

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

**ARBOURS AT MADISON, LTD.,**

**Petitioner,**

**v.**

**FHFC CASE NO. 2004-035-UC  
Application No. 2004-004C**

**FLORIDA HOUSING FINANCE  
CORPORATION,**

**Respondent.**

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**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 hearing in Tallahassee, Florida, in this matter on August 31, 2004.

**APPEARANCES**

For Petitioner, Arbours at  
Madison, Ltd.:

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For Respondent, Florida Housing  
Finance Corporation  
(Florida Housing):

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## **STATEMENT OF THE ISSUE**

The issue in this hearing was whether Petitioner, Arbours at Madison, LTD., failed to meet threshold requirements with regard to Exhibit 55 to its Application concerning Funding Commitment.

## **PRELIMINARY STATEMENT**

The parties entered into a Prehearing Stipulation which has been marked as Joint Exhibit 1 in this proceeding and admitted into evidence. Joint Exhibits 2 through 8 have also been admitted into evidence. Petitioner's Exhibit 1 was offered but not admitted. It was then proffered and is attached to the record.

## **FINDINGS OF FACT**

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

1. Arbours is a Florida for-profit limited partnership with its address at 1037 22<sup>nd</sup> Street South, Suite 102, Birmingham, Alabama 35205. Arbours is in the business of providing affordable rental housing units.
2. Florida Housing is the corporate entity delegated the authority and responsibility for administering and awarding the Housing Credit ("HC") program in the State of Florida pursuant to Chapter 420, Fla. Stat., and Rule 67-48, Fla. Admin. Code.

3. The HC program is a federally funded program which awards project owners a dollar-for-dollar reduction in income tax liability in exchange for the acquisition and substantial rehabilitation or new construction of low and very low income rental housing units. Florida Housing is the designated housing credit agency for the allocation of tax credits in the State of Florida.

4. The award of HC funds is made through a competitive process in which project owners apply using the Universal Application.

5. The 2004 Universal Application Instruction, Forms and Application Forms have been adopted as a rule by Florida Housing.

6. On March 31, 2004, all applicants, including Arbours, submitted applications to Florida Housing for review. Arbours submitted its application in an attempt to obtain funding to assist in the construction of a 72-unit affordable housing apartment complex in Madison, Madison County, Florida, named Arbours at Madison.

7. On April 29, 2004, Florida Housing completed its preliminary review and scoring of Arbours' application. At that time Arbours was awarded a preliminary score of 66 points out of a possible 66 points and 7½ out of 7½ proximity points. However, Florida Housing concluded that Arbours failed to meet threshold based on the failure to provide firm loan commitments.

8. Subsequent to the release of Florida Housing's preliminary scores, each applicant, pursuant to Rule 67-48-004(4), Fla. Admin. Code, was allowed to submit to Florida Housing Notices of Possible Scoring Errors ("NOPSE"). The purpose was to point out errors in Florida Housing's scoring of applications. Several NOPSE's were filed which challenged the scoring of Arbours' application. Specifically, NOPSE's challenged Arbours' origination fees and other aspects of the financing of the project.

9. In response to the NOPSE's and Florida Housing's preliminary review, applicants were allowed 15 days to submit revised documentation to correct any errors in their applications pursuant to Rule 67-48.004(6), Fla. Admin. Code ("cure"). All revised documentation was due to Florida Housing by June 10, 2004. Arbours submitted "cures" in an attempt to gain maximum points possible. Specifically, Arbours submitted additional information which addressed (a) the issues raised by Florida Housing concerning the financing of the project and (b) the NOPSE's which had been submitted regarding its application.

10. Subsequent to the submittal of the cure information pursuant to Rule 67-48.004(7), Fla. Admin. Code, each applicant was allowed the opportunity to provide a Notice of Alleged Deficiency in Scoring ("NOAD") with respect to the revised documentation submitted by other applicants. A NOAD was filed challenging

Arbours' cures.

11. On July 9, 2004, Florida Housing finalized its review of the additional documentation and issued final scores. The Notice of Final Scores was received by Arbours on July 12, 2004. Arbours' final score was 66 out of a possible 66 points. Arbours was also awarded 7½ out of a possible 7½ proximity tie breaker points. However, Florida Housing continued to conclude that Arbours failed to meet threshold. In the instant proceeding, Arbours challenges Florida Housing's threshold determination regarding its application.

12. The Universal Application at Part V requests information concerning how an applicant proposes to finance a proposed project. At Part V, subsection B, the Universal Application requires all applicants to complete a Development Cost Pro-Forma. Further, at Part V, subsection D, applicants are required to provide documentation of all commitments from both the permanent lenders, the syndication, or other sources of funding. In order to receive maximum points, the commitment must be firm. The Universal Application Instructions, beginning at page 66, lists the items that must be included to render a commitment firm.

