

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

TEMPLE COURT PARTNERS, LTD.,

Petitioner,

v.

**FHFC CASE NO. 2002-0030
Application No. 2002-169C**

**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 assigned Hearing Officer, Chris H. Bentley, held an informal hearing in Tallahassee, Florida, in the above-styled case on September 17, 19 and 25, 2002.

APPEARANCES

For Petitioner, Temple Court
Partners, Ltd.:

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Huey, Guilday, Tucker, Schwartz
& Williams
P. O. Box 12500
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For Respondent, Florida Housing
Finance Corporation:

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Florida Housing Finance Corporation
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STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The issue in this case is whether Respondent correctly scored Sections Part III.D.; Resident Programs in Part III.F.3.; and proximity to closest development addressed in Part III.A.11.c, of Respondent's Application in light of Respondent having elected two items under Part III.D. of the Universal Application in direct contravention of the Universal Application Instructions that an applicant may select only one.

PRELIMINARY STATEMENT

At the Final Hearing, the parties submitted a JOINT STIPULATION OF FACTS AND EXHIBITS. The JOINT STIPULATION contains seven paragraphs of facts to which the parties have stipulated and which are adopted in the Findings of Fact herein. The JOINT STIPULATION OF FACTS AND EXHIBITS is attached hereto as Attachment A. Joint Hearing Exhibits 1 through 6 were received into evidence pursuant to agreement and stipulation of the parties. Petitioner's Exhibits P1 through P5, P10 and P11 were offered and received into evidence and are not in dispute. Petitioner's proposed Exhibits P6 through P9 were offered, but not received into evidence. Petitioner's proposed Exhibits P12, P13 and P14 were marked as Demonstrative Exhibit 1. Respondent offered the testimony of Kerey Carpenter. At the outset of the informal hearing, a REQUEST FOR APPROVAL AS QUALIFIED

REPRESENTATIVE on behalf of Paula C. Reeves, as a Qualified Representative on behalf of Respondent, was considered and without objection the undersigned orally granted that request at the informal hearing.

FINDINGS OF FACT

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

1. Florida Housing is a public corporation organized under Chapter 420, Florida Statutes, 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 affordable housing to persons and families of low, moderate, and middle income.

2. Florida Housing receives a finite amount of federal low income housing tax credits (“Housing Credits”) for allocation to developers to assist in the building and maintenance of low and moderate housing units. The process of allocating the Housing Credits is competitive, and there are more requests for Housing Credits than are available.

3. Pursuant to statutory mandate, Florida Housing has established, by rule, a competitive Application process to evaluate, score, and competitively rank all applicants. Section 402.507(22)(f), Florida Statutes, and Florida Administrative

Code Rule 67-48 *et.al.* Awards for Housing Credits are included in a single Application process (“Universal Cycle”) governed by rule, Florida Administrative Code, 67-48 *et.al.*

4. The 2002 Universal Application (“Application”), and instructions for completion, were adopted by Florida Administrative Code Rule 67-48.002(61). The portion of the Application pertaining to Housing Credits is pertinent to the subject matter of this informal hearing. Parts of the Application allow applicants to earn points.

5. On or before April 15, 2002, Petitioner submitted an Application to Florida Housing for an allocation of Housing Credits for Temple Court Partners, Ltd., (“Petitioner”). After Petitioner submitted its cures, Petitioner’s Application met all threshold requirements and received a final score of 60 points.

6. The issue raised in this appeal concern Petitioner’s selection of “Demographic or Area Commitment” in Part III.D of the Application. In Part III.D of the Application, Petitioner checked both “Elderly” and “Urban In-fill” as the Demographic or Area Commitment.

7. Florida Housing awarded points on three parts of Petitioner’s Application as follows: i) zero points for Demographic or Area Commitment in Part III.D; ii) zero points for Elderly Residential Programs in Part III.F because Florida Housing was “unable to determine Demographic or Area Commitment at Part III.D;”

and iii) 2.25 points out of a possible 3.75 points for address/location of FHFC Development Proximity List “based on FHFC verification.”

8. Petitioner timely submitted an Application to Respondent for an allocation of competitive Housing Credits in the 2002 cycle.

