

LEGAL

Action Supplement

I. LEGAL

A. **FOUR6 Skyway, LLC, and DDA Development, LLC v. Florida Housing Finance Corporation and Eagle Ridge Apartments, LLLP, DOAH Case No. 18-2027BID, FHFC Case No. 2018-015BP**

1. **Background**

- a) This case regards Request for Applications (“RFA”) 2017-113, which solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding (“tax credits”) for affordable housing developments located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. Petitioner FOUR6 Skyway and Respondent Eagle Ridge submitted applications in response to the RFA. On March 16, 2018, Florida Housing posted notice of its intended decision to award funding to several applicants, including Eagle Ridge. The Board found that FOUR6 Skyway’s application was ineligible for funding.
- b) Petitioners filed a notice of intent to protest and formal written protest as required by section 120.57(3), Florida Statutes, challenging the Corporation’s scoring of its Application for funding under the RFA. Eagle Ridge filed a Notice of Appearance and was granted party status.
- c) The central issue here is whether Florida Housing’s decisions to award funding under the RFA are contrary to the agency’s governing statutes, the agency’s rules or policies, or the solicitation specifications. More specifically, the issue is whether Florida Housing’s determination that the application of FOUR6 Skyway was ineligible was within the bounds described above. If FOUR6 Skyway had been deemed eligible it would have been selected for funding instead of Eagle Ridge due to its lower lottery number.
- d) At the hearing, Florida Housing testified that FOUR6 Skyway had been found ineligible for failure to submit the latitude/longitude coordinates of its Development in the proper format. FOUR6 Skyway argued that Florida Housing should have accepted the coordinates in the wrong format, or should have waived the formatting error as a minor irregularity.

2. **Present Situation**

- a) A hearing was conducted on May 23, 2018, before Administrative Law Judge J. Bruce Culpepper. All parties filed Proposed Recommended Orders. After reviewing the Proposed Recommended Orders, the Administrative Law Judge issued a Recommended Order on July 24, 2018. The Recommended Order affirmed Florida Housing’s determination that FOUR6 Skyway was properly deemed ineligible and recommended that the Petition be dismissed. A copy of the Recommended Order is attached as Exhibit A. No parties filed Exceptions to the Recommended Order.

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3. **Recommendation**

- a) Staff recommends that the Board adopt the Findings of Fact of the Recommended Order, the Conclusions of Law of the Recommended Order, and the Recommendation of the Recommended Order, and issue a Final Order dismissing the Petition.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FOUR6 SKYWAY, LLC, AND DDA
DEVELOPMENT, LLC,

Petitioners,

vs.

Case No. 18-2027BID

FLORIDA HOUSING FINANCE
CORPORATION AND EAGLE RIDGE
APARTMENTS, LLLP,

Respondents.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes (2017),^{1/} on May 23, 2018, in Tallahassee, Florida.

APPEARANCES

For Petitioners FOUR6 Skyway, LLC; AND DDA Development, LLC ("FOUR6 Skyway"):

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For Respondent Eagle Ridge Apartments, LLLP ("Eagle Ridge"):

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STATEMENT OF THE ISSUE

The issue to determine in this bid protest matter is whether Respondent, Florida Housing Finance Corporation's, intended award of funding under Request for Applications 2017-113 was contrary to its governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

This matter involves a protest to a Notice of Intent to Award issued by Florida Housing. On October 6, 2017, Florida Housing, through Request for Applications 2017-113 ("RFA 2017-113"), solicited applications to allocate competitive housing credits for affordable housing developments located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties.

On March 16, 2018, Florida Housing posted notice of its intent to award funding in Pinellas County to Eagle Ridge.

