

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RST FRUITLAND HOUSING, L.P.,)
)
 Petitioner,)
)
vs.) Case No. 10-0896
)
FLORIDA HOUSING FINANCE)
CORPORATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

A final hearing was held in this matter before Robert S. Cohen, Administrative Law Judge with the Division of Administrative Hearings, on April 27, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael P. Donaldson, Esquire
 Carlton Fields, P.A.
 215 South Monroe Street, Suite 500
 Post Office Drawer 190
 Tallahassee, Florida 32302-0190

For Respondent: Hugh R. Brown, Esquire
 Florida Housing Finance Corporation
 227 North Bronough Street, Suite 5000
 Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUE

The issue is whether the Florida Housing Finance Corporation ("Florida Housing") properly rescinded the preliminary funding awarded to RST Fruitland Housing, L.P.

("RST"), pursuant to applicable rules, prior agency practice, and the existing case law.

PRELIMINARY STATEMENT

On October 23, 2009, Respondent Florida Housing rescinded funding tentatively awarded to Petitioner RST. Petitioner timely submitted a Petition for Administrative Hearing, which challenged Florida Housing's actions, on November 13, 2009. On February 10, 2010, RST filed an Amended Petition with Florida Housing, which was forwarded to the Division of Administrative Hearings on February 18, 2010.

The final hearing was first scheduled for April 8 and 9, 2010, by Notice of Hearing entered March 1, 2010. The hearing was continued upon motion filed by Florida Housing. The final hearing was rescheduled and held on April 27, 2010. On April 21, 2010, the parties filed a Joint Pre-Hearing Stipulation containing extensive stipulated findings of fact.

At the hearing, RST presented the testimony of two expert witnesses: Michael A. Hartman (expert in affordable housing) and Robert Vogt (expert in market study preparation and analysis). RST offered Exhibits 1 through 10, which were received into evidence. Florida Housing presented the testimony of three expert witnesses: Robert Von (expert in market study preparation and analysis), Ben Johnson (expert in credit underwriting of affordable housing developments), and Stephen

Auger (expert in affordable housing programs). Florida Housing offered Exhibits 1 through 3, which were received into evidence. Joint Exhibits 1 through 6, were received into evidence. The parties asked that Official Recognition be taken of Florida Administrative Code Rule Chapter 67-48.

A Transcript was filed on May 7, 2010. After the hearing, Petitioner and Respondent filed their Proposed Recommended Orders on May 24, 2010.

References to statutes are to Florida Statutes (2009) unless otherwise noted.

FINDINGS OF FACT

1. RST is a limited partnership authorized to do business in Florida and is controlled by Roundstone Development, LLC ("Roundstone"). Roundstone is in the business of providing affordable rental housing. In addition to Florida, Roundstone operates in Texas, Arkansas, Mississippi, and South Carolina. Michael Hartman, the consultant for Roundstone, has been involved in the development of over 70 affordable housing developments, including many in Florida.

2. Florida Housing is a public corporation created by Section 420.504, Florida Statutes, to administer the governmental function of financing or refinancing of affordable housing and related facilities in Florida. Florida Housing's statutory authority and mandates appear in Part V of

Chapter 420, Florida Statutes. Florida Housing is governed by a Board of Directors consisting of nine individuals appointed by the Governor and confirmed by the Senate.

3. On July 31, 2009, Florida Housing issued RFP 2009-04 (the "RFP") setting forth criteria and qualifications for developers to seek funding for affordable housing projects from funds that Florida received through the American Recovery and Reinvestment Act of 2009, PL 111-5 ("ARRA"). ARRA was enacted in 2009 by Congress as part of federal economic stimulus efforts.

4. RST received notice of the RFP through e-mail notification on July 31, 2009. The RFP required applicants to submit proposals to Florida Housing no later than 2:00 p.m. on August 14, 2009. RST submitted an application and intended to seek financing for its affordable housing project by applying for funding from the sources that are proposed to be allocated through the RFP.

Florida Housing's Programs

5. Florida Housing administers numerous programs aimed at assisting developers to build affordable housing. These programs include: the Multi-Family Mortgage Revenue Bond Program ("MMRB") established under Section 420.509, Florida Statutes; the State Apartment Incentive Loan Program ("SAIL") created pursuant to Section 420.5087, Florida Statutes; and the

Low Income Housing Tax Credit Program (the "Tax Credit program") established under the authority of Section 420.5093, Florida Statutes.

