

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

LULAV SQUARE APARTMENTS,
LIMITED PARTNERSHIP,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

FHFC Case No. 2012-039UC
Application No. 2011-126C

Respondent.

_____ /

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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Metz, Husband & Daughton, P.A.
P.O. Box 10909
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For Respondent:

Matthew A. Sirmans
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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 seven applications properly qualified for the Development Category of "Preservation," pursuant to Florida Housing's rule requirements.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 5. Petitioner's Exhibits 1 through 3 and Respondent's Exhibit 1 were also received into evidence. 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 and other applications 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, Lulav Square Apartments Limited Partnership, submitted Application Number 2011-126C in Florida Housing's 2011 Universal Cycle seeking \$1,806,287 in annual federal tax credits to help finance the development of a 140-unit apartment complex for seniors in Miami-Dade County, Florida. This project involves the acquisition and substantial rehabilitation of an older affordable housing development located in a set of historic buildings in Miami Beach. (Joint Exhibit 1)

2. Petitioner competed for funding in the "Preservation Set-Aside" category, in which Florida Housing reserved 35% of the state's available tax credits for those projects qualifying under the Development Categories of "Preservation" or "Acquisition/Preservation." These two Development Categories denote projects seeking to rehabilitate older (pre-1992) affordable housing developments originally financed through federal programs administered by the U.S. Department of Housing and Urban Development ("HUD") or the U.S. Department of Agriculture's Rural Development Services ("RD"). Rule 67-48.002(90), Florida Administrative Code. (Joint Exhibit 1)

3. Petitioner's application met all of Florida Housing'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 33.5 points out of a possible 36. The final rankings, however, did

not result in an award of tax credits to Petitioner. Seven other applications with a slightly higher proximity tie-breaker score and which also selected the Development Category of "Preservation" for projects located in Miami-Dade County were ranked higher than Petitioner. These included Applications Numbers 2011-048C, 2011-049C, 2011-050C, 2011-053C, 2011-111C, 2011-114C and 2011-213C. Three of these seven applicants (2011-048C, 2011-049C and 2011-050C) were ultimately awarded tax credit funding. Petitioner is challenging all seven of these applications on the basis that they failed to meet threshold requirements regarding their status in the "Preservation" Development Category. Had the seven applications been deemed to have failed threshold, then Petitioner would have received its requested funding as a result of final rankings. (Joint Exhibit 1)

4. Part III.A.3.a.(3)(c) of the Universal Application Instructions requires an applicant seeking to qualify for the Development Category of "Preservation" to provide the following documentation:

- (c) The Applicant must provide behind a tab labeled "**Exhibit 23**" a letter from HUD or RD, dated within 12 months of the Application Deadline, which includes the following information:
 - i. Name of the Development;*
 - ii. Address of the Development;
 - iii. Year built;
 - iv. Total number of units that receive PBRA and/or ACC;
 - v. The HUD or RD program currently associated with the existing development; and

- vi. Confirmation that the Development has not received financing from HUD or RD after 1992 where the rehabilitation budget was at least \$10,000 per unit.

*For purposes of this provision, the Name of the Development may be the name at the time of the PBRA, and/or ACC award.

If the Application does not qualify for the Development Category of Preservation or Acquisition and Preservation, the Application will fail threshold and the proposed Development will automatically be deemed to be RA Level 6.

(Joint Exhibit 2)

5. In the submissions of each of the seven challenged applications, the Applicant provided a letter from HUD as their Exhibit 23. These identical letters supplied in individual bulleted statements each of the items required by Florida Housing in subsections i. through v. of the Instructions quoted above in Paragraph 4 herein. However, in response to the requirement of subsection vi (“confirmation that the Development has not received financing from HUD or RD after 1992 where the rehabilitation budget was at least \$10,000”), the HUD letters state:

The existing development is a Public Housing Program for eligible individuals and/or households, and the development has not received financing from HUD on any one given year for the sole purpose of rehabilitation where the rehabilitation budget was at least \$10,000 per unit.

(Joint Exhibits 4 and 5)

6. Notices of Possible Scoring Errors (“NOPSEs”) were filed challenging the sufficiency of these letters from HUD, but Florida Housing accepted the letters as satisfactory.

7. Petitioner’s own Exhibit 23 contains a statement from HUD that “Lulav Square has not received any additional financing from HUD after 1992.” (Petitioner’s Exhibit 1). A HUD letter submitted on behalf of another applicant states: “The subject properties have not received HUD financing for unit rehabilitation from 1992 to current date.” (Petitioner’s Exhibit 2) Another applicant submitted a letter from HUD which states: “Development has not received financing from HUD or RD after 1992 where the rehabilitation budget was at least \$10,000 per unit.” (Petitioner’s Exhibit 3)

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 that the HUD letters from seven applicants were sufficient to satisfy its rule requirements, 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 accepted the HUD letters from the seven challenged applicants. More specifically, the issue is whether the language contained in those letters (“the development has not received financing from HUD on any one given year for the sole purpose of rehabilitation where the rehabilitation budget was at least \$10,000 per unit”) satisfies the Application Instructions of a confirmation from HUD that “the Development has not received financing from HUD or RD after 1992 where the rehabilitation budget was at least \$10,000 per unit.”

