

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

WILLOW GROVE, LLC,

Petitioner,

v.

FHFC CASE NO.: 2004-021-UC

Application No. 2004-021C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, on August 25, 2004, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing Finance Corporation's appointed Hearing Officer, David Ramba.

APPEARANCES

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

For Petitioner:

John Saxton, Qualified Representative
295 North Drive – Suite G
Melbourne, Florida 32934

Petitioner was not represented by counsel, but by a qualified representative, Mr. Saxon was asked, and responded affirmatively that he was familiar with the Criteria and Standards of a Qualified Representative, as contained in Rule 28-106.106 and 28-106.107, Florida Administrative Code, the statutes and Rules for Florida Housing, and Ch. 120 relating to Florida

Administrative Procedures. Mr. Saxon is determined to be a Qualified Representative for the Petitioner.

For Respondent:

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

EXHIBITS

There was no joint preliminary statement nor joint exhibits submitted at the hearings.

Each party submitted exhibits as follows:

Petitioner's Exhibits:

- Exh. 1. Excerpts of Universal Application instructions regarding the submission of cures.

Respondent's Exhibits:

- Exh. 1. Petitioner's submitted cure for Part III, Section C.2. of Petitioner's application (site control).
- Exh. 2. Petitioner's submitted cure for Part V, Section D of Petitioner's application (financing commitments).
- Exh. 3. Exhibit 3 to Petitioner's application (applicant entity corporate documents).
- Exh. 4. Exhibit 55 to Petitioner's application (loan commitment from Collateral Mortgage Capital).
- Exh. 5. Exhibit 56 to Petitioner's application (equity commitment from Simpson Housing Solutions).
- Exh. 6. Preliminary Scoring Summary for Petitioner's application, dated April 28, 2004.
- Exh. 7. NOPSE Scoring Summary for Petitioner's application, dated May 19, 2004.

- Exh. 8. Final Scoring Summary for Petitioner's application, dated July 7, 2004.
- Exh. 9. Exhibit 53 to Petitioner's application (Commitment to Defer Developer Fee).

WITNESSES

There were no witnesses for either party.

PRELIMINARY STATEMENT

On or before March 31, 2004, Petitioner, Willow Grove, LLC, ("Willow Grove") submitted an application to Respondent, Florida Housing Finance Corporation ("Florida Housing") for Low Income Housing Tax Credits in the 2004 Universal Cycle. On July 9, 2004, Florida Housing notified Willow Grove of the "final" results of the scoring of Willow Grove's application and provided Willow Grove with a Notice of Rights pursuant to Sections 120.569 and 120.57, Florida Statutes. On July 25, 2004, Willow Grove filed an Election of Rights, requesting an informal hearing pursuant to Sections 120.569 and 120.57(2), Florida Statutes. On July 29, 2004, Willow Grove timely filed its Petition for an informal administrative hearing. An informal administrative hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes, on August 25, 2004, in Tallahassee, Florida. There are no disputed issues of material fact.

STATEMENT OF THE ISSUES

There are two issues in this case:

- I. Whether Petitioner failed to establish site control.
- II. Whether Petitioner's cure materials created a financing shortfall in their construction financing commitments.

FINDINGS OF FACT

1. Willow Grove timely submitted an Application to Florida Housing for housing credits in the 2004 Universal Cycle in connection with a proposed 96-unit garden apartment development in Brevard County, Florida.
2. To encourage the development of low-income housing for families, Congress in 1987 created federal income Tax Credits that are allotted to each state, including Florida. Section 42 of the Internal Revenue Code governs this program. The Tax Credits equate to a dollar-for-dollar reduction of the holder's federal tax liability, which can be taken for up to ten years if the project satisfies the Internal Revenue Code's requirements for each year. The developer sells, or syndicates, the Tax Credits to generate a substantial portion of the funding necessary for construction of the development.
3. Florida Housing is a public corporation organized pursuant to section 420.504, Florida Statutes, to provide and promote financing of affordable housing and related facilities in Florida. Florida Housing is an agency as defined in section 120.52, Florida Statutes, and, therefore, is subject to the provisions of Chapter 120, Florida Statutes.
4. Florida Housing is the statutorily created "housing credit agency" responsible for the allocation and distribution of low-income Tax Credits (also know as housing credits) in Florida. See section 420.5099, Florida Statutes. In this capacity, Florida Housing determines which entities will receive housing credits for financing the construction or rehabilitation of low-income housing.
5. Florida Housing is governed by a Board of Directors appointed by the Governor with the Secretary of the Department of Community Affairs sitting ex-officio.

