

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HERITAGE VILLAGE COMMONS, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

FHFC Case No. 2012-037UC
Application No. 2011-055C

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, Diane D. Tremor, held an informal hearing in the above captioned proceeding in Tallahassee, Florida on September 5, 2012.

APPEARANCES

For Petitioner:

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For Respondent:

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STATEMENT OF THE ISSUES

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Respondent Florida Housing Finance Corporation properly applied its ranking methodology with respect to selecting developments to satisfy the Transit Oriented Development (“TOD”) goal.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 6. Objections were sustained to Petitioner’s proffered Exhibits 1 through 3 relating to rulemaking proceedings occurring subsequent to the 2011 Universal Cycle Application process which is the subject of this proceeding. Joint Exhibit 1 is a Joint Stipulation of Facts and Exhibits. That document basically describes the application process and the circumstances regarding the scoring of Petitioner’s application with regard to the issues in dispute. The Joint Stipulation of Facts and Exhibits (Joint Exhibit 1) is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders, which have been fully considered by the undersigned.

FINDINGS OF FACT

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

1. The Petitioner, Heritage Village Commons, LTD., submitted Application Number 2011-055C in Florida Housing's 2011 Universal Cycle seeking \$1,510,000 in annual federal tax credits to help finance the development of a 120-unit apartment complex for seniors in Longwood, Seminole County, Florida, known as Heritage Village Commons. (Joint Exhibit 1)

2. In light of the benefits of commuter rail, both in enhancing resident mobility and in promoting mass transit for the community at large, Florida Housing established a new, first-time goal in the 2011 Universal Cycle to fund three Transit Oriented Developments from Florida's limited supply of tax credits (the "TOD Goal"). (Joint Exhibit 1) The Application Instructions provide that when selecting eligible unfunded Applications to meet the TOD Goal,

A lower ranked Application will be selected for tentative funding prior to a higher ranked Application if the higher ranked Application is located in a designated TOD area where an Application has already been tentatively selected for funding, . . .

(Joint Exhibit 4) The 2011 Universal Application Instructions, at Part III.A.2.h, lists the "designated TOD areas" by naming individual rail stations within each of four counties. The Instructions refer to these individual rail stations within the four counties as "designated areas." The "designated areas" for Miami-Dade contained

twenty stations, two were listed for Broward County and one each for Palm Beach County and Seminole County. (Joint Exhibit 5) In order to qualify as a TOD, applicants were required to submit, as an Exhibit 20, a form entitled “Local Government Verification of Qualification as a TOD Development.” This form contained a listing of the same rail stations within each of the four counties and required that the rail station relied upon by the Applicant be identified. (Joint Exhibit 2).

3. Petitioner, Heritage Village Commons, LTD., sought funding as a TOD in Seminole County. It was the only applicant to seek TOD status outside of Miami-Dade County. In final rankings, all three of the projects chosen by Florida Housing to fulfill its TOD Goal were located in Miami-Dade County. Had Florida Housing distributed the TOD designations amongst the four designated counties to satisfy its TOD Goal, Petitioner would have been eligible for funding.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because Florida Housing determined to choose three Miami-Dade Applicants to fulfill its TOD Goal, Petitioner, a lower ranked applicant, was deemed ineligible for funding. As such,

Petitioner's substantial interests are affected and Petitioner has standing to challenge Florida Housing's ranking decisions in this proceeding.

The issue for determination in this proceeding is whether Florida Housing improperly applied its ranking methodology with respect to selecting developments to satisfy its TOD Goal. More specifically, the issue is whether Florida Housing's rules, which include the Universal Application and the Universal Application Instructions, required Florida Housing to fund three TOP developments regardless of county or required the ranking of TOP developments to be distributed amongst the four designated counties. It is Petitioner's position that the rules require a distribution of TOD Developments across multiple counties and that one applicant in a county with a funded TOD Development would be skipped over for another applicant in a county without a funded TOD Development. Florida Housing's position is that its ranking methodology refers individually to each of the identified rail stations, and not to the individual counties.

