



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: Twin Lakes at Lakeland, LLLP v. Florida Housing Finance Corporation
FHFC Case No. 2012-005 UC

Dear Ms. Harrell:

Enclosed is my Recommended Order in the referenced proceeding, along with Joint Exhibits 1 through 6, Petitioner's Exhibit 1 and Petitioner's proffered Exhibit 2; 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
Matthew Sirmans, Esquire

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

TWIN LAKES AT LAKELAND LLLP,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

FHFC Case No. 2012-005UC
Application No. 2011-107C

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 Tallahassee, Florida, in the above captioned proceeding on May 10, 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:

Matthew Sirmans
Assistant 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 regarding the financing of its proposed project.

PRELIMINARY STATEMENT

At the informal hearing, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 6. Petitioner's Exhibit 1 was also received into evidence.¹ 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 Respondent's objection to Petitioner's Exhibit 2, a document prepared after the close of the application process, was sustained.

1. The Petitioner, Twin Lakes at Lakeland, LLLP, submitted Application Number 2011-107C in Florida Housing's 2011 Universal Cycle seeking \$1,155,000 in annual federal tax credits to help finance the development of an 88-unit apartment complex in Lakeland, Florida, known as Twin Lakes at Lakeland. (Joint Exhibit 1)

2. Part V of the 2011 Universal Application Instructions require an applicant to demonstrate, as a threshold requirement, the financing of its project through the submission of certain documentation. For non-corporation funding commitments, the Instructions set forth the criteria which must be met for firm commitments. These include a document containing the terms, the proposed interest rate of the construction loan and the permanent loan, specific reference to the Applicant, a statement that the commitment does not expire before nine months after the Application Deadline, and the signature of all parties. The Instructions further state that a commitment letter will not be considered if any information contained in the document is inconsistent with information stated elsewhere within the document or elsewhere within the Application. No specific form is prescribed and the documentation is to be inserted behind a tab labeled as "Exhibit 47."²

(Joint Exhibit 6, pages 102 and 103)

² There is some confusion created by the documents submitted into evidence, in that the documentary evidence references an "Exhibit 49" as opposed to the Exhibit 47 referenced in the rules. However, the actual Exhibit number on the documents submitted into evidence has no bearing on the issues for determination in this proceeding.

3. In response to this requirement, Petitioner submitted, as Exhibit 49 to its initial application, a letter from the Housing Authority of the City of Lakeland, Florida. This letter references the “88 elderly tax credit units as further described” in the Petitioner’s “Application (the “Project”)”, and sets forth the terms, including the loan amount, interest rates, the period of the loan, debt service, repayment and the term of the commitment. The typewritten signature block on the letter states “John Calcagni, Interim Executive Director, Housing Authority of the City of Lakeland, Florida.” However, the signature itself is absent. Following the signature block is another signature block for Petitioner Twin Lakes at Lakeland, LLLP, and that block bears the signature of John Calcagni, with the typewritten words “John Calcagni, Secretary of GP of Applicant.” (Petitioner’s Exhibit 1).

4. In its preliminary scoring of Petitioner’s application, Florida Housing concluded that the loan from the Housing Authority of the City of Lakeland could not be considered a source of financing because the commitment letter is not signed by the lender. (Joint Exhibit 3, at page 3)

5. In response to this preliminary scoring, Petitioner submitted a Cure attaching a revised Exhibit 49, which was a fully executed loan commitment letter from the Housing Authority of the City of Lakeland, Florida. This letter is identical to the initially submitted Exhibit 49, with two exceptions. It is fully executed but, in the opening paragraph it makes reference to “144 elderly tax credit

units as further described” in the Petitioner’s “Application (the “Project”).” (Joint Exhibit 4)

6. In its final scoring of Petitioner’s application, Florida Housing concluded that Petitioner failed to meet threshold requirements for demonstrating adequate financing because the revised commitment letter from the Housing Authority of the City of Lakeland “is for 144 elderly tax credit units, whereas the Application states the total number of proposed units is 88.” (Joint Exhibit 5, page 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 Petitioner was ineligible for funding due to a 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 met threshold requirements regarding the financing of its proposed project. More specifically, the issue is whether the revised financing loan commitment letter provided by The Housing Authority of the City of Lakeland, Florida was deficient

because it referenced a 144-unit project, as opposed to Petitioner's application for an 88-unit project.

