STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ASWAN VILLAGE ASSOCIATES, LLC.,

Petitioner,

v.

FHFC CASE NO. 2003-042
Application No. 2003-026S

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, Chris H. Bentley, held an informal administrative hearing in Tallahassee, Florida, in the above-styled case on September 10, 2003.

APPEARANCES

For Petitioner, Aswan Village Associates, LLC.:	Lynn C. Washington, Esquire Holland & Knight, LLP 701 Brickell Avenue, Suite 3000 Miami, FL 33131
For Respondent, Florida Housing Finance Corporation:	Paula C. Reeves Deputy General Counsel 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 for determination in this proceeding is whether the application of Petitioner, ASWAN VILLAGE ASSOCIATES, LLC., meets the threshold requirement that there be a firm financing commitment for the proposed project. More specifically, the issue is whether Petitioner was required to demonstrate that thirty-five percent (35%) of the total equity being provided was paid prior to or simultaneously with the closing of the construction financing.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9. Petitioner's Exhibit 1 was also received into evidence, but the parties later agreed that it was not relevant to the sole issue in dispute. Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

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

1. The Petitioner, ASWAN VILLAGE ASSOCIATES, LLC., a limited partnership, submitted an application to the Respondent, FLORIDA HOUSING

FINANCE CORPORATION, for an award of funds from the State Apartment Incentive Loan (SAIL) program for the development of affordable rental housing in the 2003 Universal Application Cycle. The 2003 Universal Application form and Instructions are adopted and incorporated by reference in the Respondent's Rule 67-48.002(111), Florida Administrative Code.

2. Among the threshold requirements for applicants is that financing documentation reflect that all funding commitments are firm. With respect to equity commitments, the Instructions to the 2003 Universal Application provide as follows:

Syndication/HC Equity

- A firm commitment from a Housing Credit Syndicator is an agreement which is executed and accepted by all parties including the Applicant, is dated, and includes all terms and conditions of the agreement. In order for a syndication/equity commitment to be scored firm, it must expressly state the syndication rate (amount of equity being provided divided by the anticipated amount of credits the syndicator expects to receive), capital contributions pay-in schedule (stating the amounts to be paid prior to or simultaneously with the closing of construction financing and the amounts to be paid prior to completion of construction), the percentage of the anticipated amount of credit allocation being purchased, the total amount of equity being provided, and the anticipated Housing Credit Allocation. **Additionally, in order for the commitment to be scored firm, 35% of the total equity being provided must be paid prior to or simultaneously with the closing of the construction financing.** Proceeds from a bridge loan from the syndicator will count toward meeting this requirement; however, bridge loans from other sources will not count toward meeting this requirement.

- Applicants may submit a closed limited partnership agreement and it will be counted as firm. If the agreement fails to provide the **items** required for a commitment stated above, the Applicant must provide signed documentation from the purchaser of credits, i.e. limited partner, that provides the **data** requested in the previous paragraph.

- If not syndicating/selling the housing credits, the owner's commitment to provide equity must be included. The commitment must include the following:

    - the total amount of equity; and
    - the pay-in schedule stating the amounts to be paid prior to or simultaneously with the closing of construction financing and the amounts to be paid prior to the completion of construction; and the anticipated Housing Credit Allocation.

- Important! If not syndicating/selling the housing credits, evidence of ability to fund, as defined under Firm Commitment above, must be provided as an exhibit to the Application. **Additionally, in order for the commitment to be scored firm, 35% of the total equity being provided must be paid prior to or simultaneously with the closing of the construction financing.** Proceeds from a bridge loan will NOT count toward meeting this requirement.

- If the amount of housing credits requested on the funding request form is less than the anticipated amount of credit allocation stated in the equity/owner/syndication commitment, the commitment will not be considered a source of financing.

- A bridge loan contained within a syndication commitment will be counted as a firm commitment if the syndication commitment is scored firm. A demonstration of the ability to fund is not required

> for the bridge loan in order for the syndication commitment to be scored firm. The Applicant may include the amount of the bridge loan as equity proceeds on the Construction or Rehabilitation Analysis and on the Permanent Analysis. **The bridge loan amount will be counted as equity proceeds for meeting the 35% requirement stated in the first bullet of this section.** (Emphasis supplied)

3. To demonstrate its equity financing, Petitioner submitted an Exhibit containing a copy of an executed document entitled "First Amended & Restated Operating Agreement of Aswan Village Associates, LLC." The parties agree that this Operating Agreement, which was executed on February 25, 2003, is a closed limited partnership agreement within the meaning of the second paragraph quoted in Paragraph 2 above. There is no dispute that the Petitioner provided the applicable factual information required in the second sentence of the first paragraph quoted in paragraph 2 above; to wit: the syndication rate, the capital contributions pay-in schedule, the percentage of the anticipated amount of credit allocation being purchased, the total amount of equity being provided and the anticipated housing credit allocation. The Petitioner did not demonstrate that thirty-five percent (35%) of the total equity being provided was paid prior to or simultaneously with the closing of the construction financing (the "35% requirement").