On March 21, 2018, Petitioner timely filed a formal written protest of the award with Florida Housing.^{2/} On April 18, 2018, Florida Housing referred the protest to the Division of Administrative Hearings ("DOAH") for assignment to an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.^{3/}

The final hearing was held on May 23, 2018. Joint Exhibits 1 through 10 were admitted into evidence. FOUR6 Skyway's Exhibits 1, 8 through 11, and 19 were admitted into evidence. Eagle Ridge's Exhibits 1 through 4 and 7 were admitted into evidence.^{4/} Florida Housing presented the testimony of Marisa Button. Eagle Ridge called Alissa Sieben to testify.^{5/} Following the hearing, FOUR6 Skyway filed the deposition testimony of Karla Brown, which has been accepted into evidence.

A two-volume Transcript of the final hearing was filed with DOAH on June 6, 2018. At the close of the hearing, the parties were advised of a ten-day time frame after receipt of the hearing transcript to file post-hearing submittals. All parties filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to provide

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

2. Florida Housing has been designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code. As such, Florida Housing is authorized to establish procedures to distribute low-income housing tax credits and to exercise all powers necessary to administer the allocation of these credits. § 420.5099, Fla. Stat. For purposes of this administrative proceeding, Florida Housing is considered an agency of the State of Florida.

3. Florida Housing administers the competitive solicitation process to award low-income housing tax credits and other funding by means of request for proposals or other competitive solicitation. Florida Housing initiates the competitive solicitation process by issuing a Request for Applications. §§ 420.507(48) and 420.5087(1), Fla. Stat.; and Fla. Admin. Code R. 67-60.009(4).

4. The low-income housing tax credit program (commonly referred to as "tax credits" or "housing credits") was enacted to incentivize the private market to invest in affordable rental housing. Tax credits are awarded competitively to real estate developers in Florida for rental housing projects which qualify. Typically, developers then sell the tax credits to raise capital for their housing projects. Because tax credits allow developers

to reduce the amount necessary to fund a housing project, they can (and must) offer the tax credit property at lower, more affordable rents. Developers also agree to keep rents at affordable levels for periods of 30 to 50 years.

5. The Request for Applications at issue in this matter is RFA 2017-113, entitled "Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties." The purpose of RFA 2017-113 is to distribute funding to create affordable housing developments in the State of Florida. Through RFA 2017-113, Florida Housing intends to provide an estimated \$14,601,863.00 of housing credit financing.

6. Florida Housing issued RFA 2017-113 on October 6, 2017. Applications were due to Florida Housing by December 28, 2017.^{6/}

7. Florida Housing received 33 applications in response to RFA 2017-113. Five proposed developments, including FOUR6 Skyway^{7/} and Eagle Ridge, applied for funding for housing credits in Pinellas County. Upon receipt of the applications, Florida Housing assigned each applicant a lottery number.

8. Florida Housing created a Review Committee from amongst its staff to score each application. The Review Committee reviewed, deemed eligible or ineligible, and ranked applications pursuant to the terms of RFA 2017-113, as well as Florida

Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.

9. As further explained below, the Review Committee deemed FOUR6 Skyway's application ineligible for consideration under RFA 2017-113. Specifically, the Review Committee determined that FOUR6 Skyway's application failed to state its housing project's Development Location Point in "decimal degrees, rounded to at least the sixth decimal point" as expressly required by Section Four, A.5.d(1), of RFA 2017-113.

10. Conversely, the Review Committee found that Eagle Ridge's application satisfied all mandatory and eligibility requirements for funding and was awarded 20 out of 20 total points. Eagle Ridge was assigned a lottery number of 16.

11. On March 16, 2018, the Review Committee presented its recommendation of preliminary rankings and allocations to Florida Housing's Board of Directors. Based on the Review Committee's recommendations, the Board of Directors (without explanation) stated that FOUR6 Skyway did not satisfy all mandatory and eligibility requirements for funding. Consequently, although FOUR6 Skyway was assigned a lower lottery number of 2, the Board of Directors selected Eagle Ridge for funding to develop affordable housing in Pinellas County. (Only applications that met all eligibility requirements were considered for selection.)

The Board of Directors approved \$1,660,000.00 in housing credit funding for Eagle Ridge's housing project.

