

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

GHG EVERGREEN, LTD.
(2008-174BS)
(PROJECT NAME:
EVERGREEN),

Petitioner,

vs.

~~2008~~ CASE NO.: 2008-094UC-Ranking
FLORIDA HOUSING APPLICATION
NO. 2008-174BS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

PETITION FOR INFORMAL
ADMINISTRATIVE HEARING

Petitioner, GHG Evergreen, Ltd., ("Evergreen" or "the Applicant"), by and through its undersigned attorney and pursuant to Sections 120.569 and 120.57(2), Florida Statutes (2007), and Rules 28-106.301, 67.21.0035 and 67.48.005, Florida Administrative Code ("F.A.C.") hereby files its petition for an informal administrative hearing to review the scoring and proposed funding determination of the Florida Housing Finance Corporation ("Florida Housing" or "Corporation") with respect to the application submitted by Evergreen seeking an allocation of funds from the 2008 Universal Application Cycle ("2008 Cycle") funding batch.

1. Petitioner's name, address and telephone number are:

GHG Evergreen, Ltd.
c/o The Gatehouse Group, Inc.
120 Forbes Blvd.
Mansfield, MA 02048
508-337-2525

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2. The name, address, telephone and facsimile number of Petitioner's representative for service purposes during this proceeding are:

Michael G. Maida
Michael G. Maida, P.A.
1709 Hermitage Blvd., Suite 201
Tallahassee, FL 32308
850/425-8124
850/681-0879

3. The name and address of the affected agency are:

Florida Housing Finance Corporation
227 N. Bronough Street
City Centre Building, Room 5000
Tallahassee, FL 32301-1329

4. Florida Housing is a public corporation organized pursuant to Section 420.504, Fla. Stat., to provide and promote the public welfare by administering the governmental function of financing and refinancing affordable housing and related facilities in Florida. Florida Housing is governed by a Board of Directors (the "Board"), appointed by the Governor with the Secretary of the Department of Community Affairs sitting ex-officio. Florida Housing is an agency as defined in Section 120.52, Fla. Stat., and therefore is subject to the provisions of Chapter 120, Fla. Statutes.

Affordable Housing Programs

5. Florida Housing administers various affordable housing programs including the Multifamily Mortgage Revenue Bonds (MMRB) Program pursuant to Section 420.509, Fla. Stat., and Rule Chapter 67-21, Fla. Admin. Code and the State Apartment Incentive Loan (SAIL) Program pursuant to Sections 420.507(22) and 420.5087, Fla. Stat., and Rule Chapter 67-48, Fla. Admin. Code.

6. The 2008 Universal Cycle Application, through which affordable housing developers apply for funding under various affordable housing programs administered by Florida Housing, is adopted as the Universal Application Package or UA1016 (Rev. 3-08) by Rules 67-21.003(1)(a) and 67-48.004(1)(a), Fla. Admin. Code, respectively, and consists of Parts I through V and instructions.

7. Because the demand for MMRB and SAIL funding exceeds that which is available under the MMRB Program and the SAIL Program, qualified affordable housing developments must compete for this funding. To assess the relative merits of proposed developments, Florida Housing has established a competitive application process known as the Universal Cycle pursuant to Rule Chapters 67-21 and 67-48, Fla. Admin. Code, respectively. Specifically, Florida Housing's application process for the 2008 Universal Cycle is set forth in Rules 67-21.002-.0035 and 67-48.001-.005, Fla. Admin. Code

8. As discussed in more detail below, to determine which applications will be allocated MMRB or SAIL funds or an allocation of tax credits, Florida Housing scores and competitively ranks the applications.

9. The Corporation's scoring and evaluation process for applications is set forth in Rules 67-21.003 and 67-48.004, F.A.C. Under these Rules, the applications are preliminarily scored based upon factors contained in the application package and the Florida Housing rules. After the initial scoring, Florida Housing issues preliminary scores to all applicants.

10. Following release of the preliminary scores, competitors can alert Florida Housing of an alleged scoring error concerning another application by filing a written Notice of Possible Scoring Error ("NOPSE") within a specified time frame. After the Corporation considers issues raised in a timely filed NOPSE, it notifies the affected applicant of its decision.

11. Applicants have an opportunity to submit "additional documentation, revised pages and such other information as the [a]pplicant deems appropriate to address the issues" raised by preliminary or NOPSE scoring. See Rules 67-21.003 and 67-48.004(6), F.A.C. In other words, applicants can "cure" errors or omissions in their applications pointed out during preliminary scoring or raised by a competitor during the NOPSE process.