9. In its Application, Petitioner proposed to rehabilitate a 61-unit mid-rise apartment complex in Miami, Florida.

10. As a result of the preliminary scoring, Respondent determined that Petitioner did not meet the Demographic or Area Commitment requirement in Part III.D because Petitioner had selected both the “Elderly” and “Urban In-Fill Development” boxes on the Application form. With regard to the selection of those boxes, in Part III.D of the Universal Application, the Universal Application Instructions specifically state that “Applicants may select only one of the following” Thus, the instructions clearly directed Applicants that only one of the boxes in Part III.D could be checked. In contravention of those instructions, Petitioner checked two of the boxes.

11. It is Petitioner’s contention that it checked both boxes because the development met the definition of both “Elderly” and “Urban In-Fill Development” and Petitioner wanted to be accurate and precise. However, checking two boxes when the instructions clearly allow only one box to be checked creates confusion and uncertainty instead of accuracy and precision and is contrary to the instructions in the Universal Application Instructions.

12. The Universal Application and Universal Application Instructions have been adopted as rules by Respondent.

13. Petitioner included in its Application several other references with regard to “Elderly” or “Senior” issues. Those references are as follows:

- a. Part II.F.3 - Temple Court committed to provide “Qualified Resident Programs for Elderly Developments.”
- b. Part III.A.11.b(3) - Temple Court checked “yes” in response to the question “If the proposed Development will serve the Elderly . . . will it be located within five miles of a medical facility?”
- c. Exhibit 19 - The narrative description of the development states that “[t]he 61-unit property is designated to serve elderly residents.
- d. Exhibit 31 - Temple Court submitted a market study evidencing the need for low-income elderly housing at the site.
- e. Exhibit 41 - The financing commitment letter from Sun Trust states that the loan “will be used to construct a 61-unit multifamily apartment complex (set aside for senior housing....”

14. Petitioner, in its Initial Application at Part III.F.3, “Qualified Resident Programs for Elderly Developments (maximum 6 Points)”, selected 3 blocks totaling 6 points. The Universal Application Instructions state with regard to Part III.F.3, “Qualified Resident Programs for Elderly Developments,” that “to be eligible to

select resident programs in this category, Applicant must have selected Elderly in the Demographic or Area Commitment section of this Application.” Because Petitioner selected both “Elderly” and “Urban In-Fill Development” in contravention of the instructions that Petitioner could only select one of the nine different Demographic or Area Commitment boxes, the Petitioner has in effect failed to select any Demographic or Area Commitment in Part III.E.

15. In Part III.A.11.c of Petitioner’s Initial Application Petitioner did not check “yes” or “no” and did not check a distance to Developments on the FHFC Development Proximity List which serve the same demographic group as the proposed Development in Petitioner’s Application. Respondent awarded Petitioner 2.25 points on Part III.A.11.c in preliminary scoring and stated in the Universal Scoring Summary that the points “were adjusted based on FHFC verification.”

16. In Part III.A.11.c of Petitioner’s Initial Application wherein there is requested the “Name of the closest Development” included on the FHFC Development Proximity List which serves the same demographic group as the proposed Development, Petitioner answered “N/A - Urban In-Fill.” Thus, in its Initial Application, Petitioner, in answer to this question of the application, relied on its selection of “Urban In-Fill Development” under Part III.E as its Demographic or Area Commitment instead of relying upon “Elderly” as its Demographic or Area Commitment.

17. Rule 67-48.004, Florida Administrative Code, describes the application and selection process applicable to this case. It states that there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application deadline. In other words, there are certain non-curable items. Specifically, Rule 67-48.004(14), Florida Administrative Code, states:

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:

...

(i) Demographic or Area Commitment;

...

Thus, under Respondent's rules, there was no opportunity for Petitioner to "CURE" Part III.D which is entitled "Demographic or Area Commitment."

