**STATE OF FLORIDA**
**FLORIDA HOUSING FINANCE CORPORATION**

ELMWOOD TERRACE LIMITED PARTNERSHIP,

Petitioner,

v.

FHFC CASE NO.: 2010-020GA
DOAH CASE NO.: 10-1975

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

**FINAL ORDER**

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on December 10, 2010. The matter for consideration before this Board is a recommended order pursuant to Section 120.57(1), Florida Statutes, and Rule 28-106, Florida Administrative Code.

Petitioner timely filed its Petition for Administrative Hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes, (the "Petition") challenging Florida Housing's recission of Exchange funding. Florida Housing reviewed the Petition pursuant to Section 120.569(2)(c), Florida Statutes, and determined that the Petition raised disputed issues of material fact. Pursuant to Section 120.57(1), Florida Statutes, a formal hearing was held in this case on June 14 through 16 and

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Della M Harrell /DATE: 12/13/2010

22, 2010, in Tallahassee, Florida, before Administrative Law Judge William F. Quattlebaum of the Division of Administrative Hearings (DOAH). Petitioner and Florida Housing timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge (ALJ) issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ recommended that Florida Housing issue a Final Order denying Petitioner's application for Exchange funding.

Pursuant to Section 120.57(1)(k), Florida Statutes, Petitioner timely filed "Petitioners Exceptions to the Recommended Order" (hereinafter "Exceptions"), a copy of which is attached hereto as "Exhibit B" and made a part hereof by reference. Florida Housing subsequently filed its "Response to Petitioners Exceptions to Recommended Order" (hereinafter "Response"), a copy of which is attached hereto as "Exhibit C."

After a review of the entire record in this proceeding, the Board makes the following findings and rulings:

## RULING ON PETITIONER'S EXCEPTIONS

1. The section of the Exceptions entitled "Background", which includes argument against the Recommended Order, does not specifically address enumerated findings of fact or conclusions of law, and cannot be considered by

this Board as exceptions under Section 120.57(1)(k), Florida Statutes. Accordingly, this Board specifically rejects the assertions and arguments presented in this section.

2. The section of the Exceptions entitled "General Objections", which includes argument against the Recommended Order, does not specifically address enumerated findings of fact or conclusions of law, and cannot be considered by this Board as exceptions under Section 120.57(1)(k), Florida Statutes. Accordingly, this Board specifically rejects the assertions and arguments presented in this section.

3. Petitioner takes exception to the finding of fact in paragraph 10 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

4. Petitioner takes exception to the finding of fact in paragraph 17 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

5. Petitioner takes exception to the finding of fact in paragraph 21 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

6. Petitioner takes exception to the finding of fact in paragraph 24 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

7. Petitioner takes exception to the finding of fact in paragraph 50 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

8. Petitioner takes exception to the finding of fact in paragraph 64 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

9. Petitioner takes exception to the finding of fact in paragraph 66 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

10. Petitioner takes exception to the finding of fact in paragraph 68 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

11. Petitioner takes exception to the finding of fact in paragraph 74 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

12. Petitioner takes exception to the finding of fact in paragraph 81 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

13. Petitioner takes exception to the finding of fact in paragraph 83 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

14. Petitioner takes exception to the finding of fact in paragraph 85 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

15. Petitioner takes exception to the finding of fact in paragraph 87 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

16. Petitioner takes exception to the finding of fact in paragraph 88 of the Recommended Order. The Board finds that this finding of fact is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

17. Petitioner takes exception to the conclusion of law (misidentified in the Exceptions as a finding of fact) in paragraph 97 of the Recommended Order. The Board finds that this conclusion of law is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

18. Petitioner takes exception to the conclusion of law in paragraph 98 of the Recommended Order. The Board finds that this conclusion of law is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

19. Petitioner takes exception to the conclusion of law in paragraph 101 of the Recommended Order. The Board finds that this conclusion of law is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

20. Petitioner takes exception to the conclusion of law in paragraph 103 of the Recommended Order. The Board finds that this conclusion of law is based on competent, substantial evidence and specifically rejects Petitioner's exceptions thereto based on the testimony and evidence in the record and Florida Housing's Response.

## RULING ON THE RECOMMENDED ORDER

21. The findings of fact set out in the Recommended Order are supported by competent substantial evidence.

22. The conclusions of law in the Recommended Order are supported by competent substantial evidence.

## ORDER

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

23. The 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.

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

**IT IS HEREBY ORDERED** that Florida Housing's recission of funding to Petitioner is **AFFIRMED** and the relief requested in the Petition is **DENIED**.

**DONE and ORDERED** this ***10th*** day of December, 2010.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

Wellington H. Meffert II, General Counsel
Hugh R. Brown, Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Kevin Tatreau
Director of Multifamily Development Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

J. Stephen Menton, Esquire
Rutledge, Ecenia and Purnell, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
Telephone: (850) 681-6788
Facsimile: (850) 681-6515

## 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 MARTIN LUTHER KING, JR., BLVD., 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.**

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

| | | |
|---|---|---|
| ELMWOOD TERRACE LIMITED PARTNERSHIP, | ) | |
| Petitioner, | ) | |
| vs. | ) | Case No. 10-1975 |
| FLORIDA HOUSING FINANCE CORPORATION, | ) | |
| Respondent. | ) | |

RECOMMENDED ORDER

On June 14 through 16 and 22, 2010, a formal administrative hearing was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: J. Stephen Menton, Esquire
Rutledge, Ecenia, & Purnell, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32302

For Respondent: Hugh R. Brown, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

STATEMENT OF THE ISSUE

In 2009, Elmwood Terrace Limited Partnership (Petitioner) filed an application with the Florida Housing Finance

Corporation (Respondent), seeking funding to develop an affordable housing apartment complex in Ft. Myers, Florida. The Respondent denied the application. The issue in this case is whether the Petitioner's application should have been granted.

PRELIMINARY STATEMENT

In 2007, the Petitioner first proposed to develop an affordable housing apartment complex in Ft. Myers, Florida. After completion of an evaluation and approval process, the Respondent awarded federal tax credits to the Petitioner. The Petitioner intended to sell the tax credits for cash, but there were no buyers, and the tax credits were of little value to the Petitioner. Other affordable housing developers found themselves in similar circumstances.

In 2009, the federal government provided an alternative affordable housing funding mechanism that required the exchange of the unmarketable tax credits for cash at a discounted rate. The federal tax credits issued by the Respondent to the Petitioner as well as other developers were returned by the Respondent to the federal government and exchanged for the discounted cash.

The Respondent thereafter issued a Request for Proposal to allocate the cash, and, after the resolution of related litigation addressed herein, the Petitioner participated in the allocation process. Ultimately, the Respondent denied the

Petitioner's funding request based on a second analysis of the Petitioner's development proposal.

By Petition for Hearing dated March 29, 2010, the Petitioner challenged the denial. The Respondent forwarded the Petition for Hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

On June 10, 2010, the parties filed a Joint Pre-hearing Stipulation that included a statement of stipulated facts. The stipulated facts have been incorporated as necessary into this Recommended Order and are otherwise adopted in their entirety.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits 3 through 5, 7 through 13, 15, 16, 18, 19, 22, 23, 25 through 28, 31 through 36, 39, 42 through 44, 53 through 55, 58, 59, 61, 63, and 70 through 72 admitted into evidence. The Respondent presented the testimony of three witnesses and had two exhibits admitted into evidence. Joint Exhibits 1, 2, and 4 through 12 were also admitted into evidence.

The six-volume Transcript of the hearing was filed on June 29, 2010. The final volume of the Transcript (the rebuttal testimony of Robert Vogt) was filed on July 8, 2010.

All parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

On May 21, 2010, the Petitioner filed a Petition for Administrative Determination of Invalidity of Existing Rule (DOAH Case No. 10-2799RX) that was consolidated for hearing with the instant proceeding. The rule challenge is addressed by a separate Final Order issued contemporaneously with this Recommended Order.

## FINDINGS OF FACT

1. The Petitioner is a limited partnership and developer of affordable housing in Florida. The Petitioner is seeking to construct a 116-unit affordable housing family apartment complex ("Elmwood Terrace") in Fort Myers, Lee County, Florida. The Petitioner has standing to initiate and participate in this proceeding.

2. The Respondent is a public corporation organized under Chapter 420, Florida Statutes (2010), to administer state programs that provide financial support to developers seeking to construct affordable housing. Such support is provided through a variety of mechanisms, including the use of federal tax credits.

3. The federal tax credit program was created in 1986 to promote the construction and operation of privately-developed affordable housing. The tax credits relevant to this proceeding provide a dollar-for-dollar credit against federal tax liabilities for a period of ten years.