6. These funding sources are allocated by Florida Housing to finance the construction or substantial rehabilitation of affordable housing. A portion of the units constructed based upon funding from these programs must be set aside for residents earning a certain percentage of area median income ("AMI"). For purposes of these proceedings, the primary program of interest is the Tax Credit program.

Tax Credits

7. The Tax Credit program was created in 1986 by the federal government. Tax Credits come in two varieties: competitively awarded nine percent tax credits, and non-competitively awarded four percent tax credits. For the nine percent credits, the federal government annually allocates to each state a specific amount of tax credits using a population-based formula. Tax Credits are a dollar for dollar offset to federal income tax liability over a 10-year period. A developer awarded Tax Credits will often sell the future stream of Tax Credits to a syndicator who in turn sells them to investors seeking to shelter income from federal income taxes.

8. The developer receives cash equity with no debt associated with it. Thus, Tax Credits provide an attractive

subsidy and, consequently, are a highly sought after funding source. Florida Housing is the designated agency in Florida to allocate Tax Credits to developers of affordable housing. Every year since 1986, Florida Housing has received an allocation of Tax Credits to be used to fund the construction of affordable housing.

Universal Application

9. Florida Housing has historically allocated funds from the MMRB, SAIL, and Tax Credit programs through a single annual application process. Since 2002, Florida Housing has administered the three programs through a combined competitive process known as the "Universal Cycle." The Universal Cycle operates much the same as an annual competitive bidding process in which applicants compete against other applicants to be selected for limited funding.

10. Florida Housing has adopted rules which incorporate by reference the application forms and instructions for the Universal Cycle as well as general policies governing the allocation of funds from the various programs it administers. Typically, Florida Housing amends its Universal Cycle rules, forms, and instructions every year.

11. The typical process used by Florida Housing to review and approve the Universal Cycle applications operates as set

forth in Florida Administrative Code Rule 67-48.004, and is summarized as follows:

a. Interested developers submit applications by a specified date.

b. Florida Housing reviews all applications to determine if certain threshold requirements are met. A score is assigned to each application. Applications receive points towards a numerical score, based upon such features as programs for tenants, amenities of the development as a whole and of tenants' units, local government contributions to the specific development, and local government ordinances and planning efforts that support affordable housing in general.

c. Florida Housing has built into its scoring and ranking process a series of "tiebreakers" to bring certainty to the selection process. The tiebreakers are written into the application instructions which, as indicated above, are incorporated by reference into Florida Housing's rules.

d. After the initial review and scoring, a list of all applications, along with their scores, is published by Florida Housing on its website. The applicants are then given a specific period of time to alert Florida Housing of any errors they believe Florida Housing made in its initial review of the applications. An appeal procedure for challenging the scores

assigned by Florida Housing is set forth in Florida Administrative Code Rule 67-48.005.

e. Following the completion of the appeal proceedings, Florida Housing publishes final rankings which delineate the applications that are within the "funding range" for the various programs. In other words, the final rankings determine which applications are preliminarily selected for funding. The applicants ranked in the funding range are then invited into a "credit underwriting" process. Credit underwriting review of a development selected for funding is governed by Florida Administrative Code Rule 67-48.0072. In the credit underwriting process, third party financial consultants (selected by Respondent, but paid for by the individual applicants) determine whether the project proposed in the application is financially sound. The independent third party examines every aspect of the proposed development, including the financing sources, plans and specifications, cost analysis, zoning verification, site control, environmental reports, construction contracts, and engineering and architectural contracts.

f. Subsection (10) of Florida Administrative Code Rule 67-48.0072 expressly requires that an appraisal (as defined by the Uniform Standards of Professional Appraisal Practice), and a market study be ordered by the Credit Underwriter, at the applicant's expense. The Credit Underwriter is required to

consider the market study, as well as the development's financial impact on other developments in the area previously funded by Florida Housing, and make a recommendation to approve or disapprove a funding allocation.

RST's Application in the 2008 Universal Cycle

12. RST timely submitted an application in the 2008 Universal Cycle seeking an award of Tax Credits and a supplemental loan to construct a 100-unit garden style apartment complex ("Plata Lago") in Fruitland Park, Lake County, Florida.

13. RST complied with all of the requirements of the 2008 Universal Cycle Application and Instructions, and achieved a perfect score for its application. RST also achieved maximum tie-breaker points. As a result, RST was allocated by Florida Housing \$1,334,333 in Tax Credits from the Universal Cycle allocation.