12. FOUR6 Skyway protests Florida Housing's selection of Eagle Ridge instead of its own housing project. FOUR6 Skyway specifically challenges Florida Housing's determination that its application was ineligible under the terms of RFA 2017-113. If FOUR6 Skyway successfully demonstrates that Florida Housing erred in disqualifying its application, FOUR6 Skyway, by virtue of holding the lower lottery number, will be selected for housing credit financing in Pinellas County instead of Eagle Ridge.

13. The focus of FOUR6 Skyway's challenge is the information it provided in response to RFA 2017-113, Section Four, A.5.d., entitled "Latitude/Longitude Coordinates."

14. RFA 2017-113, Section Four, A.5, entitled "Location of Proposed Development" instructs, in pertinent part:

a. The Applicant must indicate the county where the proposed Development will be located. This RFA is only open to proposed Developments located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas counties.

* * *

d. Latitude/Longitude Coordinates

(1) All applicants must provide a Development Location Point^[8/] stated in decimal degrees, rounded to at least the sixth decimal place.

15. In its application, FOUR6 Skyway responded to Section Four, A.5.d(1), as follows:

[Latitude in decimal degrees, rounded to at least the sixth decimal place.]

N 27 43 34.215880

[Longitude in decimal degrees, rounded to at least the sixth decimal place]

W 82 40 47.887360

16. As shown above, FOUR6 Skyway stated its Development Location Point in a "degree/minute/second" format instead of the required "decimal degrees" format.^{9/} Because FOUR6 Skyway failed to comply with the Section A.5.d instruction to state the Development Location Point in decimal degrees, the Review Committee (and subsequently the Board of Directors) determined that FOUR6 Skyway's application was ineligible for funding.^{10/}

17. In arguing that its application was eligible under RFA 2017-113, FOUR6 Skyway contends that map coordinates written in a "degree/minute/second" format may be converted to decimal degrees by using the following mathematical equation:

$\text{Degree} + \text{minute}/60 + \text{second}/3600 = \text{decimal degrees.}$

Using this formula, the coordinates FOUR6 Skyway listed in its application can be converted into the following decimal degrees:

Latitude: N 27 43 34.215880 equals 27.726171
decimal degrees

Longitude: W 82 40 47.887360 equals -
82.679969 decimal degrees

18. Florida Housing does not dispute that the latitude/longitude coordinates FOUR6 Skyway listed (in either the "degree/minute/second" or decimal degree formats) correspond to a map location that would have been eligible for funding under RFA 2017-113. Consequently, FOUR6 Skyway argues that Florida Housing could have, and should have, used this "simple" mathematical formula to obtain the decimal degrees of its Development Location Point.

19. FOUR6 Skyway further claims that it included sufficient information on the face of its application for Florida Housing to pinpoint the exact location of its proposed housing development in Pinellas County. Not only did FOUR6 Skyway list the address of its development, but it attached to its application a Surveyor Certification Form which also identified its Development Location Point using the "degree/minute/second" format.^{11/} FOUR6 Skyway asserts that, in light of the fact that the term "decimal degrees" is not defined by statute, rule, or in RFA 2017-113, Florida Housing should have deemed its application eligible for funding based on the information it provided.

20. Finally, FOUR6 Skyway contends that Florida Administrative Code Rules 67-60.002(6) and 67-60.008 authorize Florida Housing to waive "minor irregularities" in applications. FOUR6 Skyway maintains that Florida Housing should have exercised its discretion and waived FOUR6 Skyway's failure to state its

Development Location Point in decimal degrees as a "minor irregularity." Therefore, Florida Housing should have found FOUR6 Skyway's application eligible for funding under RFA 2017-113.

21. In response to FOUR6 Skyway's challenge, Florida Housing asserts that it properly acted within its legal authority to disqualify FOUR6 Skyway's application. Florida Housing argues that FOUR6 Skyway, by stating the latitude/longitude coordinates of its Development Location Point in the (unacceptable) "degree/minute/second" format, failed to comply with the express terms of RFA 2017-113, thus rendering its application ineligible for funding.

