STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GARDENS OF DAYTONA, LTD.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-3582
	)	
FLORIDA HOUSING FINANCE CORPORATION,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Tallahassee, Florida, on October 12-13, 2000.

APPEARANCES

For Petitioner: Jon C. Moyle, Jr.
Cathy M. Sellers
Moyle, Flanigan, Katz, Kollins, Raymond & Sheehan, P.A.
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For Respondent: Elizabeth G. Arthur
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STATEMENT OF THE ISSUE

The issue is whether Respondent properly scored Petitioner's application for an allocation of low-income housing federal income tax credits.

PRELIMINARY STATEMENT

By Petition for Formal Administrative Hearing Pursuant to Sections 120.569 and 120.57(1), Florida Statutes, Petitioner challenged the score and preliminary ranking that Respondent assigned to Petitioner's application for the 2000 allocation of low-income housing federal income tax credits.

The petition alleges that Petitioner made a scrivener's error in checking the box corresponding to its selection of the percentage of units to be set aside for low-income persons. The petition alleges that Respondent's improper refusal to allow Petitioner to correct this scrivener's error caused Petitioner's application to lose a substantial number of points because the remainder of Petitioner's application, such as its equity commitment letter, assumed a different set-aside election than the one shown in the application.

The petition alleges that Respondent improperly deducted points for the form of the loan commitment letter because Respondent declined to treat a deferred developer's fee as a means of satisfying a condition in the loan commitment letter.

The petition alleges that Respondent improperly deducted points for the omission from Petitioner's application of the name of the environmental consultant certifying compliance with environmental safety standards.

At the hearing, Petitioner called three witnesses and offered into evidence 14 exhibits, counting subparts as separate

exhibits. Respondent called one witness and offered into evidence two exhibits. The parties jointly offered one exhibit. All exhibits were admitted except Petitioner Exhibits 3 and 6, which were proffered.

The court reporter filed the Transcript on October 17, 2000.

FINDINGS OF FACT

1. Respondent is a not-for-profit corporation organized under Section 420.504, Florida Statutes. Respondent's purpose is to facilitate the construction of affordable housing in Florida by assisting developers interested in providing such housing.

2. Respondent administers several affordable housing programs. The program involved in this case is the competitive housing credit (HC) program, which allocates the low-income housing federal income tax credits allowed by Section 42, Internal Revenue Code (Tax Credits). Developers use or, more often, sell the Tax Credits to make their projects financially feasible by offsetting the reduced income characteristically generated by affordable housing.

3. The HC program allocates Tax Credits to those projects that Respondent determines best serve the affordable housing needs of Florida residents. The allocation process is competitive because Section 42, Internal Revenue Code, allocates to each state a limited amount of Tax Credits. Each year, developers propose projects whose collective qualified basis would yield many more Tax Credits than Florida is allocated under

Section 42; this year, for instance, Respondent could have allocated four times the amount of Tax Credits actually available.

4. To allocate the available Tax Credits, Respondent has established a competitive process. In the first stage, Respondent assigns preliminary scores to each completed application and then ranks the applications by their scores. The application with the most points tentatively receives the first Tax Credits to be allocated, and this process is repeated with the remaining applications, in their order of ranking, until the available Tax Credits are exhausted.

5. In the second stage, Respondent invites those applicants whose applications have tentatively received an allocation of Tax Credits to enter credit underwriting. Credit underwriting involves a more detailed examination of each application, during which time applicants may make certain revisions in their proposed projects. At the conclusion of credit underwriting, Respondent makes final allocations of Tax Credits to specific proposed projects.

6. This case involves the preliminary scoring that precedes credit underwriting. This case raises the issue of the accuracy of Respondent's scoring of one or two items in Petitioner's application: the loan commitment letter and, if the next issue is resolved in Petitioner's favor, the equity commitment letter. However, the most important issue in this case requires a

determination of the extent to which, during the preliminary scoring process, an applicant may revise or correct the set-aside election made in its application or, in the alternative, the necessity, if any, that Petitioner attempt to make such a revision or correction. A minor issue in this case is the propriety of certain penalties that Respondent imposed.