4. The Petitioner's position is that the 35% requirement is not applicable or required for a closed limited partnership agreement to be considered a firm

commitment. The Respondent's position is that the 35% requirement is applicable to all applicants, even those who submit closed operating agreements.

CONCLUSIONS OF LAW

5. 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. No issue as to proper notice or jurisdiction has been raised in 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.

6. This case concerns the issue of whether Petitioner's application should be rejected for failure to demonstrate a firm commitment for equity financing solely because Petitioner did not demonstrate that thirty-five percent (35%) of the total equity being provided was paid prior to or simultaneously with the closing of the construction financing. More specifically, the issue is whether the 35% requirement is applicable when a closed limited partnership operating agreement, such as that submitted by Petitioner in its application, is provided to demonstrate firm equity financing.

7. The application Instructions, at pages 60 and 61, address equity financing

and set forth the information and activities required to demonstrate a firm commitment. Those Instructions, quoted in paragraph 2 of the Findings of Fact above, address Housing Credit Syndicator agreements (the first bullet), closed limited partnership agreements (the second bullet), owner commitments in the absence of syndicating or selling housing credits (third bullet) and bridge loans (fifth bullet). The Instructions concerning all but one of those four types of equity financing specifically refer to the requirement that 35% of the total equity being provided be paid prior to or simultaneously with the closing of the construction financing. The one exception is a closed limited partnership agreement.

8. The Instructions provide that a closed limited partnership agreement "will be counted as firm" and that the same "items" required with respect to a Housing Credit Syndicator agreement be documented either in the closed limited partnership agreement itself or in further documentation that provides the same "data." The five "items" or "data" required with respect to syndicator agreements are factual information. They include facts concerning a rate, a schedule, a percentage, an amount and an allocation. The remaining or "additional" requirement with respect to syndication equity financing is the 35% requirement. Unlike the factual information which must be included in the agreement, the 35% requirement is of a different character. It is not a mere fact. It is an act or function which must occur in

order for the commitment to be scored firm. The 35% requirement is set forth in a separate sentence, and is preceded by the word "additionally." The 35% requirement is simply not a part of the factual information (i.e., an "item" or a portion of "data") which must be provided by a limited partnership which has a closed agreement demonstrating equity financing.

9. While the 35% requirement is expressly referenced in the paragraphs pertaining to syndication, owner financing and bridge loans, it is not contained within the Instructions relating to closed limited partnership agreements. Had the Respondent intended to apply the 35% requirement to a limited partnership agreement which is closed, it would have been a simple matter to add such a requirement to the paragraph specifically pertaining to closed limited partnership agreements, as it did with respect to syndicator agreements, an owner's provision of equity and bridge loans. It did not add such a requirement, and none can be implied from the plain wording of the instructions.

10. Counsel for the Respondent argues that the Instructions relating to closed limited partnership agreements, by referencing "the items required for a commitment stated above" and "the data requested in the previous paragraph," mandate the application of the 35% requirement to such closed limited partnership agreements. This interpretation is unreasonable and erroneous because it contradicts the plain

wording of the Instructions.

11. Had the Respondent intended to treat closed limited partnership agreements in the same manner as syndicator agreements, there would be no reason or need for the second bulleted paragraph in the Instructions. The Instructions obviously draw a distinction between a commitment represented in a Housing Credit Syndicator agreement and a commitment represented in a closed limited partnership agreement.

12. Moreover, the Respondent's interpretation of the Instructions ignores the word "additionally," which precedes the statement of the 35% requirement in the paragraph pertaining to syndicator agreements. As written, the 35% requirement is simply not within the same group as the five delineated "items" or "data" which must be expressly "stated" in a syndicator agreement. It is a separate "additional" requirement which is not restated as a requirement for closed limited partnership agreements to be considered firm.

13. In summary, the Instructions provide that if there is a closed limited partnership agreement and documentation of the five items required with respect to syndicator agreements, the equity commitment will be deemed firm. There is no requirement that 35% of the total equity provided be paid prior to or simultaneously with the closing of the construction financing by an applicant who submits a closed

limited partnership agreement. Having provided the required information regarding its equity financing, Petitioner met the threshold requirement of a firm financial commitment.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's commitment for equity financing, as represented in its closed limited partnership operating agreement, be deemed a firm commitment.

Respectfully submitted and entered this 18th day of September, 2003.

Chris H. Bentley

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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 Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Friday, September 26, 2003. 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.