

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

SAS Fountains at Pershing Park, Ltd.,
a Florida limited partnership

Petitioner,

v.

DOAH Case No.: 10-8219
FHFC Case No.: 2010-028GA

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 February 26, 2010. APD Housing Partners 20, LP, ("Petitioner") timely submitted its 2009 Universal Cycle Application ("Application") to Florida Housing Finance Corporation ("Florida Housing") to compete for an allocation of competitive housing credits under the Housing Credit (HC) Program administered by Florida Housing. Petitioner timely filed its Petition for Review, pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (the "Petition") challenging Florida Housing's scoring of its Application. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della M Harrell / DATE: 10/22/10

Petition raised disputed issues of material fact. A formal hearing was held in this case on September 13-14, 2010, in Tallahassee, Florida, before Administrative Law Judge W. David Watkins, at the Division of Administrative Hearings. The timing of the hearing and deadlines for post-hearing submittals were expedited in recognition of the Exchange program expenditure requirements.

Petitioner and Respondent timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer found and concluded that Petitioner met the threshold requirements for developer experience, recommended that Florida Housing enter a Final Order directing Petitioner to proceed to closing on Petitioner's requested tax credit and Exchange Program financing.

The Board's previous decision was based on a Credit Underwriting Report prepared by First Housing Development Corporation, dated July 16, 2010. That Credit Underwriting Report, in addition to disallowing the Developer Experience, also found that the proposed Guarantors did not have sufficient resources to back the guarantees.

The parties have requested that the July 16, 2010, Credit Underwriting be approved for use in closing on the requested financing, with the following changes:

Mitigating Factors Item 1, (Page A-6) AND Special Conditions Item 2, (Page B-1)

would be deleted and replaced with:

Operating Deficit Guarantee of FL Tax Holdings, Ltd., Michael J. Sciarrino and Michael J. Sciarrino Revocable Trust, in the amount of nine (9) months of operating expenses (inclusive of replacement reserves) and nine (9) months of debt service, or \$540,081, for the full 15 years of the compliance period.

All other terms and conditions of the Final Credit Underwriting Report dated July 16, 2010 would remain the same, except that any negative recommendations related to the Developer and the negative recommendations for approval of the TCEP loan or Housing Credit allocation would be disregarded.

Upon consideration of the foregoing, the Board enters this as its Final Order in this matter.

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 of the Recommended Order are supported by competent substantial evidence.

The Recommendation in the Recommended Order is consistent with Florida Housing's rules and applicable law.

ORDER

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

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.

The conclusions of law of 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 Petitioner, SAS Fountains at Pershing Park, Ltd; proceed to closing on its requested tax credit and Exchange Program financing, based on the July 16, 2010, Credit Underwriting Report considered by the Board on July 30, 2010, with the following changes:

1. Any negative recommendations related to the Developer and negative recommendations for the Exchange funding or Housing Credit allocation are hereby deleted and disregarded and;

2. Mitigating Factors Item 1, (Page A-6) AND Special Conditions Item 2, (Page B-1) of the Credit Underwriting Report are hereby deleted and replaced with:

Operating Deficit Guarantee of FL Tax Holdings, Ltd., Michael J. Sciarrino and Michael J. Sciarrino Revocable Trust, in the amount of nine (9) months of operating expenses (inclusive of replacement reserves) and nine (9) months of debt service, or \$540,081, for the full 15 years of the compliance period.”

No other closing terms, conditions, and requirements applicable to other 2009 Tax Credit projects with Exchange funding and which are applicable to SAS Fountains at Pershing Park, Ltd.'s closing are waived.

DONE and ORDERED this 22nd day of October, 2010.



FLORIDA HOUSING FINANCE CORPORATION

By: Stuart Schraga
Chair

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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

SAS FOUNTAINS AT PERSHING PARK,)
LTD,)
)
Petitioner,)
)
vs.) Case No. 10-8219
)
FLORIDA HOUSING FINANCE)
CORPORATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A final hearing was held in this matter before W. David Watkins, Administrative Law Judge with the Division of Administrative Hearings, on September 13 and 14, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: M. Christopher Bryant, Esquire
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For Respondent: Wellington H. Meffert, II, Esquire
Hugh R. Brown, Esquire
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227 North Bronough Street, Suite 5000
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STATEMENT OF THE ISSUE

The issue is whether the Florida Housing Finance Corporation ("Florida Housing" or "FHFC") properly rescinded the

preliminary funding awarded to SAS Fountains of Pershing Park, Ltd. ("Pershing Park"), pursuant to applicable rules, prior agency practice, and the existing case law.

PRELIMINARY STATEMENT

On July 30, 2010, Respondent Florida Housing rescinded funding tentatively awarded to Petitioner Pershing Park. On August 9, 2010, Petitioner timely submitted a Petition for Administrative Proceedings which challenged FHFC's actions. Pershing Park's Petition was then forwarded to the Division of Administrative Hearings on August 23, 2010.

Due to the timing requirements of the federal funding at issue, Petitioner requested an expedited hearing and abbreviated schedule for the submittal of proposed orders and issuance of the Recommended Order. Accordingly, the final hearing was held on September 13 and 14, 2010, and the parties agreed to submit their proposed orders by September 22, 2010. At the commencement of the hearing, the parties filed a Joint Pre-Hearing Stipulation containing extensive stipulated findings of fact.