7. During the hearing, the parties stipulated that the Administrative Law Judge was not to attempt a comprehensive rescoring of Petitioner's application, if he were to sustain any portion of Petitioner's challenge. As explained by Respondent's witness, scoring involves a myriad of contingencies and, if presented with any items requiring rescoring, Respondent's employees running the scoring spreadsheet would require as much as one hour to recalculate Petitioner's score. Thus, the parties agreed that Respondent would perform any recalculation within one business day following the issuance of the recommended order, although, of course, performing the recalculation would not waive Respondent's right to file any exceptions that it deems necessary or otherwise oppose any recommended changes to the scoring of Petitioner's application.

8. The parties also agreed upon an expedited schedule for post-hearing filings. The parties agreed to file their proposed recommended orders by 9:00 a.m. on October 19, 2000, serving the Administrative Law Judge by e-mail the prior evening. The Administrative Law Judge agreed to issue the recommended order on

or before October 20, 2000. The parties further agreed to file exceptions on or before October 23, 2000, and any responses to exceptions on or before October 25, 2000. The parties and Administrative Law Judge have agreed upon this expedited filing schedule because the last opportunity for Petitioner to receive Tax Credits for the cycle for which it applied would require final action by Respondent's board at its October 27, 2000, meeting.

9. The application for the subject cycle of the HC program comprises 24 Forms requesting detailed information. Respondent imposes a deadline by which all applicants must submit their completed applications. Following this deadline, Respondent conducts the preliminary scoring.

10. The HC program has a maximum of 632 points, divided as follows: Form 1--0 points; Form 2--2 points; Form 3--85 points; Form 4--150 points; Form 5--20 points; Form 6--5 points; Form 7--106 points; Form 8--44 points; Form 9--100 points; Form 10--10 points; Form 11--50 points; Form 12--35 points; Form 13--0 points; Form 14--45 points; Form 15--10 points; Form 16--25 points; Form 17--95 points; Form 18--15 points; Form 19--0 points; Form 20--50 points; Form 21--30 points; Form 22--30 points; Form 23--0 points; and Form 24--0 points.

11. The application forms impose minor penalties for the failure of an application to provide "complete, accurate information in the format and location prescribed by the

instructions . . .." Any such omissions or inaccuracies in any or all of Forms 1-4 result in a 2.5 point penalty. In other words, omissions or inaccuracies in one or all four of these Forms result in a single 2.5 point penalty. Any such omissions or inaccuracies in any or all of Forms 5-10 result in a 1.5 point penalty. Any such omissions or inaccuracies in any or all of Forms 11-13 result in a 1 point penalty. Any such omissions or inaccuracies in one or all of Forms 14-19 result in a 1 point penalty. Any such omissions or inaccuracies in one or all of Forms 20-24 result in a 1 point penalty.

12. Petitioner does not contest the 1 point penalty that Respondent has imposed for the erroneous entry, described below, at Form 20, Item I. However, Petitioner contests Respondent's scoring of other Items and assessment of other penalties, based on the election made at Form 20, Item I. These scoring and penalty issues include, but may not be limited to, the 2.5 point penalty imposed on Forms 1-4 due to an inconsistency between the set-aside information provided in Forms 1 and 20; up to 144.67 points lost in Form 4 due to the failure to meet the condition in the equity commitment letter that the qualified basis attributable to all 230 units qualify for Tax Credits; seven of eight points lost in Form 10 for the deficiency in leveraging Tax Credits due to the loss of nearly half of the expected Tax Credits; and 30 points lost in Form 21 due to the determination that the equity commitment letter is not firm and unconditional.

Petitioner claims that these lost points and penalty, together with any points lost on Form 4 for the determination that the loan commitment letter is not firm and unconditional and the 1.5 point penalty for an omission from the environmental safety certification in Form 7, Exhibit D, improperly prevented Petitioner's application from entering credit underwriting for an allocation of Tax Credits.