12. After affected applicants submit their "cure" documentation, competitors can file a Notice of Alleged Deficiencies ("NOAD") challenging the quality or validity of a "cure." Following the Corporation's consideration of the cure materials submitted by the affected applicants and its review of the issues raised in the NOADs Florida Housing publishes final scores for all the submitted applications.

13. Rules 67-21.0035 and 67-48.005, Fla. Admin. Code, establish a procedure through which an applicant can challenge the final ranking or scoring of a competing application. The notice of final rankings advised applicants who were adversely affected of the right to appeal Florida Housing's decision.

14. This Petition seeks review pursuant to Section 120.57(2), Florida Statutes, of the funding determinations made by the Florida Housing Finance Corporation with respect to the allocation of MMRB and SAIL funds and the allocation of non-competitive housing credits from the 2008 Universal Cycle. There are no disputed issues of material fact.

The 2008 Florida Housing Rankings and Funding Determinations

15. On April 7, 2008 Evergreen and many other entities submitted applications seeking an allocation of MMRB and SAIL funds as well as an allocation of non-competitive housing credits from the 2008 Universal Cycle. Evergreen's application was assigned Application No. 2008-174BS.

16. In the Final Ranking and Notice of Rights dated September 26, 2008 Florida Housing released its final scoring, rankings and funding determinations for the applications in the 2008 Cycle (the "Rankings").

17. According to the Rankings, Evergreen's Application met all threshold requirements, achieved a perfect final score of 66 total points out of a possible 66 points and 7.5 proximity tie-breaker points out of a possible 7.5 points. Nonetheless, Evergreen was deemed not to be entitled to an award of MMRB or SAIL funds, or an allocation of non-competitive housing credits. Essentially, Florida Housing's final scores and rankings indicate that a competitor, the Meetinghouse at Zephyrhills, Application No. 2008-185BS ("Meetinghouse"), also met all threshold requirements, achieved a perfect score and maximum tie-breaker points.¹ Based upon these conclusions, Florida Housing made its funding determination based on SAIL leveraging. Since Meetinghouse's leveraging level was higher than Evergreen's, Meetinghouse was awarded MMRB and SAIL funds, and an allocation of non-competitive housing credits.

18. Evergreen would have been entitled to an allocation of MMRB and SAIL funds and an allocation of non-competitive housing credits from the 2008 Universal Cycle if Florida Housing followed its adopted rules and scored Meetinghouse correctly and consistently with other applications. Through this Petition, Evergreen challenges the conclusion that it is not entitled to an allocation of Bond and SAIL funds and seeks a determination that, under the applicable scoring criteria, Evergreen's Application is entitled to an award of MMRB and SAIL funds as well as an allocation of non-competitive housing credits. Thus, Evergreen's substantial interests are subject to a determination in this proceeding.

19. The September 26, 2008 Final Ranking and Notice of Rights ("Notice") advised applicants of their right to contest Florida Housing's scoring, ranking and funding determinations

¹ The Evergreen and Meetinghouse developments are located in Pasco County.

regarding other applications by filing a petition within twenty-one days from the date an affected applicant received the Notice. Under Rule 67-48.005, F.A.C., an applicant may petition for an informal hearing if the appeal does not involve disputed issues of material fact. This Petition is timely filed.

Infrastructure Availability and the Meetinghouse Application

20. In order to obtain funding or an allocation of MMRB and SAIL funds, an application must satisfy certain threshold requirements. One of the threshold requirements for all applicants in the 2008 Cycle was to demonstrate the availability of infrastructure.

21. The Universal Application Package Instructions at Part III.C.3 entitled "Evidence of Infrastructure Availability (Threshold)" require verification of the availability of certain types of infrastructure, including availability of electricity. Pursuant to the rules set forth in the Universal Application Instructions at Part III.C.3, the verification of availability of electricity must be provided in the Application in "Exhibit 28" to the Application.

22. The rules set forth in the Universal Application Package Instructions at Part III.C.3 specifically require that "verification of the availability of each type of infrastructure [including electricity] on or before the Application Deadline must be provided." The Application Deadline was April 7, 2008.

23. As part of its cure material, Meetinghouse amended its Application with a revised letter from Progress Energy dated June 9, 2008 which is submitted as Exhibit 28 to its Application. (See attached Exhibit A.) While the letter affirms the status of electricity, the letter does not verify that electricity was available on or before April 7, 2008 - the Application deadline. Meetinghouse therefore failed to demonstrate the availability of utility services as of the Application Deadline, and should have been rejected.

