application Deadline. (*Exhibit J-7*) As a result,

³ *Spinal Cord Living-Assistance Development, Inc. (SCLAD) v. Florida Housing Finance Corporation*, FHFC Case No. 2007-028UC (2007) ("In an attempt to 'cure' the resulting financing shortfall, Petitioner deferred its developer fee of \$205,000, and requested an increase in the HOME funding amount of \$316,000. ***This constitutes a clear violation of Rule 67-48.004(14)(n)*** ...Accordingly, Petitioner's attempt to change its funding request from \$1,100,000 by \$316,000, for a total of \$1,416,000 was properly rejected by [Florida Housing].") (Final Order adopting Recommended Order, pgs. 5 and 6) (*Emphasis added*)

there was no basis under Rule 67-48.004(14)(m) to reject CPD's Application for that reason. Significant here is the next sentence in the rule: "Any attempted changes to these items will not be accepted." *(Emphasis added)*

S-12. The deficiency noted by Florida Housing in its preliminary scoring summary regarding the original Bank of America commitment was the failure to calculate the amount of equity based on the two limiting factors stated in the letter, namely that the Bank was purchasing the credits at \$.71 cents on the dollar (as opposed to 100% on the dollar) as the 99.99% investor (as opposed to 100% investor). Nowhere in the preliminary scoring summary is anything akin to a "directive" to change CPD's funding request from that originally requested in its Application. Indeed, the annual housing credit allocation stated in the second paragraph of the original Bank of America commitment (i.e., "(which is \$1,103,825 annual housing credit allocation)") was consistent with the funding request amount in CPD's Application. In its preliminary scoring summary, Florida Housing did nothing more than describe the deficiencies in the letter. It is not Florida Housing's role to instruct CPD or any other applicant in the Universal Application Cycle on how to cure a deficiency;

indeed, to do so would be to assist CPD in completing its Application which Florida Housing cannot do.⁴ Like all other applicants competing for funding in the Universal Application Cycle, CPD is presumed to know the governing rules and instructions, including the restrictions placed on the funding request amount by Rule 67-48.004(14)(m) and the requirements applicable to equity commitment letters at Part V.D.2.(f) of the Application Instructions.⁵ And, recognizing those restrictions, while it may have resulted in an equity commitment amount less than that desired by CPD, the deficiencies in the equity commitment letter noted at preliminary scoring could have been cured by simply performing the mathematical calculations contemplated in the letter (i.e., the \$.71 cents and 99.99%) on CPD's original funding request of \$1,103,825, an amount also recognized as the "annual housing credit allocation" in the letter itself.

S-13. While Florida Housing may have accepted Petitioner's revised equity commitment for purposes of having cured the mathematical calculation deficiencies noted at preliminary scoring,

⁴ Marian Manor, Inc. v. Florida Housing Finance Corporation, FHFC Case No. 2006-019UC (2006) ("Rule 67-48.004(1)(b), F.A.C., provides, in pertinent part, that "all applications must be complete..." and also prohibits Florida Housing from assisting an applicant with its application.") (Final Order adopting Recommended Order, p. 8)

⁵ See, SCLAD, supra ("To allow Petitioner to ignore the entirety of Rules not cited in the Instructions for Filing Cures would be to totally disregard the rules governing competitive funding applications. The Instructions furnished to Petitioner simply contain procedural rules and documentation necessary for filing cures. They are provided to applicants as a courtesy and do not diminish, alter or excuse the strict requirements of Chapter 67-48, Florida Administrative Code.") (Final Order adopting Recommended Order, p. 7)

the revised letter created a new failure, or inconsistency, in that “the commitment reflects a larger HC request amount than applied for, which is not allowed under paragraph 67-48.004(14)(m)...”. (*Exhibit J-4*)

S-14. An inconsistency in a threshold item created by the Applicant in its cure is justification for rejection of the application. Rule 67-48.004(9), Fla. Admin. Code. ⁶

S-15. And, even if it is assumed for purposes of argument that the issue regarding the funding request amount was not simply an inconsistency created by the Petitioner in its cure but, rather, was somehow apparent at the time of preliminary scoring and not identified as a deficiency at that time, Rule 67-48.004(9), Fla. Admin. Code, provides that any deficiency listed in the mandatory elements in subsection (14), which includes the funding request amount at subsection 14(m), can be identified at any time prior to sending the final scores, regardless of whether the deficiency was previously identified and will result in rejection of the Application. (*Emphasis added*)

