

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

THE LOFTS AT TARPON RIVER, LLC,
and HTG FORT LAUDERDALE, LLC,

Petitioners,

v.

FHFC CASE NO.: 2012-035C
Application Nos. 2011-119C
2011-105C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, as well as Rule 67-48.005(5), Fla. Admin. Code, a final hearing in this matter was held in Tallahassee, Florida on September 7, 2012, before the undersigned Appointed Hearing Officer, Chris H. Bentley.

APPEARANCES

For Petitioners:

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For Respondent:

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STATEMENT OF THE ISSUES

There are no disputed issues of material fact in this proceeding. The issue for determination in this proceeding is whether Florida Housing Finance Corporation ("Florida Housing") correctly scored and ranked Applications #2011-185C (North West Gardens II) and 2011-191C ("Northwest Gardens IV") as relates to the eligibility of each of those Applications to receive the Proximity Tie-Breaker Tier 1 Score Boost (the "Boost") for Proximity Tie-Breaker Points.

PRELIMINARY STATEMENT

At the final hearing, the parties submitted a Joint Stipulation of Facts and Exhibits which has been admitted into evidence as Joint Exhibit 1. Joint Exhibits 2 – 7 were admitted into evidence pursuant to the Stipulation embodied in Joint Exhibit 1. Hearing Officer Exhibits 1 and 2 are excerpts from the Rules of Florida Housing and were neither offered nor admitted into evidence, but were used as demonstrative exhibits.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders, which have been fully considered by the undersigned.

FINDINGS OF FACT

Based upon the undisputed facts and the exhibits received into evidence at the hearing, the following relevant facts are found:

1. The matters set forth in the Joint Stipulation of Facts and Exhibits, Joint Exhibit 1, are accepted as fact in this proceeding and incorporated herein by reference.

2. Petitioner, The Lofts at Tarpon River, LLC, ("The Lofts") is a Florida limited liability company with its address at 9400 South Dadeland Boulevard, Suite 100, Miami, Florida 33156, and is in the business of providing affordable rental housing units in the State of Florida. Petitioner, HTG Fort Lauderdale, LLC ("HTG") is a Florida limited liability company, with its address at 3225 Aviation Avenue, Suite 602, Coconut Grove, Florida 33133, and is in the business of providing affordable rental housing units in the State of Florida.

3. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. Section 420.504, F.S.

4. The Petitioners timely submitted their applications for financing in Florida Housing's 2011 Universal Cycle. Petitioner, The Lofts, pursuant to Application #2011-119C, applied for \$2,561,000 in annual federal tax credits to help finance the development of its project, an 100-unit apartment complex in Fort

Lauderdale, Florida. Petitioner, HTG, pursuant to Application #2011-105C, applied for \$2,300,000 in annual federal tax credits to help finance the development of its project, an 111-unit apartment complex in Fort Lauderdale, Florida.

5. On June 8, 2012, Florida Housing's Board of Directors adopted "HC and HC HOME Final Ranking 6-8-2012." The Lofts met all of Florida Housing's threshold application requirements, received a score of 79 points, ability-to-proceed tie-breaker score of 6.0 points and a proximity tie-breaker score of 33.75 points. HTG met all of Florida Housing's threshold application requirements, received a score of 79 points, ability-to-proceed tie-breaker score of 6.0 points and a proximity tie-breaker score of 33.25 points.

6. Pursuant to Florida Housing's ranking methodology, including the application of a Set Aside Unit Limitation (SAUL), there were not enough tax credits available in the Large County Geographic Set-Aside to fund Petitioners' projects.

7. Petitioners timely filed their petitions challenging Florida Housing's scoring of two (2) competing applications.

8. Petitioners challenge Florida Housing's scoring of the following applications:

(a) Northwest Gardens II (Application No. 2011-185C), and

(b) Northwest Gardens IV (Application No. 2011-191C);

hereinafter referred to as the "Applicants".

