

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

DALE BAIRSTOW,

Petitioner,

v.

CASE NO.: 2011-011HHF

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2) of the Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal telephonic hearing in the above styled case on September 2, 2011.

APPEARANCES

For Petitioner:

Dale Bairstow, *Pro Se*
1430 Gulf Blvd., Apt 507
Clearwater, Florida 33767

For Respondent:

Hugh R. Brown
Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

There are no disputed issues of material fact. The issue for determination in this proceeding is whether Petitioner's application for financial assistance from Florida's Hardest Hit Fund ("HHF"), a program providing mortgage payment assistance to eligible homeowners, should be denied on the sole ground that Petitioner's condominium is not listed on current Federal Housing Administration or Fannie Mae approved lists of condominiums.

PRELIMINARY STATEMENT

At the informal telephonic hearing, Petitioner Dale Bairstone testified on his own behalf, and Respondent Florida Housing Finance Corporation presented the testimony of David Westcott, Respondent's Director of Homeownership Programs. The parties entered into a Joint Prehearing Stipulation, basically describing the financial assistance program. Subsequent to the hearing, Respondent submitted a Proposed Recommended Order.

FINDINGS OF FACT

Based upon the undisputed facts in the Petition and the Joint Prehearing Stipulation, as well as the undisputed testimony presented, the following relevant facts are found:

- (1) In January of 2010, the United States Department of the Treasury created

the “Housing Finance Agency (HFA) Innovation Fund for the Hardest-Hit Housing Markets” (HFA Hardest-Hit Fund) to help homeowners avoid foreclosure in the areas hardest hit by steep home price declines and unemployment. The funds were allocated under the Federal Emergency Economic Stabilization Act of 2008 (EESA), administered by the U.S. Department of the Treasury.

2. The U. S. Treasury has injected more than \$7.6 billion into the HFA Hardest-Hit Fund to be split amongst eighteen states and the District of Columbia. Florida has been awarded over \$1 billion through the HFA Hardest-Hit Fund.

3. The U. S. Treasury has designated an agency in each state that is responsible for creating and administering the foreclosure prevention assistance programs to award funds based on the unique issues of the state. Respondent Florida Housing Finance Corporation is responsible for implementing the Hardest-Hit Fund programs in Florida. Florida was directed to use a portion of the funds specifically for targeted unemployment programs that provide temporary assistance to eligible homeowners.

4. Respondent Florida Housing currently has two programs under the HFA Hardest Hit Fund: the Unemployment Mortgage Assistance Program (UMAP) and the Mortgage Loan Reinstatement Payment Program (MLRP). Both program funds are in the form of a 0% interest, deferred payment loan that is subordinate to current mortgages on the home. The loans are forgiven at a rate of 20% a year over a five-

year period, starting 18 months after the homeowner is accepted into the program.

5. Under UMAP, loan funds can be used to pay monthly mortgage and escrowed mortgage-related expenses until the homeowner can resume payments or for up to six (6) months, with a cap of \$12,000, whichever occurs first. A homeowner participating in the UMAP is required to pay 25% of his/her monthly income toward the monthly mortgage payment, with a minimum payment of \$70 per month. The UMAP targets homeowners who are unemployed, underemployed or have had a reduction of income through no fault of their own, and are experiencing a financial hardship.

6. Under the MLRP program, loan funds of up to \$6,000 can be used to bring the past-due first mortgage current for a homeowner who has returned to work or recovered from underemployment and can now resume the monthly mortgage payment(s) based on his or her new income.

7. The federal Emergency Economic Stabilization Act of 2008 does not reference condominiums. There are no Florida statutes specifically directed to the FHA Hardest Hit Fund, or to the UMAP or MLRP programs administered by Florida Housing. The Respondent has not proposed or adopted any rules pursuant to Chapter 120 of the Florida Statutes related to these programs.

