STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BRISBEN FLORIDA II
LIMITED PARTNERSHIP
(MEADOW POINTE),

Petitioner,

v.

FHFC CASE NO.: 2002-0045C

FLORIDA HOUSING FINANCE
CORPORATION,

APPLICATION NO.: 2002-166BS

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 October 10, 2002. On or before April 15, 2002, Petitioner submitted its Application to Florida Housing Finance Corporation ("Florida Housing") to compete for an allocation of Multi-Family Mortgage Revenue Bonds and SAIL funds. Petitioner timely filed a Petition for Informal Administrative Hearing, pursuant to Sections 120.569 and 120.57(2), Florida Statutes, (the "Petition") challenging Florida Housing's scoring on parts of the Application. Florida Housing reviewed the Petition pursuant to Section 120.569(c), Florida Statutes. An informal hearing was held in this case on September 20, 2002, in Tallahassee, Florida, before Florida Housing appointed Hearing Officer, David E. Ramba. Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and

correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended Florida Housing enter a Final Order to allow Petitioner to continue to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds and, within 30 days of the date that the Board takes action on the informal appeals, allow Petitioner to submit documentation that they are able to fill the SAIL funding gap in accordance with the 2002 Universal Application Instructions.

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

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

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

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

The Hearing Officer's recommendation that a Final Order be entered allowing Petitioner to continue to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds and, within 30 days of the date of this Final Order, Petitioner may submit documentation that they it is able to fill the SAIL funding gap in accordance with the 2002 Universal Application Instructions is approved and accepted as the appropriate disposition of this case. Accordingly, Petitioner is to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds. Petitioner has 30 days from the date of this Final Order to submit documentation that it is able to fill the SAIL funding gap in accordance with the 2002 Universal Application Instructions.

DONE and ORDERED this 10th day of October, 2002.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chairperson

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.

Copies to:

Hugh R. Brown
Assistant General Counsel
Florida Housing Finance Corporation
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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BRISBEN FLORIDA II LIMITED
PARTNERSHIP (MEADOW POINTE),

Petitioner,

v.

FHFC CASE NO.: 2002-0045
App No.: 2002-166BS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, on September 10, 2002, an informal administrative hearing was held in this case in Tallahassee, Florida, before for the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

APPEARANCES

The representatives for the parties at the hearing are as follows:

For Petitioner:

Warren Husband
Metz, Hauser & Husband, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909

For Respondent:

Hugh R. Brown, Assistant General Counsel
Florida Housing Finance Corporation
227 N. Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

EXHIBIT
"A"

EXHIBITS

The following exhibits were offered jointly by the parties and were received by the Hearing Officer:

1. Prehearing Stipulation
2. Part II, Section A.1 of the Meadow Pointe application (#2002-166BS).
3. Part V, Section A.1 of the Meadow Pointe application.
4. The initially submitted Exhibit 43 to the Meadow Pointe application ("Construction or Rehab Analysis").
5. 2002 Preliminary Universal Scoring Summary for the Meadow Pointe application dated May 13, 2002.
6. NOPSE filed against Part V, Section A.1 of the Meadow Pointe application (3 pages).
7. 2002 NOPSE Universal Scoring Summary for the Meadow Pointe application dated June 10, 2002.
8. Cure materials filed by Meadow Pointe pertaining to Exhibit 43 of the initial application (2 pages).
9. 2002 Final Universal Scoring Summary for the Meadow Pointe application dated July 22, 2002.
10. Pages 56-76 of the UA1016 Application instructions.

PRELIMINARY STATEMENT

On or before April 15, 2002, Petitioner submitted an application to Florida Housing for Multi-Family Mortgage Revenue Bonds and SAIL funds in the 2002 Universal Cycle program. On July 22, 2002, Florida Housing notified Petitioner of the results of the scoring of Petitioner's application and provided Petitioner with a Notice of Rights pursuant to Sections 120.569 and 120.57, Florida Statutes. On August 13, 2002, Petitioner filed its Election of Rights. On August 13, 2002, Petitioner timely filed its Petition for Informal Administrative Hearing ("Petition"). An informal hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes.

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 9. Meadow Pointe also introduced an excerpt from the Application Instructions for the 2002 Universal Cycle, which was admitted into evidence without objection as Exhibit 10. There are no disputed issues of material fact.

STATEMENT OF THE ISSUE

The issue in this case is whether the Florida Housing Finance Corporation ("FHFC") erred in rejecting Petitioner's application to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds ("Bonds") after the application was found to be ineligible to compete for SAIL funds in the 2002 Universal Cycle program.

