STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VESTCOR FUND XII, LTD.

DOAH CASE NO. 09-00366
FHFC CASE NO.: 2008-118GA

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

MALABAR COVE, LLLP, and
MALABAR COVE II, LTD.

_________________________________/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation for consideration and final agency action on July 24, 2009. On December 24, 2008, Vestcor Fund XII, Ltd. ("Vestcor") timely filed its Petition for Administrative Hearing ("Petition") with Respondent, Florida Housing Finance Corporation ("Florida Housing"), pursuant to Sections 120.569 and 120.57(1), Florida Statutes, challenging Florida Housing's acceptance of a credit underwriting report for a proposed nearby development known as Malabar Cove (Phase I and II). Finding that the allegations in the Petition included disputes of material fact, Florida Housing forwarded the Petition to the Division of Administrative Hearings

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
[signature] /DATE: 7/24/09

(DOAH) on January 22, 2009. The developers of Malabar Cove, Malabar Cove LLLP and Malabar Cove Phase II, Ltd. (collectively, "Malabar Cove") subsequently filed a Petition to Intervene, which was granted. A formal hearing was held in this case on March 26 and 27, 2009, in Tallahassee, Florida, before Administrative Law Judge William F. Quattlebaum ("ALJ"). Vestcor, Florida Housing and Malabar Cove timely filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ recommended that Florida Housing enter a Final Order dismissing the Petition filed by Vestcor.

Pursuant to Section 120.57(1)(k), Florida Statutes, Vestcor filed "Petitioner's Exceptions to Recommended Order" ("Exceptions") with Florida Housing on June 17, 2009. A copy of the Exceptions is attached hereto as "Exhibit B." Florida Housing and Malabar Cove subsequently filed responses in opposition to the Exceptions ("Responses"). Copies of the Responses of Florida Housing and Malabar Cove are attached hereto as "Exhibit C" and "Exhibit D", respectively.

RULING ON EXCEPTIONS TO RECOMMENDED ORDER

Vestcor's Exceptions to the Recommended Order are as follows:

1. That the Administrative Law Judge ("ALJ") erred by not conducting a *de novo* proceeding to formulate agency action; and,

2. That the ALJ also erred in determining that the only issue for consideration was whether the credit underwriter and Florida Housing complied with "the applicable rule requirements" ... and not also the applicable statutory requirements that the credit underwriting rule carries out.

With respect to the first Exception set forth above, the Board rejects Vestcor's argument and Exception for the reasons set forth in the Responses filed by Florida Housing and Malabar Cove. The Board adopts the Responses attached hereto as its grounds for rejecting the first Exception set forth above and incorporates these Responses herein.

With respect to the second Exception set forth above, the Board rejects Vestcor's argument and Exception for the reasons set forth in the Responses filed by Florida Housing and Malabar Cove. The Board adopts the Responses attached hereto as its grounds for rejecting the second Exception set forth above and incorporates these Responses herein.

RULING ON THE RECOMMENDED ORDER

The aforementioned Exceptions having been rejected, the Board finds that the findings of fact and conclusions of law of the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED:**

1. The Findings of Fact of the Recommended Order are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

2. The Conclusions of Law of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

3. The Petition for Administrative Hearing filed in this matter by Petitioner, Vestcor Fund XII, is hereby DISMISSED and all relief requested therein is DENIED.

DONE and ORDERED this 24th day of July, 2009.

FLORIDA HOUSING FINANCE CORPORATION

By: ______________________
Chairperson

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VESTCOR FUND XII, LTD., d/b/a MADALYN LANDING APARTMENTS,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

MALABAR COVE, L.L.L.P., AND MALABAR COVE, II, LTD.,

Intervenors.

Case No. 09-0366

RECOMMENDED ORDER

On March 26 and 27, 2009, a formal administrative hearing was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

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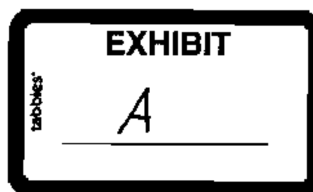

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STATEMENT OF THE ISSUE

The issue in this case is whether credit underwriting reports associated with applications for funding submitted by the developer of an apartment complex in Brevard County, Florida, met applicable requirements, and whether acceptance and approval of such reports by the Respondent, Florida Housing Finance Corporation (FHFC), was appropriate.

PRELIMINARY STATEMENT

In 2007 and 2008, the developer of Malabar Cove, an affordable housing apartment complex located in Brevard County, Florida, applied to participate in loan programs operated by the FHFC. On December 12, 2008, the FHFC Board of Directors (FHFC Board or Board) approved the applications.

On December 24, 2008, the Petitioner, Vestcor Fund XII, Ltd., the developer of Madalyn Landing Apartments (Madalyn Landing), a competing apartment complex in Brevard County, Florida, filed a Petition for Administrative Hearing with the FHFC challenging the Board's decision. On January 22, 2009, the

FHFC forwarded the Petition for Administrative Hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

Also on January 22, 2009, the developer of Malabar Cove (identified in the petition as Malabar Cove, L.L.L.P., and Malabar Cove, II, Ltd., and hereinafter in this Recommended Order as "Malabar Cove") filed a petition to intervene that was granted by Order dated February 13, 2009.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits 1 through 7, 9 through 25, 27, 28, 30, 31, 34, 35 (parts A and B), and 36 admitted into evidence. The FHFC presented the testimony of one witness. Malabar Cove presented the testimony of one witness. A Pre-hearing Stipulation filed on March 17, 2009, was admitted into evidence as Joint Exhibit 1. The Pre-hearing Stipulation set forth relevant facts that have been incorporated as appropriate into this Recommended Order.

The three-volume Transcript of the hearing was filed on April 6, 2009. A Corrected Volume 3 of the Transcript was filed on April 8, 2009. On April 15, 2009, the FHFC filed an unopposed Motion for Extension of Time to File Proposed Recommended Orders that was granted by an Order entered on April 16, 2009. All parties filed Proposed Recommended Orders

on April 21, 2009, that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The FHFC is a public corporation organized under Chapter 420, Florida Statutes (2008), to administer a state program through which, insofar as is relevant to this proceeding, developers obtain funding for construction of rental apartments to provide housing to persons of low, moderate, and middle income. The funding is provided through various mechanisms, including the State Apartment Incentive Loan (SAIL) program.

2. The Petitioner owns and operates Madalyn Landing, a 304-unit, affordable housing complex in Palm Bay, Brevard County, Florida, located approximately one-half mile from the Malabar Cove apartment complex. Madalyn Landing was constructed in 2000.

3. The Petitioner has consistently asserted that the Malabar Cove apartment complex will negatively impact the Petitioner's ability to obtain and retain tenants for Madalyn Landing and has objected to the receipt by Malabar Cove of financial assistance available through local and state programs for affordable rental housing construction developers.

4. To participate in the programs administered by the FHFC, developers submit applications for project funding during

an annual process identified as the "universal cycle." Each application is evaluated, scored, and competitively ranked against other applications filed during the same cycle.

5. Applicants are provided with an opportunity to review and comment on the evaluation and scoring of all proposals. Defects in application may be cured during this initial review process. After the period for comment ends, the FHFC issues a revised competitive ranking of the proposals. Developers may challenge the second ranking through an administrative hearing.

6. After the second ranking process is final, developers achieving an acceptable score receive a preliminary funding commitment and proceed through an evaluation process performed by an independent credit underwriter. The underwriter reviews each proposal according to the provisions of Florida Administrative Code Rule 67-48.0072. The credit underwriting reports are eventually submitted to the FHFC Board for approval.