6. Housing credits are allocated by Florida Housing through a competitive application process. Applications for housing credits are submitted to Florida Housing through a once-a-year process referred to as the Universal Cycle, which is governed by chapter 67-48, Florida Administrative Code.

7. The Universal Cycle is a single-application process for the housing credit program, the Florida Housing-administered SAIL program under section 420.5087, Florida Statutes, and the Home Investment Partnership Program operated by Florida Housing pursuant to section 420.5089, Florida Statutes, and federal Housing and Urban Development regulations.

8. Florida Housing uses a scoring process for the award of housing credits outlined in rule 67-48.004, Florida Administrative Code, and a Qualified Allocation Plan (QAP). The provisions of the QAP are adopted and incorporated by reference in rule 67-48.025, Florida Administrative Code.

9. Pursuant to the QAP, housing credits are apportioned among the most populated counties, medium populated counties, and least populated counties. The QAP also establishes various set-asides and special targeting goals. One of the set-asides in the QAP is for Front Porch Florida Community developments.

10. The 2004 Universal Cycle Application, adopted as Form UA1016 (Rev. 3-04) by rule 67-48.002(111), Fla. Admin. Code, consists of Parts I through V 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. Evidence of Site Control is a threshold item.

11. To provide a means of determining which applicant should rank higher when all threshold requirements are met and application scores are identical, Florida Housing awards “tie-breaker” points for proposed developments which are in close proximity to certain services, such as a Medical Facility, Pharmacy, or Bus Stop or Metro-Rail Stop.

12. Preliminary scores for all applicants were released by Florida Housing on April 28-29, 2004. Following consideration of comments submitted by other applicants and further review of applications pursuant to rule 67-48.004(4) and (5), Florida Administrative Code, Florida Housing released Notices of Possible Scoring Error (NOPSE) scores on May 28, 2004. Applicants were then permitted to submit “cures” to problems identified in the preliminary and NOPSE scores. See rule 67-48.004(6), Florida Administrative Code. Applicants also were allowed to comment on the “cures” submitted by competitor applicants by filing Notices of Alleged Deficiencies (NOADs). See rule 67-48.004(7).

13. After review of NOADs, final scores were released by Florida Housing on July 9, 2004, through a final scoring summary dated July 8, 2004. Each applicant received its own Final Scoring Summary.

Site Control Issue

14. In its preliminary scoring of Petitioner’s application, Florida Housing found that the application did not meet threshold requirements for failure to demonstrate site control, on the grounds that the contract for purchase and sale of the development site did not indicate that Willow Grove was the buyer, and that the assignment to Willow Grove was invalid as it did not include the signatures of the Assignee. (Respondent’s Exhibit 6).

15. Willow Grove attempted to cure the site control threshold failure by submitting an Assignment of Contract executed by both the Assignor, Heartsprings International Ministries,

Inc., to the Assignee, Willow Grove. This Assignment of Contract referred to an Exhibit A, which was not attached. (Respondent's Exhibit 1).

16. In its final scoring summary, Florida Housing rejected Petitioner's attempt to cure the threshold failure regarding the site control issue on the grounds that the Assignment of Contract was invalid, in that it referenced an exhibit that was not attached. (Respondent's Exhibit 9).

