STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

LANDINGS AT CROSS BAYOU, LLP,

Petitioners,

DOAH CASE NO. 2012-2899
FHFC CASE NO. 2012-44UC

vs.

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 March 15, 2013. The matter for consideration before this Board is a Recommended Order filed pursuant to Section 120.57(1), Florida Statutes, and Rule 28-106.216, Florida Administrative Code. The Board has jurisdiction.

Petitioner timely filed its Petition for Administrative Hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (the "Petition") challenging Florida Housing's scoring of a competitor's application for funding in the 2011 Universal Application Cycle. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition raised disputed issues of material fact. Pursuant to Section 120.57(1), Florida Statutes, a

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Della M Harris /DATE: 4/15/13

formal hearing was held in this case on October 23, 2012, in Tallahassee, Florida, before Administrative Law Judge Lawrence P. Stephenson of the Division of Administrative Hearings ("DOAH"). Petitioner and Florida Housing timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge ("ALJ") issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ recommended that Florida Housing issue a Final Order awarding Petitioner an allocation of low income housing tax credits from the next available allocation.

Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, Florida Housing timely filed "Respondent's Exceptions to Recommended Order" (hereinafter "Exceptions"), a copy of which is attached hereto as "Exhibit B" and made a part hereof by reference. Petitioner subsequently filed its "Response to Respondent's Exceptions to Recommended Order" (hereinafter "Response"), a copy of which is attached hereto as "Exhibit C."

After a review of the entire record in this proceeding, the Board makes the following findings and rulings:

RESPONDENT'S EXCEPTIONS

1. Respondent Florida Housing's Exceptions to Conclusion of Law No. 48 of the Recommended Order, and to the Recommendation of the Recommended Order, as being contrary to the uncontroverted facts in the Record, are not well taken.

2. The facts set forth in the Recommended Order make clear that the "CBD-2" zoning category at issue in Application No. 2011-106C was not in effect at any time material to the 2011 Universal Application Cycle; that at all times material the parcel at issue was zoned "DC-1." However, under R. 67-48.004(6 and 9), the facial inconsistency created by the reference to "CBD-2" zoning on the map attached to the letter dated February 27, 2012, from the Zoning Official for the City of St. Petersburg, cannot be ignored.

3. Because of this inconsistency, the MLF Towers Application, No. 2011-106UC, should have been rejected. *See,* Twin Lakes of Lakeland LLLP v. Florida Housing Finance Corporation, FHFC Case No. 2012-005UC (Final Order June 8, 2012.

RULING ON RESPONDENT'S EXCEPTIONS

Respondent's Exceptions to the Recommended Order are not adopted.

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 the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing:

1. 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.

2. The Conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

3. The Recommendation of the Recommended Order is adopted.

IT IS HEREBY FOUND AND ORDERED that Florida Housing erred in its scoring of MLF Towers' Application No. 2011-106C, and that Petitioner Landings at Cross Bayou, LLLP, is entitled to an award of Low Income Housing Tax Credits from the next available allocation.

DONE and ORDERED this 15 *th* day of MARCH, 2013.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

Wellington H. Meffert II, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Kevin Tatreau
Director of Multifamily Development Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Michael P. Donaldson, Esq.
Carlton Fields, P.A.
P.O. Drawer 190
Tallahassee, FL 32302

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
DIVISION OF ADMINISTRATIVE HEARINGS

LANDINGS AT CROSS BAYOU, LLLP,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 12-2899
	)	
FLORIDA HOUSING FINANCE CORPORATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

A formal hearing was conducted in this case on October 23, 2012, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael P. Donaldson, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

For Respondent: Wellington H. Meffert, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

Exhibit A

STATEMENT OF THE ISSUE

The issue is whether Florida Housing Finance Corporation ("Florida Housing") erred in its scoring of Universal Cycle Application No. 2011-106C.

PRELIMINARY STATEMENT

On July 2, 2012, Petitioner Landings at Cross Bayou, LLLP ("Landings") filed a Petition for Administrative Hearing with Florida Housing. In the Petition, Landings contested Florida Housing's scoring decisions regarding Universal Cycle Application No. 2011-106C, also referred to herein as the MLF Towers application. Landings had submitted an application directly competing with the MLF Towers application for funding pursuant to the federal Low Income Housing Tax Credit program ("Tax Credit program"). Landings alleged that it would have received funding but for Florida Housing's erroneous scoring of the MLF Towers application.

On September 4, 2012, Florida Housing referred the case to the Division of Administrative Hearings for the assignment of an Administrative Law Judge and the conduct of a formal administrative hearing. The case was set for hearing on October 23, 2012. The hearing was convened and completed as scheduled.

At the outset of the hearing, the parties stipulated to the admission of Joint Exhibits 1 through 15, which were duly

admitted into evidence. Joint Exhibit 15 was the deposition testimony of Phillip Lazzara, the Zoning Official for the City of St. Petersburg. Landings presented the testimony of Paula Rhodes, director of development in the Southeast for Norstar Development, the managing general partner for the Landings project. Ms. Rhodes was accepted as an expert in the universal application process. Landings' Exhibit 1 was admitted into evidence. Florida Housing presented the testimony of Stephen Auger, its executive director, who was also accepted as an expert in the universal application process. Florida Housing offered no exhibits of its own into evidence.

The one-volume transcript of the hearing was filed at the Division of Administrative Hearings on November 1, 2012. The parties timely filed their Proposed Recommended Orders on November 13, 2012.

Unless otherwise noted, all statutory references are to Florida Statutes (2012).

FINDINGS OF FACT

1. Landings is a Florida limited liability partnership with its address at 200 South Division Street, Buffalo, New York 14204. Landings is in the business of providing affordable rental housing units in Florida.

2. Florida Housing is a public corporation created by section 420.504, Florida Statutes, to administer the

governmental function of financing or refinancing of affordable housing and related facilities in Florida. Pursuant to section 420.5099, Florida Housing has been designated as the housing credit agency for the state within the meaning of 26 U.S.C. §42(h)(7)(A)[1/] with the responsibility to administer the federal Tax Credit program in Florida. Florida Administrative Code Chapter 67-48 sets forth the rules for the program.

3. The 2011 Universal Cycle Application, through which affordable housing developers applied for funding under various affordable housing programs administered by Florida Housing, was adopted as the Universal Application Package or UA1016 (Rev. 2-11) by Florida Administrative Code Rule 67-48.004(1)(a). The Application Package consists of Parts I through V with exhibit forms and instructions.

4. Because the demand for shares of low income housing tax credits exceeds the credits available under the Tax Credit program, 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. The application process for the 2011 Universal Cycle is set forth in rules 67-48.001 through 67-48.004 and may be summarized as follows:

a. The publication and adoption by rule of a Universal Application package;

b. The completion and submission of applications by developers;

c. Florida Housing's preliminary scoring of applications;

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

e. Florida Housing's consideration of the NOPSEs submitted, with notice to applicants of any resulting changes in their preliminary scores;

f. An opportunity for the applicant to submit additional materials to Florida Housing to "cure" any items for which the applicant was deemed to have failed to satisfy threshold requirements or received less than the maximum score;[2/]

g. A second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant's cure materials by filing a Notice of Alleged Deficiency ("NOAD");

h. Florida Housing's consideration of the NOADs submitted, with notice to applicants of any resulting change in their scores;

i. An opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing's evaluation of any item for which the applicant was deemed to have failed to satisfy threshold requirements or received less than the maximum score;

j. Final ranking scores, ranking of applications, and allocation of Housing Credits or other funding to successful

applicants as well as those who successfully appeal through the adoption of final orders; and

k. A final appeals process through which applicants may be allocated award funding from future credits by making the case that their application would have received funding "but for" specific scoring errors Florida Housing made in their application or competing applications.

5. On December 6, 2011, Landings, along with other competing applicants, submitted an application to Florida Housing for funding in the 2011 Universal Cycle. Landings sought Tax Credit funding to finance the development of its project, a 184-unit apartment complex in St. Petersburg, Florida. The Landings project was built decades ago as a public housing project and requires major rehabilitation. All of the units in this complex receive rental assistance from the United States Department of Housing and Urban Development ("HUD").

6. In the 2011 application cycle, Florida Housing set aside 35 percent of its allocation for the preservation of existing subsidized properties. In Pinellas County, two preservation projects, Landings and MLF Towers, directly competed for this preservation set-aside funding.[3/]

7. On June 8, 2012, Florida Housing's Board of Directors adopted "Final Post-Appeal Scores and Ranking." Landings met all of Florida Housing's threshold application requirements, received the maximum base application score of 79 points out of 79 points,

the maximum ability-to-proceed tire breaker score of 6.0 points and the 23.75 proximity tie-breaker points. This score would have placed Landings in the funding range "but for" Florida Housing's scoring of the MLF Towers application.

8. Part III of the Universal Application Package requires an applicant to provide information concerning the proposed development. Section C of Part III requires the applicant to provide information concerning the proposed development's "Ability To Proceed," including information concerning Site Control and Zoning.

9. In its initial application, MLF Towers submitted documentation to satisfy the Ability To Proceed requirements. Its Site Control information included Exhibit 27, an agreement for purchase and sale of the subject properties. The MLF Towers project included "scattered sites" as defined in rule 67-48.002(105), meaning that the proposed development site comprises properties that are not contiguous. Exhibit 19 to the MLF Towers application provided the addresses and geographic coordinates of each of the three properties in the project. The addresses were on 2nd Avenue South and 3rd Avenue South in St. Petersburg. MLF Towers also submitted documentation indicating that the zoning for the Development site was "Downtown Center-1" ("DC-1"), a designation providing for intense mixed-use development.