There are critical differences between Florida Housing’s rule requirement and the language used in the letters from HUD in the seven challenged applications. The Instructions require a confirmation that a development has not received financing from HUD **after 1992 where the rehabilitation budget was at least \$10,000 per unit.** HUD’s confirmation that the developments had not received financing from HUD **on any one given year for the sole purpose of rehabilitation where the rehabilitation budget was at least \$10,000 per unit** has an entirely different meaning. As pointed out by Petitioner, Florida Housing’s requirement refers to a maximum of \$10,000 per unit since 1992, and not \$10,000 per unit per year or on any one given year. As an example, under a “per year” scenario, HUD could commit \$9,999 per unit in rehabilitation funding to a development every year since the specified year of 1992, thus amounting to

\$199,980 per unit. While such financing would be less than \$10,000 per unit “on any one given year,” per the HUD letter, it is not less than Florida Housing’s required maximum of \$10,000 per unit since 1992. This reasonable interpretation of the HUD letters would thwart the objective of restricting the Preservation Set-Aside to older affordable housing developments that have not been materially renovated with public funds in the last 20 years.

It is true that Florida Housing did not require HUD to complete a form with specifically quoted language, as it requires from third parties on other occasions. However, the Instructions did require HUD to materially comply with the express mandate of confirming that the project had not received financing after 1992 where the rehabilitation budget was at least \$10,000 per unit. The HUD letters with respect to the seven challenged applications simply do not meet that express requirement.


Respondent Florida Housing argues that Petitioner, as well as other competing applicants who filed NOPSEs with regard to the HUD letters, failed to demonstrate in detail any actual violations or any actual evidence that the seven challenged applicants were not eligible to be a Preservation development. It is further argued that Florida Housing could not “ding” these seven applicants because its Instructions did not specifically state what language it required to be in the HUD letter.

These arguments ignore the fact that it is the Applicant's burden to show compliance with Florida Housing's rules in the competitive application process. Moreover, the requirement that there be a confirmation from HUD that a development "has not received financing . . . after 1992 where the rehabilitation budget was at least \$10,000 per unit" is not confusing or ambiguous. A representation that the development "has not received financing from HUD on any one given year for the sole purpose of rehabilitation where the rehabilitation budget was at least \$10,000 per unit" simply does not meet this requirement. Those seven applicants were incorrectly scored. A proper scoring would have resulted in Petitioner receiving its requested funding.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered awarding Petitioner, Lulav Square Apartments Limited Partnership, its requested tax credit funding from the next available allocation.

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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FLORIDA HOUSING FINANCE
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Respondent.

JOINT STIPULATION OF FACTS AND EXHIBITS

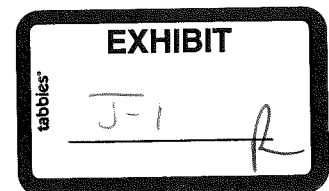
Petitioner, Lulav Square Apartments Limited Partnership (“Lulav Square”), and Respondent, Florida Housing Finance Corporation (“Florida Housing” or “FHFC”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 9:00 am, September 5,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

The Parties

1. Lulav Square is a Florida limited partnership with its address at 2206 Jo-An Drive, Sarasota, Florida 34231, 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

Attachment A



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.

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.

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 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 Florida Housing seeking tax credit funding. Lulav Square (FHFC Applic. #2011-126C) applied for \$1,806,287 in annual tax credits to help finance the development of its project, a 140-unit apartment complex for seniors in Miami-Dade County, Florida. This project involves the acquisition and substantial rehabilitation of an older affordable housing development located in a set of historic buildings in Miami Beach.

7. Lulav Square competed for funding in the "Preservation Set-Aside," in which Florida Housing reserved 35% of its available tax credits for those projects qualifying under the Development Categories of "Preservation" or "Acquisition/Preservation." FHFC 2011 Universal Cycle Applic. Instr., p. 122. These two Development Categories denote projects seeking to rehabilitate older (pre-1992) affordable housing developments originally financed through federal programs administered by the U.S. Department of Housing and Urban Development ("HUD") or the U.S. Department of Agriculture's Rural Development Services ("RD"). Rule 67-48.002(90), F.A.C.

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.

8. On June 8, 2012, Florida Housing's Board of Directors adopted final scores and rankings. The Lulav Square project met all of Florida Housing'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 33.5 points out of a possible 36. The final rankings, however, did not result in an award of tax credits to Lulav Square.

The Challenged Applications

9. In this proceeding, Lulav Square challenges Florida Housing's scoring of the following seven applications (collectively, "the Challenged Applications"), which, like Lulav Square, proposed developments located in Miami-Dade County:

- (a) Stirrup Plaza Preservation Phase One (FHFC Applic. #2011-048C);
- (b) South Miami Plaza Preservation (FHFC Applic. #2011-049C);
- (c) Dante Fascell Preservation (FHFC Applic. #2011-050C);
- (d) Haley Sofge Preservation Phase One (FHFC Applic. #2011-053C);
- (e) Claude Pepper Preservation Phase One (FHFC Applic. #2011-111C);
- (f) Jack Orr Plaza Preservation Phase One (FHFC Applic. #2011-114C); and
- (g) Gwen Cherry (FHFC Applic. #2011-213C).