⁶ See, Walton County Development Corporation v. Florida Housing Finance Corporation, FHFC Case No. 2002-0066 (“Petitioner’s reliance on Rule 67-48.004(9), Florida Administrative Code, for the proposition that Respondent may not reject or reduce points in its final scoring unless an issue was previously identified in its preliminary [or NOPSE scoring] defies common sense when it is applied to new information submitted for the first time in “cure” documentation.”) (Final Order adopting Recommended Order, p. 9)

S-16. Thus, as a matter of law, Florida Housing's rejection of Petitioner's revised equity commitment letter at the time of final scoring is not only authorized by rule, such action is mandated by rule; and, because the issue involves a mandatory item, it makes no difference when the issue first arose or was first identified by Florida Housing as long as the deficiency is identified prior to final scoring.

S-17. Petitioner introduced documentation (which was accepted over Florida Housing's objection)⁷ pertaining to Florida Housing's scoring of another application (Application No. 2009-106C) from this same 2009 Universal Application Cycle. (Exhibits P-2 through P-5) The fact that Florida Housing may have failed to detect a similar deficiency in another application demonstrates nothing more than "...a mistake or oversight on [its] part, and does not serve as precedent for a clear disregard of the controlling rules."⁸ Neither does the fact that Florida Housing apparently missed a defect in another application serve to excuse Petitioner's failure to comply with

⁷ Recommend Order, page. 2.

⁸ Nautilus Development Partners, LLLP v. Florida Housing Finance Corporation, FHFC Case No. 2006-023UC (2006) ("The fact that Respondent may have approved in a prior cycle another applicant's ...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.")(Final Order adopting Recommended Order, p. 9)

the explicit requirements of the rules.⁹ If anything, it means that Florida Housing should have exercised greater diligence in scoring the other application.¹⁰ Here, Petitioner would have been unaware of Florida Housing's decision to accept or reject the cure in the other application until after Petitioner had submitted its own cure. Thus, Petitioner was certainly not prejudiced or misled by Florida Housing's failure to reject the cure in that other application in this case.¹¹

S-18. Cypress Senior Village, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-027UC, a case relied upon by Petitioner, is distinguishable from the case at hand. In Cypress, the issue was whether or not a computation sheet was an "attachment" to a Fee Waiver Form under Florida Housing's rules and instructions at

⁹ MBCDC: Villa Maria, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-025UC (2006) ("The fact that Respondent apparently missed the defect with the second 2005 form...does not change the explicit requirement in Respondent's rules that no forms from previous cycles will be accepted.") (Final Order adopting Recommended Order, p. 10); *see also*, Plaza La Isabela, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-022UC (2006) (Petitioner's reliance on Florida Housing orders from different universal cycles "cannot be read for the proposition that [Florida Housing] is required to ignore its clear and unambiguous rules.") (Final Order adopting Recommended Order, p. 11)

¹⁰ Furthermore, the fact that Florida Housing may have failed to detect a similar defect in the equity commitment letter in another application does not operate to change that application's funding request amount. This is so regardless of any attempt to do so by the applicant. Rule 67-48.004(14), F.A.C., is explicit in its mandate that the funding request amount "...cannot be revised, corrected or supplemented after Application Deadline." And, to the extent that the applicant may have attempted to change its funding request amount during the cure period, the rule precludes its acceptance by Florida Housing (i.e., any attempted changes "will not be accepted.").

¹¹ MBCDC: Villa Maria, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2005-005UC (2005) (In the same application, even if Florida Housing erred in accepting one commitment as a source of permanent financing, "that fact would not result in the conclusion that its rejection of [the rejected commitment] as a source of permanent financing was unreasonable or incorrect...The documentation concerning both [commitments] were submitted by Petitioner at the same time as part of the 'cure' process. Petitioner could not have relied upon or been misled by [Florida Housing's] treatment of the [accepted commitment] as a basis for its submittal of the [rejected commitment] because it learned of [Florida Housing's] treatment of both financing sources at the same time.") (Final Order adopting Recommended Order, p. 11)

that time. The meanings of such words as “accompanies” and “foregoing” as used in Florida Housing’s rules and instructions at that time were at issue and discussed in detail, including resort to their dictionary definitions. The Hearing Officer observed that the nuances in the language “creates a certain inherent ambiguity with regard to the proper interpretation of Florida Housing’s rules” and determined that the “ambiguity must be decided in favor of the applicant.” The Hearing Officer also noted that “If Florida Housing intended the computation sheet to be an attachment or exhibit...it could have simply so stated explicitly.” Florida Housing took heed and subsequently amended its rules and instructions accordingly.

