STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

THE LANDINGS ON MILLENNIA BLVD.,

Petitioner,

v.

FHFC CASE NO. 2002-0057
Application No. 2002-076S

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____/

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2)of the 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 September 5, 2002.

APPEARANCES

For Petitioner, The Landings on Millennia Blvd.:	M. Christopher Bryant, Esq. Oertel, Hoffman, Fernandez & Cole P. O. Box 1110 Tallahassee, FL 32302-1110
For Respondent, Florida Housing Finance Corporation:	Paula C. Reeves Qualified Representative Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue is whether Petitioner is entitled to receive the maximum proximity tie-breaker points (1.25 points) for a grocery store located within one mile from its proposed development. More specifically, the issue is whether the Family Dollar Store identified in Petitioner's application constitutes a "grocery store," as that term is defined in Respondent's rules.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits A through G. The parties also filed a Posthearing Stipulation of Facts and Exhibits. 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 Posthearing Stipulation of Facts and Exhibits is attached to this Recommended Order as Exhibit 1, and the facts recited therein are incorporated in this Recommended Order. The Request for Approval as Qualified Representative for the Respondent filed by Paula C. Reeves was granted.

Immediately prior to the instant hearing, an identical issue was presented in the informal hearing concerning Newport Sound Partners, Ltd., Case Number 2002-0058, Application Number 2002-130C. Counsel for the parties in the Newport case were the same as in the instant case. In the interest of expediting the hearing, the parties

adopted and incorporated by reference their arguments presented in the Newport Sound informal proceeding.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

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

1. Petitioner applied to the Respondent for a low interest SAIL loan of $2.0 million to assist in the construction of a 336-unit multi-family housing development in Orange County, Florida.

2. In the 2002 Universal Application cycle, tie-breaker points may be awarded to applicants upon a showing that their existing or planned development is within a certain distance to various services, including grocery stores, public schools, medical facilities and public bus stops. The number of points to be awarded is based upon the distance between the claimed tie-breaker service and the proposed development. With respect to grocery stores, 1.25 points are awarded if the grocery store is within one mile; 1.0 point if within one to two miles; .75 points if within two to three miles; .5 points if within three to four miles; and .25 points if within four to five miles.

3. For the purposes of awarding tie-breaker points, a "grocery store" is defined in the 2002 Universal Application Instructions as follows:

> a grocery store means a self-service retail market that sells food and household goods and has at least 4,500 square feet of air conditioned space.

There is no other definition of a "grocery store" contained within the statutes or promulgated rules which govern this proceeding.

4. The Universal Application Package, which includes both the application forms and the instructions, is adopted as a rule and is incorporated by reference in the Respondent's Rule 67-48.002(116), Florida Administrative Code.

5. Petitioner's application asserted entitlement to 1.25 tie-breaker points due to the location of a Family Dollar Store within one mile of its proposed development. Through a Notice of Potential Scoring Error ("NOPSE"), another applicant challenged Petitioner's designation of the Family Dollar Store as a grocery store.

6. In its timely submitted "cure," Petitioner presented an affidavit stating that the Family Dollar Store designated by Petitioner is in excess of 6,000 square feet of air conditioned space, that customers select items from shelves and present them at checkout counters at the front of the store for purchase, and that in excess of 150 linear feet of shelf space in the store was dedicated to the sale of food and household goods. The affidavit contained a non-exclusive listing of some 29 food products (such as cereal, peanut butter, spaghetti sauce, pastas, rice, macaroni, crackers, cookies, popcorn, cake mixes, coffee and tea, condiments, bottled and canned juices, soft drinks and canned items, including tuna, meat, soup, fruits, vegetables, and apple sauce) and some 13 categories of household goods (such as toilet paper, storage and

trash bags, paper towels, disposable diapers and wipes, disposable plates, napkins and eating utensils, laundry and dishwashing detergents, light bulbs, cleaning supplies, various toiletries and home medical supplies and medications) offered for sale at the designated Family Dollar Store. The affidavit further stated that the prices posted for the identified food and household goods at the Family Dollar were generally as low or lower than the regular prices for the same products at a Supermarket located approximately 2.2 miles from the Family Dollar Store.