7. The developer of Malabar Cove is Atlantic Housing Partners (AHP), which develops and operates affordable housing projects in Florida, including others within Brevard County.

8. Malabar Cove is a multifamily apartment complex located in Palm Bay, Florida, which was proposed by AHP in two phases. Phase I of the project included 76 three-bedroom, two-bath apartment units. Phase II of the project included 72 additional units designated as follows: eight three-bedroom, two-bath

units; 32 two-bedroom, one-bath units; and 32 four-bedroom, three-bath units.

9. The Malabar Cove units are designated for tenants earning 60 percent or less of the Area Median Income (AMI) as determined by the U.S. Department of Housing and Urban Development.

10. Madalyn Landing Apartments are likewise designated for tenants earning 60 percent or less of the AMI.

11. AHP applied for approximately $4 million in SAIL funds and $680,000 in supplemental loan funds for Malabar Cove Phase I during the 2007 universal cycle. The project received a preliminary funding commitment letter during the 2007 cycle and proceeded into the credit underwriting process.

12. AHP applied for approximately $2 million in SAIL funds and $680,000 in supplemental loan funds for Malabar Cove Phase II during the 2008 universal cycle. The project received a preliminary funding commitment letter during the 2008 cycle and proceeded into the credit underwriting process.

13. Malabar Cove obtained tax-exempt bond financing from the Brevard County Housing Authority (BCHA).

14. Madalyn Landing was constructed with $14 million in tax-exempt bond financing from the FHFC.

15. Developers constructing affordable housing projects with tax-exempt bond financing are eligible to receive low-

income housing tax credits. The credits are approximately 4 percent of the development costs for a period of ten years. Such tax credits are typically sold to institutional investors and generate equity for the developer. The tax credits obtained by the Petitioner for Madalyn Landing and by AHP for Malabar Cove were sold to generate equity for construction of the properties.

16. Construction of the Malabar Cove project commenced prior to this litigation and was projected to be complete as of April 2009. The receipt of funding from the BCHA obligates Malabar Cove to provide the affordable rental housing as identified herein.

17. Because the Malabar Cove project includes supplemental loan funds from the FHFC, 10 percent of the units must be held for tenants making 33 percent or less of the AMI, assuming that the FHFC ultimately approves the Malabar Cove request.

18. There is no evidence that Madalyn Landing or any other competing affordable housing apartment complex is required to, or has, set aside units for tenants making 33 percent or less of the AMI.

19. The credit underwriting reports for both phases of Malabar Cove were prepared by the Seltzer Management Group, Inc. (SMG), and were submitted to the FHFC Board in December 2008. SMG retained a certified public accounting firm, Novogradac &

Company, LLP (Novogradac), to prepare the market studies referenced in the credit underwriting reports.

20. References herein to the Novogradac market study are as reported by SMG in the credit underwriting report.

21. The Novogradac market study determined that construction of the Malabar Cove development would have a negative impact on Madalyn Landing, as well as on a second affordable housing rental complex not at issue in this proceeding.

22. According to the SMG report, Novogradac determined that "there are ample eligible renters in the sub-market," but noted that Malabar Cove, a newer housing complex, would have "a competitive advantage as it relates to age, condition, amenities, and unit size." The report stated that Malabar Cove's competitive advantage could result in occupancy at competing apartment complexes "at below break even levels once the market stabilizes."

23. As reflected in the SMG report, the Novogradac study included a projection of affordable housing demand in the market area through analysis of a "capture rate," a projection of the percentage of tenants an affordable housing project must achieve from the pool of appropriately-qualified tenants in order to be financially feasible.

24. A capture rate of 10 percent or less is regarded as a positive indicator of financial feasibility. The Malabar Cove capture rate was projected to be between about 3 and 6 percent, depending on the type of rental unit. Accordingly, the Malabar Cove project is regarded as financially feasible.

25. According to the SMG report, Novogradac noted that the relevant housing market had experienced declining occupancy rates in the last few years, while the number of available affordable rental units had remained stable. Novogradac attributed the situation to the general economic downturn and "to the decline in the single family home market specifically" as unoccupied single-family residences have become available at rental rates competitive with affordable housing units.

26. The SMG credit underwriting report states as follows:

> Novogradac believes the current situation to be temporary and that single family home values will recover in the future. As home values recover, single family homes will revert to home ownership and no longer be available to the rental market or rents for the single family homes will rise to historical levels and no longer directly compete with the traditional affordable housing apartment units. Novogradac concludes that when the supply of competing single family homes is reduced to normal levels, affordable housing occupancy levels will increase to levels just below . . . those experienced between 2004 and 2006.

27. Neither the credit underwriting report nor the market study established a time frame during which single-family

housing values were expected to improve. Although testimony was offered at the hearing as to what the phrase "in the future" was intended to signify, the testimony on this point reflected little more than speculation (albeit informed), and none of the testimony was persuasive.

28. The credit underwriting report included a substantive review of the Malabar Cove financing package and the ability of the developer to proceed through the construction process to the point of project completion and unit occupancy. The referenced information in the credit underwriting report on this issue was not credibly contradicted. The credit underwriting report adequately and accurately determined that the developer could proceed with the project through completion.

29. The credit underwriting report recommended that the FHFC Board approve the Malabar Cove applications for funding.

30. On December 12, 2008, the FHFC Board unanimously voted to accept the credit underwriting reports for the relevant phases of Malabar Cove and to approve the applications for funding.

31. It is unnecessary to include herein a detailed recitation of the discussion during the Board's meeting on December 12, 2008.

32. Review of the meeting transcript establishes that the Board's decision followed discussions with representatives of

the Malabar Cove project and the Madalyn Landing apartment complex as well as the credit underwriter.

33. The Board was aware of the affordable housing market conditions in Brevard County and elsewhere in the state. The Board was clearly aware that the construction of the Malabar Cove project would likely have an impact on competing affordable housing providers, specifically Madalyn Landing, and there was reference to the fact that such competition could potentially reduce housing costs for the populations being served by the FHFC programs. The Board additionally considered the present and future availability of state funds.

34. There is no evidence that the Board acted inappropriately or unreasonably in approving the credit underwriting reports for the Malabar Cove project and proceeding to commit the funds at issue in this proceeding, or that the decision was an abuse of the Board's discretion.

35. The Petitioner has asserted that the Board's recent decision in the "Pine Grove" project (wherein the Board declined to follow the credit underwriter's recommendation for approval of an affordable housing project located in Duval County) requires that the Petitioner's project be denied, particularly because the perceived viability of the Pine Grove project was regarded as superior to that of Malabar Cove.

36. The FHFC Board's denial of the Pine Grove application is the subject of a separate administrative proceeding, and this Recommended Order sets forth no findings of fact applicable to the Pine Grove project or the Board's decisions related to the Pine grove application.

37. The evidence establishes that the Board discussed the Pine Grove decision during their consideration of the Malabar Cove applications.

38. Prior to the Board's denial of the Pine Grove application, the FHFC Board had apparently never rejected a credit underwriter's recommendation for approval. However, there was uncontradicted testimony that, because the Board's rules provides an opportunity for both the FHFC and an applicant to review a draft credit underwriting report prior to the issuance of the final report, underwriting problems are routinely resolved prior to the issuance of the report and that, where a problem cannot be sufficiently resolved for the credit underwriter to recommend approval, developers routinely withdraw applications rather than attempt to seek Board approval for projects over the negative evaluation by the credit underwriter.

39. There was consideration at the December 12 Board meeting about the relevance of the Pine Grove application denial (over the credit underwriter's recommendation) to the Board's presumable intention to approve the Malabar Cove applications;

however, the evidence fails to establish that the Board's decision on the Pine Grove application has any relevance to the instant case.

