

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

PINNACLE PLAZA, LTD.,)
)
 Petitioner,)
)
vs.) Case No. 06-2032
)
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 September 29, 2006.

APPEARANCES

For Petitioner: Stephen T. Maher
Gary Cohen
Shutts & Bowen LLP
201 South Biscayne Boulevard, Suite 1500
Miami, Florida 33131

For Respondent: Wellington Meffert, II, General Counsel
Hugh R. Brown, Deputy General Counsel
Florida Housing Finance Corporation
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Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUE

The issue is whether Respondent improperly withheld points, in scoring Petitioner's application, for proximity to a grocery store, so as to improperly deny Petitioner an opportunity to

enter the credit underwriting phase of the process by which Respondent allocated federal income tax credits for low-income housing projects in the 2006 funding cycle. (Pursuant to Florida Administrative Code Rule 67-48.005(4), Respondent would send Petitioner's proposal to credit underwriting for the 2007 funding cycle, if Petitioner proves that Respondent improperly scored Petitioner's application in the 2006 funding cycle, which is now closed by operation of federal law.)

PRELIMINARY STATEMENT

By Petition Requesting Informal Hearing and Grant of the Relief Requested filed May 26, 2006, Petitioner challenged the decision of Respondent not to award any points for the tie-breaker item concerning proximity to a grocery store. By letter dated June 12, 2006, Respondent transmitted the case to the Division of Administrative Hearings on the ground that the petition raises disputed issues of material fact.

At the hearing, each party called two witnesses. The parties offered nine joint exhibits: Joint Exhibits 1-9. All exhibits were admitted.

The court reporter filed the transcript on October 16, 2006. The parties filed their Proposed Recommended Orders on October 26, 2006.

FINDINGS OF FACT

1. This case involves the 2006 funding cycle of Respondent's Housing Credit program. In this program, Respondent allocates nine percent low-income housing, federal income tax credits to various developers and investors based on their proposals to construct qualified affordable rental housing units in Florida. Because the demand for federal income tax credits allocated to Florida exceeds the supply of such credits, Respondent has adopted an elaborate scoring program, supplemented with tie-breaker points and lottery numbers, to evaluate competitively the various proposals.

2. On February 1, 2006, Petitioner timely filed its application for an allocation of federal income tax credits under the Housing Credit program (Application). The Application seeks an allocation of federal income tax credits in the Large County set-aside for the construction of a 132-unit apartment complex in Miami.

3. Sufficient applications routinely receive maximum scores that Respondent has had to adopt tie-breaking criteria to differentiate between those proposals that may enter credit underwriting and those proposals that may not, due to the lack of available federal income tax credits. These criteria involve the proximity of the proposed project to certain services or facilities, such as public transit, medical clinics, and grocery

stores. Sufficient applications routinely receive all of the tie-breaker points that Respondent has had to assign lottery numbers to further differentiate between those proposals that may enter credit underwriting and those proposals that may not.

4. The sole issue in this case is the proximity of the project proposed by Petitioner to a grocery store. Petitioner's proposal received the maximum score, exclusive of the tie-breaker score. Petitioner's proposal received a lottery number that, if its proposal earned the grocery-store tie breaker points, it would enter credit underwriting.

5. Page 14 of the application instructions defines a "grocery store" as:

a retail establishment, open to the public,
. . . consisting of 4,500 square feet or
more of air conditioned space, which as its
major retail function sells groceries,
including foodstuffs, fresh and packaged
meats, produce and dairy products, which are
intended for consumption off-premises, and
household supplies

6. Page 15 of the application instructions requires that the grocery store "must be in existence and available for use by the general public as of the [a]pplication [d]eadline." The application deadline for the 2006 funding cycle was February 1, 2006, so the characteristics of the grocery store identified by Petitioner are fixed as of February 1.

7. By letter dated March 2, 2006, Respondent informed Petitioner that it was withholding 1.25 points from its tie-breaker score due to Petitioner's failure to provide the required information as to the proximity of its proposed project to a grocery store.

8. Pursuant to its procedures, Respondent gave Petitioner an opportunity to submit "cure" documentation to demonstrate Petitioner's entitlement to the 1.25 points for proximity to a grocery store. The submittal of "cure" documentation may address issues raised in Respondent's preliminary review of an application but does not extend the date on which the grocery store must be in existence. On April 10, 2006, Petitioner timely filed "cure" documentation identifying the subject grocery store as the Mas Unidos Market at 832 Southeast 8th Street. Accompanying materials indicated that the air-conditioned space was 4547 square feet.

9. By letter dated May 4, 2006, Respondent advised Petitioner that it would receive no points for the proximity of the proposed project to a grocery store because the grocery store identified by Petitioner had less than 4500 square feet of air-conditioned space available to the public. In its final scoring summary, Respondent found that the subject market had less than 4500 square feet of air-conditioned space available to the public.

