



May 23, 2012

VIA HAND DELIVERY

Della M. Harrell, Clerk  
Florida Housing Finance Corporation  
227 North Bronough Street, Suite 5000  
Tallahassee, FL 32301-1329

Re: New Tidewater Apartments, LLC v. Florida Housing Finance Corporation  
FHFC Case No. 2012-001 UC

Dear Ms. Harrell:

Enclosed is my Recommended Order in the referenced proceeding, along with Joint Exhibits 1 through 6, Petitioner's proffered Exhibit 1, and the parties' Proposed Recommended Orders. I did not receive a transcript of the informal hearing.

By copies of this letter and the Recommended Order, the parties are advised that the Recommended Order and the record of the hearing are being transmitted to your office on this date.

Very sincerely yours,

Diane D. Tremor

DDT/bsr  
Enclosures

cc: Michael P. Donaldson, Esquire  
Hugh Brown, Esquire

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

NEW TIDEWATER APARTMENTS, LLC

Petitioner,

vs.

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

FHFC Case No. 2012-001UC  
Application No. 2011-056C

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**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 May 7, 2012.

**APPEARANCES**

For Petitioner:

Michael P. Donaldson  
Carlton Fields, P.A.  
P.O. Drawer 190  
215 S. Monroe St., Suite 500  
Tallahassee, FL 32302

For Respondent:

Hugh Brown  
Deputy General Counsel  
Florida Housing Finance Corporation  
227 North Bronough Street, Ste. 5000  
Tallahassee, FL 32301-1329

## **STATEMENT OF THE ISSUES**

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application met threshold requirements for Site Control.

## **PRELIMINARY STATEMENT**

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 6.<sup>1</sup> 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.

The sole issue in this case is identical to an issue raised in the case of *New Madison Apartments, LLC vs. Florida Housing Finance Corporation*, FHFC Case No. 2012-002UC (Application No. 2011-057C), an informal proceeding conducted by the undersigned on May 7, 2012. Accordingly, counsel for the parties adopted their legal arguments made in the *New Madison Apartments* proceeding as their legal arguments in the instant proceeding.

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<sup>1</sup> Respondent's objection to Petitioner's Exhibit 1, a document prepared after the close of the application process, was sustained.

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, New Tidewater Apartments, LLC, submitted Application Number 2011-056C in Florida Housing's 2011 Universal Cycle seeking \$694,170 in annual federal tax credits to help finance the development of a 100-unit apartment complex in Perry, Florida, known as Perrytowne Apartments. (Joint Exhibit 1)

2. The Universal Cycle Application and Application Instructions, at Part III( C )(2), require an applicant to demonstrate, as a threshold requirement, Site Control by providing specified documentation. In response to this requirement, Petitioner submitted in its initial application an "Agreement of Purchase and Sale for Perrytowne Apartments" made and executed on December 2, 2011. That Agreement identifies Griffin Heights, LLC as the Seller and Petitioner as the Purchaser, and references a 100-unit apartment complex located in Perry, Florida. (Joint Exhibit 2)

3. In its preliminary scoring of Petitioner's application, Florida Housing concluded that Petitioner failed to meet threshold requirements with regard to Site

Control for two reasons. First, the Agreement for Purchase and Sale attached as Exhibit 27 of the Application did not include an Exhibit A providing a legal description of the property. Second, Section 7.17 of the Agreement for Purchase and Sale states that “The sale of the property by the Seller to the Purchaser requires the written consents of its partners,” and Petitioner failed to provide evidence of the consent of the partners. (Joint Exhibit 3)

4. In response to this preliminary scoring, Petitioner submitted two Cure Forms. (Joint Exhibit 4) The first form attached a copy of the December 2, 2011 “Agreement of Purchase and Sale for Perrytowne Apartments,” along with an Exhibit A containing a legal description of the property and an “Addendum to the Agreement of Purchase and Sale.” The second Cure Form attached an identical “Addendum to the Agreement of Purchase and Sale.” The Addendum attached as Cures purports to serve as evidence of the written consents of the partners, as required by Section 7.17 of the Purchase and Sale Agreement. However, on two occasions in the Addendum, there is reference to a Purchase and Sale Agreement dated November 27, 2011, and no reference to a December 2, 2011 Agreement. The Addendum refers to the same Seller and the same Purchaser as the December 2, 2011 Purchase and Sale Agreement, as well as the same 100-unit apartment complex located in Perry, Florida. It appears that the same representatives of the

parties signed both the Addendum and the December 2, 2011 Purchase and Sale Agreement, and that the same person witnessed the signatures on both documents.