40. The Board was advised that the affordable housing markets in Duval County and Brevard County, although currently troubled, are not similar, with the Duval County market for affordable housing being described as historically weak and the Brevard County market weakness attributed to the recent economic downturn.

41. Additionally, the Board was aware that, in the Pine Grove application, the FHFC has obligated itself to satisfy the mortgage of an affordable housing development competing with Pine Grove through a "Guarantee Fund" program. Simply stated, if the developer of the FHFC-guaranteed project defaults on payment, the FHFC is essentially "on the hook" for the debt, and the Board was apparently sufficiently concerned of the default prospect to include such consideration in rendering a decision on the Pine Grove application. The FHFC has no similar obligation to any competitor of the Malabar Cove apartment complex.

42. Not insignificantly, the Board's consideration of the Malabar Cove project included the fact that construction of the Malabar Cove apartment complex had commenced and was projected

to be complete by April 2009, while construction of the Pine Grove project had not commenced.

43. There is no credible evidence that the Board's decision to accept the credit underwriter's recommendation to approve the Malabar Cove applications was improper or inappropriate for any reason related to the Pine Grove decision.

CONCLUSIONS OF LAW

44. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

45. All parties identified herein have standing to participate in this proceeding.

46. The applicant for the funding at issue in this proceeding has the burden of establishing that the proposed award of funding by the FHFC complies with the requirements for approval by the FHFC Board. Florida Dept of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

47. The issue in this case is whether the credit underwriter and the FHFC Board complied with the applicable rule requirements when the Board approved the Malabar Cove applications for funding. The evidence establishes that both the credit underwriter and the Board complied with all applicable requirements.

48. Florida Administrative Code Rule 67-48.0072 provides in relevant part as follows:

> 67-48.0072 Credit Underwriting and Loan Procedures.
>
> The credit underwriting review shall include a comprehensive analysis of the Applicant, the real estate, the economics of the Development, the ability of the Applicant and the Development team to proceed, the evidence of need for affordable housing in order to determine that the Development meets the program requirements and determine a recommended SAIL or HOME loan amount, Housing Credit allocation amount or a combined SAIL loan amount and Housing Credit Allocation amount, if any. Corporation funding will be based on appraisals of comparable developments, cost benefit analysis, and other documents evidencing justification of costs. As part of the credit underwriting review, the Credit Underwriter will consider the applicable provisions of Rule Chapter 67-48, F.A.C.
>
> (1) After the final rankings are approved by the Board, the Corporation shall offer all Applicants within the funding range an invitation to enter credit underwriting. The Corporation shall select the Credit Underwriter for each Development.
>
> (2) For SAIL and HOME Applicants and Applicants eligible for a supplemental loan, the invitation to enter credit underwriting constitutes a preliminary commitment.
>
> * * *
>
> (5) The Credit Underwriter shall verify all information in the Application, including information relative to the Applicant, Developer, Housing Credit Syndicator, General Contractor, and, if an ALF, the

service provider(s), as well as other members of the Development team.

* * *

(10) A full or self-contained appraisal as defined by the Uniform Standards of Professional Appraisal Practice and a separate market study shall be ordered by the Credit Underwriter, at the Applicant's expense, from an appraiser qualified for the geographic area and product type not later than completion of credit underwriting. The Credit Underwriter shall review the appraisal to properly evaluate the proposed property's financial feasibility. Appraisals which have been ordered and submitted by third party credit enhancers, first mortgagors or Housing Credit Syndicators and which meet the above requirements and are acceptable to the Credit Underwriter may be used instead of the appraisal referenced above. The market study must be completed by a disinterested party who is approved by the Credit Underwriter. The Credit Underwriter shall consider the market study, the Development's financial impact on Developments in the area previously funded by the Corporation, and other documentation when making its recommendation of whether to approve or disapprove a loan, a Housing Credit Allocation, a combined SAIL loan and Housing Credit Allocation, or a Housing Credit Allocation and supplemental loan. The Credit Underwriter shall also review the appraisal and other market documentation to determine if the market exists to support both the demographic and income restriction set-asides committed to within the Application.

* * *

(24) For SAIL and HOME Applications and HC Applications eligible for a supplemental loan, the Credit Underwriter's loan

> recommendations will be sent to the Board for approval.
>
> (25) After approval of the Credit Underwriter's recommendation for funding by the Board, the Corporation shall issue a firm loan commitment.

49. The rule requires that the credit underwriter's review include a comprehensive analysis of the applicant, the real estate, the economics of the project, the ability of the applicant and developer to proceed, and the evidence of need for affordable housing. The evidence establishes that the credit underwriter met these requirements.

50. The rule requires that the credit underwriter consider the market study, the development's financial impact on other developments in the area that received FHFC funding, and "other documentation." The evidence establishes that the credit underwriter met these requirements.

51. There is apparently little question that the Malabar Cove apartments will impact the ability of Madalyn Landing to obtain and retain tenants. The rule does not require that an underwriter recommend against funding a project on the basis of an adverse impact to a competing project, or that the FHFC Board deny an application to fund a project based on an adverse impact to a competitor.

52. The FHFC Board was clearly aware of all material aspects of the relevant housing market and of the Malabar Cove

project. The Board was clearly aware of the Petitioner's objections to the project and considered them prior to rendering their decision.

53. There is no evidence that the FHFC Board acted arbitrarily, capriciously, inappropriately or unreasonably, or otherwise abused its discretion on December 12, 2008, when the Board accepted the recommendations set forth in the credit underwriting reports that applications for funding filed by the developer of the Malabar Cove project be approved.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent enter a final order dismissing the petition for hearing filed in this case.

DONE AND ENTERED this 2nd day of June, 2009, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of June, 2009.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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VESTCOR FUND XII, LTD., d/b/a
MADALYN LANDING APARTMENTS,

Petitioner,

vs. DOAH Case No. 09-0366

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

MALABAR COVE, L.L.L.P. and
MALABAR COVE, II, LTD.,

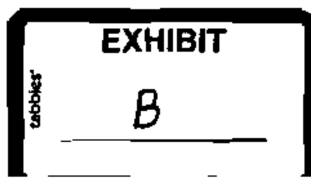
Intervenors.
_______________________________/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner Vestcor Fund XII, LTD., d/b/a Madalyn Landing Apartments ("Madalyn Landing" or "Petitioner"), pursuant to section 120.57(1)(k), Florida Statutes, and Florida Administrative Code Rule 28-106.217, submits its exceptions to the Recommended Order in the captioned administrative proceeding.

The Administrative Law Judge ("ALJ") erred by not conducting a de novo proceeding to formulate agency action. Instead, the Recommended Order is replete with indicators that the ALJ improperly conducted a limited review of the Florida Housing Finance Corporation ("Florida Housing") preliminary decision on December 12, 2008, to approve the credit underwriting reports recommending funding for the Malabar Cove project.

The pages and paragraph numbers of the Recommended Order addressed by this exception begin with Conclusion of Law paragraph 47, page 14, framing the issue as whether the



credit underwriter and the Florida Housing Board complied with the applicable rule requirements "when the Board approved the Malabar Cove applications for funding." In the paragraphs following paragraph 47, the ALJ proceeded to review whether the Board "considered" the relevant housing market and the Madalyn Landing objections, culminating in the ALJ's determination that the Board "considered them prior to rendering their [sic] decision." Recommended Order, p. 17-18, ¶52. Finally, the ALJ concluded as follows in the final numbered paragraph on page 18:

> There is no evidence that the FHFC Board acted arbitrarily, capriciously, inappropriately or unreasonably, or otherwise abused its discretion on December 12, 2008, when the Board accepted the recommendations set forth in the credit underwriting reports that applications for funding filed by the developer of the Malabar Cove project be approved.