9. The Northwest Gardens II Application met all of the Florida Housing's threshold application requirements, received a score of 79 points, ability-to-proceed tie-breaker score of 6.0 points and a proximity tie-breaker score of 34.25 points as its Final Score. The Northwest Gardens IV Application met all of Florida Housing's threshold application requirements, received a score of 79 points, ability-to-proceed tie-breaker score of 6.0 points and a proximity tie-breaker score of 34.25 points as its Final Score. The Final Ranking of the Applicants' Applications places them ahead of the Petitioners' Applications.

10. As part of its Proximity Tie-Breaker Measurement Point score, an applicant in the 2011 Universal Cycle may receive a boost to its score if its Application meets the requirements set forth in Part III.A.2.e of the Instructions:

e. If the Application involves a site with an existing Declaration of Trust between a Public Housing Authority and HUD, in order for the Application to be eligible for the Proximity Tie-Breaker Tier 1 Score boost (outlined at Part III.A.10.a (2)(b) of the Instructions), the Applicant must meet the following criteria:

- (1) Select and qualify for one of the following Development Categories at Part III.A.3.a of the Application; New Construction, Rehabilitation, Acquisition and Rehabilitation, Redevelopment or Acquisition and Redevelopment; and

- (2) Provide, behind a tab labeled "Exhibit 20," a letter from the PHA dated within 12 months of the Application Deadline and signed by the Executive Director or Chairman of the Board, certifying that there is an existing Declaration of Trust between the PHA and the HUD for the proposed Development site.

11. Part III.A.2.e. of the 2011 Universal Cycle Application states:

Does the Application involve a site with an existing Declaration of Trust between a Public Housing Authority and HUD?

Yes

No

If "Yes", to be eligible for Proximity Tie-Breaker Tier 1 Score boost the Applicant must meet the criteria outlined in Part III.A.2.e. of the Instructions and provide the required documentation behind a tab labeled "**Exhibit 20.**"

12. Both Applicants answered "yes" to Question, Part III.A.2.e. of their Applications at Application Deadline and both provided a letter from the Housing Authority of the City of Fort Lauderdale pertaining to the existence of a Declaration of Trust(s), behind the tab labeled Exhibit 20, as part of their exhibits to their Applications.

13. Applicant Northwest Gardens II submitted a letter behind Exhibit 20 to its Application for the purpose of meeting the requirements set forth in Part III.A.2.e. of the Instructions to receive a "boost" to its score. That letter is contained in Joint Exhibit 3 to this proceeding. In pertinent part, the letter states "... I am writing to certify that there is an existing Declaration of Trust . . . on the site

for the proposed Development referenced above (see attached for location)." The "proposed Development referenced above" is "Northwest Gardens II". The Development site for Northwest Gardens II involves "Scattered Sites" as defined in the Rules of Florida Housing. The Northwest Gardens II letter behind Exhibit 20 to its Application, attaches a list of six scattered sites with individual addresses which comprise the proposed Development.

14. Applicant Northwest Gardens IV submitted a letter behind Exhibit 20 to its Application for the purpose of meeting the requirements set forth in Part III.A.2.e. of the Instructions to receive a boost to its score. That letter is contained in Joint Exhibit 3 to this proceeding. In pertinent part, the letter states "... I am writing to certify that there are two existing Declarations of Trust . . . on the site for the proposed Development referenced above (see attached for location)." The "proposed Development referenced above" is "Northwest Gardens IV". The Development site for Northwest Gardens IV involves "Scattered Sites" as defined in the Rules of Florida Housing. The Northwest Gardens IV letter behind Exhibit 20 to its Application attaches a list of four scattered sites with individual addresses which comprise the proposed Development.

15. Florida Housing awarded both Northwest Gardens II and Northwest Gardens IV "boost" points for the existence of the Declaration of Trust. If Florida

Housing had not awarded those "boost" points to Northwest Gardens II and Northwest Gardens IV, both Petitioners would have received funding.

16. Florida Housing received NOPSEs in connection with the Applicants' eligibility for the Proximity Tie-Breaker Tier 1 Score boost. Florida Housing did not accept the NOPSEs with regard to the Proximity Tie-Breaker Tier 1 Score boost.

