

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

HTG HARBOR VILLAGE, LTD., AS APPLICANT
FOR CRESTWOOD APARTMENTS,

Petitioner,

v.

FHFC CASE NO.: 2010-028GA
DOAH CASE NO.: 10-6673

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on June 10, 2011. The matter for consideration before this Board is a recommended order pursuant to Section 120.57(1), Florida Statutes, and Rule 28-106, Florida Administrative Code.

Petitioner timely filed its Petition for Administrative Hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (the “Petition”) challenging Florida Housing’s rescission of Exchange funding. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition raised disputed issues of material fact. Pursuant to Section 120.57(1), Florida Statutes, a formal hearing was held in this case on January 19 and 20, 2011

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della M. Hamill DATE: 6/13/11

in Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings (DOAH). Petitioner and Florida Housing timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge (ALJ) issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ recommended that Florida Housing issue a Final Order denying Petitioner's application for Exchange funding. Petitioner did not file Exceptions to the Recommended Order.

After a review of the entire record in this proceeding, the Board makes the following findings and rulings:

RULING ON THE RECOMMENDED ORDER

1. The findings of fact set out in the Recommended Order are supported by competent substantial evidence.
2. The conclusions of law in the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED**:

3. The findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

4. The conclusions of law in the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Florida Housing's rescission of funding to Petitioner is **AFFIRMED** and the relief requested in the Petition is **DENIED**.

DONE and ORDERED this *10th* day of June, 2011.



FLORIDA HOUSING FINANCE
CORPORATION

By: _____

Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HTG HARBOR VILLAGE, LTD,)
AS APPLICANT FOR CRESTWOOD)
APARTMENTS,)
)
Petitioner,)
)
vs.) Case No. 10-6673
)
FLORIDA HOUSING FINANCE)
CORPORATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 19, and 20, 2011, with the parties appearing in Tallahassee, Florida, before June C. McKinney, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donna E. Blanton, Esquire
Radey Thomas Yon & Clark, P.A.
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For Respondent: Hugh R, Brown, Esquire
Florida Housing Finance Corporation
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STATEMENT OF THE ISSUE

Whether HTG Harbor Village, Ltd's, as Applicant for Crestwood Apartments, ("Petitioner" or "Crestwood") application for funding of Housing Credits and Exchange Funding awards should be granted by Florida Housing Corporation ("Florida Housing").

PRELIMINARY STATEMENT

The Florida Housing Board of Directors ("Board") rescinded an allocation of Housing Credits and an award of Exchange Funding for Petitioner on June 25, 2010. On July 12, 2010, Petitioner timely filed a petition with Florida Housing to contest the Board's decision, and the matter was referred to the Division of Administrative Hearings on July 29, 2010.

The matter was noticed for hearing for October 12 and 13, 2010. Upon motion of the parties, the hearing was canceled, held in abeyance, and re-scheduled for January 19 through 20, 2011, and proceeded as scheduled.

On January 10, 2011, the parties filed a Pre-Hearing Stipulation, which included a statement of admitted facts. The stipulated facts have been incorporated as necessary into this Recommended Order.

At hearing, Petitioner presented the testimony of three witnesses: Matthew Rieger, Kevin Tatreau, and Ben Johnson. Respondent presented the testimony of three witnesses:

Stephen Auger, Kevin Pichard, and Ben Johnson. The parties offered Joint Exhibits numbered 1 through 45, all of which were received in evidence.

On January 21, 2011, Petitioner filed Petitioner's Unopposed Motion Requesting Official Recognition of Post-Hearing Final Agency Action or, In the Alternative, Requesting the Record be Reopened for Admission of Additional Evidence Filed ("Motion"). A teleconference was held on the Motion February 1, 2011. The undersigned granted the Motion and issued the order on February 2, 1011, admitting Petitioner's Composite Exhibit 1.