8. The Respondent has developed certain homeowner, property and mortgage

eligibility criteria for UMAP and/or MLRP loans, and these criteria are set forth on an internet web page maintained by Florida Housing and in a procedures manual. The only criterion at issue in this proceeding is the property eligibility requirement as it relates to condominiums.

9. To be qualified, the property must be located in Florida, and must be either a single family home, a condominium, a townhome, a manufactured or mobile home on a foundation permanently affixed to real estate owned by the homeowners, or a two-, three- or four-family dwelling unit of which one unit is occupied by the homeowner as their primary residence. With regard to condominiums, Florida Housing determined that the homeowner's condominium must be listed on the current Federal Housing Administration (FHA) or the Fannie Mae approved list of condominiums.

10. Respondent denied Petitioner's HHF application on the sole ground that his condominium was not listed on either the FHA or the Fannie Mae lists of approved condominiums in Florida.

11. Respondent Florida Housing has no control over whether a condominium appears on the FHA or Fannie Mae approved lists.

12. For more than 30 years, Florida Housing has administered a first-time home buyer program, and has a long history of working with FHA and Fannie Mae

mortgage products. Florida Housing has relied upon those entities in the past to decide which home buyers should be given new mortgage loans. In discovering that FHA and Fannie Mae had approved lists of condominiums, Florida Housing relied upon its past experience with those entities and made inclusion on the FHA and/or Fannie Mae approved condominium lists a criterion for HHF eligibility. FHA and Fannie Mae and Freddie Mac, which uses Fannie Mae's approved list, are among the few forms of financing for condominium units in Florida. Florida Housing believed it reasonable to utilize the FHA and Fannie Mae approved lists to direct the Hardest Hit Funds because it was believed that condominiums on those lists would have the most sustainable associations which would most likely lead to a sustainable home ownership outcome for homeowners receiving Hardest Hit Funds.

12. Petitioner has sought inclusion of his condominium on the FHA approved list, but has not been successful. Petitioner's research has shown that there are 455 condominiums in the City of Clearwater, where his unit is located, and only 11 of those are on the FHA-approved list.

13. No documentary or other evidence was presented as to all the FHA requirements for placement on its approved condominium list. It is Petitioner's understanding that his condominium could get on the list if its condominium association were willing to maintain 100% replacement reserves. However, that

action would raise the condominium association fee another \$75.00 per month, and Petitioner's condominium association's board has consistently tried to keep the condo fees constant. The reserve budget for Petitioner's condominium is over \$600,000, and the association has no delinquencies with the maintenance fees. According to Petitioner, his condominium is probably one of the most financially sound condominiums in the area.

14. Respondent Florida Housing does not dispute the financial soundness of Petitioner's condominium. Florida Housing acknowledges that increases in condo association fees contributes to the high number of mortgage defaults in Florida, and does not dispute Petitioner's testimony that his association fees would increase \$75.00 per month if 100% replacement reserves were imposed. The denial of Petitioner's application for funding was based solely upon the fact that Petitioner's condominium does not appear on the approved lists maintained by FHA or Fannie Mae.

15. Respondent would reconsider Petitioner's application for funding if his condominium were to appear on the FHA and/or Fannie Mae approved lists, assuming he continues to meet all the other eligibility criteria.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, the Informal Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Because Respondent Florida Housing Finance Corporation determined that Petitioner Bairstone was ineligible for funding under Florida's Hardest Hit Fund program due to the fact that his condominium was not included on an approved list of condominiums maintained by the Federal Housing Administration ("FHA") and/or Fannie Mae, the Petitioner's substantial interests are affected by Florida Housing's proposed agency action. Accordingly, Petitioner has standing to bring this proceeding under Chapter 120 of the Florida Statutes.

The sole issue for determination in this proceeding is whether Florida Housing may properly deny a condominium owner's application for funding under the Hardest Hit Fund program on the sole ground that the condominium is not included on a list of approved condominiums maintained by the FHA and/or Fannie Mae.

