

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

PEARL APARTMENTS, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

FHFC Case No. 2012-047UC
Application No. 2011-158C

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, commencing on August 23, 2012, and continuing on February 25, 2013.

APPEARANCES

For Petitioner:

Douglas Manson and Craig Varn
Manson Bolves, P.A.
1101 West Swan Avenue
Tampa, Florida 33606
and
Michael G. Maida
Michael G. Maida, P.A.
1709 Hermitage Blvd., Ste. 201
Tallahassee, Florida 32308

For Respondent: Matthew A. Sirmans
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUES

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner, PEARL APARTMENTS, LTD., should receive funding for its application submitted in Florida Housing's 2011 Universal Cycle.

PRELIMINARY STATEMENT

The informal hearing in this cause commenced on August 23, 2012. After hearing argument from counsel, Florida Housing's Motion to Dismiss for Lack of Standing and Petitioner's Motion for Summary Recommended Order were denied, and a continuance was granted to allow Petitioner the opportunity to depose Jean Salmonsens, Housing Development Manager at Florida Housing. The informal proceeding was recommenced and concluded on February 25, 2013.

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 3. Joint Exhibit 1 is a Joint Stipulation of Facts and Exhibits. That document basically describes the application process and stipulates to the June 8, 2012 Final Ranking of all applications (Joint Exhibit 2) adopted by Florida Housing's Board and provided to all applicants, along with a Notice of

Rights regarding challenges to the final ranking or scoring of other applicants (Joint Exhibit 3). 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.

During the hearings, Florida Housing stipulated that the two applications challenged in Petitioner's initial Petition, Metro South (Application Number 2011-128C) and Collins Park (Application No. 2011-052C), were ineligible for funding. However, it is Florida Housing's position that even if those two applicants are removed from consideration, Petitioner would still not be entitled to funding because another applicant, Stirrup Plaza (Application Number 2011-048C), was ranked higher than the Petitioner. This is the basis for Florida Housing's Motions to Dismiss for Lack of Standing, as well as the Petitioner's Motion to Amend its Petition so as to incorporate a challenge to the Stirrup Plaza application.

As requested by the parties, official recognition is taken of the adopted rules and Final Orders of Florida Housing.

Various other Motions and responses were filed by the parties. The Findings and Conclusions in this Recommended Order render the substance of those Motions moot.

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, PEARL APARTMENTS, LTD., timely submitted Application Number 2011-158C in the 2011 Universal Cycle for an allocation of \$2,561,000 in annual federal tax credits to help finance the development of a proposed 100-unit high rise complex in Miami-Dade County. (Joint Exhibit 1)

2. Petitioner competed for funding in the Transit Oriented Development (“TOD”) Category, for which it was Florida Housing’s goal to fund three applicants. (Application Instructions, page 125)

3. On June 8, 2012, Florida Housing issued its “final” scoring and ranking of all applicants. This listing included those applicants who were awarded funding in the various development categories, as well as a listing of “Eligible Unfunded Applications” and a listing of “Ineligible Applications.” Petitioner’s application was listed as an “Eligible Unfunded Application,” receiving 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 36 of a possible 37 proximity tie-breaker points. The June 8, 2012 listing showed that the three TOD Category awards went to Application Numbers 2011-208C (Washington Square), 2011-128C (Metro South) and 2011-181C (West Brickell View). The listing

showed that Application Number 2011-048C (Stirrup Plaza) was awarded funding in the “Preservation Set-Aside” Development Category. None of the awarded applicants appeared in the listing of “Eligible Unfunded Applications.” According to the June 8, 2012 Ranked Order listing, the only application appearing in the “Eligible Unfunded Applications” listing ranked higher than Petitioner and otherwise meeting the TOD Category criteria was Application Number 2011-052C (Collins Park). (Joint Exhibit 2)

4. The June 8, 2012 “final” ranking and scoring list was provided to all applicants, along with a Notice of Rights advising applicants of their rights and various responsibilities if they wished to contest the final ranking or scoring of other applicants. This Notice advised applicants, in part, that a Petition must allege facts “sufficient to demonstrate that, but for the specifically identified threshold, scoring or ranking errors in the challenged Application, its Application would have been in the funding range **at the time** Florida Housing provided the Applicant with its final ranking.” (Emphasis added) (Joint Exhibit 3) This language, provided to all applicants in their Notice of Rights, is essentially identical to that appearing in Rule 68-48.005(c), Florida Administrative Code.

5. Petitioner’s initial Petition challenged the scoring and ranking of Metro South (Application Number 2011-128C) and Collins Park (Application No. 2011-052C). As noted above, Metro South was one of the three awarded

applicants in the TOD Category and Collins Park was the only eligible applicant ranked higher than Petitioner in the listing of “Eligible Unfunded Applications” appearing on the June 8, 2012 listing approved by Florida Housing and sent to all applicants along with their Notice of Rights. Petitioner’s Petition alleged that but for the erroneous scoring and ranking of Metro South and Collins Park, its application would have been entitled to funding in the TOD Category.

6. When Florida Housing receives Petitions challenging the scoring and/or ranking of competing applications, it is Florida Housing’s practice to initially assume that the challenged applicants are not eligible for funding and to perform its scoring process anew by eliminating the challenged applicants and re-ranking the remaining applicants, including the petitioning applicant. The result reached is then applied to determine if the petitioning applicant would have received funding were it not for the scoring or ranking of the challenged competing applicants. This practice is not described or required by any existing rule adopted by Florida Housing, nor do the results change funding decisions previously made with respect to initially funded applicants appearing on the June 8, 2012 ranked order listing. After Florida Housing performed this exercise regarding Petitioner’s challenge, Florida Housing took the position that Petitioner lacked standing on the ground that even if Metro South and Collins Park were eliminated from consideration, Petitioner would not be entitled to funding because the next

applicant to move into the funding range in the TOD Category would be Stirrup Plaza (Application No. 2011-048C). As noted above, Stirrup Plaza's application was not on the June 8, 2012 listing of "Eligible Unfunded Applications," but instead was listed as an awarded applicant under the "Preservation Set-Aside" Category.

