STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

VESTCOR FUND XII, LTD., d/b/a MADALYN LANDING APARTMENTS,	)	
Petitioner,	)	
vs.	)	Case No. 09-0366
FLORIDA HOUSING FINANCE CORPORATION,	)	
Respondent,	)	
and	)	
MALABAR COVE, L.L.L.P., AND MALABAR COVE, II, LTD.,	)	
Intervenors.	)	

RECOMMENDED ORDER

On March 26 and 27, 2009, a formal administrative hearing was conducted in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Donna E. Blanton, Esquire
Elizabeth McArthur, Esquire
Radey, Thomas, Yon & Clark, P.A.
301 South Bronough Street, Suite 200
Post Office Box 10967
Tallahassee, Florida 32301

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

For Intervenors: M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole &
Bryant, P.A.
301 South Bronough Street, Fifth Floor
Post Office Box 1110
Tallahassee, Florida 32302-1110

STATEMENT OF THE ISSUE

The issue in this case is whether credit underwriting reports associated with applications for funding submitted by the developer of an apartment complex in Brevard County, Florida, met applicable requirements, and whether acceptance and approval of such reports by the Respondent, Florida Housing Finance Corporation (FHFC), was appropriate.

PRELIMINARY STATEMENT

In 2007 and 2008, the developer of Malabar Cove, an affordable housing apartment complex located in Brevard County, Florida, applied to participate in loan programs operated by the FHFC. On December 12, 2008, the FHFC Board of Directors (FHFC Board or Board) approved the applications.

On December 24, 2008, the Petitioner, Vestcor Fund XII, Ltd., the developer of Madalyn Landing Apartments (Madalyn Landing), a competing apartment complex in Brevard County, Florida, filed a Petition for Administrative Hearing with the FHFC challenging the Board's decision. On January 22, 2009, the

FHFC forwarded the Petition for Administrative Hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

Also on January 22, 2009, the developer of Malabar Cove (identified in the petition as Malabar Cove, L.L.L.P., and Malabar Cove, II, Ltd., and hereinafter in this Recommended Order as "Malabar Cove") filed a petition to intervene that was granted by Order dated February 13, 2009.

At the hearing, the Petitioner presented the testimony of three witnesses and had Exhibits 1 through 7, 9 through 25, 27, 28, 30, 31, 34, 35 (parts A and B), and 36 admitted into evidence. The FHFC presented the testimony of one witness. Malabar Cove presented the testimony of one witness. A Pre-hearing Stipulation filed on March 17, 2009, was admitted into evidence as Joint Exhibit 1. The Pre-hearing Stipulation set forth relevant facts that have been incorporated as appropriate into this Recommended Order.

The three-volume Transcript of the hearing was filed on April 6, 2009. A Corrected Volume 3 of the Transcript was filed on April 8, 2009. On April 15, 2009, the FHFC filed an unopposed Motion for Extension of Time to File Proposed Recommended Orders that was granted by an Order entered on April 16, 2009. All parties filed Proposed Recommended Orders

on April 21, 2009, that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The FHFC is a public corporation organized under Chapter 420, Florida Statutes (2008), to administer a state program through which, insofar as is relevant to this proceeding, developers obtain funding for construction of rental apartments to provide housing to persons of low, moderate, and middle income. The funding is provided through various mechanisms, including the State Apartment Incentive Loan (SAIL) program.

2. The Petitioner owns and operates Madalyn Landing, a 304-unit, affordable housing complex in Palm Bay, Brevard County, Florida, located approximately one-half mile from the Malabar Cove apartment complex. Madalyn Landing was constructed in 2000.

3. The Petitioner has consistently asserted that the Malabar Cove apartment complex will negatively impact the Petitioner's ability to obtain and retain tenants for Madalyn Landing and has objected to the receipt by Malabar Cove of financial assistance available through local and state programs for affordable rental housing construction developers.

4. To participate in the programs administered by the FHFC, developers submit applications for project funding during

an annual process identified as the "universal cycle." Each application is evaluated, scored, and competitively ranked against other applications filed during the same cycle.