13. Petitioner timely submitted its application for the HC program. Form 1, Item I.A, of Petitioner's application states that Petitioner is a limited partnership whose general partner, Affordable Housing Solutions for Florida, Inc., is a not-for-profit corporation. At present, Petitioner's general partner owns 100 percent of the partnership interests. Form 1, Item I.C, states that Heritage Affordable Development, Inc., is the "co-developer," but has no ownership interest in Petitioner.

14. Form 1, Item II.A, describes the proposed project as a rehabilitation of an existing development in Daytona Beach. Form 1 identifies a total of 230 residential units in the project, which is to be known as Daytona Garden Apartments.

15. Form 1, Item IV, is a certification that is signed by Petitioner. In relevant part, the certification states:

> The Applicant and all Financial Beneficiaries understand and agree that full points will be awarded only in the event that all information required by each form is provided in accordance with the application requirements. Failure to provide complete, accurate information in the format and location prescribed by the application will

> result in a **REDUCTION OF POINTS OR REJECTION OF THE APPLICATION** as indicated on each form. Subject to the limited exceptions contained within Rule 67-48.005, F.A.C., only information contained within this application will be considered for purposes of points awarded or appealed. . . .

16. Most of the points at issue in this case arise from a mistake that Respondent claims to have made in completing Form 20, Item I. This item requires the applicant to make a crucial election for its proposed project. The two relevant choices are: 1) 20 percent of the units are set aside for persons earning no more than 50 percent of the area median income (20/50) or 2) 40 percent of the units are set aside for persons earning no more than 60 percent of the area median income (40/60). The application notes clearly that, pursuant to federal regulation, 20/50 elections restrict all set-aside units to no more than 50 percent of the area median income.

17. The percentage of set-aside units determines the extent to which the qualified basis of a project may yield Tax Credits. The purpose of Section 42, Internal Revenue Code, and the HC program is to facilitate the development of affordable housing. The set-aside election assures that the developer will reserve a certain percentage of units in the project for reduced-income residents.

18. The 40/60 election means that the developer is setting aside a minimum of 40 percent of the units for residents earning no more than 60 percent of the area median income. The developer

may choose to set aside for such reduced-income residents a greater percentage of the units in order to qualify for more Tax Credits. The 20/50 election offers the developer the same type of option, but, due to the cited federal regulation, the developer may only claim additional Tax Credits for units set aside for residents earning no more than 50 percent--not 60 percent--of the area median income.

19. In making its election on Form 20, Item I, Petitioner placed an x in the box for the 20/50 election. Petitioner claims to have intended to have placed an x in the box for the 40/60 election.

20. As already noted, the 20/50 election precludes the allocation of any Tax Credits for units set aside for residents earning more than 50 percent of the area median income. However, Petitioner's application sets aside nearly half of its 230 units for residents earning 60 percent of the area median income, and the application anticipates receiving tax credits for these set-asides, as well as the set-asides for residents earning 50 percent or less of the area median income.

21. Numerous elements in Petitioner's application reveal Petitioner's expectation to qualify the entire basis of its project for Tax Credits. For instance, Form 1, Item III.E, shows that 100 percent of the 230 units are set aside. However, a note at the top of this sub-item warns: "If the set-aside percentage and the Number of Residential Units shown in Items E, F, G and H

are found to be inconsistent with other forms in the Application, the information contained in Form. . . 20 for [the HC program] WILL BE RELIED UPON."

22. Form 10, which calculates the leveraging effect of allocated tax credits based on the number of set-aside units, similarly reveals the expectation that 230 units would be set aside for lower-income residents and, thus, eligible for generating Tax Credits.

23. On Form 20, Item III, Petitioner provided additional evidence of its expectation to obtain tax credits for all 230 of its set-aside units. Item III shows Petitioner's commitment to set aside 15.65 percent of the units for residents earning not more than 33 percent of the area median income, 36.09 percent of the units for residents earning not more than 50 percent of the area median income, and 48.26 percent for residents earning not more than 60 percent of the area median income. Form 20, Item III, requires the applicant to represent that it will maintain these set-aside percentages--clear evidence that the applicant is anticipating Tax Credits for all of the set-asides scheduled in Form 20, Item III.