14. Based on the final ranking of its application, RST was invited into the credit underwriting process on October 6, 2008. RST timely accepted the invitation and paid the necessary underwriting fees.

Credit Underwriting

15. Under the credit underwriting process, a professional credit underwriter is appointed by Florida Housing to review the proposed project that qualified for funding as a result of the Universal Cycle. The credit underwriter reviews and assesses

numerous financial, demographic, and market factors concerning the proposed project. The credit underwriter selected by Florida Housing to review the RST application was Seltzer Management Group, Inc. ("Seltzer").

16. As required by the applicable 2008 Universal Cycle Application requirements and rule, the credit underwriting process required the preparation of a Market Study by an independent appraiser. Seltzer engaged Meridian Appraisal Group ("Meridian") to perform an independent appraisal and market study as required by the RFP. This initial Market Study was issued with the identified purpose defined as follows:

- a. Provide a site analysis for the subject property.
- b. Provide regional and neighborhood analyses for the subject property.
- c. Provide an Apartment Market Overview for the subject market area.
- d. Provide an evaluation of market demand within the competitive area for affordable rental apartment products.
- e. Identify and evaluate the relevant competitive supply of affordable apartments.
- f. Perform an income band analysis for the subject property based on achievable restricted rents.

g. Perform a Capture Rate analysis for the subject property as a restricted property, and estimate an absorption rate.

h. Establish rental estimates for the subject, both as a market rate project and as restricted by the Housing Credit program.

i. Illustrate the difference between our estimate of the market rental rates and restricted rental rates.

j. Estimate the impact of the subject project on the existing rental inventory.

Economic Downturn

17. By the fall of 2008, significant changes were taking place in the economic environment and the affordable housing market in particular. Many of the projects that had been awarded funding through Florida Housing allocation process were encountering difficulties and in many instances were unable to close. By the latter part of 2008, it became evident that the market for Tax Credits had precipitously dropped as a result of the changed economic environment.

18. Shortly before RST was to complete the credit underwriting process, the syndicator who had originally expressed its intent to purchase the Tax Credits awarded to RST announced that it would not go forward with the syndication.

This withdrawal was a direct result of the nationwide downturn in economic conditions.

19. Many other projects that were awarded Tax Credits during the 2007 and 2008 (and later the 2009) Universal Cycles similarly experienced difficulty in finding syndicators to purchase the awarded Tax Credits and were also unable to proceed to closing.

20. In early 2009, in recognition of the collapse of the housing market and the difficulty in marketing Tax Credits, the federal government, as part of its economic stimulus efforts, established mechanisms to assist in the development of affordable housing and offset some of the economic devastation to developers.

ARRA

21. The ARRA enacted by Congress and signed by the President on February 17, 2009, included specific provisions intended to address the collapse of the Tax Credit market. ARRA gives states the ability to return to the federal government previously awarded Tax Credits that had not been utilized. These Tax Credits are exchanged for a cash distribution of 85 cents for each tax credit dollar returned. The money that is awarded to the states for the return Tax Credits (the "Exchange Funds") is to be used by Florida Housing to fund developers who were unable to syndicate their Tax Credits due to the economic

downturn. In other words, the Tax Credits that had not been utilized as a result of the declining economic conditions were allowed to be converted into cash from the federal government to be allocated to developers who were ready to proceed with their affordable housing projects but for the inability to syndicate their Tax Credits.

22. ARRA also included a direct allocation of funds to state housing finance agencies under the Tax Credit Assistance Program ("TCAP"). These funds were allocated to the states to "resume funding of affordable rental housing projects across the nation while stimulating job creation in the hard-hat construction industry." TCAP is a separate program included as part of ARRA to provide gap financing for affordable housing projects that have been affected by the economic downturn.

The RFP

23. In response to ARRA, on July 31, 2009, Florida Housing issued RFP 2009-04 (the "RFP"), setting forth criteria and qualifications for developers to seek funding for affordable housing projects from money that had been allotted by the federal government as part of economic stimulus efforts. RST received notice of the RFP through e-mail notification on July 31, 2009. The RFP required applicants to submit proposals to Florida Housing by no later than 2:00 p.m. on August 14, 2009.

24. The RFP solicits proposals from applicants with an "Active Award" of Tax Credits who were unable to close and are seeking alternate funding to construct affordable housing utilizing Exchange Funds from the Tax Credit Exchange Program authorized under Section 1602 of ARRA.

