

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

**CITY VIEW APARTMENTS AT
HUGHES SQUARE,**

Petitioner,

v.

**FHFC CASE NO. 2004-028-UC
Application No. 2004-086S**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, the Florida Housing Finance Corporation (hereinafter "Florida Housing"), by its duly designated Hearing Officer, Chris H. Bentley, held an informal hearing in Tallahassee, Florida, in this matter on August 27, 2004.

APPEARANCES

For Petitioner, Brownsville
Manor Apartments:

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For Respondent, Florida Housing
Finance Corporation
(Florida Housing):

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STATEMENT OF THE ISSUE

The issues in this hearing involve whether Petitioner City View Apartments at Hughes Square (hereinafter “City View”), met threshold requirements with regard to Exhibits 28, 29 and 33 to its Application.

PRELIMINARY STATEMENT

The parties entered into a Joint Stipulation of facts and exhibits which has been marked as Joint Exhibit 1 in this proceeding. In addition to Joint Exhibit 1, Joint Exhibits 2 through 8 were admitted into evidence pursuant to Stipulation. Petitioner’s Exhibit 1 was admitted into evidence.

FINDINGS OF FACT

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

1. On or before March 31, 2004, Petitioner submitted an Application to Florida Housing Finance Corporation (“Florida Housing”) for the award of funds from the State Apartment Incentive Loan (“SAIL”) program of for the development of affordable rental housing in the 2004 Universal Cycle.
2. Florida Housing is a public corporation organized under Chapter 420, Fla. Stat., to administer the financing and refinancing of projects which provide housing affordable to persons and families of low, moderate and middle income in

Florida.

3. Florida Housing receives its funds for the SAIL program from an allocation of documentary stamp tax revenue and publishes a Notice of Funding Availability announcing the amount of SAIL funding, which in the 2004 Universal Cycle was approximately \$55,000,000. Florida Housing received requests from all applicants for SAIL loans in the 2004 Universal Cycle.

4. SAIL funds are apportioned among the counties, grouped as most, medium, and the least populated counties, and according to set-asides and special targeting goals set forth in the statute for the elderly, commercial fishing workers and farmworkers and families. See Section 420.5087 (3), Fla. Stat.

5. Florida Housing has established by rule a process (the “Universal Cycle”) in which applicants for any of the above-referenced Florida Housing multi-family rental programs submit a single application (the “Universal Cycle Application”) by which projects are evaluated, scored, and competitively ranked. See Section 420.507 (22)(f), Fla. Stat. and Chapter 67.48, Fla. Admin. Code.

6. The 2004 Universal Cycle Application, adopted as Form UA1016 (Rev. 3-04) by Rule 67-48.002 (111), Fla. Admin. Code, consists of Parts I through V and instructions, some of which are not applicable to every Applicant. Some of the parts include “threshold” items.

7. Failure to properly include a threshold item or satisfy a threshold requirement results in rejection of the application. Other parts allow applicants to earn points, which are different from threshold items.

8. After Petitioner submitted its 2004 Universal Cycle Application, on or before March 31, 2004, Florida Housing's staff commenced scoring the Application pursuant to Part V, Chapter 420, Fla. Stat. and Chapter 67-48, Fla. Admin. Code. Florida Housing completed the scoring process on April 29, 2004.

9. After performing preliminary scoring, Florida Housing's staff notified Petitioner of the results. Any applicant could question the scoring of Petitioner's Application if it believed Florida Housing had made a scoring error, within 10 calendar days after the date the applicant received the preliminary scores by filing a Notice of Possible Scoring Error ("NOPSE").

10. Florida Housing reviewed each NOPSE that was timely received. On May 28, 2004, Florida Housing sent Petitioner any NOPSE relating to its Application submitted by other applicants and Florida Housing's position on any NOPSE.

11. Petitioner could submit additional documentation, revised forms, and other information that it deemed appropriate to address any issue raised in any NOPSE, Florida Housing's position on each NOPSE and preliminary scoring. These documents, revised forms and other information were known as "cures" and were due

on or before June 10, 2004 (the “cure period”).

