

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

**EAGLE RIDGE SEBRING LIMITED  
PARTNERSHIP,**

**Petitioner,**

vs.

**FHFC Case No: 2003-034  
Application No. 2003-136C**

**FLORIDA HOUSING FINANCE  
CORPORATION,**

**Respondent.**

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**RECOMMENDED ORDER**

An informal administrative hearing was noticed and held on September 11, 2003, at Tallahassee, Florida, before the Florida Housing Finance Corporation's appointed Hearing Officer, David E. Ramba.

**APPEARANCES**

**For the Petitioner:**

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**For the Respondent:**

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## EXHIBITS

The following exhibits were offered by the parties at the hearing and were admitted into evidence by the Hearing Officer:

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| Petitioner's Exhibit 1/<br>Respondent's Exhibit 4: | 2003 Application Instructions, pp. 57-58.  |
| Petitioner's Exhibit 2:                            | PNC Bank Loan Commitment Letter, dated April 9, 2002 (from 2002 Woodland Point Apartments Application).                            |
| Petitioner's Exhibit 3:                            | PNC Bank Loan Commitment Letters, dated April 9, 2002 and June 12, 2002 (from 2002 Covington Point Senior Apartments Application). |
| Petitioner's Exhibit 4:                            | 2002 Universal Scoring Summary for Woodland Point Apartments, dated Oct. 17, 2002.   |
| Petitioner's Exhibit 5:                            | 2002 Universal Scoring Summary for Covington Point Senior Apartments, dated Oct. 17, 2002.   |
| Petitioner's Exhibit 6:                            | PNC Bank Loan Commitment Letter, dated March 28, 2003 (from original 2003 Eagle Ridge Application).                                |
| Petitioner's Exhibit 7:                            | Columbia Housing Syndication Commitment Letter, dated March 28, 2003 (from original 2003 Eagle Ridge Application).                 |
| Petitioner's Exhibit 8/<br>Respondent's Exhibit 2: | 2003 Scoring Summary for Eagle Ridge Apartments, dated July 18, 2003.  |
| Petitioner's Exhibit 9/<br>Respondent's Exhibit 3: | PNC Bank Loan Commitment Letter, dated June 13, 2003 (from cure materials for 2003 Eagle Ridge Application).                       |
| Petitioner's Exhibit 10:                           | Columbia Housing Syndication Commitment Letter, dated June 13, 2003 (from cure materials for 2003 Eagle Ridge Application).        |

- Petitioner's Exhibit 11: Composite of: The Meridian Housing Limited Partnership v. FHFC, FHFC Case No. 2002-0027 (Applic. #2002-110S), Final Order (Oct. 10, 2002) & Petition for Informal Administrative Hearing (Aug. 9, 2002); TWC Sixty-Seven, Ltd. v. FHFC, FHFC Case No. 2002-0040 (Applic. #2002-113BS), Final Order (Oct. 10, 2002) & Petition for Formal Administrative Hearing (Aug. 13, 2002); Hatton House Senior Housing Partners, Ltd. v. FHFC, FHFC Case No. 2002-0034 (Applic. #2002-164S), Final Order (Oct. 10, 2002).
- Petitioner's Exhibit 12: Composite of: Belmont Heights Associates Phase III, Ltd. v. FHFC, FHFC Case No. 2003-050 (Applic. #2003-110C), Recommended Order (Sept. 2, 2003) & Petition for Review (Aug. 12, 2003); Arbor Crest, Ltd. v. FHFC, FHFC Applic. No. 2003-093CS, Joint Proposed Recommended Order (Sept. 3, 2003) & Petition for Review of 2003 Universal Scoring Summary (August 8, 2003); Aguaclara, Ltd. v. FHFC, FHFC Case No. 2003-0032 (Applic. #2003-087C), Joint Proposed Recommended Order (Sept. 9, 2003) & Petition Requesting Informal Hearing (Aug. 12, 2003).
- Respondent's Exhibit 1: Cure Package for 2003 Eagle Ridge Application.
- Respondent's Exhibit 3-1: 2003 Scoring Summary for Eagle Ridge Apartments, dated June 9, 2003.
- Respondent's Exhibit 3-2: 2003 Scoring Summary for Eagle Ridge Apartments, dated May 12, 2003.
- Respondent's Exhibit 5: 2002 Application Instructions, pp. 46-47.
- Respondent's Exhibit 6: 2003 Eagle Ridge Application.
- Respondent's Exhibit 7: Tidewater Revitalization, Ltd. v. FHFC, FHFC Case No. 2002-023 (Applic. #2002-067C), Final Order (Oct. 10, 2002).