4. The Respondent is the designated Florida agency responsible for distribution of the federal tax credits. The tax credits are awarded pursuant to a "Qualified Allocation Plan" (QAP) that must be annually approved by the Governor and adopted as an administrative rule by the Respondent.

5. As a matter of course, developers receiving the federal tax credits sell them through syndicators for discounted cash. The sale of the tax credits generates debt-free cash equity for developers.

6. Developers seeking financial support to build affordable housing units submit applications to the Respondent during an annual competitive process known as the "Universal Cycle."

7. Every three years, the Respondent commissions a study (the "Shimberg Report"), which measures, within each Florida county, the number of "cost-burden" renters earning 60 percent or less of an area's median income (AMI) who pay more than 40 percent of their income in rent. The AMI is determined by the federal government. The cost-burden households are further classified into four groups: families, the elderly, farm workers, and commercial fishermen. The Shimberg Report also assesses needs related to homeless people in the state.

8. Developers seeking to obtain affordable housing financing are required to set aside a portion of the proposed

units for income-limited residents. Access to affordable housing units is generally targeted towards persons receiving no more than 60 percent of the AMI.

9. The Universal Cycle process allows the Respondent to target specific housing deficiencies in terms of geographic availability and population demographics and to preserve the stock of existing affordable housing.

10. During the Universal Cycle process, the Respondent identifies areas where additional affordable housing is unnecessary, to discourage additional development in weak markets and to encourage development in those locations where there is a lack of access to affordable housing. The Respondent classifies areas where there is little need for additional affordable housing as "Location A" areas.

11. Each application filed during the Universal Cycle is evaluated, scored, and competitively ranked against other applications filed during the same Universal Cycle.

12. After the Respondent completes the competitive ranking of the applications submitted in the Universal Cycle, the applicants are provided with an opportunity to review and comment on the evaluation and scoring of the proposals. Applicants may also cure defects in their own proposals.

13. After the close of the review and comment period, the Respondent publishes a revised competitive ranking of the

proposals. Developers may challenge the second ranking through an administrative hearing.

14. After the second ranking process is final, developers achieving an acceptable score receive preliminary funding commitments and proceed into a "credit underwriting" evaluation process.

15. The credit underwriting process is governed by Florida Administrative Code Rule 67-48.0072. The Respondent selects an independent credit underwriter who reviews each proposal according to requirements set forth by administrative rule (the "Credit Underwriting Rule"). The cost of the credit underwriting review is paid by the developer.

16. The credit underwriter considers all aspects of the proposed development, including financing sources, plans and specifications, cost analysis, zoning verification, site control, environmental reports, construction contracts, and engineering and architectural contracts. The responsibility for the market study is assigned by the credit underwriter to an independent market analyst.

17. The credit underwriter prepares a report for each applicant invited into the process. The reports are submitted to the Respondent's nine-member, statutorily-created Board of Directors (Board). The Board approves or denies each application for financial support.

18. The Petitioner applied for funds for the Elmwood Terrace project during the 2007 Universal Cycle.

19. The Petitioner's application received a perfect score, maximum points, and was allocated tax credits in the amount of $1,498,680. The Petitioner thereafter entered the credit underwriting process.

20. The credit underwriting analysis was performed by Seltzer Management Group (SMG). SMG contracted with a market analyst, Vogt, Williams & Bowen Research, Inc. (VWB), to prepare the required market study.

21. The affordable units at Elmwood Terrace were initially intended for persons receiving incomes no more than 60 percent of the AMI. The VWB research indicated that the Elmwood Terrace project would adversely affect the existing affordable housing developments, if the Elmwood Terrace units were available to the 60 percent AMI population.

22. The existing affordable housing developments, also serving the 60 percent AMI population, included two developments that had participated in the Respondent's "Guarantee Fund" program, addressed elsewhere herein.

23. VWB determined that the impact of the Elmwood Terrace project on the existing developments could be ameliorated were some of the Elmwood Terrace units targeted during "lease-up" to persons at income levels of not more than 50 percent of the AMI.

The lease-up period is the time required for a new development to reach anticipated occupancy levels.

24. The issue was the subject of discussions between the Petitioner, VWB, and SMG. To resolve the anticipated negative impact on the existing affordable housing developments, the Petitioner agreed to target the 50 percent AMI population.

25. In September 2008, the credit underwriter issued his report and recommended that the Petitioner receive the previously-allocated tax credits. On September 22, 2008, the Respondent's Board accepted the credit underwriting report and followed the recommendation.

26. In the fall of 2008, after the Petitioner received the tax credits, the nation's economic environment deteriorated considerably. As a result, the syndicator with whom the Petitioner had been working to sell the tax credits advised that the sale would not occur. The Petitioner was unable to locate an alternate purchaser for the tax credits.

27. The Petitioner considered altering the target population of the project in an attempt to attract a buyer for the tax credits, and there were discussions with the Respondent about the option, but there was no credible evidence presented that such an alteration would have resulted in the sale of the Petitioner's tax credits.

28. Lacking a buyer for the tax credits, the Petitioner was unable to convert the credits to cash, and they were of little value in providing funds for the project.

29. The Petitioner was not alone in its predicament, and many other developers who received tax credits in the 2007 and 2008 Universal Cycles found themselves unable to generate cash through the sale of their tax credits.

30. In early 2009, Congress adopted the American Recovery and Reinvestment Act of 2009 (PL 111-5), referred to herein as ARRA, which incorporated a broad range of economic stimulus activities.

31. Included within the ARRA was the "Tax Credit Exchange Program" that provided for the return by the appropriate state agency of a portion of the unused tax credits in exchange for a cash distribution of 85 percent of the tax credit value.

32. The State of Florida received $578,701,964 through the Tax Credit Exchange Program.

33. The ARRA also provided additional funds to state housing finance agencies through a "Tax Credit Assistance Program" intended to "resume funding of affordable housing projects across the nation while stimulating job creation in the hard-hat construction industry."

34. On July 31, 2009, the Respondent issued a Request for Proposals (RFP 2009-04) to facilitate the distribution of the ARRA funds.

35. The Respondent issued the RFP because the 2009 QAP specifically required the Respondent to allocate the relevant federal funds by means of a "competitive request for proposal or competitive application process as approved by the board." The 2009 QAP was adopted as part of the 2009 Universal Cycle rules.

36. Projects selected for funding through the RFP would be evaluated through the routine credit underwriting process.

37. Participation in the RFP process was limited to developers who held an "active award" of tax credits as of February 17, 2009, and who were unable to close on the sale of the credits.

38. The RFP included restrictions against proposals for development within areas designated as "Location A."

39. Although the location of the Elmwood Terrace project had not been within an area designated as "Location A" during the 2007 Universal Cycle process, the Respondent had subsequently designated the area as "Location A" by the time of the 2009 Universal Cycle.

40. The RFP also established occupancy standards for projects funded under the RFP that exceeded the standards established in the Universal Cycle instructions and an

evaluation process separate from the Universal Cycle requirements.

41. Although the restrictions in the RFP would have automatically precluded the Petitioner from being awarded funds, the Petitioner submitted a response to the RFP and then filed a successful challenge to the RFP specifications (DOAH Case No. 09-4682BID).

42. In a Recommended Order issued on November 12, 2009, the Administrative law Judge presiding over the RFP challenge determined that certain provisions of the RFP, including the automatic rejection of Location A projects, the increased occupancy standards, and the RFP evaluation criteria, were invalid.

43. The Respondent adopted the Recommended Order by a Final Order issued on December 4, 2009, and invited the Petitioner into the credit underwriting process by a letter dated December 9, 2009.

44. The credit underwriter assigned to analyze the Petitioner's project was SMG, the same credit underwriter that performed the original analysis of the Petitioner's project during the 2007 Universal Cycle.

45. SMG retained Meridian Appraisal Group, Inc. (Meridian), to prepare the required market study.

46. The Respondent was not consulted regarding the SMG decision to retain Meridian for the market analysis. The decision to retain Meridian for the market analysis was entirely that of SMG.

47. The Respondent did not direct SMG or Meridian in any manner regarding the assessment or evaluation of any negative impact of the proposed project on existing affordable housing developments.

48. Meridian completed the market study and forwarded it to SMG on January 26, 2010.

49. The Meridian market analysis included a review of the relevant data as well as consideration of the actual economic conditions experienced in Lee County, Florida, including the extremely poor performance of the existing housing stock, as well as significant job losses and considerable unemployment.

50. The Meridian market analysis determined that the Elmwood Terrace development would have a negative impact on two existing affordable housing apartment developments that were underwritten by the Respondent through a Guarantee Fund created at Section 420.5092, Florida Statutes, by the Florida Legislature in 1992.