7. While Petitioner maintained that the Family Dollar Store constitutes a "grocery store" within the definition set forth in Respondent's rule (at page 10 of the application instructions), Petitioner alternatively sought tie-breaker points for a Publix Supermarket located within one to two miles of the proposed development. The Respondent awarded Petitioner one tie-breaker point for proximity to the Publix store, determining that the Family Dollar Store is not a grocery store.

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 the Family Dollar Store constitutes a "grocery store" for purposes of awarding tie-breaker points. This issue must be resolved in accordance with the adopted definition of a "grocery store" contained in the application instructions, which instructions are adopted as rules of the Respondent and which, along with other adopted rules, govern this competitive application process and this proceeding.

As noted above, the rule definition of a "grocery store," for purposes of awarding proximity tie-breaker points, contains four clear requirements. To qualify as a "grocery store," the facility must: (1) be a self-service retail market, (2) sell food, (3) sell household goods, and (4) contain at least 4,500 square feet of air conditioned space. These four requirements are neither vague nor ambiguous. There is no factual dispute or question that the Family Dollar Store designated by Petitioner is a self-service retail market, sells food, sells household goods and contains in excess of 4,500 square feet of air conditioned space.

The definition of a "grocery store" was promulgated by the Respondent, presumably in compliance with the rulemaking requirements of the Administrative Procedure Act. Accordingly, both Respondent and applicants who apply for funding from Respondent are bound by its clear and unambiguous terms.

Respondent urges that it interprets its definition of "grocery store" to require that said store sell meats, produce and dairy products, that sufficient space be devoted to the sale of food and household goods (though Respondent does not argue how

much space is required) and that food and household good sales must be its major retail function (though Respondent does not argue what amount or percentage of gross sales must be achieved). Respondent relies upon the dictionary definition of a "grocer" as "a dealer in staple foodstuffs, meats, produce, and dairy products and usually household supplies," stating that Florida Housing interprets its definition to contain the ordinary meaning of "grocery" within its definition. Respondent also points to definitions contained within Chapter 500 of the Florida Statutes, known as the "Florida Food Safety Act," apparently for the proposition that a store which only sells prepackaged foods is not a "grocery store." It should be noted that the term "grocery store" is not defined in Chapter 500, Florida Statutes. In any event, Chapter 500, Florida Statutes, which is administered by the Department of Agriculture and Consumer Services, does not purport to govern proceedings before the Florida Housing Finance Corporation, and the Respondent's rule definition of a "grocery store" makes no reference to Chapter 500 of the Florida Statutes.

The problem with Respondent's arguments is that the Respondent's definition of a "grocery store" does not contain the requirements now urged by the Respondent. Respondent is responsible for its own chosen and adopted definition of a "grocery store." Respondent could have stated that such a store must sell fresh meat or produce or dairy products, but it did not. Respondent could have required that a certain percentage of square footage or gross sales must be devoted to the sale of food or households goods, but it did not. Respondent could have required that in order to

be entitled to tie-breaker points, a proposed development must be within a certain proximity to a "supermarket," but it did not. Respondent argues that it intended to convey the "ordinary meaning of 'grocery' within its definition." While words should be given their plain and ordinary meaning when interpreting rules, Respondent's argument disregards the fact that it undertook to define the words "grocery store" within its promulgated rule. That definition could have incorporated an "ordinary" dictionary meaning of "grocery" or it could have incorporated any other requirement deemed appropriate by the Respondent. If there were no rule definition of "grocery store" to which all applicants were bound, Respondent's argument that great deference to an agency's interpretation might have merit. But, here, Respondent itself has provided its interpretation by a clear and unambiguous definition, it has adopted that definition by rule, and Respondent may not enlarge, modify or change that definition to the detriment of applicants who relied upon the definition provided.