18. There are no issues of material fact apparent on the record of this proceeding.

19. The rules of Respondent in effect at the time of the 2000 Application Cycle are different from the rules of the Respondent currently in effect and applicable to this 2002 Application Cycle. The rules for the 2000 Application Cycle, in pertinent part, provided that Applicants could submit CURES for transpositional or

to this 2002 Application Cycle. The rules for the 2000 Application Cycle, in pertinent part, provided that Applicants could submit CURES for transpositional or scrivener's errors. In the 2000 Cycle when such a CURE was presented, the Applicant was then assessed a penalty. The current rules applicable to the 2002 Application Cycle and this proceeding have no provision allowing Applicants the opportunity to CURE transpositional or scrivener's errors and have no provision for penalty points. In simple terms, the rules applicable to the 2000 Application Cycle are different in material part to the rules applicable to the 2002 Cycle. The current rules embody a different application and scoring these when compared to the 2000 rules.

CONCLUSIONS OF LAW

20. 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. Petitioner's substantial interests are affected by the proposed action of the Respondent. Therefore, Petitioner has standing to bring this proceeding.

21. The Universal Application Instructions, as well as the Universal Application, have been adopted as rules. Therefore, both Petitioner and Respondent are bound by the terms of those rules. Section 67-48.004(2), Florida Administrative Code, mandates that "Failure to submit an Application completed in accordance with the Application Instructions and these rules will result in rejection of the Application

22. The Universal Application Instructions are unequivocal with respect to Part III.D, pertaining to “Demographic or Area Commitment.” Those instructions explicitly state that “Applicants may select only one of the following” Demographic or Area Commitments. Petitioner’s Initial Application clearly violated that requirement by selecting two of those nine items instead of just one.

23. Petitioner’s argument that it should be allowed to change its Application is inconsistent with Respondent’s rules. The materiality of Petitioner’s erroneous completion of Part III.D with respect to the very competitive application process which the Respondent’s rules require is exemplified by Rule 67-48.004(14)(i), Florida Administrative Code. That rule mandates that certain items, including “Demographic or Area Commitment” must be included in the Initial Application and cannot be revised, corrected or supplemented after the Application Deadline. Respondent has thus determined, by rule, that the initial submission of the “Demographic or Area Commitment” designation by an Applicant is essential to a fair and competitive process. This rule further requires that failure to submit these items shall result in the rejection of the Application without opportunity to submit additional information. The Petitioner, having failed to indicate a single Demographic or Area Commitment designation in accordance with the Application Instructions and rules, the Respondent would have been justified under its rules, in rejecting Petitioner’s Application on this ground alone.

24. Petitioner's argument that Respondent should have gleaned Petitioner's "intent" to apply as an "Elderly" development instead of as a "Urban In-Fill Development" and thereby in effect eliminate from Petitioner's Application the check mark Petitioner placed next to "Urban In-Fill Development" is inconsistent with Rule 67-48.004(1), Florida Administrative Code. Further, it would be inappropriate for Respondent to attempt to divine the "real intent" of an Applicant when the Application has not been completed in accordance with the clear unequivocal instructions and rules of the Respondent. The Respondent cannot and should not attempt to do so. It is the responsibility of an Applicant to fill out the Application Form in accordance with the instructions, thus making the intent of the Applicant clear and unequivocal on the face of the Application. For the Respondent to try to divine in some subjective manner the "real intent" of an Applicant would necessarily lead to inconsistent and debatable conclusions. When an Application is inconsistent on its face because of actions of the Applicant, as is this Application, the burden and responsibility of that inconsistency must fall upon the Applicant. The Respondent cannot pick up the fumbled ball and run it in for a touchdown on behalf of the Applicant and still maintain the integrity of the competitive process embodied in the Application Cycle.

25. Petitioner has not filled out Part III.D of its Initial Application in accordance with the applicable rules. The rules of Respondent prohibit Petitioner from revising or "curing" its erroneous and inconsistent response to Part III.D in its

Initial Application. Thus, it is not entitled to any points under Part III.D of its Application.

26. With regard to Part III.F.3 of the Application, “Qualified Resident Programs for Elderly Developments”, “to be eligible to select resident programs in this category, Applicant must have selected Elderly in the Demographic or Area Commitment section of this Application.” It is concluded as a matter of law that the effect of the Petitioner, contrary to the instructions, selecting two Demographic or Area Commitments in Section III.D, is legally the same as having made no selection. Thus, as a matter of law, Petitioner has not met the prerequisite of selecting “Elderly” in the Demographic or Area Commitment Section of the Application, Part III.D. Therefore, Petitioner is not eligible to select a resident program in Part III.F.3 and should receive no points therefore.

