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

**CLERMONT RRH, LTD./ SUNNY HILL APARTMENTS,**

**Petitioner,**

**v.**

**FHFC CASE NO. 2005-015UC**
**Application No. 2005-004C**

**FLORIDA HOUSING FINANCE CORPORATION,**

**Respondent.**
_____/



## RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above styled case on July 15, 2005.

## APPEARANCES

For Petitioner, Clermont RRH, Sunny Hills Apartments:

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For Respondent, Florida Housing Finance Corporation:

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## STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The sole issue for determination is whether Petitioner's application met threshold requirements for construction financing.

## PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibit 1 (as amended by the renumbering of Exhibits) and Petitioner's Exhibits 1 through 5. Joint Exhibit 1 is a Prehearing Stipulation containing Stipulated Findings of Fact. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with regard to the issue in dispute. The Prehearing Stipulation is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

At the hearing, Petitioner presented the testimony of Mr. Thomas Flynn. Counsel for the Respondent objected to that testimony on the grounds of relevancy. The undersigned reserved ruling on that objection. Having reviewed the testimony in light of the issue in this proceeding, the Respondent's objection is sustained.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

## FINDINGS OF FACT

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

1. Along with other competing applicants, Petitioner, Clermont RRH, Ltd./Sunny Hill Apartments, submitted Application No. 2005-004C for low income housing tax credits to help finance the acquisition and rehabilitation of an existing 33-unit apartment complex in Clermont, Lake County, Florida.

2. In its initial application, Petitioner stated that September 30, 2006 was its "anticipated placed-in-service date" (Petitioner's Exhibit 1, page 8) and that its total development cost for "Construction or Rehab" was $2,166,020. (Petitioner's Exhibit 1, pages 25-26). Among the sources of funding for construction or rehab, Petitioner listed the amount of $424,000 under Item 4, which reads:

HC Equity Proceeds Paid Prior to Completion of Construction which is Prior to Receipt of Final Certificate of Occupancy or in the case of Rehabilitation, prior to placed-in-service date as determined by the Applicant.

In support of this listing, Petitioner submitted an Exhibit 59, an equity funding commitment from MMA Financial. (Petitioner's Exhibit 2) A portion of this document sets forth a schedule of the delivery of capital contributions, which provides, in pertinent part, as follows:

| Later of: | Amount | % |
|---|---|---|
| 1. Admission Date<br>Close of Construction Loan<br>Receipt of Permanent Loan Commitment | $185,500 | 35% |
| 2. 50% Construction Completion, as evidenced by a third party inspecting architect | $132,500 | 25% |
| 3. 100% Construction Completion, as evidenced by a third party inspecting architect and receipt of cost and credit certification from the independent accountants | $106,000 | 20% |

(Petitioner's Exhibit 2, page 2) These items total the $424,000 listed under item 4 of the sources for construction or rehab financing in Petitioner's Pro Forma. (Petitioner's Exhibit 1, page 26)

3. The Respondent's scoring summary issued after the receipt of Notices of Potential Scoring Errors (NOPSE) found, as pertinent herein, that the Petitioner's

equity commitment from MMA Financial did not meet threshold requirements based upon three stated reasons. Only one of those reasons is pertinent to the issue for determination in this proceeding. That reason relates to paragraph 1 of the payment schedule quoted above. In its April 14, 2005 Scoring Summary, Respondent states, in part:

> . . . Page 80 of the Universal Application Instructions states as part of the criteria for a firm equity commitment that the commitment must state an equity amount to be paid prior to or simultaneous with the closing of construction financing that is at least 35% of the total equity to be provided. Page 2 of the provided equity commitment states that 35% of the equity will be provided at the later of 3 stated events and does not specifically provide that 35% will be paid prior to or simultaneous with the closing of construction financing. Therefore, the equity commitment was not scored firm and not counted as a source of financing.

(Petitioner's Exhibit 4)

4. As a "cure," Petitioner submitted a new equity commitment from the Fifth Third Bank. The documentation from that Bank contained the following pay-in schedule:

> Capital Contribution #1
> $185,500 (35%) to be paid prior to or simultaneously with the closing of the construction loan.
>
> Capital Contribution #2
> $132,500 (25%) at 50% construction completion, as evidenced by a third party inspecting architect.
>
> Capital Contribution #3

> $106,000 (20%) at 100% construction completion, as evidenced by a third party inspecting architect and receipt of cost and credit certification from the independent accountants.