25. The RFP provides a general description of the type of projects that will be considered eligible for this alternate funding. The RFP also sets forth eligibility criteria that are a precondition to award of an allocation of Exchange Funds, and also specifies that projects allocated Exchange Funds and also specifies that projects allocated Exchange Funds will be required to meet new credit underwriting standards.

Occupancy Standards

26. Section 5B.1b. of the RFP states that a tentative funding award under the RFP will be rescinded "if the submarket of the Proposed Development does not have an average occupancy rate of 92% or greater for the same Demographic population, as determined by a market study ordered by the Credit Underwriter, and analyzed by the Credit Underwriter and Florida Housing staff, as well as approved by the Board." The RFP does not define "submarket." Likewise, there was no definition of "submarket" in the rules which governed the 2008 or 2009 Universal Cycle. The word "submarket" is included in the 2009 Universal Cycle Rule, but it is not defined.

27. RST timely submitted a response to the RFP on August 14, 2009, which sought additional funding for the Plata Lago project. On August 20, 2009, Florida Housing issued a Notice of Awards for RFP #2009-04. Based on the Notice, RST was one of the responders awarded funds subject to successfully completing the underwriting criteria listed in the RFP. Accordingly, RST was once again invited into credit underwriting. By accepting the invitation, RST was required by the credit underwriter to update its Market Study ("2009 Study"). This Second Market Study, which was completed approximately eight months after the 2008 study, was also prepared by Meridian on July 14, 2009. Likewise, Seltzer was the assigned underwriter.

28. On September 9, 2009, Seltzer issued a letter to Florida Housing concerning the Plata Lago project. In essence, Seltzer in the letter considered the 2009 Market Study and concluded that "the submarket average occupancy rate for the subject does not meet the minimum requirement of 92%."

29. On October 23, 2009, Florida Housing's Board of Directors considered Seltzer's letter and a staff recommendation and voted to rescind funding to RST because of the alleged failure to satisfy the 92 percent occupancy requirement. This action effectively stopped the underwriting process.

30. While RST timely filed its petition with the Division, it also intervened in a challenge to the provisions of the RFP. The challenge specifically involved a review of the 92 percent occupancy standard. In that matter, Elmwood Terrace Ltd. P'ship v. Fla. Hous. Fin. Corp., Case No. 09-4682BID, 2009 Fla. Div. Adm. Hear. Lexis 816 (Final Order entered December 7, 2009), the administrative law judge entered a Recommended Order on November 12, 2009, holding that the provision of the RFP which required a 92 percent occupancy rate is contrary to Florida Housing's governing statutes and rules. The administrative law judge concluded that Florida Housing is limited to using the 90 percent occupancy test established at Florida Administrative Code Rule 67-48.0072(10).

31. Florida Housing issued its Final Order in the Elmwood case on December 7, 2009, adopting the administrative law judge's Recommended Order. Based upon the Final Order in Elmwood, Florida Housing has reevaluated the RST Market Study under the provisions of the 2009 Universal Cycle Rule which established a 90 percent occupancy test. Florida Housing has now concluded that RST's Market Study indicates an 87 percent occupancy rate. Accordingly, Florida Housing has not changed its previous position and refuses to allow Petitioner to move forward in the underwriting process.

Unstipulated Findings of Fact

32. Two market studies were commissioned by Florida Housing and Seltzer regarding the proposed Plata Lago development, the first in November 2008 and the second in July 2009.

33. Both the First and Second Market Studies were performed by Meridian Appraisal Group and Robert Von, a state-certified general appraiser.

34. While purported to be a new stand-alone study, the Second Market Study is identical in many respects to the First Market Study. However, the First Market Study predated the requirement of the occupancy test in Florida Administrative Code Rule 67-48.0072(10), while the Second Market Study included the 90 percent occupancy test analysis. In each of the two studies, a circle is drawn extending out 10 miles from the proposed location of the Plata Lago development. That circle represents the primary market area ("PMA") which includes Fruitland Park, Lady Lake, and Leesburg. The PMA is where generally two-thirds to three-quarters of the demand for a facility originates.

35. In the Second Market Study, when the occupancy rate of the three existing senior apartment developments within the PMA is considered, the threshold requirement of 90 percent is met. If the PMA alone were considered, Florida Housing would not have

rescinded the Tax Credits, and Petitioner would be entitled to move forward with its project.