**WITNESSES**

No witnesses were presented by either party.

## **STATEMENT OF THE ISSUE**

Whether Eagle Ridge Sebring Limited Partnership (“Eagle Ridge”) failed to meet the threshold requirements in its original application and cure materials for their loan commitment.

## **PRELIMINARY STATEMENT**

On or before April 8, 2003, Petitioner submitted an application to FHFC for Federal Low Income Housing Tax Credits in FHFC’s 2003 Universal Application Cycle. On July 22, 2003, Petitioner received notice from FHFC of the results of the scoring of Petitioner’s application and provided Petitioner with a Notice of Rights pursuant to Section 120.569 and 120.57, Florida Statutes. On August 12, 2003, Petitioner timely filed its Petition for Informal Administrative Hearing. On August 18, 2003, Petitioner filed its Amended Petition for Informal Administrative Hearing, which was accepted by the Hearing Officer without objection from Respondent. An informal hearing was conducted pursuant to Sections 120.569 and 120.57(2), Florida Statutes. There are no disputed issues of material fact.

## **FINDINGS OF FACT**

1. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat. 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.

2. Fla. Stat. § 420.5099, *et al.* provides that Florida Housing is the designated entity for Florida that administers the Housing Credit program.

3. This Petition for Informal hearing was filed pursuant to Fla. Stat. §§120.569 and 120.57(2) Fla. Admin. Code R. 28-106.301 and 67-48.005.

4. This hearing concerns the 2003 Universal Scoring Summary for competitive Housing Credits in relation to a proposed multi-family housing development.

5. The Petitioner received notice of the Universal Scoring Summary on July 21, 2003, when Florida Housing mailed a memorandum to all applicants that included "final scores" and a notice of rights.

6. The Petitioner's substantial interests are affected by the Universal Scoring Summary.

7. The Low Income Housing Tax Credit Program is governed by Section 42 of the Internal Revenue Code (IRC), by which Housing Credits are allotted annually to each state on a per capita basis. The purpose of Housing Credit allocations is to encourage private developers to build and operate affordable housing for lower income families. The tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax liability, subject to enumerated limitations, which can be taken for up to 10 years if the project continues to satisfy all IRC requirements.

8. The Housing Credits are allocated annually through Florida Housing (in accordance with a Qualified Allocation Plan developed by Florida Housing) to real estate developers for the purpose of developing affordable multi-family housing projects. Housing Credits are typically sold to investors, with the sale proceeds generating some of the funding necessary for the project. The equity financing generated by the sale of the

Housing Credits reduces the amount of long-term debt required for the development, making it possible to operate the development at rents that are affordable to lower income families.

11. The available pool of federal tax credits each year is finite and, thus, requires qualified projects to compete for Housing Credits. Florida Housing has established a competitive application process. Fla. Admin. Code R. 67-48.002 through 67-48.005, establishes the rules for the application process for competitive Housing Credits.

12. The criteria Florida Housing utilizes in evaluating real estate projects that are competing for Housing Credits are set forth in Fla. Stat. § 420.5099(2).

13. As part of the competitive Housing Credit application process, Florida Housing requires applicants to include in their applications binding, or “firm,” commitment letters from their lenders and syndicators. Demonstrating binding funding commitments is a threshold item, the failure of which results in rejection of the application and the ability to compete for Housing Credits. See 2003 Universal Application Instructions, pgs. 61-62 (¶13) and p. 64 (¶5, ¶5.a.). See Fla. Admin. Code R. 67-48.002(11).

14. In keeping with the above distinction drawn between “firm” and “conditional” commitments, page 57 of FHFC’s 2003 Application Instructions provides that a “firm” commitment letter must state “[a]ll conditions that are required to be met prior to funding,” and the letter must not be subject to any further “committee approval” or the like.