The Universal Application Package or UA1016 (Rev. 2-11), which includes the application forms and the Application Instructions, is adopted by Rule 67-48.004(1)(a), Florida Administrative Code. Petitioner relies upon the different use of the phrases "designated TOD area" and "designated areas" contained within the Application Instructions to conclude that the true intent of the rules was to distribute TOD Developments amongst the various counties, and not amongst the

various rail stations located within a single county. Neither of these terms is further defined by rule.

The pertinent rule language regarding the ranking of the TOD Goal is as follows:

(c) 3 TOD Developments Goal

(i) Notwithstanding Section 4.c. above, when selecting eligible unfunded Applications to meet the Goal of funding 3 TOD Developments, a lower ranked Application will be selected for tentative funding prior to a higher ranked Application if the higher ranked Application is located in a designated TOD area where an Application has already been tentatively selected for funding, even if the higher ranked Application is in Group 1 and the lower ranked Application is in Group 2. Designated TOD areas are listed in Part III.A.2.h. of the Instructions. Once this Goal has been met, this provision will no longer apply.

(Joint Exhibit 4) Part III.A.2.h of the Instructions provide:

For purposes of the 2011 Universal Application Cycle, the designated TOD areas are:

- Designated Areas in Broward County: Deerfield Beach TOD and Sheridan Station TOD;
- Designated Areas in Miami-Dade County: Allapattah Station, Brickell Station, Brownsville Station, Civic Center Station, Coconut Grove Station, Culmer Station, Dadeland North Metrorail, Dadeland South Metrorail, Douglas Rd. Station, Dr. Martin Luther King, Jr. Station, Earlington Heights Station, Government Center Station, Northside Station, Okeechobee Metrorail Station, Overtown Arena Station, Santa Clara Station, South Miami Station, Tri-Rail Metrorail Station, University Station, and Vizcaya Station;

- Designated Area in Palm Beach County: West Palm Beach Station/Seaboard Station; and
- Designated Area in Seminole County: City of Longwood Transit Village.

Indicate whether the proposed Development meets the requirements to qualify as a TOD Development.

(Joint Exhibit 5)

While there is some appeal to Petitioner's position that the words "designated TOP area" refer collectively to a particular county served by commuter rail and all the specified stations therein, as opposed to individual rail stations which are referred to as "designated areas", Florida Housing's interpretation that the intent was to fund three TOD developments regardless of county is not an unreasonable interpretation.

Florida Housing's intent to give preference to proximity to a particular rail station, as opposed to distributing TOP developments among the counties, is indicated on page 123 of the Application Instructions, wherein preference is given to Applicants whose project is less than or equal to 0.125 miles away from a public rail station. (Joint Exhibit 6) The local government Verification form required that a particular rail station be identified. In the case of Miami-Dade County, there would be no need to have an applicant and the local government select one of 20 rail station boxes if the important inquiry were County as opposed to rail station.

If Florida Housing had intended to have a TOD goal of funding only one TOD development per county instead of per designated TOD area, it could have simply stated so in its instructions. Instead of stating that a lower ranked Application would be selected for funding prior to a higher ranked Application if the higher ranked Application is located in a **designated TOD area**, it would have stated “if a higher ranked Application is located in a **county** where an Application has already been tentatively selected for funding”. Moreover, Exhibit 20, the Local Government Verification form, requires that the local government official certify that the proposed Development is located “within the area identified below.” (Joint Exhibit 2) An “area” is not synonymous with a “county”. The “area” refers to the individual rail stations provided on the form. If the goal were to fund one TOD per county, why make the goal number three, since there were four eligible counties? Why even list the individual rail stations within the four counties? The ranking methodology set forth in the Instructions reflects an intent not to overdevelop one particular rail station and to distribute the eligible projects amongst the various rail stations, not amongst the four counties.


While Petitioner’s interpretation would foster Florida Housing’s overall goal to have a diversified rental housing portfolio, Florida Housing’s interpretation does not detract from that goal and constitutes a reasonable interpretation of those portions of the Application and Instructions relating to the TOD Goal to fund three

Transit Oriented Developments with proximity to a rail station. An agency's interpretation of its own rules will be upheld even if that interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *Golfcrest Nursing Home v. Agency for Health Care Administration*, 662 So.2d 1330 (Fla. 1st DCA 1995). Florida Housing's interpretation and implementation of its ranking methodology with regard to the TOD applicants was neither clearly erroneous nor unreasonable and was certainly within the range of permissible interpretations.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered affirming Florida Housing's ranking of the three Miami-Dade County applicants (Applications Numbers 2011-208C, 2011-128C and 2011-181C) as meeting its goal of funding three TOD Developments and denying the relief requested by Petitioner.