24. As a whole, though, the application reveals only that Petitioner expected to obtain Tax Credits for all 230 units. If the application, construed as a whole, were to represent the 20/50 election, nothing in the application reveals whether Petitioner's expectation to obtain a larger amount of Tax Credits

emerged from a scrivener's error in marking the 20/50 election, rather than the 40/60 election, as Petitioner contends, or a failure to understand the regulatory limitation imposed upon the 20/50 election. Nothing in the application actually mentions a 40/60 election, and Petitioner did not attempt to address the apparent 20/50 election until after the deadline for submitting applications.

25. One of Petitioner's witnesses was a vice president of Heritage Affordable Development, Inc. She testified that her job imposed upon her numerous responsibilities in preparing Petitioner's application, including the task of placing the x in the box for the 40/60 election, and she mistakenly placed the x in the box for the 20/50 election. This is the only direct evidence in the record indicating whether the 20/50 election was due to a misunderstanding of the federal regulation limiting the use of the 20/50 election or a mistake in checking the right box on the form.

26. Although her testimony is self-serving, Petitioner's witness testified in a forthright manner, as she described her hurried and fatigued efforts to complete the application by the deadline. The Administrative Law Judge credits her testimony that she intended to check the 40/60 election, but, in her haste, checked the 20/50 election, and time did not permit her to discover her error until after she had submitted Petitioner's application.

27. However, even if Petitioner's election were treated as a scrivener's error, the question would remain whether the correction of such an error would materially affect Petitioner's application. An extensive review of recent case law reveals no better definition of what is "material" than that offered by Respondent's witness, who testified that something is material if it affects the outcome. In other words, something is material if it is consequential.

28. Changing a 20/40 set-aside election to a 40/60 set-aside election would be undeniably material to Petitioner's application. If the application effectively makes the 20/50 election, absent changing its election, Petitioner would suffer the major consequence of the loss of eligibility for Tax Credits for nearly half of the 230 units to be developed.

29. Thus, the only way that the proposed change may be deemed inconsequential or immaterial is if the application, fairly construed, as a whole, already makes the 40/60 election, and Petitioner seeks only to clarify this election in Form 20, Item 1.

30. As already noted, Form 20 expressly supersedes any contrary set-aside information in Form 1. The express deference in Form 1, Item II.E, to the set-aside information contained in Form 20, as well as the reference to "other forms in the Application," sufficiently notifies the careful reader of the application that the set-aside information in Form 20 is the

definitive expression of the actual set-aside election contained in each application.

31. However, Form 20 itself is contradictory concerning the set-aside election. The clear and first expression of the set-aside commitment in Form 20 chooses the 20/50 set-aside, but the second, more detailed (and thus less amenable to misstatement) expression of the set-aside commitment reveals the choice of the 40/60 set-aside in the set-aside schedule.

32. The resulting ambiguity in Form 20 requires, under the case law discussed in the Conclusions of Law, consideration of the two provisions in Form 20, in pari materia, in an effort to discern the true meaning of this document in terms of the set-aside election. Construed together, as well as with the many other Items reflecting a 40/60 election and the absence of any other Items reflecting a 20/50 election, the application, as a whole, evidences a 40/60 set-aside election.

33. As already noted, the determination that Petitioner's application effectively makes the 40/60 set-aside election affects the scoring of other Items.

34. Most directly, Petitioner challenges the assessment of a 2.5 point penalty for the discrepancy between the set-asides elected in Form 20, Item I, and the set-asides shown in Form 1, Item II.E. Respondent may not assess a penalty on Form 1 because the set-asides shown in Form 1, Item II.E, are not incorrect. Although they are inconsistent with the set-aside election shown

in Form 20, Item I, the error is in the latter Item, and Respondent has already assessed a penalty for this mistake.

