

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE PINES OF PUNTA GORDA,)	
INC.,)	
)	
Petitioner,)	
)	
vs.)	Case No. 99-2493
)	
FLORIDA HOUSING FINANCE)	
CORPORATION,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on September 13, 1999.

APPEARANCES

For Petitioner:	Robert S. Cohen Robert S. Cohen, P.A. 1435 East Piedmont Drive Suite 201-B Tallahassee, Florida 32312
For Respondent:	Maureen McCarthy Daughton Nabors, Giblin & Nickerson, P.A. Post Office Box 11008 Tallahassee, Florida 32302-1008

STATEMENT OF THE ISSUE

The issue is whether Respondent improperly rejected Petitioner's application during the threshold check of applications for bond funds in the Multifamily Mortgage Revenue Bond Program. The case requires the identification of the requirements of a threshold check.

PRELIMINARY STATEMENT

By Petition for Formal Administrative Proceedings dated March 30, 1999, Petitioner requested a recommended order determining that, during the threshold check, Respondent improperly rejected Petitioner's application to participate in the Multifamily Mortgage Revenue Bond Program.

On June 3, 1999, Respondent transmitted the petition and file to the Division of Administrative Hearings and requested that an Administrative Law Judge conduct a hearing on the relevant issues. By Notice of Hearing dated June 22, 1999, the Administrative Law Judge set the final hearing for September 13, 1999.

At the hearing, Petitioner voluntarily dismissed the portion of its petition directed against Selzer Management Group, Inc.

At the hearing, Petitioner called two witnesses. Respondent called two witnesses. The parties jointly offered 11 exhibits, which were admitted.

Respondent ordered a transcript. However, after inquiring of the parties as to the status of the allocation of mortgage funds for 1999, the Administrative Law Judge directed the parties to file any proposed recommended orders by noon, September 16, 1999, even though the court reporter would not have filed the transcript by that date.

FINDINGS OF FACT

1. Respondent is a public corporation generally responsible for the administration of the programs previously administered by the Florida Housing Finance Agency. Among these programs is the Multifamily Mortgage Revenue Bond Program (Program). This case involves Petitioner's application for an allocation of mortgage funds for 1999.

2. The Program provides construction and permanent mortgage loans to developers of rental housing. Respondent offers submarket interest rates if the developers reserve rental units for lower-income tenants. As is relevant to this case, Respondent funds the loans through the sale of tax-exempt mortgage revenue bonds.

3. The allocation process is competitive because the demand for mortgage funds exceeds their supply. The allocation process consists of several parts. Respondent's staff first conducts a completeness review. Respondent's staff assigns each application that passes the completeness review to an independent underwriter, which conducts a threshold check. Respondent's staff comparatively ranks the applications that pass the threshold check, and the staff submits the rankings to Respondent's Board of Directors. After finalizing the rankings, the Board sends the applications within the funding range to final credit underwriting, at which point credit underwriters closely examine each application. The underwriters make funding

recommendations to the Board, which accepts, rejects, or modifies the recommendations in making the final funding decisions.

4. According to the 1999 Developer's Handbook (Handbook, which is Joint Exhibit 1), the first event in the closing schedule is the real estate closing. Joint Exhibit 1, p. F-3. After the real estate closing, Respondent and other parties negotiate the bond prices and mortgage interest rates. The final event in the closing schedule is the bond closing, at which point Respondent delivers the bonds to the bond purchasers in exchange for the bond proceeds, which Respondent lends in the form of a mortgage loan to the developer.

5. The Handbook also reprints Chapter 67-21, Florida Administrative Code. Rule 67-21.008(12), all references to Rules are to the Florida Administrative Code, provides that the developer shall, "prior to the requested date for funding," provide Respondent with, among other things, a commitment for mortgagee title insurance subject only to the standard exceptions and evidence as to the status of liens so as to reflect only those liens that Respondent has permitted to remain recorded against the mortgaged property.

