

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

OAKWOOD APARTMENTS,

Petitioner,

v.

**FHFC CASE NO. 2002-0021
Application No. 2002-723H**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on August 29, 2001.

APPEARANCES

For Petitioner, Oakwood
Apartments:

William F. Newman
Program Director
The Center for Affordable Housing, Inc.
203 East Third St., Suite 201
Sanford, FL 32771

For Respondent, Florida Housing
Finance Corporation:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

RECEIVED
SEP 11 10 14 AM '02
STATE OF FLORIDA
DEPARTMENT OF
COMMUNITY AFFAIRS

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue for determination in this proceeding is whether Petitioner's application failed to set forth the experience of the developer sufficient to meet the required threshold of developing at least two projects of similar magnitude to that for which HOME financing was sought.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 7. The Respondent's objections to Petitioner's proffered exhibits, which consisted of photographs of two developments, a letter from the Senior Vice President of the CNL Bank in Orlando and the resumes of its development team and board members, were sustained on the grounds that these documents were not a part of the application timely submitted to the Respondent. At the commencement of the hearing, the parties also filed a Prehearing Stipulation containing a Joint Stipulation of Facts. That Prehearing Stipulation was marked as Hearing Officer's Exhibit 1. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with regard to the issue in dispute. The Joint Stipulation of Facts is attached to this Recommended Order as Exhibit 1, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, counsel for the Respondent submitted a Proposed Recommended Order, and the Petitioner's representative responded to that Proposed Recommended Order by letter.

FINDINGS OF FACT

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

1. By Application Number 2002-723H, the Petitioner, The Center for Affordable Housing, Inc., applied for \$1,011,100.00 in HOME funding for acquisition and rehabilitation of a garden apartment development consisting of 72 residential units located in 19 buildings, each of which contains from three to five 1, 2 and 3 bedroom units located in Mt. Dora, Florida. The name of the development is Oakwood Apartments, and the developer is the same as the applicant.

2. The HOME Rental Application Package, or "HOMER 1015," which includes the application forms and instructions thereto, is adopted by reference as a rule in the Respondent's existing Rule 67-48.002(61), Florida Administrative Code. The HOME Rental Application Instructions and Information require, as a threshold item, that the developer demonstrate that it has completed "at least two affordable housing developments of similar magnitude" by providing a certification and a prior experience chart to be attached to the application as Exhibit 11. The phrase "housing developments of similar magnitude" is not specifically defined in the application, the

instructions or by rule of the Respondent. However, the experience chart (Exhibit 11) requires the inclusion of information demonstrating “Construction Category (New Construction or Rehabilitation);” “Design Type: garden, townhouses, high-rise, duplex/quad., mid-rise w/ elevator, single family, or other (specify type);” and “Number of Units.” The term “developer” is defined in Respondent’s Rule 67-48.002(32), as:

any individual, association, corporation, joint venturer, or partnership which possesses the requisite skill, experience, and credit worthiness to successfully produce affordable multifamily housing pursuant to this rule chapter.

3. In its initial application, Petitioner submitted the developer’s certification and the experience chart. The chart, Exhibit 11, illustrated that the developer’s experience included the new construction of 141 single family units, and the rehabilitation of some 22 duplexes, approximately 65 single family units and a 28-unit garden apartment complex, known as the Palm Tree Apartments.

4. After notification that the Respondent’s scorers agreed with a Notice of Potential Scoring Errors (“NOPSE”) to the effect that Petitioner’s experience chart did not indicate two previous developments of similar magnitude (size, scale, or design) as the proposed development, Petitioner timely filed a “cure,” stating:

Developer has just completed \$598,000.00 rehab project on a 28-unit development of similar (if not more complex) requirements. Principal staff person’s development experience was not reflected in application documentation. Several of directors have development backgrounds and participate in this process. References to substantiate the developer’s competency can be provided upon request.

The Respondent ultimately determined that Petitioner had failed to meet the threshold requirements regarding Developer Experience because the chart, Exhibit II, does not provide the required experience of similar magnitude.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The Petitioner's substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

The sole issue in this proceeding is whether Petitioner met the threshold requirement of demonstrating that its developer, in this case the applicant, had completed two affordable housing developments similar in magnitude to the development proposed by Petitioner, as required by the applicable rules, instructions and application form (which are also rules, pursuant to Rule 67-48.002(61), Florida Administrative Code). The application Instructions define the developer's experience, as set forth in the certification and Exhibit 11, to be a threshold item. Rule 67-48.004(13)(b), Florida Administrative Code, requires the Respondent to reject an application if the applicant fails to achieve the threshold requirements as detailed In Chapter 67-48, the applicable application and the application instructions.

Petitioner's Exhibit 11 demonstrates that the prime prior experience of the developer (in this case, the applicant) is in the new construction of single family dwellings and the rehabilitation of single family and duplex units. Exhibit 11, and its cure, demonstrates that the developer recently completed the one rehabilitation project involving a 28-unit garden apartment, at a cost of \$598,000.00. The rules require a demonstration that the developer complete "at least two affordable housing developments of similar magnitude."