10. There is no issue as to the proximity of the subject grocery store to the proposed project. The question is whether the subject grocery store meets the definition of a grocery store, as of the application deadline.

11. A sketch that Petitioner submitted to Respondent assists in the analysis. The sketch depicts a 3891 square foot area (Primary Space), which meets all criteria. The Primary Space contains groceries and was air-conditioned and available to the public as of the application deadline.

12. A 656-square-foot area (Additional Space) is separated from the Primary Space by a storage area. If the Additional Space counts toward the area of the grocery store, the subject grocery store would meet Respondent's definition because the Primary Space and Additional Space total 4547 square feet.

13. The owner of the subject grocery store operates a single business from the Primary Space and Additional Space. In doing so, he employs a single set of employees, maintains a single set of financial books, and operates under a single occupational license.

14. On the other hand, the Additional Space is not accessible from the Primary Space, due to the storage area that divides the two areas. The owner of the subject grocery store intends to convert the storage area into a cafeteria, so as to

permit interior access between the two spaces, but no such renovation had taken place as of the application deadline. At present, a customer seeking to purchase goods from both spaces must pay for his goods at the one space, leave through the front door, walk a short distance along a sidewalk immediately in front of the two spaces (which occupy a small strip mall), enter the front door of the other space, and pay for his purchases in the other space. Also, the Primary Space contains typical grocery items, but the Additional Space contains items more typically associated with hardware stores. However, these factors, according to an employee of Respondent who testified at the hearing, do not preclude a determination that the Additional Space is part of a grocery store.

15. But the problem with the Additional Space is that it was not available to the public as of the application deadline. The owner of the subject grocery store commenced retail operations in the Additional Space in the fall of 2005, which was prior to the application deadline. However, due to hurricane damage from the 2005 storms, the owner closed the Additional Space for repairs in late 2005 through mid- to late-February 2006, which was after the application deadline. The Additional Space was thus in existence and available to the public as of the application deadline, and Respondent properly excluded the area of the Additional Space in determining whether

the store satisfied, as of the application deadline, the criteria of 4500 square feet available to the public.

16. Petitioner contends that the temporary loss of the Additional Space, due to ongoing repairs, should not cause its exclusion from the calculation. The problem with this argument is that it is impossible for Respondent to determine with reasonable certainty whether the owner will complete repairs and reopen the space as a retail grocery operation. The requirement that the space be available to the public on a specific date provides a clear test that is easily administered. The modified requirement for which Petitioner contends creates uncertainty and invites contention as to whether certain space was under repair, the extent of repairs left to complete as of the application deadline, and similar issues that promise prolific litigation, not efficient administration, of the proximity-scoring item.

17. Respondent contends that, if the Additional Space were included, the subject grocery store fails to satisfy the area criterion because the office space behind the Primary Space should not have been included as available to the public. The evidence does not support this contention, although the treatment of the Additional Space in the Recommended Order moots this issue.

18. Directly accessible from the Primary Space, the office space, which totals 107.69 square feet, is separated from the Primary Space by a locked gate. The owner conducts business with customers within the office space, but he must determine, for each customer, whether he wishes to remotely unlock the gate and allow the customer to enter the office space for such purposes as cashing a check. In most cases, the owner makes this determination by viewing the customer through a camera mounted at the gate. If in doubt, the owner leaves the office and meets the customer before escorting the customer to the office, where sums of cash are kept. The security is necessitated by the location of the subject grocery store in a neighborhood afflicted by crime. The presence of the locked gate has not caused Respondent to contend that the adjacent customer bathroom, which is also behind the gate, should not be counted as part of the grocery store, nor should it have this effect as to the office space behind the gate.

19. Petitioner contends that the hallway and bathroom behind the Additional Space should have been included in the area of the subject grocery store. If these areas had been available to the public on the application deadline, this contention would be correct, but the hallway and bathroom were also unavailable to the public on this date. Even if they were included, the total area of the subject grocery store would be

only 4085.99 square feet, consisting of 3891 square feet of Primary Space, 107.69 square feet of office space behind the Primary Space, and 87.3 square feet of hallway and bathroom behind the Additional Space.

20. Petitioner has thus failed to prove that it is entitled to any tie-breaker points for proximity to a grocery store.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2006) and Fla Admin. Code R 67-48.005(2).

22. Section 420.5093(3), Florida Statutes, authorizes Respondent to administer the Housing Credit program and allocate federal income tax credits to the most suitable applications.

23. Petitioner bears the burden of proving the material allegations concerning its application. Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

24. Petitioner has failed to prove its entitlement to any tie-breaker points for proximity of its proposed project to a grocery store.

RECOMMENDATION

It is

RECOMMENDED that the Florida Housing Finance Corporation enter a final order dismissing the Petition Requesting Informal Hearing and Grant of the Relief Requested.

DONE AND ENTERED this 27th day of October, 2006, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of October, 2006.

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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.