12. After Petitioner submitted its cures, all applicants had an opportunity to review Petitioner’s cures. Any applicant could submit to Florida Housing a Notice of Alleged Deficiencies (“NOAD”) to challenge the Petitioner’s cures. Florida Housing then reviewed each NOAD and made a determination on each NOAD.

13. Following this process, on July 9, 2004, Florida Housing sent Pre-Appeal Scores and a Notice of Rights to Petitioner. The Notice of Rights notified Petitioner that it could contest Florida Housing’s actions by requesting an informal hearing before a contracted hearing officer.

14. Petitioner timely requested an informal hearing on August 2, 2004, and submitted its Petition for Informal Hearing on August 2, 2004.

15. Florida Housing found that City View failed threshold because the form submitted from the Orlando Utilities Commission for electricity failed to reference whether electricity was available to the development site prior to the Application Deadline of March 31, 2004. (See Joint Exhibit 2, Cure Item 19T, formerly Item 2T; Exhibit 28 to Application.)

16. Florida Housing found that City View failed threshold because the letter submitted from the Orlando Utilities Commission for water failed to reference whether water was available to the development site prior to the Application Deadline

of March 31, 2004. (See Joint Exhibit 3, Cure Item 20T, formerly Item 3T; Exhibit 29 to Application.)

17. Florida Housing found that City View failed threshold because the Applicant Verification of Availability of Environmental Safety failed to provide evidence that a Phase I update had been prepared. (See Joint Exhibit 4, Cure Item 21T, formerly Item 7T; Exhibit 33 to Application.)

18. The Universal Application Package Instructions have been adopted as a rule. Rule 67-48.002(111), Fla. Admin. Code. Part III.C.3 of those instructions entitled “Evidence of Infrastructure Availability (Threshold)” requires that evidence of availability of electricity must be provided in Exhibit 28 to the Application and that evidence of availability of water must be provided in Exhibit 29 to the Application. That rule further states that “Verification of the availability of each type of infrastructure on or before the Application Deadline must be provided.” It further provides that “Each Verification of Availability of Infrastructure Form or letter confirming infrastructure availability must demonstrate availability on or before the Application Deadline.”

19. Petitioner’s Exhibit 28 to its Application is Joint Exhibit 2 in this proceeding. It is entitled “Verification of Availability of Infrastructure Electricity.” The form used by Petitioner for Exhibit 28 is the form provided in the Universal

Application Package that has been adopted a rule. Rule 67-48.002(111), Fla. Admin. Code.

20. Exhibit 28 (Joint Exhibit 2) to Petitioner's Application states "the undersigned service provider confirms that on or before 6/7/04 . . ." electricity is available to the proposed development.

21. Exhibit 28 (Joint Exhibit 2) to Petitioner's Application does not verify that electricity was available to the site on or before March 31, 2004.

22. The Application Deadline set by rule is March 31, 2004. Rule 67-48.002(10), Fla. Admin. Code.

23. Petitioner's Exhibit 29 to its Application is Joint Exhibit 3 in this proceeding. Petitioner used the form entitled "Verification of Availability of Infrastructure Water" which has been adopted as a rule in the Universal Application Package for its Exhibit 29 to the Application.

24. As required by the form, Exhibit 29 to the Application (Joint Exhibit 3) states: "The undersigned service provider confirms that on or before 6/7/04 . . ." potable water is available to the proposed development.

25. Petitioner's Exhibit 29 to its Application (Joint Exhibit 3) does not verify the availability of water infrastructure to the site on or before the Application Deadline of March 31, 2004.

26. Part III.C.5 of the Universal Application Package Instructions is entitled “Environmental Site Assessment (Threshold).” It states:

(a) Applicant must demonstrate that a Phase I Environmental Site Assessment (ESA) has been performed. The firm performing the ESA must certify that the review was performed in accordance with ASTM Practice E1527-00. The properly completed and executed Verification of Environmental Safety-Phase I Site Assessment Form must be provided behind a tab labeled ‘Exhibit 33’”.