At the hearing, Pershing Park presented the testimony of three witnesses: Scott Clark; Kenneth White (expert in residential real estate development); and W. Scott Culp (expert in residential real estate development, with emphasis in the development, construction, and financing of affordable rental

housing). In addition, the transcript of the deposition of Robert Brunson was received in evidence. Pershing Park Exhibits 1 through 3, 11, and 14 through 18, and 22 were received into evidence. FHFC presented the testimony of two witnesses: Douglas McCree (expert in affordable housing financing and underwriting); and Stephen Auger. Florida Housing offered Exhibits 1 through 5, 7, 8, 11, and 12, all of which were received into evidence. Joint Exhibits 1 through 5 were received into evidence. At hearing, the parties requested that Official Recognition be taken of Florida Administrative Code Rule Chapter 67-48, and that request was granted.

The three-volume hearing Transcript was filed with the Division on September 17, 2010. Both Petitioner and Respondent timely filed their Proposed Findings of Fact and Conclusions of Law on September 22, 2010. In addition, Petitioner filed an unopposed request for official recognition of specific rules adopted by FHFC, as well as Internal Revenue Service Form 8609 and 8609-A, with instructions. The request for official recognition is granted, and these rules and forms, as well as the submittals of the parties, have been duly considered in the preparation of this Recommended Order.

References to statutes are to Florida Statutes (2009) unless otherwise noted.

FINDINGS OF FACT

1. Pershing Park is a Florida limited partnership whose business address is 655 West Morse Boulevard, Suite 212, Winter Park, Florida 32789. Pershing Park is engaged in the development of affordable housing in this state. Pershing Park is an "Applicant," as defined in Florida Administrative Code 67-8, and RFP 2010-04.

2. Florida Housing is a public corporation created by Section 420.504, Florida Statutes, to administer the governmental function of financing or refinancing of affordable housing and related facilities in Florida. Florida Housing's statutory authority and mandates appear in Part V of Chapter 420, Florida Statutes. Florida Housing is governed by a Board of Directors consisting of nine individuals, representing various affordable housing stakeholder interests^{1/} and two consumer members appointed by the Governor and confirmed by the Senate. The Secretary of the Department of Community Affairs sits as a voting *ex officio* member of the board.

3. On February 26, 2010, Florida Housing issued RFP 2010-04 (the "RFP") setting forth criteria and qualifications for applicants to seek funding for affordable housing projects from funds that Florida received through the American Recovery and Reinvestment Act of 2009, PL 111-5 ("ARRA"). ARRA was enacted

in 2009 by Congress as part of federal economic stimulus efforts.

4. The RFP was issued on February 26, 2010, and required applicants to submit proposals to Florida Housing no later than 2:00 p.m. on March 12, 2010. Pershing Park submitted an application and intends to seek financing for its affordable housing project by applying for funding from the sources that are proposed to be allocated through the RFP.

Florida Housing's Programs

5. Florida Housing administers several programs aimed at assisting developers to provide affordable multifamily rental housing for low-income Floridians. These programs include: the Multi-Family Mortgage Revenue Bond Program ("MMRB") established under Section 420.509, Florida Statutes; the State Apartment Incentive Loan Program ("SAIL") created pursuant to Section 420.5087, Florida Statutes; and the federal Low Income Housing Tax Credit Program (the "Tax Credit program") established in Florida under the authority of Section 420.5093, Florida Statutes. Most relevant to this case is the Tax Credit Program, the allocation of which is governed by Section 420.5099, Florida Statutes.

6. These funding sources are allocated by Florida Housing to finance the construction or substantial rehabilitation of affordable housing. A portion of the units constructed based

upon funding from these programs must be set aside for residents earning a certain percentage of area median income ("AMI"). Historically, the units have typically been targeted to tenants earning 60 percent of AMI or below.

Tax Credits

7. The Tax Credit program was created in 1986 by the federal government. Tax Credits come in two varieties: competitively awarded 9 percent tax credits, and non-competitively awarded 4 percent tax credits. For the 9 percent credits, the federal government annually allocates to each state a specific amount of tax credits using a population-based formula. Tax Credits are a dollar-for-dollar offset to federal income tax liability over a ten-year period. A developer awarded Tax Credits will often sell the future stream of Tax Credits to a syndicator who in turn sells them to investors seeking to shelter income from federal income taxes.

8. The developer receives cash equity with no debt associated with it. Thus, Tax Credits provide an attractive subsidy and, consequently, are a highly sought-after funding source. Florida Housing is the designated agency in Florida to allocate Tax Credits to developers of affordable housing. Every year since 1986, Florida Housing has received an allocation of Tax Credits to be used to fund the construction of affordable housing.

9. As required by Section 42 of the Internal Revenue Code, each year Florida Housing adopts a Qualified Allocation Plan ("QAP"), which sets forth the allocation methodology for the competitive (9 percent) tax credits. The QAP must be approved by the Governor each year. The QAP is also adopted and incorporated by reference in Florida Housing's rules. See Fla. Admin. Code R. 67-48.002(88).

10. The 2009 QAP includes the following provision: "In order for the Corporation to implement the provisions of The Recovery and Reinvestment Act of 2009 (the "2009 Stimulus Act"), any funds received pursuant to the 2009 Stimulus Act may be allocated by a competitive request for proposal or competitive application process as approved by the Board. Any such process will be governed by Section 42, IRC, and Chapter 67-48, F.A.C., as applicable, or, an emergency rule authorized by the Florida Legislature specifically for the 2009 Stimulus Act, if any." The 2009 QAP was adopted as part of the 2009 Universal Cycle rules by Florida Housing's Board of Directors on March 13, 2009.

