

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

**TIDEWATER REVITALIZATION, LTD.,**

**Petitioner,**

**v.**

**FHFC CASE NO. 2002-0023  
Application No. 2002-067C**

**FLORIDA HOUSING FINANCE  
CORPORATION,**

**Respondent.**

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**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 hearing in Tallahassee, Florida, in the above styled case on September 20, 2002.

**APPEARANCES**

For Petitioner:

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For Respondent:

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## **STATEMENT OF THE ISSUE**

There are no disputed issues of material fact. The sole issue is whether Petitioner's application should be rejected for failure to meet the threshold requirement of demonstrating site control over the property that is the subject of the proposed development. More specifically, the issues are whether the Purchase and Sale Agreement submitted by Petitioner is deficient because it does not contain the legal description of the property and whether the Second Amendment to that Purchase and Sale Agreement is deficient because it does not contain the signature of one of the sellers of the property.

## **PRELIMINARY STATEMENT**

At the informal hearing, the parties stipulated to the admission into evidence of Exhibits 1 through 7. Exhibit 8 was also received into evidence. At the commencement of the hearing, the parties filed a Joint Stipulation of Facts and Exhibits. That document basically describes the application process, and the circumstances regarding the scoring of Petitioner's application with regard to the issue in dispute. The Joint Stipulation of Facts and Exhibits is attached to this Recommended Order as Exhibit 1, and the facts recited therein are incorporated in this Recommended Order.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

### **FINDINGS OF FACT**

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. Petitioner timely submitted its application to obtain an award of low-income housing tax credits with respect to a 100-unit apartment complex in Taylor County, Florida.

2. The Universal Application Package, which includes both the application forms and instructions, is adopted as a rule and is incorporated by reference in the Respondent's Rule 67-48.002(116), Florida Administrative Code.

3. The application instructions require applicants to demonstrate, as a threshold matter, their ability to proceed with the proposed project. As part of this demonstration, applicants are required to provide evidence of site control by providing one of three documents: a qualified contract, a deed or a lease. With respect to a qualified contract, which is at issue in this proceeding, the application instructions contain the following requirements:

A qualified contract is one that has a term which does not expire before the last expected closing date of December 31, 2002 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date not earlier than December 31, 2002; provides that the

buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless a fully executed assignment of the qualified contract which assigns all of the buyer's rights, title and interests in the qualified contract to the Applicant, is provided.

4. After preliminary scoring of Petitioner's initial application, Respondent found that Petitioner had failed to meet the threshold requirement of demonstrating site control. Petitioner timely filed its "cure" documentation. This documentation included a Purchase and Sale Agreement dated February 7, 2000, wherein the sellers were identified as Hazel Baumgardner, Judith Ware Abbott and Tidewaters Apartments. This Agreement describes the real property which is the subject of the Agreement, in part, as:

that certain parcel of land and buildings containing 100 rental apartments and known as "Tidewater Apartments," together with any buildings, structures and improvements thereon located in the City of Perry, Taylor County, Florida, as more particularly described in Exhibit "A", attached hereto . . .

The copy of the Purchase and Sale Agreement submitted to Respondent in Petitioner's "cure" does not contain Exhibit A, or otherwise contain a legal description of the property. The Purchase and Sale Agreement provides that the "closing shall take place on or before December 31, 2000," and states that time is of the essence in all provisions of the agreement. The Agreement also provides that it constitutes the entire agreement between the parties "and may not be modified or amended except by an instrument in writing signed by the parties hereto."

5. Also included as part of Petitioner's "cure" documentation was a letter dated October 11, 2000, in which the buyer and the sellers agreed that the Closing Date would be within fifteen (15) days after approval of the Transfer of Physical Assets by HUD. This letter bears the signatures of sellers Hazel M. Baumgardner and Judith Ware Abbott.

6. Also included as part of Petitioner's "cure" documentation was a document entitled "Second Amendment to Purchase and Sale Agreement for Tidewater Apartments." This Second Amendment revises the terms of the Purchase and Sale Agreement, as amended October 11, 2000, with respect to the purchase price, and also states that "notwithstanding the provisions of this amendment or prior amendment and contract of the parties, this agreement shall terminate on December 31, 2002." The Second Amendment is signed by Petitioner and by seller Hazel Baumgardner. Seller Judith Ware Abbott's signature does not appear on this Second Amendment.

7. After review of Petitioner's "cure" documentation, Respondent determined that Petitioner's "cure" failed to meet threshold with regard to site control. The Respondent found that the "cure"

does not include Exhibit A, legal description. In addition, since the cure provides no evidence that one seller can sign for all, the amendments to the contract are invalid. Therefore, the contract does not have a term which does not expire before 12/31/02.

