

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON RESERVE, LTD,)
)
 Petitioner,)
)
 vs.) Case No. 10-0354
)
 FLORIDA HOUSING FINANCE)
 CORPORATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on August 30, 2010, in Tampa, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings

APPEARANCES

For Petitioner: Douglas P. Manson, Esquire
Manson Law Group, P.A.
1101 West Swann Avenue
Tampa, Florida 33606-2637

For Respondent: Matthew A. Sirmans, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUES

The issues in this case are: (1) Whether Respondent, Florida Housing Finance Corporation (Florida Housing), erred in its determination that Petitioner, Madison Reserve, Ltd.'s

(Madison Reserve), application seeking an allocation of Housing Credits from the 2009 Universal Cycle failed to meet threshold and should not receive an Ability to Proceed Tie-Breaker Point with regard to zoning; and (2) Whether Florida Housing erred in its characterization of Madison Reserve's application as a Priority II application.

PRELIMINARY STATEMENT

On December 3, 2009, Florida Housing advised Madison Reserve that its application in the 2009 Universal Cycle failed to meet threshold with respect to zoning and was deemed to be a Priority II application. Madison Reserve timely filed a Petition for Informal Administrative Hearing contesting the final agency action by Florida Housing. After a review of the Petition, Florida Housing decided there were disputed issues of material fact. The matter was forwarded to the Division of Administrative Hearings for assignment of an Administrative Law Judge to conduct a formal hearing.

At the final hearing, Petitioner called one witness: Todd L. Borck, managing member of Florida Reserve, Ltd. Respondent also called one witness: Steve Auger, executive director of Florida Housing. The parties offered 17 joint exhibits which were admitted into evidence.

A Transcript of the final hearing was ordered by the parties and was filed at the Division of Administrative Hearings

on September 8, 2010. By rule, the parties were allowed ten days to submit proposed recommended orders, but requested 30 days. Each party timely submitted a Proposed Recommended Order, and each was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Madison Reserve is a Florida limited partnership made up of a general partner, Madison Reserve Apartments, LLC, and an "initial limited partner," Todd L. Borck. The members of the general partner are Todd L. Borck and Patrick E. Law. Borck and Law are experienced developers of real estate properties, especially those which qualify for Low Income Housing Tax Credits ("Housing Credits") from Florida Housing.

2. Borck and Law are affiliated with two other entities which filed applications for Housing Credits in the 2009 Universal Cycle. Those two entities, Madison Heights and Madison Terrace, are also Florida limited partnerships in which Borck and Law are members of the general partners. As part of its application, Madison Reserve submitted a "Declaration of Priority I Related Applications" form, which identified the other two entities as part of the Pool of Related Applications for the Madison Reserve application.

3. Florida Housing is a public corporation organized pursuant to Section 420.504, Florida Statutes (2009), to provide

and promote the public welfare by administering the governmental function of financing and refinancing affordable housing and related facilities in Florida.

4. The 2009 Universal Cycle was the first time that applicants were required to designate themselves as Priority I or Priority II applicants. Preference for funding was to be given to Priority I applicants. With certain exceptions, all Priority I applications for a given Set-Aside were to be funded before any Priority II applications were funded.

5. In essence, the rules in effect for the 2009 Universal Cycle require that applications submitted by related applicants be considered a "Pool of Related Applications." While there is no limit to the number of related applications within a Pool of Related Applications that may be submitted, there can be no more than three related applications in order to file under Priority I. There is an exception to that rule if applicants have entered into joint ventures with a not-for-profit entity or a public housing authority. In those cases, applicants are permitted to up to three additional Priority I applications.

6. The Priority I/Priority II designations were upheld as valid rules in Atlantic Housing Partners, LLP v Florida Housing Finance Corporation, Case No. 09-2276RP (DOAH July 14, 2009).

7. On August 20, 2009, Madison Reserve submitted an application seeking an allocation of Housing Credits from the

2009 Universal Cycle. Madison Reserve's submission was assigned Application No. 2009-197C. Two-thousand and nine (2009) designates the year the application was filed; 197 indicates that Madison Reserve application was the 197th application processed in that cycle; and C indicates the application was seeking Housing Credits. The application was basically a "shell" application as is the general practice among entities seeking an allocation of Housing Credits. A shell application contains only minimal information about the applicant and the proposed project. The remaining portions of the application are filed during the "cure" period and, thereafter, pursuant to specific requests by Florida Housing. The shell application provides only the essential information needed by Florida Housing to make a preliminary assessment of the applicant's ability to proceed through the process.

8. Application 2009-197C designated ARD MR, LLC, as the developer for the proposed project for which Madison Reserve was seeking Housing Credits. Exhibit 9 to the application designates the developer and sets forth the ownership of the applicant entity. In both cases, Borck and Law are the only natural persons listed with any interest in the project.