Universal Application

11. Florida Housing has historically allocated funds from the MMRB, SAIL, and Tax Credit programs through a single annual application process. Since 2002, Florida Housing has administered the three programs through a combined competitive process known as the "Universal Cycle." The Universal Cycle

operates much the same as an annual competitive bidding process in which applicants compete against other applicants to be selected for limited funding. The Universal Cycle and the attendant application review process are intended to equitably and reasonably distribute affordable housing throughout the state.

12. Florida Housing has adopted rules which incorporate by reference the application forms and instructions for the Universal Cycle as well as general policies governing the allocation of funds from the various programs it administers. Typically, Florida Housing amends its Universal Cycle rules, forms, and instructions every year.

13. Each year, the Universal Cycle provides a mechanism for selecting applications to meet statutory geographic requirements, specific targeting goals that address housing needs of particular demographic groups (such as farm workers, commercial fishery workers, the homeless, or the elderly), as well as specific set asides or targeting goals aimed at addressing identified needs (such as the Florida Keys, inner city areas, or rural development), and for preservation of existing affordable housing complexes. Each set-aside group essentially has its own separate funding from its share of the funds distributed by Florida Housing.

14. The typical process used by Florida Housing to review and approve the Universal Cycle applications operates as set forth in Florida Administrative Code Rule 67-48.004, and is summarized as follows:

a. Interested developers submit applications by a specified date.

b. Florida Housing reviews all applications to determine if certain threshold requirements are met. A score is assigned to each application. Applications receive points towards a numerical score, based upon such features as programs for tenants, amenities of the development as a whole and of tenants' units, local government contributions to the specific development, and local government ordinances and planning efforts that support affordable housing in general.

c. Florida Housing has built into its scoring and ranking process a series of "tiebreakers" to bring certainty to the selection process. The tiebreakers are written into the Application Instructions which, as indicated above, are incorporated by reference into Florida Housing's rules.

d. After the initial review and scoring, a list of all applications, along with their preliminary scores, is published by Florida Housing on its website. The applicants are then given a specific period of time to alert Florida Housing of any errors they believe Respondent made in its initial review of competitors' applications. These potential scoring errors are submitted through a Notice of Possible Scoring Error, or "NOPSE".

e. After Florida Housing staff has reviewed the NOPSEs, a revised scoring summary (the "NOPSE Scores") is published.

Applicants can then attempt to "cure" certain items within their applications by supplementing, correcting or amending the application or its supporting documentation. Following the timely submittal of "cures", an applicant's competitors have an opportunity to comment on the attempted cures by filing a Notice of Alleged Deficiency, or "NOAD." Florida Housing staff reviews all of the submitted cures and NOADs and prepares its "final" scoring summary for all applications. An appeal procedure for challenging the final scores is set forth in Florida Administrative Code Rule 67-48.005.

f. Following the completion of any appeal proceedings, Florida Housing publishes final rankings which delineate the applications that are within the "funding range" for the various programs. In other words, the final rankings determine which applications are preliminarily selected for funding. The applicants ranked in the funding range are then invited into a "credit underwriting" process. Credit underwriting review of a development selected for funding is governed by Florida Administrative Code Rule 67-48.0072. In the Credit Underwriting Process, third party financial consultants (selected by Respondent, but paid for by the individual applicants) determine whether the project proposed in the application is financially sound. The independent third party looks at every aspect of the proposed development, including the financing sources, plans and specifications, cost analysis, zoning verification, site control, environmental reports, construction contracts, and engineering and architectural contracts.

Pershing Park's Application in the 2009 Universal Cycle

15. Pershing Park timely submitted an application in the 2009 Universal Cycle seeking an award of Tax Credits and a

supplemental loan to construct a 92-unit affordable rental housing development in Orlando, Orange County, Florida. The application proposed total development costs of \$16,321,711 of which \$14,429,558 were considered "allowable" costs on which an allocation of Housing Credits could be based. Pershing Park projected that approximately \$8.8 million in construction financing and approximately \$9.77 million in permanent financing would be generated from the sale of housing credits.

16. The 2009 Universal Cycle also permitted applicants to project that a portion of their construction and permanent financing would be sought from funding made available through the ARRA. Pershing Park proposed in its application that \$3.38 million in construction and permanent financing would result from an anticipated award of ARRA funding.

17. The Pershing Park application was the subject of multiple NOPSEs, which questioned whether it was part of a pool of related applications (which would have relegated it to Priority II status under the 2009 rules); whether the required developer experience was demonstrated; whether the density on site allowed construction of 92 units; and whether the development site had a valid address. None of these NOPSEs was adopted by Florida Housing.

18. Pershing Park complied with all of the requirements of the 2009 Universal Cycle Application and Instructions, and achieved a perfect score for its application. Pershing Park also achieved maximum tie-breaker points. As a result, Pershing Park was allocated \$1,502,550 in annual Tax Credits.

Economic Downturn and ARRA

19. By the fall of 2008, significant changes were taking place in the economic environment and the affordable housing market in particular, and it became evident that the market for Tax Credits had dropped precipitously. Many projects that were awarded Tax Credits during the 2007 and 2008 Universal Cycles experienced difficulty in finding syndicators to purchase the awarded Tax Credits, or to purchase them at previously available rates, and, thus, were unable to proceed to closing.