Madalyn Landing's Proposed Recommended Order included substantial proposed findings of fact and conclusions of law, based on the competent substantial evidence presented at hearing, that would have allowed the ALJ to formulate the recommended action that Florida Housing should take, as of the time of final hearing, as required of a de novo proceeding intended to formulate agency action and not just to review action taken earlier. Instead, the ALJ's backward-looking limited review of Florida Housing action taken on December 12, 2008, was in the nature of appellate review, and resulted in an improper temporal limit on the ALJ's consideration of the facts to those facts in existence as of December 12, 2008.

The legal basis for this exception begins with the Administrative Procedure Act provision under which this proceeding was conducted:

All proceedings conducted under this subsection shall be de uovo.

§ 120.57(1)(k), Fla. Stat. (emphasis supplied). The ALJ correctly determined that he had "jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1),

Fla. Stat. (2008)." Recommended Order, p. 14, ¶44. However, the ALJ erred in not applying paragraph 120.57(1)(k) to this proceeding that he acknowledged was supposed to be a proceeding conducted under subsection 120.57(1).

The ALJ also correctly determined that Malabar Cove, as the applicant for funding from Florida Housing, has the burden of proof, pursuant to *Florida Dept. of Transportation v. J.W.C. Co., Inc.*, 396 So. 2d 778, 786-789 (Fla. 1st DCA 1981) (the "*J.W.C.*" case). Recommended Order p. 14, ¶46. However, despite the ALJ's correct determination that *J.W.C.* applies and that the burden of proof is on the applicant, Malabar Cove, the ALJ did not follow his own determination because the recommended order plainly and incorrectly placed the burden of proof on Madalyn Landing to establish that Florida Housing's initial decision was wrong as of when it was made (arbitrary, capricious, abuse of discretion on December 12, 2008, RO ¶53). The ALJ's error is based on the same misconception that was urged by the initially approved permit applicant (the Department of Transportation, "DOT") and rejected by the court in *J.W.C.* As the court explained:

> We think that DOT's position on this point is faulty ... [I]t ignores the firmly established principle ...that the proceeding leading up to the issuance of DER's notice of intent [to issue the permit] is of the type that has been characterized as "free-form" action, and as such the decision produced in merely "preliminary." Capeletti Brothers Inc. v. Department of Transportation, supra. ... **[The petition for hearing by landowners challenging the initial permit approval] commenced a de novo proceeding, which, as previously indicated, is intended "to formulate final agency action, not to review action taken earlier and preliminarily."** See McDonald v. Department of Banking and Finance, supra. The APA's hearing requirements are designed to give affected parties "an opportunity to change the agency's mind." Couch Construction Company v. Department of Transportation, supra, at page 176.

396 So. 2d at 786-787, including 787 n.16 (emphasis supplied).

In accordance with section 120.57(1)(k) and the *J.W.C.* case, the ALJ was required to conduct de novo proceedings to formulate agency action, and not to review the action of the Board taken earlier on December 12, 2008. As the court emphasized in *J.W.C.*:

> We emphasize again ... that once a formal hearing is requested, there is no "presumption of correctness" in the mere fact that in preliminary proceedings the Department has issued its "notice of intent" to issue the permit that would relieve the applicant of carrying the "ultimate burden of persuasion."

396 So. 2d at 789. Here, a formal hearing was requested by Madalyn Landing, and Florida Housing forwarded Madalyn Landing's petition to DOAH to conduct formal administrative proceedings involving disputed issues of material fact, pursuant to sections 120.569 and 120.57(1). The ALJ correctly determined that Madalyn Landing has standing to initiate and participate in these proceedings. Recommended Order, p. 14, ¶45. Accordingly, de novo proceedings were required to formulate the Florida Housing decision, with no presumption of correctness given to the initial decision.

Because the ALJ's error in failing to conduct de novo proceedings kept the ALJ from making findings of fact and conclusions of law that consider anew what the appropriate agency action should be, including by addressing the relevant facts after the Florida Housing initial action on December 12, 2008, the recommended order does not provide a sufficient basis for entry of a final order. Remand to the ALJ is necessary for entry of a new recommended order that applies the proper de novo standard and formulates the agency action to be taken on the Malabar Cove applications. As the court noted in the landmark APA case of *McDonald v. Department of Banking and Finance*, 346 So. 2d 569, 584 (Fla. 1st DCA 1977):

> [T]he hearing officer or agency conducting Section 120.57 proceedings should freely consider relevant evidence of changing economic conditions and other current circumstances external to the application. Section 120.57 proceedings are intended to

> formulate final agency action, not to review action taken earlier and preliminarily.

It would be impossible to set forth all appropriate record eitations that show facts not considered by the ALJ because of his limited appellate-type review of the Florida Housing action taken as of December 12, 2008, because this fundamental error permeates the entire Recommended Order. By way of illustration, a key underpinning to the market studies and credit underwriting reports for Malabar Cove was the assumption that the very soft, weak market for affordable housing in the Brevard County area near the Malabar Cove project was a temporary condition that had already hit bottom and was already stabilizing, so that it was reasonable to assume that Malabar Cove could achieve a 94% occupancy rate for purposes of the financial feasibility analysis. (Ben Johnson testimony, final hearing transcript Volume 2, pages 162-165; see also Petitioner's Exhibits 1 and 2, Malabar Cove Phase I and Phase II Credit Underwriting Reports Exhibit 1, Income and Expense projection with assumption of 6% vacancy loss from achievable rent revenue). In fact, Ben Johnson told the Board on December 12, 2008, that he saw signs of stabilization in the relevant market, and that he would not have recommended approval of funding if he had seen evidence of further weakening. ("We have updated occupancy information through October. I believe the market is still relatively stable ... Absolutely if anything had changed between the time I submitted my recommendation and the time I got here, I would personally have requested that the recommendation be pulled." Petitioner's Exhibit 5, Transcript of 12-12-08 Board meeting, Transcript page 27 (page 23 on bottom of page) lines 5-11).

The ALJ noted that rhe market study did not say when exactly the market would recover, and found the evidence presented by the parties was speculative regarding how long that recovery period might be. (RO p. 9-10 ¶27). Nonetheless, because he only conducted a limited

review of the Board's action on December 12, 2008, he determined that the Board's approval then was not arbitrary or capricious. (RO ¶53). But the record showed the further deterioration, not stabilization, of the market, as set forth in Madalyn Landing's proposed findings of fact:

- Novogradac did not hazard a guess in its market studies for when a full recovery could be expected. And the only mention in the market studies of any basis for projected recovery was this: "Several of the property managers indicated that the market remains soft, but two indicated that based on discussions with other property managers, the rental market had "bottomed out" and they anticipate stabilization and possibly improvement in the near future." Pet. Exh. 3 p. 9, first bullet.
- The detailed Property Profile Reports included in the market studies shed light on this optimistic assessment. The Property Profile Report for Park at Palm Bay includes the following "Trend" comment for the third quarter of 2008: "The manager ... feels the market has bottomed out and expects improvement in the upcoming months." Pet. Exh. 3, Addendum C (page bates-stamped FHFC_003686 in bottom right corner). That same page reports that the third quarter 2008 vacancy rate for Park at Palm Bay was 11.1%. *Id.* But the updated occupancy data for the "upcoming months" for Park at Palm Bay shows a vacancy rate of 12.4% in October 2008, a vacancy rate of 13.7% in November 2008; and a vacancy rate of 15.4% in December 2008 for Park at Palm Bay – showing deterioration, not stabilization – and certainly not improvement.[1] Pet. Exh. 12.