36. The Second Market Study, performed in 2009, added an additional factor to the analysis. The concept of a Competitive Market Area ("CMA") was introduced. A CMA was not designated in the 2008 Market Study.

37. CMA is neither defined in the 2009 Universal Cycle Rule or RFP 2009-04. The delineation of a CMA was not a requirement of the RFP, nor was it otherwise requested by Florida Housing.

38. CMA is not a term defined in either the development or market analysis industries. The term appears to have been created or borrowed by Florida Housing's designated market analyst based upon his experience as a certified appraiser.

39. Unlike the PMA, the CMA was not mapped or otherwise designated in the Second Market Study. However, both the First and Second Market Studies included information regarding a development known as Lake Point Senior Village ("Lake Point").

40. Both Plata Lago and Lake Point are affordable housing developments targeted at the elderly demographic category.

41. Lake Point is not in the PMA of the proposed Plata Lago development as PMA is defined in the Second Market Study.

42. The PMA as defined in the Second Market Study is a predetermined geographic area used for purposes of demographic

analysis, but not for competitive analysis. A set unmovable circle on a map could lead to skewed or absurd results if the nature and character of the developments within and without the circle are not considered by the appraiser.

43. Lake Point is an elderly affordable housing development located 13 miles from the proposed location of Plata Lago. It is located in Tavares which is outside the 10-mile radius from the proposed development and is past two lakes that separate Tavares from those developments contained within the PMA.

44. The analysis by Florida Housing's expert was that an individual moving into the Lake County area would look for elderly housing developments in close proximity to his or her work, shopping, health care, and other amenities they deemed important. The tenant does not necessarily look to see if other elderly housing developments are nearby. This is especially true when only four elderly developments are located in the county.

45. Plata Lago and Lake Point are similar to each other, both serve the elderly demographic category, and each would compete with the other for residents if the Plata Lago development were built.

46. It was appropriate for the Second Market Study to include Lake Point in its analysis of occupancy data for the

purpose of determining whether Plata Lago passed the test set forth in the rule requiring a 90 percent occupancy rate in its applicable submarket.

47. To address the requirement of the rule regarding occupancy rates for the submarket of the Plata Lago development, it was necessary for Florida Housing's consultant to determine what developments would compete with the proposed project. To do a competitive analysis, it is necessary for the consultant to move beyond the fixed PMA to a study of the market as real people in the real world look at it.

48. In the Second Market Study, the term CMA is used to describe the "submarket" as it applies to the occupancy test of the rule, as well as to distinguish this area from the PMA and from other incidental uses of the term "submarket."

49. Florida Housing's consultant investigated all the comparable properties and interviewed the manager of Lake Point about where the competition lay. The manager mentioned a property around the corner from the proposed Plata Lago (Silver Pointe) as a competitor which led the consultant to expand the CMA to include Lake Point. The manager at Silver Pointe named Lake Point as part of its competition.

50. Florida Housing's appraiser considers the submarket to be where a project's competitive property is located. In this

case, the submarket or competitive market is larger than the PMA.

51. Lake Point suffered a drop in its occupancy between the First and Second Market Studies. This was most likely attributable to the nature of elderly developments. Elderly residents tend to expire or suffer health issues that cause them to move to facilities providing health care or assisted living services.

52. On October 23, 2009, Florida Housing's Board of Directors met and considered the market study letter prepared by Seltzer along with its finding that the Plata Lago development did not pass the required occupancy test of 90 percent set forth in the rule. Based upon the occupancy rate being only 87 percent, as well as the results of the market study and credit underwriter recommendations, the Board voted to rescind Florida Housing's commitment to fund the Plata Lago development.

CONCLUSIONS OF LAW

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

54. Petitioner challenges an action of the Florida Housing Finance Corporation, a public instrumentality and agency of the State of Florida pursuant to Section 120.52 and Subsection 420.504(2), Florida Statutes.

55. Petitioner has the burden of going forward with the evidence as well as the ultimate burden of establishing the basis for their claim, The Env'tl. Trust v. Dep't of Env'tl. Prot., 714 So. 2d 493, 497 (Fla. 1st DCA 1998), and therefore must demonstrate the impropriety of Florida Housing's actions.

56. Since this case involves an agency interpretation of a rule, Petitioner's burden is to show that Florida Housing's interpretation of the term "submarket" in the rule is clearly erroneous, and not simply that alternative interpretations of the rule exist. Golfcrest Nursing Home v. Agency for Health Care Admin., 662 So. 2d 1330 (Fla. 1st DCA 1995).