5. Applicants are provided with an opportunity to review and comment on the evaluation and scoring of all proposals. Defects in application may be cured during this initial review process. After the period for comment ends, the FHFC issues a revised competitive ranking of the proposals. Developers may challenge the second ranking through an administrative hearing.

6. After the second ranking process is final, developers achieving an acceptable score receive a preliminary funding commitment and proceed through an evaluation process performed by an independent credit underwriter. The underwriter reviews each proposal according to the provisions of Florida Administrative Code Rule 67-48.0072. The credit underwriting reports are eventually submitted to the FHFC Board for approval.

7. The developer of Malabar Cove is Atlantic Housing Partners (AHP), which develops and operates affordable housing projects in Florida, including others within Brevard County.

8. Malabar Cove is a multifamily apartment complex located in Palm Bay, Florida, which was proposed by AHP in two phases. Phase I of the project included 76 three-bedroom, two-bath apartment units. Phase II of the project included 72 additional units designated as follows: eight three-bedroom, two-bath

units; 32 two-bedroom, one-bath units; and 32 four-bedroom, three-bath units.

9. The Malabar Cove units are designated for tenants earning 60 percent or less of the Area Median Income (AMI) as determined by the U.S. Department of Housing and Urban Development.

10. Madalyn Landing Apartments are likewise designated for tenants earning 60 percent or less of the AMI.

11. AHP applied for approximately $4 million in SAIL funds and $680,000 in supplemental loan funds for Malabar Cove Phase I during the 2007 universal cycle. The project received a preliminary funding commitment letter during the 2007 cycle and proceeded into the credit underwriting process.

12. AHP applied for approximately $2 million in SAIL funds and $680,000 in supplemental loan funds for Malabar Cove Phase II during the 2008 universal cycle. The project received a preliminary funding commitment letter during the 2008 cycle and proceeded into the credit underwriting process.

13. Malabar Cove obtained tax-exempt bond financing from the Brevard County Housing Authority (BCHA).

14. Madalyn Landing was constructed with $14 million in tax-exempt bond financing from the FHFC.

15. Developers constructing affordable housing projects with tax-exempt bond financing are eligible to receive low-

income housing tax credits. The credits are approximately 4 percent of the development costs for a period of ten years. Such tax credits are typically sold to institutional investors and generate equity for the developer. The tax credits obtained by the Petitioner for Madalyn Landing and by AHP for Malabar Cove were sold to generate equity for construction of the properties.

16. Construction of the Malabar Cove project commenced prior to this litigation and was projected to be complete as of April 2009. The receipt of funding from the BCHA obligates Malabar Cove to provide the affordable rental housing as identified herein.

17. Because the Malabar Cove project includes supplemental loan funds from the FHFC, 10 percent of the units must be held for tenants making 33 percent or less of the AMI, assuming that the FHFC ultimately approves the Malabar Cove request.

18. There is no evidence that Madalyn Landing or any other competing affordable housing apartment complex is required to, or has, set aside units for tenants making 33 percent or less of the AMI.

19. The credit underwriting reports for both phases of Malabar Cove were prepared by the Seltzer Management Group, Inc. (SMG), and were submitted to the FHFC Board in December 2008. SMG retained a certified public accounting firm, Novogradac &

Company, LLP (Novogradac), to prepare the market studies referenced in the credit underwriting reports.

20. References herein to the Novogradac market study are as reported by SMG in the credit underwriting report.

21. The Novogradac market study determined that construction of the Malabar Cove development would have a negative impact on Madalyn Landing, as well as on a second affordable housing rental complex not at issue in this proceeding.

22. According to the SMG report, Novogradac determined that "there are ample eligible renters in the sub-market," but noted that Malabar Cove, a newer housing complex, would have "a competitive advantage as it relates to age, condition, amenities, and unit size." The report stated that Malabar Cove's competitive advantage could result in occupancy at competing apartment complexes "at below break even levels once the market stabilizes."

23. As reflected in the SMG report, the Novogradac study included a projection of affordable housing demand in the market area through analysis of a "capture rate," a projection of the percentage of tenants an affordable housing project must achieve from the pool of appropriately-qualified tenants in order to be financially feasible.