S-19. Unlike Cypress, here there is no claimed ambiguity or nuance in the language used in the governing rules and instructions. Indeed, as summarized in paragraph S-23 below, not only are the governing rules and instructions clear and unambiguous, they are mandatory. As a result, unlike Cypress where Florida Housing could “fix” the issue by revising its rules and instructions, the rules and instructions at issue here require no clarification; Florida Housing can make them no clearer. In short, Cypress cannot be read for the proposition that Florida Housing is either required or permitted to

ignore the clear requirements of those rules;¹² nor can it be read to excuse Petitioner's compliance with those rules.

S-20. Petitioner initiated this proceeding to contest the scoring of its own application pursuant to Rule 67-48.005(2), Fla. Admin. Code. The issue here is whether or not the equity commitment letter provided by CPD on cure met the applicable requirements under Florida Housing's rules and instructions. Whether or not another applicant's equity commitment met those requirements is not necessary or relevant to that determination. This is particularly so where, as here, the other application is part of the current Universal Application Cycle and the applications in the cycle had not yet been ranked for funding by Florida Housing's Board.

S-21. Following final ranking, Florida Housing's rules provide a means of redress to those applicants adversely affected by Florida Housing's scoring of another application. Under Rule 67-48.005(5), Fla. Admin. Code, an applicant whose application would have been funded "but for" Florida Housing's failure to properly score another application may file a petition contesting Florida Housing's scoring of

¹² See, Plaza La Isabela, LLC V. Florida Housing Finance Corporation, FHFC Case No. 2006-022UC (2006) (Petitioner's reliance on Florida Housing orders from different universal cycles "cannot be read for the proposition that [Florida Housing] is required to ignore its clear and unambiguous rules.") (Final Order adopting Recommended Order, p. 11)

that other application. By way of contrast, Florida Housing's rules contain no provision that would serve to excuse an applicant's failure to comply with the requirements of the rules in connection with its own application based on Florida Housing's scoring of another application. In other words, alleged errors in scoring by Florida Housing can be used by an adversely affected applicant with standing as a sword to attack the scoring of another application in the same application cycle but not as a shield to excuse an applicant's compliance with the express requirements of the rules.

S-22. To construe Florida Housing's inaction on a single application¹³, of itself, to be anything other than an oversight on the part of Florida Housing, is not supported by the record. And, to go beyond that and construe that inaction as rising to the level of a rule interpretation, particularly when that interpretation would operate as an estoppel against Florida Housing's enforcement of its rules against Petitioner in this case (and, presumably any other applicant similarly situated) would lead to unreasonable and absurd results. It is well established that an agency cannot ignore its own rules.¹⁴

¹³ Petitioner's Exhibits P-2 through P-5 all pertain to the scoring of Application No. 2009-106C.

¹⁴ Department of Revenue v. Rae, 743 So. 2d 169, 171 (Fla. 5th DCA 1999); Savannah Springs Apartment II, Ltd. V. Florida Housing Finance Corporation, FHFC Case Nos. 2007-048UC and 2007-049UC (Final Order, adopting Recommend Order, August 8, 2008)

S-23. The rules at issue are mandatory in nature; they are clear and unambiguous, and need no interpretation. (*Emphasis added*) Rule 67-48.004(14)(m) is clear in its mandate: the funding request amount cannot be revised, corrected or supplemented after Application Deadline and any attempt to change the funding request will not be accepted. Rule 67-48.004(9) is likewise clear: any deficiency listed in the mandatory elements in subsection (14), which includes the funding request amount, can be identified at any time prior to sending the final scores, regardless of whether the deficiency was previously identified and will result in rejection of the Application. Part V.D.2.(f) of the 2009 Universal Cycle Application Instructions are clear: if the amount of housing credits requested in the application is less than the anticipated housing credit allocation stated in the commitment, the equity commitment will not be considered a source of financing. Having adopted rules mandating certain action, Florida Housing is not free to ignore the mandates of those rules. (*Emphasis added*)

S-24. Florida Housing's scoring decision in the instant case is entirely consistent with its rules and Application Instructions. To have

reached a different result would have required Florida Housing to ignore the plain meaning of those rules and instructions. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation.¹⁵ 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.¹⁶

S-25. In the instant case, and in the context of a competitive funding process, Florida Housing has reasonably interpreted its rules and incorporated instructions and forms, and properly determined that Petitioner's Application should be rejected because its housing credit equity commitment letter failed to meet applicable threshold requirements and because of the construction and permanent financing shortfall threshold failures.”