The proceeding was recorded and transcribed, and the three-volume transcript was filed at the Division of Administrative Hearings on February 3, 2011. Both Petitioner and Respondent timely filed their Proposed Recommended Orders on February 14, 1011, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the entire record of this proceeding including the necessary stipulated facts submitted by parties, oral and documentary evidence presented at the final hearing, the following findings of fact are made:

1. Florida Housing is a public corporation organized under chapter 420, Florida Statutes, 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. Florida Housing is governed by the Board consisting of nine individuals appointed by the Governor and confirmed by the Florida Senate.

2. Florida Housing provides funding through a number of different federal and state programs to assist in the development of affordable housing in this state. As required by the federal government, the state each year adopts a Qualified Allocation Plan ("QAP"), which is incorporated into Florida Housing's rules. The QAP sets forth the selection criteria and the preferences for developments that will be awarded Housing Credits each year.

3. Each year Florida Housing conducts a "Universal Cycle," through which applicants for certain Florida Housing multi-family programs submit a single application by which projects are evaluated, scored, and competitively ranked. Among the programs included in the Universal Cycle is the Housing Credit program, which was created by the federal government in 1986. Housing Credits (also called tax credits) come in two varieties: competitively awarded nine percent credits and non-competitively awarded four percent credits. For the nine percent credits, the federal government annually allocates to each state a specific amount of credits using a population-based formula. Housing

Credits are a dollar for-dollar offset to federal income tax liability over a 10-year period.

4. Developers receiving the federal awarded Housing Credits often sell the future stream of credits to a syndicator, which in turn sell the credits to investors seeking to shelter income from federal income taxes. The sale of the credits generates debt-free cash equity for developers.

5. With the recent economic downturn, the market for Housing Credits dropped significantly. A number of development projects awarded funding in recent Universal Cycles have been unable to close on such funding because of the poor market for Housing Credits.

6. In recognition of the Housing Credit market collapse, the federal government, as part of its economic stimulus efforts, established mechanisms to assist in the development of affordable housing. The American Recovery and Reinvestment Act ("ARRA"), was enacted on February 17, 2009, and includes provisions relating to the Low Income Housing Tax Credit Program. Among those provisions are the Tax Credit Exchange Program, which allows agencies that allocate Housing Credits (such as Florida Housing) to "exchange" a portion of their 2009 Housing Credit ceiling, as well as previously awarded and returned housing credits, for cash grants from the U.S. Treasury that can be used to make "sub-awards" to finance the

construction of, or acquisition and rehabilitation of, qualified low-income buildings.

7. Following the enactment of ARRA, Florida Housing issued several Requests for Proposals ("RFPs") to take advantage of the federal stimulus funds. The federal programs have quick deadlines to stimulate activity. RFP 2010-04, issued on February 26, 2010, anticipated that \$150 million in Exchange Funding would be available through the RFP. In order to be eligible for funding under RFP 2010-04, applicants were required to have an active award of nine percent Housing Credits. RFP 2010-04 provided that proposed developments receiving Exchange Funding would be governed by the same rules that govern the Universal Cycle's Housing Credit Program, including credit underwriting requirements.¹

8. HTG Harbor Village Ltd,² a Florida-limited partnership, submitted an application for funding for Crestwood to Florida Housing in 2009. Crestwood is a proposed 114-unit affordable housing complex in Palm Beach county that will serve elderly residents.

9. Crestwood submitted an application for nine-percent low-income Housing Tax Credits during the 2009 Universal Application Cycle. On February 26, 2010, the Board approved the final rankings for the 2009 Universal Application Cycle and Crestwood was awarded the Housing Credits. Florida Housing

staff issued an invitation to Crestwood to enter into the credit underwriting.

10. Crestwood also received a recommendation for Exchange Funding pursuant to RFP 2010-04, which the Board accepted on March 17, 2010. Subsequently, Crestwood was included in the ranked list of proposed developments that were awarded Exchange Funding and invited into credit underwriting.

11. The credit underwriting process is governed by Florida Administrative Code Rule 67-48.0072 ("Credit Underwriting Rule").