51. The existing Guarantee Fund properties referenced in the SMG recommendation are "Bernwood Trace" and "Westwood," both

family-oriented apartment developments within five miles of the Elmwood Terrace location.

52. The Guarantee Fund essentially obligates the Respondent to satisfy mortgage debt with the proceeds of Florida's documentary stamp taxes, if an affordable housing development is unable to generate sufficient revenue to service the debt.

53. Because the Guarantee Fund program essentially serves to underwrite the repayment of mortgage debt for a "guaranteed" affordable housing development, the program increases the availability, and lowers the cost, of credit for developers.

54. The Guarantee Fund program has participated in the financing of more than 100 projects, most of which closed between 1999 and 2002.

55. Since 2005, the Respondent has not approved any additional Guarantee Fund participation in any affordable housing developments.

56. The Respondent's total risk exposure through the Guarantee Fund is approximately 750 million dollars.

57. Prior to October 2008, no claims were made against the Guarantee Fund. Since November 2008, there have been eight claims filed against the Guarantee Fund.

58. Affordable housing financing includes restrictions that mandate the inclusion of a specific number of affordable

housing units. Such restrictions are eliminated through foreclosure proceedings, and, accordingly, access to affordable housing units can be reduced if a development fails.

59. Presuming that the eight claims pending against the Guarantee Fund eventually proceeded through foreclosure, as many as 2,300 residential units could be deducted from the stock of affordable housing.

60. When there is a claim on the Guarantee Fund, the Respondent has to assume payment of the mortgage debt. The claims are paid from the Guarantee Fund capital, which is detrimental to the Respondent's risk-to-capital ratio. The risk-to-capital ratio is presently four to one. The maximum risk-to-capital ratio acceptable to rating agencies is five to one.

61. The eight claims against the Guarantee Fund have ranged between ten and 18 million dollars each. The Respondent's bond rating has declined because of the eight claims.

62. A continued decline in the Respondent's bond rating could result in documentary stamp tax receipts being used for payment of Guarantee Fund claims and directed away from the Respondent's programs that are intended to support the creation of affordable housing.

63. In an effort to prevent additional claims against the Guarantee Fund, the Respondent has created the "Subordinate Mortgage Initiative" to provide assistance in the form of two-year loans to troubled Guarantee Fund properties.

64. When preparing the 2010 market study, Meridian did not review the VWB market analysis performed as part of the 2007 application. Although the Petitioner has asserted that Meridian should have reviewed the 2007 VWB analysis, there is no evidence that Meridian's decision to conduct an independent market study without reference to the prior market review was inappropriate.

65. On February 8, 2010, SMG issued a recommendation that the Petitioner's funding request be denied "because of the proposed development's potential financial impacts on developments in the area previously funded by Florida Housing and an anticipated negative impact to the two Guarantee Fund properties located within five miles of the proposed development."

66. There is no evidence that the Meridian analysis was inadequate or improperly completed. There is no evidence that the SMG's reliance on the Meridian analysis was inappropriate. For purposes of this Order, the Meridian analysis and the SMG credit underwriting report have been accepted.

67. Elmwood Terrace, a newer development with newer amenities, would compete for residents with the Bernwood Trace and Westwood developments.

68. The financing for Bernwood Trace and Westwood was premised on projections that the affordable housing units would be leased to the 60 percent AMI population; however, the developments have been unable to maintain full occupancy levels, even though a number of units in the two properties are leased at reduced rates based on 50 percent AMI income levels.

69. A rent reduction implemented by an existing development, whether based on economic conditions or resulting from competition, constitutes a negative impact on the development.

70. There is no credible evidence that the occupancy rates are attributable to any difficulty in management of the two developments. It is reasonable to conclude that the leasing issues are related to economic conditions present in Lee County, Florida.

71. In January 2010, VWB conducted an alternative market analysis. The VWB analysis was not provided to SMG or to the Respondent at any time during the credit underwriting process.

72. Based on the 2010 VWB analysis, the Petitioner asserted that economic conditions in Lee County, Florida, have improved since the first credit underwriting report was

completed in 2008 and that the improvement is expected to continue.

73. There is no noteworthy evidence that economic conditions have improved or will significantly improve in the Lee County, Florida, market in the predictable future, and the VWB analysis is rejected.

74. The Petitioner offered to mitigate any negative impact on the Guarantee Fund properties by committing affordable units to 50 percent AMI income levels. Given the existing economic and rental market conditions in Lee County, Florida, the evidence fails to establish that the offer would actually alleviate the negative impact on the affected Guarantee Fund developments.

75. The 2010 VWB analysis states that there is substantial unmet demand for housing at 50 percent AMI and that there will be no impact on the Guarantee Fund units if the Elmwood Terrace units were set aside for such individuals. There is no credible evidence that there is a substantial and relevant unmet affordable housing demand in Lee County, Florida. The VWB analysis is rejected.

76. Following the completion of each annual Universal Cycle process, the Respondent actively solicits feedback from developers and the public and then amends the Universal Cycle requirements to address the issues raised, as well as to reflect

existing affordable housing needs and general concerns of the Board. The amendments are applicable for the following Universal Cycle.

77. In 2009, the Respondent amended subsection (10) of the Credit Underwriting Rule as part of the annual revisions to the Universal Cycle process.

78. The relevant amendment (referred to by the parties as the "Impact Rule") added this directive to the credit underwriter:

> The Credit Underwriter must review and determine whether there will be a negative impact to Guarantee Fund Developments within the primary market area or five miles of the proposed development, whichever is greater.

79. The amendment was prompted by the Respondent's experience in the fall of 2008 when considering two separate applications for affordable housing financing. The potential negative impact of a proposed development on an existing Guarantee Fund property was central to the Board's consideration of one application, and the Board ultimately denied the application. In the second case, the Board granted the application, despite the potential negative impact on a competing development that was not underwritten by the Guarantee Fund.

80. The intent of the language was to advise developers that the existence of Guarantee Fund properties within the

competitive market area would be part of the credit underwriting evaluation and the Board's consideration.

81. Notwithstanding the language added to the rule, the credit underwriter is charged with reviewing the need for additional affordable housing. Even in absence of the added language, consideration of any negative impact to competing developments based on inadequate need for additional affordable housing would be appropriate.

82. In rendering the 2010 credit underwriting report on Elmwood Terrace, the credit underwriter complied with the directive.

83. Prior to determining that the Petitioner's funding application should be denied, the Respondent's Board was clearly aware of the Petitioner's application, the credit underwriting report and market analysis, and the economic conditions in Lee County, Florida.

84. There is no credible evidence of any need for additional affordable housing in Lee County, Florida.

85. There is no credible evidence that the Lee County, Florida, market can sustain the addition of the units proposed by the Petitioner without adversely affecting the financial feasibility of the existing Guarantee Fund developments.

86. The Board was aware that the Elmwood Terrace development could attract residents from the nearby Guarantee

Fund properties and that local economic conditions threatened the financial viability of the properties.

87. Given current economic conditions, approval of the application at issue in this proceeding would reasonably be expected to result in a negative impact to existing affordable housing developments.

88. The protection of Guarantee Fund developments is necessary to safeguard the resources used to support the creation and availability of affordable housing in the state.

CONCLUSIONS OF LAW

89. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

90. All parties identified herein have standing to participate in this proceeding.

91. The applicant for the funding at issue in this proceeding has the burden of establishing entitlement to the requested funds by a preponderance of the evidence. Florida Dept. of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981). In this case, the burden has not been met.

92. The issue in this case is whether the Petitioner's application for funding should be approved. The Petitioner also has asserted that the Respondent acted in a manner contrary to law when determining that the Petitioner would not be awarded

funds provided by the federal government in 2009 through the programs referenced herein.

93. The evidence fails to establish that the Petitioner's application for funding should be approved. The evidence further fails to establish that the Respondent's decision not to fund the Petitioner's affordable housing development was contrary to law or otherwise inappropriate.

94. Florida Administrative Code Rule 67-48.0072 provides, in relevant part, as follows:

> 67-48.0072 Credit Underwriting and Loan Procedures.
>
> The credit underwriting review shall include a comprehensive analysis of the Applicant, the real estate, the economics of the Development, the ability of the Applicant and the Development team to proceed, the evidence of need for affordable housing in order to determine that the Development meets the program requirements and determine a recommended SAIL or HOME loan amount, Housing Credit allocation amount or a combined SAIL loan amount and Housing Credit Allocation amount, if any. Corporation funding will be based on appraisals of comparable developments, cost benefit analysis, and other documents evidencing justification of costs. As part of the credit underwriting review, the Credit Underwriter will consider the applicable provisions of Rule Chapter 67-48, F.A.C.
>
> * * *
>
> (5) The Credit Underwriter shall verify all information in the Application, including information relative to the Applicant, Developer, Housing Credit Syndicator,

General Contractor, and, if an ALF, the service provider(s), as well as other members of the Development team.