FINDINGS OF FACT

1. Petitioner, Brisben Florida II Limited Partnership ("Meadow Pointe"), is an Ohio limited partnership with its address at 7800 East Kemper Road, Cincinnati, Ohio 45249, and is in the business of providing affordable housing units.

2. Respondent, Florida Housing Finance Corporation ("Florida Housing") is a public corporation that administers governmental programs relating to the financing and refinancing of affordable housing and related facilities in Florida, pursuant to Section 420.504, Florida Statutes.

3. To encourage the development of affordable rental housing for low-income families, Florida Housing provides low-interest mortgage loans to developers of qualified multi-family housing project. In exchange for an interest rate lower than conventional

market rates, the developer agrees to "set-aside" a specific percentage of the rental units for low-income tenants.

4. Through its Multi-Family Mortgage Revenue Bond (MMRB) program, Florida Housing funds these mortgage loans through the sale of tax-exempt and taxable bonds. Applicants then repay the loans from the revenues generated by their respective projects.

5. Through the State Apartment Incentive Loan ("SAIL") program, Florida Housing funds low-interest mortgage loans to developers from various sources of state revenue, which are generally secured by second mortgages on the property.

6. Because Florida Housing's available pool of tax-exempt bond financing and SAIL funds is limited, qualified projects must compete for this funding. To determine which proposed projects will put the available funds to best use, Florida Housing has established a competitive application process to assess the relative merits of proposed projects.

7. Florida Housing's competitive application process for MMRB and SAIL financing is included with other financing programs within a single application process (the "Universal Application") governed by rule Chapters 67-21 and 67-48, Florida Administrative Code.

8. The 2002 Universal Application and accompanying instructions are incorporated as form "UA1016" by reference into Chapter 67-21 by Rule 67-21.002(97), Florida Administrative Code, and into Chapter 67-48 by Rule 67-48.002(116), Florida Administrative Code.

9. For the 2002 Universal Application cycle, applicants who complete and submit form UA1016 with attachments are given a preliminary score by Florida Housing.

10. Following the issuance of preliminary scores, applicants are provided an opportunity to challenge the scoring of any competing application through the filing of a Notice of Possible Scoring Error ("NOPSE").

11. Florida Housing considers each NOPSE filed, and provides each applicant with notice of any resulting change in their preliminary scores (the "NOPSE scores").

12. Following the issuance of NOPSE scores, Florida Housing provides an opportunity for applicants to submit additional materials to "cure' any items for which the applicant received less than the maximum score, or for which the application may have been rejected for failure to achieve "threshold."

13. Following the "cure" period, applicants may again contest the scoring of a competing application by filing a Notice of Alleged Deficiencies ("NOAD"), identifying deficiencies arising from the submitted "cure" materials.

14. After considering the submitted NOADs, Florida Housing provides notice to applicants of any resulting scoring changes. The resulting scores are known as "pre-appeal" scores.

15. Applicants may appeal and challenge, via formal or informal hearings, Florida Housing's scoring of any item for which the applicant received less than the maximum score,

or for any item that resulted in the rejection of the application for failure to meet "threshold."

16. Upon the conclusion of the informal hearings, and of formal hearings where appropriate and timely, Florida Housing issues the final scores and ranking of applicants. Applicants are then awarded tentative MMRB and/or SAIL funding in order of rank; Florida Housing issues Final Orders allocating the tentative funding and inviting successful applicants in the credit underwriting process.

17. On or about April 15, 2002, Meadow Pointe and others submitted applications for MMRB and SAIL financing in the 2002 Universal Application cycle. Meadow Pointe requested $3,190,000 in tax-exempt MMRB funding and $1.5 million on SAIL funding to help finance its project, a 236-unit garden style apartment complex in Brevard County, Florida. In its application, Meadow Pointe committed all of these units to house families earning 30-60% or less of the area median income.

18. Florida Housing evaluated all applications and notified applicants of their preliminary scores on or before May 14, 2002. Applicants were then given an opportunity to file NOPSEs on or before May 24, 2002.

19. After considering all NOPSEs, Florida Housing notified applicants by overnight mail on or about June 11, 2002, of any resulting changes in the scoring of their applications. Applicants were then required to submit, on or before June 26, 2002, "cure" materials to correct any alleged deficiencies in their applications previously identified by Florida Housing.

20. Applicants were required to file NOADs on competing applications on or before July 8, 2002. After considering the submitted NOADs, Florida Housing issued notice to Meadow Pointe and others of their adjusted scores on or about July 23, 2002.