12. Florida Housing is obligated to satisfy mortgage debt under its Guarantee Fund. It has close to \$800 million in outstanding mortgage guarantee commitments. Florida Housing's Guarantee Fund has paid out eight claims since November 2008 for approximately 90 million dollars when borrowers failed to make their payments. Each payout impacted Florida Housing's risk-to-capital-ratio. Before the 2009 Universal Cycle in order to try to prevent future defaults and protect the fund from additional claims, the Board amended rule 67-48.0072(10) to require the credit underwriter to review and determine whether a proposed development "will be a negative impact on a Guarantee Fund development within the primary market area."

13. The costs associated with the credit underwriting review is paid by the developer, including the credit underwriting fee and costs of a market study.

14. Florida Housing selects an independent credit underwriter for each developer who reviews each proposal according to requirements set forth by the Credit Underwriting Rule. The credit underwriter prepares a report, known as the Preliminary Recommendation Letter ("PRL"), for each applicant invited into the process. The reports are submitted to Florida Housing's Board, who makes the final decision for funding by approving or denying each application.

15. Florida Housing chose Seltzer Management Group, Inc. ("Seltzer") as the credit underwriter for Crestwood. Seltzer conducted both the credit underwriting for Crestwood's Housing Credit allocation and its Exchange Funding simultaneously.

16. As the credit underwriter, Seltzer, has to re-evaluate the proposed development by performing a comprehensive analysis of all of the aspects of the proposed development. Seltzer sent Crestwood an email checklist to complete in order to have the PRL ready for the July 2010 Board meeting.

17. The responsibility for the market study is assigned by the credit underwriter to an independent market analyst. Seltzer retained Clobus, McLemore & Duke, Inc. ("CMD") of Fort Lauderdale to conduct the market study for Crestwood.

18. CMD completed the market study and issued it on April 6, 2010. CMD's market study report stated in its cover letter that:

There are two Elderly Guarantee Fund Developments within the subject's PMA. It is CMD's opinion that the subject's units will not have a negative impact on one or any of the Guarantee Fund Developments. Historically, low-income properties are not significantly affected by new developments other than during lease-up. Occupancy is lower now primarily due to the current economic conditions, not over-improvement. There has always been a demand for low-income housing and the impact on additional properties, including Guarantee Fund Developments may be on occupancy during lease-up.

19. In mid-April of 2010, Seltzer provided a copy of the market study to Crestwood's developers. Crestwood compared CMD's market study with their own conducted by Reinhold Wolff and determined that it was a positive market study. The determination helped Petitioner decide to continue the credit underwriting process and increase its efforts to comply with Seltzer's checklist and quick driven federal deadlines by expending additional funds to complete the process. While seeking credit underwriting approval, Crestwood was required to expend considerable time and money to proceed as an applicant in the process seeking credit underwriting approval. Crestwood developers spent approximately \$653,854.94.

20. Soon thereafter, Seltzer prepared the Crestwood PRL signed by John Elasser and emailed it to Florida Housing on May 3, 2010. The cover email stated that the PRL draft was attached. The PRL discussed the CMD market study noting specifically that CMD's opinion is that Crestwood "will not have a long-term negative impact" on Guarantee fund properties near the proposed development. Seltzer concludes the May 3, 2010, PRL by recommending that Crestwood receive both Exchange Funding and Housing Credits.

21. Three days later, on May 6, 2010, Lindsay Lockhart, Florida Housing's Guarantee Program Asset Manager, sent an email to Ben Johnson, the president of Seltzer, providing additional information on Windsor Park Apartments ("Windsor"), one of the Guarantee Fund developments referenced in the May 3, 2010, PRL. Lockhart's email discussed occupancy figures for Windsor, as well as rent concession policies and marketing strategies of Windsor.

22. Windsor was built in the late 1990s and is 1.4 miles northeast of the proposed Crestwood site. Historically, Windsor has struggled financially. Windsor has had over three-and-half million dollars in operating deficits.

23. The next day, May 7, 2010, Seltzer's president emailed Tatreau, Director of multi-family development programs at Florida Housing and stated:

The market study indicated that adding the Crestwood units may have a negative impact on the Guarantee Properties during the lease up period. I have reviewed the market study and other economic data and I think that I support that conclusion. That being said, what additional data, analysis, conclusions, recommendations, etc., are you requesting that we include in the PRL?