5. In its final scoring of Petitioner's application, Florida Housing concluded that Petitioner cured the initial defect regarding the legal description of the property, but failed to cure the defect with regard to Paragraph 7.17 of the Purchase and Sale Agreement. More specifically, Florida Housing determined that the Addendum submitted as a Cure did not satisfy the partners' consent requirement of Section 7.17 because "the Agreement referenced in the Addendum is dated November 27, 2011, and not December 2, 1011." (Joint Exhibit 5, page 7)

#### **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 Petitioner was ineligible for funding due to failure to meet a threshold requirement, Petitioner's substantial interests are affected by Florida Housing's proposed agency action.

The issue for determination in this proceeding is whether Petitioner submitted sufficient information to satisfy the threshold requirement that it has control over the site of its proposed development ("Site Control").

In order to satisfy the threshold requirement of Site Control, Petitioner submitted a Purchase and Sale agreement dated December 2, 2011, and a Cure document entitled “Addendum to the Agreement of Purchase and Sale” which, on two separate occasions, refers to a Purchase and Sale Agreement dated November 27, 2011. Petitioner argues that there is no confusion caused by this alleged inconsistency because the Addendum references the same parties, the same project, the same Section 7.17 which requires the consent of the partners, and even contains the same signatures and witnesses as the December 2, 2011 Agreement. Petitioner relies upon the cases of *Providence Square Association, Inc. v. Biancardi*, 507 So.2d 1366 (Fla. 1987), and *DR Lakes v. Brandsmart U.S.A. of West Palm Beach*, 819 So.2d 971 (Fla. 4<sup>th</sup> DCA 2002), for the proposition that instruments based on mutual mistake may be reformed so as to conform to the intent of the parties. Petitioner also relies on *Finlay Interests 35, Ltd v. Florida Housing Finance Corporation*, FHFC Case No. 2005-019UC (Final Order August 25, 2008), for the proposition that rejection of Petitioner’s application would be unreasonable when based upon the inconsistency of dates referenced in the Addendum submitted by Petitioner as a Cure.

The cases relied upon by Petitioner are totally distinguishable. The *Finlay Interests* case found it unreasonable to reject evidence regarding Site Control where an Assignment referred to a Purchase and Sale Agreement by the date

signed by an escrow agent rather than the effective date of the Agreement. Florida Housing had no rule requiring that the only way to identify a contract is by reference to an “effective date.” Here, Petitioner made no reference to any date appearing in the December 2, 2011 Agreement. Instead, Petitioner referenced a Purchase and Sale Agreement dated November 27, 2011. Such a document either does not exist or it does exist and was not attached to Petitioner’s application. In either event, Petitioner did not meet threshold with regard to Site Control.

The *Providence Square* and the *DL Lakes* cases likewise do not support Petitioner’s argument in this case. Those cases resulted from judicial evidentiary proceedings wherein the Courts recognized their equitable power to reform a document on the ground of mutual mistake in order to reflect the parties’ true intent as demonstrated by parole evidence beyond the written instrument for which reformation was sought. When Florida Housing reviews and scores the applications presented to it, it is not permitted to receive or rely upon any extrinsic evidence beyond that submitted by the applicant during the application process.

The Universal Application Instructions, at page 2, and Florida Housing’s rules, at Rule 67-48.004(1)(b), Florida Administrative Code, require applications to be complete. To demonstrate Site Control, Petitioner submitted a Purchase and Sale Agreement which required the consent of the Seller’s partners to the sale of the property. Since the evidence Petitioner presented in its Cure to demonstrate the

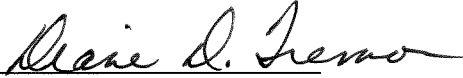


consent of the Seller's partners referenced a Purchase and Sale Agreement which bore a date different than the Purchase and Sale Agreement Petitioner submitted in its application, Petitioner failed to demonstrate Site Control. Florida Housing did not err in deeming Petitioner to have failed threshold requirements regarding Site Control.

**RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law stated herein, it is RECOMMENDED that a Final Order be entered concluding that Petitioner's application failed to meet the threshold requirement regarding Site Control.

Respectfully submitted this 23<sup>rd</sup> day of May, 2012.

  
DIANE D. TREMOR  
Hearing Officer for Florida Housing  
Finance Corporation  
Sundstrom, Freidman & Fumero, LLP  
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Copies furnished to:  
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Hugh Brown, Deputy General Counsel  
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Tallahassee, FL 32301-1329

## **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.

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

NEW TIDEWATER APARTMENTS, LLC

Petitioner,

v.