Respectfully submitted this 17th day of October, 2012.


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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(3), Florida Administrative Code, Applicants 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, excluding the caption and certificate of service. 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. five (5) calendar days from the date of issuance of the Recommended Order. 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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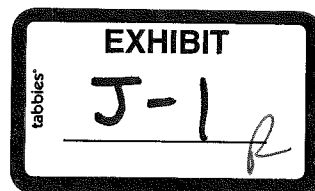
JOINT STIPULATION OF FACTS AND EXHIBITS

Petitioner, Heritage Village Commons, Ltd. (“Heritage Village”), and Respondent, Florida Housing Finance Corporation (“Florida Housing” or “FHFC”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 9:00 am, September 5, 2012, in Tallahassee, Florida, and agree to the following findings of fact and to the admission of the exhibits described below.

The Parties

1. Heritage Village is a Florida limited partnership with its address at 1105 Kensington Park Drive, Suite 200, Altamonte Springs, Florida, 32714, and it is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, 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. Fla. Stat. §420.504.



The 2011 Universal Cycle

3. Florida Housing administers various affordable housing programs, including the following:

(a) The Housing Credit (“HC”) Program, pursuant to Section 42 of the Internal Revenue Code (“I.R.C.”) and to Section 420.5099, Florida Statutes, under which Florida Housing is designated as the “housing credit agency” for the State of Florida within the meaning of Section 42(h)(7)(A) of the I.R.C. and Rule Chapter 67-48, Florida Administrative Code (F.A.C.);¹ and

(b) The HOME Investments Partnerships (“HOME”) Program, pursuant to Section 420.5089, F.S., and Rule Chapter 67-48, F.A.C.

4. The 2011 Universal Cycle Application, through which affordable housing developers apply for funding under the above-described affordable housing programs administered by Florida Housing, together with Instructions and Forms, comprise the Universal Application Package (UA1016 (Rev. 2-11)) adopted and incorporated by reference in Rule 67-48.004(1)(a), F.A.C.

5. Because the demand for HC and HOME funding exceeds that which is available under the HC Program and HOME Program, respectively, qualified affordable housing developments must compete for this funding. To assess the relative merits of

¹ The United States Congress has created a program, governed by Section 42 of the I.R.C., by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of affordable low-income housing for families. These tax credits entitle the holder to a dollar-for-dollar reduction in the holder’s federal tax liability, which can be taken for up to ten years if the project continues to satisfy I.R.C. requirements. The tax credits allocated annually to each state are awarded by state “housing credit agencies” to single-purpose applicant entities created by real estate developers to construct and operate specific multi-family housing projects. The applicant entity then sells this ten-year stream of tax credits, typically to a syndicator, with the sale proceeds generating much of the funding necessary for development and construction of the project. The equity produced by this sale of tax credits in turn reduces the amount of long-term debt required for the project, making it possible to operate the project at below-market-rate rents that are affordable to low-income and very-low-income tenants.

proposed developments, Florida Housing has established a competitive application process, known as the “Universal Cycle,” pursuant to Rule Chapter 67-48, F.A.C. Specifically, Florida Housing’s application process for the 2011 Universal Cycle, as set forth in Rule 67-48.001-.005, F.A.C., involves the following:

- a. the publication and adoption by rule of a “Universal Application Package,” which applicants use to apply for funding under the HC and HOME Programs administered by Florida Housing;
- b. the completion and submission of applications by developers;
- c. Florida Housing’s preliminary scoring of applications, with notice to applicants (preliminary scoring summary);
- d. an initial round of administrative challenges in which an applicant may take issue with Florida Housing’s scoring of another application by filing a Notice of Possible Scoring Error (“NOPSE”);
- e. Florida Housing’s consideration of the NOPSEs submitted, with notice to applicants of any resulting change in their preliminary scores (NOPSE scoring summary);
- f. an opportunity for the applicant to submit additional materials to Florida Housing to “cure” any items for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;
- g. a second round of administrative challenges whereby an applicant may raise scoring issues arising from another applicant’s cure materials by filing a Notice of Alleged Deficiency (“NOAD”);
- h. Florida Housing’s consideration of the NOADs submitted, with notice to applicants of any resulting change in their scores (final scoring summary);
- i. an opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing’s evaluation of any item in their own application for which the applicant was deemed to have failed to satisfy threshold or received less than the maximum score;
- j. final scores, ranking of applications, and award of funding to successful applicants, including those who successfully appeal the adverse scoring of their application; and

- k. an opportunity for applicants to challenge, via informal or formal administrative proceedings, Florida Housing's final scoring and ranking of competing applications where such scoring and ranking resulted in a denial of Florida Housing funding to the challenging applicant.²

6. On or about December 6, 2011, numerous applications were submitted to FHFC seeking tax credit funding. Heritage Village (FHFC Applic. #2011-055C) applied for \$1,510,000 in annual tax credits to help finance the development of its project, a 120-unit apartment complex for seniors in Longwood, Seminole County, Florida.

7. Heritage Village competed for funding among those projects qualifying as a "TOD Development" (a Transit-Oriented Development). To earn this designation, which was one newly introduced in the 2011 Universal Cycle, an applicant had to make the appropriate selection in the application and submit an FHFC form at Exhibit 20 signed by the relevant local government (J-2).

8. Part III.A.2.h of the Application Instructions states:

In order for a proposed Development to qualify as a TOD Development for purposes of this Application all of the following criteria must be met: (i) the Local Government must certify that the proposed Development is located within one of the following areas designated as a Transit-Oriented Development, Transit Oriented Development District, Rapid Transit Zone, Transit Village, or Rapid Transit Development Impact Zone by a Local Government planning agency in its comprehensive plan, land use plan, land development code, or zoning code, (ii) the proposed Development must meet the scoring criteria outlined in the Proximity section of the Application to achieve a Transit Service Score of at least 6 points, based on the proposed Development's proximity to a Public Rail Station, (iii) the Applicant's Competitive HC request amount stated at Part V.A.1. of the Application must be at least 40 percent of the Maximum Competitive HC Request for the applicable county inclusive of any DDA/QCT bonus (as set out at Part V.A.1. of the Instructions), and (iv) at least 50 of the

² This proceeding is the subject of such a challenge. When the challenger is such a proceeding is successful, Florida Housing funding is not taken away from the applicant who was scored or ranked in error and given to the challenger. Instead, the applicant keeps its funding, and the challenger receives its requested funding from the next available funding allocated to Florida Housing. Rule 67-48.005(7), F.A.C.

proposed Development's set-aside units must be located within the designated TOD area. The properly completed and executed Local Government Verification of Qualification as a TOD Development form must be provided behind a tab labeled "**Exhibit 20**".

If the proposed Development will consist of Scattered Sites, the Scattered Sites information required at Part III.A.2.c. of the Instructions must indicate which of the Scattered Sites is at least partially located within the designated TOD area and the number of set-aside units that are located on each of the respective Scattered Sites that are also located within the designated TOD area.

9. Only four counties could qualify for TOD Developments, with Miami-Dade County having the most qualifying locations: Miami-Dade County (20); Broward County (2); Palm Beach County (1), and Seminole County (1).

10. Armed with this form, if the project met several other criteria, including close proximity to the indicated rail station, the project would qualify as a TOD Development. Applic. Instr., pp. 18-19, 123.

11. In light of the benefits of commuter rail, both in enhancing resident mobility and in promoting mass transit for the community at large, FHFC established a first-time goal in the 2011 Universal Cycle to fund three TOD Developments from Florida's limited supply of tax credits (the "TOD Goal"). Applic. Instr., pp. 122, 125-26.

The 2011 Rankings

12. On June 8, 2012, FHFC's Board adopted final scores and rankings (J-3). The Heritage Village project met all of FHFC's threshold application requirements, received the maximum application score of 79 points, the maximum "ability-to-proceed" tie-breaker score of 6.0 points, and a proximity tie-breaker score of 29.75 points out of a possible 36.

