



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: W 76 Street, LLC v. Florida Housing Finance Corporation
FHFC Case No. 2012-022 UC

Dear Ms. Harrell:

Enclosed is my Recommended Order in the referenced proceeding and the parties' Proposed Recommended Orders. I did not receive a transcript of the hearing. The Exhibits will be provided to you under separate cover sheet later this week.

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

Very sincerely yours,

A handwritten signature in black ink that reads "Chris H. Bentley". The signature is written in a cursive, flowing style.

Chris H. Bentley

CHB/bsr
Enclosures

cc: Paul Bilton
Matthew Sirmans, Esq.

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

W 76 STREET LLC,

Petitioner,

v.

CASE NO.: 2012-022UC
Application No. 2011-081C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation ("Florida Housing"), by its duly designated Hearing Officer, Chris H. Bentley, held an informal hearing in Tallahassee, Florida, in the above styled case on May 8, 2012.

APPEARANCES

For Petitioner:

Paul Bilton
7735 MW 146 Street, Suite 306
Miami Lakes, Florida 33016

For Respondent:

Matthew Sirmans
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street
Suite 5000
Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUE

The issue to be determined is whether the information in Revised Application Exhibit 47 (presented during the Cure period), consisting of the 2011 UNIVERSAL CYCLE – LOCAL GOVERNMENT VERIFICATION OF CONTRIBUTION – LOAN form with an attached letter dated February 14, 2012 from the Office of The Mayor, Miami-Dade County, Florida, contains inconsistent information sufficient to preclude consideration of the Verification of Contribution pursuant to Part V, D of the 2011 Universal Application Instructions, thus resulting in a failure to meet a Threshold requirement.

PRELIMINARY STATEMENT

At the Final Hearing, the parties submitted a Joint Stipulation of Facts and Exhibits which has been admitted as Joint Exhibit 1. Joint Exhibits 2 through 6 were admitted into evidence pursuant to the stipulation embodied in Joint Exhibit 1. Petitioner Exhibit 1 was also admitted into evidence. The joint request of the parties that Official Recognition be taken of Rule Chapter 67-48, Fla. Admin. Code, as well as the incorporated Universal Application Package or U.A. 1016 (Rev. 2-11) which includes the forms and instructions is GRANTED.

FINDINGS OF FACT

Based upon the undisputed facts and exhibits received into evidence at the

hearing, the following relevant facts are found:

1. The facts recited in Joint Exhibits 1-6 are accepted as fact in this proceeding and incorporated herein by reference.

2. The Petitioner timely submitted its application for financing in Florida Housing's 2011 Universal Cycle. The Petitioner, pursuant to Application #2011-081C, applied for \$305,670 in annual federal tax credits¹ to help finance the development of its project, an 76-unit apartment complex in Miami-Dade County, Florida, known as Lake Point Plaza Apartments.

3. In its preliminary scoring of the Petitioner's Application, Florida Housing identified certain deficiencies, including the Local Government Verification of Contribution-Loan form at Exhibit 38. Florida Housing determined (*Exhibit J-2*):

1 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.

	118	The Applicant provided a Local Government Verification of Contribution - Fee Waiver form; however, the calculations by which the total amount of each waiver is determined were not attached. Therefore, the contribution cannot be considered and zero points were awarded. The Application is not eligible for automatic points.			
	118	The Applicant provided a Local Government Verification of Contribution-Loan form. However, the payment stream provided for the NPV calculation is inconsistent with the terms provided on the Local Government Verification of Contribution-Loan form. Therefore, the contribution cannot be considered and zero points were awarded. The Application is not eligible for automatic points.			
7T	V.	D.	1.	Non-Corporation Funding	Because the Local Government Contribution Form-Loan did not contain a statement that the commitment does not expire before September 7, 2012 (a date that is nine (9) months after the Application Deadline), as required at Part V.D.1.(a) of the 2011 Universal Application Instructions, the Local Government Loan cannot be considered a source of financing.

4. The Petitioner timely submitted cures in response to these scoring deficiencies (*Exhibit J-3*).

5. Following submission of cures, Florida Housing scored the Petitioner's Application and issued its final scoring summary dated March 28, 2012 (*Exhibit J-4*), in which Florida Housing concluded that the Petitioner failed to meet threshold requirements for financing, demonstrating that the total amount of monetary funds equals or exceeds uses.

6. Specifically, the threshold failures identified by Florida Housing regarding non- corporation funding in its final scoring summary are as follows:

8T	V.	B.		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of \$175,000.00.
9T	V.	B.		Permanent Analysis	The Applicant has a permanent financing shortfall of \$175,000.00.