6. At the start of the application process, Respondent supplied each prospective applicant with the Handbook. The Handbook lists numerous evaluation criteria that apply to the overall process by which Respondent decides which applications to fund. These criteria, of course, include "[e]vidence of economic

feasibility of the Development and repayment of the loan." Joint Exhibit 1, p. B-3. However, this case involves only the threshold check, which is clearly both preliminary to, and less comprehensive than, final credit underwriting.

7. In a general discussion of the preliminary reviews that precede final credit underwriting, the Handbook warns that the completeness review is "quantitative" and the threshold check is "qualitative." Joint Exhibit 1, p. E-1. The Handbook adds: "Credit Underwriters will be looking at each Application for thoroughness and quality of information." Id.

8. Part H of the Handbook addresses credit underwriting and identifies nine factors, such as the value of the security, feasibility, costs, and marketability, that are part of the "Credit Underwriting review." Although Part H mentions the threshold check, the text is not explicit as to whether "Credit Underwriting review" is meant to include the threshold check.

9. A close reading of the penultimate paragraph on page H-1 of the Handbook suggests that "Credit Underwriting review," as used on page H-1, does not include the threshold review. This paragraph of the Handbook notes that developers may be required to submit additional documentation during final credit underwriting. As noted below in the discussion of the rules, developers are prohibited from providing additional documentation during the threshold check. Given this important distinction between these two stages in the credit-underwriting process, the

final sentence of the penultimate paragraph reveals that "Credit Underwriting reviews" are limited to final credit underwriting. The sentence states: "The time required for completing Credit Underwriting reviews is directly related to the completeness and timing of submission of required items to the Credit Underwriter." The Administrative Law Judge thus determines that the identification of these nine underwriting criteria stated on page H-1 of the Handbook apply only to final credit underwriting.

10. However, the Handbook clearly addresses the threshold check at pages H-3 and H-4. These pages list 25 items applicable to the threshold check. These items include statements of the experience of the attorney and consultant, preliminary plans and specifications, a preliminary site plan, evidence of site control, a survey, a statement of permitting status, evidence of infrastructure availability and concurrency, and general construction contracts. Among the items with more direct financial impact are "[15-]year Pro Formas: sources and uses, and income, expense and occupancy projection; a "[c]over letter outlining terms of financing requested"; and a "[s]yndication commitment letter outlining participants and the basic terms of the agreement, if Housing Credits are required during construction phase."

11. Several of the rules contained in the Handbook apply to the threshold check. Most importantly, Rule 67-21.002(63) defines the "threshold check" as the "required documentation

verification and review" by the underwriter before the Board may submit an application to final credit underwriting.

12. Rule 67-21.003(5) provides that the Board shall rank applications that receive a "satisfactory" threshold check, but the rule fails to specify what is necessary to earn "satisfactory" threshold check. Rule 67-21.003(8) refers to a "favorable" threshold check, but also fails to specify what is necessary to earn a "favorable" threshold check.

13. Rule 67-21.014 explains the credit underwriting procedures. Rule 67-21.014(1) describes the threshold check, and Rule 67-21.014(2) describes final credit underwriting. Rule 67-21.014(1)(b) requires that a prerequisite to final credit underwriting is a "positive recommendation as to compliance with the Threshold Check," but the rule does not specify what is necessary to comply with the threshold check. By contrast, Rule 67-21.014(2)(b) identifies clearly the overriding criterion of final credit underwriting: "The Credit Underwriter shall review the proposed financing structure to determine whether the Loan is feasible."

14. Rule 67-21.003(1) adopts by reference the application form, which also addresses the threshold review. The front page of the application cautions: "If the necessary backup information is not accurately provided the Credit Underwriter will not be able to process your application during the Threshold Check." The front page of the application adds that applicants

may not supplement their applications during the completeness review conducted by Respondent's staff or the threshold check conducted by the underwriters.