35. However, Respondent relied on another basis for the assessment of the 2.5 point penalty for Forms 1-4. Although the record is largely undeveloped on this point, Petitioner has failed to show that its provision of a utility allowance is not flawed by an omission of the utility provider in Form 1, Exhibit H. Thus, Petitioner has failed to prove that the 2.5 point penalty for Forms 1-4 is incorrect.

36. A more important scoring issue that arises from the determination of the actual set-aside election involves Form 4, Exhibit B, which is the equity commitment letter issued on February 29, 2000, by SunAmerica Affordable Housing Partners, Inc. This is a firm undertaking by SunAmerica Affordable Housing Partners, Inc., to cause its affiliate to purchase a 99.9 percent limited partnership interest in Petitioner for a specified sum. The equity commitment letter requires that Petitioner obtain a specified amount of Tax Credits based on a determination that the qualified basis attributable to all 230 units is eligible for Tax Credits because all 230 units are set aside for reduced-income residents.

37. Respondent allowed no points for the equity commitment letter because it was conditioned on all 230 units being set aside for reduced-income residents. However, as determined above, the application, fairly construed as a whole, makes the

40/60 election and thus satisfies this condition in the equity commitment letter.

38. At the hearing, Respondent's witness, acknowledging that the apparent 20/50 election was the major reason why Respondent gave Petitioner no points for the equity commitment letter, testified that additional reasons existed for at least deducting points from the letter, as a conditional, rather than firm, commitment to purchase an equity interest in Petitioner.

39. Form 4, page 4 of 14, describes the requirements imposed upon an equity commitment letter:

> A firm commitment from a Housing Credit Syndicator . . . is an agreement which is executed and accepted by all parties, is dated, and includes all terms and conditions of the agreement. . . . In order for a syndication/equity commitment to be scored firm, it must state the syndication rate (amount of equity being provided divided by the anticipated amount of credits the syndicator expects to receive), capital contribution pay-in schedule (stating the amounts to be paid prior to or simultaneous with the closing of construction financing and stating the amounts to be paid prior to closing of permanent financing, or in the event of a construction/permanent first mortgage, the amount to be paid prior to or simultaneous with the closing of construction financing and state the amounts to be paid prior to conversion to permanent financing), the percentage of the anticipated amount of credit allocation being purchased, and the anticipated housing credit allocation.

40. Respondent's witness testified that the equity commitment letter fails to include a syndication rate and possibly a capital contribution pay-in schedule.

41. However, as Respondent's witness admitted, the syndication rate is evident from the information contained in the equity commitment letter. As noted in the cited provision from Form 4, the syndication rate is the equity provided divided by the anticipated Tax Credits allocated to the syndicator. Using the information contained in the equity commitment letter, SunAmerica Affordable Housing Partners, Inc., is purchasing a partnership interest that will entitle it to 99.9 percent of the $7,380,700 in Tax Credits, or $7,373,319 in Tax Credits. Dividing SunAmerica's equity contribution of $5,906,032 by its share of Tax Credits yields the syndication rate of 80.1 percent.

42. Likewise, the equity commitment letter adequately describes the capital contribution pay-in schedule. The equity commitment letter calls for SunAmerica to pay $3,248,317 upon the closing of the amended partnership agreement; $2,362,413 upon the commencement of construction (matched dollar-for-dollar with construction financing) and upon the satisfaction of the standard conditions set forth in SunAmerica's standard form partnership agreements; and $295,302 upon the commencement of amortization of the permanent loan, receipt of an audited cost certification of eligible basis, receipt of certain forms for the entire development; and satisfaction of the standard conditions set forth in SunAmerica's standard form partnership agreement. The adjuster clause, which reduces SunAmerica's capital contributions, dollar-for-dollar, for any reductions in actual

Tax Credits is a standard provision in equity commitment letters and does not mean that the letter is firm and unconditional.