10. The two documents that identified the zoning as DC-1 were Exhibit 26, "Local Government Verification of Status of Site Plan Approval For Multifamily Housing," and Exhibit 32 "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations." Both of these exhibits were signed by Phillip T. Lazzara, the Zoning Official for the City of St. Petersburg.[4/]

11. Landings submitted a NOPSE to Florida Housing pointing out an inconsistency between the address of the MLF Towers development site as shown in Exhibit 19 and the legal description provided with the agreement for purchase and sale submitted as Exhibit 27. The legal description in Exhibit 27 referenced an 1890 plat showing different street names than those used in the Application to identify the Development site.

12. In response to Landings' NOPSE, Florida Housing issued a scoring summary dated March 27, 2012, that found as follows:

> Based on a plat provided in a NOPSE, the legal description provided with the Agreement for Purchase and Sale is inconsistent with the Scattered Sites locations listed on Exhibit 19. The legal description shows the sites to be located on 7th Avenue or the north side of 8th Avenue. (Lots 14 through 16 of Block 39, a portion of Lot 3 and all of Lots 4 through 8 of Block 52, and Lot 17 of Block 52), while the locations listed on Exhibit 19 are (i) 540 2nd Avenue South, (ii) the north side of 2nd Avenue South, east of 6th Street South, and (iii) north side of 3rd Avenue South, west of 5th Street South.

13. Florida Housing determined that this inconsistency constituted a failure in the MLF Towers application of Part III.C.2 of the Universal Application instructions, a threshold item titled "Evidence of Site Control."

14. To cure the address issue raised by Florida Housing, MLF Towers provided a letter from Mr. Lazzara, dated February 27, 2012, explaining that the street names had changed between the time of the 1890 plat and the present. Seventh and Eighth Avenues on the 1890 plat were currently Second Avenue South and Third Avenue South, respectively. Mr. Lazzara's letter included as "Attachment A" an engineering map prepared by the City of St. Petersburg's engineering section to show the current street addresses. At the bottom of the map was the following notation: "ALL PROPERTIES ZONED 'CBD-2' EXCEPT AS NOTED."

15. In his deposition, Mr. Lazzara testified that he included the engineering map purely to illustrate that the street names had changed since the 1890 plat. Mr. Lazzara stated that the CBD-2 zoning classification was obsolete, having been abolished in 2007 when the City's land development code was revised.[5/] The subject parcels were not and could not have been zoned CBD-2 at the time of the MLF Towers application.

16. Landings reviewed the cure materials submitted by MLF Towers and concluded that the applicant had not cured the address issue because neither the plat nor the legal

description had been changed to make them consistent with one another. MLF Towers had not cured the inconsistency; it had merely explained it. Landings believed it had uncovered another inconsistency in the CBD-2 zoning designation on the engineering map.[6/]

17. Landings submitted a NOAD arguing that the cure submitted by MLF Towers included information that was inconsistent with other information in the MLF Towers application. Exhibits 26 and 32 in the initial application indicated that the property was zoned DC-1, whereas the engineering map submitted as Attachment A to the cure letter included a statement that the property was zoned CBD-2.

18. In its final scoring summary issued on or about June 8, 2012, Florida Housing accepted the cure materials submitted by MLF Towers, rejected the NOAD and rescinded the point deduction and threshold failure imposed on the MLF Towers application as a result of the NOPSE.

19. On or about June 25, 2012, a Norstar representative named Richard Cavalieri sent an email to Mr. Lazzara that attempted to persuade Mr. Lazzara to state that there was an inconsistency sufficient to show that MLF Towers should not have been funded. Mr. Cavalieri pointed out that a finding of inconsistency at this late date would not affect MLF Towers' current funding award, but would assist Landings in obtaining

"but for" funding from future tax credits. Mr. Lazzara replied as follows:

> Hi, Rick. The subject property is currently zoned DC-1. It used to be zoned CBD-2 prior to adoption of the City's new Land Development Regulations (LDRs) in 2007. The CBD-2 zoning classification no longer exists. The map that was used for the letter we provided on Feb. 27, 2012, was out of date with regard to any zoning references and was only used for the purposes of providing clarification of what street names applied. I hope that helps.

20. Florida Housing concluded that there can be no inconsistency between the DC-1 and the CBD-2 zoning designations because the CBD-2 designation did not exist at any time material to this action. Moreover, MLF Towers' Exhibit 32 provided evidence of appropriate zoning sufficient to meet the threshold requirements of Part III.C.4 of the Universal Application, and Florida Housing is not required to consider evidence of zoning beyond Exhibit 32.[7/]

21. Landings contends that there was a plain inconsistency on the face of the MLF Towers application and cure documents. Landings argues that Florida Housing's established practice mandates that it cannot look beyond the contents of the application, attempt to gauge the subjective intent of the applicant, or determine that a given inconsistency is not material when dealing with inconsistencies in applications.

22. At the final hearing, Stephen Auger, Florida Housing's executive director, testified as to the agency's rationale for accepting the cure materials submitted by MLF Towers and disregarding the apparent internal inconsistency in the zoning designations in the MLF application. Mr. Auger testified that Florida Housing did not believe that the engineering map included by Mr. Lazzara created an inconsistency because Mr. Lazzara was also the official who had signed the zoning and site plan approval forms that confirmed the correctness of the zoning designations in the MLF Towers application. When directly addressing the issue of zoning, Mr. Lazzara correctly stated that the designation was DC-1, a statement that Mr. Auger found was not rendered ambiguous or inconsistent by Mr. Lazzara's inclusion of the engineering map as a demonstrative aid to show the changed street names.

23. Mr. Auger emphasized that Mr. Lazzara was the local zoning expert, and that Florida Housing was entitled to rely on Mr. Lazzara's explicit statement that the zoning on the subject properties was DC-1, regardless of the statement on the engineering map that the properties were zoned CBD-2 unless noted otherwise. Mr. Lazzara was consistent in his information on the zoning forms; the engineering map was not submitted for a zoning designation; therefore, the apparently contradictory statement as to CBD-2 zoning was disregarded by Florida Housing.

24. Mr. Auger further testified that the final result would have been the same even if Florida Housing had preliminarily rejected the cure materials submitted by MLF Towers and accepted the NOAD filed by Landings. MLF Towers would have filed a petition appealing the decision, after which

> We would have gone into discovery working towards a trial here at DOAH. We would have deposed Philip Lazzara. He would have said that [CBD-2] hasn't been in existence since 2007, and that would have been the end of the case and we would have given MLF, you know, the points back. . . . So we would have wound up in the same place with MLF having the correct zoning designation.

25. Mr. Auger testified that Florida Housing's rules regarding inconsistencies "are about figuring out what's right." The notion of "inconsistency" means a dispute as to the factual basis of a statement in an application. Nothing submitted by MLF Towers called into question Mr. Lazzara's express statements that the properties were zoned DC-1. No zoning claims were made for the engineering map, which was submitted solely to cure an inconsistency regarding street names.

26. Mr. Auger stated that Florida Housing "got it right here," and pointed to rule 67-48.004(9) as providing Florida Housing the discretion to overlook an engineering map submitted as "a cure for something else" where the zoning officer correctly cited the zoning "on two forms specifically related to the zoning." Mr. Auger stated, "I don't understand how you can

ask us to interpret our rules in a way that doesn't help us get to the right conclusion, the factually accurate conclusion."

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. and Florida Administrative Code Rule 67-48.005. See also Ybor III, Ltd. v. Fla. Hous. Fin. Corp., 843 So. 2d 344, 347 (Fla. 1st DCA 2003).

28. The purpose of the Tax Credit program is to provide funding to developers of low-income rental housing. As an applicant for the limited funds allocated by Florida Housing, Landings has substantial interests that are adversely affected by Florida Housing's scoring decisions.

29. The general rule is that the burden of proof, apart from a statutory directive, is on the party asserting the affirmative of an issue before an administrative tribunal. Young v. Dep't of Cmty. Aff., 625 So. 2d 831, 833-834 (Fla. 1993); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349, 350 (Fla. 1st DCA 1977). In this case, Landings bears the burden of demonstrating the impropriety of Florida Housing's actions in accepting the cure submitted by MLF Towers by a preponderance of the evidence.

30. Pursuant to sections 420.507(22)(h) and 420.5099, Florida Housing is authorized to institute a competitive application process, and has done so by way of rule 67-48.004.

31. Florida Housing's Universal Application Package, Form UA1016 (Rev. 2-11), has been adopted by and incorporated into rule 67-48.004(1)(a) and thus itself possesses the legal effect of a rule.

32. Rule 67-48.004, titled "Application and Selection Procedures for Developments," provides as follows, in relevant part:

> (1) When submitting an Application, Applicants must utilize the Universal Application in effect at the Application Deadline.
>
> (a) The Universal Application Package or UA1016 (Rev. 2-11) is adopted and incorporated herein by reference and consists of the forms and instructions available, without charge, on the [Florida Housing] Corporation's Website under the 2011 Universal Application link labeled Instructions and Application or from http://www.flrules.org/Gateway/reference.asp?No=Ref-00703, which shall be completed and submitted to the Corporation in accordance with this rule chapter in order to apply for the HOME and HC Program(s).
>
> (b) All Applications must be complete, legible and timely when submitted, except as described below. Corporation staff may not assist any Applicant by copying, collating, or adding documents to an Application nor shall any Applicant be permitted to use the

Corporation’s facilities or equipment for purposes of compiling or completing an Application.

