

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

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FLORIDA HOUSING  
FINANCE CORPORATION

CP DEVELOPMENT GROUP 2, LLC,  
a Florida limited liability company

Petitioner,

v.

FHFC 2009-065UC  
Application No. 2009-114C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

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**RECOMMENDED ORDER**

Pursuant to notice, an informal Administrative Hearing was held in this case in Tallahassee, Florida, on January 13, 2010, before Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

**Appearances**

For Petitioner:

Michael P. Donaldson  
Carlton Fields, P.A.  
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Tallahassee, Florida 32301

For Respondent:

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

**PRELIMINARY STATEMENT**

Pursuant to notice and Sections 120.569 and 120.57(2), Fla. Stat., Florida Housing Finance Corporation ("Florida Housing"), by its duly designated Hearing Officer, David E.

Ramba, held an informal hearing in Tallahassee, Florida, in the above-styled case on January 13, 2010.

At the informal hearing the parties filed a Joint Stipulation of Facts and Exhibits (“Joint Stipulation”). Joint Exhibits 1 through 7 were stipulated into evidence, consisting of the following documents:

- Exhibit J-1 Joint Stipulation of Facts and Exhibits
- Exhibit J-2 Preliminary Scoring Summary 9/21/2009
- Exhibit J-3 NOPSE Scoring Summary 10/22/2009
- Exhibit J-4 Final Scoring Summary 12/2/2009
- Exhibit J-5 Equity Commitment dated August 11, 2009 from Bank of American submitted as Exhibit 57 to CPD’s original application.
- Exhibit J-6 Equity Commitment dated October 22, 2009 from Bank of America submitted by CPD as a cure.
- Exhibit J-7 Excerpted pages from CPD original Application showing the amount of Competitive HC (annual amount) requested at Part V.A.1.

In addition, Petitioner offered 5 exhibits in addition to the joint exhibits. Exhibit 1 was accepted into evidence at hearing, while the ruling on the admissibility of proposed exhibits 2 through 5 was reserved by the Hearing Officer. After reviewing the arguments made for submitting CPD’s exhibits 2 through 5, which are portions of an application with nearly identical facts and circumstances during the same application period, Respondent’s objections are **OVERRULED** and the following exhibits are accepted into evidence.

- Exhibit P-1 Equity Commitment dated October 22, 2009 from Bank of America submitted by CPD on cure and revised page 20 of the CPD Application submitted on cure.
- Exhibit P-2 Excerpts from Application No. 2009-106C.

Exhibit P-3 Preliminary scoring summary for Application No. 2009-106C.

Exhibit P-4 Cure materials from Application No. 2009-106C.

Exhibit P-5 Final scoring summary for Application No. 2009-106C.

Petitioner is referred to below as “Petitioner” or “CPD” and Respondent is referred to as “Respondent” or “Florida Housing.”

### **STATEMENT OF THE ISSUE**

The issue in this case is whether Petitioner met threshold requirements relating to its housing credit equity commitment as required by Part V.D.2. of the 2009 Universal Cycle Application Instructions.

There are no disputed issues of material fact.

### **WITNESSES**

No witnesses were called by either party.

### **FINDINGS OF FACT**

Based upon the stipulated facts agreed to by the parties and exhibits received into evidence at the hearing, the following relevant facts are found:

1. CPD is a Florida limited liability company with its address at 101 East Kennedy Blvd., Tampa, Florida 33602, 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. See Section 420.504, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

3. Florida Housing administers various affordable housing programs including the Multifamily Mortgage Revenue Bonds (MMRB) Program pursuant to Section 420.509, Fla. Stat., and Rule Chapter 67-21, Fla. Admin. Code, and the Housing Credit (HC) Program pursuant to Sections 420.507 and 420.5099, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

4. The 2009 Universal Cycle Application, through which affordable housing developers apply for funding under various affordable housing programs administered by Florida Housing is adopted as the Universal Application Package or UA1016 (Rev. 5-09) by Rules 67-21.003(1)(a) and 67-48.004(1)(a), Fla. Admin. Code, respectively, and consists of Parts I through V with instructions.

5. Because the demand for an allocation of Housing Credits and MMRB funding exceeds that which is available under the HC and MMRB Programs, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapters 67-21 and 67-48, Fla. Admin. Code, respectively. Specifically, Florida Housing's application process for the 2009 Universal Cycle is set forth in Rules 67-21.002-.0035 and 67-48.001-.005, Fla. Admin. Code.