* * *

(10) A full or self-contained appraisal as defined by the Uniform Standards of Professional Appraisal Practice and a separate market study shall be ordered by the Credit Underwriter, at the Applicant's expense, from an appraiser qualified for the geographic area and product type not later than completion of credit underwriting. The Credit Underwriter shall review the appraisal to properly evaluate the proposed property's financial feasibility. Appraisals which have been ordered and submitted by third party credit enhancers, first mortgagors or Housing Credit Syndicators and which meet the above requirements and are acceptable to the Credit Underwriter may be used instead of the appraisal referenced above. The market study must be completed by a disinterested party who is approved by the Credit Underwriter. The Credit Underwriter shall consider the market study, the Development's financial impact on Developments in the area previously funded by the Corporation, and other documentation when making its recommendation of whether to approve or disapprove a SAIL or HOME loan, a Housing Credit Allocation, or a combined SAIL loan and Housing Credit Allocation or Housing Credit Allocation and HOME loan. The Credit Underwriter must review and determine whether there will be a negative impact to Guarantee Fund Developments within the primary market area or five (5) miles of the proposed Development, whichever is greater. The Credit Underwriter shall also review the appraisal and other market documentation to determine if the market exists to support both the demographic and income restriction set-asides committed to within the Application. For the Credit Underwriter to

> make a favorable recommendation, the submarket of the proposed Development must have an average occupancy rate of 90 percent or greater.

95. The evidence establishes that both the credit underwriter and the Board complied with all applicable requirements.

96. The credit underwriter considered all of the required elements of the Credit Underwriting Rule in rendering his evaluation to the Board.

97. The Board was fully aware of the Petitioner's application, the credit underwriting report and market analysis, the local economic conditions, and the potential adverse impact to the Guarantee Fund properties presented by addition of unnecessary additional housing into the market.

98. There is no credible evidence that there is need for additional affordable housing in the Lee County, Florida, market. The location of the Petitioner's proposed development is within an area with a "Location A" designation, indicating that the market will not support the development of additional affordable housing at this time. There was no credible evidence that economic conditions have improved in the area since the "Location A" designation was assigned. There is no credible evidence that the designation of the relevant area as "Location A" was inappropriate.

99. The Petitioner suggests that application of the "Impact Rule" is legally inappropriate in this case. It should be noted that the challenged provision does nothing more than direct the credit underwriter to review the competitive circumstances of a proposed development and to determine the impact of the proposed development on any existing affordable housing projects to which the Respondent has a potential and substantial financial obligation.

100. The language does not require the credit underwriter to recommend against a proposed development that would have a "negative impact" on an existing Guarantee Fund project; likewise, the rule does not require that the Respondent's Board deny funds to such a proposed development. Absent the cited provision, the credit underwriter could properly have considered the same factors under the remaining language of the Credit Underwriting Rule, which requires that the credit underwriter's review include a comprehensive analysis of the applicant, the real estate, the economics of the project, the ability of the applicant and developer to proceed, and the evidence of need for affordable housing.

101. To some extent, the Petitioner has also suggested that because the project was approved for funding as part of the 2007 Universal Cycle, the Respondent must grant the 2009 application and award the funds that were received by

the Respondent during the exchange of what were the Petitioner's unmarketable tax credits. Such a result is not required by law and is not supported by the evidence.

102. Had the Tax Credit Exchange Program been intended merely as a pass-through of cash to the holders of the previously-unmarketable tax credits, there would have been no reason to implement an RFP process or to subject the proposals to an additional credit underwriting review.

103. The Respondent's initial decision to fund the Petitioner's project was rendered under the economic circumstances existing at that time. Had the federal government not agreed to provide cash in exchange for the tax credits held by the Petitioner and other developers, there would have apparently been no financing available for continued affordable housing development. However, nothing in the exchange program required the funds to be returned directly to the developers who previously held the tax credits. Logically, the rationale for implementing an RFP and for requiring developers to submit to a second credit underwriting review would be to permit re-evaluation of the proposed developments with regard to the decline in economic conditions. It would also be logical to presume that such a re-evaluation could result in a different result.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order denying the application for funding filed by Elmwood Terrace Limited Partnership.

DONE AND ENTERED this 6th day of October, 2010, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 6th day of October, 2010.

COPIES FURNISHED:

Hugh R. Brown, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

J. Stephen Menton, Esquire
Rutledge, Ecenia, & Purnell, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32302

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

Della Harrell, Corporation Clerk
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.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELMWOOD TERRACE LIMITED
PARTNERSHIP,

Petitioner,

vs. Case No. 10-1975

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

_____/

**PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER**

Pursuant to Section 120.57(1)(k), Florida Statutes, Petitioner, ELMWOOD TERRACE LIMITED PARTNERSHIP ("Elmwood"), hereby submits the following exceptions to the Recommended Order ("RO") entered by Administrative Law Judge William F. Quattlebaum(the "ALJ") on October 6, 2010.

**Background**

This case involves a challenge to Florida Housing's decision to deny federal stimulus funding to Elmwood and to rescind an allocation of federal low income housing tax credits previously awarded to the development. The case arose following the Board's adoption of a recommendation from Seltzer Management, Inc. ("Seltzer") in a market study review letter

dated February 28, 2010. Elmwood filed a Petition for Administrative Hearing (the "Petition") challenging the denial of its request for federal stimulus funding and the recission of the tax credits. The Petition alleged the denial was based on incomplete, irrelevant or erroneous facts and assumptions, was inconsistent with the analysis and approval of other applications seeking federal stimulus funding and was based on the incorrect or improper application of Rule 67-48.0072(10), Fla. Admin. Code (the "Credit Underwriting Rule").

The Petition was referred to the Division of Administrative Hearings ("DOAH") for a formal administrative hearing pursuant to Section 120.569 and 120.57(1), Florida Statutes (2009).[1] The RO was entered by the ALJ following completion of an evidentiary hearing. As set forth below, the RO includes erroneous and incorrect findings and conclusions and the RO fails to fully address all of the evidence presented. [2]

By way of background, Elmwood submitted an application in the 2007 Universal Cycle seeking an award of Tax Credits to construct a 116 unit family apartment in Lee County, Florida. After receiving its allocation of Tax Credits, Elmwood paid the required credit underwriting fee and began to prepare for closing. As part of the credit underwriting process for the tax

[1] All references to Florida Statutes are to the 2009 version unless otherwise noted.
[2] Citations to the transcript will include the page number as follows: (T. ___). Citations to the Joint Exhibits listed in the Prehearing Stipulation will be made as (Jt. Ex. ___); citations to Elmwood's Exhibits will be made as (Elm. Ex. ___); Exhibits of Florida Housing will be cited as (Fla. H. Ex. ___)

credit award, a market study was commissioned to evaluate market conditions and to determine the impact the proposed development would have on existing affordable housing developments in the area. At the time Elmwood received its award of tax credits, the proposed development was not located in a Location A.

The market study prepared for Elmwood in connection with the tax credit award concluded that there were some potential issues or concerns with respect to the construction of more affordable housing units in Lee County if the units were set aside at 60% AMI. However, the market study concluded there was a need and Elmwood would be viable if the units were set aside at 50% AMI during the lease up period. The market study also concluded that setting aside the units at 50% AMI would sufficiently address any concerns about the potential impact of construction of the new units on the existing affordable housing developments. Elmwood agreed to set aside its units at 50% AMI in accordance with findings in the market study. (T. 109-110; 498; JT. Ex. 6, pp. A-5) In September 2008, a credit underwriting report recommending funding for the proposed Elmwood Project was approved by the Florida Housing Board. The approved Credit Underwriting Report incorporated the agreement for the 50% AMI set asides to address impact on existing affordable housing developments, including those in the Guarantee Program.

The Florida Housing Board approval of the 2008 Credit Underwriting Report is agency precedent that adopts an approach that concerns over the impact of construction of Elmwood on existing affordable housing developments can be adequately addressed by Elmwood's agreement to restrict its units to 50% AMI or below during lease-up.

Based upon the Board's approval of the 2008 Credit Underwriting Report and the determination that construction of Elmwood would not have an impact on existing affordable housing developments, Elmwood moved forward with its development, including payment of a $150,000 carryover fee for the tax credits awarded to it. (T. 103-104; Elm. Ex. 33; Jt. Stip. ¶ 36) Elmwood subsequently incurred numerous additional fees and costs, including credit underwriting fees (for a supplemental loan), credit reporting fees, an appraisal fee, a plan and cost analysis fee, architectural, engineering, environmental and legal fees.