The Universal Application Package or UA 1016 (Rev. 2-11), which includes the application forms and the Application Instructions, is adopted by rule. See Rule 67-48.004(1)(a), Florida Administrative Code. Also pertinent to this proceeding are Rule 67-48.004(6), Florida Administrative Code, pertaining to Cure documents, and Rule 67-48.004(14), Florida Administrative Code, listing certain items that cannot be revised, corrected or supplemented after the Application Deadline. The former rule provides that when Cure documents create an inconsistency with another item in the Application, the Applicant must make such other changes as necessary to keep the Application consistent as revised. Rule 67-48.004(14)(i) lists the "total number of units" as one of the items that cannot be changed after the Application Deadline.

The evidence in this case is undisputed that the Cure document submitted by Petitioner as documentation showing non-corporate financing contains all the information required by the Application Instructions. The problem is that the Cure document contains a statement in its opening paragraph referencing the development of "144 elderly tax credit units as further described in the Partnership's FHFC 2011 Universal Application (the "Project")," as opposed to the 88-unit project described in Petitioner's application.

It is Petitioner's position that because the number of units in a proposed project is not required to be provided in a financing commitment letter under Part V.D of the Application Instructions, the fact that the number of units referenced in the commitment letter is different than the number of units referenced in the Application should not be considered as "material" in determining whether an Applicant has met threshold requirements. Petitioner further contends that the revised commitment letter, by referencing the 144 units "as further described" in the Petitioner's application demonstrates that the Application would control any inconsistency created in the commitment letter. Petitioner urges that Florida Housing's position that **any** inconsistency in a financing commitment letter results in a threshold failure is unreasonable, particularly where the complained of information was not a financing requirement set forth by Florida Housing's rules.

Respondent Florida Housing relies upon the Application Instruction providing that a firm commitment letter "will not be considered if any information contained in the document (which includes any attachments thereto) is inconsistent with information stated elsewhere within the document or elsewhere within the Application," (Joint Exhibit 6, at page 102, at Paragraph D) Florida Housing also relies upon Rule 67-48.004(6), requiring that when Cure documentation creates an inconsistency with another item in the Application, the Applicant is required to make such other changes as necessary to keep the Application

consistent as revised. Florida Housing asserts that there is no provision in its rules by which Florida Housing is permitted to weigh the materiality of an inconsistency as a means to excuse a threshold failure.

The undersigned acknowledges that Florida Housing's rules contain no definition of "consistency" or "inconsistency," nor do they address the materiality of an inconsistency. However, this does not mean that Florida Housing's scoring decisions must not be reasonable and comport with the overriding intent of its published rules. Unlike many of Florida Housing's other rule requirements, such as those pertaining to Ability to Proceed, no form is prescribed to demonstrate non-corporation funding commitments. Instead, only a "firm commitment, proposal or letter of intent" containing six items of information is required. (Joint Exhibit 6, at page 103, paragraph (a)) While those items include specific reference to the Applicant as the borrower or direct recipient, they do not require a description of the project by the number of units proposed. Here, the Petitioner's commitment letter's description of the project as containing 144 units was gratuitous, and its "inconsistency" with the Application's description of an 88-unit project is immaterial to the loan commitment.

The purpose of Petitioner's Cure commitment letter from a third party was not to alter the number of units proposed in its Application, nor did the commitment letter request such a change. Indeed, such a change in the number of

units could only be made after the Applicant had been invited to enter credit underwriting, subject to a written request “of an Applicant” to Florida Housing’s staff and approval of the Corporation. See Rule 67-48.004(14)(i), Florida Administrative Code.

Here, while there was an “inconsistency” between the number of units referenced in the commitment letter and the number of units referenced in the Petitioner’s application, such an inconsistency does not rise to the level of a failure to meet threshold requirements regarding financing. There is nothing in the Application Instructions requiring that the amount of the loan commitment be based upon the number of units set forth in the Application, nor is there a requirement that a per-unit computation be attached to the commitment letter. The “inconsistency” relied upon by Florida Housing to determine a failure to meet threshold requirements was immaterial to the requirements set forth for non-corporation funding commitments, and its decision was unreasonable and unsupported by its rules.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner’s Application be determined to meet the threshold requirements regarding non-corporation funding commitments.