57. Florida courts generally defer to an agency's interpretation of its own rules and the statutes that it administers. See D.A.B. Constructors, Inc. v. State Dep't of Transp., 656 So. 2d 940, 944 (Fla. 1st DCA 1995); Humana, Inc. v. Dep't of Health and Rehab. Servs., 492 So. 2d 388, 392 (Fla. 4th DCA 1986) (an agency's interpretation of its own rule is entitled to great weight and persuasive force). This deference is given to the interpretation of, and meanings assigned to, such rules and statutes by the officials charged with their administration. Pan Am. Airways, Inc. v. Fla. Public Serv. Comm'n, 427 So. 2d 716, 719 (Fla. 1983).

58. However, "[w]hen the agency's construction clearly contradicts the unambiguous language of the rule, the

construction is clearly erroneous and cannot stand." Woodley v. Dep't of Health and Rehab. Servs., 505 So. 2d 676, 678 (Fla. 1st DCA 1987); see also Legal Envtl. Assistance Found. v. Bd. of County Comm'rs of Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994) ("unreasonable interpretation" will not be sustained).

59. Petitioner's central argument is that the Lake Point Senior Housing development should not have been included in Florida Housing's analysis of occupancy rates for the purposes of Florida Administrative Code Rule 67-48.0072(10), which states, in pertinent part: "For the Credit Underwriter to make a favorable recommendation, the submarket of the proposed Development must have an average occupancy of 90 percent or greater." As testified to by Florida Housing's market analyst and set forth in his Second Market Study, determining the submarket in this context logically requires an analysis of what existing developments would compete with a proposed development. Petitioner's market analysis expert agrees that if Lake Point Senior Village would compete with Plata Lago, it would be appropriate to include it in such an analysis. Conversely, he could not state it was inappropriate not to include it.

60. In support of its argument, RST relies upon a finding of fact from a previous case in which RST intervened, Elmwood Terrace Ltd. P'ship v. Fla. Hous. Fin. Corp., Case No. 09-4682, 2009 Fla. Div. Adm. Hear. Lexis 816 (Final Order Dec. 7, 2009),

specifically referring to a single sentence found in paragraph 45 of the Recommended Order which states "'Submarket' and 'primary market area' are synonymous terms." Petitioner argues that this single sentence within this finding of fact is controlling in this case, meaning that in all circumstances "submarket" means "primary market area."

61. First, this argument fails because this sentence is found in a finding of fact specific to the Elmwood case. Since the statement is not a conclusion of law, it does not constitute an agency interpretation of a rule as formulated in a de novo proceeding under Subsection 120.57(1), Florida Statutes. The only conclusion of law made in the Recommended Order concerning the term "submarket" is found in paragraph 67, in pertinent part:

Florida Administrative Code Chapter 67-48 uses, but does not define, the term "submarket." Elmwood has not established that the lack of criteria for determining a submarket in the market study is arbitrary, capricious, clearly erroneous, or contrary to competition. The market studies are site specific, and the results of the market study can be challenged.

Unless the conclusion is made that the Recommended Order contradicts itself in simultaneously stating that "submarket" always means "primary market area" while stating that it is permissible for Florida Housing to define it as primary market area (or anything else) in the rule, the only logical conclusion

to be made is that the sentence in paragraph 45 of the Recommended Order is a finding of fact specific to the market study conducted for the Elmwood Terrace development, and not a statement of what the rule means generally.

62. The second reason this argument fails is that when stating the two terms are synonymous, the Recommended Order does not state that they are exclusively so or always so.

"Submarket" may be synonymous with "primary market area" in some factual circumstances, but may be synonymous with other terms in other factual circumstances. The Elmwood Recommended Order itself points to this conclusion when it states at paragraph 45 that "determining a submarket or primary area market [sic] is very subjective; even two adjacent sites may have different submarkets."

63. Finding these terms synonymous in all circumstances contradicts testimony from both parties in this case. Credible testimony from Florida Housing's market analyst and credit underwriter demonstrates that "submarket," for purposes of applying the occupancy test of the rule, cannot be based on a predetermined geographic area in order to avoid absurd or incorrect results. RST's expert agrees that primary market area is a predetermined geographic area, and further agrees that "submarket" and "primary market area" can, in some circumstances, mean different things. "Primary market area" and

"submarket" cannot be synonymous in all circumstances if "primary market area" is a predefined geographic area and, as found above, developments adjacent to each other can also be in different submarkets.