22. In support of its position, Florida Housing presented the testimony of Marisa Button, Florida Housing's Director of Multifamily Allocations. In her job, Ms. Button oversees the Request for Applications process.

23. Ms. Button initially explained the procedure by which Florida Housing awarded funding under RFA 2017-113. Ms. Button conveyed that Florida Housing created a Review Committee from amongst its staff to score the applications. Florida Housing selected Review Committee participants based on the staff member's experience, preferences, and workload. Florida Housing also assigned a backup reviewer to separately score each application.

24. Review Committee members independently evaluated and scored discrete portions of the applications based on various mandatory and scored items. Thereafter, the scorer and backup reviewer met to reconcile their scores. If any concerns or questions arose regarding an applicant's responses, the scorer and backup reviewer discussed them with Florida Housing's supervisory and legal staff. The scorer then made the final determination as to each application.

25. For RFA 2017-113, Florida Housing assigned Karla Brown, a Multifamily Programs Manager, as the lead scorer for the "proximity" portion of RFA 2017-113, which included the Section Four, A.5.d, latitude/longitude coordinates of the Development Location Point. Ms. Brown has scored proximity points for Requests for Application for approximately ten years.

26. At the final hearing, Florida Housing offered the deposition testimony of Ms. Brown. In her deposition, Ms. Brown testified that, upon reviewing FOUR6 Skyway's application, she immediately noticed that FOUR6 Skyway did not use decimal degrees to record the latitude/longitude coordinates of its Development Location Point. Ms. Brown explained that Florida Housing's mapping software required applicants to list their Development Location Points in decimal degrees in order to locate the proposed housing project. The software would not allow her to plot latitude/longitude coordinates written in the

"degree/minute/second" format. Consequently, she was not able to determine the location of (or award "proximity" points to) the FOUR6 Skyway development. As a direct result, Ms. Brown determined that FOUR6 Skyway's application was ineligible for an award of funding under RFA 2017-113.

27. Furthermore, Ms. Brown considered whether she should waive FOUR6 Skyway's latitude/longitude coordinates as a "minor irregularity." She determined that waiving FOUR6 Skyway's "degree/minute/second" coordinates was not appropriate because RFA 2017-113 expressly instructed applicants to state the Development Location Point in the distinct format used by its mapping software, i.e., decimal degrees.

28. At the final hearing, Ms. Button elaborated on Ms. Brown's testimony maintaining that an applicant's use of decimal degrees for its Development Location Point was critical in Florida Housing's review of each application. Ms. Button reiterated that Florida Housing uses the application's Development Location Point to confirm that the proposed housing project is located in the area covered by the Request For Applications. Ms. Button explained that when latitude/longitude coordinates are submitted in the wrong format, it is impossible for Florida Housing staff to plot the Development Location Point using its internal mapping software.

29. Regarding FOUR6 Skyway's argument that Florida Housing should have considered its "degree/minute/second" format as a "minor irregularity," Ms. Button testified that Florida Housing recognizes that developers occasionally make errors in their applications. In light of this possibility, the rules governing the competitive solicitation process authorize Florida Housing to waive "minor irregularities." As provided in rule 67-60.008,

[Florida Housing] may waive Minor Irregularities in an otherwise valid Application. Mistakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors, may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes.

See also Fla. Admin. Code R. 67-60.002(6) and RFA 2017-113, Section Three, A.2.C.

30. However, Ms. Button declared that the difference between latitude/longitude coordinates stated in "degree/minute/seconds" versus "decimal degrees" is more than just a "minor irregularity." Converting map coordinates into decimal degrees goes beyond simply correcting a computational or typographical error. Such action requires the scorer to actually calculate the coordinate point on behalf of the applicant. Ms. Button explained that scorers are not prepared or trained on how to mathematically determine map coordinates. (In her deposition, Ms. Brown testified that she did not "even know how

to begin to try to convert" a "decimal/minutes/second" coordinate to decimal degrees. She is a "scorer," not a "surveyor."

