

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

AGUACLARA, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2003-0032  
APPLICATION NO. 2002-087C

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**RECOMMENDED ORDER**

An informal hearing on this matter was noticed for September 11, 2003. Aguaclara, Ltd. (Aguaclara) and Florida Housing Finance Corporation (Florida Housing) submitted a Joint Proposed Recommended Order on September 9, 2003 to the Florida Housing Finance Corporation's appointed Hearing Office, David E. Ramba.

**APPEARANCES**

The representatives for the parties are as follows:

For Petitioner:

Gary J. Cohen, Esq.  
Shutts & Bowen LLP  
201 South Biscayne Boulevard  
Suite 420  
Miami, Florida 33131

For Respondent:

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

## EXHIBITS

There were no joint exhibits submitted with the proposed joint recommended order.

### STATEMENT OF THE ISSUE

The issue in this case is whether Petitioner's application and cure materials included a grocery store within 1 mile of the development to receive 1.25 tie-breaker points.

### FINDINGS OF FACT

The parties jointly submit the following proposed findings of fact, conclusions of law, and recommendations:

1. Respondent, Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to administer the financing and refinancing of projects which provide housing affordable to persons and families of low, moderate and middle income in Florida.
2. Florida Housing is the state entity designated by the Department of the Treasury to administer the allocation of Low Income Housing Tax Credits, as set forth in Section 42 of the Internal Revenue Code of 1986, as amended. The program awards a dollar-for-dollar reduction from income tax liability. The tax credits are typically sold to raise equity for the construction of affordable housing units.
3. On or before April 8, 2003, Petitioner, Aguaclara submitted an Application to Florida Housing Finance Corporation for the award of competitive 9% tax credits from the Florida Housing's Housing Credit ("HC") program in the 2003 Universal Cycle, to assist in the financing of a 185 unit apartment complex in Miami, Florida.
4. Florida Housing has established by rule a process (the "Universal Cycle") in which applicants for any of the above-referenced Florida Housing multi-family rental programs

submit a single application (the “Universal Cycle Application”) by which projects are evaluated, scored, and competitively ranked.

5. The 2002 Universal Cycle Application, adopted as Form UA1016 by R. 67-21.002(97) and 67-48.002(116), Fla.Admin.Code, consists of Parts I through VI and instructions, 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. Other parts allow applicants to earn points, however, the failure to provide complete, consistent and accurate information as prescribed by the instructions may reduce the Applicant’s overall score.

6. To provide a means of determining which applicant should rank higher when all threshold requirements were met and application scores were identical, Florida Housing awarded “tie-breaker” points for proposed developments which were in close proximity to certain services, including grocery stores. A development located within one mile of a grocery store is eligible to receive 1.25 proximity tie-breaker points.

7. After Petitioner submitted its 2002 Universal Cycle Application, Florida Housing’s staff undertook preliminary scoring of the Application pursuant to Part V, Chapter 420, Florida Statutes, and Rule Chapter 67-48, Florida Administrative Code.

8. In its application, Aguaclara submitted documentation demonstrating that its development was located within one mile of a grocery store, and Florida Housing in its preliminary scoring awarded Aguaclara the maximum 1.25 tie-breaker points for its proximity to a grocery store.

9. After completing preliminary scoring, Florida Housing's staff and by letter dated on or about May 13, 2003, Florida Housing advised Aguaclara that its preliminary score was 66 points, with 7.5 proximity tie-breaker points.

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

11. A NOPSE was filed which stated that Florida Housing erred in awarding the tie-breaker points to Aguaclara, as the V & P Supermarket, located at 1630 NW 27<sup>th</sup> Avenue, Miami, Florida, did not meet the definition of a grocery store under the rules, its floor space being less than the required minimum of 4,500 square feet.

12. After reviewing each NOPSE that was timely received, on June 9, 2003, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants, along with Florida Housing's position on any such NOPSE.

