

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

PINNACLE RIO, LLC,

Petitioner,

v.

Case Nos. 14-1398BID
14-1399BID
14-1400BID
14-1428BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ALLAPATTAH TRACE APARTMENTS,
LTD.,

Intervenor.

_____ /

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on June 13, 2014. The matter for consideration before this Board is a recommended order pursuant to Sections 120.57(1) and (3), Fla. Stat. (2013).

After a review of the record and otherwise being fully advised in these proceedings, this Board finds:

On December 13, the Board accepted the recommendations of a staff review committee assigned to evaluate the Applications submitted in response to RFA

2013-003 (the “RFA”), and notified Petitioners and other interested parties of the Board’s intended decision to tentatively award allocations of low-income tax housing tax credits (“Housing Credits”) to Allapattah Trace Apartments, Ltd. (Application #2014-184C) and HTG Miami-Dade 5, LLC (Wagner Creek). Insufficient allocation remained to fund another proposed development in Miami-Dade County. Staff then provided all Applicants with a Notice of Rights pursuant to Sections 120.569, Fla. Stat. (2013).

The Petitioners herein timely filed notices of intent to protest, followed by formal written protests, as required by Section 120.57(3), Florida Statutes (2013). Respondent, Florida Housing Finance Corporation (“Florida Housing”), found that the cases involved disputes of material fact, and forwarded them to the Division of Administrative Hearings (DOAH) for consolidation and formal hearing before an Administrative Law Judge (ALJ).

A formal hearing in these consolidated cases was held on April 22, 29 and 30, 2014, before ALJ F. Scott Boyd. Following the hearing, all parties timely submitted Proposed Recommended Orders. After considering the testimony, evidence and arguments of the parties, the ALJ issued a Recommended Order finding that Florida Housing incorrectly deemed ineligible Application #2014-240C (APC Four Forty Four, Ltd.) for lack of Developer experience, finding that the listed Principal did in fact possess the experience required by the RFA. This finding has no effect on the

status of the Applications previously selected for funding by the Board, and the ALJ affirmed Florida Housing's scoring of the remaining Applications at issue in this case. A copy of the Recommended Order is attached hereto as Exhibit A.

Petitioner Town Center Phase One, LLC ("Town Center") timely filed Exceptions to the Recommended Order (Exhibit B), as did Intervenor Allapattah Trace Apartments, Ltd. ("ATA") (Exhibit C) and Respondent Florida Housing (Exhibit D). ATA also filed a Response to the Exceptions filed by Town Center (Exhibit E).

RULING ON EXCEPTIONS

Exceptions to Findings of Fact

In reviewing a Recommended Order, an agency is not free to re-weight the evidence or to reject findings of fact unless there is *no* competent, substantial evidence to support them. *See Health Care and Retirement Corporation v. Department of Health and Rehabilitative Services*, 561 So.2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Department of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Whether a finding is one of fact or is a conclusion of law is determined by the true nature and substance of the determination or ruling, and not its characterization in the Recommended Order. *J.J. Taylor Companies v. Department of Business and Professional Regulation*, 724 So.2d 192, 193 (Fla. 1st DCA 1999).

Exceptions to Conclusions of Law

An agency is permitted to interpret statutes and administrative rules over which it has substantive jurisdiction and to reject or modify erroneous conclusions of law over which it has substantive jurisdiction. See § 120.57(1)(1), Fla. Stat. (2013). As long as the agency states with particularity the reasons for rejecting an ALJ's conclusion of law and finds that its substituted conclusion is as reasonable, or more reasonable, the agency is not bound by the ALJ's conclusions of law. Sec. 120.57(1)(1), Fla. Stat. (2013). *See also, Harloff v. City of Sarasota*, 575 So.2d 1324, 1328 (Fla. 2d DCA 1991), *review denied*, 583 So.2d 1035 (Fla. 1991).

Town Center's Exceptions

Town Center's Exception 1 disputes Finding of Fact 51 and Conclusion of Law 102. The Exception to Finding of Fact 51 must be rejected, as it is a finding supported by competent, substantial evidence: the testimony of Ken Reecy, Florida Housing's Director of Multifamily Programs. At the final hearing Mr. Reecy testified that issues regarding site plan approval and sewer infrastructure availability were no longer a part of the Application scoring process, and had been moved to the Credit Underwriting phase of development funding. (Tr. 257-258). Accordingly, the Exception to Finding of Fact 51 is rejected. *Heifetz, supra*.

Regarding Conclusion of Law 102, the ALJ concluded that the site plan and sewer availability issues raised against the ATA Application are no longer part of

the Application process. This was the clear intent of Florida Housing in removing the site plan and infrastructure criteria from the RFA, and Applicants were not required to provide information on either of these issues in their Applications, per the terms of the RFA. As found by the ALJ in Conclusion of Law 102, Florida Housing's interpretation of the applicable RFA terms was not clearly erroneous. Accordingly, Town Center's Exception to Conclusion of Law 102 should be rejected.

Town Center's Exception 2 disputes the Findings of Fact 40 and 41 of the Recommended Order, wherein the ALJ finds that the available alternative of a private sewage pump station logically implies that sewer service was available as of Application deadline (40) and that sewer capacity was therefore available for the proposed development through a private pump station (41). Both of these findings of fact are supported by competent, substantial evidence in the form of deposition testimony from a local Miami-Dade Water and Sewer official, Frank Lecanzo (TC Ex. 7, p. 40) and the live testimony of Ken Reecy (Tr. 271-272) as well as exhibits presented by ATA (ATA Ex. 18, 21). With the support of such competent, substantial evidence, the adoption of Findings of Fact 40 and 41 is appropriate and Town Center's Exception 2 is denied.