8. Petitioner relies, in part, upon Exhibit 21 of its application (received into evidence at the hearing as Exhibit 8) to demonstrate that a legal description of the property was included within the four corners of its application. This exhibit, a land survey map, is required, not for the purposes of demonstrating site control, but in connection with a request for proximity tie-breaker points. The instructions require that the map show the boundaries of the proposed development site, the location of the tie-breaker measurement point and the scale of the map. The map submitted by Petitioner is entitled “As-Built Survey for Tidewater Revitalization, Ltd., a Florida Limited Partnership, Section 26, T4S, R7E, Perry Taylor County, Florida, March 1, 2000.” Although difficult to read due to its small print, the map does contain a “description” of the development, along with several “deed calls.” However, there is nothing within this exhibit which indicates ownership of or control by Petitioner over the development depicted thereon.

### **CONCLUSIONS OF LAW**

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The Petitioner’s substantial interests are affected by the proposed action of the Respondent Corporation. Therefore, Petitioner has standing to bring this proceeding.

The sole issue in this proceeding is whether Petitioner failed to meet threshold requirements with regard to a demonstration of site control by failing to include the legal description of the property which is attached to and a part of its Purchase and Sale Agreement and by failing to demonstrate that said Agreement does not expire before December 31, 2002.

With regard to Petitioner's failure to include Exhibit A along with the submission of its Purchase and Sale Agreement, which Exhibit contains a legal description of the property, Petition makes several arguments. First, Petitioner contends that its' application Exhibit 21 (hearing Exhibit 8) contains a legal description of the property. However, as noted above, this Exhibit contains no information as to Petitioner's interest, ownership or control of the property, either by reference to a contract to purchase, a deed or a lease. It simply does not establish site control by Petitioner, as required by Respondent's rules.

Petitioner next argues that a detailed legal description of property is not an essential part of an agreement to purchase, and therefore its Purchase and Sale Agreement is a qualified contract as required by Respondent's rules. The undersigned has reviewed the cases cited by Petitioner<sup>1</sup> in support of this assertion. These cases basically deal with the issue of whether specific performance of a contract for purchase and sale can be granted based upon the sufficiency of the

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<sup>1</sup> Jordan v. Boisvert, 632 So.2d 254 (Fla. 1<sup>st</sup> DCA 1994); Triplette v. Lucas, 113 So. 685 (Fla. 1927); Kingston v. Boone, 109 So. 580 (Fla. 1926); Schofield v. Talley, 84 So. 193 (Fla. 1920); South Florida Citrus Land Co. v. Walden, 51 So. 554 (Fla. 1910).

description of the real estate. The cases recognize that extrinsic evidence can be relied upon to determine whether a surveyor can locate the land and establish the boundaries.

Not only were the property descriptions in the cited cases more specific and detailed than that contained within Petitioner's Purchase and Sale Agreement (absent the missing Exhibit A), there are other important distinctions in this proceeding. Here, the very purpose of requiring documentation of a qualified contract for purchase and sale is to demonstrate that an applicant has, or will have, control over the development site by a date certain. Absent a detailed description of the development site, there can be no demonstration of control over that site on the part of the applicant. The purpose of submitting a contract is not to enable a surveyor to establish property boundaries from that exhibit, along with the use of other extrinsic evidence. Here, Respondent is not permitted to rely upon any extrinsic evidence beyond that submitted by the applicant. The applicable rules require that all applications be complete. Rule 67-48.004(1) and (2), Florida Administrative Code. Petitioner's failure to provide the legal description of its proposed development site, which description was a part of the Purchase and Sale Agreement offered by Petitioner to demonstrate site control, violates these rules.

No matter how "widely known" the Tidewater Apartments may be to residents in Perry, Florida, the burden of Petitioner in this application process was to demonstrate to the Respondent, whose staff is located in Tallahassee, Florida, that it



had control over the site claimed as its' proposed development. In addition to the fact that Petitioner submitted an incomplete document in its "cure," the description of the property contained in the portion submitted is insufficient to demonstrate that Petitioner has, or will have, control over the property at issue. That document simply refers to land and buildings containing 100 rental apartments, known as Tidewater Apartments, located in Perry, Taylor County, Florida, "as more particularly described in Exhibit A." Without Exhibit A, it is impossible to determine the location and boundaries of the property over which Petitioner claims site control. The general description, without Exhibit A, contains no information as to the amount of land involved, and there is no reference to sections, townships, ranges or any other landmark to identify the location and boundaries of the development site.