20. In February, 2009, in recognition of the collapse of the housing market and the difficulty in marketing and syndicating Tax Credits, Congress, as part of its economic stimulus efforts, enacted the ARRA, which established mechanisms to assist in the development of affordable housing and offset some of the economic devastation to developers. Congress included specific provisions in the ARRA intended to address the condition of the Tax Credit market.

21. Section 1602 of the ARRA authorized the state Tax Credit allocating agencies to return up to 40 percent of the

state's 2009 annual Tax Credit allocation, as well as Tax Credits awarded in 2007 and 2008 to the federal government, to be exchanged for a cash distribution of 85 cents for each tax credit dollar returned. The exchange of 2007 and 2008 Tax Credits generated a pool of \$578,701,964 for the State of Florida.

The RFP

22. In response to ARRA, on February 26, 2010, Florida Housing issued RFP 2010-04 (the "RFP"), setting forth criteria and qualifications for developers to seek funding for affordable housing projects from money that had been allotted by the federal government as part of economic stimulus efforts. Except as specified otherwise in the RFP, the provisions of (Fla. Admin. Code) R. 67-48 (2009), governed the allocation of Exchange funds.

23. The RFP solicited proposals from applicants with an "Active Award" of 9 percent (competitively awarded) Tax Credits. Pershing Park and 29 other applicants submitted proposals in response to the RFP, seeking awards ranging from \$1.8 million to \$5.0 million. Pershing Park and 28 of the 29 other applicants met the threshold requirements of the RFP. Pershing Park was preliminarily awarded \$4.1 million in Exchange funding, and was invited into the credit underwriting process for both its 2009 award of tax credits and its 2010 award of Exchange funding.

Credit Underwriting

24. The representations contained in the applications for funding through FHFC are essentially taken at "face value" during the application scoring process. However, if invited to enter the underwriting process, the applicant's information is examined with an elevated level of scrutiny. Indeed, RFP 2010-04 expressly advised applicants of this additional layer of review:

f. An analysis of the Sponsor shall be completed with more in-depth consideration to key topics than typically completed by Florida Housing, including liquidity, net worth, unrestricted assets, and contingent liabilities.

g. An analysis of the credit worthiness of the Developer shall be completed with more in-depth review than typically considered, including areas of past performance, default history, failed conversions, guarantor performance, and outstanding contingencies.

(RFP 2010-04, Section Five, C.1.f, g.)

25. Under the Credit Underwriting process, a professional credit underwriter is appointed by Florida Housing to review the proposed project that qualified for funding as a result of the Universal Cycle. Pursuant to the procedures set forth in Florida Administrative Code Rule 67-48.0072, Fla. Admin. Code, the credit underwriter reviews and assesses numerous financial, demographic, and market factors concerning the proposed project. The credit underwriter selected by Florida Housing to review the

Pershing Park application was First Housing Development Corporation ("First Housing").

26. The credit underwriting process resulted in a negative recommendation from First Housing, based primarily on the "Developer Experience," contained at Exhibit 11 of Pershing Park's application. On June 18, 2010, Florida Housing's Board of Directors considered First Housing's recommendation and voted to rescind funding to Pershing Park. This action effectively stopped the underwriting process.

27. At hearing, Douglas McCree, CEO of underwriter First Housing, elaborated on his concerns regarding the Developer which formed the basis for his recommendation to deny funding to Pershing Park:

- a) The experience provided by the Developer's Principal (Mr. White) is more than 25 years old and involved a project completed before the Low Income Housing Tax Credit Program existed;
- b) One of the two projects identified as developer experience was foreclosed upon shortly after being placed in service;
- c) The Developer was not forthcoming with requested information, and in particular, did not reveal an action brought by the Securities and Exchange Commission against one of Mr. White's former companies (Whitemark Homes, Inc.);
- d) Mr. White apparently took no part in any activity as Principal of the Developer, and that all work normally done by or at the instance of the Principal was done by others

without input from the Developer's Principal;

e) The Pershing Park application was prepared and delivered to Florida Housing by employees of the GC, not the Developer.

The Applicant, Developer, and General Contractor

28. Southern Affordable Services, Inc. ("SAS") was formed in 2009 when more opportunities opened up for the development of affordable housing by non-profit entities. SAS is the sole member of the general partner and of the limited partner in SAS Fountains at Pershing Park, Ltd., the limited partnership which is the applicant. In Florida Housing's application process, the applicant is the owner. The owner directly contracts with the architect, the engineer, the developer, the general contractor ("GC"), and the management company. The applicant signs the notes for the financing and signs the loans.

29. The applicant entity will become the owner of the project upon its completion. Applicants for Tax Credit financing are single asset, single purpose entities, usually established as limited partnerships, often with the same entity initially serving in the capacity of both a fractional (0.01%) general partner and a majority (99.99%) limited partner. A Housing Credit Syndicator purchases the limited partnership interest and either sells the credits to investors or uses the credits itself to offset tax liability.

30. SAS is also the sole member of the developer, Southern Affordable Development, LLC. If SAS makes a profit from the Pershing Park development, such profit would be held and used to further the mission of the 501(c)(3) corporation that is SAS. That mission is to help those who are disadvantaged, poor, and distressed, particularly in the area of housing. SAS also anticipates engaging in some wellness services and wellness care within its affordable housing developments.