(2) Failure to submit an Application completed in accordance with the Application instructions and these rules 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 in accordance with the instructions in the Application and this rule chapter.

(3) Each submitted Application shall be evaluated and preliminarily scored using the factors specified in the Universal Application Package and these rules. Preliminary scores shall be transmitted to all Applicants.

(4) Applicants who wish to notify the Corporation of possible scoring errors relative to another Applicant's Application will be provided a time period for filing a written Notice of Possible Scoring Error (NOPSE). Such time period will be no fewer than three (3) Calendar Days from the date the preliminary scores are sent by overnight delivery by the Corporation. The deadline for filing a NOPSE will be provided at the time the preliminary scores are issued. Each NOPSE must specify the assigned Application number of the Applicant submitting the NOPSE, the assigned Application number of the Application in question and the scores in question, as well as describe the alleged deficiencies in detail. Each NOPSE is limited to the review of only one Application's score. Any NOPSE that seeks the review of more than one Application's score will be considered improperly filed and ineligible for review. There is no limit to the number of NOPSEs that may be submitted. The Corporation’s staff will review each written NOPSE Received timely. To be considered Received timely, the Applicant must submit one (1)

original hard copy and three (3) photocopies of each NOPSE. The Corporation will not consider any NOPSE submitted via facsimile or other electronic transmission.

(5) The Corporation shall transmit to each Applicant the NOPSEs submitted by other Applicants with regard to its Application. The notice shall also include the Corporation's decision regarding the NOPSE, along with any other items identified by the Corporation to be addressed by the Applicant, which may include financial obligations for which an Applicant or Developer or Principal, Affiliate or Financial Beneficiary of an Applicant or a Developer is in arrears to the Corporation or any agent or assignee of the Corporation as of the due date for NOPSE filing as set forth in subsection (4) above.

(6) Each Applicant shall be allowed to cure its Application by submitting additional documentation, revised pages and such other information as the Applicant deems appropriate ("cures") to address the issues raised pursuant to subsections (3) and (5) above that could result in failure to meet threshold or a score less than the maximum available. The time period for submitting the "cures" will be no fewer than three (3) Calendar Days from the date the notice set forth in subsection (5) above is sent by overnight delivery by the Corporation. Such notice will provide the deadline for submitting the "cures." A new form, page or exhibit provided to the Corporation during this period shall be considered a replacement of that form, page or exhibit if such form, page or exhibit was previously submitted in the Applicant's Application. Pages of the Application that are not revised or otherwise changed may not be resubmitted, except that documents executed by third parties must be submitted in their entirety, including all attachments and exhibits referenced therein, even if only a

portion of the original document was revised. Where revised or additional information submitted by the Applicant creates an inconsistency with another item in that Application, the Applicant shall also be required in its submittal to make such other changes as necessary to keep the Application consistent as revised. To be considered by the Corporation, the Applicant must submit one (1) original hard copy and three (3) photocopies of all additional documentation and revisions, and such revisions, changes and other information must be Received by the deadline set forth herein. Any subsequent revision submitted prior to the deadline shall include a written request from the Applicant for withdrawal of any previously submitted revision(s).

(7) All Applicants may submit to the Corporation a Notice of Alleged Deficiencies (NOAD) in any other Application. The time period for submitting each NOAD will be no fewer than three (3) Calendar Days from the deadline for receipt by the Corporation of the documentation set forth in subsection (6) above. The notice set forth in subsection (5) above will provide the deadline for submitting the NOAD. Each NOAD is limited only to issues created by document revisions, additions, or both, by the Applicant submitting the Application pursuant to subsection (6) above. Each NOAD must specify the assigned Application number of the Applicant submitting the NOAD, the assigned Application number of the Application in question, the pages and the documents in question, as well as describe the alleged deficiencies in detail. Each NOAD is limited to the review of only one Applicant’s submission. However, there is no limit to the number of NOADs which may be submitted. NOADs which seek the review of more than one Applicant’s submission will be considered improperly filed and ineligible for review. The Corporation will only

review each written NOAD Received timely. To be considered Received timely, the Applicant must submit one (1) original hard copy and three (3) photocopies of each NOAD. The Corporation will not consider any NOAD submitted via facsimile or other electronic transmission.

(8) The Corporation shall transmit a copy of all NOADs to the affected Applicant.

(9) Following the receipt and review by the Corporation of the documentation described in subsections (5), (6) and (7) above, the Corporation shall then prepare final scores. In determining such final scores, no Application shall fail threshold or receive a point reduction as a result of any issues not previously identified in the notices described in subsections (3), (4) and (5) above. However, inconsistencies created by the Applicant as a result of information provided pursuant to subsections (6) and (7) above 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) below can be identified at any time prior to sending the final scores to Applicants and will result in rejection of the Application. The Corporation shall then transmit final scores to all Applicants.

* * *

(13) The Corporation shall reject an Application if, following the submission of the additional documentation, revised pages and other information as the Applicant deems appropriate as described in subsection (6) above:

(a) The Development is inconsistent with the purposes of the SAIL, HOME, or HC Program(s) or does not conform to the

Application requirements specified in this rule chapter;

(b) The Applicant fails to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions;

(c) The Applicant fails to file all applicable Application pages and exhibits which are provided by the Corporation and adopted under this rule chapter;

(d) The Applicant fails to satisfy any arrearages described in subsection (5) above. For purposes of the SAIL and HOME Programs, this rule subsection does not include permissible deferral of SAIL or HOME interest.

(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 the 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:

(a) Name of Applicant entity; notwithstanding the foregoing, the name of the Applicant entity may be changed only by written request of an Applicant to Corporation staff and approval of the Board as follows: (i) after the Applicant has been invited to enter credit underwriting for the SAIL and HOME Programs and for Developments requesting non-competitive HC to be used with non-Corporation-issued tax-exempt bonds, and (ii) after the Carryover Allocation Agreement is in effect for the Competitive HC Program;

(b) Identity of each Developer, including all co-Developers; notwithstanding the foregoing, the identity of the Developer(s) may be changed only by written request of an Applicant to Corporation staff and approval of the Board after the Applicant has been invited to enter credit underwriting;

(c) Program(s) applied for;

(d) Applicant applying as a Non-Profit or for-profit organization;

(e) Site for the Development; notwithstanding the foregoing, after the Applicant has been invited to enter credit underwriting and subject to written request of an Applicant to Corporation staff and approval of the Corporation, the site for the Development may be increased or decreased, as follows: (i) for the Competitive HC, SAIL and HOME Programs provided the Tie Breaker Measurement Point is on the site and the total proximity points awarded during scoring are not reduced, and (ii) for Developments requesting non-competitive HC provided the Development Location Point is on the site;

(f) Development Category;

(g) Development Type;

(h) Demographic Commitment;

(i) Total number of units; notwithstanding the foregoing, for the SAIL and HC Programs the total number of units may be increased after the Applicant has been invited to enter credit underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation;

(j) With regard to the SAIL and HC Programs, the Total Set-Aside Percentage as stated in the last row of the total set-

aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application. With regard to the HOME Program, the Total Set-Aside Percentage as stated in the Set-Aside Commitment section of the Application, unless the change results from the revision allowed under paragraph (l) below;

(k) CHDO election for the HOME Program;

(l) Funding Request amount; notwithstanding the foregoing, requested amounts can be changed only as follows:

1. Reduced by the Applicant to reflect the maximum request amount allowed in those instances where an Applicant requested more than its request limit, or

2. When the county in which the Development is located is newly designated by HUD as a Difficult Development Area (DDA) after the Application Deadline but prior to the end of the cure period outlined in Rule 67-48.004, F.A.C.: (i) an Applicant, who has not failed threshold for exceeding its Competitive HC request limit, may increase its Competitive HC request by an amount equaling 30 percent, rounded to whole dollars, of the remainder of the Applicant’s initial request amount provided the total request amount does not exceed the maximum Competitive HC request amount for the applicable county, or (ii) an Applicant, that failed threshold during preliminary scoring for requesting more than its Competitive HC request limit because the Development was not then designated as being in a DDA, may increase its Competitive HC request amount to the maximum allowable amount for the Development. If any Development elects to recognize any newly designated DDA status, then the Development must meet any minimum Competitive HC requests that are applicable.

> (m) Submission of the Application online and submission of one original hard copy with the required number of photocopies of the Application by the Application Deadline;
>
> (n) Payment of the required Application fee by the Application Deadline;
>
> (o) The Application labeled "Original Hard Copy" must include a properly completed Applicant Certification and Acknowledgement form reflecting an original signature. All other items may be submitted as cures pursuant to subsection (6) above. With regard to paragraphs (a) and (b) above, the Board shall consider the facts and circumstances of each Applicant's request and any credit underwriting report, if available, prior to determining whether to grant the requested change . . . . (Emphasis added.)

28. Florida Housing argues that the point of the Universal Cycle Application process is to "get it right," and that it did so in this instance within the ambit of its rules and precedents. Florida Housing argues, without contradiction, that the zoning on the properties in the MLF Towers application was correctly designated as DC-1 in the application documents directly relating to zoning designation. More controversially, Florida Housing argues that under the circumstances presented in this case it was entitled to overlook the apparently contradictory zoning information set forth in the engineering map submitted by MLF Towers as a "demonstrative exhibit" on an issue other than the zoning designation of the properties.