9. The substituted conclusions of law or interpretations of the administrative rules governing this matter as set out above are found to be as or more reasonable than the conclusions of law that were rejected or modified hereby.

10. Based upon the substituted conclusions of law or interpretations of the administrative rules governing this matter, the Recommendation in the

¹⁵ 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).

¹⁶ Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995).

Recommended Order is rejected as contrary to Florida Housing's rules and applicable law.

11. It is determined as a matter of law that Florida Housing reasonably interpreted its rules and incorporated instructions and forms, and properly determined that Petitioner's Application should be rejected because its housing credit equity commitment letter failed to meet applicable threshold requirements and because of the construction and permanent financing shortfall threshold failures.

IT IS HEREBY ORDERED that Petitioner's Application be rejected for failure to meet the threshold requirements relating to its housing credit equity commitment letter and because of the construction and permanent financing shortfall threshold failures.

DONE and ORDERED this 20th day of February, 2010.



FLORIDA HOUSING FINANCE CORPORATION

By: 
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

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FLORIDA HOUSING
FINANCE CORPORATION

CP DEVELOPMENT GROUP 2, LLC,
a Florida limited liability company

Petitioner,

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FHFC 2009-065UC
Application No. 2009-114C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, an informal Administrative Hearing was held in this case in Tallahassee, Florida, on January 13, 2010, before Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

Appearances

For Petitioner:

Michael P. Donaldson
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Tallahassee, Florida 32301

For Respondent:

Robert J. Pierce
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

PRELIMINARY STATEMENT

Pursuant to notice and Sections 120.569 and 120.57(2), Fla. Stat., Florida Housing Finance Corporation ("Florida Housing"), by its duly designated Hearing Officer, David E.

Ramba, held an informal hearing in Tallahassee, Florida, in the above-styled case on January 13, 2010.

At the informal hearing the parties filed a Joint Stipulation of Facts and Exhibits (“Joint Stipulation”). Joint Exhibits 1 through 7 were stipulated into evidence, consisting of the following documents:

- Exhibit J-1 Joint Stipulation of Facts and Exhibits
- Exhibit J-2 Preliminary Scoring Summary 9/21/2009
- Exhibit J-3 NOPSE Scoring Summary 10/22/2009
- Exhibit J-4 Final Scoring Summary 12/2/2009
- Exhibit J-5 Equity Commitment dated August 11, 2009 from Bank of American submitted as Exhibit 57 to CPD’s original application.
- Exhibit J-6 Equity Commitment dated October 22, 2009 from Bank of America submitted by CPD as a cure.
- Exhibit J-7 Excerpted pages from CPD original Application showing the amount of Competitive HC (annual amount) requested at Part V.A.1.

In addition, Petitioner offered 5 exhibits in addition to the joint exhibits. Exhibit 1 was accepted into evidence at hearing, while the ruling on the admissibility of proposed exhibits 2 through 5 was reserved by the Hearing Officer. After reviewing the arguments made for submitting CPD’s exhibits 2 through 5, which are portions of an application with nearly identical facts and circumstances during the same application period, Respondent’s objections are **OVERRULED** and the following exhibits are accepted into evidence.

- Exhibit P-1 Equity Commitment dated October 22, 2009 from Bank of America submitted by CPD on cure and revised page 20 of the CPD Application submitted on cure.
- Exhibit P-2 Excerpts from Application No. 2009-106C.

Exhibit P-3 Preliminary scoring summary for Application No. 2009-106C.

Exhibit P-4 Cure materials from Application No. 2009-106C.

Exhibit P-5 Final scoring summary for Application No. 2009-106C.

Petitioner is referred to below as “Petitioner” or “CPD” and Respondent is referred to as “Respondent” or “Florida Housing.”

STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner met threshold requirements relating to its housing credit equity commitment as required by Part V.D.2. of the 2009 Universal Cycle Application Instructions.

There are no disputed issues of material fact.

WITNESSES

No witnesses were called by either party.