21. One of Florida Housing's primary considerations in evaluating applications for funding is whether the applicant can demonstrate that it is ready to proceed with development and construction of its proposed project. As part of this demonstration, Florida Housing's application requires all applicants to document that they have legal title to the property on which the project is proposed to be constructed, or that they have the legal right to acquire such title, e.g., through a contract for sale or a long-term lease. These legal rights are commonly referred to as "site control." Applicants submit documentation of "site control" in Exhibit 23 to the Universal Application.

22. In its initial scoring, Florida Housing determined that the documents submitted by Meadow Pointe in Exhibit 23 to the Universal Application did not sufficiently demonstrate site control, and rejected the application for failure to meet threshold requirements, in that the contract provided did not meet the definition of "qualified contract' under Florida Housing rules.

23. Additionally, a competing applicant filed a NOPSE against Meadow Pointe, alleging that the site control documents did not clearly indicate which entity signed the purchase contract and which entity assigned the interest in the purchase contract.

24. In response to preliminary scoring, and to the NOPSE filed by a competing

applicant, Meadow Pointe submitted cure materials including a "Restated and Amended Sixth Amendment" (the "Restated Sixth Amendment") to the original purchase contract which addressed the issues raised by Florida Housing's scoring and the NOPSE filed against Meadow Pointe. The cure materials did not include the original Sixth Amendment to the purchase contract.

25. The Restated Sixth Amendment was initially accepted by Florida Housing as curing the two previously identified site control defects, and rescinded the rejection of the application on these grounds.

26. In issuing a final score, however, Florida Housing took the position that the documents submitted did not adequately demonstrate site control, due to a "gap" on the contract created by the absence of the original Sixth Amendment to the purchase contract.

27. The parties agree that the cure materials submitted by Meadow Pointe sufficiently demonstrate site control, and that the application should not have been rejected for failing to meet threshold on these grounds.

28. In response to a NOPSE filed by a competing applicant, Florida Housing determined that Meadow Pointe was ineligible to compete for SAIL funding under Rule 67-48.009(9), Florida Administrative Code, which provides, in pertinent part:

> "Except for small county requests, Applicants may not request SAIL funding for Developments receiving priority in FHFC's multifamily bond program for having no other FHFC funding."

29. Florida Housing determined that Meadow Pointe had received priority in the MMRB program during the 2001 application cycle, for having no other Florida Housing funding.

30. As a result of excluding the requested $1.5 million SAIL loan as part of the development financing, Florida Housing also concluded that Meadow Pointe had a construction financing shortfall of $597,979.

31. The parties agree that Meadow Pointe is ineligible to apply for SAIL funding during the current 2002 Universal Application cycle.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Florida Statutes and Rule 67-47, Florida Administrative Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Rule 67-48.009 (9), Florida Administrative Code renders the applicant ineligible for SAIL funding and the parties agreed in their prehearing stipulation that applicant is ineligible to apply for SAIL funding during the 2002 Universal Application cycle.

3. Page 65 of UA1016 Application instructions provides, in pertinent part, that "[a]n application that requested SAIL funds and also requested MMRB or Competitive HC that is selected for tentative funding of MMRB or Competitive HC but is not selected for tentative funding of SAIL must, within 30 days of the date that the Board takes action

on the informal appeals, submit documentation to Florida Housing and if assigned, their assigned credit underwriter, demonstrating that it is able to fill the SAIL funding gap."

4. Respondent interprets the Application instructions to require the SAIL application to be eligible to compete before these application instructions apply.

5. The plain meaning of FHFC'a application instructions does not require that the application be eligible to compete for SAIL funding, simply that they request it along with a request for MMRB or Competitive HC.

6. FHFC, in numerous other parts of their application instructions, requires that applicants be "eligible" for certain programs to move further in the application process or to be able to access additional funding.

7. FHFC's application instructions are clear and unambiguous, and cannot construe their rules in a manner that contradicts the rule's express language. See, Eager v. Florida Keys Aqueduct Auth., 580 So.2d 771 (Fla. 3rd DCA 1991), review denied, 591 So. 181 (Fla. 1991). Although an agency's interpretation of their rules will not be overturned unless the interpretation is clearly erroneous, review is not needed unless the language is not plain or the meaning is unclear.

RECOMMENDED ORDER

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

A Final Order be entered allowing the Applicant to continue to compete for an award of 2002 Multi-Family Mortgage Revenue Bonds and, within 30 days of the date that the Board takes action on the informal appeals, allow Applicant to submit

documentation that they are able to fill the SAIL funding gap in accordance with the 2002 Universal Application instructions.

Dated this 23rd day of September, 2002 in Tallahassee, Florida

David E. Ramba, Hearing Officer

Copies furnished:

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