29. Landings does not take issue with the fact that the actual zoning designation of the properties was DC-1. Rather, Landings takes the position that Florida Housing's rules dictate that "getting it right" is not the overriding criterion in the review of applications, that there is ample precedent in Florida Housing's final orders to establish that ambiguities and inconsistencies within an application and its subsequent cures is a ground for rejection, threshold failure, or the reduction of points, and that this case falls within the ambit of that established precedent.

30. Landings points out that in a final order on the 2011 Universal Cycle Application, Florida Housing has recently concluded that its rules do not allow it to distinguish between material and immaterial information submitted by an applicant, nor do the rules allow Florida Housing to disregard "gratuitous" information once it has been submitted by an applicant. Twin Lakes at Lakeland, LLLP v. Fla. Hous. Fin. Corp., FHFC Case No. 2012-005UC (Final Order, June 8, 2012). Florida Housing acknowledges that Twin Lakes stands for the cited proposition, but contends that the proposition should be limited to cases such as Twin Lakes that deal with Part V.D. of the 2011 Universal Cycle Application, which provided in pertinent part:

> Unless stated otherwise in these instructions, a firm commitment, proposal or letter of intent will not be considered if

> any information contained in the document (which includes any attachments thereto) is inconsistent with information stated elsewhere within the document or elsewhere within the Application.

31. Florida Housing argues that this provision addresses a specific set of documents (firm commitments, proposals, and letters of intent) that applicants must provide as evidence of a firm financial commitment to a project. Florida Housing further points out that the quoted language mandating rejection for inconsistency was new to the 2011 cycle, and that the previous 2009 version of the funding commitment language had given Florida Housing some discretion in choosing whether to accept or reject a financial commitment letter.

32. Florida Housing points out that the instant case does not involve Part V.D. of the Universal Cycle Application. The MLF Towers documents in question here relate to Part III.C., "Ability to Proceed," which contains no such language mandating rejection of the application for internal inconsistency.

33. Florida Housing states that this situation in the instant case is covered by the more relaxed provision of rule 67-48.004(9), unchanged since the 2009 cycle:

> [I]nconsistencies created by the Applicant as a result of information provided pursuant to subsections (6) and (7) above will still be justification for rejection of the Application, threshold failure, or reduction of points, as appropriate.

34. Florida Housing argues that the quoted rule gives it some measure of discretion to determine what is "appropriate" when confronted with a facial inconsistency not involving financial commitment. Florida Housing points to the fact that the requirements of Part V.D. were made more exacting in the 2011 cycle while those of Part III.D. remained unchanged as further indication that Florida Housing retains discretion as to materials submitted in response to Part III.D.

35. However, there are two points against Florida Housing's reading of the rule. First, the awkward placement and phrasing of the term "as appropriate" in the text of rule 67-48.004(9) does not unambiguously establish the agency's claimed discretion. The rule may also be read as requiring the agency to select the "appropriate" remedy among the three stated options -- rejection of the Application, threshold failure, and reduction of points -- depending on which portion of the application has been rendered inconsistent by the cure submission. However, the agency's reading of the rule is reasonable and commands deference.

36. Second, and more significantly, a review of the Final Order in Twin Lakes leads to the conclusion that the agency was stating a broader rule than Florida Housing urges in this proceeding. The agency was considering a recommended order from an informal hearing officer. The stipulated facts were,

briefly, that the applicant sought tax credits to help finance development of an 88-unit apartment complex in Lakeland. The applicant had submitted in its initial application a letter from the Housing Authority of the City of Lakeland referencing "88 elderly tax credit units" and setting forth the terms of the proposed loan from the Housing Authority to the applicant. In its preliminary scoring of the application, Florida Housing concluded that the loan from the Housing Authority could not be considered because the letter had not been signed by the lender.

37. The applicant submitted a cure in the form of a fully executed loan commitment letter from the Housing Authority. This letter was identical to the previously submitted letter except that it referenced "144 elderly tax credit units." In its final scoring of the application, Florida Housing concluded that the applicant failed to meet threshold requirements for demonstrating adequate financing because the revised commitment letter referenced 144 units whereas the application stated the total number of proposed units was 88.

38. Before the informal hearing officer, the applicant argued that because the number of units in a proposed project is not required to be provided in a financing commitment letter under Part V.D., the fact that the commitment letter referenced a number different from that in the application should not be considered "material." Florida Housing replied by pointing to

the mandatory rejection language of Part V.D. and the language in rule 67-48.004(6) stating that where cure documentation creates an inconsistency with another item in the application, the applicant is required to make such other changes as necessary to keep the application consistent as revised. Florida Housing asserted that there was no provision in its rules that permitted it to weigh the materiality of an inconsistency as a means to excuse a threshold failure.

39. The hearing officer concluded as follows:

> The undersigned acknowledges that Florida Housing's rules contain no definition of "consistency" or "inconsistency," nor do they address the materiality of an inconsistency. However, this does not mean that Florida Housing's scoring decisions must not be reasonable and comport with the overriding intent of its published rules. Unlike many of Florida Housing's other rule requirements, such as those pertaining to Ability to Proceed, no form is prescribed to demonstrate non-corporation funding commitments. Instead, only a "firm commitment, proposal or letter of intent" containing six items of information is required. While those items include specific reference to the Applicant as the borrower or direct recipient, they do not require a description of the project by the number of units proposed. Here, the Petitioner's commitment letter's description of the project as containing 144 units was gratuitous, and its "inconsistency" with the Application's description of an 88-unit project is immaterial to the loan commitment.
>
> The purpose of Petitioner's Cure commitment letter from a third party was not

> to alter the number of units proposed in its Application, nor did the commitment letter request such a change. Indeed, such a change in the number of units could only be made after the Applicant had been invited to enter credit underwriting, subject to a written request "of an Applicant" to Florida housing's staff and approval of the Corporation. See Rule 67-48.004(14)(i), Florida Administrative Code.
>
> Here, while there was an "inconsistency" between the number of units referenced in the commitment letter and the number of units referenced in the Petitioner's application, such an inconsistency does not rise to the level of a failure to meet threshold requirements regarding financing. There is nothing in the Application Instructions requiring that the amount of the loan commitment be based upon the number of units set forth in the Application, nor is there a requirement that a per-unit computation be attached to the commitment letter. The "inconsistency" relied upon by Florida Housing to determine a failure to meet threshold requirements was immaterial to the requirements set forth for non-corporation funding commitments, and its decision was unreasonable and unsupported by its rules. (Citations to case record omitted.)

40. In its final order, Florida Housing adopted the first two quoted paragraphs of the hearing officer's conclusions of law. However, Florida Housing rejected the final paragraph and substituted the following conclusions of law:

> Petitioner's Application stated that the development would be 88 units; the commitment letter provided on cure said that there would be 144 units in the development. Although Florida Housing does not require an applicant to provide this number of units as

part of its non-corporation funding commitment, the Applicant did so in the cure letter. Once provided, Florida Housing cannot ignore this information. Nothing in the Instruction or rule allows Florida Housing to ignore information in an application. Nothing in the Instructions or rules allows Florida Housing to weigh or to determine the materiality of an inconsistency. Instead, as demonstrated, Florida Housing's rules state at Part V.D. any inconsistency will be grounds for a threshold failure. Florida Housing cannot add or read in these new criteria and standards of materiality and selectively ignoring materials submitted in the application scoring process without having gone through the rule adoption process. Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237 (1st DCA 1996).

The burden is on the Petitioner to ensure accuracy and completeness when submitting documents. See, e.g., Plaza La Isabella, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-022UC (Final Order July 26, 2006). The burden is not on Florida Housing to assist applicants by ensuring the accuracy and completeness of their submitted documents.

This type of evaluation suggested by Petitioner would effectively have Florida Housing staff assist an applicant in the submittal of its application, in violation of Florida Housing's rules. It would not be feasible to undertake this type of scoring and maintain the integrity of the process. See 67-48.004, Fla. Admin. Code; APD Housing Partners 20, LP v. Florida Housing Finance Corporation, Case No. 2009-067UC (Final Order February 26, 2010).

* * *

> The plain language of the Instructions clearly requires the Applicant to provide all the information requested, and that all information provided must be consistent with every other part of its application.
>
> Rules have the force and effect of a statute, and rules of statutory construction apply. Florida Livestock board v. Gladden, 76 So. 2d 291 (Fla. 1954). When the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning. Holly v. Auld, 450 So. 2d 217 (Fla. 1984).
>
> The number of units found on the face of Revised Exhibit 47, the non-corporation funding commitment letter provided as a cure, was inconsistent with the number of units provided elsewhere in Petitioner's application. Based on this inconsistency, Florida Housing correctly determined that Petitioner's application failed the threshold requirement for non-corporation funding commitments and properly rejected the Application.