10T	V.	D.	1.	Non-Corporation Funding	The Applicant provided a cure for Item 7T. With the Cure the Applicant included a revised commitment letter from the Office of the Mayor for Miami-Dade county along with the Local Government Verification of Contribution Form-Loan. However, the terms of the loan in the revised letter do not agree with the terms included on the Local Government Verification of Contribution Form-Loan. Due to this inconsistency the commitment cannot be counted as a source of financing.
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7. During the Cure process the Petitioner submitted a Revised Application Exhibit 47 which has been admitted into evidence and marked as Joint Exhibit 3 in this proceeding. The Revised Application Exhibit 47 contains two documents pertinent to the issues in this case. The first is the completed form entitled “2011 UNIVERSAL CYCLE – LOCAL GOVERNMENT VERIFICATION OF CONTRIBUTION – LOAN. That form proposes that Miami-Dade County will commit to a loan of \$175,000 to the development. That completed form states that: “The loan’s repayment period, amortization period, payment frequency and other applicable terms are: Years 1 – 17: 0% rate, no repayments. Years 18-35: 0.5%, monthly interest only.” The second pertinent document is a letter dated February 14, 2012, from Russell Benford, Deputy Mayor, Miami-Dade County, Florida, to Lewis Swezy. That letter confirms the proposed loan commitment in the amount of \$175,000 and with regard to the terms of the loan states: “Construction and permanent loan terms of FY 2011 funds are zero percent interest years 1-17 with

no payments required in those years, and 0.50 percent interest years 18 through 30 subject to project cash flow.”

8. Thus, there is an inconsistency in the information contained within Revised Application Exhibit 47 (Joint Exhibit 3). In the letter from the Deputy Mayor the period of the loan is 30 years. In the commitment form, referring to the same loan referenced in the letter, the period of the loan is 35 years.

CONCLUSIONS OF LAW

9. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding.

10. The Universal Application Package, or UA1016 (Rev. 2-11), which includes both its forms and instructions, is adopted as a rule. *See*, Rule 67-48.004(1)(a), Fla. Admin. Code, and Section 120.55(1)(a)4., Fla. Stat. The forms and instructions are agency statements of general applicability that implement, interpret, or prescribe law or policy or describe the procedure or practice requirements of Florida Housing and therefore meet the definition of a "rule" found in Section 120.52, Fla. Stat. As such, the instructions and forms are themselves rules.

11. As a threshold item, an applicant in the 2011 Universal Cycle is

required to provide specific documentation of all "non-corporation" funding commitments pursuant to Part V.D. of the Application Instructions. Relevant here are the instructions governing Firm Commitments, Proposals or Letters of Intent found at Part V.D.1. If an applicant fails to achieve this (or any other designated) threshold requirement, Florida Housing's rules mandate that the application be rejected. *See, e.g.*, Rule 67-48.004(13)(b), Fla. Admin. Code.

12. Part V.D. of the Application Instructions provides in part:

Unless stated otherwise in these instructions, a firm commitment, proposal or letter of intent 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.

13. Part V.D.1.(a) of the Application Instructions states in part: "A firm commitment, proposal or letter shall contain: terms...."

14. The Application Instructions require that:

Each page and applicable exhibit of the Application must be accurately completed, and Applicants must provide all requested information. Failure to provide the requested information and documentation shall result in failure to meet threshold for threshold items. . .²

15. As noted above the information in Revised Application Exhibit 47 is inconsistent, setting forth a loan term of 30 years in one place and a loan term of 35

² Application Instructions, p. 2.

years in another place. This is violative of Part V, D of the Application instructions and thus the commitment letter embodied in Revised Application Exhibit 47 cannot be considered. The effect of this is that there is no firm commitment, proposal or letter of intent that meets the Threshold requirements in Part V, D, 1 of the Application Instructions. The consequence of failing to meet a Threshold requirement is that the application cannot be considered and must be rejected.

16. The Petitioner has offered several arguments seeking to navigate around this inconsistency obstacle created by Revised Application Exhibit 47. However, such attempts are necessarily fruitless in light of the Rules and Application Instructions and the rulings of Florida Housing Finance Corporation. In a Final Order in *Temple Court Partners Limited v. Florida Housing Finance Corporation*, FHFC Case No. 2002-003, it is noted that:

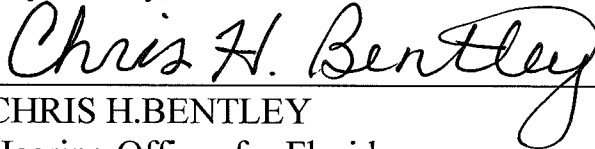
It is the responsibility of an Applicant to fill out the Application Form in accordance with the Instructions, thus making the intent of the Applicant clear and unequivocal on the face of the Application. For the Respondent to try to divine in some subjective manner the "real intent" of an Applicant would necessarily lead to inconsistent and debatable conclusions. When an Application is inconsistent on its face because of actions of the Applicant, as is this Application, the burden and responsibility of that inconsistency must fall upon the Applicant. The Respondent cannot pick up the fumbled ball and run it in for a touchdown on behalf of the Applicant and still maintain the integrity of the competitive process embodied in the Application Cycle." Temple Court Partners Limited v. Florida Housing Finance Corporation, FHFC Case No. 2002-003.