13. In response to this application requirement, Arbours in its initial application completed the required Development Cost Pro-Forma and provided exhibits, including at Exhibit 55 of the Application a letter of commitment from AIG Sun America.

14. After conducting its preliminary review and consideration of all NOPSE's, Florida Housing, in a Scoring Summary dated May 19, 2004, concluded the Arbours had failed to meet threshold for reasons related to the preparation of the Development Cost Pro-Forma and the exhibit attached thereto.

15. In response to Florida Housing's initial review and the specific comments and reasons provided in the Scoring Summary, Arbours submitted revised documentation, as part of its cure, including a new letter of commitment from AIG SunAmerica.

16. On July 9, 2004, Florida Housing issued its Final Scoring Summary which reflected Florida Housing's consideration of all cure materials and any NOAD's filed to challenge those cure materials. Florida Housing, in its scoring summary, determined that Arbours failed threshold for the following reasons:

The revised debt commitment for construction and permanent financing is incomplete. The commitment is missing a portion of paragraph 9 at the bottom of page one and the top of page two, as well as a portion of paragraph 1 at the bottom of page seven and the top of page eight. In addition, paragraph 7 on page eight references an agreement, dated June 8, 2004 (sic), to sell a 99.9% limited partnership interest in the Borrower. No such agreement was provided by the Applicant in the Application. The revised equity commitment provided by the Borrower is dated June 2, 2004 and was accepted by the Applicant on June 6, 2004. Therefore, the debt commitment for construction and permanent financing cannot be scored

firm.

17. Joint Exhibit 2 in this proceeding is part of Exhibit 55 to Petitioner's Application and is the commitment letter dated March 15, 2004, included in the original submission as part of Exhibit 55 to Petitioner's Application.

18. During the Cure process, the Applicant submitted a new commitment letter to supersede and replace that commitment letter found in Joint Exhibit 2. The new commitment letter is part of Joint Exhibit 4 and is dated "March 15, 2004 REVISED June 2, 2004" and has a hand written notation that reads "Revised". The parties have stipulated and agreed that the new commitment letter referenced above embodied in Joint Exhibit 4 is in replacement of the commitment letter embodied in Joint Exhibit 2 and not a replacement thereto. Transcript pages 32-36.

19. Beginning on the first page of the new commitment letter in Joint Exhibit 4, there is a list of numbered items, numbered one through eight on the first page of the new commitment letter which list continues being numbered 10 through 18 on page 2 of 9 of the new commitment letter; numbered 19 through 26 on page 3 of 9 of the new commitment letter; numbered 27 through 30 on page 4 of 9 of the new commitment letter; and numbered 31 through 33 on page 5 of 9 of the new commitment letter.

20. In those numbered items on the first five pages of the new commitment

letter in Joint Exhibit 4, there is no item number 9. The numbered list jumps from number 8 at the bottom of the first page to number 10 at the top of page 2 of 9 of the new commitment letter in Joint Exhibit 4.

21. At the bottom of page 1 of the new commitment letter (Joint Exhibit 4) the last numbered item reads:

8. Prepayment Penalty: Prepayment of the Loan, in full or in part, shall be permitted at any time without any fee.

At the top of page 2 of 9 of the new commitment letter (Joint Exhibit 4) there is no item numbered 9 and preceding item number 10 is the nonsensical statement “apartment complex located in Madison County, Florida.” This statement is not a complete sentence and does not relate to either item numbered 8, or item numbered 10. It is unclear whether its inclusion is a typographical error or whether the parties intended there to be an item numbered 9 which, for some reason, was excluded.

22. Beginning at the bottom of page 7 of 9 of the new commitment letter in Joint Exhibit 4 and continuing on the top of page 8 of 9, the new commitment letter reads:

1. Restrictive Covenants: The property securing the mortgage shall at all times be subject only to restrictions or limitations as are approved in writing by mortgagee and its counsel, excluding those use restrictions conditional upon the granting of Low Income Tax Credits by [sic] will not be permitted.



The exclusionary clause above is nonsensical. It appears that there is language missing from that statement. It appears reasonable to conclude as a matter of fact on the face of the document that the parties to the document had entered into an agreement with regard to restrictive covenants, the totality of which was for some reason excluded from the new commitment letter in Joint Exhibit 4.

23. Paragraph number 7 on page 8 of 9 of the new commitment letter in Joint Exhibit 4 states:

7. Borrower shall have concluded the sale of a 99.9% limited partnership interest in Borrower to SunAmerica Affordable Housing Partners, Inc. or an affiliate thereof pursuant to the letter agreement dated June 8, 2004.