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. CPD is a Florida limited liability company with its address at 101 East Kennedy Blvd., Tampa, Florida 33602, 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. See Section 420.504, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

3. Florida Housing administers various affordable housing programs including the Multifamily Mortgage Revenue Bonds (MMRB) Program pursuant to Section 420.509, Fla. Stat., and Rule Chapter 67-21, Fla. Admin. Code, and the Housing Credit (HC) Program pursuant to Sections 420.507 and 420.5099, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

4. The 2009 Universal Cycle Application, through which affordable housing developers apply for funding under various affordable housing programs administered by Florida Housing is adopted as the Universal Application Package or UA1016 (Rev. 5-09) by Rules 67-21.003(1)(a) and 67-48.004(1)(a), Fla. Admin. Code, respectively, and consists of Parts I through V with instructions.

5. Because the demand for an allocation of Housing Credits and MMRB funding exceeds that which is available under the HC and MMRB Programs, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapters 67-21 and 67-48, Fla. Admin. Code, respectively. Specifically, Florida Housing's application process for the 2009 Universal Cycle is set forth in Rules 67-21.002-.0035 and 67-48.001-.005, Fla. Admin. Code.

6. As discussed in more detail below, Florida Housing scores and competitively ranks the applications to determine which applications will be allocated MMRB funds or an allocation of Housing Credits.

7. Florida Housing's scoring and evaluation process for applications is set forth in Rules 67-21.003 and 67-48.004, Fla. Admin. Code. Under these Rules, the applications are preliminarily scored based upon factors contained in the application package and Florida

Housing's rules. After the preliminary scoring, Florida Housing issues preliminary scores to all applicants.

8. Following release of the preliminary scores, competitors can alert Florida Housing of an alleged scoring error concerning another application by filing a written Notice of Possible Scoring Error ("NOPSE") within a specified time frame. After Florida Housing considers issues raised in a timely filed NOPSE, it notifies the affected applicant of its decision by issuing its NOPSE scoring summary.

9. Applicants then have an opportunity to submit "additional documentation, revised pages and such other information as the Applicant deems appropriate ('cures') to address the issues" raised by preliminary or NOPSE scoring. See Rules 67-21.003 and 67-48.004(6), Fla. Admin. Code. In other words, within parameters established by the rules, applicants may cure certain errors and omissions in their applications pointed out during preliminary scoring or raised by a competitor during the NOPSE process.

10. After affected applicants submit their "cure" documentation, competitors can file a Notice of Alleged Deficiency ("NOAD") challenging the sufficiency of an applicant's cure. Following Florida Housing's consideration of the cure materials and its review of the NOADS, Florida Housing issues final scores for all the applications.

11. Rules 67-21.0035 and 67-48.005, Fla. Admin. Code, establish a procedure through which an applicant can challenge the final scoring of its application. The Notice of Rights that accompanies an applicant's final score advises an adversely affected applicant of its right to appeal Florida Housing's scoring decision.

12. CPD timely submitted its application for financing in Florida Housing's 2009 Universal Cycle. Pursuant to Application No. 2009-114C (the "Application"), CPD applied for

an allocation of Housing Credits in the annual amount of \$1,103,825.00 (*Exhibit J-7*) to help finance the construction of a 146-unit affordable housing rental complex in Tampa, Florida, named The Tempo.

13. In its preliminary scoring of the CPD Application (*Exhibit J-2*), Florida Housing identified certain deficiencies, including the following failures with respect to the HC equity commitment letter (*Exhibit J-5*):

1T	V	D	2	HC Equity	Per page 74 of the 2009 Universal Application Instructions, the equity commitment must "state the anticipated total amount of equity to be provided". Although, the Applicant provided an equity commitment from Bank of America (<i>Exhibit 57</i>) reflecting the total amount of equity to be provided, the amounts reflected in the equity commitment are based off of a dollar for dollar, 100% purchase of the requested allocated tax credits, versus what's actually stated in the equity commitment of \$.71, 99.99% purchase of tax credits. Because of this inconsistency, the HC equity cannot be considered a source of financing.	Preliminary
2T	V	D	2	HC Equity	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 <i>Exhibit 9</i> of the Application that the Investor Limited Member interest in the Applicant entity is 99.98%. However, the equity commitment at <i>Exhibit 57</i> 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.	Preliminary

14. CPD timely submitted a revised equity commitment letter dated October 22, 2009, from Bank of America (*Exhibit J-6*) as its cure in response to the failures noted at Items # 1T and 2T of the preliminary scoring summary.