17. Both Applicants submitted revised "2011 Universal Cycle Surveyor Certification for Competitive HC Applications" as part of their cures.

18. Florida Housing received NOADs in connection with the Applicants' eligibility for the Proximity Tie-Breaker Tier 1 Score boost. Florida Housing did not accept the NOADs with regard to the Proximity Tie-Breaker Tier 1 Score boost.

19. Florida Housing accepted the Applicants' cures as evidenced by final scoring summary issued for their Applications.

20. The parties have stipulated in Joint Exhibit 1 that with regard to Northwest Gardens II, in fact, not all of the six scattered sites comprising the Development Site are encumbered by a Declaration of Trust between the local public housing authority and the U.S. Department of Housing and Urban Development.

21. The parties have stipulated in Joint Exhibit 1 that with regard to Northwest Gardens IV, in fact, not all of the four scattered sites comprising the

Development Site are encumbered by a Declaration of Trust between the local public housing authority and the U.S. Department of Housing and Urban Development.

22. The parties have stipulated in Joint Exhibit 1 that, as a matter of fact, the tie-breaker measurement point for Northwest Gardens II was located on a scattered site in the proposed Development Site that was not encumbered by a Declaration of Trust between the local public housing authority and the U.S. Department of Housing and Urban Development.

23. The parties have stipulated in Joint Exhibit 1 that, as a matter of fact, the tie-breaker measurement point for Northwest Gardens IV was located on a scattered site in the proposed Development Site that was not encumbered by a Declaration of Trust between the local public housing authority and the U.S. Department of Housing and Urban Development.

24. In the case of each Applicant, (i) not all of the scattered sites comprising each proposed Development were encumbered by a Declaration of Trust ("DOT") between the local public housing authority and the U.S. Department of Housing and Urban Development ("HUD"), and (ii) the tie-breaker measurement point in each proposed Development was located on a scattered site which was not encumbered by a Declaration of Trust between the local public housing and HUD.

25. It is found as a matter of fact that the letters of Northwest Gardens II and Northwest Gardens IV contained behind Exhibit 20 to the their respective Applications, are factually incorrect. The letters state, respectively, that there are "... existing Declaration[s] of Trust . . ." between the housing authority and HUD "... on the site for the proposed Development referenced above (see attached for location)". In the case of each letter, the attachment referenced sets forth multiple scattered sites for each Development. The plain language of each letter indicates that there is an existing Declaration of Trust (or multiple such Declarations) on the entire site for the proposed Development which would include, for each proposed Development, every one of the scattered sites. The letters say that there is an existing Declaration of Trust on the site for the proposed Development and then the letter directs the reader to an attachment which, in each instance, lists every one of the scattered sites within the proposed Development. The clear meaning of the letters, on their face, states that there is a Declaration of Trust on the entire proposed Development site in each case. However, the facts stipulated to by the parties in this matter make clear that such a certification or assertion is not factually correct. Thus, the letters behind Exhibit 20 for both Northwest Gardens II and Northwest Gardens IV with regard to this matter are factually incorrect.

26. The Petitioners are substantially affected by the actions of Florida Housing.

CONCLUSIONS OF LAW

27. 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.

28. The issues in this case revolve around the requirements for "boost" points set forth in Part III.A.2.e. of the 2011 Universal Application Instructions, a Rule of Florida Housing. In pertinent part that rule states that an application will receive "boost" points if the application involves a site with an existing Declaration of Trust between a public housing authority and HUD and, among other things, the applicant provides, as Exhibit 20 to its Application, a letter from the public housing authority certifying that there is an existing Declaration of Trust " . . . for the proposed Development site". The question is whether the rule requires that there be a Declaration of Trust encumbering the Development site in its entirety or, in the alternative, only part of the proposed Development site. The term "site" is not defined in the rules of Florida Housing. The pertinent dictionary definition of the word "site" is " . . . the area or exact plot of ground on which anything is, has been or is to be located . . . " Random House Webster's College Dictionary, 2000. The term