43. Petitioner has thus proved that it is entitled to all available points for its equity commitment letter.

44. Lastly, Petitioner has proved that it is entitled to additional points on Form 10 for leveraging Tax Credits. Respondent allowed only 2.55 points out of 10 points for Form 10 due to its treatment of the application as making the 20/50 election and thus the loss of nearly half of the set-aside units. Treating the application as making the 40/60 election results in Petitioner earning 9 points on Form 10.

45. Form 4, Exhibit C, is the loan commitment letter issued on February 22, 2000, by SunAmerica, Inc. This is a firm undertaking by SunAmerica, Inc., to lend funds to Petitioner, subject only to the kinds of conditions that Respondent typically and reasonably determines are customary and not so substantive as to preclude a determination that the letter is firm and unconditional.

46. Respondent allowed no points for the loan commitment letter because the letter requires that, prior to the loan closing, Petitioner and its guarantor (its sole owner and general partner, Affordable Housing Solutions for Florida, Inc.) "submit evidence satisfactory to [SunAmerica, Inc.] that [Petitioner] has invested at least $50,000 in the Property in the form of equity or unsecured debt." Petitioner relied in its application on the

deferral of a developer's fee of $559,503.07 for a period of up to ten years to satisfy this requirement of the loan commitment letter.

47. In this case, the co-developer, Heritage Affordable Development, Inc., has agreed to defer its developer's fee. Neither the lender nor Respondent has raised a question concerning the source of the funds derived from the deferral of the developer's fee. In essence, the lender is requiring the addition of $50,000 in funds without the dilution of ownership interests or creation of secured debt; thus, it is irrelevant that the source of the funds is a co-developer, rather than Petitioner itself or Petitioner's general partner.

48. Because Petitioner is obligated eventually to pay the deferred developer's fee, Respondent correctly determined that the deferred developer's fee does not qualify as equity. Inexplicably, though, Respondent seems not to have seriously considered whether the deferred developer's fee qualifies as unsecured debt. As already noted, the loan commitment letter requires $50,000 of either equity or unsecured debt.

49. A deferred developer's fee is unsecured debt. Deferring a developer's fee executes in a single step the two-step transaction in which Petitioner pays the developer the subject portion of the developer's fee, and the developer immediately lends it back to Petitioner, taking an unsecured note in return.

50. When informed of the issue, the lender itself acknowledged the obvious, by letter dated October 9, 2000, that the deferred developer's fee is unsecured debt.

51. Petitioner has thus proved that it is entitled to all available points for its loan commitment letter.

52. Form 7, Exhibit D, is the Verification of Environmental Safety. This is a certificate by an environmental consultant that the site of the proposed development is free of potential problems, such as asbestos or lead-based paint in existing structures.

53. The form initially generated by Respondent contains three lines at the top for the identification of the proposed developer and development, but inadvertently omits underlining in the main body of the certificate where the name of the environmental consultant is to be placed. The original form contains a parenthetical explanation in smaller type that states: "(Name of Firm which prepared the Phase I Environmental Report)."

54. As already noted, the application imposes penalties for the "failure to provide complete, accurate information in the format and location prescribed by the instructions . . .." Relatively minor in amount and sparingly assessed, as in a single penalty regardless of the number of errors in a series of Forms, penalties rightly punish deviations from strict, technical, and formal compliance with the demands imposed by the Forms. Petitioner's challenge of the assessment of a 1.5 point penalty

for the obvious omission in Form 7, Exhibit D, unjustifiably attempts to substitute the substantive considerations that govern scoring for the formal considerations that govern assessing penalties.

55. In any event, the omission from Form 7, Exhibit D, is substantial. Following the space for the name of the environmental consultant, Form 7 then provides the substance of the certification: "[X, Inc.] hereby certifies that a Phase I Environmental Assessment of the above proposed Development Site . . . was performed by this firm and a detailed report . . . was prepared." The omission of the name of the environmental consultant, coupled with a signature that poorly communicates the idea that the signatory is signing in a representative capacity on behalf of the environmental consultant, amply supports Respondent's assessment of a 1.5 point penalty.