15. Florida Housing scored CPD's Application and issued its final scoring summary dated December 2, 2009, (*Exhibit J-4*) in which CPD was awarded maximum total points, maximum ability to proceed tie-breaker points and maximum proximity tiebreaker measurement points. However, Florida Housing concluded that CPD failed to meet threshold.

16. Specifically, the threshold failures identified by Florida Housing in its final scoring summary are as follows:

6T	V	D	2	HC Equity	As a cure for item 1T, the Applicant provided an equity commitment; however the total amount of equity listed on the first page of the equity letter does not equal the sum of the stated equity payments in the commitment letter. Therefore, the commitment could not be counted as a source of financing.	Final
7T	V	B		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of \$5,114,245.	Final
8T	V	B		Permanent Analysis	The Applicant has a permanent financing shortfall of \$10,299,679.	Final
9T	V	D	2	HC Equity	The Applicant attempted to cure item 1T by providing an equity commitment; however the commitment reflects a larger HC request amount than applied for, which is not allowable under paragraph 67-48.004(14)(m), F.A.C. Therefore, the commitment could not be counted as a source of financing.	Final

17. CPD timely filed its Petition (and subsequently, an Amended Petition) contesting Florida Housing's scoring of its Application whereupon Florida Housing noticed the matter for an informal hearing.

18. The threshold failure at Item # 6T involves a difference of \$1.00. Under the particular circumstances involved here, the \$1.00 difference in the sum of the installment amounts is reasonably attributed to rounding. Accordingly, the threshold failure at Item # 6T in the final scoring summary of the CPD Application is rescinded.

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), which includes the forms and instructions.

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. As a threshold item, an applicant in the 2009 Universal Cycle is required to provide documentation of all “non-corporation” funding commitments pursuant to Part V.D.2. of the Application Instructions. Page 20 of the Application requires an applicant to provide the amount of HC funding being requested.

5. If the applicant fails to provide adequate documentation for this threshold item or any other threshold requirement in the application or supplemental cure materials, Florida Housing’s rules mandate that the application be rejected.

6. Rule 67-48.004(14), Fla. Admin. Code, contains a list of mandatory elements that must be included in the Application, and although item (m) indicates that a Funding Request change will not be accepted, although revisions were allowed in similar applications during the 2009 UC. (Exhibits P-2 through P-5)

7. Petitioner documented its housing credit equity commitment by providing a letter dated August 11, 2009 from Bank of America. (Exhibit J-5) That letter was rejected at preliminary scoring for the reasons stated in the preliminary scoring summary. (Exhibit J-2) On cure, CPD submitted a revised equity commitment letter from Bank of America dated October 22, 2009. (Exhibit J-6) At issue is the revised equity commitment letter to address the issues raised in the preliminary scoring summary.

7. In this case, CPD took actions that were the direct result of Florida Housing’s preliminary scoring summary which pointed out how the HC funding request amount was

incorrectly calculated in the letter submitted with the application, thus could not be considered a source of financing.

8. In its cure, CPD corrected the calculation issue which, by correcting the calculation, changed the HC funding request amount. The amount was then, for consistency purposes, revised at page 20 of CPD's Universal Application. This cure was accepted by Florida Housing as addressing the scoring issue raised, but then raised the issue that a revision to the HC funding request amount was not allowed and thus CPD failed threshold.

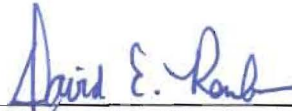
9. In accepting the cure, Florida Housing is not allowed to thus state that the cure, while accepted, is for an item that cannot be revised in the application.

10. Petitioner submitted exhibits relating to a sister entity, CP Development Group 3, LLC in Application 2009-106C, where the exact same scoring issue was raised, cured, and accepted without failing threshold. (Exhibits P-2 thorough P-5). While Florida Housing argued that this was in error not to fail CP Development Group 3, LLC that revised page 20, it is clear that there was not a consistent following of the rule that the HC funding request could not be revised if an inconsistency was found in an equity commitment letter during the preliminary scoring by Florida Housing. To accept the cure and not raise the threshold item in CP Development Group 3, LLC, and to accept the cure and fail this applicant, would produce inconsistent results and that ambiguity of interpretation should be construed against the agency that drafted and is implementing the rule.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, in is hereby RECOMMENDED that Florida Housing enter a Final Order that CPD has met the threshold requirements relating to its housing credit equity commitment letter.

Respectfully submitted this 4th day of February, 2010.



David E. Ramba, Hearing Officer

Copies furnished to:

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