41. While it is true that Twin Lakes was decided under the mandatory rejection language found in the 2011 version of Part V.D., it is also noted that the analysis employed in the Twin Lakes final order did not appear to announce a departure from Florida Housing precedent when it rejected the informal hearing officer's recommendation that the "inconsistency" in question be disregarded as immaterial to the requirements set forth for non-corporation funding commitments. Indeed, the final order cited orders predating the 2011 cycle as authority for Florida

Housing's refusal to make distinctions between "material" and "immaterial" inconsistencies in applications and cure materials, or to ignore certain information submitted by an applicant based on the totality of the circumstances.[8/]

42. The decisive aspects of APD Housing Partners 20, LP v. Fla. Hous. Fin. Corp., FHFC Case No. 2009-067UC (Final Order Feb. 26, 2010), cited as authority in the Twin Lakes final order, did not involve Part V.D. or financial commitment letters. In APD Housing, Florida Housing rejected the informal hearing officer's conclusions of law 7 through 10, which provided as follows:[9/]

> 6. At preliminary scoring, Florida Housing determined that APD 20's application failed threshold requirements for site control because the agreement submitted does not reflect APD 20 as the buyer and no assignment was provided.
>
> 7. During the cure period, APD 20 provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property. This document properly documented the Assignment in the terms of the agreement, although titles on the signature lines of the agreement did not reflect the parties to the agreement.
>
> 8. Despite the error in the titles of the signature lines, Florida Housing did not contend that the signatures were invalid or were not the authorized signatories to the agreement. In reviewing the entirety of the stipulated and received exhibits in the APD 20 application, the individuals required to sign the assignment match the parties for an appropriate Assignment and Assumption of

> Contract for Purchase and Sale of Real Property.
>
> 9. There is no question in the assignment submitted as a cure who the seller and new buyer are, and the plain reading of the assignment confirms and explains the relationship between the listed companies.
>
> 10. Based on the totality of the application and cure materials, Florida Housing can readily ascertain the correct signatories and parties to the assignment, and the title above the signature lines does not change the terms or the validity and enforceability of the First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property. (Internal citation omitted.)

43. In its lengthy substitute conclusions of law, Florida Housing emphasized that its review was strictly limited to the information to be gleaned from the face of the documents submitted by the applicant. The error in the titles on the signature lines was not subject to interpretation:

> S-10. Petitioner argues that there is no confusion that the proper parties signed the Assignment and Assumption Agreement and that the "error" in the signature lines does not change that fact; an argument apparently recognized in the Recommended Order's summary conclusion in paragraph 10 that, "Based on the totality of the application and the cure materials, Florida Housing can readily ascertain the correct signatories and parties to the assignment, and the title above the signature lines does not change the terms or the validity and enforceability" of the Assignment and Assumption Agreement. This conclusion ignores both the applicable requirements for demonstrating site control in the name of

the applicant a [sic] by Florida Housing's rules as well as the framework within which the Universal Applications Process functions. Here, the entities named on the signature lines go to the very issue of whether or not the Petitioner demonstrated site control in the name of APD 20 as required by Florida Housing's rules. Florida Housing is not permitted to disregard its rules and score Petitioner's Application based on inference and speculation. Moreover, the notion that Florida Housing is required to determine Petitioner's compliance with the site control requirements based on the "totality of the application" is contrary to Florida Housing's requirement in Part III.C.2.a. of the Application Instructions that all documentation evidencing site control be provided in one specific place in the application. Part III.C.2.a. of the Application Instructions provides in relevant part:

> Evidence of Site Control (Threshold)
>
> . . . The required documentation, including any attachments or exhibits referenced in any document, must be attached to that document regardless of whether that attachment or exhibit has been provided as an attachment or exhibit to another document or whether the information is provided elsewhere in the Application or has been previously provided. Such documentation... must be provided behind a tab labeled "Exhibit 27." . . . (Emphasis added) [10/]

S-11. Here, it is true that Florida Housing undoubtedly knew the names of the parties that should have appeared on the signature lines of the Assignment and Assumption Agreement in order to meet the applicable

> rule requirements. (Emphasis added) That, however, does not excuse the Petitioner's failure to comply with those rules. Under Florida Housing's rules, the Petitioner is responsible for the accurate completion of "each page of [its] Application" and Florida Housing is not permitted to assist in that process. The Universal Application Cycle is a competitive application process in which the application are scored objectively based not upon what an applicant may have intended to provide (or should have provided) in its application in order to satisfy the applicable rule requirements but, rather, upon the information actually provided in its application, including the exhibits and cure materials. [Internal citations and footnotes omitted.]

44. The undersigned is at a loss to reconcile the approach urged by Florida Housing in this case with its own precedents. Mr. Auger testified that there is an "inconsistency" only where there is a dispute as to the factual basis of a statement in an application, and he emphasized that Florida Housing's rules "are about figuring out what's right." In its proposed recommended order in the instant case, Florida Housing notes that the apparent inconsistency regarding the zoning classification of the subject properties was no inconsistency at all because the CBD-2 zoning in fact no longer existed. The properties could not have been zoned CBD-2. However, this state of affairs was not apparent on the face of the documents submitted by MLF Towers and was discovered only after Landings submitted its NOAD and further questions were asked of Mr. Lazzara. MLF Towers was

essentially given a second opportunity to effect a cure of its application. This opportunity was not given to the applicants in Twin Lakes and APD 20, who also presumably could have assisted Florida Housing in "figuring out what's right" in their applications and ultimately gained their acceptance.

45. In the instant case, Florida Housing also emphasizes that the documents directly relating to zoning in the MLF Towers application all correctly state that the zoning is DC-1 and that the inconsistent CBD-2 zoning statement was contained in an engineering map submitted in response to an issue other than zoning. Therefore, Florida Housing was entitled to disregard the inconsistent statement and to rely solely on the statements found in the zoning materials. This seems a reasonable way of dealing with an inconsistency but, again, it is contrary to Florida Housing precedents regarding the portion rule 67-48.004(6) that provides: "Where revised or additional information submitted by the Applicant creates an inconsistency with another item in that Application, the Applicant shall also be required in its submittal to make such other changes as necessary to keep the Application consistent as revised." Florida Housing has consistently interpretetd this language as requiring consistency throughout an application and has declined the invitation to ignore "gratuitous" information within an application.[11/]

46. An agency's interpretation of a statute it is charged with enforcing and of administrative rules promulgated thereto is entitled to great deference. Level 3 Communications, LLC v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003). An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. Legal Envtl. Assistance Found., Inc. v. Bd. of Cnty. Comm'r of Brevard Cnty., 642 So. 2d 1081, 1083-84 (Fla. 1994); Fugate v. Fla. Elec. Comm'n, 924 So. 2d 74, 76 (Fla. 1st DCA 2006); Miles v. Fla. A & M Univ. 813 So. 2d 242 (Fla. 1st DCA 2002); Dravo Basic Materials Co., Inc. v. Dep't of Transp., 602 So. 2d 632 (Fla. 2d DCA 1992).

47. The text of rule 67-48.004(9) states that inconsistencies created by an applicant's cure submissions "will still be justification for rejection of the Application, threshold failure, or reduction of points, as appropriate." Florida Housing argues that "as appropriate" gives it sufficient discretion to disregard the engineering map submitted by MLF Towers. This may be not be the only reasonable reading of the rule, see Conclusion of Law 35, supra, but it is not clearly erroneous or unreasonable.

48. Florida Housing's position in this case is not unreasonable when considered in isolation, but is so at odds with its historic practice as to be arbitrary. No rationale was

proffered as to why the inconsistency in the instant case was so trivial as to be disregarded, but similar or even more trivial inconsistencies in other cases were cause for rejection. No rationale was proffered as to why MLF Towers was given a post-NOAD opportunity to cure the inconsistency caused by its cure materials, when other applicants were not.

49. Mr. Auger testified that Florida Housing would decline to interpret its rules "in a way that doesn't help us get to the right conclusion, the factually accurate conclusion." While it is undoubtedly true that the agency prefers to reach a factually accurate conclusion, its precedents indicate that Florida Housing has placed a high priority on establishing a bright line for applicants: the applicant is responsible for the accurate completion of each page and applicable exhibit; Florida Housing does not assist the applicant nor does it engage in speculation as to the applicant's intent; inconsistencies or ambiguities on the face of applications and cure materials cause rejection, threshold failure, or reduction of points.

50. The reasons for this priority are clear and salutary. Florida Housing receives hundreds of applications during each application cycle, and could not begin to give each application the attention that would be required by a subjective evaluation to "weigh or to determine the materiality of an inconsistency." Strict objective review of the four corners of an application

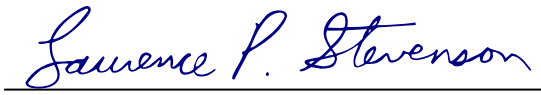
may lead to results that appear harsh in individual cases, but has the virtue of treating all applicants equally and enabling Florida Housing to process the volume of applications before it in a timely fashion.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Housing Finance Corporation enter a final order finding that it erred in its scoring of Universal Cycle Application No. 2011-106C and that Petitioner Landings at Cross Bayou, LLLP, is entitled to an award of Low Income Housing Tax Credit funds from the next available allocation.

DONE AND ENTERED this 22nd day of January, 2013, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of January, 2013.

Exhibit A

ENDNOTES

[1/] Section 420.5099(1) references § 42(h)(7)(A). However, since the Florida statute was last revised in 2002, the federal statutory reference has been renumbered to §42(h)(8)(A).

[2/] Certain items in the application are designated "threshold" items, the failure to satisfy which will result in the rejection of the application.

[3/] Florida Housing's ranking methodology includes a "Set Aside Unit Limitation" or "SAUL" that establishes a limit on the number of units funded in each county, in order to avoid an overconcentration of affordable housing units in any one county. Under the SAUL formula for the 2011 application cycle, there were not sufficient tax credits available to make an award to both Landings and MLF Towers.