24. During the Cure process, the Applicant submitted a revised letter setting forth an agreement on behalf of SunAmerica to provide to Applicant an equity investment that would require a sale by the Borrower to SunAmerica of a 99.9% limited partnership interest in the Partnership. That letter was part of Petitioner's Exhibit 55 to its Application and is part of Joint Exhibit 4 in this proceeding. That letter agreement is dated "March 15, 2004 REVISED June 2, 2004" and in handwriting is marked on its first page "REVISED". It is a three page letter signed by Stephen B. Bien and at the bottom of the third page, it reads:

AGREED AND ACCEPTED:

By: David (spelling of last name illegible)

Title: Member

Date: 6/6/2004

25. The letter agreement submitted as part of Petitioner's Exhibit 55 to its Application in the Cure process, Joint Exhibit 4, contains the following statement in the next to the last paragraph on page 3:

Please indicate your agreement and acceptance of the foregoing by signing the enclosed copy of this letter and returning it to the undersigned by June 8, 2004.

26. The revised equity investment agreement embodied in Joint Exhibit 4 does not on its face refer to the "sale of a 99.9% limited partnership interest in Borrower to SunAmerica Affordable Housing Partners, Inc. or an affiliate thereof . . . ." Rather, it states on its first page "We [SunAmerica Affordable Housing Partners, Inc.] are pleased to provide you with an equity investment as described below . . . ." The substance of the terms of the revised equity letter could be characterized as the sale of a 99.9% limited partnership in Borrower to SunAmerica Affordable Housing Partners, Inc.

27. Paragraph number 7 on page 8 of 9 of the new commitment letter in Joint Exhibit 4 requires that the Borrower shall have concluded the sale of a 99.9% limited partnership interest in Borrower to SunAmerica " . . . pursuant to the letter agreement

dated June 8, 2004”. The revised equity investment letter in Joint Exhibit 4 is not dated June 8, 2004. It is dated March 15, 2004, revised June 2, 2004 with an acceptance date of June 6, 2004.

### CONCLUSIONS OF LAW

28. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rules 28-106.301 and 67-48.005, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties of this proceeding.

29. The Petitioner’s substantial interests are affected by the proposed agency action of the Respondent. Therefore, Petitioner has standing to bring this proceeding.

30. The 2004 Universal Application Package including instructions, exhibit forms and an uncompleted application are rules incorporated by reference by Rule 67-48.002(111), Fla. Admin. Code.

31. Rule 67-48.004(13)(b) states that Florida Housing shall reject an Application if, following the submission of the additional documentation, revised pages and other information as the Applicant deems appropriate “The Applicant fails to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions . . . .”

32. The Universal Application Instructions, beginning on page 71, has a section entitled “THRESHOLD REQUIREMENTS”. Beginning on page 71 and

continuing to page 72, under “THRESHOLD REQUIREMENTS” are 17 numbered items which are “requirements to meet ‘threshold’”. Item numbered 13 states:

Financing documentation must reflect the following:

- All commitments must be considered firm . . . .

33. Part V of the Universal Application Instructions is entitled “Financing (Threshold)”. Part V.D of the Universal Application Instructions entitled “Funding Commitment(s)”, sets forth the following requirements for Applicants:

Provide documentation of all commitments from both the construction and the permanent lender(s), the syndicator or other sources of funding. The commitments must state whether they are for construction financing, permanent financing, or both. All conditions that are required to be met prior to funding must be included in the commitment letter(s). For a commitment letter to be considered as a firm commitment, all attachments must be included. Insert documentation for each source directly behind its own tab beginning with a tab labeled ‘Exhibit 55’ . . . .

34. Part V.D of the Universal Application Instructions states:

For the purpose of this Application, a firm commitment for debt financing must adhere to the following. Evidence for each firm commitment must be behind its own tab:

- A firm commitment shall contain:
  - terms
  - specific interest rate of the construction loan . . .
  - specific interest rate of the permanent loan . . .

- signature of all parties, including acceptance by the applicant . . .
- a statement that states the commitment does not expire before December 31, 2004 . . . .

35. Part V.D of the Universal Application Instructions also states “Commitments with conflicting information may be determined not to be firm depending upon the nature of the inconsistency”.

36. The parties have agreed (Transcript page 36) and it is concluded as a matter of law that the new commitment letter in Joint Exhibit 4 is not a supplement to the original commitment letter in Petitioner’s Exhibit 55, but rather is a replacement for that original commitment letter. For that reason, the parties have agreed and stipulated and it is concluded as a matter of law that there should be no comparison of the original commitment letter in Petitioner’s Exhibit 55 to its Application (Joint Exhibit 2) to the new commitment letter in Petitioner’s Exhibit 55 to its Application (Joint Exhibit 4). The proper legal standard is whether the new commitment letter in Joint Exhibit 4 meets the requirements set forth in the statute and rules. Because the new commitment letter in Joint Exhibit 4 is a replacement for the original commitment letter in Joint Exhibit 2, there should be no comparison for the purpose of determining whether there are inconsistencies. As a matter of law, the new commitment letter in Joint Exhibit 4 cannot be inconsistent with the original

commitment letter in Joint Exhibit 2.