Ms. Brown relayed that she was specifically trained to use the decimal degrees numbers, and only the decimal degrees numbers, to plot Development Location Points in the Florida Housing mapping software.)

31. Ms. Button added that, not only would converting latitude/longitude coordinates into decimal degrees place the burden on the scorers to correctly enter an applicant's data into the mapping software program, but, a scorer might miscalculate the plot points. This result would taint the reliability of the scoring process. Consequently, Florida Housing did not believe that it should have exercised its discretion to waive FOUR6 Skyway's improper latitude/longitude coordinates and convert its "degree/minute/second" Development Location Point into decimal degrees. Therefore, Florida Housing fully supported Ms. Brown's decision not to waive FOUR6 Skyway's response to Section Four, A.5.d., as a "minor irregularity."

32. Finally, Ms. Button professed that transcribing latitude/longitude coordinates into decimal degrees would be contrary to competition by relieving an applicant of the minor, but real, burden of accurately plotting its project's Development Location Point. Such a practice would allow a Florida Housing scorer to independently modify (and thus, benefit) a developer's

application, thereby enabling it to prevail over other applicants.

33. Finally, at the formal hearing, FOUR6 Skyway presented evidence of other "minor irregularities" Florida Housing has waived in past Requests for Applications.^{12/} FOUR6 Skyway argues that, in light of these prior decisions, Florida Housing's failure to waive its nonconforming latitude/longitude coordinates in this matter was arbitrary and capricious.

34. However, FOUR6 Skyway did not offer any evidence or elicit any testimony that Florida Housing has ever waived similar coordinate formatting errors. On the contrary, Ms. Button stated that she was not aware of any other instance where Florida Housing waived an applicant's listing of latitude/longitude coordinates in "degree/minute/seconds," instead of decimal degrees, as a "minor irregularity."

35. Based on the evidence presented at the final hearing, FOUR6 Skyway did not establish, by a preponderance of the evidence, that Florida Housing's decision finding FOUR6 Skyway's application ineligible for funding was clearly erroneous, contrary to competition, arbitrary, or capricious.

36. Therefore, the undersigned concludes, as a matter of law, that Petitioner did not meet its burden of proving that Florida Housing's proposed action to award housing credit funding

to Eagle Ridge under RFA 2017-113 was contrary to its governing statutes, rules or policies, or the provisions of RFA 2017-113.

CONCLUSIONS OF LAW

37. DOAH has jurisdiction over the subject matter and the parties to this competitive procurement protest pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. See also Fla. Admin. Code R. 67-60.009(2).

38. FOUR6 Skyway challenges Florida Housing's selection of Eagle Ridge for an award of housing credit funding under RFA 2017-113. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests with FOUR6 Skyway as the party protesting the proposed agency action. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Section 120.57(3)(f) further provides that in a competitive procurement protest:

[T]he administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

39. The phrase "de novo proceeding" describes a form of intra-agency review. The purpose of the ALJ's review is to "evaluate the action taken by the agency." J.D. v. Fla. Dep't of

Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and State Contracting, 709 So. 2d at 609. A de novo proceeding “simply means that there was an evidentiary hearing . . . for administrative review purposes” and does not mean that the ALJ “sits as a substitute for the [agency] and makes a determination whether to award the bid *de novo*.” J.D., 114 So. 3d at 1133; Intercontinental Props., Inc. v. Dep’t of Health & Rehab. Servs., 606 So. 2d 380, 386 (Fla. 3d DCA 1992). “The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency.” State Contracting, 709 So. 2d at 609.

40. Accordingly, FOUR6 Skyway, as the party protesting Florida Housing’s intended award, must prove, by a preponderance of the evidence, that Florida Housing’s proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of RFA 2017-113. The standard of proof FOUR6 Skyway must meet to establish that the award to Eagle Ridge violates this statutory standard of conduct is whether Florida Housing’s decision was: (a) clearly erroneous; (b) contrary to competition; or (c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.