64. This conclusion is further supported by the fact that within the Second Market Study itself, information from a third party uses the term "submarket" in a way that does not match the definition of "primary market area," thus creating the necessity to distinguish the term from how the market analyst used it for purposes of the rule. Here, Florida Housing's analyst used the term "competitive market area" to clarify this distinction. The fact that Petitioner's market analyst used the term differently does not prove that Florida Housing used the term arbitrarily or capriciously.

65. Petitioner's argument that "submarket" and "primary market area" are synonymous in all circumstances is not supported by the language of the Florida Administrative Code Rule 67-48.0072(10). The Rule does not use the terms interchangeably, but uses them separately and for differing purposes within its text. The last three sentences of the Rule read:

The Credit Underwriter must review and determine whether there will be a negative impact to Guarantee Fund Developments within the primary service area or five (5) miles of the proposed Development, whichever is

greater. 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. For the Credit Underwriter to make a favorable recommendation, the submarket of the proposed Development must have an average occupancy rate of 90 percent or greater.

The term "primary market area" that appears in the first sentence above does not appear elsewhere in the section, and specifically refers to Guarantee Fund Developments. The term does not refer to the occupancy test. The term "submarket" appears in the last sentence of the section quoted above and likewise does not appear elsewhere in the section. This term refers specifically to the occupancy test. If Florida Housing meant for these terms to be used synonymously in all circumstances, it would have used them synonymously in the Rule. As it expressly did not, the rule of statutory interpretation expressio unius est exclusio alterius ("the inclusion of one is the exclusion of the other") mandates that the difference in the purposes for which the two terms are used must be respected. When a term is used in one section of a statute (or, as here, a rule), but is omitted in another section of the same statute (or rule), the courts will not imply it where it has been excluded. Avila v. Miami-Dade County, 29 So. 3d 301 (Fla. 3d DCA 2010). Moreover, the principle of statutory construction expressum

facit cessare tacitum ("what is expressed renders what is implied silent") means that the use of the express term precludes the implication that the two terms are synonymous or implied to be construed as such.

66. In another recent case at the Division, Vestcor Fund XII, Ltd. V. Fla. Hous. Fin. Corp., DOAH Case No. 09-0366 (Final Order July 24, 2009), an existing development known as Madalyn Landing protested the funding and construction of a proposed new development, Malabar Cove, on the grounds that the existing development would suffer a negative impact by competition within the same "sub-market." The administrative law judge found that Florida Housing's Board of Directors did not act unreasonably or inappropriately in approving the Malabar Cove development, where Florida Housing, its Board, and agents complied with the applicable rules and requirements therein, and where the Board relied on a commissioned market study and recommendation from its credit underwriter, even when it was established that Madalyn Landing would suffer an adverse impact. The administrative law judge found that the Board did not act arbitrarily, capriciously, or inappropriately or otherwise abuse its discretion by reaching a decision based upon that information. While the holding in the Vestcor XII case was different from this case, the principle is the same: Florida Housing's Board may rely on the findings of its professional

analysts or credit underwriters so long as those findings are not clearly erroneous.

67. Florida Housing's reliance on the occupancy rate derived from the competitive market area was neither arbitrary, capricious, nor anti-competitive. Moreover, its findings in this case have not been proven to be clearly erroneous. Unfortunately, the result of Florida Housing's rescission of Petitioner's application from credit underwriting is a harsh result in this case. Petitioner will lose its Tax Credits of \$1,334,333 from the 2008 Universal Cycle. Moreover, RST has most certainly expended great sums to bring its project to this point. However, the harshness of the result cannot be a consideration when Petitioner is unable to prove that Florida Housing abused its discretion by relying on the professional opinions of its market analyst and credit underwriter. Based upon the evidence and facts of this case, the only conclusion that can be made is that Florida Housing's decision to rescind RST's funding commitment for failure to meet the occupancy standard was appropriate.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Housing Finance Corporation enter a final order rescinding funding to the Plata Lago

development for failing to pass the occupancy standard set forth in Florida Administrative Code Chapter 67-48.

DONE AND ENTERED this 9th day of June, 2010, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2010.

COPIES FURNISHED:

Wellington H. Meffert, II, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

Hugh R. Brown, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 5 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.