[4/] "Zoning Official" is Mr. Lazzara's job title, not merely a description of his duties. The Zoning Official is the person responsible for certifying the zoning of property on behalf of the City of St. Petersburg. Mr. Lazzara has held the position for five years. For the previous three years, Mr. Lazzara's position with the City of St. Petersburg was "Deputy Zoning Official."

[5/] Neither party explained the term "CBD." The undersigned notes that it is not uncommon for local zoning ordinances to employ that term as an acronym for "Central Business District."

[6/] Landings' challenge in this proceeding is limited to the issue of the zoning designations.

[7/] Part III.C.4. of the Application Package provides as follows, in relevant part:

> Evidence of Appropriate Zoning (Threshold)
>
> To achieve threshold the Applicant must provide the applicable Local Government verification form, properly completed and executed, behind a tab labeled "Exhibit 32." The verification form must demonstrate that as of the date that signifies the Application Deadline for the 2011 Universal Cycle the proposed Development site is

Exhibit A

> appropriately zoned and consistent with local land use regulations regarding density and intended use or that the proposed Development site is legally non-conforming. If the proposed Development consists of Scattered Sites, evidence of appropriate zoning must be demonstrated for all of the Scattered Sites. . . .

[8/] As regards the stringency of Florida Housing's scoring process, it is noted that in 2004, Administrative Law Judge T. Kent Wetherell, II described that process as follows:

> FHFC's final orders have adopted a stringent standard for evaluating compliance with the application submittal requirements in cases where the applicant "appeals" the scoring of its own application. The standard requires strict and literal compliance with the submittal requirements, no matter how technical or immaterial the requirements may seem to be. See, e.g., [Ybor, III, Ltd. v. Fla. Hous. Fin. Auth., FHFC Case No. 2001-91 (Final Order Sept. 20, 2001)](sustaining point deductions based upon the applicant's failure to include the word "acres" when describing the size of the property even though it was clear from the application that the unit of measure was acres); [Bayside at Town Center, Ltd. v. Fla. Hous. Fin. Corp., FHFC Case No. 2001-065 (Final Order Sept. 20, 2001)] (rejecting application because the name of the developer contained "Corp." in some places and "Inc." in others).

Ybor III, Ltd. v. Fla. Hous. Fin. Corp., DOAH Case No. 03-1956 (Fla. DOAH Mar. 30, 2004) at ¶ 85.

[9/] Conclusion of law 6, which was adopted by Florida Housing's final order, is included for explanatory purposes.

[10/] The quoted language from Part III.C.2.a. of the 2009 Application Instructions is identical to that in Part III.C.2.a. of the 2011 Application Instructions.

[11/] The Final Order in Twin Lakes stated as follows, at page 4:

> Petitioner's assertion that the materiality of the inconsistency be taken into account when scoring is without merit. This type of scrutiny would create a new standard in the rule. It would require staff to determine which inconsistencies are material, and which are not. Without adequate rules to govern this type of evaluation, staff would be forced to speculate and make subjective and possibly arbitrary decisions.

COPIES FURNISHED:

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

Wellington H. Meffert, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

Della Harrell, Corporation Clerk
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301-1329

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

LANDINGS AT CROSS BAYOU, LLP,

Petitioners,

DOAH CASE NO. 12-2899
FHFC CASE NO. 2012-44UC

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Florida Housing Finance Corporation ("Florida Housing"), files its Exceptions to the Recommended Order issued by Administrative Law Judge Lawrence P. Stephenson (the "ALJ") in this matter on January 22, 2013, and says:

Florida Housing takes exception to the Recommendation at page 39 of the Recommended Order as unsupported by the undisputed facts contained in the Recommended Order.

Florida Housing takes exception to Conclusion of Law 48, page 37 of the Recommended Order, as unsupported by the undisputed facts contained in the Recommended Order, or Florida Housing's precedent cases.

Florida Housing does not take exception to any Finding of Fact contained in the Recommended Order.

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION

S. Green for Della Harrell /DATE: 2-6-13

Exhibit B

The Recommended Order[1] resulted from a *de novo* fact finding proceeding under sections 120.569 and 120.57(1), Fla. Stat., involving a protest filed by Petitioner, Landings at Cross Bayou, LLP (the "Petitioner" or "Landings"), challenging Florida Housing's scoring decisions regarding a competing Application, No. 2011-106C, filed by MLF Towers ("Applicant" or "MLF"). A *de novo* proceeding is one where all questions of fact and issues of law are examined anew, as though no prior proceeding had occurred.

Florida Housing asserted throughout this proceeding that a marginal reference, by an unknown party at an unknown time to a zoning category that as a matter of fact ceased to exist long before Petitioner filed its application, could not and did not create an inconsistency.

The ALJ's legal analysis and Conclusions of Law do not engage the factual issue; they evaluate this case only on the face of the documents. What Florida Housing has perceived to be the purpose of a *de novo* hearing—to review evidence and testimony and ascertain the facts — is not what was done here.

FACTS

The uncontroverted and relevant facts established in this fact-finding proceeding are:

[1] The form of citations to the Recommended Order is (RO, ¶ __, p. __).

Exhibit B

The MLF Towers parcels were zoned DC-1 at all times material to this action (RO ¶10, p. 8; ¶19, p.11; and ¶29, p.24);

The MLF Towers parcels were not and could not have been zoned CBD-2 because that zoning classification was abolished in 2007 and did not exist at any time material to this action. (RO ¶15, p. 9 and ¶19, p.11);

The old engineering map attached to Zoning Official Philip Lazzara's letter was intended only to address the street name changes that occurred between the 1890 plat and the present. (RO ¶15, p. 9 and ¶19, p.11);

Neither the letter nor the attachment had anything to do with or any effect on the current zoning of the MLF Towers parcels. (RO ¶15, p. 9 and ¶19, p.11).

Mr. Lazzara is currently and has been Zoning Official for the City of St. Petersburg for five years; the Deputy Zoning Official for three years before that. As the local Zoning Official Mr. Lazzara is the "appropriate local government official," Florida Housing will rely upon to determine zoning issues. "Through the requirement that Exhibit 32 be utilized to demonstrate consistency with the local government zoning and land use regulations, Florida Housing has indicated its intent to rely upon the appropriate local government official to verify such ***consistency***." Kensington Place Partners, LP, v. Florida Housing Finance Corporation, FHFC Case No. 2011-042UC (Final Order September 7, 2102) (*emphasis added*).

Exhibit B

Mr. Lazzara confirmed to Petitioner's agent via email (a copy of which was attached to Landings' Petition) that the CBD-2 zoning has not existed since 2007, and that the map was intended only to address the street naming[2] issue. The ALJ referred to Mr. Lazzara's email as MLF Tower's "post-NOAD opportunity to cure." (RO ¶ 49, p. 38) This is simply wrong. The email was never filed by MLF Towers; it was an attachment to Landing's Petition.

It is the purpose of this *de novo* proceeding to determine what the facts are, and to judge whether those facts support Florida Housing's scoring decision on the MLF Towers application. The facts are clear. No evidence or testimony submitted in this proceeding in any way contradicts Florida Housing's contention that the CBD-2 zoning classification did not exist at the time the MLF Application was filed and scored, thus it could not be inconsistent with the DC-1 zoning certified by Mr. Lazzara. To ignore and contradict the facts established here would create a precedent that would hamper Florida Housing's ability to fairly and equitably distribute funding according to its statutory goals, requiring it to effectively ignore the substance of a matter.

CONCLUSION OF LAW No. 48

The ALJ erred in concluding that "Florida Housing's position in this case is not unreasonable when considered in isolation, but is so at odds with its historic

[2] In the deposition, as the streets at issue are numbered streets, street "numbers," are used to mean street "names," *e.g.,* the name of Seventh Avenue was changed to 2nd Avenue South.

Exhibit B

practice as to be arbitrary." This is incorrect. Florida Housing's precedent cases have accepted evidence that explains or clarifies application issues.

In Nova Oaks v. Florida Housing Finance Corporation, DOAH No. 12-1614; FHFC No. 2012-004UC (Final Order June 8, 2012), a competitor challenged Florida Housing's decision to deny a NOPSE that alleged that Nova Oaks' Tie-Breaker Measurement Point was 2 feet off the development site. Information provided by the Petitioner as here, in an attachment to its Petition established that as a matter of fact, the TBMP was on the development site. As in Landings, the "post-NOAD" information probative of the facts was attached as an exhibit to Nova Oaks' Petition.

Also, in Eclipse West Housing v. Florida Housing Finance Corporation, FHFC Case No. 2006-078RRLP (Final Order March 19, 2007), the Issue was whether the development's address created an inconsistency leading to a threshold failure because it appeared as "Flagler Drive," in one part of the Application, but as "Flagler Avenue," in a cure document. In preparation for trial at DOAH, the facts that came to light in preparation for hearing clearly showed that different units of local government used, without any particular logical basis, "Flagler Drive," "Flagler Avenue," or just plain "Flagler." Florida Housing settled the case based on the facts established in the "post-NOAD" discovery phase of the case.

Exhibit B

If the ALJ's reasoning here were applied to Nova Oaks and Eclipse, Florida Housing would have to deny funding to those projects, even after determining that the facts supported the opposite outcome.