15. Page 13 of the application states:

III. Development Financing: Please respond to the requested information below. Attach and label the appropriate exhibits. Failure to respond to the requested information and provide the necessary backup information will result in the determination that the application is incomplete during the Florida Housing's Staff Application Review. If the necessary backup information is not accurately provided the Credit Underwriter will be unable to process your application during the Threshold Check. All information must be clear and directly related to your proposed development. No additional information can be received by Florida Housing and the Credit Underwriter during the Application Review and Threshold Check.

A. Financing Cover Letter: Include a letter describing any anticipated sources of financing other than Bonds for the proposed development. This letter must include all information available at the time of application submission (such as interest rates and any terms associated with these sources of financing). The letter must also include how the applicant intends to fund construction.

The letter can be found behind Exhibit ____.

B. Sources and Uses of Funds: Include sources and uses of funds consistent with all intended financing. The Sources and Uses of Funds must be prepared in a format similar to the one found behind this Application.

The Sources and Uses of Funds for the proposed development can be found behind Exhibit ____.

C. Fifteen year income, expense, and occupancy projection: Include a fifteen year income, expense, and occupancy projection consistent with all financing commitments. It must demonstrate that the development meets debt service coverage requirements based on current interest rates. Please use a format similar to the one found behind this Application).

The fifteen year income, expense and occupancy projection can be found behind Exhibit __.

16. The suggested forms for reporting the sources and uses of funds and 15-year income, expense, and occupancy projections are contained in the Handbook. The two forms are detailed. By contrast, the Handbook contains no suggested form for the financing cover letter.

17. For sources of funds, the suggested form lists Respondent's loan, any tax credit equity, any deferred developer's fee, and any developer cash, as well as "other" sources. For uses of funds, the suggested form lists various acquisition costs, actual construction costs, general development costs, financial costs, and other development costs. The 15-year income, expense, and occupancy projection form is even more detailed, containing over 100 line items.

18. Petitioner's application contains a financing cover letter, sources and uses of funds, and 15-year income, expense, and occupancy projections.

19. Petitioner's financing cover letter states in its entirety:

[Petitioner] (borrower) credit enhancer will be [Respondent's] Guarantee Program.

The borrower's anticipated source of funds will be tax-exempt bonds through [Respondent's] Bond insurance prior to closing.

The borrower plans to syndicate tax credits as additional sources of funds.

The Pines development shall receive a Fair Share Impact Fee contribution from the City of Punta Gorda within the construction time frame.

The Pines project "does not" anticipate other sources of financing other than tax exempt bonds, tax credit funds and a fair share impact fee contribution.

We appreciate your consideration in this matter.

20. Petitioner used the suggested form for sources and uses of funds. For sources of funds, Petitioner's completed form shows \$12,375,800 from Respondent's loan; \$7,400,000 from tax credit equity; \$1,299,266 from the deferral of the developer fee; \$347,904 from developer cash; and \$559,800 from Charlotte County in the form of an impact-fee contribution. For uses of funds, Petitioner's completed form shows a total of \$21,982,770.

21. Petitioner's application also included a letter dated January 19, 1999, from Midland Equity Corporation to Petitioner. The letter constitutes a firm commitment from Midland Equity to purchase the project's tax credits, through the purchase of partnership interests, in three installments of \$4,440,000,

\$1,480,000, and \$1,480,000, respectively. The letter describes the due dates of the installments as follows:

First Installment: At the later of: (i) admission of the Investment Partnership to the Operating Partnership; or (ii) closing of the construction loan and Project land acquisition;

Second Installment: Within thirty (30) days of the later of: (i) completion of the Project; or (ii) receipt by the Investment Partnership of the cost and credit certification from the independent accountants.

Third Installment: Within thirty (30) days of the later of: (i) closing of the permanent loan; or (ii) receipt of the Form 8609; or (iii) 90% physical occupancy for ninety (90) consecutive days; or (iv) 1.10 Debt Service Coverage for ninety (90) days.