I would appreciate w[hat] ever guidance you ca[n] give us.

24. On May 12, 2010, Johnson followed up and emailed his employee, Elasser, instructing him to incorporate and wordsmith the language attached to the email and utilize it while revising the PRL.

25. On May 13, 2010, Elasser signed and sent a second draft Crestwood PRL to Florida Housing. His cover email states: Revised Preliminary Recommendation Letter for Crestwood, with expanded discussion of Windsor Park and Pinnacle Palms (the two Guarantee fund transactions within Crestwood's submarket). The May 13, 2010, draft PRL again referred to the CMD market study not anticipating "a long-term negative impact" on any Guarantee Fund properties. However, the letter further delineated some of Seltzer's "concerns" regarding Windsor Park by stating:

Crestwood will provide potential Windsor Park residents an additional choice when looking for rental housing-an option that will be newer and with a better unit mix. CMDuke suggests, and it is reasonable to conclude, that occupancy at Windsor may drop during Crestwood's lease-up. It is difficult, however, to quantify the number

of units lost or how long Crestwood will impact Windsor Park.

Seltzer again concludes its May 13, 2010, PRL by recommending that Crestwood receive both Exchange Funding and Housing Credits.

26. Two days after the second draft PRL was sent by Seltzer to Florida Housing, Tatreau emailed Johnson and set up a teleconference call meeting with Florida Housing staff to discuss several proposed developments under review by Seltzer that have Guarantee Fund developments nearby. Crestwood was specifically included. The call took place the following day, May 19, 2010. Most of the talking was done by the Guarantee Fund staff.

27. During the Crestwood credit underwriting process, numerous appropriate communications took place between Seltzer and Florida Housing staff about the impact that the Crestwood transaction would have on Windsor Park and Pinnacle Palms. Florida Housing Staff wanted to make sure that Seltzer had enough information relating to Guarantee Fund developments in the Crestwood market area for Seltzer's analysis and recommendation to be complete.

28. Throughout the process, Florida Housing staff provided Seltzer some of Windsor's data. Seltzer received Windsor information including the: demographic demand; good management;

poor unit design of 2/3 bedrooms; occupancy problems; good maintenance; long term struggling finances; operating deficit; and rental concessions and incentives.

29. On May 26, 2010, Seltzer sent a third draft Crestwood PRL to Florida Housing. Unlike the first two draft PRLs, Seltzer had looked through all the information received regarding Windsor for the May 26, 2010, PRL and recognized Windsor's vulnerability to new developments. Even though the third draft was signed by both Elasser and Johnson, and reversed Seltzer's earlier recommendation that Crestwood receive funding, Florida Housing neither told nor instructed Seltzer to change its recommendation for Crestwood. Seltzer concluded after its complete analysis the following:

Based upon the information presented in CMDuke's Market Study and its own Due Diligence, SMG concludes that the average occupancy rate within the Subject's submarket meets the minimum requirement of 90%. In accordance with the RFP 2010-04, however, SMG finds its concerns with regard to historical and current occupancy rates for the Elderly at prior and existing Guarantee Fund Properties within the Subject's submarket leads it to recommend FHFC rescind Applicant's tentative award of Exchange Program Funding. Construction of the Subject Development has the potential to negatively impact Affordable Housing Properties previously funded by FHFC in the area, especially the two Guarantee Fund Properties located within Crestwood's submarket.