15. Other indicia of a “firm” commitment are stated on pages 57-58 of FHFC’s Application Instructions [Petitioner’s Exh. 1] as follows:

A firm commitment must contain:

- terms
- interest rate
- signature of all parties, including acceptance by the Applicant . . .
- a statement that states the commitment does not expire before December 31, 2003, with the exception of Local Government-issued tax-exempt bonds.

16. Importantly, the above-quoted elements of a “firm” commitment appearing in FHFC’s 2003 Application Instructions are materially identical to those set forth in FHFC’s 2002 Application Instructions.<sup>1</sup> In particular, the above-quoted interest rate requirement is stated exactly the same in the Application Instructions for both 2002 and 2003. [Compare Petitioner’s Exh.1 and Respondent’s Exh. 5].

17. When preliminary scores were released by Florida Housing on May 12, 2003, Florida Housing determined that the Petitioner failed the threshold requirements relating to an allocation of Housing Credits.

18. Florida Housing found:

Loan commitments must state an interest rate in order to be scored firm. The PNC loan commitment does not clearly or absolutely state the interest rate but states ‘....shall have a pre-committed fixed rate of interest per annum (the ‘Note

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<sup>1</sup> Pages 46 and 47 of the FHFC’s 2002 Application Instructions [Respondent’s Exh. 5] state as follows:

A firm commitment must contain:

- terms
- interest rate
- signature of all parties, including acceptance by the Applicant . . .
- a statement that states the commitment does not expire before December 31, 2002, with the exception of Local Government-issued tax-exempt bonds.

Rate') as established at the Construction Loan closing by Lender.' Therefore, the loan commitment is not counted as firm or a source of financing.

19. When the final scores were released by Florida Housing in the Universal Scoring Summary, the Application was identified as failing threshold requirements for the following reasons:

Applicant submitted a revised loan commitment reflecting an interest rate certain, however the revised commitment letter is not signed by the lender. Therefore, the financial shortfalls remain.

The equity commitment was conditioned upon the PNC loan commitment dated June 13, 2003. Florida Housing found the loan commitment not to be firm and therefore must find the equity commitment, which is conditioned upon the loan, as not firm and as not a source of financing.

20. The Petitioner argued that Florida Housing has treated identical applications from the 2002 Universal Cycle differently from its 2003 application with respect to interest rate requirements.

21. In the 2002 Universal Applications submitted by the Petitioner, in the applications of *Woodland Pointe* and *Covington Pointe*, the interest rate for two of its applications was accepted by Florida Housing because the interest rate was definite, as shown by the following language: "*Interest during the construction of the Construction Loan shall be Prime floating as determined by the Lender.*"<sup>2</sup> (Emphasis added.) See Petitioner's Exhibits 2 and 3.

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<sup>2</sup> The remainder of the paragraph is of no relevance to Florida Housing's application process because the following statement pertains to "underwriting" for the Petitioner's own internal analysis and has nothing to do with the requirements of an interest rate for firm commitment purposes: "The Term Loan shall have a pre-commitment fixed rate of interest per annum (the "Note rate") as established at the Construction Loan closing by Lender. The underwritten term debt interest rate is 8.00%, subject to adjustment in the event market conditions change prior to closing." (Part III, Sections A, B, and C; pages 16, 18, 19; Part IV A and B, pages 49, and 52 of the Universal Application Instructions).



22. "Prime" rate is a clear and definite rate of interest, and is the lowest interest rate.

23. In contrast, the current 2003 Universal Application submitted by the Petitioner, the interest was not stated as definite as shown by the following language: "*The Construction/Term Loan shall have a pre-committed fixed rate of interest per annum (the 'Note Rate') as established at the Construction Loan closing by Lender.*"<sup>3</sup> See Petitioner's Exhibit 6.

24. The reference by the Petitioner to "a pre-committed fixed rate of interest per annum" does not contain an interest rate as required by the application instructions. The Petitioner argued that the "interest rate language in the Eagle Ridge loan commitment letter, that's [Petitioner's] Exhibit 6, is materially the same as the letters submitted in 2002 by Picerne that are also part of the record. . . . Florida Housing took a contrary position on what was or was not a sufficiently stated interest rate." Tr pg. 27. "Again it's the same language that you'll see in the 2002 PNC Bank commitment letters" Tr pg. 33.

25. The inclusion of the term prime rate, however, has been accepted by Florida Housing as a definite rate of interest. This language was not included in the 2003 Eagle Ridge application.