FHFC CASE NO.: 2011-001UC  
Application No. : 2011-056C

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**JOINT STIPULATION OF FACTS AND EXHIBITS**

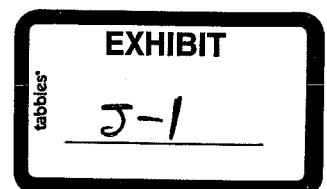
Petitioner, New Tidewater Apartments, LLC (“Petitioner”), and Respondent, Florida Housing Finance Corporation (“Florida Housing”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for May 7, 2012, in Tallahassee, Florida, and agree to the findings of fact and to the admission of the exhibits described below.

**THE PARTIES**

1. Petitioner is a Florida for-profit corporation with its address at Post Office Box 62109, North Charleston, South Carolina, 29419, and is in the business of providing affordable rental housing units in the State of Florida.

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. Section 420.504, F.S.

Attachment A



## BACKGROUND

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

(a) Housing Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code and Section 420.5099, F.S., 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 Internal Revenue Code, and Rule Chapter 67-48, F.A.C.; and

(b) 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 or UA1016 (Rev. 2-11) adopted and incorporated by 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 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 (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 (NOPSE scoring summary) to applicants of any resulting change in their preliminary scores;
- 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 (final scoring summary) to applicants of any resulting change in their scores;
- i. an opportunity for applicants to challenge, by 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;<sup>1</sup>
- 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, by 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.

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<sup>1</sup> This proceeding is the subject of such a challenge.

**PETITIONER’S APPLICATION AND SCORING ISSUES**

6. The Petitioner timely submitted its application for financing in Florida Housing’s 2011 Universal Cycle. The Petitioner, pursuant to Application #2011-56C, applied for \$694,170 in annual federal tax credits<sup>2</sup> to help finance the development of its project, an 100-unit apartment complex in Perry, Florida, known as Perrytowne Apartments.

7. In its preliminary scoring of the Petitioner’s Application, Florida Housing identified certain deficiencies, including the following matters relevant to these proceedings  
*(Exhibit J-3):*

6T	III.	C.	2.	Site Control	The Agreement of Purchase & Sale provided to demonstrate site control is incomplete. Exhibit A, legal description, was not provided in the Application.
7T	III.	C.	2.	Site Control	Section 7.17 of the Agreement for Purchase & Sale states that "The sale of the property by the Seller to the Purchaser requires the written consents of its partners." No evidence of the consent of the partners has been provided.

8. The Petitioner timely submitted cures in response to these scoring deficiencies  
*(Exhibit J-4).*

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<sup>2</sup> The United States Congress has created a program, governed by Section 42 of the IRC, 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 IRC 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. Pursuant to section 420.5099, F.S., Florida Housing is the designated “housing credit agency” for the state of Florida and administers Florida’s tax credit program under its Housing Credit (HC) Program. Through the HC Program, Florida Housing allocates Florida’s annual fixed pool of federal tax credits to developers of affordable housing under its annual Universal Cycle application process.

9. Following submission of cures, Florida Housing scored the Petitioner's Application and issued its final scoring summary dated March 27, 2012 (*Exhibit J-5*), in which Florida Housing concluded that the Petitioner failed to meet threshold requirements for site control.

10. Specifically, the threshold failure identified by Florida Housing regarding site control in its final scoring summary is as follows:

6C	III.	C.	2.	Site Control	The Agreement of Purchase and Sale provided in the Application to demonstrate site control is dated December 2, 2011. The Addendum to the Agreement for Purchase and Sale, submitted in an attempt to cure Item 8T, fails to satisfy the partners' consent requirement of Section 7.17 of the Agreement because the Agreement referenced in the Addendum is dated November 27, 2011, not December 2, 2011.
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11. The Petitioner timely filed its Petition contesting Florida Housing's scoring of its Application whereupon Florida Housing noticed the matter for an informal hearing.

**OFFICIAL RECOGNITION OF RULES**

12. The parties request the Honorable Hearing Officer take official recognition (judicial notice) of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application Package or UA1016 (Rev. 2-11) which includes the forms and instructions.

13. 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.

**EXHIBITS**

14. The parties offer the following joint exhibits into evidence and stipulate to their authenticity, admissibility and relevance in the instant proceedings, except as noted below:

- Exhibit J-1: This Joint Stipulation of Facts and Exhibits.
- Exhibit J-2: Petitioner's Exhibit 27 to Application (Site Control).
- Exhibit J-3: 2011 Universal Cycle Scoring Summary Report (Preliminary), dated January 19, 2012.
- Exhibit J-4: Petitioner's Cure for Exhibit 27 to Application (Site Control).
- Exhibit J-5: 2011 Universal Cycle Scoring Summary Report (Final), dated March 27, 2012.
- Exhibit J-6: Excerpts from the 2011 Universal Cycle Application Instructions: Part III.C.2.

Respectfully submitted this 7th day of May, 2012.

By: \_\_\_\_\_

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Attorney for Petitioner

By: \_\_\_\_\_

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