31. Scott Culp is a Principal with CPG Construction, LLLP ("CPG") and a licensed GC in the State of Florida. CPG is a multi-family residential builder almost exclusively of affordable rental housing. CPG is a general contracting company, but the services it provides to its clients include anything that relates in any manner to the construction of multi-family communities. CPG would be the GC on the Pershing Park project if the FHFC funding is restored.

32. Mr. Culp has been involved in the development of approximately 75 affordable rental housing developments from 1995-2010, containing over 20,000 units. Over 50 of those 75 developments are in Florida. He has been involved in preparing and submitting between 400 and 500 applications to FHFC for financing.

33. SAS relied on CPG and its Principal, Mr. Culp, to do the mechanical preparation of the forms, and particularly to

give SAS guidance on how to prepare them correctly, and avoid errors. SAS's President, Scott Clark, understood the process to be very complicated and exacting, and one that was beyond his expertise. Thus, he leaned on the expertise of Mr. Culp and CPG to see that it was done correctly. Mr. Clark has known Mr. Culp for over 20 years.

34. Generally, the primary role of the GC is to build the project. The GC's role is different from the Developer, in that the GC's obligation in a construction contract is for the construction in accordance with the plans and specifications, the contract documents, and whatever the owner has chosen to include in those documents. Typically, the Developer is involved with the owner making sure all those contract documents accurately reflect what the owner wants. The contractor is ultimately responsible for the actual construction in accordance with those contract documents.

35. Pershing Park did not use a paid consultant to prepare its application. CPG assisted SAS with most parts of the application, but did not charge SAS a consulting fee for its services. CPG did the work because it was trying to maintain construction volume, and will likely be the GC on the project and earn a GC fee if the funding is approved.

36. There is no requirement in Florida Housing's rules that a Principal of the owner or applicant must personally fill

in the dots and check the boxes in the application submission process. However, there is a certification page included in the application that the owner must sign, indicating what he is proposing and what he is committing to. In this instance, the certification was appropriately signed by Scott Clark as President of SAS, the sole member of the general partner and of the limited partner in the applicant, SAS Fountains at Pershing Park, Ltd.

37. In the development of affordable housing, as with any real estate development, a team approach is taken to development. The owner/applicant is ultimately responsible for the project, but the development team must be identified in the application. FHFC defines the development team to include the Developer, Management Agent, General Contractor, Architect/Engineer, Attorney, and Accountant.

38. Florida Housing's rules define "Developer" as "any individual, association, corporation, joint venturer, or partnership which possesses the requisite skill, experience, and credit worthiness to successfully produce affordable housing as required in the Application." Fla. Admin. Code R. 67-48.002(29).

39. The developer routinely relies on the work of other professionals to perform their part of the job. For example, the developer relies on the architect to review plans for

compliance with code, and if deemed necessary, the developer or contractor may even hire a third party architect to do peer review to ensure the project architect got it right. However, despite the developer's hiring an architect to do code review, the developer is still responsible to the owner to perform his tasks with regard to ensuring those things are done. The developer does not have a contract with the architect; rather, the developer is coordinating that professional's work on behalf of the owner.

40. While the developer may be responsible for seeing that necessary steps for the construction of the development have been done, there are many tasks which the developer does not and cannot personally do. For example, the developer may be responsible for assuring that the project is appropriately engineered to accommodate site conditions and utilities, but it is the project's licensed engineer that directly performs that work. And the developer may be ultimately responsible for the design and location of the buildings on the site to comply with site planning requirements, but the developer would rely on a licensed architect to design the buildings, and possibly a licensed engineer as to their configurations on the site. Similarly, the developer may be responsible for the design and location of landscaping features, but would rely on the landscape architect to perform those functions. And again, the

developer may be responsible for compliance within environmental constraints on the site, and for ensuring that soil and other site conditions are conducive to the site development plan, but would rely on soil scientists and environmental consultants to actually perform those tasks.

41. Although the developer is responsible for delivery of the finished product, FHFC's own rules specify that it is the GC who bears the responsibility for managing and controlling the construction of the development. Fla. Admin. Code R. 67-48.0072(17)(e). By contrast, FHFC's rules do not specifically identify any task of the developer which is not delegable.

Developer Experience

42. The 2009 Universal Cycle Application Instructions set forth the experience that a Developer must demonstrate in order to be a candidate for funding in that cycle:

Each experienced Developer or Principal of Developer must demonstrate experience in the completion; i.e., the certificate of occupancy has been issued for at least one building, of at least two affordable rental housing developments, at least one of which consists of a total number of units no less than 50 percent of the total number of units in the proposed Development, by providing a prior experience chart behind a tab labeled "**Exhibit 11**". If providing experience acquired from a previous affordable housing Developer entity, the person signing the Developer or Principal of Developer Certification form must have been a Principal or Financial Beneficiary of that Developer entity.

(Instructions, Part II B.1.C.)
(Emphasis in original.)

43. As noted, the Developer entity for Pershing Park, Southern Affordable Development, LLC, is a newly formed company with no development experience in its own right. Pursuant to FHFC rules, the developer identified as its manager Kenneth L. (Larry) White as bringing development experience to the organization.^{2/} It was necessary to have an experienced developer like Mr. White involved in this project. Otherwise, Mr. Clark, as president of the sole member of Southern Affordable Development, would have to run the development. But Mr. Clark is not a developer, and recognized he was in no position to run the development. Rather, he needed someone who had been in the development arena before, and knew that Mr. White was an experienced developer.