(b) If the Phase I ESA disclosed potential problems on the proposed site and required or recommended a Phase II ESA, the firm that performed the Phase II ESA, even if it is the same firm that performed the Phase I ESA, must certify that the Phase II ESA has been performed in accordance with ASTM Practice E1527-00. The properly completed and executed Verification of Environmental Safety - Phase II Site Assessment Form must be provided behind a tab labeled ‘Exhibit 34’”.

27. Using the form adopted by rule by Florida Housing, the Petitioner attached Exhibit 33 to its Application. Exhibit 33 is Joint Exhibit 4 to this proceeding. Petitioner’s Exhibit 33 to its Application states that a Phase I ESA was conducted as of February 26, 2001. Petitioner then notes on Exhibit 33 that the Phase I ESA is over 12 months old.

28. The form which is Exhibit 33 to Petitioner’s Application requires, when it is noted in the Exhibit that a Phase I ESA is over 12 months old, an answer to one of the following questions:

(1) an update to the original Phase I ESA was prepared on _____ (date of update), or

(2) a new Phase I ESA was prepared on _____ (date of new Phase I ESA).

Petitioner, in its Exhibit 33 (Joint Exhibit 4) answered question number one by stating:

No updated prepared because Phase II required. Site's environmental condition changed since date of original Phase I because clean up and remediation completed.

29. In its Exhibit 33 to the Application, Petitioner acknowledged that the Phase I ESA disclosed potential problems and stated that a Phase II ESA is required or recommended. These statements by the Petitioner in its Exhibit 33 were made by checking the applicable box on the form which constitutes Exhibit 33.

30. Petitioner's Exhibit 34 to its Application was admitted into evidence as Petitioner's Exhibit 1 in this proceeding. Petitioner's Exhibit 34 to its Application embodied the form entitled "VERIFICATION OF ENVIRONMENTAL SAFETY PHASE II ENVIRONMENTAL SITE ASSESSMENT". That form has been adopted as a rule by Florida Housing.

31. Consistent with the request set forth on the Exhibit 34 form, Petitioner, in its Exhibit 34 to its Application (Petitioner's Exhibit 1 in this proceeding), states

that a Phase II ESA was required or recommended by the Phase I ESA and that a Phase II ESA was conducted on February 26, 2001.

32. Exhibits 33 and 34 dealing with Environmental Site Assessment are threshold items.

CONCLUSIONS OF LAW

33. Pursuant to Sections 120.569 and 120.57(2), Fla. Stat., and Rules 28-106.301 and 66-48.005, Fla. Admin. Code, the Hearing Officer has jurisdiction over the parties to this proceeding.

34. The Petitioner's substantial interests are affected by the Proposed Agency Action of the Respondent. Therefore, Petitioner has standing to bring this proceeding.

35. The 2004 Universal Application Package including instructions, exhibit forms and an uncompleted application are incorporated as a rule by reference by Rule 67-48.002(111), Fla. Admin. Code.

36. Rule 67-48.004(13)(b) states that Florida Housing shall reject an Application if, following the submission of the additional documentation, revised pages and other information as the Applicant deems appropriate "The Applicant fails to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions"

37. The rules of Respondent in Part III.C.3 of the instructions in the Universal Application Package provide that verification of the availability of electricity is a threshold item.

38. Part III.C.3 of the instructions in the Universal Application Package entitled “Evidence of Infrastructure Availability (Threshold)” requires that evidence of availability of electricity must be provided in Exhibit 28 to the Application and that evidence of availability of water must be provided in Exhibit 29 to the Application. That rule further states that “Verification of the availability of each type of infrastructure on or before the Application deadline must be provided”. It also provides that “Each Verification of Availability of Infrastructure Form or letter confirming infrastructure availability must demonstrate availability on or before the Application Deadline”.

39. Petitioner’s Exhibit 28 to its Application (Joint Exhibit 2) does not verify that electricity was available to the proposed development on or before the Application Deadline of March 31, 2004.

40. Petitioner’s Exhibit 29 to its Application (Joint Exhibit 3) does not verify the availability of water infrastructure to the development site on or before the Application Deadline of March 31, 2004.