[1] These vacancy rates are derived from Petitioner's Exhibit 12, Florida Housing's monthly occupancy rate report for 2008, page one, line for Park at Palm Bay: For October 2008, 205 occupied units divided by 234 total units = 87.6%; for November 2008, 202/234 = 86.3%; and for December 2008, 198/234 = 84.6%.

- Mr. Auger confirmed from the updated occupancy rate data reported on the Florida Housing website that the market for multifamily affordable housing in Brevard County, and in Palm Bay in particular, has not improved since the Malabar Cove market studies and credit underwriting reports were done. Instead, the market appears to have gotten worse. Tr. p. 63, lines 6-12. The low occupancies in Brevard multifamily affordable housing developments appear across the board; there are no outliers that might suggest a management issue instead of a market issue. Tr. p. 44, line 20 – p. 45, line 19; Pet. Exh. 12.

Madalyn Landing Proposed Recommended Order, ¶¶ 22-24.

This is just one example of the type of updated information in the record that should have been addressed by the ALJ and would have been addressed by the ALJ if he were applying the proper de novo standard required of section 120.57(1) proceedings under the APA.

The ALJ also erred in determining that the only issue for consideration was whether the credit underwriter and Florida Housing Board complied with "the applicable rule requirements" (RO p. 14, ¶47) and not also the applicable statutory requirement that the credit underwriting rule carries out. As set forth in Madalyn Landing's Proposed Recommended Order, section 420.508(3)(b), Florida Statutes, provides Florida Housing with the following power and responsibility:

> Make the following determinations, which must be made before the corporation may make a mortgage loan for a project.
>
> 1. That a significant number of low-income, moderate income, or middle-income persons in the local government in which the project is to be located, or in an area reasonably accessible thereto, are subject to hardship in finding adequate, safe, and sanitary housing;

2. That private enterprise, unaided, is not meeting, and cannot reasonably be expected to meet, the need for such housing; and

3. That the need for such housing will be alleviated by providing the project.

(Emphasis supplied). Mr. Auger acknowledged that the need determination required by the credit underwriting rule carries out the statutory responsibility in section 420.508(3)(b), which requires Florida Housing to determine a need for affordable housing before approving a loan. Tr. p. 72, line 25 – p. 73, line 7.[2]

The ALJ failed to make sufficient findings of fact (in part because of his limited review), and made no conclusions of law, to apply the credit underwriting rule in a manner that complies with the statutory requirements in section 420.508(3)(b); indeed, although this statute was addressed in the testimony and in Madalyn Landing's Proposed Recommended Order, it was not cited anywhere in the Recommended Order.

Similarly, in part because of the ALJ's limited review and in part because of the failure to apply the credit underwriting rule in accordance with the statutory requirements in section 420.508(3)(b), the ALJ made no findings of fact regarding the appropriate evidentiary standard for need, despite the substantial evidence that a reasonable benchmark used by Florida Housing was whether existing developments previously funded by the corporation in the relevant market area had achieved an average occupancy rate of 90%, considered to approximate a break-even point. See Madalyn Proposed Recommended Order, pages 24-26, proposed findings of fact ¶¶ 59-63, with record citations to evidence supporting this standard.

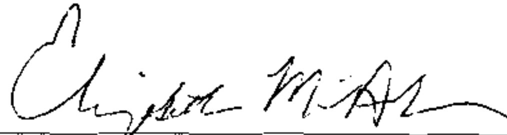
---

2 The statutory cite, in the question posed by petitioner's counsel, was incorrectly transcribed as 425.08(b) when there is no such provision; the statutory reference should be section 420.508(3)(b), which addresses the subject described in the question - the need determination required before Florida Housing can approve a loan.

CONCLUSION

Based on the foregoing, Madalyn Landing respectfully requests the Board to grant these exceptions and enter an order remanding this case back to the ALJ for entry of a new recommended order that follows the requirement for de novo proceedings to formulate the appropriate agency action to be taken on Malabar Cove's applications, and to apply the Florida Housing credit underwriting rule in a manner that will allow Florida Housing to comply with its statutory responsibilities under section 420.508(3)(b), Florida Statutes, to determine need for the Malabar Cove project that is not otherwise being met by existing developments, before approving the loans.

Respectfully submitted this 17th day of June, 2009.



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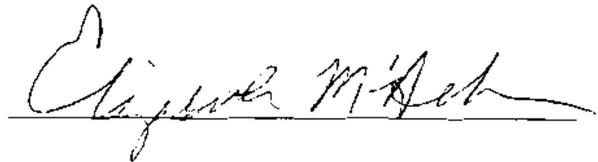
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was furnished by electronic mail and U.S. mail this 17th day of June, 2009, to Hugh R. Brown, Deputy General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301, and to M. Christopher Bryant, Oertel, Fernandez, Cole & Bryant, P.A., 301 South Bronough Street, Fifth Floor, Post Office Box 1110, Tallahassee, FL 32302.



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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VESTCOR FUND XII, LTD., d/b/a
MADALYN LANDING APARTMENTS,

Petitioner,

v.

DOAH Case No. 09-00366
FHFC Case No. 2008-118GA

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

MALABAR COVE, LLLP, and
MALABAR COVE II, LTD.

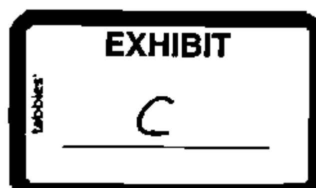
Intervenors.

_______________________________________/

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57(1)(k), Fla. Stat. and Rule 28-106.217, Fla. Admin. Code, Respondent Florida Housing Finance Corporation ("Florida Housing") responds to the Petitioner's Exceptions to the Recommended Order issued by Administrative Law Judge (ALJ) in this matter, and states:

1. On or about June 17, 2008, Petitioner Vestcor Fund XII, Ltd. ("Vestcor") filed Exceptions to the Recommended Order issued by Administrative Law Judge William F. Quattlebaum on June 2, 2009. Vestcor alleges in its Exceptions that the ALJ erred by failing to conduct a *de novo* review of the agency action at question in this proceeding, and that the ALJ erred by determining that the only issue for consideration was whether the credit underwriter and the Board of Directors of Florida Housing



FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Della M Harrell DATE: 6/29/09

("Board") complied with applicable Rule requirements, rather than applicable statutory requirements.

Alleged failure to conduct a *de novo* review

2. In this Exception, Vestcor argues that the ALJ was required to conduct a *de novo* review per Section 120.57(1)(k), and failed to do so. That the aforementioned statute mandates that all proceedings under Section 120.57(1), Fla. Stat. "shall be *de novo*" is unquestionable, and that is precisely what the ALJ did – within the parameters of the Rules governing the agency action in question.

3. Simply put, *de novo* review means, in the context of administrative law, that the ALJ is not constrained by the justifications or evidence relied upon by the agency in reviewing that agency's action, but may formulate agency action without regard to what the agency did. In other words, they ALJ may rely on evidence not relied upon by the agency, may reject the agency's reasons for taking the action under scrutiny, and may provide reasons of his or her own to formulate agency action. Naturally, nothing about a *de novo* review dictates that an ALJ may not agree with the agency action or the evidence on which it was based, it means only that the ALJ must consider the evidence presented through the hearing process whether or not such evidence was considered by the agency. A *de novo* review does not, however, permit an ALJ to expand the scope of a Rule or to add procedures or parameters to a process governed by that Rule.

4. In the instant case, the ALJ conducted a *de novo* review within the context of the Rule that, as expressed in paragraphs 49 and 50 of the Recommended Order, requires Florida Housing's credit underwriters to:

"[I]nclude a comprehensive analysis of the applicant, the real estate, the economics of the project, the ability of the applicant and developer to proceed, and the evidence of need for affordable housing" and,

"[C]onsider the market study, the development's financial impact on other developments in the area that received FHFC funding, and "other documentation."