41. The “clearly erroneous” standard has been defined to mean “the interpretation will be upheld if the agency’s

construction falls within the permissible range of interpretations.” Colbert v. Dep’t of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004); see also Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956) (when a finding of fact by the trial court “is without support of any substantial evidence, is clearly against the weight of the evidence or . . . the trial court has misapplied the law to the established facts, then the decision is ‘clearly erroneous.’”). However, if “the agency’s interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it.” Colbert, 809 So. 2d at 1166.

42. An agency action is “contrary to competition” if it unreasonably interferes with the purpose of competitive procurement. As described in Wester v. Belote, 138 So. 721, 722 (Fla. 1931):

The object and purpose [of the bidding process] . . . is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values . . . at the lowest possible expense; and to afford an equal advantage to all desiring to do business . . . , by affording an opportunity for an exact comparison of bids.

In other words, the “contrary to competition” test forbids agency actions that: (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are

awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. See § 287.001, Fla. Stat.; and Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

43. Finally, section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary, or capricious." An "arbitrary" decision is one that is "not supported by facts or logic, or is despotic." Agrico Chemical Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." Id.

44. To determine whether an agency acted in an "arbitrary, or capricious" manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Co. v. Department of Transportation, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable

person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.”

45. Turning to the protest at hand, the central question is whether Florida Housing was legally justified in determining that FOUR6 Skyway’s application was ineligible under the terms of RFA 2017-113. And, if so, whether Florida Housing’s decision not to waive the error in FOUR6 Skyway’s application as a “minor irregularity” was arbitrary or capricious. If FOUR6 Skyway demonstrates that Florida Housing should have found its application eligible (or should have waived the “degree/minute/second” coordinates format), then Florida Housing’s failure to award funding to FOUR6 Skyway would be contrary to its governing statutes, rules, policies, or the solicitation specifications.

46. Section 420.507(48) authorizes Florida Housing to award its annual allocation of low-income housing tax credits by competitive solicitation. Pursuant to its rulemaking authority under section 420.507(12), Florida Housing adopted chapter 67-60 to administer the competitive solicitation process. See Fla. Admin. Code R. 67-60.001(1).

47. According to rule 67-60.006(1):

The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter

shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by [Florida Housing], the Application shall not be considered.

48. Rule 67-60.006(1) clearly authorized Florida Housing to determine FOUR6 Skyway's application ineligible for funding under RFA 2017-113. The evidence establishes that FOUR6 Skyway failed to provide the latitude/longitude coordinates for its Development Location Point in "decimal degrees" as explicitly directed by Section Four, A.5.d(1). Ms. Button credibly testified that RFA 2017-113 required "decimal degrees" for a distinct purpose, i.e., its mapping software program exclusively used decimal degrees to locate the Development Location Point. This fact provided Florida Housing a good faith factual, logical, and rational reason to find that FOUR6 Skyway did not respond to RFA 2017-113 as specifically instructed.

49. Consequently, as directed by rule 67-60.006(1), Florida Housing did not consider FOUR6 Skyway's application when it awarded funding for Pinellas County. FOUR6 Skyway did not prove that Florida Housing's decision to disqualify its application was clearly erroneous, contrary to competition, or arbitrary, or capricious. Therefore, Florida Housing's Notice of Intent to Award housing credit financing in Pinellas County to Eagle Ridge (the next eligible, responsive applicant) was not contrary to its

governing statutes, rules or policies, the specifications of RFA 2017-113.

50. Notwithstanding the above analysis, Florida Housing's governing rules authorized it to waive "minor irregularities" in an application submitted in a competitive solicitation. As provided in rule 67-60.008:

[Florida Housing] may waive Minor Irregularities in an otherwise valid Application. Mistakes clearly evident to [Florida Housing] on the face of the Application, such as computation and typographical errors, may be corrected by [Florida Housing]; however, [Florida Housing] shall have no duty or obligation to correct any such mistakes.