If Seltzer had not agreed to the approach of setting aside the units at 50% AMI during lease-up, the Elmwood Terrace Development would not have been presented to the Florida Housing Board for approval and Elmwood would not have incurred the $150,000 tax credit reservation fee and the other expenses associated with the Credit Underwriting process. (T. 104)

Like many other developments that were awarded tax credits during the 2007 and 2008 Universal Cycles, Elmwood was not able to close on its project because of the inability to syndicate the credits due to the decline in economic conditions and the collapse of the equity syndication market. Elmwood explored other options that could have potentially enabled it to proceed to closing on its awarded tax credits. One option that Elmwood proposed to Florida Housing in late 2008 was to change the demographic grouping of the Elmwood Terrace project to an elderly project. (T. 115-118; Elm. Exs. 18 and 19) A market study was completed in March 2009 and concluded that Elmwood would be feasible and viable with such a change. Elmwood's request to change its demographic grouping was not approved by Florida Housing, even though such changes had been approved in the past.

In early 2009, the federal government, as part of its economic stimulus efforts, adopted the American Recovery and Reinvestment Act of 2009 (PL 111-5), referred to as ARRA, which incorporated a broad range of economic stimulus programs. The ARRA established mechanisms to assist in the development of affordable housing and offset some of the economic devastation to developers. Congress included specific provisions in ARRA intended to address the collapse of the tax credit market. The federal legislation was supposed to be used by the state

allocating authority to fund developers who were unable to syndicate their tax credits due to the economic downturn. To be entitled to an award of federal stimulus funds, a developer was required to demonstrate that it had an "Active Award" of tax credits and had made a good faith, unsuccessful effort to market those credits. Elmwood meets the guidelines issued by the federal government as a project eligible to receive federal assistance.

On July 31, 2009, Florida Housing issued RFP 2009-04 (the "RFP") setting forth criteria and qualifications for developers to seek financing for affordable housing projects from the federal economic stimulus funds that Florida received through the ARRA. Elmwood and one other development were the only potential applicants in Florida with an "Active Award" of tax credits excluded from eligibility for an award of federal stimulus funds under the RFP as issued. The RFP's initial exclusion of Elmwood was the result of the 2009 designation of Lee County where Elmwood would be located as a "Location A." However, Florida Housing's rules do not preclude funding based on a Location A. Rather, the rules require the units to be set aside at 50% AMI which Elmwood agreed to do. As set forth above, Elmwood had already spent considerable time and money on its proposed development before its site was designated as being

within a Location A. Elmwood successfully challenged the provisions in the RFP that excluded it from the RFP.

One of the key goals of the federal stimulus program was to assist developers who had previously been awarded tax credits and had expended significant sums of money in support of their projects only to be stalled due to the economic downturn. Elmwood, like the other applicants in the initial RFP for the federal stimulus funds who had an Active Award of tax credits, had invested considerable sums of money to advance its project. Elmwood has invested at least $2 million dollars in this project. Unlike developers applying in the 2009 and 2010 Universal Cycle process who did not obtain an award of tax credits before the economic decline and the passage of the ARRA, Elmwood made a demonstrable, sizeable commitment to its project in reliance upon the Florida Housing Board's acceptance of the original Credit Underwriting Report.

There was sufficient federal stimulus money available to fund all of the respondents to the RFP, including Elmwood. Rather than use the money to assist developers who had acted in good faith and were caught by the unexpected and uncontrollable economic decline, Florida Housing has channeled the federal stimulus funds to developers who did not obtain an award of tax credits until after the economic decline was well documented and the ARRA was passed. This diversion to fund developments that

did not have an active award of tax credits at the time of passage of the ARRA circumvents one of the primary goals of the federal stimulus funds and abandons a developer who has acted in good faith in reliance upon representations that Florida Housing would not leave its developers hanging. Elmwood seeks this Board's approval to move forward with its project with funding from the Federal Stimulus programs. Elmwood's general partner, Beneficial Communities, has successfully developed several other projects in the past utilizing funding from Florida Housing. Elmwood has unfairly been denied the opportunity to benefit from the federal stimulus funds. This project can and will be successful as well. Based on this Board's approval of the prior report setting aside the units at 50% AMI will address any reasonable concerns about impact.

**Elmwood's General Objections**

Before setting forth its specific objections to the Findings and Conclusions in the RO, Elmwood asserts the following general objections and exceptions to the recommendation embodied in the RO.

The RO fails to analyze or address the legal significance of this Board's approval of the prior Credit Underwriting Report which determined that setting aside units at 50% AMI would not have a deleterious effect on existing affordable housing developments, including the Guarantee Fund Projects in the area.

The prior determination is agency precedent which cannot be overturned or disregarded without explicit findings as to why the prior conclusion should not be followed. While the ALJ makes certain findings regarding the economic condition in Lee County, he fails to explain or detail why Guarantee Fund developments in the area are more vulnerable now to the construction of 50% AMI units than they were in September 2008 when the Board approved the prior Credit Underwriting Report.

Construction of the Elmwood project in accordance with the deeper targeting commitment made during the 2008 Credit Underwriting process and/or as an elderly development would minimize the proposed impact on the Guarantee Fund Projects in the area which are all targeted the 60% AMI level. (T. 95-100; 302-306; 328; Jt. Ex. 7, p. II-7)

The Market Study Review Letter does not address or refute the conclusions in the 2008 Credit Underwriting Report that construction of Elmwood would not have an adverse impact on existing affordable housing developments if the Elmwood units were restricted to 50% AMI and below.

The proposed denial of funding to Elmwood is based upon an invalid non-rule policy that such funding can be denied based upon a Market Study Review Letter. There is nothing in the existing rule or statute that expressly authorizes Florida Housing to deny federal stimulus funds to an eligible Applicant

because of the anticipated impact on existing Guarantee Fund developments. The Credit Underwriting Rule does not provide authority for rejecting the requested funding because there is no statutory basis to apply use protection of Guarantee Fund developments as a basis for the allocation of federal stimulus funds. Neither the RFP nor the existing Credit Underwriting Rule delineate or authorize the use of a Market Study Review Letter such as the one submitted by Seltzer as a basis for making funding decisions. Furthermore, the Credit Underwriting Rule does not expressly state that a negative impact is a basis for denying funding from any source administered by Florida Housing.

Section 420.502, Fla. Stat., sets forth the legislative findings that form the basis for Florida Housing's mission and the governmental support for affordable housing projects. That statute does not recognize protection of existing Guarantee Fund developments as a relevant funding allocation criteria.

The construction of the Elmwood project with allocation of federal stimulus funds will further the legislative goals set forth in Chapter 420, Fla. Stat. If Elmwood is not constructed, there will be no units with long term set-asides at the 50% AMI level and below. Consequently, those lower income families will be left with very poor long-term housing options.

Among the provisions in the RFP that were stricken as a result of the Final Order in the RFP Case was the evaluation process for the RFP responses set forth in Section 7 of the RFP. In determining that the review provision was invalid, Judge Harrell concluded that

> Section 7 of the RFP gives the reviewing committee and the Board unbridled discretion in determining which applicants will be allocated funds. The method of selection is not clearly stated. No criteria are set forth for the ranking of the applications. No criteria are given for how the applications will be scored. Such discretion is contrary to competition, arbitrary and clearly erroneous.

The RO improperly countenances the use of the Credit Underwriting process to accomplish the exclusion of Elmwood from consideration for federal stimulus funding contrary to the conclusion in the RFP case. The use of an RFP contemplates that there are limited resources for which competing applicants vie. In this instance, there were sufficient funds available from the federal stimulus money to enable all of the developers with stalled tax credit deals to proceed. Florida Housing has improperly denied funding to Elmwood and utilized the funds for developers who did not hold an active award of tax credits as of the date of the economic decline and the passage of ARRA.

**The RO Improperly Fails to Address the Evidence Presented Regarding Inconsistent Application of the Impact Test**

One of the issues raised by Elmwood in its challenge to the preliminary decision to deny its request for an allocation of federal stimulus funds was that Florida Housing had not applied the same approach for analyzing impact to other projects seeking federal stimulus funds, in particular another project located in the same market as Elmwood.

"It is axiomatic that administrative due process requires agency consistency among like petitioners or respondents." Central Fla. Regional Hosp., Inc. v. Dept. of Health and Rehab. Services, 582 So. 2d 1193, 1196 (Fla. 5th DCA 1991).