The application instructions, which are rules, clearly require applicants to demonstrate that a contract or agreement for purchase and sale does not expire before December 31, 2002. The February 7, 2000, Agreement offered by Petitioner demonstrates to the contrary. The October 11, 2000, letter of modification demonstrates to the contrary. The June 25, 2002, Second Amendment, while purporting to extend the termination date to December 31, 2002, was not signed by one of the sellers. Accordingly, that amendment could not be specifically enforced as against seller Abbott, and Petitioner has thus failed to provide evidence of site control as of December 31, 2002. See Preve v. Albert 578 So.2d 33 (Fla. 4<sup>th</sup> DCA

1991). Again, the undersigned has reviewed the cases relied upon by Petitioner,<sup>2</sup> and finds them to be inapplicable to the facts in this case. None of those cases involved an attempt to modify a contract without the signature of one of the parties. As noted above, the Purchase and Sale Agreement relied upon by the Petitioner to demonstrate site control clearly states, immediately after the paragraph specifying a closing date (paragraph 7), and again in the last paragraph of that Agreement (paragraph 27), that time is of the essence in all provisions of, and with respect to all matters pertaining to, this Agreement. That Agreement further provides, at paragraph 21(D), that the Agreement “may not be modified or amended except by an instrument in writing signed by the parties hereto.” The Second Amendment purporting to extend the closing date to December 31, 2002, was not signed by seller Judith Ware Abbott, a named party to the initial Agreement. There being no other evidence timely submitted by Petitioner during the application process demonstrating that one seller had the authority to sign for the other seller, Petitioner failed to meet the threshold requirement to demonstrate site control over the proposed development.

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<sup>2</sup>Southwest Bank of Deerfield Beach v. Ralph Jackson Realty, Inc., 354 So.2d 1217 (Fla. 4<sup>th</sup> DCA 1978); Burke v. Wallace, 124 So 30 (Fla. 1929); Harper v. Bronson, 139 So. 203 (Fla. 1932); Middelthon v. Crowder 563 So.2d 94 (Fla. 3d DCA 1990); Lord v. Die Polder, 113 So.2d 440 (Fla. 2d DCA 1959); Malsby v. Gamble, 54 So. 766 (Fla. 1911).

**RECOMMENDATION**

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that Petitioner's application be rejected for failure to meet the threshold requirement of a demonstration of site control with respect to its proposed development.

Respectfully submitted and entered this 2nd day of October, 2002.



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TIDEWATER REVITALIZATION, LTD.,

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FHFC CASE NO.: 2002-0023  
App No.: 02-0067

FLORIDA HOUSING FINANCE  
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Respondent.

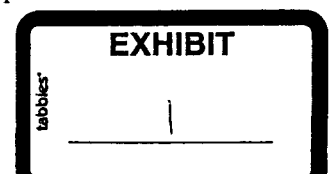
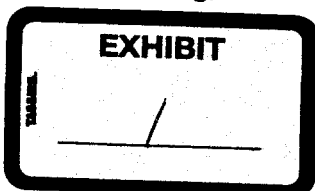
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**JOINT STIPULATION**  
**OF FACTS AND EXHIBITS**

The parties, TIDEWATER REVITALIZATION, LTD. ("Tidewater"), and FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing"), hereby stipulate for purposes of expediting the informal hearing scheduled for 9:00 am, September 20, 2002, in Tallahassee, Florida, and agree to the following facts and exhibits:

1. Petitioner, Tidewater Revitalization, LTD, ("Tidewater"), is a Florida for-profit limited partnership in the business of developing affordable housing units in the state of Florida. Tidewater's address is 4243 Northlake Blvd., Suite D, Palm Beach Gardens, FL 33410.

2. Florida Housing is a public corporation organized under Chapter 420, F.S., to provide and promote the public welfare by administering the governmental function of financing, and refinancing houses, and related facilities in Florida in order to provide



decent, safe, and affordable housing to persons and families of low, moderate, and middle income.

3. Florida Housing receives a finite amount of federal low income housing tax credits (“Housing Credits”) for allocation to developers to assist in the building and maintenance of low and moderate housing units. The process of allocating the Housing Credits is competitive, and the amount of funding requests for Housing Credits exceed available funds.

4. Pursuant to statutory mandate, Florida Housing has established, by rule, a competitive application process to evaluate, score, and competitively rank all applicants. Section 420.507 (22)(f), F.S., and Fla. Admin. Code R. 67-48 *et. al.* Awards for Housing Credits are included in a single application process (“Universal Cycle”) governed by rule, Fla. Admin. Code R. 67-48 *et. al.*

5. The 2002 Universal Application (“Application”) and accompanying instructions are incorporated as form, “UA1016,” by reference in Fla. Admin. Code R. 67-48.002(116). The portion of the Application pertaining to Housing Credits is pertinent to the subject matter of this informal hearing. Some of this portion includes “threshold” items. Failure to properly include a threshold item or to satisfy a threshold requirement shall result in the rejection of the application.