(Petitioner's Exhibit 3) These three items total the $424,000 listed under item 4 of the sources for construction or rehab financing in Petitioner's Pro Forma. (Petitioner's Exhibit 1, page 26) The language concerning Capital Contribution #3 is identical to that contained in paragraph 3 of Petitioner's first commitment letter from MMA Financial discussed above.

5. No competitor filed a Notice of Alleged Deficiency (NOAD) regarding the "cures" submitted by Petitioner. (Joint Exhibit 1, paragraph 11)

6. In final scoring, Respondent awarded Petitioner a score of 61 points, as well as 7.5 tiebreaker proximity points. However, Respondent concluded that Petitioner's application failed a threshold requirement due to a financing shortfall in construction financing. As specific grounds for the rejection of Petitioner's application, Respondent stated:

> The Application has a construction financing shortfall of $42,295. The construction financing sources the Applicant provided that had funds available prior to completion of construction are: Fifth Third Bank equity - $318,000, Fifth Third Bank loan - $250,000, USDA RD mortgage - $500,000; USDA RD mortgage assumption - $880,725, and deferred Developer Fee - $175,000. These sources total $2,123,725 which is $42,295 short of the Total Development Cost of $2,166,020.

(Petitioner's Exhibit 5) In essence, Respondent disqualified that portion of the equity

commitment from the Fifth Third Bank identified as "Capital Contribution #3" in the amount of $106,000. Petitioner's Pro Forma included that $106,000 among its sources of funding for construction or rehab under Item 4.

## CONCLUSIONS OF LAW

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

The sole issue in this proceeding is whether Petitioner's application failed the threshold requirements for construction financing. More specifically, the issue is whether, under the terms of the equity financing document from the Fifth Third Bank, the third payment ($106,000) scheduled "at 100% construction completion, as evidenced by a third party inspecting architect and receipt of cost and credit certification from the independent accountants" qualifies as equity proceeds "paid prior to completion of construction," as set forth in the Universal Application Instructions and forms.

The Universal Application Package, or UA 1016 (Rev. 2-05), which includes

both its forms and instructions, is adopted as a rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Accordingly, both the Respondent and the Petitioner are bound by its terms, as well as by other adopted rules which govern the application process.

Neither Chapter 67-48, Florida Administrative Code, nor the 2005 Application Instructions provide definitions of the terms "completion of construction" or "placed-in-service." The instructions simply state that the applicant must state the amount of equity "to be paid prior to construction completion." The closest one comes to a definition of "paid prior to construction completion" is contained on line 4 of the Pro Forma relating to the Construction or Rehab Analysis," which appears on page 26 of Petitioner's Exhibit 1. Item 4 reads:

> HC Equity Proceeds Paid Prior to Completion of Construction which is Prior to Receipt of Final Certificate of Occupancy or in the case of Rehabilitation, prior to placed-in-service date as determined by the Applicant.

A proper reading of Item 4 is that the words "prior to completion of construction" with regard to rehabilitation projects, such as that proposed by Petitioner, means prior to the placed-in-service date. Respondent argues that because of the qualification of the Fifth Third Bank's Capital Contribution #3 (i.e., "at 100% construction completion, as evidenced by a third party inspecting architect and receipt

of cost and credit certification from the independent accountants"), there can be no certainty that that payment will occur at any specific time or prior to the placed-in-service date determined by the Petitioner, and therefore the $106,000 cannot qualify as being paid "prior to completion of construction." That same argument could be made with respect to the words "prior to receipt of final certificate of occupancy," as there is no way to determine when that certificate will be obtained.

As noted above, the words "placed-in-service" are nowhere defined in the Respondent's rules. However, it should be obvious that a project cannot be "placed in service" (which, by common sense, should, at the very least, mean used for its intended purpose) until construction or rehabilitation is complete. Here, the equity commitment from Fifth Third Bank simply states that construction will be deemed complete when evidenced by an inspecting architect and certified by independent accountants, at which time the $106,000 will be released. This does not conflict with the concept of the otherwise undefined phrase "paid prior to construction completion," as used in the application instructions, or the "placed-in-service date" term used in the application forms. The Petitioner here has chosen September 30, 2006 as its anticipated "placed-in-service date," and it must be assumed that Petitioner knew and anticipated the terms of its financing when choosing that date. Stated differently, it must be assumed that construction would be 100% complete as

evidenced by an inspecting architect and certification from the accountants prior to the time Petitioner's proposed development was "placed-in-service," and thus the third payment proceeds would be paid "prior to completion of construction" as that term is explained on page 26 of Respondent's forms. In short, it was unreasonable for Respondent to determine that the $106,000 third payment would not occur prior to the placed-in-service date anticipated by Petitioner, and thus "prior to completion of construction."