Construction Financing Shortfall Issue

17. In its preliminary scoring summary dated April 28, 2004, Florida Housing found that the Willow Grove application failed to meet threshold requirements on the grounds that a loan commitment provided by Willow Grove could not be considered "firm" or as a source of financing for scoring purposes. The commitment from Collateral Mortgage Capital, LLC in the amount of \$3,352,350 was rejected as it was not from a regulated financial institution and no ability to fund the commitment was demonstrated. (Respondent's Exhibits 4 and 6).

18. Willow Grove attempted to cure the threshold failure regarding the Collateral Mortgage Capital, LLC, funding commitment by submitting a replacement commitment from ARCS Commercial Mortgage Co., L.P. ("ARCS") in the amount of \$3,016,530 (construction loan). (Respondent's Exhibit 2).

19. Florida Housing rejected Willow Grove's attempted cure regarding the construction financing commitments, on the grounds that the commitment from ARCS was for an amount \$335,820 less than the original commitment, thereby creating a construction financing shortfall in the same amount. (Respondent's Exhibits 2 and 8).

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Rule 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

2. Based on the information submitted by Respondent and admissions made by Petitioner during the Hearing relating to the financing shortfall, it is not necessary to address the site control issue.

3. The Applicant had a construction loan commitment from ARCS in the amount of \$3,352,350 but inadvertently submitted a commitment with an incorrect amount of \$3,016,530 with its cure, leaving a shortfall of \$335,820.

4. Pages 71-72 of the 2004 Universal Application instructions provide, in pertinent part:

Requirements to meet Threshold include:

- ...
13. Financing documents must reflect the following:
- All commitments must be considered firm;
 - Total sources must equal or exceed uses;
- ...

5. Page 67 of the 2004 Universal Application instructions sets forth the requirements for a "firm commitment" for debt financing, in pertinent part:

If the commitment is not from a regulated Financial Institution in the business of making loans or a governmental entity, evidence of ability to fund must be provided. Evidence of ability to fund includes: (1) a copy of the lender's most current audited financial statements no more than 17 months old; or (2) if the loan has already been funded, a copy of the note and recorded mortgage.

6. Willow Grove has argued that the Equity Funding Commitment (“Equity Commitment”) provided at Exhibit 56 of the Application (Respondent’s Exhibit 5 in these proceedings) from Simpson Housing Solutions, dated March 29, 2004, contains a contingency clause that serves to make up the shortfall resulting from the rejection of Willow Grove’s original commitment (Respondent’s Exhibit 4) and the resulting shortfall created by Willow Grove’s attempted cure (Respondent’s Exhibit 1). This argument fails for two reasons. First, the language of the contingency clause found in paragraph 2.B. of the Equity Commitment essentially provides that the “Managing Member” would make up the difference by reducing the “Developer’s Fee”. This argument fails because the “Managing Member” includes the Petitioner, who has committed to defer an amount of the Developer Fee in Exhibit 53 to the Applicant (Respondent’s Exhibit 9). While no ability to fund this Developer Fee is required, this fee is fixed and unchangeable for scoring purposes and cannot be adjusted to make up for a shortfall otherwise apparent in the Application, even if it could be sufficiently adjusted.

7. Secondly, Petitioner argues that the language of the Equity Commitment at paragraph 2.B. also provides that the Managing Members (again, including the Petitioner) would contribute sufficient capital to make up for any shortfall. This argument fails because this potential or contingent source of funds cannot be considered as a firm commitment, the requirements of which are set forth in paragraph 9 above. The entities that comprise the “Managing Member” (as defined in the Equity Commitment), Affordable Multi-Family, LLC, and Heartsprings International Ministries, are not regulated financial institutions nor governmental agencies, and their contribution, contingent or not, cannot be counted as a source of funds to make up for the demonstrated shortfall.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Florida Housing Finance Corporation enter a final order rejecting Petitioner's application for failure to demonstrate sources of funding greater than or equal to uses, creating a construction financing shortfall.

Respectfully submitted and entered this 13th day September, 2004.



David E. Ramba, Hearing Officer

Copies furnished to:

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