13. The final rankings, however, did not result in an award of tax credits to Heritage Village. Instead, all three of the projects funded by FHFC to fulfill its TOD Goal were located in Miami-Dade County: Washington Square Apartments (FHFC Applic. #2011-208C); Metro South Senior Apartments (FHFC Applic. #2011-128C); and West Brickell View Apartments (FHFC Applic. #2011-181C).

14. Heritage Village timely filed its petition alleging a ranking error by Florida Housing and has satisfied Florida Housing's requirements for a challenge of this nature. If, as Heritage Village alleges, Florida Housing incorrectly applied its ranking methodology, then Heritage Village would have received its requested funding as a result of the final rankings. Heritage Village therefore has standing to challenge Florida Housing's ranking decisions in this proceeding.

The Ranking Methodology for the TOD Goal

15. Effective November 22, 2011, Florida Housing adopted by reference in its rules the Universal Application Package for Florida Housing's 2011 Universal Cycle, which includes both the Application and Exhibits to be completed by developers and submitted to Florida Housing, as well as a set of Application Instructions. Rule 67-48.004(1)(a), F.A.C.

16. On page 125 of the Application Instructions (J-4), the following provision appears with respect to the TOD Goal:

Notwithstanding Section 4.c. above, when selecting eligible unfunded Applications to meet the Goal of funding 3 TOD Developments, a lower ranked Application will be selected for tentative funding prior to a higher ranked Application if the higher ranked Application is located in a designated TOD area where an Application has already been tentatively selected for funding, even if the higher ranked Application is in Group 1 and the lower ranked Application is in Group 2. Designated TOD areas are

listed in Part III.A.2.h. of the Instructions. Once this Goal has been met, this provision will no longer apply.

17. The phrase “designated TOD area” as used in the above-quoted TOD ranking provision is a term new to the 2011 Universal Cycle. It is not a defined term, but on page 19 of the Application Instructions (Part III.A.2.h.), individual rail stations are listed under each of the four eligible counties as “Designated Areas,” with these listings grouped by county and introduced as “designated TOD areas,” as set forth below (J-5):

For purposes of the 2011 Universal Application Cycle, the designated TOD areas are:

- Designated Areas in Broward County: Deerfield Beach TOD and Sheridan Station TOD;
- Designated Areas in Miami-Dade County: Allapattah Station, Brickell Station, Brownsville Station, Civic Center Station, Coconut Grove Station, Culmer Station, Dadeland North Metrorail, Dadeland South Metrorail, Douglas Rd. Station, Dr. Martin Luther King, Jr. Station, Earlington Heights Station, Government Center Station, Northside Station, Okeechobee Metrorail Station, Overtown Arena Station, Santa Clara Station, South Miami Station, Tri-Rail MetroRail Station, University Station, and Vizcaya Station;
- Designated Area in Palm Beach County: West Palm Beach Station/ Seaboard Station; and
- Designated Area in Seminole County: City of Longwood Transit Village.

Official Recognition

18. The parties ask the Hearing Officer to take official recognition (judicial notice) of Rule Chapter 67-48, F.A.C., as well as the incorporated Universal Application Package (UA1016 (Rev. 2-11)), which includes the forms and instructions.

19. The parties stipulate, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of the Florida Housing Finance Corporation


and to any Rules promulgated by the Florida Housing Finance Corporation, including past and present versions of the Universal Cycle Application, Instructions, and any forms and exhibits attached thereto or incorporated by reference therein.


Evidentiary Stipulations

The parties offer the following joint exhibits into evidence:

- Exhibit J-1: This Joint Stipulation of Facts and Exhibits.
- Exhibit J-2: Exhibit 20 from the 2011 Universal Application.
- Exhibit J-3: 2011 Universal Application Cycle Ranked Order (June 8, 2012).
- Exhibit J-4: Pages 125-126 from the 2011 Universal Application Cycle Instructions.
- Exhibit J-5: Pages 18-19 from the 2011 Universal Application Cycle Instructions.

Respectfully submitted this 5th day of September, 2012.

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