30. Seltzer subsequently sent a fourth draft PRL to Florida Housing on June 1, 2010, and a fifth final PRL to Florida Housing on June 3, 2010. The last PRL's cover email stated "Here is the final." The negative recommendations remained in both the PRL of June 1 and 3, 2010, even though the language was slightly different from the language used in previous PRLs. The final June 3, 2010, PRL discusses the operating deficits and Seltzer's "serious concerns." It recommends not only that Crestwood's Exchange Funding be rescinded, but that its Housing Credit allocation also be taken back. Additionally, the recommendation in the June 1 PRL and the final June 3 PRL is based only on the negative impact on Windsor Park, not on any other Guarantee Fund development or other affordable housing development in the area. The final version provides:

Information presented by CMDuke's Market Study and developed through its own Due Diligence leads SMG to conclude the average occupancy rate within the Subject's submarket meets the minimum requirement of 90% for the same demographic population. RFP 2010-04, however, also requires consideration of the potential impact of the Subject Development on existing Guarantee Fund Properties. Based upon marginal occupancy rates and resulting Operating Deficits, SMG has serious concerns regarding the potential negative impact of the Subject Development on Windsor Park. SMG therefore recommends FHFC rescind Applicant's HC allocation award and its Exchange Program Funding.

31. The June 3, 2010, PRL from Seltzer concerning Crestwood was the subject of the Staff Recommendation from the Florida Housing staff to the Florida Housing Board on June 18, 2010. The Staff Recommendation states:

Staff has received a preliminary recommendation letter for Crestwood Apartments (Exhibit A) containing a negative recommendation because the Development would cause a negative impact on a Guarantee Fund transaction in the area. Staff has reviewed this report and finds that the Development does not meet all of the requirements of Rule Chapter 67-48., F.A.C. and RFP 2010-04 to be approved for further credit underwriting consideration.

32. The Staff Recommendation concluded by recommending that the Board "[r]escind and return the nine-percent Low-Income Housing Tax Credit award and Exchange Funding to Florida Housing Finance Corporation."

33. Petitioner was first notified of the negative recommendation concerning Crestwood by email on June 2, 2010. After notification of the negative recommendation, Crestwood's developer presented several proposals to Florida Housing's staff in an effort to mitigate any impact of Crestwood on Windsor, the nearby Guarantee Fund development. All of Crestwood's proposals were rejected including the proposal to provide a reserve after Florida Housing determined that what was offered did not mitigate the risk for the Guaranteed Fund.

34. At the June 18, 2010, Florida Housing Board meeting, the Board considered the final PRL of June 3, 2010, with the Crestwood application. Seltzer's president, Johnson, presented Seltzer's recommendation and stated "[it] just doesn't match what's happening on the ground" and that he found it "prudent" to protect the Windsor development.³

35. There was no discussion at the Board meeting about Seltzer's first two draft recommendations to approve the Housing Credit allocation and Exchange Funding for Crestwood.

36. Steve Auger, executive director of Florida Housing, admitted to the Board at the meeting that he did not know whether Crestwood would have any negative impact on Windsor, but said:

And, Mr. Chair, if I may, just one thing, potential impact is all we've got. You know, we're talking about a development that's not built and we're talking about guessing about people's behavior. So potential - we will never have anything other than potential when we're talking about, you know, the possibilities there.

37. At the meeting, the Florida Housing Board considered the Staff Recommendation for Crestwood and voted unanimously to accept it, which denied Crestwood's application and rescinded the award of Housing Credits and Exchange Funding.

38. Petitioner received formal notice of Florida Housing's decision to rescind the Housing Credit and Exchange Program

funding awarded to Crestwood on June 25, 2010. On July 12, 2010, Crestwood filed a petition with Florida Housing that commenced this proceeding.

39. A day after the hearing closed, on January, 21, 2011, the Florida Housing Board voted through Item N on its Consent Agenda to approve a credit underwriting letter authorizing \$1.8 million loan to Windsor from RFP 2010-16. The credit underwriting letter states "[T]he Guarantee Program's credit exposure will be eliminated or greatly reduced." Upon the approval, staff was directed to proceed with loan closing activities.

40. During 2010, Windsor Park's occupancy rate increased. The occupancy report for Windsor shows the following occupancy rate increases: January 2010, 87.08 percent; February 2010, 88.75 percent; March 2010, 87.50 percent; April 2010, 89.17 percent; May 2010, 89.58 percent; June 2010, 88.75 percent; July 2010, 92.25 percent; August 2010, 94.17 percent; September 2010, 96.25 percent; and October 2010, 95.00 percent. No credible evidence was presented to show that the increased occupancy rate trend had a correlating financial improvement for Windsor's long term financial struggles.

