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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

GARDENS OF DAYTONA, LTD.

Petitioner,

FHFC CASE NO.: 2000-02
DOAH CASE NO: 00-3582

v.

FLORIDA HOUSING FINANCE CORP.,

Respondent.
_____/

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Debbie Reed /DATE: 2/27/01

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("FHFC" or "Respondent") on October 27, 2000 for consideration and final action. On May 23, 2000, GARDENS OF DAYTONA, LTD., ("Petitioner") filed a Petition for Formal Administrative Hearing alleging that FHFC had incorrectly scored its application for allocation of housing credits. Pursuant to this notice, this matter was heard before Robert E. Meal, Administrative Law Judge, Division of Administrative Hearings on October 12 through 13, 2000. Both parties filed Proposed Recommended Orders.

After consideration of the evidence, arguments, testimony presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge issued his Recommended Order. A true and correct copy of the Recommended Order is attached hereto as Exhibit "A". The Administrative Law Judge recommended that FHFC rescore Petitioner's application to reflect the findings and conclusions contained in his

Recommended Order. If as a result of the rescoring, Petitioner's score is above the funding line, then Petitioner is to be invited into credit underwriting.

On October 23, 2000, Petitioner timely filed its Exceptions to Recommended Order. On October 23, 2000 Respondent timely filed its Exceptions to Recommended Order. On October 25, 2000 Respondent filed its Response to Petitioner's Exceptions to Recommended Order. On October 26, 2000, Petitioner filed its Response to Respondent's Exceptions to Recommended Order. Each exception is addressed below.

STANDARD OF REVIEW

The standards to be applied by an agency in reviewing the findings of fact contained in a DOAH Recommended Order are well settled. The findings of fact of an administrative law judge may not be rejected or modified, "unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." Section 120.57(1)(l), Florida Statutes; Belleau v. Dept. of Environmental Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Martuccio v. Dept. of Professional Regulation, 622 So. 2d 607 (Fla. 1st DCA 1993); Fla. Dept. of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

An agency reviewing a recommended order is not authorized to re-evaluate the quantity and quality of the evidence presented beyond a determination of whether the evidence is competent and substantial. South Florida Cargo Carriers Association v. Dept. of Business and Professional Regulation, 738 So.2d 391 (Fla. 3d DCA 1999); Brogan v. Carter, 671, So.2d 822, 823 (Fla. 1st DCA 1996). If the record of the DOAH formal hearing discloses any competent substantial evidence to support the findings of fact made

by the Administrative Law Judge in the Recommended Order, FHFC is bound by such factual findings. South Florida Cargo Carriers Association v. Dept. of Business and Professional Regulation, 738 So.2d 391 (Fla. 3d DCA 1999).

RULINGS ON PETITIONER'S EXCEPTIONS

In Petitioner's first exception, Petitioner asserts that the Court erred in finding that the failure to name a utility provider warranted the assessment of a 2.5 point penalty for Form 1 in connection with the scoring Petitioner's application. On May 23, 2000, Petitioner filed its Petition for Formal Administrative Hearing. On August 3, 2000, FHFC mailed its position paper to Petitioner indicating that Petitioner should not be subject to a 2.5 point penalty for failure to disclose the name of the utility provider. The position letter was introduced into evidence as Petitioner's Exhibit 1. After receipt of the position paper, the Petition for Formal Administrative hearing was not amended to delete the allegation that Petitioner was improperly penalized for the utility name issue. Therefore, the issue remained before the Administrative Law Judge.

The position paper together with testimony of Mr. Christopher Buswell[1] is the only evidence presented at the hearing on the issue. The Administrative Law Judge in Finding of Fact No. 35 of the Recommended Order indicated that the record was "largely undeveloped on this point" but still proceeded to find that Respondent relied on another basis for the assessment of a 2.5 penalty for Form 1. Because the record is largely undeveloped on the point and the only competent substantial evidence presented indicates that FHFC erred in assessing a 2.5 penalty for Form 1, the conclusion that can be drawn

[1] Mr. Buswell's testimony stated to the effect that when an applicant makes an argument to the Corporation about a particular scoring point on the application, and the Corporation accepts that argument and concedes the Corporation was wrong, the Corporation corrects the scores. TR. pp193-194.

from the evidence is that FHFC erred in assessing a 2.5 penalty for Form 1. Therefore, there exists no competent substantial evidence on which the Administrative Law Judge could base Finding of Fact No. 35. No other evidence was presented that would enable the Administrative Law Judge to infer or determine that another basis was used in assessing a 2.5 point penalty for Form 1. Therefore, Petitioner's first exception is hereby accepted and the Finding of Fact No. 35 of the Recommended Order is hereby rejected.