Respectfully submitted this 23rd day of May, 2012.



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

Copies furnished to:

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

Matthew Sirmans
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
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**

TWIN LAKES AT LAKELAND LLLP

Petitioner,

vs.

FHFC CASE NO.: 2012-005C

Application No. : 2011-107C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

JOINT STIPULATION OF FACTS AND EXHIBITS

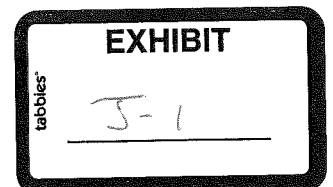
Petitioner, Twin Lakes at Lakeland, LLLP (“Petitioner”), and Respondent, Florida Housing Finance Corporation (“Florida Housing”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 9 am, May 10, 2012, in Tallahassee, Florida, and agree to the findings of fact and to the admission of the exhibits described below.

THE PARTIES

1. Petitioner is a Florida limited liability limited partnership with its address at 430 Hartsell Avenue, Lakeland, Fl 33815, 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.

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;¹
- 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.

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 #2011-107C,

¹ This proceeding is the subject of such a challenge.

applied for \$1,155,000 in annual federal tax credits² to help finance the development of its project, an 88-unit apartment complex in Lakeland, Florida, known as Twin Lakes at Lakeland.

7. As part of its Application, Petitioner stated that that the total number of units in the Development was 88 (*Exhibit J-2*).

8. In its preliminary scoring of the Petitioner’s Application, Florida Housing identified certain deficiencies, including a letter from the Housing Authority of the City of Lakeland, Florida (*Exhibit J-3*):

1T	V.	D.	1.	Non-Corporation Funding	The Applicant submitted a loan commitment letter from the Housing Authority of the City of Lakeland, Florida. However, the commitment letter is not signed by the lender. Therefore, the loan could not be considered a source of financing.
----	----	----	----	-------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

9. The Petitioner timely submitted cures in response to these scoring deficiencies, including a new letter from The Housing Authority of the City of Lakeland, Florida, at Exhibit 49 (*Exhibit J-4*).

10. 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

² 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.

which Florida Housing concluded that the Petitioner failed to meet threshold requirements for demonstrating adequate financing.

11. Specifically, the threshold failure identified by Florida Housing regarding financing its final scoring summary are as follows:

5T	V.	D.	1.	Non-Corporation Funding	The Applicant attempted to cure Items 1T and 4T by submitting a signed loan commitment letter from the Housing Authority of the City of Lakeland, Florida. However, the commitment letter is for 144 elderly tax credit units, whereas the Application states the total number of proposed units is 88. Therefore, the loan could not be considered a source of financing.
----	----	----	----	-------------------------	----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------

12. 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

13. 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.

14. 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.

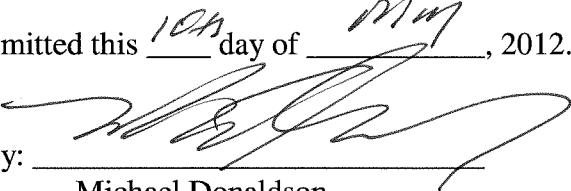
EXHIBITS

15. 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:

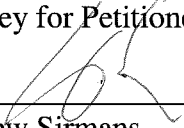
- Exhibit J-1: This Joint Stipulation of Facts and Exhibits.
- Exhibit J-2: Excerpt from Petitioner's Application.
- Exhibit J-3: 2011 Universal Cycle Scoring Summary Report (Preliminary), dated January 19, 2012.
- Exhibit J-4: Petitioner's Cure for Exhibit 49 to Application.
- Exhibit J-5: 2011 Universal Cycle Scoring Summary Report (Final), dated March 27, 2012.
- Exhibit J-6: Excerpts from the 2011 Universal Cycle Application Instructions: Part V.D.

Respectfully submitted this 10th day of May, 2012.

By: _____


Michael Donaldson
Florida Bar No. 0802761
Carlton Fields, P.A.
P.O. Drawer 190
Tallahassee, Fl 32302
Attorney for Petitioner

By: _____


Matthew Sirmans
Florida Bar No. 0961973
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Facsimile: (850) 414-6548
Email:
matt.sirmans@floridahousing.org
Attorney for Respondent