The ALJ notes that, "While it is true that the agency prefers to reach a factually accurate conclusion," it is confined, even in a DOAH fact-finding proceeding, to a "strict objective review of the four corners of an application ..." (RO at ¶ 49 and ¶ 50, p. 38) That is the standard employed in Florida Housing's Informal Hearings, where decisions on the interpretation and application of Florida Housing's rules and application instructions are made in a context of the stipulated and undisputed facts contained within the documentation provided in the Application. If this case sets the precedent for DOAH proceedings, then it is pointless for either applicants or Florida Housing to try a fact-finding case there.

The cases cited in the Recommended Order[3] as support for the Recommendation that Florida Housing erred in scoring the MLF Towers application have one commonality: they were all cases where no material facts were disputed--each was decided on the face of the application documents. In those cases the ALJ was correct in stating that determining whether the scoring was correct was confined to "the information to be gleaned from the face of the

[3] APD housing Partners 20, LP v Florida Housing Finance Corporation, FHFC Case No. 2009-067UC (Final Order Feb. 26, 2010); Plaza La Isabella, LLC v. Florida Housing Finance Corporation FHFC Case No. 2006-022UC (Final Order July 26, 2006); and Twin Lakes at Lakeland, LLLP v. Florida Housing Finance Corporation, FHFC Case No. 20152-005UC (Final Order June 8, 2012).

documents." (RO at ¶ 43, p. 33) In those cases, no evidence or testimony was included, no factual inquiry was made, and no facts were found, unlike this case.

Regardless of the outcome of parsing the rule, and even if the ALJ was correct in concluding that the 2011 Rule amendment to Section V.D. of the Application made no distinction between that section and the unchanged parts of the Application, disqualifying an Application because of an irrelevant facial inconsistency unrelated to the purpose of the attachment to Mr. Lazzara's letter would be a wildly inappropriate and absurd outcome—all the more so where it is abundantly clear on the facts that no inconsistency as to the zoning of the subject property existed. The CBD-2 zoning classification no longer existed at the time of the Application, thus could not be inconsistent with the DC-1 classification.

The burden is on an applicant seeking funding to demonstrate entitlement. Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932 (Fla. 1996). Petitioner's burden is to show that Florida Housing's interpretation and application of its rule is clearly erroneous, and not simply that alternative interpretations of its rule exist. Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995). As noted by the ALJ, it neither clearly erroneous nor unreasonable. (RO at ¶ 35, p. 26, and ¶ 47, p. 37)

An agency's interpretation of statutes and administrative rules are entitled to great deference. Level 3 Communications, LLC v. Jacobs, 841 So.2d 447(Fla. 2003), and an agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. 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); Dravo Basic Materials Co, Inc. v. Dept of Transportation, 602 So. 2d 632 (Fla. 2d DCA 1992). The evidence and testimony provided here do not support a conclusion that Florida Housing's interpretation and application of its rules to these facts is clearly erroneous or constitutes an unreasonable interpretation.

To say that Florida Housing erred in its scoring and should have disqualified the MLF Towers Application based on an marginal note referring to a non-existent zoning category unrelated to the subject matter of the letter, would require that Florida Housing not just ignore but directly contradict, the indisputable facts proved at hearing. Florida Housing properly applied its Universal Cycle rules in its scoring of the MLF Towers Application, No. 2011-106C.

WHEREFORE, based upon the Exceptions to Recommended Order set forth above, the Respondent requests:

1. That the Florida Housing Finance Corporation Board of Directors adopt the Findings of Fact and Conclusions of Law but decline to adopt Conclusion of Law No. 48 and substitute in its place the following:

> 48. Florida housing's position in this case is not unreasonable, given the facts adduced in this proceeding.

2. Decline to adopt the Recommendation of the Recommended Order and instead enter a Final Order affirming Florida Housing's decision to accept the verification of site control, Item 5T, submitted as a cure to Application Number 2011-106C, and

3. Dismiss the Petition filed by Landings at Cross Bayou.

Respectfully submitted this 6th day of February, 2013.

Wellington Meffert, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street
Suite 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
wellington.meffert@floridahousing.org
Attorney for Respondent

Exhibit B

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Electronic Transmission this *6th* day of February, 2013, to: Michael P. Donaldson, Esq., Carlton Fields, P.A., P.O. Drawer 190, Tallahassee, Florida 32302, at mdonaldson@carltonfields.com .

Attorney for Respondent

Exhibit B

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

LANDINGS AT CROSS BAYOU, LLLP,

Petitioner,

DOAH CASE NO. 2012-2899
FHFC CASE NO. 2012-44UC

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RESPONSE TO EXCEPTIONS OF RESPONDENT

Petitioner, Landings at Cross Bayou, LLP ("Landings") pursuant to Rule 28-106.217, Florida Administrative Code ("FAC"), responds to the Exceptions filed by Respondent Florida Housing Finance Corporation ("Florida Housing") as follows:

1. This matter comes before the Florida Housing Board of Directors ("Board") for final agency action following a formal hearing conducted under the authority of Section 120.569 and 57(1) Florida Statutes ("F.S."), and Rule 67-48, F.A.C. The formal hearing was conducted on October 23, 2012, before Administrative Law Judge Lawrence P. Stevenson ("ALJ") assigned to this case by the Division of Administrative Hearings ("DOAH").

Exhibit C

2. On January 22, 2013, after considering the evidence, testimony and arguments made by both parties at hearing, including all of the allegations found in Florida Housing's Exceptions, and the Proposed Recommended Orders submitted by both parties, the ALJ entered a Recommended Order ("RO") which concluded Landings had shown, by a preponderance of the evidence, that Florida Housing had not properly scored a competing application to the detriment of Landings. Specifically, the ALJ concluded that Florida Housing's scoring action was contrary to Florida Housing Rules as well as prior precedent because it ignored information submitted by an applicant in a cure that was inconsistent with other information in the original application.

3. In his R.O., the ALJ pointed to language from the Board's own decision in *Twin Lakes at Lakeland, LLP v. FHFC,* FHFC Case No. 2012-005UC (Final Order entered June 8, 2012), providing that the type of evaluation suggested by Florida Housing in its recommended order:

> would effectively have Florida Housing staff assist an applicant in the submittal of its application, in violation of Florida Housing's own rules. It would not be feasible to undertake this type of scoring and maintain the integrity of the process. (RO ¶40, page 30) ... The reasons for this priority are clear and salutary. Florida Housing receives hundreds of applications during each application cycle, and could not begin to give each application the attention that would be required by a subjective evaluation to "weigh or to determine the materiality of an inconsistency." (RO ¶40, page 31).

4. The ALJ further addressed the issue of the materiality of an inconsistency, finding that:

> the analysis employed in the *Twin Lakes* final order did not appear to announce a departure from Florida Housing precedent when it rejected the informal hearing officer's recommendation that the "inconsistency" in question be disregarded as immaterial to the requirements set forth ... Indeed the final order cited authority for Florida Housing's refusal to make distinctions between "material" and "immaterial" inconsistencies in applications and cure materials, or to ignore certain information submitted by an applicant based on the totality of the circumstances. (RO ¶41, pages 31-32).

The ALJ went on to quote the portion of the Board's final order in the *Twin Lakes* case that provided that the information "found on the face of the [documentation] provided as a cure, was inconsistent with [information] provided elsewhere in Petitioner's application. Based on this inconsistency, Florida Housing ... properly rejected the Application." (RO ¶40, page 31).

5. In addressing Florida Housing's argument that the *Twin Lakes* final order relied on a different provision of Florida Housing's rules, the ALJ noted that the analysis employed in the *Twin Lakes* Final Order cited orders that predate the 2011 cycle changes. Specifically, the ALJ quoted extensively from *APD Housing Partners 20, LP v. FHFC.*, FHFC Case No. 2009-067UC (Final Order Feb. 26, 2010). In that case, even though it was clear that Florida Housing knew the names of the parties that should have appeared on the signature lines of an Assignment and Agreement that was submitted as part of the site control documentation, that

fact did not "excuse the Petitioner's failure to comply with [Florida Housing's] rules. Under Florida Housing's rules, the Petitioner is responsible for the accurate completion of 'each page of [its] Application' and Florida Housing is not permitted to assist in that process."

6. On February 6, 2013, Florida Housing filed its Exceptions to the R.O. requesting that the well-reasoned findings of fact and conclusions of law reached by the ALJ be ignored, rejected, and replaced with a conclusion that simply finds "Florida Housing's position in this case is not unreasonable given the facts of this case". Landings requests that the Board take no such action but instead adopt the RO in toto. In fact, it is believed that Florida Housing has never overturned a DOAH ALJ's R.O. previously. It would require a truly unique set of circumstances indeed to warrant such an action, something not presented by this case.

7. In support of its request to overturn the RO, Florida Housing argues that the ALJ failed to examine all questions of fact and issues of law "anew as through no prior proceeding had occurred." Florida Housing then seeks to recharacterize the issue in this proceeding as what the correct zoning is. This is not and never has been the issue. The issue is whether the applicant submitted with its cure documentation information that was inconsistent with other information included elsewhere in its application.

Exhibit C

8. Florida Housing does not take exception to any finding of fact made by the ALJ but rather only to Conclusion of Law 48 in which the ALJ provides:

> Florida Housing's position in this case is not unreasonable when considered in isolation, but is so at odds with its historic practice as to be arbitrary. No rationale was proffered as to why the inconsistency in the instant case was so trivial as to be disregarded but similar or even more trivial inconsistencies in other cases were cause for rejection. No rationale was proffered as to why MLF Towers was given a post NOAD opportunity to cure the inconsistency caused by its cure materials, when other applicants were not. (RO ¶48, page 38).