Petitioner's second exception deals with the Verification of Environmental Safety in Form 7, Exhibit D. The form at issue, Form 7, Exhibit D, contained a space indicating a location where information should be inserted along with a parenthetical stating what information should be provided in that location. Petitioner argues that there was no competent substantial evidence to warrant a finding that Petitioner made an obvious omission in Form 7 that warranted an assessment of a 1 ½ point penalty. Specifically, Petitioner took exception to the last sentence of Finding of Fact No. 54 and the entire Finding of Fact No. 55 of the Recommended Order. Petitioner argued that there was no evidence in the record to counter Petitioner's representative's testimony that she did not believe any information was required to be provided in the blank space near the top of the form.

An agency may not reject or modify a finding of fact made by an Administrative Law Judge unless it finds that the finding was not based on competent substantial evidence. If the record of the DOAH formal hearing discloses any competent substantial evidence to support the findings of fact made by the Administrative Law Judge in the Recommended Order, FHFC is bound by such factual findings. South Florida Cargo Association v. Dept. of Business and Professional Regulation, 738 So.2d 391 (Fla. 3d

DCA 1999). In this case, Petitioner introduced into evidence as Exhibit 7 a memo from FHFC entitled Frequently Asked Questions. In this memo other applicants asked about providing information in blank spaces and all applicants where told that answers were required in the blank spaces. The form at issue was included. Furthermore, FHFC provided copies of forms with a line drawn in at the blank space. This evidence, coupled with the form itself, provides ample competent substantial evidence on which the Administrative Law Judge could base its finding. The testimony of Petitioner's representative concerning her belief that no information was required to be provided in the blank space near the top of the form was not the only evidence provided on the issue. Where there is any competent substantial evidence in the record, the agency is bound by the finding of fact made by the Administrative Law Judge.

The Administrative Law Judge resolved the factual issues concerning the information provided on Form 7 and found that there was an omission and that the omission was substantial. Further, the Administrative Law Judge stated in Findings of Fact No. 54 that substantive considerations govern scoring and penalties rightly punish deviations from strict, technical and formal compliance with the demands imposed by the Forms. These findings were based on competent substantial evidence as indicated by Form 7, Exhibit D.

Petitioner further argued that adding a line to the Verification of Environmental Safety form constitutes a non-rule policy. The line added to the form by FHFC was technical in nature. The substance of the document remained the same and no content of the form was changed. The addition of the line merely clarified the location where

information was requested in the original form. This technical change does not require rule-making pursuant to Section 120.54(3)(d), Florida Statutes.

FHFC is satisfied that the evidence was fairly considered and that reasonable conclusions were drawn in the Recommended Final Order. FHFC declines to reject or modify any of the findings of fact rendered by the Recommended Order regarding the omission from Form 7, Exhibit D that warranted an assessment of a 1 ½ point penalty. These Findings of Fact are based on competent substantial evidence in the record when considered as a whole. Therefore, Petitioners second exception is hereby rejected and Florida Housing adopts Findings of Fact Nos. 52-54 of the Recommended Final Order.

RULINGS ON RESPONDENT'S EXCEPTIONS

Respondent's first exception deals with the scoring of Form 20, Section I, wherein Petitioner selected the minimum set aside of 20% of the units for persons earning no more than 50% of the area median income (the "20/50 election"). The Administrative Law Judge found that the underlying application reflected a selection of a minimum set aside of 40% of the units for persons earning no more than 60% of the area median income (the "40/60 election). These findings of fact have not been challenged by FHFC.

In making the finding that a 40/60 election should be used in scoring Petitioner's application, the Administrative Law Judge made a finding that a 1 point penalty had been imposed for an erroneous entry on Form 20, Item 1. FHFC excepted to this finding in Finding of Fact No. 12 of the Recommended Order that stated that a 1-point penalty was imposed for the erroneous entry on Form 20, Item 1. Because FHFC initially scored the application in accordance with the methodology used by a 20/50 election, the information on Form 20, Item 1 was assumed by FHFC to be correct and no penalty was ever

assessed for the election made on the form. The scoring of other forms that flowed from that election, however, was affected by the election. The evidence presented indicates that FHFC scored the application with a 20/50 election which means that no penalty was assessed for the erroneous entry on From 20, Item 1.

However, because the ALJ made a finding that the application made a 40/60 election, the application, with respect to that particular election, would have to be rescored in accordance with the 40/60 election. The rescoring would include an assessment of a one-point penalty for the "scrivener's error" contained on Form 20. The Administrative Law Judge specifically addressed the issue in Conclusion of Law No. 68 of the Recommended Order wherein the Administrative Law Judge stated "This is a case in which the applicant is merely attempting to require that, despite the applicant's carelessness in preparing Form 20, Item 1 (for which a penalty is entirely appropriate), Respondent give effect to the 40/60 set-aside election made in the applicant's application, construed fairly as a whole." The court's finding was based on competent substantial evidence. The finding that a 1-point penalty was assessed on Form 20, Item 1 is therefore a harmless error since the penalty will be assessed in accordance with the findings of the Administrative Law Judge upon the rescoring of the application giving effect to the 40/60 election.

