

**STATE OF FLORIDA**

**FLORIDA HOUSING FINANCE CORPORATION**

MERRYPLACE AT PLEASANT CITY  
ASSOCIATES, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2005-018UC  
Application No. 2005-036C

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**RECOMMENDED ORDER**

Pursuant to notice, on July 12, 2005, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

**APPEARANCES**

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

**For Petitioner:**

Michael P. Donaldson, Esquire  
CARLTON FIELDS, P.A.  
P.O. Drawer 190  
215 S. Monroe Street, Suite 500  
Tallahassee, FL 32302

**For Respondent:**

Robert J. Pierce, Assistant General Counsel  
Florida Housing Finance Corporation  
227 N. Bronough Street, Ste. 5000  
Tallahassee, FL 32301-1329

FILED  
JUL 11 2005  
TALLAHASSEE, FLORIDA  
CLERK OF DISTRICT COURT

## **EXHIBITS**

### **Joint Exhibits:**

- Exh. 1. Joint Stipulation.
- Exh. 2. Merryplace Application and Exhibits.
- Exh. 3. Preliminary Scoring Summary dated 3/17/05.
- Exh. 4. NOPSE Scoring Summary dated 4/14/05.
- Exh. 5. Final Scoring Summary dated 5/24/05.
- Exh. 6. NOPSE filed by Application No. 2005-086C.
- Exh. 7. NOPSE filed by Application No. 2005-045C.
- Exh. 8. "Cure" submitted by Merryplace in response to preliminary and NOPSE scoring.
- Exh. 9. NOAD filed by Application No. 2005-064C.

### **For Petitioner:**

- Demonstrative Exh. 1. Definition of "Scattered Sites" (with emphasis supplied by Petitioner).
- Demonstrative Exh. 2. Copy of Exhibit B attached to Petitioner's petition.

## **WITNESSES**

There were no witnesses for either party.

## **STATEMENT OF THE ISSUE**

There are two issues in this case. First, whether Petitioner's development site consists of "Scattered Sites" as that term is defined in Rule 67-48.002(92), Fla. Admin. Code. Second, if Florida Housing rejected a previously filed NOPSE which claimed the

proposed development site is a “scattered site,” are they then precluded from reversing its determination and deeming the site to be scattered later in the scoring process.

### **PRELIMINARY STATEMENT**

On or before February 16, 2005, Petitioner, MerryPlace at Pleasant City Associates, Ltd., (“Merryplace”) submitted an application to, Respondent, Florida Housing Finance Corporation (“Florida Housing”) for Housing Credits in the 2005 Universal Cycle Application program. On May 25, 2005, Florida Housing notified Merryplace of the results of the scoring of Merryplace’s application and provided Merryplace with a Notice of Rights pursuant to Sections 120.569 and 120.57, Florida Statutes. On June 14, 2005, Merryplace filed its Election of Rights. On June 16, 2005, Merryplace 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 July 12, 2005, in Tallahassee, Florida. There are no disputed issues of material fact.

### **FINDINGS OF FACT**

1. Merryplace timely submitted an Application to Florida Housing for housing credits in the 2005 Universal Cycle in connection with a proposed 128-unit garden style apartment complex in Palm Beach 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 known 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, the Home Investment Partnership Program operated by Florida Housing pursuant to section 420.5089, Florida Statutes, and federal Housing and Urban Development regulations, and the Multifamily Mortgage Revenue Bond Program.

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.

10. The 2005 Universal Cycle Application, adopted as Form UA1016 (Rev. 2-05) by rule 67-48.004(1)(a), Florida Administrative 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. Site plan approval, infrastructure availability, zoning approval and environmental site assessment are among the threshold items.

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 Grocery Store, Public School, and Public Bus Stop or Metro-Rail Stop.

12. Preliminary scores for all applicants were released by Florida Housing on March 18, 2005. 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 Notice of Possible Scoring Error (NOPSE) scores on April 15, 2005. 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), Florida Administrative Code.

13. After review of cures and NOADs, final scores were released by Florida Housing on May 25, 2005, through a final scoring summary dated May 24, 2005. Each applicant received its own final scoring summary.

14. A NOPSE was filed by a competing applicant (Application No. 2005-086C) which alleged that the Grocery Store listed on the Surveyor Certification Form in connection with proximity tie-breaker points did not meet the definition of Grocery Store as defined in the Universal Application Instructions.

15. As the result of preliminary and NOPSE scoring, Merryplace was awarded no proximity tie-breaker points out of a possible 1.25 tie-breaker points for its proximity to a Grocery Store and no proximity tie-breaker points out of a possible 1.25 tie-breaker points for its proximity to a Public School.

16. Additionally, a NOPSE was filed by a competing applicant (Application No. 2005-45C) which alleged that the MerryPlace development site was a “scattered site” divided by streets.

17. Florida Housing did not concur with the NOPSE. Therefore, in the NOPSE scoring, Florida Housing did not penalize MerryPlace for the “scattered site” allegation.

18. In response to the preliminary and NOPSE scoring, Merryplace submitted cure materials relating to the proximity tie-breaker points. Included among the cure materials submitted in connection with the proximity tie-breaker points was supplemental information which, according to MerryPlace, “...is necessary to keep the Application consistent as revised resulting from a cure to Part III Section A subsection 10.a.(2)(a) Exhibit 25.” The supplemental cure information included (i) a First Amendment to Contract for Purchase and Sale of Real Property dated April 18, 2005, which amended the legal description (the “Amended Legal Description”) contained in the Contract for Purchase and Sale of Real Property submitted as evidence of site-control at Exhibit 27 to Merryplace’s original Application, and (ii) a new Contract for Purchase and Sale of Real Property dated April 25, 2005, concerning three (3) parcels of property consisting of approximately one acre, along with an assignment which assigned the new contract to Merryplace.