In a formal administrative hearing conducted pursuant to Sections 120.569 and 120.57, Florida Statutes, the parties are entitled to put on evidence as to any relevant issues and that evidence is to be reviewed *de novo*. The ALJ is supposed to resolve conflicting evidence and, ultimately, make Findings of Fact based upon competent, substantial evidence in the record. See, *e.g.* Heifetz v. Department of Business & Professional Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Here, the RO fails to address the specific issues raised by Elmwood regarding the approval of the Renaissance Preserve development ("Renaissance") in Lee County. Evidence was presented which established that this proposed affordable housing development

located in proximity to Elmwood, was granted funding through the RFP. (Elm. Ex. 61 and 63)[3] In approving federal stimulus funding for Renaissance, Florida Housing did not apply the same approach for determining impact on the existing Guarantee Fund Projects. (T. 175-176; 331-332) Evidence was presented that there are residents in the Guarantee Fund project who would qualify to move to Renaissance if it were constructed. (T. 331-332; Vogt Rebuttal Testimony, pp. 8-21) However, Renaissance was granted federal stimulus funding without being tested with the same impact approach applied to Elmwood. The ALJ's failure to evaluate and address this evidence was error.

There is no basis in the Credit Underwriting Rule to support applying a different approach for analyzing the anticipated impact of construction of Renaissance. (T. 333)

The impact projection used by Meridian and Seltzer for Elmwood was based simply upon an analysis as to whether there are existing residents in the Guarantee Fund Projects who could qualify to move to Elmwood if it was built. There is no analysis of turnover rates or the reasons for the vacancies that exist in the market. This approach to analyzing impact is based on speculation and assumptions and is not a compelling basis to reject the approach and conclusions in the 2008 Market Study.

---

[3] Renaissance is located within five miles of the same Guarantee Fund Projects as Elmwood. (T. 175; Elm. Ex. 61, p. 5)

The bottom line is that the approach utilized for analyzing the anticipated impact of Elmwood is flawed and has been inconsistently applied.

In addition, the RO fails to address the evidence presented regarding an analogous development in immediate proximity to Elmwood. Beneficial built an affiliated development known as Maple Crest less than a mile from Elmwood Terrace. (T. 83) Maple Crest consists of 116 units and was financed through an award of Tax Credits by Florida Housing in the 2006 Universal Cycle. (T. 84) The results at Maple Crest confirm that, even with the market decline, there remains a high demand for affordable housing units in Lee County targeted at the 50% AMI level and below. (T. 86-87; 123-124; 272-276; Elm. Exs. 23 and 70) An analysis of the tenant origins for Maple Crest demonstrates that none of the residents at Maple Crest moved from the Guarantee Fund Projects. (T. 272-279; 283; 325-326; Elm. Exs. 23, 70)

**Elmwood's Specific Exceptions to the RO**

With respect to the specific findings and conclusions in the RO, Elmwood states as follows:

Elmwood takes exception to Findings of Fact 10 based on the lack of competent substantial evidence. The Location A designation has been used to indicate areas where new affordable housing will not be approved unless the developer agrees to set

asides at lower income levels. It does not provide a basis for concluding affordable housing is "unnecessary" or there is "little need." As discussed below, Elmwood was not in a Location A area when it received its initial award of tax credits. Elmwood has expended significant time, effort and money in reliance on the approval of the Credit Underwriting Report which recognized that impact to existing affordable developments could be adequately addressed by setting aside the units at 50% AMI and below.

Elmwood takes exception to Findings of Fact 17. This finding is incomplete. In this case, a Market Study Review Letter rather than a Credit Underwriting Report was presented to the Board. There is no basis in the statute or rule for utilizing a Market Study Review Letter as a basis for denying funding.

Elmwood takes exception to Findings of Fact 21. The VWB research only indicated there is a potential that construction of Elmwood at 60% AMI units could affect neighboring housing developments not that such an impact was certain.

Elmwood takes exception to Findings of Fact 24. This finding is incomplete since the agreement to target the 50% AMI population was only during the "lease up."

Elmwood takes exception to Findings of Fact 50. This Finding of Fact is incomplete because it does not reflect that a

different approach to assessing impact was applied to another development in the same market area by the same market analyst.

Elmwood takes exception to Findings of Fact 64. This Finding of Fact is incomplete and fails to properly apply the law. The prior Credit Underwriting Report is agency precedent that was relevant to consideration of the Elmwood Application and, based on the concept of administrative finality, may not be disregarded without full explanation.

Elmwood takes exception to Findings of Fact 66. This Finding of Fact is incomplete because it fails to analyze the different approach to assessing impact that was applied the Renaissance Village project.

Elmwood takes exception to Findings of Fact 68. This Finding of Fact is not supported by competent substantial evidence in the record. There is no evidence that the two guarantee properties reduced their rates to the 50% AMI level at any time, let alone on a consistent basis.

Elmwood takes exception to Findings of Fact 74. This Finding of Fact is incomplete because it fails to distinguish or explain why the conclusion reached in the prior Credit Underwriting Report is no longer valid.

Elmwood takes exception to Findings of Fact 81. This Finding of Fact is incomplete because it fails to distinguish or

explain why the conclusion reached in the prior Credit Underwriting Report is no longer valid.

Elmwood takes exception to Findings of Fact 83. This Finding of Fact is incomplete because it fails to address whether the Board considered and evaluated its prior approval of the Credit Underwriting Report which concluded that setting aside the units at 50% AMI would protect against impact on the existing Guarantee Fund developments. Based on the principles of administrative finality, this prior conclusion cannot be ignored without specific distinguishing facts.

Elmwood takes exception to Findings of Fact 85. This Finding of Fact is incomplete because it fails to address whether the Board considered and evaluated its prior approval of the Credit Underwriting Report which concluded that setting aside the units at 50% AMI would protect against impact on the existing Guarantee Fund developments. Based on the principles of administrative finality, this prior conclusion cannot be ignored without specific distinguishing facts.

Elmwood takes exception to Findings of Fact 87. This Finding of Fact is incomplete because it fails to address whether the Board considered and evaluated its prior approval of the Credit Underwriting Report which concluded that setting aside the units at 50% AMI would protect against impact on the existing Guarantee Fund developments. Based on the principles

of administrative finality, this prior conclusion cannot be ignored without specific distinguishing facts. This Finding also does not address why a different approach to impact was utilized for the Renaissance Village Project.

Elmwood takes exception to Findings of Fact 88. There is no statutory basis for elevating protection of Guarantee Fund developments to be a determining factor for funding from the federal stimulus funds.

Elmwood takes exception to Findings of Fact 97. This Finding of Fact is incomplete because it fails to address whether the Board considered and evaluated its prior approval of the Credit Underwriting Report which concluded that setting aside the units at 50% AMI would protect against impact on the existing Guarantee Fund developments. Based on the principles of administrative finality, this prior conclusion cannot be ignored without specific distinguishing facts.

There are different legal standards applicable to considering exceptions to an ALJ's findings of fact as compared to conclusions of law. An agency may reject or modify a conclusion of law over which it has substantive jurisdiction, but must state with particularity its reasons for rejecting or modifying such conclusion of law, and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Section 120.57(1)(l), Fla.

Stat.; Prysi v. Dept. of Health, 823 So. 2d 823, 825 (Fla. 1st DCA 2002). An agency is entitled to give less weight to ultimate findings of fact that are based on matters of opinion infused with policy considerations for which the agency has special responsibility.

Elmwood takes exception to Conclusion of Law 98. This Conclusion of Law is not supported by competent, substantial evidence. The Location A designation does not provide a basis for concluding that the market is inadequate to support the development of additional affordable housing. The Location A designation has been used to require developers to set aside units at the 50% AMI level. This Conclusion demonstrates that the RO is premised on a misconception of the Location A designation and the effect of setting aside units at 50% AMI.

Elmwood takes exception to Conclusion of Law 101. This Conclusion is wrong as a matter of law because it disregards the concept of administrative finality. The approval of the prior Credit Underwriting Report represents a determination that impact on existing affordable housing developments could be adequately addressed by setting aside the units at 50% AMI. That determination cannot be overturned without explicit findings as to why the prior determination is no longer valid.

Elmwood takes exception to Conclusion of Law 103. This Conclusion is wrong as a matter of law because it disregards the

concept of administrative finality. The approval of the prior Credit Underwriting Report represents a determination that impact on existing affordable housing developments could be adequately addressed by setting aside the units at 50% AMI. The determination cannot be overturned with adequate explicit findings as to why the prior determination is no longer valid.

**An analysis of the tenant origins for Maple Crest demonstrates that none of the residents at Maple Crest moved from the Guarantee Fund Projects. This experience confirms that Elmwood can be built without affecting the Guarantee Fund Projects.