Therefore, Respondent's first exception is hereby rejected and Petitioner's application will be rescored to give the effect to the 40/60 election and include an assessment of a 1-point penalty for Form 20, Section I.

Respondent's second exception is to the Administrative Law Judge's finding that the equity commitment letter should be scored firm rather than conditional. In order for

an equity commitment letter to be scored firm it must contain, among other things, the syndication rate and the capital contribution pay-in schedule. The Administrative Law Judge made the determination that the syndication rate, although not expressly provided, could be implied in the equity commitment letter and that the capital contribution pay-in schedule was provided as required by Form 4, Page 4. To make the determination, the Administrative Law Judge examined the equity commitment letter and considered the testimony of Respondent's witness. Based on the information contained in the equity commitment letter and on the testimony presented, the Administrative Law Judge found that the syndication rate was evident and that the letter adequately described the capital pay-in schedule.

The evidence presented supports the approach used by the Administrative Law Judge outlined in Findings of Fact Nos. 36 through 43 of the Recommended Order. Although Petitioner's Wintness' testimony was completely self serving and Respondent's witness testified that the equity commitment letter failed to indicate a syndication rate and the capital contribution pay-in schedule, FHFC is bound by the standard set in South Florida Cargo Carriers Association. The Administrative Law Judge weighed the evidence presented and made his conclusion that the required information had been submitted based on the evidence presented. Because these findings of fact are based on competent substantial evidence, the Respondent's second exception is hereby rejected.

Respondent's third exception relates to the bank commitment letter. Respondent asserts that the bank commitment letter required that the evidence Petitioner submitted to show it had invested at least $50,000.00 in the property in the form of equity or unsecured debt must be satisfactory to the bank, SunAmerica. The Administrative Law

Judge reviewed the bank commitment letter (Joint Exhibit 1, Form 4, Exhibit B), and considered testimony on the issue. From this evidence the Administrative Law Judge made the determination that a deferred developer's fee of $559,503.07 constituted a sufficient investment of $50,000 in unsecured debt for purposes of rendering the letter firm. The Administrative Law Judge further referenced a letter dated October 9, 2000 from Michael L. Fowler, Vice President of SunAmerica to Mark Kaplan, Executive Director of Florida Housing that indicated the Bank confirmed the deferred developer's fee was an acceptable unsecured debt. The October 9, 2000 letter stated in part "Please allow this letter to confirm that the evidence applicant submitted with the 2000 Combined Cycle application for deferred developer fees of up to $559,503.07 sufficiently evidenced the investment of at least $50,000 in unsecured debt."

Respondent objected to the entry of this letter as it was not contained in the original application. Over Respondent's objection, the court admitted the letter. (TR, Vol. 2., pp. 105). The Administrative Law Judge admitted the letter on the basis that it would be explanatory of the loan commitment letter and not to supplement or change the application. However, arguably the letter dated October 9, 2000, was an attempt to supplement Petitioner's application after the deadline because the letter, as opposed to the application, stated that the treatment of the deferred developer's fee as unsecured debt was acceptable to SunAmerica. Only due to the questionable admission of the October 9, 2000 letter, was there sufficient competent evidence for the Administrative Law Judge to find that deferred developer's fee of $559,503.07 constituted an unsecured debt that was acceptable to SunAmerica for purposes of rendering the letter firm. Therefore, Respondent's third exception is hereby rejected.

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

1. Petitioner's first exception is hereby **ACCEPTED** and Finding of Fact Number 35 in the Recommended Final Order is hereby **REJECTED.**
2. Petitioner's second exception is hereby **REJECTED.**
3. Respondent's first exception is hereby **REJECTED** and Petitioner's application will be rescored to give effect to the 40/60 election and include an assessment of a 1-point penalty for Form 20, Section I.
4. Respondent's exceptions 2 and 3 are hereby **REJECTED.**
5. With the exception of finding of Fact No. 35 of the Recommended Order, the Findings of Fact and Conclusions of Law as rendered by the Administrative Law Judge are hereby sustained and incorporated into this Final Order as the findings and conclusions of FHFC.
6. FHFC will rescore Petitioner's application to reflect the findings and conclusions contained in this Final Order and, if the resulting score is above the funding line, invite Petitioner in to credit underwriting.

DONE and ORDERED this 27th day of February, 2001.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Jay Taylor, Chairman

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 MARTIL L. KING, JR., BOULEVARD, 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.

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