51. "Minor Irregularity" is defined in rule 67-60.002(6) as:

[A] variation in a term or condition of an Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of [Florida Housing] or the public.

52. Based on the testimony of Ms. Brown, FOUR6 Skyway's latitude/longitude formatting error was clearly evident on the face of its application. Therefore, Florida Housing was authorized (but, had no duty or obligation) to waive FOUR6 Skyway's mistake.

53. However, rule 67-60.002(6) only empowered Florida Housing to waive FOUR6 Skyway's error if it did not "provide a competitive advantage or benefit not enjoyed by other Applicants,

and [did] not adversely impact the interests of [Florida Housing] or the public." At the evidentiary hearing, Florida Housing articulated several well-founded reasons why it should not have considered FOUR6 Skyway's latitude/longitude formatting error a "minor irregularity" under rule 67-60.002(6).

54. Initially, as stated above, the Florida Housing scorers could not simply discount FOUR6 Skyway's "degree/minute/second" coordinates as computational or typographical errors. Florida Housing's mapping software specifically required applicants to provide latitude/longitude coordinates in "decimal degrees, rounded to at least the sixth decimal place." Otherwise, the program could not plot the Development Location Point.

55. Ms. Button also persuasively testified that a decision to convert "degree/minute/second" coordinates into "decimal degrees" would have provided FOUR6 Skyway a competitive advantage or benefit over other applicants. If Ms. Brown had corrected FOUR6 Skyway's latitude/longitude coordinates, she would have affirmatively amended FOUR6 Skyway's application by recalculating its Development Location Point coordinates. As a result, Ms. Brown would have employed a different scoring methodology and practice than the standard she applied to the other applicants who complied with RFA 2017-113's instructions. Such action would have raised the specter of favoritism, as well as questions regarding

whether Florida Housing's competitive solicitation process was conducted on a fair and level playing field.

56. Finally, Florida Housing credibly explained why it would not have envisioned or expected a scorer (Ms. Brown) to waive, then correct, FOUR6 Skyway's "degree/minute/second" coordinates. The RFA 2017-113 scorers were neither trained to, nor familiar with, converting "degree/minute/second" coordinates into decimal degrees. Consequently, entrusting an untrained scorer to independently recalculate longitude/latitude coordinates into a different format might threaten the reliability of the solicitation scoring process.

57. Based on the above evidence, Florida Housing offered good faith factual, logical, and rational reasons why waiving a Development Location Point stated in "degree/minute/second" coordinates would have provided FOUR6 Skyway with a competitive advantage or benefit, as well as adversely impacted the interests of Florida Housing. Accordingly, Florida Housing's decision not to treat FOUR6 Skyway's latitude/longitude coordinates as "minor irregularities" was not clearly erroneous, contrary to competition, or arbitrary, or capricious.

58. As a final issue, FOUR6 Skyway introduced evidence of several prior solicitations during which Florida Housing waived certain mistakes in applications as "minor irregularities." (see endnote 12). FOUR6 Skyway argues that, while rule 67-60.008

gives Florida Housing the discretion to waive "minor irregularities," Florida Housing should not exercise that discretion in an "arbitrary" or "capricious" manner. In other words, in the competitive solicitation process, Florida Housing must ensure that similar circumstances reach similar results. Therefore, to be consistent with its previous practice, Florida Housing should have applied the "minor irregularity" rule to FOUR6 Skyway's latitude/longitude coordinate formatting error.

59. However, FOUR6 Skyway did not present any evidence that Florida Housing has ever waived an applicant's failure to present its Development Location Point in the specified latitude/longitude format (i.e., "decimal degrees") as a "minor irregularity." While Florida Housing may have previously waived certain mathematical errors or omissions, as concluded above, FOUR6 Skyway's use of "degree/minute/second" coordinates was more than a mere computation or typographic oversight. Florida Housing could not use the information FOUR6 Skyway provided in response to Section Four, A.5.d(1), unless its scorer conducted an independent calculation converting FOUR6 Skyway's "degree/minute/second" coordinates into decimal degrees. Such action goes beyond correcting "computation and typographical errors." Consequently, the evidence shows that Florida Housing reasonably exercised its discretion under rules 67-60.008 and 67-60.006(2) not to waive, then correct, the latitude/longitude

coordinates FOUR6 Skyway provided in its application as its Development Location Point.