9. Borck is experienced with the 2009 Universal Cycle and the application process. He has filed over 100 applications for various entities and acts as a consultant for other entities

with which he has no ownership interest. One such entity is Madison Springs, LLC (Madison Springs). Borck assisted that entity with filing an application in the 2009 Universal Cycle. Madison Springs' application was assigned number 2009-195C.

Related Application Issue

10. For the 2009 Universal Cycle, Florida Housing, for the first time, limited applicants to only three related entity applications. That is to say, applicants, such as Borck and Law, could not be affiliated with more than three entities who had filed for Housing Credits in the 2009 Universal Cycle. In fact, Borck and Law were affiliated with Madison Reserve, Madison Heights and Madison Terrace.

11. However, in Exhibit 9 of the application filed by Madison Springs, Borck and Law were listed as owners of TLB Madison Springs, LLC, and PEL Madison Springs, LLC, respectively. Those two entities are the members of Madison Springs Apartments, LLC, the managing member of Madison Springs, Borck and Law are also listed as owners of the two limited liability companies that comprise the members of ARD MT, LLC, the developer identified in Exhibit 9 of the Madison Springs application. However, Exhibits 11 and 53 of the Madison Springs application list CAS Orlando Development, Inc. (CAS Orlando), as the developer for the project. There are obvious errors in the Madison Springs application.

12. Borck and Law had previously held ownership of the entities as set forth in the Madison Springs' Exhibit 9 to its application. However, Borck and Law's ownership interests had been rescinded prior to the filing of the Madison Springs application. The Exhibit 9, filed by Madison Springs, was in error as to Borck and Law's involvement with the project. The Exhibit 9 was also in error as to the developer. The correct developer for Madison Springs is CAS Orlando.

13. In order to correct its error, Madison Springs filed a corrected Exhibit 9 during the cure period. That Exhibit 9 clarified that neither Borck, nor Law, had any ownership interest in or affiliation with Madison Springs or its developer. The cure document was filed with Florida Housing on November 3, 2009. Included within the cure documents were Articles of Amendment to Articles of Organization of Madison Springs. The Articles of Amendment were filed with the Secretary of State on April 13, 2009, some four months prior to filing of applications in the 2009 Universal Cycle. The Articles of Amendment clearly indicate the deletion of Borck and Law from the ownership of Madison Springs.

14. Florida Housing did not accept the cure submitted by Madison Springs concerning Borck and Law's non-affiliation with Madison Springs. The reason stated by Florida Housing's executive director was that when Madison Springs initially filed

its cure documents, it did so under the wrong application number. The documents came in under Application No. 2009-194C, instead of 2009-195C. That mistake was a typographical or clerical error. In fact, Application No. 2009-194C had already been withdrawn prior to the time Madison Springs submitted its cure documents intended for Application No. 2009-195C. Thus, there would have been no reason for cure documents to have been filed for Application No. 2009-194C.

15. The cure documents submitted by Madison Springs included a revised Exhibit 9, as discussed above. Florida Housing at some point realized that the cure documents, including Exhibit 9, actually belonged to the Madison Springs Application (2009-195C), rather than the withdrawn application. However, the cure was still not accepted because it had been filed under the incorrect application number initially. Florida Housing's executive director opined that there was, in effect, no way to cure the error once it had been made. No credible rationale for that position was espoused.

16. Nevertheless, the evidence is clear that the owners of Madison Reserve are not affiliated with Madison Springs and were not affiliated with Madison Springs at the time the applications were filed in the 2009 Universal Cycle. The fact that Madison Springs submitted an Exhibit 9 in its application that was in error, stating that Borck and Law were owners of Madison

Springs, does not independently create a legal ownership interest.

17. Clearly, Madison Springs did not intend to sabotage the application of Madison Reserve. The principals of those entities are friends and have done business together. But the action taken begs the question of whether Florida Housing would allow representations in competing applications to void or undermine another applicant's submission. Florida Housing's executive director spoke frankly at the final hearing and said that sabotage scenarios would have to be looked at, but he did not believe that the instant case was such a scenario.

Project Designation Issue

18. The Madison Reserve application designated its intended project as "Garden Apartments" at page 7 of the application. The site plan form (Exhibit 26 to the application) submitted along with the application refers to the project as a "Garden" development type. In the local government verification form (Exhibit 32) accompanying the application, the development type is listed as "Planned Development Project Multi-Family" (PDP MF). The parties stipulate that "[a]lthough undefined in the Rules, 'Garden Apartments' means multi-family developments, and is considered a term of art within the development and real estate community."¹

19. The project type is an essential part of an application because it puts other applicants on notice as to what their competitors are planning. Further, the project type dictates the kind of zoning that must be available in order to pursue the project. Part and parcel of the designation of project type is the verification by local zoning authority that the proposed site of the project is properly zoned. Applicants must show that the proposed development is appropriately zoned and is consistent with local land use regulations regarding density and intended use or that the proposed development is legally non-conforming.