26. In contrast to what the Petitioner argued, the 2002 Universal Applications of *Woodland Pointe* and *Covington Pointe* did state an interest rate as being "Prime floating as determined by the Lender."

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<sup>3</sup> The remainder of the paragraph is of no relevance to Florida Housing's application process because the following statement pertains to "underwriting" for the Petitioner's own internal analysis and has nothing to do with the requirements of an interest rate for firm commitment purposes: "The underwritten construction/term debt interest rate is 7.50%, subject adjustment in the event market conditions change prior to closing." (Part III, Sections A, B, and C; pages 16, 18, 19; Part IV A and B, pages 49, and 52 of the Universal Application Instructions).

27. In the case of *Magnolia Terrace Housing Partners vs. Florida Housing*, Case No. 2002-0059; Application No. 2002-085C, Florida Housing found that:

The required elements of a “firm commitment” for the construction loan (hereinafter referred to as the “Mortgage Loan Advance”) and the permanent loan (hereinafter referred to as the “Mortgage Loan”) are both expressed within the “Forward Commitment” letter issued by GMACCM. The instructions to Part V, Section E (Funding Commitment(s), on pages 46-47 of the Universal Application provide the elements of a firm commitment for debt financing. One of the required elements is an interest rate. As provided in the “Forward Commitment” letter, “[t]he Mortgage Loan Advance shall bear interest at the interest rate for the Mortgage Loan.” The interest rate provided in the “Forward Commitment” letter for the Mortgage Loan is 7.50%; therefore the interest rate provided for the Mortgage Loan Advance is 7.50%. For these reasons, the Commitment Letters provide a firm financing commitment. (See Attachment A, copy of *Magnolia Terrace Housing Partners, supra*).

28. *Magnolia Terrace* is distinguishable from the case involving the Petitioner because in *Magnolia Terrace* there was, in fact, an interest rate stated. Thus, contrary to the assertions of the Petitioner, Florida Housing has not changed its interpretation of an interest rate in its loan commitment letters submitted by applicants.

29. The Petitioner cured the interest rate threshold issue and the threshold failure was rescinded by Florida Housing. In doing so, however, the Petitioner’s revised loan commitment was unsigned, thereby causing a second threshold failure.

30. The Petitioner argued that “a cross reference from the syndication letter” regarding Housing Credits to the loan commitment letter is sufficient to “cure” the missing signature on the loan commitment letter. Tr pg. 27.

31. The Petitioner admitted that the revised loan commitment letter submitted to Florida Housing “omitted a signature from the loan commitment letter, the revised

commitment letter. . . . And, ultimately, Florida Housing deemed that letter conditional for lack of that signature. . . .” Tr pg. 39-40.

32. Although the Petitioner argued the omitted signature on the revised loan commitment letter was a “clerical error,” Petitioner is a sophisticated developer who submitted numerous applications in multiple competitive application cycles. Tr pg 14. The Petitioner knew, or should have known that Florida Housing does not (with specified exceptions, none of which apply here<sup>4</sup>) go outside the four-corners of the application before it.

33. Thus, the “omitted signature” could just as logically have indicated an unwillingness to proceed, when the lender was given the opportunity to revisit the matter before it. Tr. Pg. 39. To find otherwise would place Florida Housing in the precarious position of having to judge what may or may not be “mere clerical errors” versus a true intention to simply not fund a particular development. This is not something that can be undertaken by Florida Housing, nor should such a precedent be established, given Florida Housing’s stringent time constraints during the highly competitive application process.

34. Further, the Petitioner’s “syndication letter” is clearly insufficient to address the loan commitment letter that is separately required under the 2003 Universal Application Instructions. If one letter satisfied the requirements of the other letter, then both letters would not be required by Florida Housing. Both letters, however, are required and a cross-reference within one does not negate the requirement of the other, separate

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<sup>4</sup> The verification exceptions listed in the 2003 Universal Application Instructions are (1) proximity; (2) site plan or plat approval; (3) local government contributions as to the nature and the amount of the contribution; and (4) local government incentives compared against plans and annual reports in accordance with Fla. Stat. 420.9075(9).

commitment. Fla. Admin. Code R. 67-48.002(11); 2003 Universal Application Instructions.

