

**THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

THE HOUSING AUTHORITY OF THE CITY
OF KEY WEST, FLORIDA,

Petitioner,

FHFC Application No. 2004-019S

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

PETITION FOR AN INFORMAL HEARING

Petitioner, The Housing Authority of the City of Key West, Florida, pursuant to Florida Statute and Rules, files this Petition for an Informal Hearing, and says as follows:

I. PARTIES AND NOTICE

1. Petitioner is The Housing Authority of the City of Key West, Florida (the "Authority"), whose address is 1400 Kennedy Drive, Key West, Florida 33040, and whose telephone number is 305-296-5621.

2. The affected agency is Respondent, Florida Housing Finance Corporation (the "Corporation"), 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329. The Corporation's identification number for this matter is 2004-019S.

3. The Authority received notice of the Corporation decision by way of memorandum and scoring summary from the Corporation dated July 9, 2004.

II. FACTS

1. The Housing Authority of the City of Key West, Florida (the "Applicant") is a unit of local government organized and existing under Chapter 421, Florida Statutes, who possess the statutory authority to own and operate housing developments and to issue bonds and other debt instruments to finance the projects owned by the Authority.

2. The Authority submitted an Application for a SAIL Loan on or before the March 31, 2004 application deadline for a SAIL Loan in the 2004 MMRB, SAIL & HC Combined cycle for an affordable housing development to be owned, operated and managed by the Authority known as Roosevelt Gardens (the "Roosevelt Gardens Development").

3. The Corporation reviewed the Authority's Application and initially determined that 3 threshold issues had not been met.

4. The Authority, through the cure process, submitted responses to all 3 of the threshold issues, and the Corporation determined that 2 of the 3 issues were cured. However, the Corporation notified the Authority that the failure to satisfy the initial SAIL Eligibility set forth in Rule 67-48.002(98) had not been cured as the Authority had not demonstrated that "permanent financing" had not closed prior to the Application Deadline. The requirement that the permanent financing for the development not be closed prior to the Application Deadline is set forth in Rule 67-48.002(98)(b).

5. Rule 67-48.002(98) provides in its entirety as follows:

(98) "SAIL Development" means a residential development comprised of one or more residential buildings, each containing five or more dwelling units and functionally related facilities, proposed to be constructed with SAIL funds for Eligible Persons or Eligible Households or a residential development comprised of one or ore buildings containing dwelling units and functionally related facilities proposed to be substantially rehabilitated

with SAIL funds for Eligible Persons or Eligible Households. *If a Development has received a tentative allocation or tentative funding commitment and is proposed to be constructed or substantially rehabilitated, is under construction, in the process of substantial rehabilitation, or has been completed, it may be considered for the SAIL Program funding only if:*

- (a) The pro forma in the prior Housing Credit or Multifamily Mortgage Revenue Bonds Application submitted for the Development reflected SAIL funding, unless otherwise specified in the Universal Application Package; and
- (b) Permanent financing of the costs associated with construction or rehabilitation of the Development, including tax-exempt bonds with conversion clauses, has not closed as of the Application Deadline, or if financed with Multifamily Mortgage Revenue Bonds or Local Government-issued tax-exempt bonds, the bonds did not close prior to January 1, 2003, or if the Development received an allocation of Housing Credits, the IRS Forms 8609 have not been issued, unless otherwise specified in the Universal Application Package; and
- (c) The Development has not already received funding through the SAIL Program."

(Emphasis supplied by Authority)

6. The Authority obtained preliminary financing for the Roosevelt Gardens Development on July 30, 2000, through a Predevelopment Loan (the "PLP Loan") from the Corporation in the amount of \$500,000, pursuant to the Corporation's Predevelopment Loan Program in accordance with Rule Chapter 67-38 as in effect as of March 26, 1998.

7. The Authority obtained initial financing for the Roosevelt Gardens Development through the issuance by the Authority of two series of bonds, namely, The Housing Authority of the City of Key West, Florida Multifamily Housing Revenue Notes, Series 2002 (Roosevelt Gardens Project) issued in the initial principal amount of \$9,850,000, and The Housing Authority of the City of Key West, Florida, Multifamily

Housing Revenue Note, Series 2003 (Roosevelt Garden Project) issued in the principal amount of \$2,000,000 (collectively, the "Authority Bonds").