37. In the 33 numbered items listed on the first five pages of the new commitment letter (Joint Exhibit 4), there is no item numbered 9. Between item number 8 and item number 10 is an incomplete sentence that states “Apartment complex located in Madison County, Florida”. In the Universal Application Instructions Part V.D, it states that “all conditions that are required to be met prior to funding must be included in the commitment letter . . . .” Because of this errant phrase between item number 8 and item number 10 in the new commitment letter, it must be concluded on the face of the new commitment letter that there are required conditions that are not sensibly and fully set forth in the new commitment letter. The requirements of Part V of the Universal Application Instructions are threshold items. Thus, in this regard, it must be concluded that the new commitment letter be deemed to have failed to meet the threshold requirement that all required conditions to be met prior to funding must be included in the commitment letter. Also in Part V.D it states that “a firm commitment shall contain: terms . . .”. The numbered items on the first five pages of the new commitment letter, numbered 1 through 8 and 10 through 33 are terms of the commitment. It can be reasonably concluded because of the anomaly of the orphaned phrase that not all of the terms are contained in the commitment, thus it cannot be deemed a firm commitment thereby failing a threshold requirement.

38. The language beginning at the bottom of page 7 of 9 of the new commitment letter (Joint Exhibit 4) and continuing on the top of page 8 of 9 referenced in paragraph 22 above, is nonsensical. As noted above, it appears that there is language missing from that statement. Because it is concluded as a matter of fact on the face of the documents that the parties to the document had entered into an agreement with regard to restrictive covenants, the totality of which was excluded from the new commitment letter, it must be concluded as a matter of law that the new commitment letter fails the requirement in Part V.D that requires that all conditions that are required to be met prior to funding must be included in the commitment letter. Part V being a threshold item, the Applicant has failed to meet the threshold requirements in this regard.

39. Paragraph 7 on page 8 of 9 of the new commitment letter (Joint Exhibit 4) sets forth the requirement “. . . pursuant to the letter agreement dated June 8, 2004.” Part V.D of the Universal Application Instructions states in part that “For a commitment letter to be considered as a firm commitment, all attachments must be included.” The Applicant has purported to attach the “letter agreement dated June 8, 2004” referenced in paragraph 7 on page 8 of 9 of the new commitment letter (Joint Exhibit 4) by the inclusion in its Exhibit 55 to the Application of the revised equity investment agreement (Joint Exhibit 4) referenced in paragraphs 24 through 26 above.

However, that document is not dated June 8, 2004. That document constitutes an offer on the part of SunAmerica to ACRH Development, LLC and is dated “March 15, 2004 REVISED June 2, 2004” and shows that the offer was accepted on June 6, 2004. While it might be argued that the letter was dated either May 15, 2004, June 2, 2004, or June 6, 2004, it cannot rationally be argued that the document is dated June 8, 2004.

40. Petitioner argues that because the new commitment letter (Joint Exhibit 4) was prepared before it had knowledge of the date of acceptance of the revised equity investment agreement and because that agreement provided that it must be accepted by June 8, 2004, the Applicant simply assumed June 8, 2004 as the date of the letter agreement. While this may or may not be the case, it is not apparent on the face of the documents. Simply put, the new commitment letter referenced a letter agreement dated June 8, 2004. The three page letter referred to here as the revised equity investment agreement (Joint Exhibit 4) is not a letter agreement dated June 8, 2004. Thus, it must be concluded that the Applicant has failed to meet the threshold requirement in Part V.D of the Universal Application Instructions that “for a commitment letter to be considered as a firm commitment, all attachments must be included”.

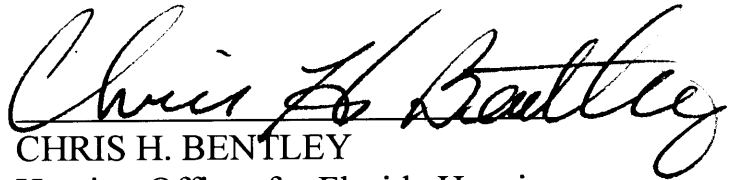


**RECOMMENDATION**

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

1. That a Final Order be entered determining that Petitioner, Arbours at Madison, Ltd., has failed to achieve the threshold requirements as set forth above with regard to its Application and the Application should be rejected pursuant to Rule 67-48.004(13), Fla. Admin. Code.

Respectfully submitted and entered this 20th day of September, 2004.



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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 September 25, 2004. 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.