41. Rule 67-48.004(13), Fla. Admin. Code, provides that the Respondent shall reject an Application if the Applicant fails to achieve the threshold requirements as detailed in the rules, the Application and the Application instructions. With regard to Petitioner's Exhibits 28 and 29, the Petitioner has failed to achieve the threshold requirements detailed in the rules, the Application and the instructions.

42. Respondent argues with regard to Exhibits 33 and 34 to its Application (Joint Exhibit 4 and Petitioner Exhibit 1) that because both the Phase I and Phase II ESAs were over four years old that Petitioner has failed the threshold requirements with regard to Environmental Site Assessment. Respondent, in support thereof, argues that it is the policy of Florida Housing, through its application process, to require confirmation from developers that the development site is environmentally "clean" within 12 months of the Application Deadline. Respondent, however, has cited no specific statute or rule that sets forth the explicit requirement that a Phase I or Phase II ESA must have been completed within 12 months of the Application Deadline. Indeed, no such requirement appears on the face of the statute or Respondent's rules.

43. The Universal Application Package Instructions at page 72 in the section entitled "SPECIAL REQUIREMENTS" states that:

10. Ability to proceed must be demonstrated by submission of the required certifications or documentation, as the case may be, of site plans/plat approval, site control, infrastructure availability, zoning approval, and environmental site assessment. Infrastructure and zoning must be in place as of the Application Deadline.

While the foregoing specifically states that “infrastructure and zoning must be in place as of the Application Deadline” it does not set forth that same requirement for “environmental site assessment”. Nor does that provision state a requirement that a Phase I or Phase II ESA must have been performed within 12 months of the Application Deadline.

44. The forms adopted by rule by Florida Housing that constitute Exhibits 33 and 34 do not set forth an explicit requirement that a Phase I or Phase II ESA must have been conducted within 12 months of the Application Deadline. The form which constitutes Exhibit 33 to the Application clearly asks for the date the Phase I ESA was conducted; asks if the Phase I ESA is over 12 months old from the Application Deadline; asks whether the site’s environmental condition changed since the date of the original Phase I ESA; in the event of changed conditions, asks the date of an update to the original Phase I ESA or the date a new Phase I ESA was prepared; and asks whether a Phase II ESA is required or recommended. While it might be inferred from these questions that a Phase I or Phase II ESA should have been performed

within 12 months of the Application Deadline, it does not make a clear and explicit statement that such a requirement is mandated as a threshold item. Similarly, the form which constitutes Exhibit 34 dealing with Phase II environmental site assessments simply asks the date a Phase II ESA was conducted when such was required or recommended by the Phase I ESA.

45. In this case, as shown by Petitioner's Exhibit 33 and 34 to its Application, there was a Phase I ESA in 2001 and as a result, there was a Phase II ESA in 2001. The Applicant has properly filled out the forms which constitute Exhibits 33 and 34.

46. While applicants should be held to strict performance with regard to the clear requirements of the rules governing the application process, applicants cannot be held to strict performance of ambiguous implications of those rules embodied in the instructions and forms. Should Florida Housing want to make it a requirement that a Phase I or Phase II ESA must have been performed within 12 months of the Application Deadline, it needs to make that explicit statement in its rules. It has not done that.

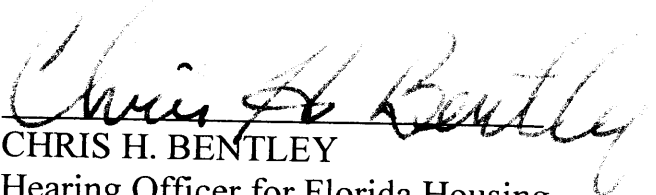
Therefore, with regard to Exhibits 33 and 34 to its Application, Petitioner has met threshold requirements.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law stated herein, it is
RECOMMENDED:

1. That a Final Order be entered determining that Petitioner City View Apartments at Hughes Square's Application has failed to achieve the threshold requirements with regard to Exhibits 28 and 29 to the Application and the Application should be rejected pursuant to Rule 67-48.004(13), Fla. Admin. Code.

Respectfully submitted and entered this 20th day of September, 2004.


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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 Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on September 25, 2004. 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.