As clearly enunciated in the cases of Cleveland Clinic Hospital v. Agency for Health Care Administration, 679 So.2d 1237 (Fla. 1st DCA 1996); Boca Raton Artificial Kidney Center v. Department of Health and Rehabilitative Services, 493 So.2d 1055 (Fla. 1st DCA 1986); and Central Florida Regional Hospital, Inc. v. Department of Health and Rehabilitative Services, 582 So.2d 1193 (Fla. 5th DCA 1991), rev. denied, 592 So.2d 679 (Fla. 1991), an agency must follow its own rules. It cannot apply one set of rules during the application process and then apply a different set of rules after the applicants have already relied upon the agency's

announced policies and requirements. If the rule, as it plainly reads, should prove impractical in operation, the rule can be amended pursuant to established rulemaking procedures. However, absent such amendment, expedience cannot be permitted to dictate its terms. Applicants are entitled to plan, predict and compete for the scores they receive on the basis of the clear rules which govern the competitive application process.

All applicants in the 2002 Universal Cycle, including Petitioner, were entitled to rely upon the promulgated definition of a "grocery store," as published in the Universal Application Instructions. Petitioner clearly demonstrated, in its "cure" documentation, that the Family Dollar Store designated in its application constitutes a "grocery store" as defined by rule of the Respondent. Accordingly, Petitioner is entitled to receive the maximum tie-breaker points for its proximity to a grocery store.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner be awarded 1.25 tie-breaker points (in lieu of 1.0 tie-breaker points) for its proximity to a grocery store.

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

Diane D. Tremor

DIANE D. TREMOR
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STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

THE LANDINGS ON MILLENNIA BOULEVARD, LTD,
2002-076S,

Petitioner,

CASE NO. 2002-0058

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

POST HEARING STIPULATION OF FACTS AND EXHIBITS

The parties, THE LANDINGS ON MILLENIA BOULEVARD, LTD ("Landings on Millennia"), and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing"), hereby stipulate and agree to the following facts and exhibits:

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.

2. Florida Housing receives its funding for the SAIL program from an allocation of documentary stamp revenues. The apportionment of funds is grouped according to the most populated to the least populated counties. Availability of funding to developers is further affected by specialized targeting goals, and set-aside funding

issues, that may pertain to the elderly, farm workers, and commercial fishing workers. The SAIL funding process is highly competitive, and there are more requests for SAIL funding than are available funds.

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.* Applying for SAIL funds is 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 SAIL funding is pertinent to the subject matter of this informal hearing. Parts of the application allow applicants to earn points. The failure to provide complete, consistent, and accurate information as prescribed by the instructions may reduce the Applicant's overall score.

5. On or before April 15, 2002, Petitioner submitted an Application to Florida Housing for the SAIL program for Landings on Millennia multi-family development, a proposed development of affordable rental housing in the 2002 Universal Cycle.

6. After Petitioner submitted its Application for SAIL funding, Florida Housing's staff began scoring the Application pursuant to Part V, Chapter 420, Fla. Stat., and Fla. Admin. Code R. 67-48 *et. al.* Florida Housing completed the preliminary scoring process on May 13, 2002.

7. After the preliminary scoring process was finished, Florida Housing's staff notified Petitioner of the results. Any applicant could question (or challenge) the score of Petitioner's Application if it believed that Florida Housing had made a scoring error. This challenge had to occur within ten (10) calendar days after the date the Petitioner received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE").

8. Florida Housing asserts that it has reviewed each challenge, or NOPSE, that was timely received. On June 10, 2002, Florida Housing sent Petitioner any NOPSE relating to its Application, submitted by other applicants, and the results of Florida Housing's evaluation of the NOPSE. The NOPSE challenged the Petitioner's request of a Family Dollar Store to be deemed a grocery store, by Florida Housing, for purposes of receiving proximity points (defined below). See Joint Exhibits "A" and "B."

9. Petitioner was allowed to submit additional documentation, revised forms, and other information that Petitioner deemed appropriate to address any issue raised in response to: (a). The Applicant's preliminary scoring; (b). any NOPSE filed; and (c). Florida Housing's position on any NOPSE. These documents, revised forms, and other information, submitted to Florida Housing by an applicant being challenged, are called cures ("Cures"). The Cures were due on or before June 26, 2002, ("Cure Period"). In this case, Petitioner submitted a Cure. See Joint Exhibit "F."