24. If Florida Housing had properly rejected the Meetinghouse application, MMRB and SAIL funds and an allocation of non-competitive housing credits would have been available to fund another Elderly Development project in Pasco County. Evergreen is the eligible Elderly Development in Pasco County that should be funded.

Villa Capri

25. An applicant's rejection for failure to establish the availability of electricity as of the application deadline was recently addressed in Villa Capri Associates, Ltd., vs. Florida Housing Finance Corporation, FHFC Case No. 2008-058UC (Recommended Order Dated September 8, 2008). In that case, Villa Capri submitted cure material which included a letter from Florida Power and Light confirming that "at the present time, FPL has sufficient capacity to provide electric service to the above captioned property." (See page 5 of the Recommended Order.) In scoring the application, Florida Housing determined that Villa Capri failed to achieve threshold with respect to the availability of electricity because:

The cure is deficient because the letter does not specifically state that the service was available to the site on or before the Application Deadline (April 7, 2008) as required by the 2008 Universal Application Instructions.

(See Villa Capri final scoring summary.)

26. Villa Capri challenged Florida Housing's determination on the grounds that the original and cure material submitted in its application should be read in concert to demonstrate the availability of electricity. It further argued that the cure letter did nothing more than "cure" the development's address and that nothing in the cure material was inconsistent with the original letter from FPL.

27. In rejecting the challenge, the Hearing Officer concluded:

... to accept [Villa Capri's] argument would be to totally disregard the adoptive rules which govern this proceeding. [Florida Housing's] rules expressly address

'cure' materials and the manner in which they must be submitted and considered.

* * * *

The Instructions and Forms require that evidence of the availability of electricity be set forth behind a specific tab labeled 'Exhibit 28.' The availability of other forms of infrastructure are to be demonstrated in other exhibit numbers.... [Florida Housing's] rules do not permit electrical infrastructure to be demonstrated circumstantially or by inference. Instead, the Instructions explicitly require and provide for the means and methods (including the designated exhibit number) of demonstrating the availability of electricity as of the application deadline. The Instructions require that '[v]erification of the availability of **each** type of infrastructure on or before the Application Deadline must be provided,' and that '**each** letter confirming infrastructure availability must demonstrate availability on or before the Application Deadline.' (Application Instructions, Part III.C.3)

* * * *

While the result reached here may seem harsh in light of the probable reality that electricity was available to [Villa Capri's] proposed development as of the application deadline, any other result would require speculation on the part of Florida Housing and a complete disregard and violation of [Florida Housing's] adopted rules, by which all applicants, as well as Florida Housing itself, are bound.

(See Hearing Officer's Recommended Order.)

28. The Hearing Officer's Recommended Order was adopted as Florida Housing's Findings of Fact and Conclusions of Law at its Board Meeting on September 26, 2008. Accordingly, Villa Capri's Application was rejected as a result of failing to demonstrate the availability of electricity as of the Application deadline.

Specific Facts Warranting Reversal

29. Specific facts warranting reversal or modification of Florida Housing's proposed action are those alleged in this Petition, include, but are not limited to the following:

a. Florida Housing's rules set forth in the Universal Application Package Instructions as Part III.C.3 entitled "Evidence of Infrastructure Availability (Threshold)" require

verification of the availability of certain types of infrastructure including electricity.

b. The Universal Application Package Instructions at Part III.C.3 require that the verification of availability of electricity must be provided in the Application as "Exhibit 28" to the Application.

c. The Universal Application Package Instructions at Part III.C.3 specifically require that "verification of the availability of each type of infrastructure [including electricity] on or before the Application Deadline must be provided."

d. Florida Housing's rules make the verification set forth in Exhibit 28 to an application a threshold item. Rule 67-48.004(13)(b) provides that Florida Housing shall reject an Application if the Applicant fails to achieve the threshold requirements as detailed in the rules.

e. The Universal Application Package Instructions at page 74 under title "THRESHOLD REQUIREMENTS" state that "Requirements to meet Threshold include: ...Ability to proceed must be demonstrated by submission of the required certifications or documentation, as the case may be, of site plan/plat approval, site control, infrastructure availability, zoning approval and environmental site assessment." Infrastructure must be in place as of the Application Deadline.

f. The Application Deadline was April 7, 2008.

g. Exhibit 28 of the "cure" material submitted by Meetinghouse failed to disclose electrical infrastructure availability as of the Application Deadline.