22. The commitment letter elaborates:

With respect to the Second Installment, completion of the Project shall mean receipt of permanent certificates of occupancy or temporary certificates of occupancy with conditions/requirements for receiving the permanent certificates satisfactory to the Investment Partnership.

23. Petitioner's application contained a copy of an agreement between Petitioner, as owner, and a general contractor. The contract is for \$13,328,435 and calls for the payment of 95 percent of the total contract price upon the substantial completion of work. The value of the five percent retainage is thus \$666,421. Substantial completion is the date on which the Building Department issues a certificate of occupancy for each building.

24. City of Punta Gorda Ordinance 946-89 provides that a landowner shall pay impact fees. The ordinance authorizes landowners to pay the impact fee not later than the issuance of a certificate of occupancy.

25. In conducting the threshold check, the underwriter completed a "threshold review checklist." This form states that the "threshold check" is the "review and verification of this information by the Credit Underwriter" The form adds: "The following items must be satisfactorily addressed." In explanation, the form states: "'Satisfactory' means that the Applicant has met the minimum threshold requirements pursuant to the Application but the items will be further reviewed and analyzed during Final Credit Underwriting."

26. The underwriter noted that Petitioner's application satisfied each of the 25 items required on pages H-3 and H-4 of the Handbook, except for the cover letter outlining the terms of the requested financing. As for this item, the underwriter noted: "The financing cover letter does not explain how the construction period will be funded. Based on the other information in the application, [the underwriter] calculates a \$1,375,546 construction period funding gap."

27. In determining that Petitioner's application contained a construction period financing gap, the underwriter constructed a table entitled "Construction Period Funding Analysis."

28. For uses of funds, the underwriter inserted \$21,982,770 for total development costs. The underwriter obtained this figure from the uses and sources of funds that accompanied Petitioner's application.

29. For "construction sources of funds," the underwriter listed six items totaling \$20,607,224, leaving a "construction funding gap" of \$1,375,545. The six items were Respondent's loan of \$12,375,800; the first installment of \$4,440,000 from the syndicator of the tax credits; the deferred developer fee of \$1,299,288; developer cash of \$347,904; Charlotte County's impact fee contribution of \$559,800; and an additional developer fee available for deferral of \$1,584,454. As to the failure to include the second installment, the underwriter noted that the "second capital contribution is not paid until both construction and the final cost certification are complete."

30. This was the first time that Respondent required a threshold check in the Program. Respondent arranged for several underwriters to conduct threshold checks. The underwriter who performed the threshold check of Petitioner's application testified at the hearing. His testimony was credible and established him as a capable credit underwriter with experience in projects of the type proposed in Petitioner's application.

31. However, the underwriter was limited in his ability to explain the source of the requirements of the threshold check. Rather than rely on the available documentation, he explained

that he relied on conversations with Respondent's staff and mostly common sense. As noted below, there is good reason why the underwriter did not rely on documentation of the contents of the threshold check.

32. The underwriter did not clearly explain the objective of the threshold review, again understandably. However, he explained in detail his reasoning in determining that Petitioner's application left a construction-period financing gap of \$1.375 million. He was not asked how this analysis differs from the construction financing analysis that presumably is part of final credit underwriting, but the available record permits no finding of such a difference.

33. After examining the record, the Administrative Law Judge is unable to define adequately the scope of review entailed by the threshold review. Clearly, the threshold review requires more than the completeness review, but less than final credit underwriting. Although it is impossible to specify much more about what the threshold review requires, it is possible to find that nothing in this record informed Petitioner that its application would undergo a construction-period financing analysis, of the type performed by the underwriter in this case, during the threshold check, rather than during final credit underwriting.

34. The finding that the analysis that resulted in the rejection of Petitioner's application exceeded the scope of the

threshold check eliminates the necessity of findings concerning Petitioner's challenge to the conclusions of the underwriter who performed this analysis.