10. Like Lulav Square, all of the Challenged Applications competed for tax credit funding in the Preservation Set-Aside. Each of the Challenged Applications selected the Development Category of "Preservation." As of the adoption of final scores and rankings, Florida Housing deemed each of the Challenged Applications to have met Florida Housing's threshold requirements, including qualification for the Development Category of "Preservation." Pursuant to Florida Housing's ranking methodology,

including application of the SAUL for Miami-Dade County,³ each of the Challenged Applications was ranked above Lulav Square due to their somewhat higher proximity tie-breaker scores, with Florida Housing ultimately awarding tax credit funding to three of the Challenged Applications: Stirrup Plaza Preservation Phase One (FHFC Applic. #2011-048C); South Miami Plaza Preservation (FHFC Applic. #2011-049C); and Dante Fascell Preservation (FHFC Applic. #2011-050C).

11. Lulav Square timely filed its petition alleging a scoring error by Florida Housing common to each of the Challenged Applications and has satisfied Florida Housing's requirements for a challenge of this nature. If, as Lulav Square alleges, the Challenged Applications should have failed threshold and should not have been ranked for funding, then Lulav Square would have received its requested funding as a result of the final rankings. Lulav Square therefore has standing to challenge Florida Housing's scoring decisions in this proceeding.

The "Preservation" Development Category & The Challenged Applications

12. 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.

³ The fact that Lulav Square and the Challenged Applications all propose projects located in Miami-Dade County is of special significance. In an effort to distribute its available tax credits across the state, Florida Housing uses a Set-Aside Unit Limitation ("SAUL") that restricts the number of units it will fund in any given county. Thus, an application ranked higher than applications in other counties may nonetheless be skipped over for funding if the SAUL for its county has been exceeded under Florida Housing's rules.

13. Part III.A.3.a.(3)(c) of the 2011 Universal Application Instructions (J-2) requires an Applicant seeking to qualify for the Development Category of “Preservation” to document the following (emphasis added):

- (c) The Applicant must provide behind a tab labeled “**Exhibit 23**” a letter from HUD or RD, dated within 12 months of the Application Deadline, which includes the following information:
 - i. Name of the Development*;
 - ii. Address of the Development;
 - iii. Year built;
 - iv. Total number of units that receive PBRA and/or ACC;
 - v. The HUD or RD program currently associated with the existing development; and
 - vi. Confirmation that the Development has not received financing from HUD or RD after 1992 where the rehabilitation budget was at least \$10,000 per unit.

*For purposes of this provision, the Name of the Development may be the name at the time of the PBRA and/or ACC award.

If the Application does not qualify for the Development Category of Preservation or Acquisition and Preservation, the Application will fail threshold and the proposed Development will automatically be deemed to be RA Level 6.

14. Page 13 of the 2011 Universal Application itself (J-3) cross-references this provision from the Application Instructions and states the following with respect to the Development Category selected by the applicant:

If selecting Preservation or Acquisition and Preservation, the Applicant must meet the required criteria and provide, behind a tab labeled “**Exhibit 23**”, the required information, as outlined at Part III.A.3.a.(3) of the Instructions.

15. In the original submission of each of the Challenged Applications, with the exception of Gwen Cherry, the Applicant selected the Development Category of “Preservation” and responded to these requirements by providing a letter from HUD in Exhibit 23, which states as follows in its closing paragraph (J-4):

The existing development is a Public Housing Program for eligible individuals and/or households, and the development has not received financing from HUD on any one given year for the sole purpose of rehabilitation where the rehabilitation budget was at least \$10,000 per unit.

16. Lulav Square filed NOPSEs challenging the sufficiency of these letters from HUD, but Florida Housing accepted the letters as satisfactory in its NOPSE scoring.

17. For Gwen Cherry, the Applicant selected the Development Category of “Preservation” in its original application, but the Applicant did not provide the required HUD letter. Instead, the Applicant submitted the HUD letter as part of its cure materials, and this letter contains the same language quoted in paragraph 16 (J-5).

18. Ultimately, Florida Housing accepted the HUD letters in the Challenged Applications and deemed each of the Challenged Applications to have met Florida Housing’s threshold requirements for purposes of final ranking, including qualification for the Development Category of “Preservation.”

Official Recognition

19. 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.


20. 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: Pages 23-24 from the 2011 Universal Application Cycle Instructions.
- Exhibit J-3: Pages 13-14 from the 2011 Universal Application.
- Exhibit J-4: Composite - Exhibit 23 from the Challenged Applications (except Gwen Cherry).
- Exhibit J-5: Exhibit 23 from the Gwen Cherry Application (FHFC Applic. #2011-213C).

Respectfully submitted this 5th day of September, 2012.

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