5. The ALJ further found that Rule 67-48.0072(10), Fla. Admin. Code:

"[D]oes not require that an underwriter recommend against funding a project on the basis of an adverse impact to a competing project, or that the FHFC Board deny an application to fund a project based on an adverse impact to a competitor."

(Paragraph 51 of Recommended Order).

Clearly the decision of whether to fund a development when the listed factors are present is a matter left to the discretion of the Board.

6. Interestingly, Vestcor does not dispute this finding, and in fact seems to recognize, as the ALJ did, that this Rule does not require Florida Housing to either approve or disapprove developments – only that they must consider the listed factors in making their decision. The evidence was clear that Florida Housing and its credit underwriters did consider the impact of the proposed Malabar developments on nearby Madalyn Landing, thus depriving Vestcor of the argument that Florida Housing violated the Rule above. This is the reason Vestcor chose not to frame the central issue of this matter in the context of Florida Housing violating its Rules, but instead alleged that Florida Housing had abused it's discretion in approving the Malabar credit underwriting reports. The ALJ evidently agreed with Vestcor's characterizatiou of the issue, and conducted a *de novo* hearing within the parameters expressed by Vestcor itself, parameters that Vestcor now iguores.

7. Within the context of the applicable Rule above, the ALJ properly conducted a *de novo* review of the evidence on the issue of whether Florida Housing abused its discretion. Vestcor argues that the ALJ conducted a "limited review" of the agency action and states that it provided competent, substantial evidence that "would have allowed" the ALJ to formulate an alternative to the disputed action taken by Florida Housing. Respondent agrees that the ALJ could have reached a different result than he did. That he chose not to after hearing the aforementioned competent and substantial evidence does not establish that the review conducted was something less than *de novo*, nor does the mere fact that the ALJ did not include Vestcor's Proposed Findings of Fact in his Recommended Order establish such an error.

8. Having accepted Vestcor's correct characterization of the central issue of this case as being a question of abuse of discretion, the ALJ then considered the evidence presented at hearing. While much of this evidence was the same information presented to the Board when it made its decision on December 12, 2008, the record is clear that the ALJ provided Vestcor ample opportunity to submit any further evidence. There was no ruling made during the proceedings or finding or conclusion in the Recommended Order that Vestcor was restricted in presenting only that information available to the Board on December 12, 2008. Vestcor's argument that the ALJ improperly restricted his review is not based on any statement or finding to be found in the record or in the Recommended Order. That the ALJ happened to agree with Florida Housing's action in this case does not mean the ALJ failed conduct a *de novo* review, absent some indication to the contrary.

9. Vestcor does not explicitly state the basis for its argument that no *de novo* review was conducted, but instead generally states "It would be impossible to set forth all appropriate record citations that show facts not considered by the ALJ because of his appellate-type review of the Florida Housing action..." That a proposed finding of fact or conclusion of law is absent from an ALJ's Recommended Order does not necessarily demonstrate that the proposed finding of fact or legal conclusion was not considered, only that it was not accepted or adopted by the ALJ for any number of reasons. Absent a clear indication in the record that the ALJ was limiting his review, Vestcor's argument fails.

10. The only specific examples provided by Vestcor, on pages 5-7 of its Exceptions, are nothing more than a repeat of the arguments made in its Proposed Recommended Order, to wit, that the ALJ should have made findings in their favor and given certain aspects of the evidence more weight than others. These arguments do not establish that the ALJ restricted his review. Again, the record does not indicate that the ALJ failed to consider these proposed findings, but shows only that the findings do not appear in the Recommended Order.

Alleged failure in issue determination

11. Vestcor also alleges that the ALJ failed in determining that the only issue for consideration was whether Florida Housing and its credit underwriter complied with applicable rule requirements. Despite the fact that such argument does not appear as an issue in Vestcor's petition or the Prehearing Stipulation filed in this case, Vestcor argues that the ALJ erred by failing to consider the standards set forth in Section 420.508(3)(b),

Fla. Stat., which sets forth various criteria the Board is to consider when deciding to fund a development. In fact, the parties agreed in the Prehearing Stipulation that credit underwriting reviews were governed by Rule 67-48.0072, Fla. Admin. Code.

12. Vestcor's reliance on Section 420.508(b)(3), Fla. Stat. is misplaced in this instance. While this section does provide a list of general determinations that Florida Housing must make before making a mortgage loan on a development, this statute does not specifically apply to the credit underwriting process and in fact is not the authority for the aforementioned Rule which makes specific requirements on credit underwriting. At best Vestcor's argument fails because the aforementioned Rule only makes specific and interprets those general requirements, at worst it is irrelevant in light of other specific authority for the Rule and the fact that this Rule imposes specific duties in furtherance of that other authority.

13. Lastly, Vestcor's asserts that Florida Housing's chief witness, Executive Director Stephen P. Auger, acknowledged that the "need determination required by the credit underwriting rule carries out the statutory responsibility in section 420.508(3)(b), which requires Florida Housing to determine a need for affordable housing before approving a loan." This assertion is mistaken. The actual exchange from pp. 72-73 of the transcript, in which counsel for Vestcor questions Mr. Auger, reads:

> Q: Isn't it true that you've also had at the same time you had that mission, you have provisions in your credit underwriting rule that require an assessment of need of affordable housing **and also** in section 425.08(b)[1] which says Florida Housing must make a determination that there is a need for affordable housing before approving a loan; is that correct?
> A: Yes.
>
> (Emphasis added)

[1] This reference was incorrectly transcribed and should have read "420.508(b)."

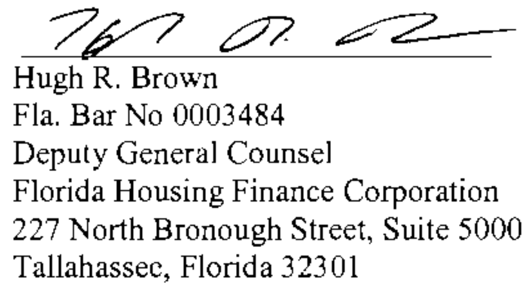
Clearly the witness was answering "yes" to the compound question above. Mr. Auger did not through this answer indicate that Section 420.508(b)(3) was related to Rule 67-48.0072(10), Fla. Admin. Code nor did he state that the provisions of this statute applied also to the Rule. Mr. Auger merely stated that a determination of demand is necessary under both provisions and not that the credit underwriting rule implemented this part of the statute.

Conclusion

14. Vestcor's arguments that the ALJ did not conduct a *de novo* review are based solely on the fact that the ALJ did not include Vestcor's Proposed Findings of Fact in his Recommended Order, and as such do not demonstrate that the ALJ so erred. Likewise, Vestcor's argument that the ALJ abused his discretion by failing to apply a statutory standard (an argument conspicuously absent from Vestcor's petition) fails as the applicable Rule does not implement that statute, but merely has a concurrent requirement that demand for affordable housing in the area be shown. Based on the evidence presented at trial, the ALJ concluded that Florida Housing met this requirement regardless. (*See* Recommended Order, paragraphs 22, 24 and 26).

WHEREFORE, Vestcor's Exceptions to the Recommended Order should be DENIED.

Respectfully submitted this 29th day of June, 2009.