27. Part III.A.11.c of the Application elicits information with regard to the proximity of the proposed development to developments on the FHFC Development Proximity List which serve the same demographic group and awards points for that proximity. With regard to Petitioner’s Application, it cannot be determined which demographic group it proposes to serve since it did not comply with the instructions in Part III.D of the Application and choose one demographic group. As noted above, this failure on the part of Petitioner has the same legal effect as though Petitioner had chosen no demographic group under Part III.D. That being the case, it is not possible

for Petitioner to answer Part III.A.11.c of the Application and Petitioner should receive no points for Part III.A.11.c.

28. Petitioner has provided to the Hearing Officer what is in legal effect the final order of Respondent with regard to the Grand at Lake Wales Application in the 2000 Combined Cycle. Because the action of Respondent in that case has, in legal effect, been reduced to finality, it is appropriate to cite that case as precedent. Its value as precedent must be measured, however, by the similarity of the facts and issues in that case to the facts and issues in this case. Petitioner argues that the action of Respondent in Grand at Lake Wales is inconsistent with the action it proposes in this case. However, a comparison of the rules that were applicable to the issues involved in the Grand at Lake Wales case to the rules involved in this case reveal that there are substantial and material differences which distinguish the action of the Respondent in the Grand at Lake Wales case from the proposed action in the instant case. In particular, the rules in the 2000 Cycle allowed Applicants an opportunity to CURE transpositional or scrivener's errors that did not otherwise materially affect the Application. Those rules then imposed a penalty upon such correction. As set forth above, the present rules which apply to this case do not have any such provisions. The present rules are unequivocal in their requirements with regard to the issues involved in this case. Therefore, having considered the final action of Respondent in the Grand at Lake Wales matter from the 2000 Combined Cycle and having considered argument of counsel on that matter, it is concluded as a matter of law that

the final action of Respondent in that matter is distinguishable from the proposed action in this cause and does not demonstrate an inconsistency with regard to the interpretation of the present rules applicable to this proceeding.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that:

1. Petitioner is not entitled to any points under Part III.D of its Application;
2. Petitioner is not eligible to select a resident program in Part III.F.3 and should receive no points therefore; and
3. Having failed to properly respond to Part III.D of the Application, Petitioner is unable to answer Part III.A.11.c and should receive no points therefore.

Respectfully submitted and entered this 2nd day of October, 2002.



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FHFC CASE NO.: 2002-0030
APPLICATION NO. 2002-169C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

JOINT STIPULATION OF FACTS AND EXHIBITS

The parties have agreed to and stipulate to the following facts:

1. 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 affordable housing to persons and families of low, moderate, and middle income.
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3. Pursuant to statutory mandate, Florida Housing has established, by rule, a competitive Application process to evaluate, score, and competitively rank all applicants. Section 420.507 (22)(f), Fla. Stat. and Fla. Admin. Code R. 67-48 *et. al.* Awards for Housing

ATTACHMENT A

Credits are included in a single Application process (“Universal Cycle”) governed by rule, Fla. Admin. Code R. 67-48 *et. al.*

4. The 2002 Universal Application (“Application”), and instructions for completion, were adopted by Fla. Admin. Code R. 67-48.002(61). The portion of the Application pertaining to Housing Credits is pertinent to the subject matter of this informal hearing. Parts of the Application allow applicants to earn points.

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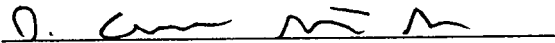
EXHIBITS

- | | |
|---|---|
| 1 | Page from Petitioner’s application showing two demographic or area commitments checked. |
| 2 | Rule 67-48(14) pertaining to non-curable items. |
| 3 | Universal Cycle Application Instruction for 2002, pertaining to Demographic or Area Commitment. |
| 4 | 2002 Universal Scoring Summary. |

Respectfully submitted this 18th day of September, 2002.



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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.