

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

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FLORIDA HOUSING
FINANCE CORPORATION

APD Housing Partners 20, LP,
a Florida limited partnership

Petitioner,

FHFC 2009-067UC
Application No. 2009-214C

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

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
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Tallahassee, Florida 32301

For Respondent:

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Florida Housing Finance Corporation
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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 11 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 Contract for Purchase and Sale dated August 17, 2009, submitted as Exhibit 27 to APD 20’s original application.
- Exhibit J-6 First Amendment to and Assignment and Assumption Agreement of Contract for Purchase and Sale of Real Property submitted by APD 20 on cure.
- Exhibit J-7 Equity Commitment dated August 17, 2009 from Alliant Capital, Ltd., submitted as Exhibit 56 to APD 20’s original application.
- Exhibit J-8 Construction or Rehab Analysis excerpted from APD 20’s original application.
- Exhibit J-9 Equity Commitment dated August 17, 2009 from Alliant Capital, Ltd., submitted by APD 20 on cure.
- Exhibit J-10 Revised Construction or Rehab Analysis submitted by APD 20 on cure.
- Exhibit J-11 Excerpted pages from APD 20’s original application showing the amount of Competitive HC (annual amount) requested at Part V.A.1.

In addition, Petitioner offered into evidence the following three documents, the first two were received over Respondent’s objections of relevancy, the third document ruling was deferred upon until this order, and Respondent’s objections to Exhibit P-3 are SUSTAINED, as the information is irrelevant and was not within the four corners of the application or cure material that was available to Florida Housing in the scoring process.

- Exhibit P-1 Selected pages from APD 20’s application.

Exhibit P-2 Printout from online records of the Florida Department of State, Division of Corporations.

Exhibit P-3 Letter dated December 23, 2009 by Jorge C. Mederos and December 21, 2009 signed by Philip Kennedy.

Petitioner is referred to below as "Petitioner" or "APD 20" and Respondent is referred to as "Respondent" or "Florida Housing."

STATEMENT OF THE ISSUE

The original petition had two issues to be determined during this informal hearing. Prior to the hearing Florida Housing conceded the threshold item relating to the construction financing shortfall, so the remaining issue in this case is whether Florida Housing erred in determining the APD 20 failed to meeting the applicable threshold requirements regarding site control.

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. APD 20 is a Florida limited partnership with its address at 1700 Seventh Avenue, Suite 2075, Seattle, Washington 98101-1394, 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.

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 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 Rule 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 Credit 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 Universal Cycle pursuant to Rule 67-21 and Rule 67-48, Fla. Admin. Code, respectively. Specifically, Florida Housing's application process for the 2009 Universal Cycle is set forth in Rule 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 preliminary 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 writing Notice of Possible Scoring Error (“NOPSE”) within a specified time frame. After Florida Housing considered issues raised in a timely filed NOPSE, it notifies the affected application 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. APD 20 timely submitted its application for financing in Florida Housing’s 2009 Universal Cycle. Pursuant to Application No. 2009-214C (the “Application”), APD 20 applied for an allocation of Housing Credits in the amount of \$1,405,417 (*Exhibit J-11*) to help finance the construction of a 151-unit affordable housing rental complex in Miami, Florida, named TM Alexander.

13. In its preliminary scoring of the APD 20 Application (*Exhibit J-2*), Florida Housing identified certain deficiencies, including the following site control and financing issues relevant to these proceedings (*Exhibits J-5 and J-7, respectively*):

Site Control

1T	III	C	2	Site Control	The August 17, 2009 Purchase and Sale Agreement does not reflect the Applicant as the buyer and no assignment was provided.	Preliminary
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Financing

2T	V	D	2	HC Equity	The Applicant submitted an equity commitment from RBC Capital Markets. However, the sum of the equity installment payments does not equal the total amount of equity reflected in the commitment. As a result, the commitment is not considered a source of financing.	Preliminary
3T	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 Exhibit 9 of the Application that the limited partner's interest in the Applicant entity is 99.98%. However, the equity commitment at Exhibit 55A states the 99.99% of the HC allocation is being purchased. Because of this inconsistency, the HC equity cannot be considered a source of financing.	Preliminary
6T	V	B		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of \$17,062,722.	Preliminary

14. APD 20 timely submitted cures in response to these scoring deficiencies. In response to the site control failure, APD 20 provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property (*Exhibit J-6*); and in response to the financing failures, a revised equity commitment letter from Alliant Capital, Ltd., and a revised Construction or Rehab Analysis. (*Exhibits J-9 and J- 10, respectively*)

Item # 2T: The equity commitment provider was Alliant Capital, Ltd., not RBC Capital Markets. The error in the name was corrected on the NOPSE scoring summary (*Exhibit J-3*).

14T	V	D	2	HC Equity	The Applicant submitted an equity commitment from Alliant Capital, Ltd. However, the sum of the equity installment payments does not equal the total amount of equity reflected in the commitment. As a result, the commitment is not considered a source of financing.	NOPSE
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15. Following submission of cures, Florida Housing scored APD 20's Application and issued its final scoring summary dated December 2, 2009 (*Exhibit J-4*), in which APD 20 was awarded maximum total points, maximum ability to proceed tiebreaker points and maximum proximity tie-breaker measurement points. However, Florida Housing concluded that APD 20 failed to meet threshold requirements for site control and financing.