20. Neither "Garden Apartments," nor "Garden," is a term defined by the rules of Florida Housing, nor is the term used in the Hernando County Zoning Code. When the Hernando County zoning authority submitted its verification of zoning-- Exhibit 32--Garden Apartments was not listed as the development type, because there was no zoning designation in the county for that phrase. Rather, the zoning authority used the term, PDP MF, because it encompasses all permitted uses in the R-3 zoning district for which Madison Reserve's project was to be located. Hernando County recognized Madison Reserve's Garden Apartments as an intended PDP MF, but could not verify it under the name Garden Apartments.

21. Madison Reserve's proposed development is appropriately zoned and is consistent with local land-use regulations regarding density and intended use as required.² Gary Fisher, Hernando County Zoning Authority, provided verification on Madison Reserve's zoning form that the proposed development was properly zoned and that for zoning purposes in Hernando County, the proper development type for Madison Reserve's proposed Garden Apartments would be "Planned Development Project, Multi-Family." In Hernando County, PDP MF would allow for the construction of multi-family developments, such as the Garden Apartments proposed by Madison Reserve.

22. Florida Housing maintains that despite its stipulation to the facts stated above, the Madison Reserve application fails because the application was not properly completed. Specifically, the use of varying terms, such as Garden, Garden Apartments, and PDP-MF, although meant to be the same project by Madison Reserve, were not the exact same wording. There is no dispute as to what the project is meant to be, so the discrepancy is basically form over substance.

CONCLUSIONS OF LAW

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

24. The applicant seeking funding has 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).

25. Florida Administrative Code Rule 67-48.002(100) defines a "related application" as one which is:

[S]ubmitted in the same Funding Cycle that shares one or more Principals or Affiliates of an Applicant or Developer common to any or all of the Principals or Affiliates of an Applicant or Developer in another Application in the same Funding Cycle.

26. "Principal" is then defined in Florida Administrative Code Rule 67-48.002(92) as:

(i) any general partner of an Applicant or Developer, any limited partner of an Applicant or Developer, any manager or member of an Applicant or Developer, any officer, director or shareholder of an Applicant or Developer, (ii) any officer, director, shareholder, manager, member, general partner or limited partner of any general partner and limited partner of an Applicant or Developer, (iii) any officer, director, shareholder, manager, member, general partner or limited partner of any manager or member of an Applicant or Developer, and (iv) any officer, director, shareholder, manager, member, general partner or limited partner of any shareholder of an Applicant or Developer.

27. "Affiliate" is defined in Florida Administrative Code Rule 67-48.002(4) as:

[A]ny person that, (i) directly or indirectly, through one or more

intermediaries, controls, is controlled by, or is under common control with the Applicant or Developer, (ii) serves as an officer or director of the Applicant or Developer or of any Affiliate of the Applicant or Developer, (iii) directly or indirectly receives or will receive a financial benefit from a Development except as further described in Rule 67-48.0075, F.A.C., or (iv) is the spouse, parent, child, sibling, or relative by marriage of a person described in (i), (ii) or (iii) above.

28. As to whether Madison Reserve was related to more than three other applicant entities during the 2009 Universal Cycle, Petitioner met its burden of proof. The applicant was not related to more than three other applicant entities as defined by rule. A third party may not create a legal ownership interest simply by stating that such interest exists.

29. Madison Reserve is entitled to Priority I status in its applications filed in the 2009 Universal Cycle.

30. Florida Administrative Code Rule 67-48.004(14)(g) prohibits an applicant from changing its Development Type after the application deadline. It states in pertinent part:

Notwithstanding any other provision of these rules, there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline. Failure to submit these items in the Application at the time of the Application Deadline shall result in rejection of the Application without opportunity to submit additional information. Any attempted changes to these

items will not be accepted. Those items are as follows:

* * *

(g) Development Type;

31. Although Madison Reserve referred to its Development Type with different words, it did not change the stated Development Type. The Development Type identified in the initial application is essentially the same as that addressed elsewhere in the application package.

32. As to whether the county zoning authority gave its approval for Madison Reserve's project as a Garden Apartment, Garden, or PDP-MF, Petitioner met its burden of proof. The proposed Garden Apartments project is consistent with local land-use regulations for PDP MF as stipulated to by the parties.

33. The "discrepancies" in the application package concerning the Development Type do not mislead Florida Housing or any competing applicant as to Madison Reserve's intent.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by Respondent, Florida Housing Finance Corporation, deeming Petitioner, Madison Reserve, Ltd., 's, application to have met the zoning threshold;

that the application be granted Priority I status; and that the application meets or exceeds all statutory and rule criteria.

DONE AND ENTERED this 9th day of November, 2010, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of November, 2010.

ENDNOTES

- ^{1/} See Joint Prehearing Stipulation, Page 11, Paragraph 4.
^{2/} See Joint Prehearing Stipulation, Page 12, Paragraph 7.

COPIES FURNISHED:

Wellington H. Meffert, II, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

Delia Harrell, Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

Douglas P. Manson, Esquire
Manson Law Group, P.A.
1101 West Swann Avenue
Tampa, Florida 33606-2637

Matthew A. Sirmans, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.