It is further concluded that Respondent was prohibited from determining that Petitioner failed to meet threshold requirements regarding construction financing because Respondent did not earlier identify this issue during its preliminary and NOPSE scoring. Rule 67-48.004, Florida Administrative Code, sets forth the specific application and selection procedures for developments. After the transmission of preliminary scores from the Respondent, competing applicants may provide Notices of Possible Scoring Errors (NOPSE) regarding other applications, describing the alleged deficiencies "in detail." Rule 67-48.004(3) and (4). The Respondent must then transmit to each applicant the NOPSEs submitted by other applicants with regard to their application, and also include the Respondent's decision regarding the NOPSEs, along with any other items identified by the Respondent to be addressed by the applicant. Rule 67-48.004(5). Thereafter, the applicant is provided an

opportunity to "cure" the issues raised in preliminary scoring, the NOPSE's and any other item identified by the Respondent. Rule 67-46.004(6). Competing applicants are then afforded an opportunity to submit a Notice of Alleged Deficiency (NOAD) directed to any other applicant's "cure." Rule 67-48.004(7). In this instance, no NOADs were submitted regarding Petitioner's application. After that process, final scores are prepared by the Respondent. In that regard, Rule 67-48.004(9), Florida Administrative Code, states, in relevant part:

> In determining such final scores, no Application shall be rejected or receive a point reduction as a result of any issues not previously identified in the notices described in subsections (3), (4) and (5) above [the preliminary and NOPSE scoring, which includes other items identified by Respondent at the time of notification of NOPSE scoring results]. However, inconsistencies created by the Applicant as a result of information provided pursuant to subsections (6) [the cure documents] and (7) [ the NOADS] above will still be justification for rejection or reduction of points, as appropriate.

This regulatory provision prohibits the Respondent from rejecting Petitioner's application for failure to meet threshold requirements as stated in the final scoring summary.

Respondent argues that a "cure" is a replacement for a previously rejected document and that any "inconsistencies" presented in a cure document can be considered by Respondent in its final scoring. This argument might be valid if the language at issue in this proceeding (the third capital contribution by the Fifth Third

Bank) were not word-for-word identical to the language used in the MMA Financial equity commitment submitted in Petitioner's initial application, to which Respondent raised no issue. Respondent argues that Respondent would not have proceeded to evaluate the details of the MMA commitment, since it was rejected *in toto* as not being a "firm" commitment. In fact, in its April 14, 2005 Scoring Summary, Respondent provided three very specific and different reasons for rejecting the MMA Financial commitment (Petitioner's Exhibit 4), all of which were cured after Petitioner submitted the equity commitment from the Fifth Third Bank as a replacement for the MMA Financial commitment. Had Petitioner been notified that Respondent found the language contained within the MMA commitment regarding the payment at 100% Construction Completion objectionable, it could have "cured" such an objection, just as it did with regard to the MMA commitment regarding the 35% payment to occur at the closing of the construction loan. Having found no inconsistency to prevent the MMA Financial document from being considered a firm commitment with regard to payment in relation to construction completion, Respondent is prohibited from finding an inconsistency in the identical language contained within the Fifth Third Bank commitment document.

## RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered determining that Petitioner's application meets the threshold requirements and does not have a construction rehabilitation financing shortfall.

Respectfully submitted and entered this 9th day of August, 2005.

Diane D. Tremor

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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 August 16, 2005. 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.

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## PREHEARING STIPULATION

Petitioner, Clermont RRH, Ltd. /Sunny Hill Apartments ("Sunny Hill") and Respondent, Florida Housing Finance Corporation ("Florida Housing"), by and through undersigned counsel, submit this Prehearing Stipulation for purposes of expediting the informal hearing scheduled for 2:00 pm, July 15, 2005, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below:

## STIPULATED FINDINGS OF FACT

1. Clermont RRH, Ltd., is a Florida limited partnership with its principal address at 516 Lakeview Road, Villa 8, Clearwater, Florida 33756, and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. (Section 420.504, Fla. Stat.; Rule 67-48, Fla. Admin. Code).

EXHIBIT
tabbies J-1

*ATTACHMENT A*

3. Petitioner has applied for an allocation of competitive 9% low-income housing tax credits under the Low Income Housing Tax Credit ("HC") program administered by Florida Housing, as authorized by the U.S. Department of the Treasury. The HC program is set forth in Section 42 of the Internal Revenue Code of 1986, as amended, and it awards developers and investors a dollar for dollar reduction in income tax liability through the allocation of tax credits in exchange for construction of affordable rental housing units.