17. The inconsistency found in information on the face of Revised Application Exhibit 47 constitutes the failure of a Threshold requirement thus requiring that the Application be rejected.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated above, it is RECOMMENDED that Revised Application Exhibit 47 contains inconsistent information thus precluding the consideration of the Application Exhibit thereby resulting in the failure of the Application to meet a Threshold requirement thereby necessitating the rejection of the application.

Respectfully submitted this 23rd day of May, 2012.



CHRIS H.BENTLEY
Hearing Officer for Florida
Housing Finance Corporation
Sundstrom, Friedman & Fumero, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301

Copies furnished to:

Paul Bilton
7735 NW 146 Street, Suite 306
Miami Lakes, Florida 33016

Matt Sirmans
Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 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**

W 76 STREET LLC

Petitioner,

vs.

FHFC CASE NO.: 2012-022 UC
Application No. : 2011-081C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

JOINT STIPULATION OF FACTS AND EXHIBITS

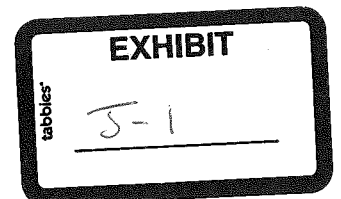
Petitioner, W 76 Street LLC (“Petitioner”), and Respondent, Florida Housing Finance Corporation (“Florida Housing”), by and through undersigned counsel, submit this stipulation for purposes of expediting the informal hearing scheduled for 1 pm, May 8, 2012, in Tallahassee, Florida, and agrees to the findings of fact and to the admission of the exhibits described below.

THE PARTIES

1. Petitioner is a Florida limited liability company with its address at 7735 NW 146 Street, Suite 306, Miami, Fl 33016 and is in the business of providing affordable rental housing units.

2. Florida Housing is a public corporation, with its address at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32310, organized to provide and promote the public welfare by administering the governmental function of financing and refinancing housing and related facilities in the State of Florida. 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.

¹ 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 #2011-81C, applied for \$305,670 in annual federal tax credits² to help finance the development of its project, an 76-unit apartment complex in Miami-Dade County, Florida, known as Lake Point Plaza Apartments.

7. In its preliminary scoring of the Petitioner’s Application, Florida Housing identified certain deficiencies, including the Local Government Verification of Contribution –Loan form at Exhibit 38. Florida Housing determined (*Exhibit J-2*):

11S	The Applicant provided a Local Government Verification of Contribution - Fee Waiver form; however, the calculations by which the total amount of each waiver is determined were not attached. Therefore, the contribution cannot be considered and zero points were awarded. The Application is not eligible for automatic points.
11S	The Applicant provided a Local Government Verification of Contribution-Loan form. However, the payment stream provided for the NPV calculation is inconsistent with the terms provided on the Local Government Verification of Contribution-Loan form. Therefore, the contribution cannot be considered and zero points were awarded. The Application is not eligible for automatic points.

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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.

8. The Petitioner timely submitted cures in response to these scoring deficiencies (*Exhibit J-3*).

9. Following submission of cures, Florida Housing scored the Petitioner's Application and issued its final scoring summary dated March 28, 2012 (*Exhibit J-4*), in which Florida Housing concluded that the Petitioner failed to meet threshold requirements for financing, demonstrating that the total amount of monetary funds equals or exceeds uses.

10. Specifically, the threshold failures identified by Florida Housing regarding non corporation funding in its final scoring summary are as follows:

8T	V.	B.		Construction/Rehab. Analysis	The Applicant has a construction financing shortfall of \$175,000.00.
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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.

EXHIBITS

13. 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: Preliminary Scoring Report, 2011 Universal Cycle, dated January 19, 2012

Exhibit J-3: Excerpt of Cures submitted by Petitioner dated, February 29, 2012

Exhibit J-4: Final Scoring Summary Report, 2011 Universal Cycle, dated March 28, 2012

Exhibit J-5: Excerpts from 2011 Universal Cycle Application Instructions: Part IV.A.

Exhibit J-6: Excerpts from the 2011 Universal Cycle Application Instructions: Part V.D.

Respectfully submitted this 8th day of MAY, 2012.

By:



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Telephone: 305-821-0330
Petitioner

By: _____


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