44. Mr. White was retained as manager by the Developer entity through an Independent Services Agreement. As such, he is not part of the ownership structure, nor is he an employee. Rather, he is an independent contractor, engaged with particular duties as the manager of that business. Mr. White's scope of services is set out in Article 3 of the Agreement, and requires him to serve as an officer or manager of the Developer entity. Specifically, Mr. White is to provide the Developer entity with his expertise and advice relating to the development of

affordable housing as the Developer entity deems necessary. The Agreement also states that Mr. White has no authority to bind the Developer entity, and cannot make any discretionary decisions on behalf of the Company. Mr. White reasonably understands this latter restriction to mean he may not exceed his scope of services. Mr. White's specific direction from SAS's President was to see that the construction of the project is done in a timely and appropriate manner.

45. Consistent with the 2009 Universal Cycle Instructions, the Pershing Park application identified two affordable housing developments that Mr. White had been involved in developing: the 180-unit Holly Creek Apartments in Texas; and the 168-unit Woodbridge Apartments in Orlando, Florida. Both of these developments were developed as affordable housing, and Mr. White played a key role in their development. Holly Creek was completed in 1984, and Woodbridge was developed from 1985 to 1986. Notably, FHFC rules impose no standard for how recently a development must have been constructed in order for it to serve as proof of developer experience.

46. Florida Housing does not dispute that Pershing Park's developer experience as set forth in Exhibit 11 of Petitioner's application facially satisfies the threshold requirements of the 2009 Universal Cycle.

FHFC Concern over the Woodbridge Development

47. Respondent's (and First Housing's) concerns regarding reliance on the Woodbridge development as a source of developer experience is that shortly after its completion in 1985 a foreclosure action was initiated. However, the unrebutted evidence established that the foreclosure was unrelated to any deficiency in the development of the project, or in Mr. White's services as the developer of the project. Rather, the foreclosure was apparently the result of the owner, Goldenrod Partnership, not making required payments on the debt incurred to construct the project. Although Mr. White was a general partner of the owner entity, he was not personally involved in the decisions not to service the debt. The evidence established that those decisions were made by the two financial partners in Goldenrod, Robert Brunson and Barry Ellis. Respondent does not contend that Mr. White failed to satisfactorily exercise his duties relating to the design, permitting, construction, and lease-up of the project.

65. The fact that subsequent to the completion of the Woodbridge project a summary judgment of foreclosure was entered against Goldenrod Partnership and its general partners, does not negatively reflect on Mr. White's abilities as a developer. And given the circumstances of the foreclosure as established in

this record, nor should it tarnish Mr. White's credit worthiness.

66. The un rebutted evidence established that, following the foreclosure on Woodbridge, Mr. White has had a successful career in residential real estate development, and has had no trouble accessing credit to do so. Mr. White has constructed roughly ten multi-family developments containing approximately 2,000 units, and more than 40 single-family developments, containing over 3,000 units.

FHFC Concern over Whitemark and the SEC

67. Respondent's other primary concern over Mr. White's development experience centers on his service as CEO of Whitemark Homes, Inc., a publicly traded company, at the time that the Securities and Exchange Commission ("SEC") investigated some financial reporting issues regarding Whitemark. Those reporting issues concerned how Whitemark prepared consolidated financial statements after its acquisition of another company in north Florida. Specifically, the acquired company had certain contracts and options to purchase valuable beachfront property for condominium development. Whitemark's chief financial officer (not Mr. White) and the company's certified public accounting firm agreed on the approach to valuing and reporting these assets on financial disclosures filed with the SEC. At hearing, un rebutted testimony established that the CFO and the

accounting firm took additional due diligence steps to verify that the manner of reporting these assets was appropriate. The SEC disagreed with that conclusion and initiated an enforcement action.

68. Ultimately, after spending a significant amount of money, energy, and attention on the SEC matter, Mr. White and Whitemark elected to settle the matter with the SEC. According to the terms of the settlement, Mr. White was ordered to disgorge the proceeds of certain sales of stock he had engaged in as part of a regular, structured stock sale. He also was required to pay interest connected with those stock sales. No fines or penalties were imposed, and no restrictions regarding Mr. White's service to the company were imposed.^{3/}

69. Neither the SEC order, nor the underlying factual basis for it, related to Mr. White's skills or abilities as a developer. They were not the result of any failed or incomplete developments, nor of any misappropriation of company funds or shareholder money. Rather, the matter appears to have resulted from a difference of professional opinion on a complex accounting matter. More importantly, the entry of the cease and desist order did not affect Mr. White's credit worthiness. It has not impaired his ability to access credit for development activities. Although the company with which Mr. White is now associated, Lifeway Homes, is not currently developing home

sites due to economic conditions and the poor market for new construction, Mr. White has successfully engaged in development activities after the entry of the cease and desist order, developing five projects totaling around 700 units.

70. At hearing, First Housing's representative criticized the Applicant for not providing complete information during the credit underwriting process. However, there is no competent substantial evidence of record that the Applicant or its representatives or Development team members withheld or concealed any information from the credit underwriter, or failed to provide information in response to a request from the underwriter.^{4/}

CONCLUSIONS OF LAW

71. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2010).