8. The Authority Bonds were issued pursuant to the authority of Chapter 421, Florida Statutes, as governmental essential function bonds under section 103(a) of the Internal Revenue Code of 1986, as amended (the "Code"), and were designated by the Authority as "bank qualified" bonds under section 265(b) of the Code. Tax-exempt bonds that are issued for a for profit developer using bond volume allocation are not eligible for designation as "bank qualified" under Section 256(b) of the Code. The Authority Bonds were sold pursuant to a competitive sale process, without a prior commitment from any governmental entity or private financial institution to purchase them.

9. Unlike a "Tax Exempt Bond-Financed Development", as defined in Rule 67-48.002(107), which is a development financed with private activity bonds issued pursuant to sections 141 and 142 of the Code, governmental bonds such as the Authority Bonds do not require, nor do they receive, an allocation of a portion of the State of Florida's annual bond volume limitation under section 146 of the Code, nor a Housing Credit Allocation, as defined in Rule 67-48.002(64).

10. Based on Corporation's Scoring Summary, the Authority has satisfied the requirements of the first sentence of Rule 67-48.002(98), in that the Roosevelt Gardens Development satisfies the definition of a "SAIL Development" set forth therein.

11. The only disputed eligibility criteria is whether the Authority satisfies the requirements set forth in the second sentence of Rule 67-48.002(98), or indeed, whether

requirements of the second sentence (specifically that no permanent financing be closed prior to the Application Deadline) even applies to the Authority or the Authority Bonds.

12. The Authority contends that the requirements set forth in the second sentence of Rule 67-48.002(98) do not apply to either the Authority or to the Authority Bonds.

III. ANALYSIS OF RULE 67-48.002(98)

1. The Authority has not received "a tentative allocation or tentative funding commitment" from either the Corporation or a Local County Housing Finance Authority operating under Chapter 159, Part IV, Florida Statutes (a "LCHFA"). For the second sentence of Rule 67-48.002(98) to apply to the Authority and the eligibility of the Roosevelt Gardens Development to participate in the SAIL Loan program administered by the Corporation, it is imperative that "a tentative allocation or tentative funding commitment" have been provided by either the Corporation or a LCHFA. The Corporation has failed to document any such tentative allocation or tentative funding commitment ever existed.

2. The Corporation's Rules set forth in Chapter 67-48, entitled "Affordable Multifamily Rental Housing SAIL/HOME/HC", are designed to provide a system pursuant to which the Corporation can provide an allocation of Housing Credits for a non-governmentally owned housing development intending to utilize low income housing tax credits under section 42 of the Code, or private activity bonds issued on a tax exempt basis using a portion of the States annual bond volume amount allocated to the Corporation. Indeed, the Corporation has not adopted any Rules (in accordance with Chapter 120, Florida Statutes) which address circumstances such as the present

circumstance. That is, a governmentally owned housing development financed with governmental tax exempt bonds rather than private activity bonds.

3. The terms used in the phrase "a tentative allocation or tentative funding commitment" are not defined in Chapter 67-48 of the Corporation's Rules. As such, any meaning for these terms must be derived by the context in which they are used.

4. The phrase "a tentative allocation" can derive some meaning from a reading of clause (a) of the second sentence of Rule 67-48.002(98), through the reference to a prior "Housing Credit or Multifamily Mortgage Revenue Bonds Application submitted for the Development." As used in the Rules set forth in Chapter 67-48, "Housing Credit" refers to credit provided under section 42 of the Code and is administered by the Corporation under these Rules. As stated previously in this Petition, this program is wholly inapplicable to the Authority since it is a governmental entity and not a private development entity. Similarly, the reference to a "Multifamily Mortgage Revenue Bonds Application" can only mean an application to the Corporation to issue its private activity bonds on behalf of a private development entity using an allocation of State bond volume authority. Again, this is simply not applicable to the Authority or any other governmental borrower.