Pursuant to Rule 67-48.002(32), Florida Administrative Code, a "developer" is an entity which possesses the requisite skill, experience and credit worthiness to successfully produce affordable "multifamily housing." Thus, it is doubtful that Petitioner's experience in the areas of new construction and rehabilitation of single family dwellings could be considered as the requisite experience required to be demonstrated in the Petitioner's HOME application. It is further unclear from the definitions contained within Respondent's rule whether a duplex constitutes "multifamily housing." However, these issues are not determinative of the issue as to whether Petitioner demonstrated completion of "at least two affordable housing developments of similar magnitude" as the project under review.

The term "similar magnitude" is not defined in the Respondent's rules. However, the word "similar" is generally understood to mean "comparable" or "alike in substance or essentials" or "closely resembling each other." The word "magnitude" generally refers to size or quantity. See April, 2000 Edition of Random

House Webster's College Dictionary. While not specifically defining the term "similar magnitude," the Respondent's instructions clearly reveal that the Respondent expected a similarity in the construction category, the design type and the number of units. A single family residence and/or a duplex is not of comparable size or quantity to a 72-unit apartment project. The new construction of single family residences is not comparable or similar to the rehabilitation of a 72-unit apartment project. While the rehabilitation of a 28-unit garden apartment development can be considered "similar" in construction category and design type, it is not of similar "magnitude" with the number of units proposed in Petitioner's subject application. It should be noted that the dissimilarity in the costs of the 28-unit and the proposed 72-unit garden apartment projects should not be deemed a determinative consideration, inasmuch as the application did not require a listing of the costs of the projects under review. Even if the 28-unit project could be deemed a project of "similar magnitude" as the 72-unit project proposed, Petitioner was required to demonstrate its prior experience in the completion "of at least two affordable housing developments of similar magnitude," and did not do so.

Petitioner's arguments in opposition to the scoring and rejection of its application primarily concern definitions contained within Respondent's rules and the threshold requirements for eligibility as contained in the application instructions and forms. These arguments are more properly advanced in a rule challenge proceeding pursuant to Section 120.56 of the Florida Statutes. Absent a successful rule-challenge

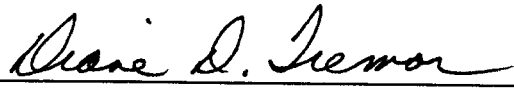
proceeding or an amendment to Respondent's rules which govern the application process, both applicants and the Respondent are governed by the rules as they currently exist. While the wisdom of the rules might be questioned with respect to the award of funds to qualified candidates, their applicability to Petitioner's application may not be questioned in the instant proceeding. The question is whether Respondent properly applied the applicable rules in this instance.

The rules require a demonstration of experience in the completion of two developments of similar magnitude. The rules require that this demonstration be made in terms of construction category, design type and number of units. The Respondent's listing of projects on Exhibit 11 and its cure do not demonstrate the comparability or similarity in the magnitude or the number of projects required to demonstrate the developer's experience to meet threshold.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's application be rejected for failure to meet the threshold requirement for "Developer Experience."

Respectfully submitted and entered this 26th day of September, 2002.



DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation
Rose, Sundstrom & Bentley, LLP
2548 Blirstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Copies furnished to:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

William F. Newman
Program Director
The Center for Affordable Housing, Inc.
203 East Third St., Ste. 201
Sanford, FL 32771

H. O.
Ex. 1

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

OAKWOOD APARTMENTS,

Petitioner,

FHFC Case No. 2002-0021

v.

Application No. 2002-723H

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

_____ /

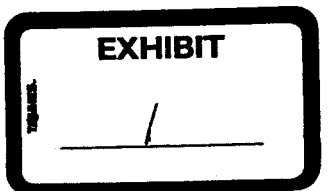
PREHEARING STIPULATION

The parties have agreed to and stipulate to the following:

1. On or before April 15, 2002, Petitioner submitted an Application to Florida Housing Finance Corporation ("Florida Housing") for the award of funds from the Home Investments Partnerships Program ("HOME") for the development of affordable rental housing in the 2002 Universal Cycle.

2. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing and refinancing houses and related facilities in Florida in order to provide decent, safe and sanitary housing to persons and families of low, moderate and middle income.

3. Pursuant to statutory mandate, Florida Housing has established by rule a competitive application process to evaluate, score and competitively rank all applicants. (See Section 420.507 (22)(f), Florida Statutes and Rule Chapter 67.48 F.A.C.) Awards for the Home Investment Partnership program are included in a single application process (the "Universal Cycle") governed by Rule Chapter 67-48, Florida Administrative Code.



4. The 2002 HOME Application, and instructions for completion, adopted as Form HOMER1015 by R. 67-48.002(61), F.A.C., contains parts I through VI, some of which are not applicable to every Applicant. Some of the parts include "threshold" items. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application.