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

Site Control

15T	III	C	2	Site Control	In an attempt to cure item 1T, the Applicant provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property; however the cure was deficient because the Amendment was signed on behalf of Mederos-Civic Acquisitions, LLC and not the Seller (Mederos-T.M. Alexander Acquisitions, LLC).	Final
16T	III	C	2	Site Control	In an attempt to cure item 1T, the Applicant provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property; however the cure was deficient because the Amendment was signed on behalf of APD Housing Partners 19, LP and not the Applicant (APD Housing Partners 20, LP).	Final

Financing

17T	V	B		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of \$910,360.	Final
7C	V	B		Construction/Rehab. Analysis	The Applicant attempted to cure item 6T by providing a revised Construction and Permanent Analysis that shows \$7,920,133 of HC equity as a source of financing during the construction period. The revised equity commitment letter from Alliant Capital, Ltd indicates that only \$7,009,773 will be paid during the construction period. Therefore, the Applicant will have a construction financing shortfall of \$910,360 (see item 17T).	Final

17. APD 20 timely filed its Petition contesting Florida Housing's scoring of its Application whereupon Florida Housing noticed the matter for an informal hearing.

18. The original HC equity commitment (*Exhibit J-7*) included in APD 20's original Application contained the same equity pay-in structure as the revised HC equity commitment letter provided by APD 20 on cure. In both the original and revised letters, the equity pay-in was scheduled in 4 installments, with only the first 2 installments being paid during construction. The third payment was conditioned upon factors which would result in its payment only after

completion of construction; thus, the amount of the third equity installment was not eligible to be considered as equity proceeds paid prior to completion of construction on the Construction or Rehab Analysis. Nevertheless, that amount was included (along with the amounts representing the first 2 equity installments) in the total amount of “HC Equity Proceeds Paid Prior to Completion of Construction ...” shown on line B.3. of not only the revised Construction or Rehab Analysis provided by APD 20 on cure (which, as explained in the comment at Item # 7C, resulted in the threshold failure at Item # 17T), but in the original Construction or Rehab Analysis (*Exhibit J-8*) included in APD 20’s original Application as well. As a result, a construction shortfall (in the amount of the third equity installment shown on the original HC equity commitment) existed at the time of preliminary scoring due to the same equity pay-in structure that resulted in the \$910,360 shortfall described at Item # 17T (and as explained in Item #7C) of the final scoring summary. While a construction shortfall failure was determined to exist at preliminary scoring, the reasons for the shortfall described in the preliminary scoring summary were based on other deficiencies unrelated to the issue involving the equity pay-in structure in the HC equity commitment.

Because the issue involving the equity pay-in structure was not identified or otherwise alluded to during preliminary or NOPSE scoring, Florida Housing is precluded by rule² from assessing a threshold failure for that same issue for the first time at final scoring. Accordingly, the threshold failure for the construction financing shortfall of \$910,360 described at Item # 17T in the final scoring summary of the ADP 20 Application is rescinded.

² Subject to exceptions not germane here, Rule 67-48.004(9), F.A.C., provides in relevant part that “... no Application shall fail threshold or receive a point reduction as a result of any issues not previously identified in [the preliminary or NOPSE scoring processes].”

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 demonstrate site control by providing documentation pursuant to Part III.C.2 of the Application Instructions. If an applicant fails to properly demonstrate this or other threshold issues, Florida Housing's rules mandate that the application be rejected.

5. In its original application, APD 20 demonstrated site control by providing a Contract for Purchase and Sale of Real Property between Mederos-T.M. Alexander Acquisitions, LLC, as the "Seller" and The American Opportunity Foundation, Inc. and Allied Pacific Development, LLC, as "Buyer." APD 20 was not a party to the agreement submitted in the original application.

6. At preliminary scoring, Florida Housing determined that APD 20's application failed threshold requirements for site control because the agreement submitted does not reflect APD 20 as the buyer and no assignment was provided. (Exhibit J-2)

7. During the cure period, APD 20 provided a First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property. This document properly documented the Assignment in the terms of the agreement, although titles on the signature lines of the agreement did not reflect the parties to the agreement.

8. Despite the error in the titles of the signature lines, Florida Housing did not contend that the signatures were invalid or were not the authorized signatories to the agreement. In reviewing the entirety of the stipulated and received exhibits in the APD 20 application, the individuals required to sign the assignment match the parties for an appropriate Assignment and Assumption of Contract for Purchase and Sale of Real Property.

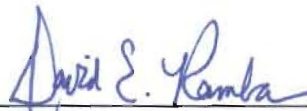
9. There is no question in the assignment submitted as a cure who the seller and new buyer are, and the plain reading of the assignment confirms and explains the relationship between the listed companies.

10. Based on the totality of the application and cure materials, Florida Housing can readily ascertain the correct signatories and parties to the assignment, and the title above the signature lines does not change the terms or the validity and enforceability of the First Amendment to and Assignment and Assumption of Contract for Purchase and Sale of Real Property.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, in is hereby RECOMMENDED that Florida Housing enter a Final Order finding that APD 20 has achieved threshold for site control, and reversing Florida Housing's rejection of Petitioner's application.

Respectfully submitted this 4th day of February, 2010.



David E. Ramba, Hearing Officer

Copies furnished to:

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