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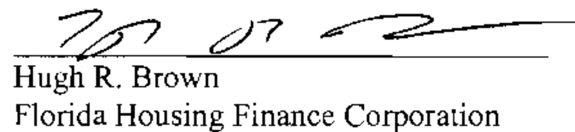
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by facsimile and U.S. Mail to Donna E. Blanton, Esquire and Elizabeth McArthur, Esquire, Counsel for Petitioner, Radey Thomas, Yon and Clark, P.A., 301 South Bronough Street, Suite 200, Tallahassee, Florida 32301, and to M. Christopher Bryant, Esquire, Counsel for Intervenor, Oertel, Fernandez, Cole & Bryant, P.A., P.O. Box 1110, Tallahassee, Florida 32302-1110 this 29th day of June, 2009.



Hugh R. Brown
Florida Housing Finance Corporation

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VESTCOR FUND XII, LTD., d/b/a MADALYN LANDING APARTMENTS,

Petitioner,

vs. **Case No. 09-000366**

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

MALABAR COVE, L.L.L.P, and MALABAR COVE II, LTD.

Intervenors.

______________________________________/

INTERVENORS' RESPONSE IN OPPOSITION TO PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57(1)(k), Fla. Stat., and Rule 28-106.217, Fla. Admin. Code, Intervenors Malabar Cove, L.L.L.P., and Malabar Cove II, Ltd., ("Malabar Cove I and II") hereby respond in opposition to the Exceptions to Recommended Order filed by Petitioner Vestcor Fund XII, Ltd., d/b/a Madalyn Landing Apartments ("Madalyn Landing"), in this matter. In opposition to the exceptions, Intervenors state as follows:

1. **Failure to Conduct De Novo Review.** Madalyn Landings' first exception claims that the Administrative Law Judge ("ALJ") erred by failing to conduct a de novo proceeding to formulate final agency action. This exception should be denied for several reasons, the first being that Florida Housing Finance Corporation ("Florida Housing") lacks substantive

jurisdiction over the question of law of the nature of the proceeding and standard of proof employed by an ALJ of the Division of Administrative Hearings.

2. Section 120.57(1)(l), Fla. Stat., defines the role of an agency, such as Florida Housing, in acting on a recommended order resulting from a hearing involving a disputed issued of material fact. Section 120.57(1)(l) states in part as follows:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction....

3. Madalyn Landing has provided no citation to statute or other authority which would support a conclusion that Florida Housing has substantive jurisdiction over the ALJ's determination of whether to conduct the proceeding as a "de novo" proceeding. Generally, the manner in which the DOAH proceeding is conducted is not subject to review and reversal by the agency. See, for example, Barfield v. Department of Health, 805 So. 2d 1008 (Fla. 1st DCA 2001), reversing agency's displacement of the ALJ's evidentiary ruling on whether document constituted inadmissible hearsay. Therefore, Florida Housing's Board of Directors may not disturb the ALJ's determination.

4. Further, Madalyn Landing has waived the argument that the case should have been reviewed de novo. In its Petition for Administrative Hearing initiating this proceeding, Madalyn Landing included the following as its statement of Ultimate Facts and Law:

> ... Florida Housing violated its own credit underwriting rule, broke with its own recent precedent interpreting rule 67-48.0072(10), acted arbitrarily and capriciously, and abused its discretion.

In its Statement of Position in the Prehearing Stipulation, Madalyn Landing stated, as the conclusion of its "brief general statement" of position:

> The Board's vote to approve the credit underwriting reports for Malabar Cove I and II was arbitrary and capricious and constituted an abuse of discretion. Thus, the credit underwriting reports for Malabar Cove I and II must be rejected.

5. The ALJ properly determined, in the context of how Madalyn Landing framed the issue in its Petition and in the Prehearing Stipulation, that the approval of the credit underwriting reports was not arbitrary or capricious or an abuse of discretion. A decision is "arbitrary" if it is not supported by facts or logic; a decision is "capricious" if it is contrary to facts or logic. Board of Clinical Laboratory Personnel v. Florida Association of Blood Banks, 721 So. 2d 317 (Fla. 1st DCA 1998). A decision constitutes an "abuse of discretion" only if no reasonable person would take the view asserted. See, Scott v. State, 717 So. 2d 908 (Fla. 1998). If reasonable persons could differ as to the propriety of action taken, there is no abuse of discretion. Papcun v. Piggyback Discount Souvenirs, 472 So. 2d 880 (Fla. 5th DCA 1985).

6. In its proposed recommended order, Madalyn Landing substantially changed its position, and argued that the approval of the credit underwriting reports should be subject to de novo review. There is, of course, no mechanism in Section 120.57(1) proceedings for a party to object to the proposed recommended order submitted by an opposing party. If such a meehanism been available, Respondent and Intervenor would have opposed Petitioner's substantial change in its legal position.

7. In any event, Madalyn Landing also overlooks the fact that there was substantial evidence and testimony presented as to why the credit underwriting reports should have been (and were) approved. See, the detailed discussion in the response to the second exception. On consideration of this evidence, and very little contrary evidence from Madalyn Landing, the ALJ agreed with the conclusion reached in the credit underwriting ("CU") reports for Malabar Cove I and II, and agreed with the Board's approval of the credit underwriting reports.

8. Madalyn Landing further overlooks that the agency action at issue here was the consideration and approval (or rejection) of a CU report prepared not by Intervenors, but by an independent third party selected by FHFC. As noted by all parties in the Pre-hearing Stipulation, the controlling rule for the credit underwriting process is found in Section 67.48.0072(10), which requires the credit underwriter to "consider... the development's financial impact on developments previously funded by the Corporation...."

9. Thus, the ultimate inquiry for both the Board in considering the CU report, and for a hearing officer or ALJ in presiding over a challenge to the Board's action on a CU report, is whether the credit underwriter considered the impact of the development on other developments. Arguably, by virtue of FHFC's Board of Director's role in reviewing, and approving or rejecting, credit underwriting reports, the Board must also take that into consideration. There can be no dispute that both the credit underwriter and the Board took into consideration the impact of Malabar Cove I and II on existing developments, expressly including Madalyn Landing. Both the credit underwriter and the Board fulfilled the duties imposed on them by rule.

10. The credit underwriting rule does not contain any standards to be applied by either the credit underwriter or the Board of Directors in determining how much impact is "too much impact" on an existing development, such that a report should be rejected and the proposed funding not closed. In the absence of a standard in the rule, the ALJ can not determine that the rule was violated by the approval of the CU report. The only way the rule could have been violated by the credit underwriter or the Board is if the credit underwriter and the Board had neglected to consider the impact. They clearly did consider the potential impact of Malabar Cove I and II on previously financed developments, including Madalyn Landing, and determined

that that impact was not so great as to support denial of the Malabar Cove I and II credit underwriting reports.

Compliance with Statutory Requirement

11. At page 7 and 8 of its Exceptions, Madalyn Landing argues that the ALJ erred in not making findings of fact that Madalyn Landing contends are required by Section 420.508(3), Fla. Stat. Notably, Madalyn Landing did not cite this section of the statutes as entitling it to relief in its Petition for Administrative Hearing, instead including only a general reference to "part V of Chapter 420, Florida Statutes," the Chapter that controls virtually all of Florida Housing's multi-family housing programs. In the Prehearing Stipulation, Madalyn Landing also failed to cite Section 420.508(3)(b) as being controlling of or relevant to this case.

12. All parties in this case stipulated that the "credit underwriting review of a development selected for funding is governed by Rule 67-48.0072, Florida Administrative Code." See, Prehearing Stipulation at paragraph E. 6. There was no stipulation among the parties that the credit underwriting review was also controlled by Section 420.508, nor was there any unilateral assertion in the Prehearing Stipulation that that was the case.