**Conclusion**

Elmwood is a developer with an "active award" of tax credits who was unable to close as a result of the decline in economic conditions. Elmwood was approved for funding in 2008 based on a credit underwriting report that concluded setting aside the units at 50% AMI during lease up would alleviate concerns about the impact on the existing affordable housing units. In reliance upon the approach approved in the September 2008 Credit Underwriting Report, Elmwood has expended significant time and money on its proposed development. Under these circumstances, Florida Housing is estopped from changing its approach for addressing concerns regarding impact. There is no persuasive factually or legally compelling reason for Florida

Housing to reach a contrary determination that construction of Elmwood will now have an unacceptable negative impact on the existing Guarantee Fund Projects.

The financial difficulties encountered by Guarantee Fund developments in Lee County and elsewhere are the result of financing premised upon the inability to obtain 60% AMI rents. The appropriate way to address those concerns is to restructure the financing or to provide financial assistance to the developments until such time as the market can again support their financing structure. Halting the development of new affordable housing units set aside at the 50% AMI level will not solve the underlying problems with the projects financed at 60% AMI. If Florida Housing focuses only on the needs of the units financed at 60% AMI, it abandons its mission to ascertain the need for affordable housing at lower income levels and its duty to facilitate the construction of units to meet those needs.

Florida Housing has not followed a consistent approach in assessing the anticipated impact of the construction of Elmwood and the construction of Renaissance. The existing language in Rule 67-48.0072(10) does not provide a basis for differentiating the impact of Renaissance Center from the impact of Elmwood. Consistent application of the Rule requires approval of funding for Elmwood.

If Florida Housing wants to apply new policies or standards to Elmwood as part of the credit underwriting process for the RFP, Elwood should at least be afforded an opportunity to change its application to address any reasonable concerns that are identified.

The market study review letter Elmwood should be rejected and underwriting process and, if necessary to address concerns in the market identified during the credit underwriting process, Elmwood should be awarded funding.

A Final Order should be entered rejecting the Credit Underwriter's recommendation to deny federal stimulus funding to Elmwood and concluding the Florida Housing's approval of funding for Renaissance Center compels a similar approval for Elmwood.

Respectfully submitted,

J. Stephen Menton
Florida Bar Number 331181
Rutledge, Ecenia & Purnell, P.A.
Post Office Box 551
Tallahassee, FL 32301
850-681-6788
850-681-6515 (facsimile)
Attorney for Elmwood Terrace
Limited Partnership

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 5th day of November, 2010, by electronic mail with a copy by U. S. Mail to Wellington H. Meffert II, General Counsel, Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301.

Attorney

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ELMWOOD TERRACE LIMITED PARTNERSHIP,

Petitioner,

vs.

FHFC Case No.: 2010-020GA
DOAH Case No.: 10-1975

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

**RESPONSE TO PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER**

Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, Respondent, Florida Housing Finance Corporation "Florida Housing" hereby submits the following Response to the Exceptions filed by Petitioner to the Recommended Order issued in this proceeding, and states:

1. Section 120.57(1)(k), Florida Statutes, sets forth the standards by which an agency shall consider exceptions filed to a recommended Order issued thereunder, stating in pertinent part:

> The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

Rule 28.106.217(1), Florida Administrative Code also provides:

> Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

**Standard for Exceptions to Findings of Fact**

2. Section 120.57(1)(l), Florida Statutes, provides, in pertinent part:

> The agency may not reject or modify the findings of fact 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 upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Accordingly, this Board is bound to honor the Administrative Law Judge's (ALJ's) Findings of Fact unless they are not supported by competent, substantial evidence. *B.J. v. Department of Children and Family Services*, 983 So.2d 11 (Fla. 1st DCA 2008). Notably, Petitioner makes no allegations in its Exceptions regarding that the proceedings on which the findings were based did not comply with the essential requirements of law.

**Standard for Exceptions to Conclusions of Law**

3. Section 120.57(1)(l), Florida Statutes, further provides:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of

> administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

**Response to Petitioner's "Background"**

4. Petitioner has included a 'Background" section in its Exceptions purporting to provide background information for the Board to consider in ruling on its Exceptions. While this section includes a recitation of some of the facts of the case (in a light favorable to Petitioner), it also includes legal argument not specifically addressed to any finding of fact or conclusion of law, and otherwise does not meet the requirements for exceptions set forth in Section 120.57(1), Florida Statutes. (*See* paragraphs 1-3, *supra).* The statements in Petitioner's "Background" constitute a blanket objection to the findings of the Recommended Order which are not contemplated by Section 120.57(1), Florida Statutes. Accordingly, this Board should ignore this unauthorized recitation of facts and legal argument in its consideration of any specific Exceptions made by Petitioner.

**Response to Petitioner's "General Objections"**

5. As is the case with Petitioner's "Background" section, Section 120.57(1)(k), Florida Statutes, does not authorize "General Objections' to a

recommended order. These "General Objections" includes legal argument repeated from Petitioner's Proposed Recommended Order and general criticisms of the Administrative Law Judge's reasoning, but are not addressed to specific portions of the recommended order as is required by statute. These "General Objections' do not meet the specific requirements for exceptions to findings of fact or conclusions of law set forth in the statute. (*Id.)* Additionally, the "General Objections" include repeated legal argument regarding issues dispensed with in another related case involving identical parties, a rule challenge proceeding under Section 120.56, Florida Statutes, DOAH Case No. 10-2799RX. This case has resulted in a Final Order dated October 6, 2010 finding that the challenged provisions were not rules, and if so, would be valid. This Board should reject and ignore any argument regarding these legal issues, and for the reasons stated above, reject and ignore all recitation of facts and legal argument not meeting the statutory requirements, and should only address those exceptions identified as "Specific Objections", to which Respondent's responses are set forth below.

**Responses to Petitioner's Specific Objections**

6. Petitioner takes exception to the finding of fact in paragraph 10 of the Recommended Order, stating that it is not based on competent, substantial evidence, stating that the Location A designation does not provide a basis for

concluding that affordable housing is unnecessary or that there is little need for it in the designated area. Evidently the Petitioner objects to the ALJ's use of the fact that Lee County is currently designated as Location A as circumstantial evidence of a *current* lack of need for affordable housing, which it is. This finding of fact is based on competent, substantial evidence in that the ALJ correctly finds that Location A is used to discourage development of affordable housing in *soft markets* (or "*weak markets*") for affordable housing, which in this context necessarily includes markets where there is insufficient demand for affordable housing. The competent, substantial evidence on which this finding is based is found in the testimony of Stephen P. Auger at Tr. 574-577, 651-653. Moreover, this Finding of Fact is based on a stipulated finding of fact included in the parties' prehearing stipulation at paragraph 31, which states:

> 31. As part of each Universal Cycle process, Florida Housing designates certain geographic areas of the state that are considered soft markets as "Location A" areas. Florida Housing first began incorporating into its application process a mechanism for identifying weak markets, known as "Location A" in 2003. *The Location A areas are determined during the Universal Cycle rulemaking so that developers are alerted as to those areas where Florida Housing has concluded, based on a published methodology that includes occupancy data, that the market is too weak to support affordable housing projects.* The Location A designations are included in the Universal Cycle Application Instructions, which are incorporated by reference into the rules of Florida Housing.
>
> (Emphasis added)

7. Petitioner takes exception to the finding of fact in paragraph 17 of the Recommended Order, stating that the finding is "incomplete." That a finding lacks the detail a party subjectively believes it should is not a standard to reject such a finding. Findings of fact can only be rejected by this Board if they are not based on competent substantial evidence. (*See* paragraphs 1-2, *supra).* This finding contains a simple and brief description of the credit underwriting process, and as stated, is a summary of the procedure described in Rule 67-48.0072, Florida Administrative Code (2009). The Market Study Review Letter, whatever it may be called, is a summary of the Credit Underwriter's review of the market study. Notably, the Credit Underwriter also undertook to conduct its own validation of the findings of the market study, which also form the recommendations embodied in the letter. (Tr. 450-451). Lastly, as Petitioner does not argue or state that this finding is not based on competent, substantial evidence, this Board cannot accept this exception or reject this finding.

8. Petitioner takes exception to the finding of fact in paragraph 21 of the Recommended Order, arguing that the ALJ incorrectly described a finding by Petitioner's market analyst as being "certain" that there was a potential impact on neighboring housing developments. This finding does not state that impact is certain, but only that the research indicated it would occur, as was stated by Petitioner's expert, Robert Vogt, at the final hearing:

> Vogt: Well, I think that we found that there was support for some of the units at the project. We felt that the project could probably achieve a stabilized occupancy. But we believed that Elmwood Terrace *would have a competitive impact* on the existing LIHTC housing if economic conditions didn't improve, and that's described in point four of that page.
>
> (Tr. 252-253)
> (Emphasis added)

Again, Petitioner fails to show that this finding is not based on competent, substantial evidence.

