

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

CP DEVELOPMENT GROUP 2, LLC,
a Florida limited liability company

Petitioner,

v.

FHFC CASE NO.: 2009-065UC
Application No. : 2009-114C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**FLORIDA HOUSING FINANCE CORPORATION'S
ARGUMENT IN OPPOSITION TO THE RECOMMENDED ORDER**

The Recommendation arrived at in the Recommended Order is based upon conclusions of law contrary to Florida Housing rules and applicable law. Specifically, conclusions of law in paragraphs 7, 8, 9 and 10 on pages 8 and 9 of the Recommended Order are incorrect as a matter of law.

Paragraphs 8 and 9 conclude that Florida Housing, in accepting Petitioner's cure as having cured the deficiency noted at preliminary scoring, "is not allowed to" reject the cure "for an item that cannot be revised in the application."

The funding request amount is among a list of mandatory items that must be included in the application and cannot be revised, corrected or supplemented after application deadline; any attempt to change the funding request amount (or any of

the other mandatory items) will not be accepted. In other words, these items cannot be cured. Rule 67-48.004(14), F.A.C.

It is undisputed that the amount of funding requested by Petitioner in its original application was for an annual housing credit allocation of \$1,103,825.00. (Exhibit J-7) And, pursuant to Rule 67-48.004(14)(m), F.A.C., that amount could not be changed after application deadline; any attempted change will not be accepted. (*Emphasis added*)

On cure, Petitioner submitted a revised equity commitment letter based upon an annual housing credit allocation of \$1,470,887.00. (Exhibit J-6)

Petitioner also submitted a “consistency” cure in the form of a revised page to its application changing the funding request amount to \$1,470,887.00. However, by operation of Rule 67-48.004(14), F.A.C., that attempt to change the funding request amount could not be accepted.

Under the Application Instructions governing equity commitments, if the amount of housing credits requested in the application is less than the anticipated housing credit allocation stated in the commitment, the equity commitment will not be considered a source of financing. (*Emphasis added*) Part V.D.2.(f) of the 2009 Universal Cycle Application Instructions.

Here, it is undisputed that the Petitioner’s funding request of \$1,103,825.00 is less than the anticipated housing credit allocation of \$1,470,887.00 stated in the

revised equity commitment. As a result, the equity commitment cannot be considered a source of financing. The rules are mandatory in this regard.

While Florida Housing may have accepted Petitioner's revised equity commitment for purposes of having cured the mathematical calculation deficiencies noted at preliminary scoring, the revised letter created a new failure, or inconsistency, in that "the commitment reflects a larger HC request amount than applied for, which is not allowed under paragraph 67-48.004(14)(m)...".

An inconsistency in a threshold item created by the Applicant in its cure is justification for rejection of the application. Rule 67-48.004(9), F.A.C.

And, even if it is assumed for purposes of argument that the Petitioner's attempt to increase its funding request amount was not simply an inconsistency created by the Petitioner in its cure but, rather, was somehow apparent at the time of preliminary scoring and not identified as a deficiency at that time, Rule 67-48.004(9) provides that any deficiency listed in the mandatory elements in subsection (14), which includes the funding request amount at subsection (14)(m), can be identified at any time prior to sending the final scores, regardless of whether the deficiency was previously identified and will result in rejection of the Application. (*Emphasis added*)

Thus, as a matter of law, Florida Housing's rejection of Petitioner's revised equity commitment letter at the time of final scoring is not only authorized by rule,

such action is mandated by rule; and, because the issue involves a mandatory item, it makes no difference when the issue first arose or was first identified by Florida Housing as long as the deficiency is identified prior to final scoring.

The conclusion of law in paragraph 10 concludes that Florida Housing's failure to detect a similar deficiency in another application, "would produce inconsistent results and that ambiguity of interpretation should be construed against" Florida Housing.¹

The fact that Florida Housing may have failed to detect a similar deficiency in another application demonstrates nothing more than "...a mistake or oversight on [its] part, and does not serve as precedent for a clear disregard of the controlling rules."² Neither does the fact that Florida Housing apparently missed a defect in another application serve to excuse Petitioner's failure to comply with the explicit requirements of the rules.³

Furthermore, the scoring of that competing application from this same Universal Application Cycle is subject to challenge in a proceeding brought pursuant to Rule 67-48.005(5), F.A.C. That is the proper forum to determine whether Florida Housing erred in the scoring of a competing application.

¹ At the informal hearing, Florida Housing objected to the introduction of exhibits pertaining to the scoring of this other application. Recommend Order, page. 2.

² Nautilus Development Partners, LLLP v. Florida Housing Finance Corporation, FHFC Case No. 2006-023UC (2006)

³ MBCDC: Villa Maria, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2006-025UC (2006)

To construe Florida Housing's inaction on a single application, of itself, to be anything other than an oversight on the part of Florida Housing, is not supported by the record. And, to go beyond that and construe that inaction as rising to the level of a rule interpretation, particularly when that interpretation would operate as an estoppel against Florida Housing's enforcement of its rules against Petitioner in this case (and, presumably any other applicant similarly situated) would lead to unreasonable and absurd results. It is well established that an agency cannot ignore its own rules.⁴

The rules at issue are mandatory in nature; they are clear and unambiguous, and need no interpretation. Rule 67-48.004(14)(m) is clear in its mandate: any attempt to change certain items, among them the funding request, will not be accepted. Rule 67-48.004(9) is likewise clear: any deficiency listed in the mandatory elements in subsection (14), which includes the funding request amount, can be identified at any time prior to sending the final scores, regardless of whether the deficiency was previously identified and will result in rejection of the Application. Part V.D.2.(f) of the 2009 Universal Cycle Application Instructions are clear: if the amount of housing credits requested in the application is less than the anticipated housing credit allocation stated in the commitment, the equity commitment will not be considered a source of financing. (*Emphasis added*)

⁴ Department of Revenue v. Race, 743 So. 2d 169, 171 (Fla. 5th DCA 1999); Savannah Springs Apartment II, Ltd. V. Florida Housing Finance Corporation, FHFC Case Nos. 2007-048UC and 2007-049UC (Final Order, adopting Recommend Order, August 8, 2008)

Having adopted rules mandating certain action, Florida Housing is not free to ignore the mandates of those rules.

Florida Housing's scoring decision in the instant case is entirely consistent with its rules and Application Instructions. To have reached a different result would have required Florida Housing to ignore the plain meaning of those rules and instructions. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation.⁵ The interpretation should be upheld even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation.⁶

In the instant case, and in the context of a competitive funding process, Florida Housing has reasonably interpreted its rules and incorporated instructions and forms, and properly determined that Petitioner's Application should be rejected because its housing credit equity commitment letter failed to meet applicable threshold requirements and because of the construction and permanent financing shortfall threshold failures.

For the reasons set forth herein, Conclusions of Law 7, 8, 9 and 10, in the Recommended Order are contrary to Florida Housing's rules and should be rejected as a matter of law.

⁵ 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. 1st DCA 2002).

⁶ Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995).

Instead, the Board should adopt conclusions of law consistent with its rules and applicable law as set forth herein and enter its Final Order rejecting Petitioner's Application.

Respectfully submitted, this 10th day of February, 2010.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Argument in Opposition to Recommend Order has been furnished this 10th day of February, 2010 by electronic mail to David E. Ramba at David@rambaconsulting.com and to Michael P. Donaldson at mdonaldson@carltonfields.com



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