6. On or before April 15, 2002, Tidewater submitted an Application to Florida Housing for an allocation of Housing Credits for Tidewater Apartments, a proposed development of affordable rental housing in the 2002 Universal Cycle.

7. After Tidewater submitted its Application for Housing Credits, Florida Housing’s staff began scoring the Application pursuant to Part V, Chapter 420, Fla. Stat.,

and Fla. Admin. Code R. 67-48 *et. al.* Florida Housing completed the preliminary scoring process on May 13, 2002.

8. Following the issuance of preliminary scores, applicants are provided an opportunity to challenge the scoring of any competing application through the filing of a Notice of Possible Scoring Error (“NOPSE”). Florida Housing considers each NOPSE filed, and provides each applicant with notice of any resulting change in their preliminary scores (the “NOPSE scores”).

9. Following the issuance of NOPSE scores, Florida Housing provides an opportunity for applicants to submit additional materials to “cure” any items for which the applicant received less than the maximum score, or for which the application may have been rejected for failure to achieve “threshold.”

10. Following the “cure” period, applicants may again contest the scoring of a competing application by filing a Notice of Alleged Deficiencies (“NOAD”), identifying deficiencies arising from the submitted “cure” materials.

11. After considering the submitted NOADs, Florida Housing provides notice to applicants of any resulting scoring changes. The resulting scores are known as “pre-appeal” scores.

12. Applicants may appeal and challenge, via formal or informal hearings, Florida Housing’s scoring of any item for which the applicant received less than the maximum score, or for any item that resulted in the rejection of the application for failure to meet “threshold.”

13. One of Florida Housing's primary considerations in evaluating applications for funding is whether the applicant can demonstrate that it is ready to proceed with development and construction of its proposed project. As part of this demonstration, Florida Housing's application requires all applicants to document that they have legal title to the property on which the project is proposed to be constructed, or that they have the legal right to acquire such title, e.g., through a contract for sale or a long-term lease. These legal rights are commonly referred to as "site control."

14. In its initial scoring of the Tidewater application, Florida Housing found that the documents submitted in the Tidewater application regarding site control failed to meet threshold requirements of Part III, Section C, subsection 2 of the Universal Application: Tidewater failed to provide evidence to demonstrate site control.

15. Tidewater submitted additional documentation during the cure period in response to Florida Housing's initial scoring, including a Revised Purchase and Sale Agreement and Second Amendment to Purchase and Sale Agreement for Tidewater Apartments.

16. All applicants were allowed to review any other applicant's Cure. Thereafter, any applicant could, if it chose to do so, submit to Florida Housing a Notice of Alleged Deficiencies ("NOAD") to challenge the Tidewater's Cures. Florida Housing received several NOADs in this matter.

17. Following the submission of the cure material and NOADs, Florida Housing again determined that Tidewater's application failed the threshold site control requirement of III, Section C, subsection 2 of the Universal Application in two respects: The cure submitted for 1T of the 2002 Universal Scoring Summary does not include,



“Exhibit A, legal description,” an attachment to the Purchase and Sale Agreement. In addition, Florida Housing determined that the additional documentation submitted during the cure period provided no evidence that one seller had the authority to sign for the other sellers in the Second Amendment to Purchase and Sale Agreement for Tidewater Apartments, which made the amendment to the contract invalid. Therefore, Florida Housing determined the contract does not have a term which does not expire before 12/31/02.

18. On or about July 22, 2002, Florida Housing sent Final Scores and a Notice of Rights to Tidewater, informing Tidewater that it could contest Florida Housing’s actions in accordance with the provisions of Sections 120.569 and 120.57, F.S.

19. Tidewater timely requested a formal hearing by filing its Petition in accordance with Chapter 120 Fla. Stat., on or about August 13, 2002.

The parties offer the following JOINT EXHIBITS into evidence:

- Exh. 1. Joint Stipulation.
- Exh. 2. Revised Purchase and Sale Agreement.
- Exh. 3. Revised Second Amendment to Purchase and Sale Agreement for Tidewater Apartments.
- Exh. 4. Letter dated October 11, 2000, re: Purchase and Sale for Tidewater Apartments.
- Exh. 5. NOADs filed against Tidewater application pertaining to site control.
- Exh. 6. 2002 Final Universal Scoring Summary for the Tidewater application dated July 22, 2002.
- Exh. 7. Excerpts from the 2002 Universal Application and Instructions

Respectfully submitted this 20th day of September, 2002

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## **NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT**

All parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages. Written arguments must be filed with Florida Housing's Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on Monday, October 7, 2002. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.