ATA's Exceptions

ATA's Exception 1 disputes Finding of Fact 34 and part of 50, wherein the ALJ found that the criteria present on the sewer form presented during Credit Underwriting are also criteria for the RFA, because the forms are incorporated by reference. The Board finds that these Findings of Fact are more appropriately deemed Conclusions of Law. *J.J. Taylor Companies v. Department of Business and Professional Regulation*, 724 So.2d 192, 193 (Fla. 1st DCA 1999). As such, they may be changed by the Board, as this issue lies within its substantive jurisdiction (the interpretation of its own rules). *Harloff v. City of Sarasota*, 575 So.2d 1324, 1328 (Fla. 2d DCA 1991), *review denied*, 583 So.2d 1035 (Fla. 1991).

The Board finds there is no competent, substantial evidence to support a finding of fact or conclusion of law that the Certification of Sewer Capacity Form was incorporated into the RFA. As noted by ATA, "sewer" only appears in two places in the RFA: in the Applicant Certification (where no mention of the form is made) and in Item 13 of Exhibit C, which requires submission of either the form or a "sewer letter" during Credit Underwriting and mentions the form. In neither place is the form incorporated by reference, and a mere reference to a second document does not incorporate that document by reference absent an express intent to do so. *Kanter v. Boutin*, 624 So.2d 779, 781 (Fla. 4th DCA 1993). ATA's Exception to Findings of Fact 34 and 50 is granted, and these findings are modified by the Board

as set forth below. The granting of this Exception and change to the Recommended Order described above will not affect the overall result of the proceedings nor change the funding selection originally approved by the Board.

ATA's Exception 2 is identical to Florida Housing's sole Exception, and disputes part of Conclusion of Law 102, specifically the ALJ's characterization of Credit Underwriting as "part of a bifurcated and extended selection process." Credit Underwriting is not part of Florida Housing's "selection process", but is a separate process to perform a more detailed analysis of proposed Developments already selected for funding. Credit underwriting is a separate and different process from the Application/selection process. The solicitation, Application and selection parts of the funding process are governed by Fla. Admin. Code R. 67-60, and addresses whether projects facially meet certain minimum criteria for funding. Credit Underwriting is governed by a separate rule chapter, 67-48, wherein the feasibility and viability of projects previously selected for funding are reviewed. Farther along in the funding process, financing transactions are closed, and yet farther, projects are monitored for compliance with the terms of the funding provided. As this is an issue within the substantive jurisdiction of the Board, it grants this exception and substitutes its own Conclusion of Law as set forth below. The granting of this Exception will not affect the overall result of the proceedings nor change the funding selection originally approved by the Board.

Florida Housing's Exception

Identically to ATA's Exception 2, Florida Housing disputes that part of Conclusion of Law 102 which conflates the Application process with Credit Underwriting, and adopts and sets forth the argument for granting ATA's Exception 2 as fully set forth herein. The Board therefore modifies the ALJ's Conclusion of Law 102 to more accurately reflect the status of the Credit Underwriting phase of the funding process, by striking "a bifurcated and extended selection" and inserting "the funding," as set forth below. The granting of this Exception and change to the Recommended Order described above will not affect the overall result of the proceedings nor change the funding selection originally approved by the Board.

RULING ON THE RECOMMENDED ORDER

The Board finds that the findings of fact and the conclusions of law of the Recommended Order are reasonable and appropriate under the circumstances.

ORDER

In accordance with the foregoing, it is hereby found and ordered:

1. Town Center's Exceptions 1 and 2 are **DENIED** for the reasons stated above.

2. ATA's Exception 1 is **GRANTED** for the reasons stated above. Paragraph 34 of the Recommended Order is deleted in its entirety, and the last sentence of paragraph 50 is deleted.

3. The remaining findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

4. ATA's Exception 2 and Florida Housing's Exception are **GRANTED**. The Conclusion of Law in paragraph 102 is deleted in its entirety and replaced with the following:

102. Here, while the credit underwriting phase is part of the funding process rather than a performance issue, FHFC similarly interprets its specifications and rules as requiring ATA to demonstrate ability to proceed, not at the time of application, but only later, during the credit underwriting phase. The specifications' requirement that an applicant must acknowledge and certify at the time of application that it will later provide certifications within 21 days of the invitation to enter credit underwriting of the status of site plan approval and the availability of sewer service to the development as of the application deadline is certainly confusing, but the Corporation's interpretation is not clearly erroneous.

5. The remaining conclusions of law of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

3. The Recommendation of the Recommended Order is adopted.

Accordingly, it is found and **ORDERED** that Applications 2014-184C (Allapattah Trace Apartments, Ltd.) and 2014-239C (HTG Miami-Dade 5, LLC) are selected for funding under RFA 2013-003, subject to the requirements of Credit Underwriting, and that all relief requested in the Petitions is **DENIED**.

DONE and ORDERED this 13th day of June, 2014.



FLORIDA HOUSING FINANCE CORPORATION

By: 
Chair

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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, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, 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.