

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

GHG EVERGREEN, LTD.,

Petitioner,

vs.

FHFC Case. No. 2008-094UC
Application No. 2008-174BS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, this cause was scheduled for an informal hearing before Diane D. Tremor, the duly designated Informal Hearing Officer for the Florida Housing Finance Corporation, to commence in Tallahassee, Florida, on February 16, 2009.

APPEARANCES

For Petitioner:

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For Respondent:

Wellington Meffert
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
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STATEMENT OF THE ISSUES

The prime issue raised by the Petition for Informal Hearing was whether the application filed on behalf of the Meetinghouse at Zephyrhills, Application Number 2008-185BS, in the 2008 Universal Cycle was improperly scored by the Florida Housing Finance Corporation.

PRELIMINARY STATEMENT

At the commencement of the informal hearing, counsel for Florida Housing announced that a resolution of the issues had been reached in this proceeding and submitted a Joint Proposed Recommended Order, along with Joint Exhibits 1 and 2. That Joint Proposed Recommended Order is attached to and incorporated in this Recommended Order as Attachment A. No further argument or exhibits were offered.

RECOMMENDATION

Based upon the parties' resolution of the issues and submission of the attached Joint Proposed Recommended Order, and in accordance therewith, it is RECOMMENDED that a Final Order be entered concluding that Application No. 2008-185BS submitted by the Meetinghouse at Zephyrhills in the 2008 Universal Cycle was improperly scored with regard to a threshold requirement pertaining to the availability of infrastructure, specifically electricity, as of the application deadline, and that Petitioner

GHG Evergreen, Ltd., is entitled to its requested award of funding from the next available allocation.

Respectfully submitted this 31st day of March, 2009.



DIANE D. TREMOR
Hearing Officer for Florida Housing
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**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

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

Petitioner,

vs.

**FHFC Case No.: 2008-094UC
FLORIDA HOUSING APPLICATION
NO. 2008-174BS**

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

**JOINT PROPOSED
RECOMMENDED ORDER**

Petitioner GHG Evergreen, Ltd., ("Evergreen" or "the Applicant"), and Florida Housing Finance Corporation ("Florida Housing") submit the following Joint Proposed Recommended Order wherein the parties stipulate and agree to the following Findings of Fact, Conclusions of Law and Recommendation.

Appearances

For Petitioner:

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ATTACHMENT A

Statement of the Issue

The issue in this case is whether Florida Housing properly evaluated and scored a competitor's application, The Meetinghouse at Zephyrhills, Application No. 2008-185BS ("Meetinghouse"), with respect to infrastructure availability. Specifically, Evergreen contends that Meetinghouse's application failed threshold requirements with regard to the availability of infrastructure, specifically electricity, as of the application deadline date. Evergreen further contends that had Florida Housing properly evaluated and scored the Meetinghouse application, Meetinghouse would have been rejected and Evergreen would have been entitled to an allocation of funds from the 2008 Universal Application Cycle.

Preliminary Statement

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.

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.

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.

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

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. 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.

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.

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.

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.

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.

Evergreen timely sought 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.

Findings of Fact

1. 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.

2. 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").

3. 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. Evergreen was deemed not to be entitled to an award of MMRB or SAIL funds, or an allocation of non-competitive housing credits. Florida Housing's final scores and rankings indicated 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 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.

4. Evergreen timely filed a Petition for Informal Administrative Hearing challenging the conclusion that it was not entitled to an allocation of funds and sought a determination that, under the applicable scoring criteria, Evergreen's Application was entitled to an award of MMRB and SAIL funds as well as an allocation of non-competitive housing credits from the 2008 Universal Cycle. Evergreen's substantial interests are affected by the agency action.

5. 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.

6. The rules set forth in the Universal Application Package Instructions at Part III.C.3 state that "verification of the availability of each type of infrastructure [including

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

electricity] on or before the Application Deadline must be provided.” The Application Deadline was April 7, 2008.

7. As part of its cure material, Meetinghouse amended its Application with a revised letter from Progress Energy dated June 9, 2008 which was submitted as Exhibit 28 to its Application. While the letter affirmed the status of electricity, the letter did not verify that electricity was available on or before April 7, 2008 - the Application deadline.

8. If Florida Housing had rejected the Meetinghouse application, Evergreen would have been entitled to receive MMRB and SAIL funds and an allocation of non-competitive housing credits from the 2008 Universal Cycle.

Conclusions of Law

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. 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. 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."

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.

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.

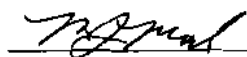
The Application Deadline was April 7, 2008. Exhibit 28 of the "cure" material submitted by Meetinghouse failed to disclose electrical infrastructure availability as of the Application Deadline. Meetinghouse therefore failed to demonstrate the availability of utility services as of the Application Deadline. 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." Under its adopted rules, Florida Housing was required to reject the Meetinghouse Application as it failed to meet threshold with respect to electrical infrastructure availability.

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

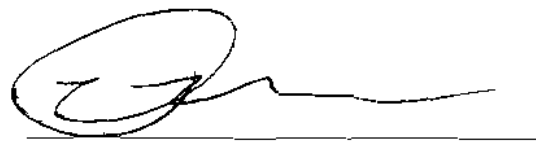
RECOMMENDATION

Based on the Stipulated Findings of Fact and Conclusions of Law stated above, the Parties recommend that the Hearing Officer enter a Recommended Order finding that Meetinghouse's application failed threshold requirements with regard to the availability of infrastructure, specifically electricity, as of the application deadline date. Florida Housing should have rejected the Meetinghouse application. Had the Meetinghouse application been rejected Evergreen would have been ranked within the funded range and entitled to an allocation of funds from the 2008 Universal Application Cycle. Evergreen's Application is entitled to an award of MMRB and SAIL funds as well as an allocation of non-competitive housing credits from the 2008 Universal Cycle.

Respectfully submitted this 16TH February, 2009.




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via hand delivery to Diane Tremor, Hearing Officer, this 16TH day of February, 2009.



Wellington Meffert, General Counsel
Florida Housing Finance Corporation

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(6), Florida Administrative Code, 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, excluding the caption and certificate of service. 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 April 6, 2009. 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.