13. In response to the NOPSE, Florida Housing deducted the 1.25 tie-breaker points awarded to Aguaclara for its proximity to a grocery store, resulting in a total of 6.25 tie-breaker proximity points.

14. 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 , 2002 (the "cure period").

15. As its cure, Aguaclara submitted information which substituted another grocery store, La Fama #2, located at 2288 NW 28<sup>th</sup> Street, Miami, Florida, for the grocery store indicated in its initial application.

16. All applicants had an opportunity to review cures submitted by Petitioner, and any applicant could submit to Florida Housing a Notice of Alleged Deficiencies (“NOAD”) challenging the Petitioner’s cures. A NOAD was filed which stated that Florida Housing should not award the tie-breaker points to Aguaclara, as La Fama #2 did not consist of at least 4,500 square feet of air-conditioned space, and there did not meet the definition of “grocery store,” under the rules.

17. On or about July 22, 2003, Florida Housing advised Aguaclara that its total application score was unchanged, at 66, and that its total tie-breaker proximity points remained at 6.25, noting that, “Applicant attempted to cure Item 1P [the grocery store proximity issue] by submitting a new Grocery Store, but the cure was deficient because the retail establishment submitted in the cure does not meet the definition of a Grocery Store as it consists of less than [sic] 4,500 square feet of air conditioned space.”

18. Florida Housing did not accept the La Fama #2 as a grocery store, and did not award any tie-breaker proximity points to Aguaclara on that basis.

19. Following this process, Florida Housing on July 22, 2002, sent Pre-Appeal Scores and a Notice of Rights to Petitioner. The Notice of Rights notified Petitioner that it could contest Florida Housing’s actions by requesting an informal hearing before a contracted hearing officer.

20. Petitioner timely requested an informal hearing by filing its Petition for Informal Administrative Hearing on August 12, 2003.

21. After review of Aguaclara's Petition, Florida Housing verified that La Fama #2 is a grocery store within the meaning and intent of Florida Housing's criteria, consisting of over 4,500 square feet of air conditioned space devoted to retail self service sales of food and household goods.

### CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat. and R. 67-47, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.
2. Florida Housing is authorized to institute a competitive application process, Sec. 420.507 (22)(f), Fla. Stat., and has done so, Rule 67-48.004, Fla. Admin. Code.
3. Florida Housing's application form and instructions, are adopted as a form, UA1016, by Rule 67-48.002(116), Fla. Admin. Code. Part III, Section A, subsection 11, paragraph (1), subparagraph (b), provides that a proposed development located within one mile of a grocery store will receive 1.25 tie-breaker points.
4. The application instructions at page 10 of UA1016 provide "[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. Webster's New Collegiate Dictionary defines "grocery" as "[C]ommodities sold by a grocer; a grocer's store;" and defines "grocer," as "[A] dealer in staple foodstuffs, eats produce, and dairy products and usually household supplies."

5. Florida Housing interprets the above referenced definition of “grocery store,” to include La Fama #2.

6. 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 and M University, 813 So.2d 242 (Fla. 1<sup>st</sup> DCA 2002), even if the agency’s interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. Golferest Nursing Home v. Agency for Health care Administration, 662 So.2d 1330.

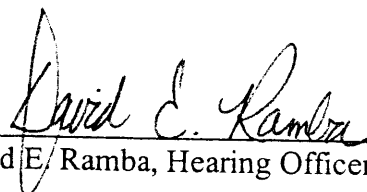
7. Florida Housing’s interpretation of the term “grocery store,” as applied to the La Fama #2 store, supplied by Petitioner for purposes of proximity tie-breaker points, is neither clearly erroneous nor unreasonable.

**RECOMMENDATION**

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

That a FINAL ORDER be entered by Respondent stating Petitioner, Aguaclara, Ltd.’s, proposed development is located within one mile of La Fama #2, a grocery store, and is thus entitled to the award of 1.25 tie-breaker points for that proximity.

Respectfully submitted this 23rd of September, 2003.

  
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David E. Ramba, Hearing Officer

Copies Furnished to:

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