24. A capture rate of 10 percent or less is regarded as a positive indicator of financial feasibility. The Malabar Cove capture rate was projected to be between about 3 and 6 percent, depending on the type of rental unit. Accordingly, the Malabar Cove project is regarded as financially feasible.

25. According to the SMG report, Novogradac noted that the relevant housing market had experienced declining occupancy rates in the last few years, while the number of available affordable rental units had remained stable. Novogradac attributed the situation to the general economic downturn and "to the decline in the single family home market specifically" as unoccupied single-family residences have become available at rental rates competitive with affordable housing units.

26. The SMG credit underwriting report states as follows:

> Novogradac believes the current situation to be temporary and that single family home values will recover in the future. As home values recover, single family homes will revert to home ownership and no longer be available to the rental market or rents for the single family homes will rise to historical levels and no longer directly compete with the traditional affordable housing apartment units. Novogradac concludes that when the supply of competing single family homes is reduced to normal levels, affordable housing occupancy levels will increase to levels just below . . . those experienced between 2004 and 2006.

27. Neither the credit underwriting report nor the market study established a time frame during which single-family

housing values were expected to improve. Although testimony was offered at the hearing as to what the phrase "in the future" was intended to signify, the testimony on this point reflected little more than speculation (albeit informed), and none of the testimony was persuasive.

28. The credit underwriting report included a substantive review of the Malabar Cove financing package and the ability of the developer to proceed through the construction process to the point of project completion and unit occupancy. The referenced information in the credit underwriting report on this issue was not credibly contradicted. The credit underwriting report adequately and accurately determined that the developer could proceed with the project through completion.

29. The credit underwriting report recommended that the FHFC Board approve the Malabar Cove applications for funding.

30. On December 12, 2008, the FHFC Board unanimously voted to accept the credit underwriting reports for the relevant phases of Malabar Cove and to approve the applications for funding.

31. It is unnecessary to include herein a detailed recitation of the discussion during the Board's meeting on December 12, 2008.

32. Review of the meeting transcript establishes that the Board's decision followed discussions with representatives of

the Malabar Cove project and the Madalyn Landing apartment complex as well as the credit underwriter.

33. The Board was aware of the affordable housing market conditions in Brevard County and elsewhere in the state. The Board was clearly aware that the construction of the Malabar Cove project would likely have an impact on competing affordable housing providers, specifically Madalyn Landing, and there was reference to the fact that such competition could potentially reduce housing costs for the populations being served by the FHFC programs. The Board additionally considered the present and future availability of state funds.

34. There is no evidence that the Board acted inappropriately or unreasonably in approving the credit underwriting reports for the Malabar Cove project and proceeding to commit the funds at issue in this proceeding, or that the decision was an abuse of the Board's discretion.

35. The Petitioner has asserted that the Board's recent decision in the "Pine Grove" project (wherein the Board declined to follow the credit underwriter's recommendation for approval of an affordable housing project located in Duval County) requires that the Petitioner's project be denied, particularly because the perceived viability of the Pine Grove project was regarded as superior to that of Malabar Cove.

36. The FHFC Board's denial of the Pine Grove application is the subject of a separate administrative proceeding, and this Recommended Order sets forth no findings of fact applicable to the Pine Grove project or the Board's decisions related to the Pine grove application.

37. The evidence establishes that the Board discussed the Pine Grove decision during their consideration of the Malabar Cove applications.

38. Prior to the Board's denial of the Pine Grove application, the FHFC Board had apparently never rejected a credit underwriter's recommendation for approval. However, there was uncontradicted testimony that, because the Board's rules provides an opportunity for both the FHFC and an applicant to review a draft credit underwriting report prior to the issuance of the final report, underwriting problems are routinely resolved prior to the issuance of the report and that, where a problem cannot be sufficiently resolved for the credit underwriter to recommend approval, developers routinely withdraw applications rather than attempt to seek Board approval for projects over the negative evaluation by the credit underwriter.

39. There was consideration at the December 12 Board meeting about the relevance of the Pine Grove application denial (over the credit underwriter's recommendation) to the Board's presumable intention to approve the Malabar Cove applications;

however, the evidence fails to establish that the Board's decision on the Pine Grove application has any relevance to the instant case.