h. Florida Housing scored the Meetinghouse Application as if it met threshold with respect to electrical infrastructure availability.

i. No other application in this cycle achieved threshold with respect to electrical infrastructure availability unless the material provided for at Exhibit 28 specifically

stated that electrical infrastructure was available as of the April 7, 2008 Application Deadline.

j. 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, "[t]he Applicant fails to achieve the threshold requirements as detailed in these rules, the applicable Application, and Application instructions."

k. Florida Housing did not reject the Meetinghouse Application.

l. Evergreen would have been ranked in the funded range and entitled to receive an allocation of MMRB, SAIL and non-competitive housing credits had Florida Housing rejected the Meetinghouse Application.

Conclusion

30. The Cure documents submitted by Meetinghouse demonstrated that it failed to meet threshold requirements for infrastructure availability.

31. Florida Housing erred in its evaluation and scoring of the Meetinghouse Application.

32. Florida Housing should have rejected the Meetinghouse application because Meetinghouse failed to demonstrate Evidence of Infrastructure Availability as required under Part III, Section C. 28 of the 2008 Universal Application Instructions.

33. Properly scoring, evaluating and ranking Meetinghouse results in Evergreen being ranked in the funding range for Bond and SAIL developments located in Pasco County.

34. The September 26, 2008 Final Rankings are based upon incorrect scoring of the Meetinghouse Application.

35. Evergreen was excluded from the funding range in the 2008 Universal Cycle as a

result of Florida Housing's erroneous scoring of the Meetinghouse Application.

ULTIMATE FACT AND LAW

36. As a matter of ultimate fact and law, Evergreen states that its Application is entitled to an allocation of MMRB and SAIL funds and an allocation of non-competitive housing credits from the 2008 cycle.

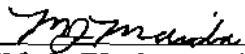
STATUTES AND RULES AT ISSUE IN THIS PROCEEDING

37. The statutes and rules at issue in this proceeding include, but are not limited to, Sections 420.5093 and 420.5099, Florida Stat. (2006); Rule 28.106.201, Rule 67-21.0035, Rule 67-48.004, and Rule 67-48.005, F.A.C.

WHEREFORE, Petitioner, GHG Evergreen, Ltd., respectfully requests that:

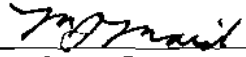
- a. Florida Housing Finance Corporation refer this Petition to be heard before a hearing officer approved by Florida Housing;
- b. An informal administrative hearing be conducted pursuant to Section 120.57(2), Florida Stat. (2007), to review Florida Housing's funding determination regarding Evergreen's Application;
- c. Recommended and final orders be issued determining that Evergreen is entitled to an allocation of funds based upon a correct scoring of the Meetinghouse Application; and
- d. Such further relief as may be deemed appropriate be granted.

RESPECTFULLY SUBMITTED this 2d day of October, 2008.


MICHAEL G. MAIDA
FL BAR No.: 0435945
Michael G. Maida, P.A.
1709 Hermitage Blvd., Suite 201
Tallahassee, FL 32308
850/425-8124

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and one copy of the foregoing have been filed with Corporation Clerk, Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301-1329, on this 2nd day of October, 2008.



MICHAEL G. MAIDA



Progress Energy

June 9, 2008

Finlay Development
Attn: Adam Scrivener
4300 Marsh Landing Blvd.
Jacksonville, Florida 32250

SUBJECT: AVAILABILITY OF SERVICE – Meetinghouse at Zephyrhills, On Wire Road approximately 1,100 feet N or the SW corner of the intersection of Daughtery Road and Wire Road, Zephyrhills, Florida 33540

Dear Mr. Scrivener:

The above referenced proposed project Meetinghouse at Zephyrhills, Zephyrhills, Florida is in the Progress Energy Florida service area.

As of April 10, 2008, Progress Energy Florida will provide the necessary services to the above referenced project as allowed by the policies and regulations as set by Florida Public Service Commission, local and national codes once service is formally applied for.

At the present time there are no existing moratoriums that could affect our service to this site.

If you require any further information or assistance, please do not hesitate to contact me at (813) 783-6944.

Very truly yours,

PROGRESS ENERGY FLORIDA

A handwritten signature in cursive script that reads "Darryl Foshee".

Darryl Foshee
Service Coordinator

DF/atn

Progress Energy Florida, Inc.
35453 Eiland Blvd
Zephyrhills, FL 33542

Exhibit A