The Florida Housing Finance Corporation is an "agency" subject to the requirements of Florida's Administrative Procedure Act ("APA"). Section 420.504(2), Florida Statutes. As such, it is required to adhere to the rulemaking mandates set forth in Section 120.54 of the Florida Statutes with regard to its agency statements falling within the definition of a "rule." A "rule" is defined, in part, as

“each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency.” Section 120.52(16), Florida Statutes. An “unadopted rule” is “an agency statement that meets the definition of the term ‘rule,’ but that has not been adopted pursuant to the requirements of s. 120.54.” Section 120.52(20), Florida Statutes. Rulemaking is not a matter of agency discretion (Section 120.54(1)(a), Florida Statutes), and no agency action that determines the substantial interests of a party may be based upon an unadopted rule (Section 120.57(1)(e)1, Florida Statutes).

Florida Housing’s requirement that a condominium owner may receive funds under Florida’s Hardest Hit Program only if the condominium is included on an approved list maintained by the FHA or Fannie Mae determined the substantial interests of Petitioner Bairstone by rendering him ineligible for such funds. That eligibility requirement constitutes an agency statement of general applicability that implements, interprets or prescribes law or policy or describes the procedure or practice requirements of Florida Housing, within the APA’s definition of a “rule.” Section 120.52(16), Florida Statutes. It is a mandatory policy used to determine eligibility for benefits under Florida’s Hardest Hit Program, and it is intended by its own effect to create rights or require compliance, or otherwise to have the direct and consistent effect of law. McDonald v. Department of Banking and Finance, 346

So.2d 569, 581 (Fla. 1st DCA 1977); Department of Revenue v. Vanjaria Enterprises, 675 So.2d 252 (Fla. 5th DCA 1996). Florida Housing has not adopted that eligibility requirement as a rule under the rulemaking mandates of Section 120.54, Florida Statutes. Accordingly, Florida Housing may not utilize that unadopted rule as the basis for denying Petitioner Bairstone's application for funding. Section 120.57(1)(e)1, Florida Statutes; Kerper v. Department of Environmental Protection, 894 So.2d 1006 (Fla. 5th DCA 2005).

At the hearing and in its Proposed Recommended Order, Respondent Florida Housing attempted to justify its reliance upon the unadopted eligibility rule by contending that it was logical and reasonable (i.e., not arbitrary or capricious) because of the agency's long-time reliance on FHA and Fannie Mae mortgage eligibility requirements. The issue of whether the substance of Respondent's unadopted rule is or is not arbitrary or capricious would only be relevant if this proceeding had been brought pursuant to Sections 120.56(2) or (3), as a challenge to a proposed or an existing rule, or if Florida Housing had initiated rulemaking and was proceeding expeditiously to adopt the rule at the time of the hearing, as provided in Section 120.57(1)(e)2, Florida Statutes. Here, Florida Housing has not proposed the subject eligibility requirement as a rule, has not adopted it as a rule and has not initiated the rulemaking procedures required by the Administrative Procedure Act. The 2008

amendments to Florida's APA are clear that Florida Housing may not use its unadopted rule requiring inclusion of Petitioner's condominium on an FHA or Fannie Mae approved condominium list as a basis for denial of Petitioner's application for funding.

At the informal hearing, Petitioner presented evidence of the financial soundness of his condominium association. Respondent does not dispute this evidence. Florida Housing having stipulated that Petitioner meets all other requirements for funding under Florida's Hardest Hit Program, Petitioner's application for funding under that Program should be granted.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law stated above, it is RECOMMENDED that Petitioner Bairstone's application for funding under Florida's Hardest Hit Program be GRANTED.

Respectfully submitted this 25th day of October, 2011.



DIANE D. TREMOR
Hearing Officer for Florida
Housing Finance Corporation

Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Copies furnished to:

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

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

Mr. Dale Bairstow
1430 Gulf Blvd., Apt. 507
Clearwater, FL 33767