35. In light of the adverse finding on the scope of the threshold check, Respondent would argue in the alternative that this Recommended Order should proceed to analyze the conclusions of the underwriter in the construction-period financing analysis.

36. However, the record does not permit a finding that Petitioner's application does or does not provide adequate assurance that Petitioner would be able to deliver a lien-free project at the bond/mortgage closing, as is Petitioner's clear obligation. There are some complicated timing questions in terms of projecting, relative to the bond closing, the receipt of the second installment from the tax-credit syndicator, the payment of all of the impact fees, and the payment of the retainage allowed under the general contractor's contract. The second installment alone would eliminate the gap found by the underwriter, as would the impact fees and retainage together.

37. The inability to make this finding at this time reinforces the prematurity of the analysis conducted by the underwriter. The process permits the developer to add new or explanatory information during final credit underwriting, but not the threshold check. A process as complicated and important as matching, prior to bond/mortgage closing, sources and uses of funds should be deferred until the stage in the process--i.e.,

final credit underwriting--at which the underwriter can obtain additional information from the developer. Given the state of the present record, this process must await final credit underwriting because nothing adequately informed Petitioner that his application would be subjected to construction-period financing analysis during the threshold check.

38. The 1999 allocation cycle is nearly complete. In August 1999, the Board reviewed the underwriters' funding recommendations and ordered the allocation of \$162 million in mortgage funds, which, when added to a \$5 million carryover from 1998, results in a total allocation of \$167 million. Respondent has allocated all of this amount, except for about \$8 or \$9 million.

39. However, the projects that have already been allocated funds must close by September 30, 1999, or the funds revert to the state pool, from which Respondent may make additional allocations at its November 1999 meeting. If mortgage funds become available due to unclosed deals, the Board will reconsider approximately 10 to 12 applications that were not initially funded, but which passed the threshold check. If Respondent issues a final order consistent with this Recommended Order, Respondent's Board would rank Petitioner's application among these unfunded 10 to 12 applications.

40. It is unclear whether the 10 to 12 remaining applications have already undergone final credit underwriting.

Clearly, Petitioner's application has not yet undergone final credit underwriting. The construction-period financing issues prematurely raised during the threshold check nonetheless require analysis during final credit underwriting. If the other 10 to 12 applications have already undergone final credit underwriting, and given the imminent year-end deadline on the 1999 allocation, Respondent should consider allowing Petitioner, at its financial risk, to apply for final credit underwriting, prior to the November 1999 meeting at which Respondent's Board will consider this Recommended Order.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction over the subject matter. Sections 120.57(1) and 420.504(2), Florida Statutes. (All references to Sections are to Florida Statutes.)

42. As the applicant, Petitioner bears the burden of proof. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

43. Section 420.58(1) authorizes Respondent to adopt rules for the evaluation and competitive ranking of applications for funding.

44. Petitioner has proved that Respondent improperly rejected Petitioner's application during the threshold check. Respondent has described the threshold check in several rules, including the application form, and the Handbook, but has not

sufficiently described the threshold check so as to allow an underwriter performing a threshold check to conduct a construction-period financing analysis of the type that resulted in the rejection of Petitioner's application during the threshold check.

RECOMMENDATION

It is

RECOMMENDED that the Florida Housing Finance Corporation enter a final order determining that Petitioner's application has passed the threshold check, directing that Respondent incorporate any additional information obtained by any additional review process undertaken pursuant to the recommendation contained in Paragraph 40 above, and directing that (subject to the outcome of final credit underwriting) Respondent reconsider Petitioner's application among the 10 to 12 remaining applications for any mortgage funds that remain in the Program after the September 30, 1999, closing deadline passes.

DONE AND ENTERED this 16th day of September, 1999, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 16th day of September, 1999.

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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 must be filed with the agency that will issue the final order in this case.