19. The Amended Legal Description reads as follows: “Approximately 5.5 contiguous acres of the approximately 14 acre MerryPlace development site in the Pleasant City section of West Palm Beach Florida. The 5.5 acre portion is bounded on the

north by 19<sup>th</sup> Street, on the south by Lilac Court, on the west by Spruce Avenue, and on the east by Dixie Highway.”

20. According to Rule 67-48.002(92), F.A.C.,“ ‘Scattered Sites’ for a single Development means a Development consisting of more than one parcel in the same county where two or more of the parcels (i) are not contiguous to one another or are divided by a street or easement and (ii) it is readily apparent from the proximity of the sites, chain of title, or other information available to the Corporation that the properties are part of a common or related scheme of development.”

21. A NOAD was filed by a competing applicant (Application No. 2005-064C) which alleged that the cure materials submitted by Merryplace demonstrate that the Development consists of Scattered Sites and that because Merryplace failed to disclose this in the relevant parts of the Application and in the Surveyor Certification, the Application should be rejected and, further, that no proximity tie-breaker points should be awarded. The NOAD included a May 3, 2005, letter from a land surveyor in which the surveyor certified that (i) he inspected a parcel of land the same as that described in the Amended Legal Description and (ii) that the said “parcel of land is divided by 17<sup>th</sup> & 18<sup>th</sup> Street which runs from Spruce Avenue to Dixie Highway.” The NOAD also included a Street Atlas printout showing that the Merryplace Development site as described in the Amended Legal Description is divided by 17<sup>th</sup> and 18<sup>th</sup> Streets.

22. In its final scoring summary dated May 24, 2005, Florida Housing found that Merryplace failed the following threshold items: Site Plan Approval, Availability of Electricity, Availability of Water, Availability of Sewer, Availability of Roads, Zoning, and Environmental Safety, because, according to the scoring summary, for each of the



items, the applicable form provided with the Merryplace Application “reflects the ‘Development Location’ as ‘On Spruce Avenue at the Northeast corner of Spruce Avenue and 17<sup>th</sup> Street.’ Based on the information provided in the Applicant’s cures, it appears that the proposed Development consists of Scattered Sites and...” as indicated in the scoring summary the applicant failed to provide evidence for each of the scattered sites.

23. In addition, no tie-breaker points were awarded for proximity to a Grocery Store, Public School and Public Bus Stop because, according to the scoring summary, “The Applicant submitted documentation during the CURE period showing that the site is a Scattered Site. Based on this documentation, the Applicant has not correctly answered the question at Part III.A.2.b. and provided the Address, total number of units and latitude/longitude information for each of the Scattered Sites behind a tab labeled Exhibit 20, as required by the Universal Application Instructions. Furthermore, per page 12 of the Application Instructions the Surveyor Certification Form was not properly completed because the Yes/No box regarding Scattered Sites was not filled out.”

### **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. At issue here is Florida Housing’s interpretation of its rule defining “Scattered Sites” and its application to the particular facts of this case, as well as the definition of a parcel within the definition of “scattered sites.”

3. Florida Housing conceded at hearing that when first evaluating the application after the NOPSE, they determined that the site was not a scattered site, and the applicant relied on that determination when providing CURE materials to Florida Housing. Florida Housing, with exhibits attached to the NOPSE including a site plan and existing streets and easements, made a determination which was relied upon by applicant that the primary parcel is not a scattered site. (See Joint Exhibit 7).

4. Neither the Universal Application, its instructions, nor Florida Housing's rules define parcel. The only such definition found in the Florida Statutes appears to be in section 163.3164 (16) and 380.031 (13) which states:

“Parcel of Land” means any quantity of land capable of being described with such definiteness that its locations and boundaries may be established, which is designated by its owner or developer as land to be used, or developed as, a unit or has been used or developed as a unit.

5. Under these facts, the boundaries are definite and established by the sales contract and attached legal description in the application, Exhibit 27, and the primary parcel of the application, and noted in the legal description as “together with portions of public road right-of-ways and alleys, lying within the above said plats.”

6. While this Hearing Officer is troubled that the development site was consistently described as “On Spruce Avenue at the Northeast Corner of Spruce Avenue and 17<sup>th</sup> Street” in the application, this issue also should have been addressed as a response to the NOPSE filed by Applicant 2005-04C which provided a site plan of the Merryplace Development.

7. Florida Housing appears to desire to prevent a developer-applicant from attempting to combine separate projects into one, or try and reconfigure common

boundaries across roadways in order to lessen requirements for documentation requirements for each individual parcel. The intent of their desire does not appear to be violated in this particular fact pattern.

8. With a decision that there were not multiple parcels that would make the development subject to the definition of “scattered sites”, this order does not require the examination of Florida Housing’s prior determination after the filing of a NOPSE that the development was not a “scattered site,” and then, after receiving additional information, reversed their determination.

#### **RECOMMENDATION**

Based on the Findings of Fact and Conclusions of Law stated above, it is hereby RECOMMENDED that Florida Housing enter a Final Order determining that the development site does not meet the definition of “scattered sites” as the primary parcel was a single parcel, and the secondary parcels were contiguous to the primary parcel and not divided by any street or easement, and as such, Merryplace has met threshold and should be awarded the appropriate tie-breaker proximity points.

DATED this 11<sup>th</sup> day of August, 2005, in Tallahassee, Florida.



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David E. Ramba, Hearing Officer

Copies furnished to:

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