"Development" is defined in Rule 67-48.002(31), Florida Administrative Code, as meaning ". . . Project as defined in Section 420.503, F.S." Section 420.503(33),

Florida Statutes, defines "project" as meaning:

. . . any work or improvement located or to be located in the state, including real property, buildings, and any other real and personal property, designed and intended for the primary purpose of providing decent, safe, and sanitary residential housing for persons or families, whether new construction, the acquisition of existing residential housing or the remodeling, improvement, rehabilitation, or reconstruction of existing housing, together with such related non-housing facilities as the corporation determines to be necessary, convenient or desirable.

29. As can be seen from their definitions, both the word "site" and the word "Project" are broad terms. On the face of the pertinent language in Part III.A.2.e., there is a clear requirement that there be an existing Declaration of Trust between a public housing authority and HUD ". . . for the proposed Development site". The language of the rules do not in any fashion state that one is entitled to "boost" points if there is a Declaration of Trust on only part of a Development site. Rather, the language is all encompassing that there be a Declaration of Trust ". . . for the proposed Development site". Obviously, Florida Housing could have written its Rule to require a Declaration of Trust for the proposed Development site or any part thereof, but it did not choose to do so.

30. Florida Housing Rule 67-48.002(105) states that:

'Scattered Sites' as applied to a single Development means a Development site that when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, a 'Scattered Site').

Thus, it is plain from this Rule that a "Development site" when comprised of real property that is not contiguous, is made up of non-contiguous sites, each referred to in the Rule as a "Scattered Site". The language in Part III.A.2.e., with regard to "boost" points, does not refer to "Scattered Sites". Rather, it refers specifically to ". . . the proposed Development site". In other words, it refers to the entire project, whether that project is made up of a contiguous piece of property or whether that project is made up of non-contiguous pieces of property.

31. In this case, the letters furnished by Northwest Gardens II and Northwest Gardens IV in Exhibit 20 to their Applications purporting to certify to the existence of a Declaration of Trust for the proposed Development site are both factually wrong. On their face, they state that the proposed Development site in its entirety is encumbered by a Declaration of Trust. In fact, the parties have stipulated that the proposed Development sites in each case are not encumbered by a Declaration of Trust. Rather, only part of each proposed Development site is encumbered by a Declaration of Trust. Thus, it would appear to be inappropriate for Florida Housing to award "boost" points based on factually incorrect certification letters.

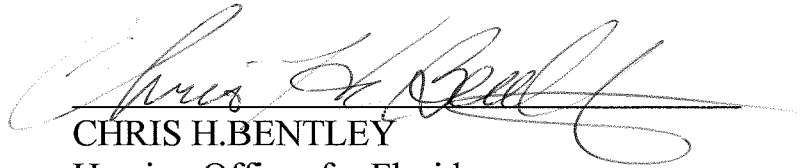
32. The language in Part III.A.2.e. does not address only those proposed Development sites which consist of Scattered Sites. Rather, the language requires certification that there is an existing Declaration of Trust ". . . for the proposed Development site" whether that proposed Development site be made up of one contiguous parcel of real property or several Scattered Sites of non-contiguous parcels of real property. In both events, the reference in the Rule language on its face is directed to the entire proposed Development site, not only a portion thereof.

33. Therefore, it appears that the Applicants Northwest Gardens II and Northwest Gardens IV were erroneously awarded "boost" points in their scoring and that but for that error the Petitioners herein would have received funding for their projects.

RECOMMENDATION

Therefore, based upon the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED that Florida Housing enter a Final Order holding that Northwest Gardens II, Application No. 2011-185C, and Northwest Gardens IV, Application No. 2011-191C, were erroneously scored and determining that Petitioner, The Lofts, Application No. 2011-119C, and Petitioner, HTG Fort Lauderdale, LLC, Application No. 2011-105C, are eligible for funding from the next available allocation.

Respectfully submitted this 20th day of October, 2012.



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