13. Notably, the credit underwriting rule, Rule 67-48.0072, does not cite any portion of Section 420.508, Fla. Stat., as either the specific authority for the rule or the law implemented by it. While Section 420.508 may apply at some stage of the application selection and funding process, it is legally irrelevant to the preparation, consideration, and approval of credit underwriting reports.

14. Contrary to Madalyn Landing's assertion at page 8 of its exceptions, Mr. Auger did not testify at hearing that the "need determination required by the credit underwriting rule carries out the statutory responsibility in Section 420.508(3)(b)." Mr. Auger was asked a

compound, two part question by Madalyn Landing's counsel: whether the credit underwriting rule has provisions that require an assessment of the need for affordable housing, and whether Section "425.08(b)" (presumably meaning Section 420.508(3)(b)) requires a determination of need. He answered this compound question with a single "yes." He did not say that the credit underwriting rule implements the statute cited; and, as pointed out in the preceding paragraph, it was not adopted for that purpose. See Final Hearing Transcript at Volume I, pages 72-73.

15. At most, the credit underwriting rule requires a consideration of need for the affordable housing in the preparation of the CU reports. The first, unnumbered paragraph of Rule 67-48.0072 states that the credit underwriting review shall include "the evidence of need for affordable housing." But the rule does not require the specific findings of Section 420.508(3)(b).

16. The provisions of Section 420.508(3)(b), cited by Madalyn Landing as not having been satisfied, can be summed up in a single word: demand. The statute concerns making determinations regarding the hardship on low-income, moderate-income, and middle-income persons in finding adequate, safe, and sanitary housing; that unaided private enterprise cannot meet the need; and that the development will help alleviate the need.

17. The CU reports for Malabar Cove Phase I and II noted that no new affordable housing units had been recently introduced into the market. See, Petitioner's Exhibit 1 at page A-7, and Exhibit 2 at page A-7. The same section of the CU reports summarized the existence of over 2000 income-qualified renter households in the sub-market, and identified a "capture rate" of 6.1%, well within the 10% capture rate that the record established was considered indicative of sufficient demand.

18. The market studies prepared by the CPA firm of Novogradac and Company, referenced in the CU reports, concluded that there was "strong demand for Malabar Cove I and

II." See Petitioner's Exhibits 3 (at pages 6 and 59) and 4 (at pages 6 and 62). There was testimony presented to the Board in December 2008 regarding the historic and anticipated future strength (high occupancies) in the Brevard affordable housing market (Pet. Exh. 5, at pages 2 and 3) and of the anticipated future demand for affordable housing projected in the market studies (Pet. Exh. 5 at page 18, lines 20 through 24). There was testimony presented at the final hearing regarding demand in this market (Transcript Volume I at p. 52), and specifically how the calculated "capture rate" is indicative of demand (Transcript Volume II pages 184-186). Testimony was also offered regarding the projected growth in the number of cost-burdened renter households in Brevard County. (Transcript Volume III at pages 359-360).

19. After hearing or reading the evidence that had been presented to the Board, as well as live testimony at the final hearing regarding demand for affordable housing in Brevard County, the ALJ entered a recommended order concluding that there was "no evidence the Board acted arbitrarily, capriciously, inappropriately, or unreasonably, or otherwise abused its discretion... when it accepted the recommendation set forth in the credit underwriting reports." (See Conclusion of Law 53; and see Finding of Fact 34). He made express findings of fact regarding the Novogradac market studies, including their determination that "there are ample eligible renters in the submarket" and their inclusion of "a projection of affordable housing demand in the market area through analysis of a 'capture rate.'" (See Findings of Fact 22 and 23). Since a capture rate analysis is an analysis of <u>net</u> demand – after deducting the competition from existing affordable housing developments – it necessarily calculates unmet need for affordable housing. See Exhibit 3 at page 57, and Exhibit 4 at page 60.

20. Whether the evidenee presented demonstrates that a statutory standard has been met is an issue of ultimate fact. See <u>Goin v. Commission on Ethics</u>, 658 So. 2d 1138 (Fla. 1st

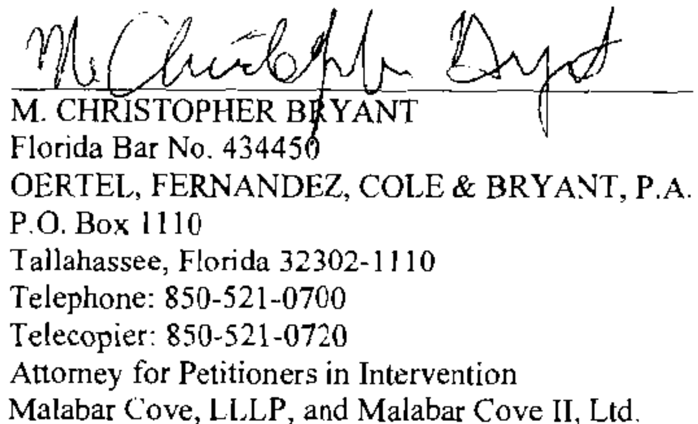
DCA 1995)(whether public employee knew or should have known that reduced price on service provided to him by company seeking contract with his employer was intended to influence his action on the award of the contract was issue of ultimate fact for ALJ, and agency final order reversing that determination was reversed on appeal); Kany v. Florida Engineers Management Corp., 948 So. 2d 948 (Fla. 5th DCA 2007)(ALJ's determinations that licensed engineer exercised responsible charge over the preparation of drawings and did not aid or assist an unlicensed draftsman in the practice of engineering were factual determinations not subject to reversal by agency in its final order); Pillsbury v. State Department of Health and Rehabilitative Services, 744 So. 2d 1040 (Fla. 2nd DCA 1999)(hearing officer's determinations that evidence didn't show consistent failure by daycare facility operators address deficiencies, and that operators reasonably cooperated to correct violations and remedy complaints, were issues of fact, and could not be rejected if supported by competent substantial evidence). Since the issue of satisfaction of a statutory standard is an issue of ultimate fact, an agency may not reject or modify it without first determining that there is not competent substantial evidence to support it. See, Feldman v. Department of Transportation, 389 So. 2d 692 (Fla 4th DCA 1980). In this case, there was ample evidence to support the determination that there was unmet need, and that the credit underwriting reports should be approved.

21. In conclusion then, the credit underwriting rule does not require the detailed findings stated in Section 420.508(3)(b). The ALJ correctly determined that the reports, through the market studies ordered by the credit underwriter, considered the need or demand for the affordable units, and were properly approved. Had the issue of the statutory findings been properly preserved and presented, and had it been deemed applicable, there was ample evidence to support more detailed findings on a determination of demand, including the market studies,

but that detail is not required under the credit underwriting rule. The ALJ considered the same evidence presented to the Board, plus additional evidence, and concluded that the market studies addressed need, and that approval of the CU reports was not error.

WHEREFORE, Madalyn Landing's Exceptions to the Recommended Order should be denied.

FILED AND SERVED this 26th day of June, 2009.



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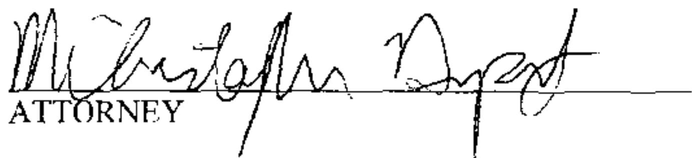
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished via Hand Delivery to the Clerk, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301-1329; and copies furnished via U.S Mail to Hugh Brown, Deputy General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329; and to Donna E. Blanton, and Elizabeth McArthur, Attorneys at Law, Radey Thomas Yon & Clark, P.A., 301 South Bronough Street, Suite 200, Tallahassee, Florida 32301, this 26th day of June, 2009.



ATTORNEY

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