4. The 2005 Universal Cycle Application, through which affordable housing developers apply for funding under the HC program, is adopted as Form UA1016 (Rev. 02/05) by R. 67-48.004(1)(a), Fla. Admin. Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant.

5. On or about February 16, 2005, Sunny Hill and others submitted applications for financing in Florida Housing's 2005 funding cycle. Sunny Hill (Application #2005-004C) applied for an allocation of $68,500 in 9% competitive tax credits (which would amount to a total 10-year allocation of $685,000 in tax credits) to help finance the acquisition and rehabilitation of an existing 33-unit apartment complex in Clermont (Lake County), Florida, within the Rural Development set-aside category.

6. Sunny Hill received Florida Housing's preliminary scoring of the Application on March 22, 2005.

7. Florida Housing's rules provide that all competitors in the Universal Application process are permitted to view each others' applications, and following the issuance of preliminary scores, to submit a Notice of Possible Scoring Error (NOPSE) against any competing application that they believe has been incorrectly scored.

8. After evaluating any NOPSE filed against an application, Florida Housing issues a second set of scores reflecting any scoring changes to that application resulting from information or argument provided in the NOPSE. In the 2005 Universal Cycle, such "NOPSE" scores were provided to all applicants on or about April 15, 2005.

9. Following the issuance of NOPSE scoring summaries, applicants are permitted to "cure" any identified deficiencies through the submission of additional information, either revising or replacing the existing application documents as the case may be.

10. As with the original application, competitors are permitted to review the "cures" submitted by any other applicant, and to file a Notice of Alleged Deficiency (NOAD) against any competing application, addressing any deficiencies they believe present in their competitor's submitted "cures".

11. After evaluating the "cure" documentation (if any) and any NOAD filed against an application, Florida Housing issues "final" scores to every applicant, and provides a point of entry for each applicant to contest the scoring of their application. In the 2005 Universal Cycle, Florida Housing issued these "final" scores on or about May 25, 2005.

12. In the instant case, Florida Housing provided Sunny Hill with preliminary and NOPSE scoring summaries indicating various deficiencies, which Sunny Hill successfully "cured" and which are not directly pertinent to the instant case. Sunny Hill also provided, as part if its cure, a new equity commitment from Fifth Third Bank Community Development Corporation to replace a prior commitment disqualified by Florida Housing.

13. No competitor filed a NOAD against the Sunny Hill application in the 2005 Universal Cycle.

14. At the conclusion of the NOPSE and NOAD processes, Florida Housing awarded the Sunny Hill application a score of 61 points, as well as 7.5 tiebreaker proximity points. At the same time, however, Florida Housing concluded that the Sunny Hill application failed a threshold requirement for an alleged financing shortfall in construction financing. In doing so, Florida Housing stated its specific grounds for the rejection as follows:

> The Application has a construction financing shortfall of $42,295. The construction financing sources the Applicant provided that had funds available prior to completion of construction are: Fifth Third Bank equity - $318,000, Fifth Third Bank loan - $250,000, USDA RD mortgage - $500,000, USDA RD mortgage assumption - $880,725, and deferred Developer Fee - $175,000. These sources total $2,123,725 which is $42,295 short of the Total Development Cost of $2,166,020.

15. But for the disqualification of $106,000 of the Fifth Third Bank equity commitment, Florida Housing would not have found a construction financing shortfall in the Sunny Hill application, and the application would have passed threshold with a final score of 61 with 7.5 tie-breaker proximity points.

## EXHIBITS

The parties offer the following joint exhibits into evidence and stipulate to their authenticity, admissibility and relevance in the instant proceedings.

Exhibit J-1: This Prehearing Stipulation.

Exhibit J-2: Scoring summaries for Application #2005-004C (Sunny Hill) dated March 17, 2005, April 14, 2005, and May 25, 2005 (composite).

Exhibit J-3: Original application and Pro Forma for application #2005-004C (Sunny Hill), without exhibits.

Exhibit J-4: A letter dated April 15, 2005, from Catherine A. Cawthon, Vice President of Fifth Third Bank Community Development Corporation to Thomas F. Flynn, comprising an equity commitment submitted by Sunny Hill as part of its "cure" documentation.

The parties also request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application form and Instructions (Form UA1016 Rev. 2-05).

Respectfully submitted this 15th day of July, 2005.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to Chris Bentley and/or Diane Tremor, Hearing Officers, Rose, Sundstrom & Bentley, L.L.P., 2548 Blairstone Pines Drive, Tallahassee, Florida 32301 this 15th day of July, 2005.

Hugh R. Brown
Deputy General Counsel