40. The Board was advised that the affordable housing markets in Duval County and Brevard County, although currently troubled, are not similar, with the Duval County market for affordable housing being described as historically weak and the Brevard County market weakness attributed to the recent economic downturn.

41. Additionally, the Board was aware that, in the Pine Grove application, the FHFC has obligated itself to satisfy the mortgage of an affordable housing development competing with Pine Grove through a "Guarantee Fund" program. Simply stated, if the developer of the FHFC-guaranteed project defaults on payment, the FHFC is essentially "on the hook" for the debt, and the Board was apparently sufficiently concerned of the default prospect to include such consideration in rendering a decision on the Pine Grove application. The FHFC has no similar obligation to any competitor of the Malabar Cove apartment complex.

42. Not insignificantly, the Board's consideration of the Malabar Cove project included the fact that construction of the Malabar Cove apartment complex had commenced and was projected

to be complete by April 2009, while construction of the Pine Grove project had not commenced.

43. There is no credible evidence that the Board's decision to accept the credit underwriter's recommendation to approve the Malabar Cove applications was improper or inappropriate for any reason related to the Pine Grove decision.

CONCLUSIONS OF LAW

44. 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. (2008).

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

46. The applicant for the funding at issue in this proceeding has the burden of establishing that the proposed award of funding by the FHFC complies with the requirements for approval by the FHFC Board. Florida Dept of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

47. The issue in this case is whether the credit underwriter and the FHFC Board complied with the applicable rule requirements when the Board approved the Malabar Cove applications for funding. The evidence establishes that both the credit underwriter and the Board complied with all applicable requirements.

48. 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.
>
> (1) After the final rankings are approved by the Board, the Corporation shall offer all Applicants within the funding range an invitation to enter credit underwriting. The Corporation shall select the Credit Underwriter for each Development.
>
> (2) For SAIL and HOME Applicants and Applicants eligible for a supplemental loan, the invitation to enter credit underwriting constitutes a preliminary commitment.
>
> * * *
>
> (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 loan, a Housing Credit Allocation, a combined SAIL loan and Housing Credit Allocation, or a Housing Credit Allocation and supplemental loan. 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.

* * *

(24) For SAIL and HOME Applications and HC Applications eligible for a supplemental loan, the Credit Underwriter's loan

> recommendations will be sent to the Board for approval.
>
> (25) After approval of the Credit Underwriter's recommendation for funding by the Board, the Corporation shall issue a firm loan commitment.

49. The rule 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. The evidence establishes that the credit underwriter met these requirements.

50. The rule requires that the credit underwriter consider the market study, the development's financial impact on other developments in the area that received FHFC funding, and "other documentation." The evidence establishes that the credit underwriter met these requirements.

51. There is apparently little question that the Malabar Cove apartments will impact the ability of Madalyn Landing to obtain and retain tenants. The rule does not require that an underwriter recommend against funding a project on the basis of an adverse impact to a competing project, or that the FHFC Board deny an application to fund a project based on an adverse impact to a competitor.

52. The FHFC Board was clearly aware of all material aspects of the relevant housing market and of the Malabar Cove

project. The Board was clearly aware of the Petitioner's objections to the project and considered them prior to rendering their decision.

53. There is no evidence that the FHFC Board acted arbitrarily, capriciously, inappropriately or unreasonably, or otherwise abused its discretion on December 12, 2008, when the Board accepted the recommendations set forth in the credit underwriting reports that applications for funding filed by the developer of the Malabar Cove project be approved.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Respondent enter a final order dismissing the petition for hearing filed in this case.

DONE AND ENTERED this 2nd day of June, 2009, 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 2nd day of June, 2009.

COPIES FURNISHED:

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

M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole &
Bryant, P.A.
301 South Bronough Street, Fifth Floor
Post Office Box 1110
Tallahassee, Florida 32302-1110

Donna E. Blanton, Esquire
Elizabeth McArthur, Esquire
Radey, Thomas, Yon & Clark, P.A.
301 South Bronough Street, Suite 200
Post Office Box 10967
Tallahassee, Florida 32301

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

Sherry Green, 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.