5. The meaning of the phrase "tentative commitment" can derive some meaning from a reading of clause (b) of the second sentence of Rule 67-48.002(98), through the reference to "Permanent financing of the costs associated with construction or rehabilitation of the Development, including tax-exempt bonds with conversion clauses, has not closed as of the Application Deadline, or if financed with Multifamily Mortgage Revenue Bonds or Local Government-issued tax-exempt bonds....". Within

the overall context of Chapter 67-48, the only "permanent financing" that would involve any sort of a commitment (within this context, from either the Corporation or a LCHFA) would be an issue of private activity bonds, and the commitment would be for the issuance of such bonds using a portion of the available State bond volume amount to be allocated to the proposed development. A governmental entity issuing its own debt instruments to finance a project to be owned by that governmental entity would neither seek nor require a commitment from any other person to issue such debt. The reference to bond financed projects using "Multifamily Mortgage Revenue Bonds or Local Government-issued tax-exempt bond" would include only private activity bonds using bond volume allocation or bonds issued by a City or County. Rule 67-48.002(77) defines a "Local Government" as a unit of local general-purpose government, defined in section 218.32(2), F.S. as either a county or a municipality. As stated earlier, the Authority did not issue or utilize "Multifamily Mortgage Revenue Bonds" using a portion of the State's bond volume amount, and the Authority is neither a county nor a city. Thus the Authority Bonds can not fit within the meaning of either Multifamily Mortgage Revenue Bonds or Local Government-issued tax-exempt bonds.

6. When the terms "tentative allocation" and "tentative commitment" are read in context, it is abundantly clear that neither the Authority nor the Roosevelt Gardens Development received either a "tentative allocation" or a "tentative commitment."

7. Since the Corporation agrees that the Authority and the Roosevelt Gardens Development satisfied the first sentence of Rule 67-48.002(98), and it is clear from a proper reading of the Rule that the second sentence of Rule 67-48.002(98) does not apply to the Authority or the Roosevelt Gardens Development, the Corporation's determination

that the Authority did not satisfy the threshold eligibility for the Roosevelt Gardens Development was incorrect and can not be sustained.

8. The above analysis is also consistent with the following provision from the 2004 Universal Application Instructions starting on page 3:

"An Applicant with a proposed Development that has never received SAIL funding and was successful in receiving MMRB funding in any of the 2002 or 2003 application cycles may submit an Application requesting SAIL funding for the same Development, as outlined in Part V.A., even if the Applicant did not previously request SAIL and did not show SAIL funding in its pro forma in the prior Application. An Applicant of a Local Government-issued Tax-Exempt Bond-Financed Development that has never received SAIL funding and closed on its bond financing in 2002 using 2002 private activity bond allocation, may submit an Application requesting SAIL funding for the same Development, as outlined in Part V.A. These Applications requesting SAIL funding are eligible for tentative funding only as stipulated in the Ranking and Selection Criteria section of these instructions."

9. The deletion of the wording "in a previous cycle" from the 2003 version of Rule 67-48.002(98) is important in that the 2003 version of the Rule meant that the tentative allocation or commitment to be considered must be one from the Corporation. The deletion of this phrase from the 2004 version of the Rule and subsequent inclusion in the 2004 Universal Application Instruction (set forth in paragraph 8 above) expands the financing sources to include Local Government-issued Tax-Exempt Bond Financed Developments. The Application Instructions which are incorporated by reference as part of the Rule clearly defines and expands the source of "a tentative allocation or tentative funding commitment." Again, as stated above, none of these circumstances apply to the Authority or the Roosevelt Gardens Development.

10. The facts and circumstances facing the Corporation with regards to its Rules and the Authority's application present a unique situation. To the knowledge of the Authority, the Authority is the only applicant for a SAIL Loan by a governmental

entity for a governmentally owned project in which no non-governmental person has any interest. The granting of this petition would have a very limited impact on the Corporation's administration of the SAIL Loan program.

11. Since the Authority did not secure a tentative allocation or tentative funding commitment from either the Corporation or a Local Government, it is exempt from the Application of the second sentence of Rule 67-48.002(98), including clauses (a), (b), and (c) thereof, and must be judged to have met threshold.

IV. SUBSTANTIAL INTEREST

The Corporations final score affects the Authority's substantial interests because the Authority is the development entity and applicant for the development. The Authority will incur damages including lost development cost and a reduction in first mortgage balance if the application fails to meet threshold.

V. REQUEST FOR RELIEF

WHEREFORE The Authority requests:

- (i) That recommended and final orders be entered finding that the Authority should be determined to have met threshold.
- (ii) Such other relief as is appropriate.

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Dated this 2nd day of August 2004.


J. Manuel Castillo, Sr.
Executive Director
The Housing Authority of the City
of Key West, Florida
1400 Kennedy Drive
Key West, Florida 33040
(305) 296-5621
(305) 296- FAX

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was delivered to Corporation Clerk, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, this 2nd day of August, 2004.

Petitioner

Dated this 2nd day of August, 2004.



J. Manuel Castillo, Sr., Executive Director
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