6. As discussed in more detail below, Florida Housing scores and competitively ranks the applications to determine which applications will be allocated MMRB funds or an allocation of Housing Credits.

7. Florida Housing's scoring and evaluation process for applications is set forth in Rules 67-21.003 and 67-48.004, Fla. Admin. Code. Under these Rules, the applications are preliminarily scored based upon factors contained in the application package and Florida



Housing's rules. After the preliminary scoring, Florida Housing issues preliminary scores to all applicants.

8. Following release of the preliminary scores, competitors can alert Florida Housing of an alleged scoring error concerning another application by filing a written Notice of Possible Scoring Error ("NOPSE") within a specified time frame. After Florida Housing considers issues raised in a timely filed NOPSE, it notifies the affected applicant of its decision by issuing its NOPSE scoring summary.

9. Applicants then have an opportunity to submit "additional documentation, revised pages and such other information as the Applicant deems appropriate ('cures') to address the issues" raised by preliminary or NOPSE scoring. See Rules 67-21.003 and 67-48.004(6), Fla. Admin. Code. In other words, within parameters established by the rules, applicants may cure certain errors and omissions in their applications pointed out during preliminary scoring or raised by a competitor during the NOPSE process.

10. After affected applicants submit their "cure" documentation, competitors can file a Notice of Alleged Deficiency ("NOAD") challenging the sufficiency of an applicant's cure. Following Florida Housing's consideration of the cure materials and its review of the NOADS, Florida Housing issues final scores for all the applications.

11. Rules 67-21.0035 and 67-48.005, Fla. Admin. Code, establish a procedure through which an applicant can challenge the final scoring of its application. The Notice of Rights that accompanies an applicant's final score advises an adversely affected applicant of its right to appeal Florida Housing's scoring decision.

12. CPD timely submitted its application for financing in Florida Housing's 2009 Universal Cycle. Pursuant to Application No. 2009-114C (the "Application"), CPD applied for

an allocation of Housing Credits in the annual amount of \$1,103,825.00 (*Exhibit J-7*) to help finance the construction of a 146-unit affordable housing rental complex in Tampa, Florida, named The Tempo.

13. In its preliminary scoring of the CPD Application (*Exhibit J-2*), Florida Housing identified certain deficiencies, including the following failures with respect to the HC equity commitment letter (*Exhibit J-5*):

1T	V	D	2	HC Equity	Per page 74 of the 2009 Universal Application Instructions, the equity commitment must "state the anticipated total amount of equity to be provided". Although, the Applicant provided an equity commitment from Bank of America ( <i>Exhibit 57</i> ) reflecting the total amount of equity to be provided, the amounts reflected in the equity commitment are based off of a dollar for dollar, 100% purchase of the requested allocated tax credits, versus what's actually stated in the equity commitment of \$.71, 99.99% purchase of tax credits. Because of this inconsistency, the HC equity cannot be considered a source of financing.	Preliminary
2T	V	D	2	HC Equity	Per page 74 of the 2009 Universal Application Instructions, the percentage of credits being purchased must be equal to or less than the percentage of ownership interest held by the limited partner or member. The Applicant stated at <i>Exhibit 9</i> of the Application that the Investor Limited Member interest in the Applicant entity is 99.98%. However, the equity commitment at <i>Exhibit 57</i> states that 99.99% of the HC allocation is being purchased. Because of this inconsistency, the HC equity cannot be considered a source of financing.	Preliminary

14. CPD timely submitted a revised equity commitment letter dated October 22, 2009, from Bank of America (*Exhibit J-6*) as its cure in response to the failures noted at Items # 1T and 2T of the preliminary scoring summary.

15. Florida Housing scored CPD's Application and issued its final scoring summary dated December 2, 2009, (*Exhibit J-4*) in which CPD was awarded maximum total points, maximum ability to proceed tie-breaker points and maximum proximity tiebreaker measurement points. However, Florida Housing concluded that CPD failed to meet threshold.

16. Specifically, the threshold failures identified by Florida Housing in its final scoring summary are as follows:

6T	V	D	2	HC Equity	As a cure for item 1T, the Applicant provided an equity commitment; however the total amount of equity listed on the first page of the equity letter does not equal the sum of the stated equity payments in the commitment letter. Therefore, the commitment could not be counted as a source of financing.	Final
7T	V	B		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of \$5,114,245.	Final
8T	V	B		Permanent Analysis	The Applicant has a permanent financing shortfall of \$10,299,679.	Final
9T	V	D	2	HC Equity	The Applicant attempted to cure item 1T by providing an equity commitment; however the commitment reflects a larger HC request amount than applied for, which is not allowable under paragraph 67-48.004(14)(m), F.A.C. Therefore, the commitment could not be counted as a source of financing.	Final

17. CPD timely filed its Petition (and subsequently, an Amended Petition) contesting Florida Housing's scoring of its Application whereupon Florida Housing noticed the matter for an informal hearing.