9. Florida Housing lists what it has determined are the "relevant facts" established in this proceeding – essentially that because the zoning designation in the original application was correct, the inclusion of incorrect information in the curative document could be ignored. This is not now and never has been the policy of Florida Housing nor is this supported by historical precedent. The ALJ's Conclusion of Law to the contrary is supported by competent substantial evidence in the record and overwhelming precedent including a controlling case from the same year's Universal Application Cycle. Two applications submitted in the 2011 Universal Application Cycle, MLF Towers (the Landings case) and Twin Lakes at Lakeland, were treated by Florida Housing in polar opposite fashion and Florida Housing is now asking the Board to reach exactly the opposite conclusion in Landings as it asked the Board to reach in *Twin Lakes* in order to enable Florida Housing to prevail in both cases. This is a classic case of "heads, I win; tails, you

lose." Further while Florida Housing urges the Board to adopt a "get it right" standard in the instant case, that standard was not the one employed in the *Twin Lakes* case. Rather the standard followed in *Twin Lakes* is the appropriate one, namely "Florida Housing must follow its own rules."

10. In essence, Florida Housing attempts to use its Exceptions to change the issue raised in this proceeding by deeming "relevant" facts that were not in its possession at the time the scoring decision was made. Again Florida Housing is not challenging any of the facts found by the ALJ but realigning, reanalyzing, and reweighing those facts to address an issue that was never raised by Landings in the instant case, i.e. what the correct zoning is. Florida law provides that the Board, as a reviewing agency, may not reweigh the evidence presented at a DOAH final hearing. *Rogers v. Dept. of Health,* 920 So.2d 27, 30 (Fla. 1st DCA 2005). Weight of the evidence is in the province of the ALJ as the "fact finder." *Tedder v. Fla. Parole Comm'n,* 842 So.2d 1022, 1025 (Fla. 1st DCA 2003).

11. As framed by the ALJ, the sole issue presented by the Landings case was whether Florida Housing erred in ignoring information included in a cure document that was inconsistent with information found in the Application, a fact that was called to Florida Housing's attention in a Notice of Alleged Deficiency filed by Landings. Ironically, Florida Housing in its own Proposed Recommended Order identified the sole issue of disputed fact in this case as "whether

documentation submitted as part of the Applicant's cure was inconsistent with documentation included elsewhere in the Application." What the correct zoning is ultimately found to be – something Florida Housing did not know at the time it made its scoring decision – is not relevant to whether Florida Housing erred in ignoring information contained in cure documentation that was inconsistent with information in MLF Towers's application.

12. In response to the issue presented, the ALJ -- while considering all the same points and cases raised by Florida Housing in its Exceptions -- concluded that there was an inconsistency between the zoning designation appearing in the cure documentation and that in the original application materials which should not have been ignored and which should have instead resulted in a penalty.

13. In support of this conclusion, the ALJ explained the process that he, as well as Florida Housing, must follow to "get it right." The ALJ indicated that Florida Housing's process and Final Orders have adopted a stringent standard for evaluating compliance with the Application submittal requirements in cases where the applicant appeals a scoring decision. The standard requires strict and literal compliance with the submittal requirements, no matter how technical or immaterial the requirements may seem. Citing *Ybor III, Ltd. v. FHFC,* DOAH Case No. 2003-1956(Fla. DOAH March 30, 2004, Final Order entered May 24, 2004)

14. The *Ybor* case stands in direct contradiction of Florida Housing's assertion that, in a *de novo* proceeding, it can consider additional information that was not available during the scoring and review process. The scoring decisions must be based on documentation received by Florida Housing as of the completion of the scoring process and to rely on information submitted after that point is impermissible. See *Ybor,* at page 28 citing *Camilla Point, Ltd. v. FHFC,* FHC Case No. 2002-05 (Final Order entered October 10, 2002.)

15. The simple question in the instant case is this: was information included in the cure document inconsistent with information included in the original Application? Both the ALJ and Florida Housing concluded that inconsistent information was submitted. Faced with that undisputed fact and conclusion, the ALJ merely measured that inconsistency against the clear guidance of Rule 67-48.004(6 and 9) F.A.C., which specifically requires such inconsistencies must result in a rejection of the application, a threshold failure, or reduction of points as appropriate. In relevant part those sections provide as follows:

> "Where revised or additional information submitted by the Applicant creates an inconsistency with another item in that Application, the Applicant shall also be required in its submittal to make such other changes as necessary to keep the Application consistent as revised." (67-48.004(6), F.A.C.)
>
> "However inconsistencies created by the Applicant as a result of information provided pursuant to

Exhibit C

> subsections (6) and (7) above will still be justification for rejection of the Application threshold failure, or reduction of points, as appropriate." (67-48.004(9), F.A.C.)

16. The burden is on the applicant not Florida Housing to "get it right" by ensuring accuracy and completeness when submitting documents including cure documents. Florida Housing lacks the ability to assist an applicant in ensuring accuracy or completeness or consistency when submitting documents. See *Brownsville Manor Apartments v. Florida Housing Finance Corporation*, FHFC Case No. 2004-029UC (Final Order entered October 14, 2004); *Fifth Avenue Estates v. Florida Housing Finance Corporation*, FHFC Case No. 2002-025UC (Final Order entered October 10, 2002; *Plaza La Isabela, LLC v. Florida Housing Finance Corporation*, FHFC Case No. 2006-022UC (Final Order entered August 31, 2006).

17. Florida Housing argues that the document which included the inconsistent information submitted by the Applicant was immaterial, and should be ignored. However, Florida Housing cites no rule or Final Order for the authority to ignore any inconsistency regardless of materiality or the authority to assist an applicant in resolving inconsistent information. On the contrary, as the ALJ correctly points out, a series of cases, including most recently the *Twin Lakes* case, stands in direct contravention to the action Florida Housing asks the Board to find appropriate here. In fact, Florida Housing has historically and repeatedly

interpreted its rules and instructions as excluding any authority to weigh the materiality of an inconsistency. Once information provided by an applicant is shown to be inconsistent, Florida Housing is not free to ignore that information. *Twin Lakes* Citing *Temple Court Partners, Ltd. v. Florida Housing,* FHFC Case No.2002-003UC (Final Order entered October 10, 2002)

18. Similarly in *APD 20 Housing Partners, LP v. FHFC,* FHFC Case No. 2009-067UC (Final Order February 26, 2010) Florida Housing concluded that applications are to be scored objectively based upon the information actually submitted by an applicant – not on what the applicant may have intended to provide. Florida Housing cannot pick up the ball fumbled by the applicant and run it in to the end zone.

19. Neither of the cases cited by Florida Housing as authority for consideration of matters outside the four corners of the application are controlling. *Eclipse West Housing v. FHFC,* FHFC Case No. 2006-078 RRLP (Final Order entered March 19, 2007) was not a Universal Application Cycle case and, therefore, was not subject to the rules relied upon by Landings in this proceeding. The program at issue in *Eclipse* – the Recovery Loan Program -- is an entirely different program with different purposes and application instructions. *Nautilus Development Partner, LLP v. Florida Housing,* FHFC Case No. 2006-023UC (Final Order entered July 31, 2006).

20. *Nova Oakes v. FHFC*, FHFC Case No. 2012-004UC (Final Order entered June 8, 2012) involved the use of documents outside the four corners of an application to settle a case. It offers no support for the proposition that such information can be used by Florida Housing to support a scoring decision. In the instant case an applicant submitted a document in its cure which was inconsistent with other information in its application. Pursuant to the applicable rules and precedent, Florida Housing could not ignore this information or determine that it was not material. By ignoring the information, Florida Housing committed a scoring error which negatively impacted Landings. The fact that the original information included in the application – rather than the inconsistency in a subsequent cure submittal -- ultimately may be correct does not relieve Florida Housing from complying with its rules and precedent. By ignoring a clear inconsistency in the latter filed cure document, Florida Housing committed a scoring error in violation of its own policy and rules and now asks the Board to ignore everything Florida Housing argued in *Twin Lakes* a matter of months ago.

21. In summary, the integrity of the Florida Housing application scoring process as well as the integrity of the system of Board review of Recommended Orders from ALJs requires that the Board reject Florida Housing's request and enter a final order adopting the ALJ's RO consistent with the final orders adopted by the Board including the *Twin Lakes case,* a case from the very same Universal

Cycle as the case before the Board. To do otherwise would be, in the words of the ALJ, "so at odds with precedent as to be arbitrary."

WHEREFORE, Landings request that the Board adopt the Recommended Order in toto.

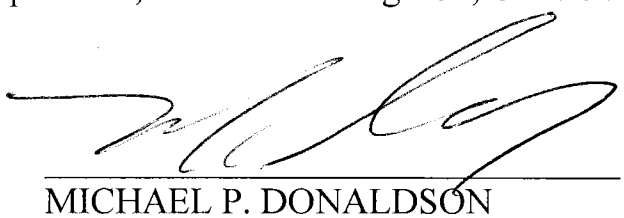
Respectfully submitted,

Michael P. Donaldson
FL Bar No. 0802761
CARLTON FIELDS, P.A.
P.O. Drawer 190
215 S. Monroe St., Suite 500
Tallahassee, FL 32302
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
Counsel for Petitioner

Exhibit C

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished this 18th day of February, 2013 to Wellington Meffert, General Counsel, Florida Housing Finance Corporation, 227 N. Bronough St., Suite 5000, Tallahassee, FL 32301.



MICHAEL P. DONALDSON

Exhibit C