41. There is insufficient evidence to show that the addition of Crestwood to the Windsor market area would not adversely affect the financial feasibility of the existing

Guarantee Fund. Florida Housing's priority to protect the Guarantee Fund is necessary to safeguard the resources used to support the creation and availability of affordable housing in the state.

CONCLUSIONS OF LAW

42. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to sections 120.569 and 120.57(1), Florida Statutes.

43. As an applicant for funding in this proceeding, Petitioner has the burden of establishing entitlement to the Housing Credits and Exchange Funding it seeks. Fla. Dep't of Trans. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

44. To prevail, Petitioner must establish facts by a preponderance of the evidence that Florida Housing improperly denied its application for funding. Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

45. The Credit Underwriting Rule provides in relevant part, as follows:

67-48.0072 Credit Underwriting and Loan Procedures.

The credit underwriting review shall include a comprehensive analysis of the Applicant, the real estate, the economics of the Development, the ability of the Applicant and the Development team to proceed, the evidence of need for affordable housing in

order to determine that the Development meets the program requirements and determine a recommended SAIL or HOME loan amount, Housing Credit allocation amount or a combined SAIL loan amount and Housing Credit Allocation amount, if any. Corporation funding will be based on appraisals of comparable developments, cost benefit analysis, and other documents evidencing justification of costs. As part of the credit underwriting review, the Credit Underwriter will consider the applicable provisions of Rule Chapter 67-48, F.A.C.

* * *

(5) The Credit Underwriter shall verify all information in the Application, including information relative to the Applicant, Developer, Housing Credit Syndicator, 23 General Contractor, and, if an ALF, the service provider(s), as well as other members of the Development team.

* * *

(10) A full or self-contained appraisal as defined by the Uniform Standards of Professional Appraisal Practice and a separate market study shall be ordered by the Credit Underwriter, at the Applicant's expense, from an appraiser qualified for the geographic area and product type not later than completion of credit underwriting. The Credit Underwriter shall review the appraisal to properly evaluate the proposed property's financial feasibility. Appraisals which have been ordered and submitted by third party credit enhancers, first mortgagors or Housing Credit Syndicators and which meet the above requirements and are acceptable to the Credit Underwriter may be used instead of the appraisal referenced above. The market study must be completed by a disinterested party who is approved by the Credit Underwriter. The Credit Underwriter shall

consider the market study, the Development's financial impact on Developments in the area previously funded by the Corporation, and other documentation when making its recommendation of whether to approve or disapprove a SAIL or HOME loan, a Housing Credit Allocation, or a combined SAIL loan and Housing Credit Allocation or Housing Credit Allocation and HOME loan. The Credit Underwriter must review and determine whether there will be a negative impact to Guarantee Fund Developments within the primary market area or five (5) miles of the proposed Development, whichever is greater. The Credit Underwriter shall also review the appraisal and other market documentation to determine if the market exists to support both the demographic and income restriction set-asides committed to within the Application. For the Credit Underwriter to make a favorable recommendation, the submarket of the proposed Development must have an average occupancy rate of 90 percent or greater.

46. The Petitioner went through great lengths to discuss the details of the process by which the recommendation came before the Board. While it is necessary to set forth procedure, the ultimate issue in this case is whether the Petitioner's application for funding should be approved. While Petitioner has asserted entitlement to Florida Housing funding, the record simply does not support the claim. The evidence demonstrates that Crestwood will be a negative impact on Windsor, a Guarantee Fund development within 1.4 miles of Crestwood's primary market area.