5. After Petitioner submitted its 2002 HOME Application, on or before April 15, 2002, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Florida Statutes, and Rule Chapter 67-48, Florida Administrative Code. Florida Housing completed the scoring process on May 13, 2002.

6. After performing preliminary scoring, Florida Housing's staff notified Petitioner of the results. Petitioner's application failed to meet the requirements for eleven threshold items, all of which were remedied by Petitioner prior to final scoring.

7. Any applicant could question the scoring of Petitioner's Application if it believed Florida Housing had made a scoring error, within ten calendar days after the date the applicant received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE").

8. Florida Housing reviewed each NOPSE that was timely received. On June 10, 2002, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants and Florida Housing's position on any NOPSE.

9. A NOPSE filed on May 24, 2002, questioned whether Petitioner demonstrated sufficient Developer Experience as required in Part II, Section B, subsection 1, of the Universal Application. The NOPSE was sent to Petitioner on June 10, 2002. (The item is designated as 12T on Florida Housing scoresheets.)

10. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any issue raised in any NOPSE, Florida

Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due on or before June 26, 2002 (the "cure period"). Any Applicant could submit to Florida Housing of a NOPSE.

11. Florida Housing found that Petitioner's cure for item 12T did not provide sufficient Developer Experience as required on Page 5 of HOMER1015, by demonstrating "... experience in the completion of two affordable housing developments of similar magnitude."

12. Petitioner applied for \$1,011,100.00 in HOME funding for rehabilitation of a development consisting of 72 residential units located in 19 buildings, each of which contains from 3 to 5 1,2, and 3 bedroom units, at 550 Lincoln Ave., Mt. Dora, Florida 32757.

13. Petitioner's application, at Exhibit 11, provided evidence that Petitioner has developed eleven projects. Ten of the projects were rehabilitation of existing buildings; of these, one was a duplex, two projects were eight and 14 duplex units, one project included 30 single-family homes, one project included 35 single-family homes, and one project consisted of 28 garden apartment units.

14. Petitioner also cited as experience a development consisting of the new construction of 141 single-family homes.

15. Petitioner's cure consisted of a statement that, "Developer has just completed \$598,000 rehab project on a 28-unit development of similar (if not more complex) requirements. Principal staff persons development experience was not reflected in application documentation. Several of directors have development backgrounds and participate in this process. References to substantiate the developer's competency can be provided upon request."

16. After Petitioner submitted its cures, all applicants had an opportunity to review Petitioner's cures. Any applicant could submit to Florida Housing a Notice of Alleged

Deficiencies (“NOAD”) to challenge the Petitioner’s cures. No NOAD was filed on Petitioner’s application.

17. Florida Housing determined, based on Exhibit 11 to Petitioner’s application, and on the cure submitted, that Petitioner’s Developer Experience was not of “similar magnitude,” as Florida Housing interpreted the term.

18. Following this process, Florida Housing on July 22, 2002, sent Pre-Appeal Scores and a Notice of Rights to Petitioner, informing Petitioner that it could contest Florida Housing’s actions in accordance with the provisions of sections 120.569 and 120.57, Florida Statutes.

19. Petitioner timely requested an informal hearing by filing its “Petition for Informal Proceeding in Accordance with sections 120.569 and 120.57(2), Florida Statutes,” on August 13, 2002.

20. The issues before the Hearing Officer for decision in the informal hearing are whether Florida Housing’s interpretation and application of the term, “similar magnitude,” to Petitioner’s application and cure is unreasonable or clearly erroneous, and whether Florida Housing’s interpretation of the term, “Developer Experience,” to include only projects completed by the Applicant entity is unreasonable or clearly erroneous .

21. The parties proffer the following joint exhibits:

- Exh. 1: Petitioner’s Application, numbered 2002-723H
- Exh. 2: Excerpt from HOMER1015 Application Instructions (3 pages)
- Exh. 3: Exhibit 11 to Petitioner’s Application (2 pages)
- Exh. 4: NOPSE filed on item II. B. 4 (4 pages)
- Exh. 5: Cure form for item II. B. 4 (2 pages)
- Exh. 6: Florida Housing scoresheet for Petitioner’s Application (2 pages)
- Exh. 7 Rule 9B-3.047 and sec. 202 and 311, Florida Building Code

Respectfully submitted this 29th day of August, 2002.



Wellington H. Meffert II, General Counsel
Florida Bar No. 0765554
Florida Housing Finance Corporation
227 N. Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329
Telephone: 850/488-4197
Facsimile: 850/414-6548



William F. Newman, Program Director
The Center for Affordable Housing, Inc.
203 East Third Street, suite 201
Sanford, Florida 32771
Telephone: 407/323-3268
Facsimile: 407/323-3800

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

All parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages. Written arguments must be filed with Florida Housing's Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Monday, October 7, 2002. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.