56. In summary, Petitioner has proved that Respondent has mis-scored Petitioner's application by deducting points on Form 4 for an equity commitment letter and loan commitment letter that are actually firm; deducting points on Form 10 for inadequate Tax Credit leveraging; and deducting points on Form 21 for an equity commitment letter that is actually firm. Respondent should rescore Petitioner's application to correct these items and any other items for which Petitioner lost points due to Respondent's treatment of the application as making a 20/50 set-aside election.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

58. Section 420.5093 authorizes Respondent to allocate Tax Credits. Rule 67-48.002(81) establishes a qualified allocation plan, pursuant to Section 42(m)(1)(B), Internal Revenue Code.

59. As an applicant, the burden of proof is on Petitioner to show that Respondent mis-scored Petitioner's application. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

60. The most difficult issue in this case is whether Respondent improperly treated Petitioner as having made a 20/50 set-aside election, rather than a 40/60 set-aside election.

61. Rule 67-48.004(3) provides in part:

> All Applications must be complete, accurate, legible and timely when submitted. All Applications must be received by the Application Deadline as specified in the Notice of Funding or Credit Availability for each Program. Neither Applications nor any additional or replacement items will be accepted by facsimile machine. Subject to the limited exceptions contained within Rule 67-48.005, F.A.C., once the Application has been received by the Corporation, no additions, deletions, or changes will be accepted for Application or scoring purposes.

62. Rule 67-48.005(1)(a) provides in part: "In its petition for review, the Applicant shall have the opportunity to

cure transpositional or scrivener's errors that do not otherwise materially affect the Application . . .."

63. The checking of the box indicating the election of the 20/50 set-aside qualifies as a scrivener's error. See Wesley v. State of Florida, 762 So. 2d 599 (Fla. 5th DCA 2000) (per curiam) (scrivener's error for trial judge to check wrong box next to "adjudicated guilty" when judge meant to check "adjudication withheld").

64. However, any change from a 20/50 election to a 40/60 election would materially affect Petitioner's application by substantially increasing the amount of Tax Credits for which the proposed project may be eligible. Thus, if the application, fairly construed, as a whole, makes a 20/50 election, Petitioner may not prove its claim that Respondent mis-scored Petitioner's application by relying on the rule allowing corrections of scrivener's error, because the effect of the correction would materially affect Petitioner's application.

65. Thus, the only means by which Petitioner may obtain additional points in connection with the several items driven by the set-aside election is if the application, fairly construed, as a whole, makes a 40/60 election. If so, Petitioner's attempt to correct the election shown on Form 20, Item I, either would be unnecessary or immaterial.

66. The interpretation of conflicting language in a document requires consideration of all of the provisions, in pari

materia, in an attempt to determine intent. Cf. Dune I, Inc. v. Palms North Owners Association, Inc., 605 So. 2d 903, 905 (Fla. 1st DCA 1992).

67. Construed as a whole, even without regard to Petitioner's intent, the application reveals a 40/60 election. Obviously, the intent of the person responsible for completing the application reinforces this interpretation of the application.

68. This conclusion is driven by the facts unique to this case and does not undermine the rule requiring the submittal of complete applications by the deadline or the rule carving out a well-defined exception for scrivener's errors. This is not a case in which an applicant is trying to enlarge its proposed project while in preliminary scoring. This is not a case in which an applicant is trying to change the identity of the developer while in preliminary scoring. This is not a case in which an applicant is trying to change the location of the proposed project while in preliminary scoring. This is not even a case in which an applicant is trying to change its set-aside election while in preliminary scoring. This is a case in which an 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.

RECOMMENDATION

It is

RECOMMENDED that the Florida Housing Finance Corporation rescore Petitioner's application to reflect the findings and conclusions contained in this recommended order and, if the resulting score is sufficiently high, invite Petitioner to credit underwriting.

DONE AND ENTERED this 19th day of October, 2000, 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
Division of Administrative Hearings
this 19th day of October, 2000.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within the timeframes set forth in this recommended order. Any exceptions to this recommended order must be filed with the agency that will issue the final order in this case.