7. On November 12, 2012, a date after the Petitioner's initial Petition was filed and after Florida Housing's rescoring of applications as a result of Petitioner's Petition, Florida Housing entered a Final Order in the case of Lulay Square Apartments, LP v. Florida Housing Finance Corporation, FHFC Case No. 2012-039), holding that Stirrup Plaza failed a threshold requirement and did not qualify for the Development Category of Preservation.

8. While maintaining its position that it sufficiently alleged standing in its initially-filed Petition challenging the scoring and ranking of the Metro South and Collins Park applications, Petitioner filed a Motion to Amend its Petition and an Amended Petition which also challenged the scoring and ranking of the Stirrup Plaza application on the identical grounds alleged and ruled upon in the Lulay Square proceeding. Florida Housing opposed the Motion to Amend and continued to assert that the Petitioner lacked standing to go forward with its challenge because Stirrup Plaza would move into the open slot created by the elimination of the Metro South and Collins Park applications.

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. The ultimate issue in this case is whether Petitioner is entitled to receive funding in the TOD category due to the alleged and stipulated erroneous scoring and/or ranking of the Metro South and the Collins Park applications. Stated differently, the issue is whether Petitioner is precluded from being funded because, even if the Metro South and Collins Park applications were eliminated, a new and revised re-ranking of applications would result in the Stirrup Plaza application filling the third open slot in the TOD category. These issues are resolved in Petitioner's favor, as more fully discussed below.

Florida Housing's Application Instructions, which are adopted as a rule by Rule 67-48.004(1)(a), Florida Administrative Code, dictate the manner in which Florida Housing is to rank and select applicants for funding. With regard to the TOD Category, under which Petitioner sought funding, the Instructions require that an attempt be made first to select one applicant which meets the 1/8th Mile Preference, and next, "the highest ranked Application(s) among **all remaining unfunded Applications that are eligible to meet the TOD Goal** will be funded

until the Goal to fund 3 TOD Developments has been met.” (Emphasis supplied) (Application Instructions, pages 125-26 at Section(c)(ii) and (iii)). Applying that rule to the facts as reflected in Joint Exhibit 2, the three developments awarded funding pursuant to the “final” ranked order furnished to all applicants were Washington Square (Application Number 2011-028C), Metro South (Application Number 2011-128C) and West Brickell View (Application Number 2011-181C). If Metro South is eliminated, as Florida Housing has stipulated it should be for the purposes of this proceeding, the next remaining eligible “unfunded” application to fill Metro South’s slot, according to Florida Housing June 8, 2012, “final” ranking, would be Collins Park. If Collins Park is eliminated from consideration, as Florida Housing has stipulated it should be for the purposes of this proceeding, the next remaining eligible “unfunded” application to fill the third TOD slot is Petitioner, according to Florida Housing’s June 8, 2012 “final” ranking approved by the Board and furnished to all applicants. Stirrup Plaza was not an “eligible unfunded application,” but instead was a funded applicant under the Preservation Set-Aside Category. Consequently, Petitioner should be awarded funding in the TOD Category.

Competing applicants are required to base their challenges upon facts existing “at the time” Florida Housing provides its final ranking. Rule 67-48.005(5)(c), Florida Administrative Code. Also See Joint Exhibit 3. Here,

Florida Housing adopted and provided all applicants its final ranking (Joint Exhibit 2) on June 8, 2012. That final ranking demonstrates that Stirrup Plaza was awarded funding in the “Preservation Set-Aside” Category, and thus was not an “unfunded” applicant eligible for consideration in the TOD Category within the clear meaning of the Ranking and Selection Criteria set forth on pages 125 and 126 of the Application Instructions.

Florida Housing argues that Rule 67-48.005(c) does not specifically state that an applicant need not challenge a higher ranked application that has already received funding. That statement is true, but it ignores the well-established maxim that rules must be read in *pari materia* so as to give effect to all their provisions. The Application Instructions constitute rules and those Instructions specifically provide that when fulfilling the TOD goal, only eligible “unfunded” applicants are to be considered. The fact that Florida Housing may be required to fulfill the TOD goal prior to fulfilling other goals does not negate the fact that “at the time” of Petitioner’s Petition, Stirrup Plaza was not an “unfunded” applicant, and thus it was not an eligible applicant for consideration in the TOD Category.


In summary, Petitioner’s initial Petition sufficiently alleged that but for the Metro South and Collins Park applicants, Petitioner would be entitled to funding in the TOD Category. Petitioner was not required to challenge the Stirrup Plaza application. Florida Housing having stipulated that Metro South and Collins Park

are ineligible for funding in the TOD Category, Petitioner becomes one of the three eligible applicants entitled to funding in that TOD category.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Florida Housing enter a Final Order holding that Petitioner, PEARL APARTMENTS, LTD., be awarded its requested tax credit funding from the next available allocation for the project identified in its Application Number 2011-158C.

Respectfully submitted this 14th day of March, 2013.


DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation
Sundstrom, Friedman & Fumero, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Copies furnished to:

Douglas Manson and Craig Varn
Manson Bolves, P.A.
1101 West Swan Avenue
Tampa, Florida 33606

Michael G. Maida
Michael G. Maida, P.A.
1709 Hermitage Blvd., Ste. 201
Tallahassee, Fl 32308

Matthew A. Sirmans
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(6), 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.