9. Petitioner takes exception to the finding of fact in paragraph 24 of the Recommended Order, again arguing that the finding is "incomplete" because the finding does not mention at what point the 50% of Area Median Income (AMI) set-aside restrictions would end (after lease-up). The finding is, on its face, factually correct in that Petitioner did agree to a 50% of AMI set-aside. That the ALJ declined to go into further detail does not mean the finding is not based on competent, substantial evidence, particularly when the finding is correct as worded. Once again, that a finding does not provide the detail a party would prefer to see in finding is not a standard by which this Board can reject such a factual finding.

10. Petitioner takes exception to the finding of fact in paragraph 50 of the Recommended Order, again arguing that the finding is incomplete because it does not reflect what Petitioner characterizes as a "different approach" to assessing impact found in another development. Petitioner does not argue that this finding is

not based on competent, substantial evidence, but merely complains that the ALJ did not adopt its argument regarding the applicability and relevance of another market study. It is the prerogative of the ALJ to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. *Rogers v. Department of Health, 920 So.2d 27 9Fla. 1st DCA 2005).*

11. Petitioner takes exception to the finding of fact in paragraph 64 of the Recommended Order, stating again that the finding is "incomplete" and that the ALJ "failed to properly apply the law" - neither of which are standards that enable this Board to alter the finding per Section 120.57(1)(l), Florida Statutes. Petitioner's arguments that the ALJ did not properly consider the *relevance* of the prior market study cannot be considered by this Board as such determinations are the prerogative of the ALJ. (*Id.*).

12. Petitioner takes exception to the finding of fact in paragraph 66 of the Recommended Order, again improperly arguing that the finding is "incomplete." This is another argument regarding the ALJ's assessment of the evidence and should be rejected for failing to show the finding is not based on competent, substantial evidence, as well as for the reasons stated in paragraphs 11 and 12, *supra*.

13. Petitioner takes exception to the finding of fact in paragraph 68 of the Recommended Order, arguing the finding is not based on competent, substantial evidence, stating that there is no evidence that the two Guarantee Fund developments have reduced their rates to the 50% AMI level at any time. The actual finding of fact at paragraph 68 of the Recommended Order reads:

> 68. The financing for Bernwood Trace and Westwood was premised on projections that the affordable housing units would be leased to the 60 percent AMI population; however, the developments have been unable to maintain their full occupancy levels, even though a number of units in the two properties are leased at reduced rates based on 50 percent AMI income levels.

This finding as applied to the Westwood development is based on competent, substantial evidence, found in the testimony of Respondent's expert market analyst, Robert Von, who stated:

> Von: We didn't have to imply what the rents were. We actually knew what they were. And we knew that the rents in particular at West Chase and Westwood were trending down to the 50 percent rents. In fact, I think West Chase -- Westwood, I think, had rents for the two and three-bedroom units already down at or near the 50 percent level. So it wasn't surprising to us, once we knew that, that they would have tenants at the 50 percent AMI level.
>
> (Tr. 378-380; *see also* Tr. 376)

14. Petitioner takes exception to the finding of fact in paragraph 74 of the Recommended Order, again improperly arguing that the finding is "incomplete", in that it fails to distinguish or explain why the conclusion reached in the prior Credit Underwriting Report is no longer valid. Petitioner does not state or argue that the

finding is not based on competent, substantial evidence, but again makes an improper argument that the ALJ should have given the prior Report more weight than he did. Even if this were permissible argument, in the text of the finding itself, the ALJ provides his rationale for when mentions "existing economic conditions in Lee County."

15. Petitioner takes exception to the finding of fact in paragraph 81 of the Recommended Order, improperly arguing that the Finding is "incomplete", because it fails to distinguish or explain why the conclusion reached in the prior Credit Underwriting Report is no longer valid. Petitioner does not state or argue that the finding is not based on competent, substantial evidence, but again makes an improper argument that the ALJ should have given the prior Report more weight than he did. This cannot form the grounds for granting an exception to a finding of fact. (*Rogers, supra).*

16. Petitioner takes exception to the finding of fact in paragraph 83 of the Recommended Order, improperly arguing that the finding is "incomplete" for the same reasons described in paragraphs 14 and 15 above. Petitioner does not state or argue that this Finding is not based on competent, substantial evidence, but instead argues that the legal doctrine of "administrative finality" requires that the conclusions of the previous Credit Underwriting Report have to be factually distinguished. The facts distinguishing the conclusions of the previous (November

2007) report are obvious: this proceeding arises out of a subsequent, separate and distinct application process, and not the process that resulted in the first Credit Underwriting Report, and that as the Recommended Order recognizes, the economic situation in Lee County has changed for the worse in the context of the development of affordable housing. (*See* paragraph 74 or Recommended Order).

17. Petitioner takes exception to the finding of fact in paragraph 85 of the Recommended Order, again improperly arguing that the Finding is incomplete, because it fails to address whether the Board considered and evaluated its prior approval of the (November 2007) Credit Underwriting Report. This Exception should be rejected for the same reasons expressed in paragraph 16 above.

18. Petitioner takes exception to the finding of fact in paragraph 87 of the Recommended Order, again improperly arguing that the Finding is incomplete, because it fails to address whether the Board considered and evaluated its prior approval of the (November 2007) Credit Underwriting Report. This Exception should be rejected for the same reasons expressed in paragraphs 14-16 above.

19. Petitioner takes exception to the finding of fact in paragraph 88 of the Recommended Order, arguing that there is no statutory basis for the Board to consider the impact to Guarantee Fund developments in determining whether to supply federal stimulus funds to a development. The Petitioner does not state or argue that the finding is not based on competent, substantial evidence. Moreover,

this issue has been resolved by a Final Order in the associated rule challenge, wherein the ALJ determined that Florida Housing did not act improperly by considering impact to Guarantee Fund developments in distributing federal stimulus funds in *Elmwood Terrace Limited Partnership v. Florida Housing Finance Corporation*, DOAH Case No. 10-2799RX, Final Order dated October 6, 2010. Accordingly, this Board is bound by this Final Order and cannot consider this improper Exception.

20. Petitioner takes exception to the 'Finding of Fact" in paragraph 97 of the Recommended Order, for the same reasons described in paragraphs 14-18 above. This paragraph is not a Finding of Fact, but a Conclusion of Law, and the Exception should be rejected for the reasons set forth in paragraphs 14-18 above.

21. Petitioner takes exception to the Conclusion of Law in paragraph 98 of the Recommended Order, arguing that it is not supported by competent, substantial evidence because the "Location A" designation "does not provide a basis for concluding that the market is inadequate to support the development of additional affordable housing." This Exception should be rejected for the reasons set forth in paragraph 6 above, in that the ALJ, in the context of this case, clearly considered the Location A designation as an indicator and circumstantial evidence (in addition to the competent, substantial evidence presented by Respondent's

witnesses and exhibits) of a lack of need for affordable housing in Lee County, and not a dispositive factor in its own right.

22. Petitioner takes exception to the Conclusion of Law in paragraph 101 of the Recommended Order, arguing that it is wrong because it disregards the concept of "administrative finality." Petitioner argues that the Recommended Order should have included findings that distinguished the previous finding in the November 2007 Credit Underwriting Report that impact could be mitigated by Elmwood setting aside units at 50% AMI. Once again, the findings distinguishing the circumstances of the previous November 2007 report are obvious: the instant case arose from a separate application process with separate requirements, under a new version of the applicable Rules, an increasing concern for the health of the Guarantee Fund, and in the context of changed economic circumstances in Lee County, as recognized in *inter alia*, paragraphs 26-40, 49-63, 73-81 of the Recommended Order. Even if supportable, Petitioner's argument regarding "administrative finality" is no more than an attempt to avoid the prohibition on an agency usurping the ALJ's prerogative in assessing the weight and credibility of the evidence.

23. Petitioner takes exception to the Conclusion of Law in paragraph 103 of the Recommended Order, for the same reasons expressed in paragraph 22

above. This Board should reject this Exception for the same reasons set forth therein.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors reject the arguments presented in Petitioner's Exceptions, and adopt the Findings of Fact, Conclusions of Law and Recommendation of Recommended Order as its own and issue a Final Order consistent with same in this matter.

Respectfully submitted this 15th day of February, 2010.

*s/Hugh R. Brown*
Hugh R. Brown
Deputy General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Fax: (850) 414-6548

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Exceptions has been furnished this 15th day of November, 2010 by electronic mail to:

William F. Quattlebaum
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 3239903060

J. Stephen Menton, Esquire
Rutledge, Ecenia and Purnell, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
Telephone: (850) 681-6788
Facsimile: (850) 681-6515

*s/ Hugh R. Brown*
Hugh R. Brown
Deputy General Counsel
Florida Housing Finance Corporation