18. The threshold failure at Item # 6T involves a difference of \$1.00. Under the particular circumstances involved here, the \$1.00 difference in the sum of the installment amounts is reasonably attributed to rounding. Accordingly, the threshold failure at Item # 6T in the final scoring summary of the CPD Application is rescinded.

### CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding.

2. As requested by the parties during the informal hearing, official recognition is taken of Respondent's rules, particularly Rule Chapters 67-21 and 67-48, Fla. Admin. Code, as well as the Universal Application Package or UA1016 (Rev. 3-08), which includes the forms and instructions.

3. The Universal Application Package, or UA1016 (Rev. 3-08), which includes both its forms and instructions, is adopted as a rule. *See*, Rule 67-48.004(1)(a), Fla. Admin. Code, and



Section 120.55(1)(a)4., Fla. Stat. The forms and instructions are agency statements of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of Florida Housing and therefore meet the definition of a “rule” found in Section 120.52, Fla. Stat. As such, the instructions and forms are themselves rules.

4. As a threshold item, an applicant in the 2009 Universal Cycle is required to provide documentation of all “non-corporation” funding commitments pursuant to Part V.D.2. of the Application Instructions. Page 20 of the Application requires an applicant to provide the amount of HC funding being requested.

5. If the applicant fails to provide adequate documentation for this threshold item or any other threshold requirement in the application or supplemental cure materials, Florida Housing’s rules mandate that the application be rejected.

6. Rule 67-48.004(14), Fla. Admin. Code, contains a list of mandatory elements that must be included in the Application, and although item (m) indicates that a Funding Request change will not be accepted, although revisions were allowed in similar applications during the 2009 UC. (Exhibits P-2 through P-5)

7. Petitioner documented its housing credit equity commitment by providing a letter dated August 11, 2009 from Bank of America. (Exhibit J-5) That letter was rejected at preliminary scoring for the reasons stated in the preliminary scoring summary. (Exhibit J-2) On cure, CPD submitted a revised equity commitment letter from Bank of America dated October 22, 2009. (Exhibit J-6) At issue is the revised equity commitment letter to address the issues raised in the preliminary scoring summary.

7. In this case, CPD took actions that were the direct result of Florida Housing’s preliminary scoring summary which pointed out how the HC funding request amount was



incorrectly calculated in the letter submitted with the application, thus could not be considered a source of financing.

8. In its cure, CPD corrected the calculation issue which, by correcting the calculation, changed the HC funding request amount. The amount was then, for consistency purposes, revised at page 20 of CPD's Universal Application. This cure was accepted by Florida Housing as addressing the scoring issue raised, but then raised the issue that a revision to the HC funding request amount was not allowed and thus CPD failed threshold.

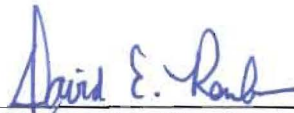
9. In accepting the cure, Florida Housing is not allowed to thus state that the cure, while accepted, is for an item that cannot be revised in the application.

10. Petitioner submitted exhibits relating to a sister entity, CP Development Group 3, LLC in Application 2009-106C, where the exact same scoring issue was raised, cured, and accepted without failing threshold. (Exhibits P-2 thorough P-5). While Florida Housing argued that this was in error not to fail CP Development Group 3, LLC that revised page 20, it is clear that there was not a consistent following of the rule that the HC funding request could not be revised if an inconsistency was found in an equity commitment letter during the preliminary scoring by Florida Housing. To accept the cure and not raise the threshold item in CP Development Group 3, LLC, and to accept the cure and fail this applicant, would produce inconsistent results and that ambiguity of interpretation should be construed against the agency that drafted and is implementing the rule.

**RECOMMENDATION**

Based on the Findings of Fact and Conclusions of Law stated above, in is hereby RECOMMENDED that Florida Housing enter a Final Order that CPD has met the threshold requirements relating to its housing credit equity commitment letter.

Respectfully submitted this 4th day of February, 2010.



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David E. Ramba, Hearing Officer

Copies furnished to:

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