47. In this matter, the credit underwriter considered all of the required elements of the Credit Underwriting Rule in providing the evaluation and recommendation to the Board. The credible evidence demonstrates that from the initial draft PRL dated May 3, 2010, where Seltzer first indicated that a potential negative impact existed,⁴ to the fifth PRL dated June 3, 2010, where Seltzer finalized its analysis and concluded that Windsor's operating deficits caused "serious concerns," each of the drafts and the final PRL established consistently that Crestwood will be a negative impact on Windsor.⁵ The greater weight of the evidence established that Windsor's historical financial struggles could easily lead to a new claim against the Guarantee Fund if Crestwood was built as a new better unit mix available for the elderly. That problem was demonstrated in each draft PRL, presented to staff in the final PRL, and ultimately voted on by the Board. Therefore, the evidentiary record demonstrates that Petitioner cannot be funded due to its negative impact on Windsor.

48. Petitioner asserts that Seltzer only adversely changed its recommendation on the third PRL draft after numerous communications from Florida Housing staff who was dissatisfied with the first two draft recommendations of approval. Regardless of the discussions, the Florida Underwriting Rule does not prohibit Florida Housing staff from providing

information to the credit underwriter to evaluate during its analysis. The record demonstrates that Florida Housing staff neither coerced Seltzer nor directed Seltzer to reverse the Crestwood recommendation during the communications. Instead, the record shows that Seltzer only changed its recommendation after receiving all of the data available for Windsor and evaluating it, which was after the second draft PRL. Thus, the record lacks sufficient evidence for the undersigned to make a determination that Florida Housing abused its discretion and applied its Credit Underwriting Rule arbitrarily and capriciously to Crestwood.

49. Petitioner further contends that the Florida Housing Board's approval on January 21, 2011, of a credit underwriting report for Windsor that authorized closing on a \$1.8 million loan demonstrates that a potential negative impact from Crestwood on Windsor Park will either be eliminated or greatly decreased. Crestwood asserts that the use of the RFP funds "will result in a reduced debt burden which will further stabilize the property." (emphasis added) At the point in time that the record was reopened to receive the aforementioned evidence, no evidence was presented that the transaction was completed or closing activities had taken place. The language is even futuristic in saying that it will reduce and stabilize. And, even assuming it was, no evidence exists that such a loan

would change the credit underwriter's opinion related to the negative impact Crestwood will have on Windsor.

50. Thus, as found above, the Petitioner failed to establish a legal basis that Crestwood is entitled to funding when such a development will have a negative impact on Windsor, a Guarantee Fund development. Therefore, Petitioner's application is denied.

RECOMMENDATION

Upon consideration of the Findings of Fact and the Conclusions of Law reached, it is

RECOMMENDED that the Florida Housing enter a final order denying Petitioner's application for funding.

DONE AND ENTERED this 16th day of March, 2011, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of March, 2011.

ENDNOTES

¹ Florida Administrative Code Rule 67-48.0072 details the credit underwriting requirements.

² HTG Harbor Village has been active in the development of affordable housing since the late 1990s and has completed ten projects in Florida that received funding from Florida Housing. Some previous real estate development has been in Palm Beach county.

³ Prehearing Stipulation Admitted Facts paragraph 24.

⁴ The first draft PRL dated May 3, 2010, started the analysis of Crestwood's negative impact on Windsor by Seltzer noting that CMD's opinion is that Crestwood "will not have a long-term negative impact" on Guarantee fund properties near the proposed development. Rule 67-48.0072(10) does not specify a time period for negative impact to the Guarantee Fund Developments but only requires a review and determination if there is a negative impact.

⁵ As Seltzer further evaluated Crestwood, the remaining drafts continued to detail Crestwood's negative impact. Draft two delineated some of Seltzer's "concerns" and stated that "it is reasonable to conclude, that occupancy at Windsor may drop, during Crestwood's lease-up. It is difficult, however to quantify the number of units lost or how long Crestwood will impact Windsor Park." Draft three further detailed Seltzer's analysis stating "[Seltzer] finds its concerns with regard to historical and current occupancy rates for the Elderly at prior and existing Guarantee Fund Properties within [Crestwood's] submarket. Construction of the Subject Development has the potential to negatively impact Affordable Housing Properties previously funded especially the two Guarantee Fund Properties located within Crestwood's submarket."

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in this case.