72. Petitioner challenges an action of the Florida Housing Finance Corporation, a public instrumentality and agency of the State of Florida pursuant to Sections 120.52 and 420.504(2), Florida Statutes.

73. Petitioner has the burden of going forward with the evidence as well as the ultimate burden of establishing the basis for their claim, The Environmental Trust Fund v. Dept. of

Env'l Protection, 714 So. 2d 493, 497 (Fla. 1st DCA 1998), and therefore must demonstrate the impropriety of Florida Housing's actions.

74. This is a de novo proceeding designed to formulate final agency action on the closing of the requested funding. See Ybor III, Ltd. v. FHFC, DOAH Case No. 03-1956 (Fla. DOAH Mar. 30, 2004; Fla. DCA, FHFC May 18, 2004), at para. 100. It is not an appellate-style review of action taken earlier and preliminarily by the Respondent. The standard of proof to be applied is a preponderance of the evidence. Ybor III, supra.

75. There is no question the credit underwriting process established in Florida Housing's rules fulfills the important function of verifying information set forth in an application for funding. Likewise, as noted by Respondent, Florida Housing's Board is entitled to rely upon the professional judgment of its underwriter when deciding whether or not to approve project funding. RST Fruitland Housing, LP v. Florida Housing Finance Corporation, Case No. 10-0896 (Fla. DOAH June 9, 2010). However, where, as here, the preliminary decision of the Board is challenged in a de novo administrative proceeding, the material facts underlying the recommendation must be established by competent substantial evidence. In this instance, they have not.

Developer Experience

76. The only objective standard contained within FHFC's rules governing the Universal Application Cycle process for developer experience are that the Developer entity, or a Principal within the Developer entity, has constructed at least two affordable housing developments, at least one of which has at least half of the number of apartment units proposed in the pending application. The same rules that govern the Universal Cycle govern the award of Exchange funding.

77. There is no dispute that the 180-unit Holly Creek Apartments in Texas and the 168-unit Woodbridge Apartments in the Orlando area, both of which were developed with the efforts of Mr. White, satisfy the standards for number, size, and affordability. The rule also requires that a certificate of occupancy ("CO") was obtained for at least one unit in one building within each such qualifying development. Both developments were constructed to completion and were leased out to tenants, so there is likewise no dispute that the "CO" requirement was met.

78. There is no requirement in FHFC rules as to how recently the qualifying apartment developments must have been constructed, or that the qualifying developments be financed in whole or in part with low income housing tax credits. Respondent cannot add additional requirements into the

qualification process after the fact. An agency must follow its own rules until they are amended or abrogated. Cleveland Clinic v. AHCA, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996). "An agency cannot change its standards on the personal whim of a bureaucrat." Courts v. AHCA, 965 So. 2d 154, 159 (Fla. 1st DCA 2007).

79. Both the Universal Cycle rules and RFP 2010-04 contemplate a more in depth analysis of the developer during the credit underwriting process. The goal of this analysis, according to both rule and RFP provisions, is to determine whether the developer is "credit worthy." The term "credit worthy" is not defined in FHFC's rules, its rule-adopted instructions or forms, its RFP, or its governing statutes. Where a term used in a statute or rule is not defined, it should be given its plain and ordinary meaning. See Nehme v. Smithkline Beecham Clinical Labs, 863 So. 2d 201, 204 (Fla. 2003).

80. "When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary." Nehme, 863 So. 2d at 205. The Merriam-Webster Online Dictionary defines "credit worthy" as "financially sound enough to justify the extension of credit." [Pet. Exh. 22]^{5/} In short, the term "credit worthy" means the ability to obtain credit. FHFC's and its underwriter's position that Mr. White, as the qualifying

Principal for the recently formed Developer entity, is not "credit worthy" is not supported by the facts found herein, and is contrary to the unrebutted evidence of record. As noted, Mr. White has successfully engaged in development activity for more than 25 years. No evidence was offered that he has had any difficulty accessing credit for his development activities, notwithstanding the S.E.C. matter discussed above.

Woodbridge and the S.E.C.

81. As noted, Mr. White's involvement as a general partner in the Woodbridge Apartments development in the mid-1980's, a development for which a foreclosure action was initiated soon after construction was completed, has not adversely affected Mr. White's credit worthiness, particularly 25 years after the fact. The evidence established that Mr. White's role in Woodbridge was as the "development partner," while the other two partners in that development, Robert Brunson and Barry Ellis, were the "financial partners" who pursued, obtained, and managed the financing. For whatever reason, after the development was completed (on schedule and within budget) Brunson and Ellis decided to discontinue payments on the debt. The resulting foreclosure was not the consequence of Mr. White's actions as the developer. The 2009 Universal Cycle Instructions provide that should a member of the development team fail to "place-in-service" a development or project, such event may result in a

negative recommendation from the underwriter. (Instructions, Part II, B.) There is no evidence in this record to suggest that Mr. White, or any other member of the Pershing Park development team failed to place a project "in-service."

82. Likewise, the SEC Cease and Desist Order concerning Whitemark and White, issued in December 2005 in settlement of an investigation, cannot reasonably be seen to tarnish Mr. White's credit worthiness. Rather, it appears Mr. White reasonably relied upon the professional opinions of the company's CFO and outside accounting firm regarding the transactions at issue. In the end, the SEC disagreed with the company's reporting, and took action. However, Mr. White and Whitemark, after a significant expenditure of time, money, and effort contesting the allegations, chose to settle the matter with no admission of wrongdoing or of the underlying facts alleged by the SEC. Since the matter was resolved through settlement, the allegations remain simply that: unproven allegations. Thus, there is no factual basis to conclude White or his company was guilty of any wrongdoing.