35. In the case of *Tidewater Revitalization, LTD., vs. Florida Housing*, Case No. 2002-0023; Application No. 2002-067C, the Final Order states that, "The June 20, 2002, Second Amendment. . . was not signed by one of the sellers," thus failing site control threshold requirements. The same logic applies in the instant matter pertaining to threshold requirements of the required signature on the commitment letter. See Respondent's Exhibit 7.

36. Finally, the Petitioner cites four cases from the 2002 Universal Application Cycle in Petitioner's Exhibit 12 (*Hatton House, Belmont Heights, Aguaclara Ltd., and Arbor Crest*) in which Petitioner argues that an applicant and Florida Housing "went outside" the four corners of the Application. There are four instances in which Florida Housing's Rules allow verification outside the four corners of the Application. They are: (1) proximity; (2) site plan or plat approval; (3) local government contributions as to the nature and the amount of the contribution; and (4) local government incentives compared against plans and annual reports in accordance with Fla. Stat. 420.9075(9). (Part III, Sections A, B, and C; pages 16, 18, 19; Part IV A and B, pages 49, and 52 of the Universal Application Instructions). See Attachment B.

37. The cases of *Belmont Heights, Aguaclara Ltd., and Arbor Crest* all involved proximity points pertaining to services, and *Hatton House* involved local government contributions and proximity points. Thus, none of the cases cited are applicable to the matter of the Petitioner in which a firm commitment is required and for which matters outside of the Petitioner's application may not be verified by Florida Housing.

## CONCLUSIONS OF LAW

15. Pursuant to Fla. Stat. §§ 120.569 and 120.57(2) and Fla. Admin. Code R. 76-47, the Hearing Officer has jurisdiction over the parties to this proceeding.
16. Florida Housing is the designated state housing authority for purposes of allocating Housing Credits and other funding sources. Fla. Stat. § 420.5099 *et. al.*
17. The 2003 Universal Application Instructions (Instructions), which have been adopted and incorporated by reference into Florida Housing's rules, Fla. Admin. Code R. 67-48.002(11).
18. The Prime rate is defined by the *Wall Street Journal* as "The base rate of loans posted by at least 75% of the nation's 30 largest banks." Black's Law Dictionary, Seventh Edition, defines Prime rate under "interest rate, as "The interest rate that a commercial bank holds out as its lowest rate for a short-term loan to its most creditworthy borrowers, usu. large corporations." The Prime rate satisfies Florida Housing's requirement of a defined and firm interest rate.
19. In the case of *Tidewater Revitalization, LTD., vs. Florida Housing*, Case No. 2002-0023; Application No. 2002-067C, the Final Order states that, "The June 20, 2002, Second Amendment. . . was not signed by one of the sellers," thus failing site control threshold requirements.
20. Fla. Admin. Code R. 67-48.004(2), requires that Florida Housing reject any submitted application that is not completed in accordance with the Application instructions and Fla. Admin. Code R. 67-48 *et al.*

21. Without question, an agency must follow its own rules. *Cleveland Clinic Florida Hosp. v. Agency for Health Care Admin.*, 679 So.2d 1237 (Fla. 1<sup>st</sup> DCA 1996), *review denied* 695 So.2d 701 (Fla. 1997).

22. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. *Legal Environmental Assistance Foundation, Inc. v. Board of County Commissioners of Brevard County*, 642 So.2d 1081 (Fla. 1994); *Miles v. Florida A&M University*, 813 So.2d 242 (Fla. 1<sup>st</sup> DCA 2002). The agency's interpretation will be upheld even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *Golfcrest Nursing Home v. Agency for Health Care Administration*, 662 So. 2<sup>d</sup> 1330 (1995).

23. Florida Housing's interpretation and application of the rules to the scoring and rejection of the Petitioner's application is neither unreasonable nor clearly erroneous, and should be upheld.

### **RECOMMENDATION**

Based on the Findings of Fact and Conclusions of Law stated above, it is recommended that the Florida Housing Finance Corporation enter a Final Order denying Petitioner's application for competitive Housing Credits because it failed to meet threshold by failing to provide a mandated signature and, thus, failing to provide a firm commitment.

Respectfully submitted this 26th day of September, 2003.



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David E. Ramba, Hearing Officer

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