10. All applicants were allowed to review any other applicant's Cure. Thereafter, any applicant could, if it chose to do so, submit to Florida Housing a Notice of Alleged Deficiencies ("NOAD") to challenge the Petitioner's Cures. Thereafter, Florida Housing received two NOAD challenges to Petitioner's application, but the NOASDs did not pertain to the grocery store issues.

11. After the NOAD process, on or about July 22, 2002, Florida Housing sent Final 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, Fla. Stat.

12. Petitioner timely requested a formal hearing by filing its Petition in accordance with Chapter 120 Fla. Stat., on or about August 13, 2002.

13. Due to the possibility of applicants receiving a perfect score of seventy one (71) in the Housing Credit competitive arena, Florida Housing created a number of tie-breaker points. One of the tie-breaker points pertains to how close a grocery store is located to the proposed housing development.

14. In the Rule applicable to the matter before the Hearing Officer, a grocery store is defined as follows: "For purposes of tie-breaker points, a grocery store means a self-service retail market that sells food and household goods and has at least 4,500 square feet of air conditioned space." See Joint Exhibit "A."

15. Generally, the closer the grocery store is to the proposed development, the higher the points, or fraction of a point. If the grocery store is within a mile, the proximity tie-breaker point awarded would be one and a quarter of a point (1.25); within one to two miles, the proximity tie-breaker point would be one (1); within two to three miles, the proximity tie-breaker point would be three quarters of a point (.75); within three to four miles, the tie-breaker point would be a half point (.5); and within four to five miles, the tie-breaker point would be a quarter of a point (.25). See Joint Exhibit "B."

16. In its initial application, Petitioner identified a Family Dollar Store, located within one mile of the proposed development, for consideration as a grocery

store. In its preliminary score, Florida Housing awarded Petitioner one and a quarter (1.25) tiebreaker points for proximity to a grocery store. A challenge to the Family Dollar Store was made during the NOPSE process, stating that, "The Applicant [Petitioner] cited 'Family Dollar' as a grocery store. This is not a grocery store. Zero tiebreaker points should be awarded for proximity to grocery store." See Joint Exhibit "D."

17. In its Cure, Petitioner stated its position, in response to the NOPSE, that the Family Dollar Store is a grocery store, as defined by the applicable rule. Additionally, Petitioner stated, in its Cure, that if Florida Housing disagreed that the Family Dollar Store is a grocery store, then Petitioner requested Florida Housing to, alternatively, consider the Publix Supermarket, located at 5265 South John Young Parkway, Orlando, Florida 32839, within one (1) to two miles of Petitioner's development. Thereafter, Florida Housing awarded one (1) tiebreaker point for the Publix Store, but did not award tiebreaker points for the Family Dollar Store.

18. Florida Housing chose the store that was farther from the proposed development (the Publix Supermarket) for the reason that the Family Dollar Store was not considered to be a grocery store by Florida Housing. This decision by Florida Housing resulted in one quarter (.25) less proximity points to Petitioner.

19. The issue before the Hearing Officer is whether the Family Dollar Store falls within the definition of a grocery store. See Joint Exhibit "A."

The parties offer the following JOINT EXHIBITS into evidence:

EXHIBIT	DESCRIPTION
A.	**DEFINITION OF GROCERY STORE**; PAGE 10, APPLICATION INSTUCTIONS
B.	**PROXIMITY**; PART III, A. 11 b.(1) OF APPLICATION NUMBER 2002-

	130C
C.	**PRELIMINARY SCORING SUMMARY** FOR APPLICATION NUMBER 2002-130C
D.	**NOTICE OF POSSIBLE SCORING ERROR (NOPSE)**
E.	**NOTICE OF POSSIBLE SCORING ERROR (NOPSE) SCORING SUMMARY** FOR APPLICATION NUMBER 2002-130C
F	**CURE** TO PART III, A. 11 b.(1) OF APPLICATION NUMBER 2002-130C
G.	**FINAL SCORING SUMMARY** FOR APPLICATION NUMBER 2002-130C

Respectfully submitted,

DATE: September 9, 2002

By: _____

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DATE: September 9, 2002

By: _____

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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.