Provision of Information to Underwriter

83. Florida Administrative Code Rule 67-48.0072(22) provides in relevant part:

If the Credit Underwriter requires additional clarifying materials in the course of the underwriting process, the

Credit Underwriter shall request same from the Applicant and shall specify deadlines for the submission of same. Failure to submit required information by the specified deadline, unless a written extension of time has been approved by the Corporation, shall result in withdrawal of the preliminary commitment or the HC invitation to enter credit underwriting, or both, as applicable, and the funds will be distributed as outlined in the Universal Application instructions.

84. There is no evidence that Pershing Park failed to timely respond to requests for "additional clarifying materials" from the underwriter. To the contrary, it appears Pershing Park was proactive in providing clarifying information about its application to Florida Housing. There is no evidence to support the conclusion that Pershing Park violated Rule 67-48.0072(22).

85. Respondent's final concerns relate to Mr. White's limited activity as Principal of the Developer, and that Pershing Park's application was prepared and delivered to Florida Housing by employees of the GC, not the Developer.

86. FHFC's rules separately define Applicant, Developer, and GC. The "Applicant" is the person or legally formed entity seeking a loan or funding from FHFC, or responding to an RFP. The "Developer" is the "individual, association, corporation, or joint venturer, or partnership which possesses the requisite skills, experience, and credit worthiness to successfully produce affordable housing." (Emphasis added.) The "GC" is the

person or entity "duly licensed in the State of Florida with the requisite skills, experience and credit worthiness to successfully provide the units required in the Application, and which meets the criteria described in Rule 67-48.0072." Rule 67-48.002(8), (29), and (52).

87. The Developer and the GC serve different functions. FHFC's rules specify the conditions that a GC must meet. The rules specify that the GC must, for example, employ a Development superintendent. Fla. Admin. Code R. 67-48.0072(17)(a). The GC must secure building permits for the development, to be "issued in the name of the GC." Id. at 17(c). The GC must ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, unless otherwise approved by FHFC's Board. Id. at (17)(f).

88. Significantly, the rule also states the GC must "[E]nsure that none of the GC's duties to manage and control the construction of the Development are subcontracted." Fla. Admin. Code R. 6748.0072(17)(e). FHFC's executive director agreed that the meaning of this provision is that those specific duties for management and control of construction cannot be delegated. By contrast, he could point to no provision of FHFC's rules that list duties of the Developer which cannot be delegated.

89. The Developer entity, through its certification form, certifies that it or its Principal has the requisite skills,

experience, and credit worthiness to produce the units proposed in the application. The signing party affirms his understanding that he will be the Developer or Principal of the Developer of record, and will remain in such capacity until the Development has been completed. The form certifies many things, but does not certify that the Developer's Principal will personally perform tasks. It certifies ultimate responsibility, not specific tasks.

90. The Developer certification form itself identifies tasks that are "certified" to by the Developer or its Principal, such as compliance of the design, plans, and specifications with all federal, state, and local requirements. But the Developer will surely rely on architects, engineers, geotechnical scientists, environmental consultants, and others to perform such tasks, and to perform them competently and professionally. The Developer may, in the words of Mr. McCree, be the "captain of the ship," but he is not the one operating and maintaining the engines or steering the ship. There is no evidence to establish that Mr. White's level of participation to date in the Pershing Park development is in violation of statute or rule.

91. While the Developer may be responsible for certain tasks ultimately being accomplished, nothing in FHFC's rules require the Developer or its Principal to personally perform such tasks.

92. Without doubt, the underwriting process utilized in the evaluation of Florida Housing applications serves a valuable function. With millions of dollars at stake in a highly competitive allocation process, it would be irresponsible for Respondent not to subject facially qualified applications to a second, more detailed, level of scrutiny to assure the likely success of these important projects. However where, as here, the "issues and concerns" raised during the underwriting process are not supported by the facts adduced at hearing, the application should be approved.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Florida Housing Finance Corporation enter a Final Order directing SAS Fountains at Pershing Park, LTD; proceed to closing on its requested tax credit and Exchange Program financing.

DONE AND ENTERED this 30th day of September, 2010, in
Tallahassee, Leon County, Florida.



W. DAVID WATKINS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of September, 2010.

ENDNOTES

^{1/} These consist of citizens actively engaged in: residential home building; banking or mortgage banking; areas of labor engaged in home building; housing development and advocate for low-income persons; the commercial building industry; and a former local government elected official.

^{2/} Florida Administrative Code Rule 67-48.002(92), defines "Principal" to include the manager of the Developer. Thus, Mr. White served as a Principal of the Developer.

^{3/} The SEC Cease and Desist Order (adopting the Offers of Settlement tendered by Respondents white and Whitemark) expressly provides that Respondents neither admit nor deny the truth of the allegations set forth in the SEC Complaint.

^{4/} To the contrary, it appears Pershing Park was proactively engaged in providing clarifying information to Respondent and the underwriter. For example, Pershing Park submitted a letter in response to the second draft Credit Underwriting Report within 2 days of receiving the Report.

^{5/} No alternative dictionary definition was offered by Respondent.

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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.