60. In sum, the evidence in the record demonstrates that Florida Housing's determination that FOUR6 Skyway's application was ineligible for funding under RFA 2013-113 was not contrary to Florida statutes, rules or policies, or the specifications of RFA 2017-113. Further, Florida Housing's determination that the latitude/longitude coordinates FOUR6 Skyway provided in its application did not constitute "minor irregularities" within the application of rules 67-60.002(6) and 67-60.008 was not "arbitrary or capricious."

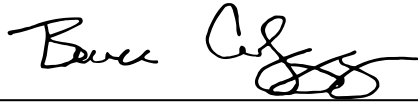
61. Accordingly, the undersigned concludes that FOUR6 Skyway did not meet its burden of proving, by a preponderance of the evidence, that Florida Housing's award of housing credit funding in Pinellas County to Eagle Ridge is contrary to its governing statutes, rules, or policies, or RFA 2107-113's terms or provisions. Florida Housing's selection of Eagle Ridge should not be set aside.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order dismissing the protest by FOUR6 Skyway. It is further recommended that Florida Housing Finance Corporation

select Eagle Ridge as the recipient of housing credit funding under RFA 2017-113.

DONE AND ENTERED this 24th day of July, 2018, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of July, 2018.

ENDNOTES

^{1/} Unless otherwise stated, all citations to the Florida Statutes and Florida Administrative Code are to the 2017 versions.

^{2/} No protests were made to the specifications or terms of RFA 2017-108.

^{3/} In addition to FOUR6 Skyway, Venetian Isles of Pinellas, LP ("Venetian Isles"), also challenged Florida Housing's award of funding to Eagle Ridge in Pinellas County. Venetian Isles timely filed a Notice of Protest with Florida Housing. After referral to DOAH, Venetian Isles' bid protest was assigned DOAH Case No. 18-2028BID. On April 26, 2018, the FOUR6 Skyway and Venetian Isles matters were consolidated.

Following the formal hearing, however, on June 14, 2018, Venetian Isles voluntarily dismissed its protest. Accordingly, the sole issue for consideration before DOAH is whether Florida Housing improperly determined that FOUR6 Skyway's application was ineligible for funding under RFA 2017-113.

^{4/} Venetian Isles' Exhibits 4 through 6 were admitted into evidence at the formal hearing. Venetian Isles was also allowed to proffer into evidence its Exhibits 1, 2, and 7. But see endnote 3 above.

^{5/} Eagle Ridge called Ms. Sieben specifically to respond to allegations raised by Venetian Isles. As Venetian Isles voluntarily dismissed its bid protest, Ms. Sieben's testimony is no longer relevant to a material issue in DOAH Case No. 18-2027 regarding FOUR6 Skyway.

^{6/} RFA 2017-113 was modified on November 1 and November 29, 2017.

^{7/} Petitioner DDA Development, LLC ("DDA"), is the "Developer" entity for the FOUR6 Skyway housing development as defined by Florida Housing in Florida Administrative Code Rule 67-48.002(28).

^{8/} Rule 67-48.002(33) defines "Development Location Point" as "a single point selected by the Applicant on the proposed Development site that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development." In other words, the Development Location Point identifies the specific location of an applicant's proposed housing site.

^{9/} Eagle Ridge provided its Development Location Point in the proper decimal degrees format.

^{10/} Aside from the latitude/longitude coordinates, FOUR6 Skyway's application was otherwise valid and eligible for funding under RFA 2017-113.

^{11/} The Surveyor Certification Form FOUR6 Skyway provided with its application, as well as the requirement to state the Development Location Point in the "degree/minute/seconds" format, was applicable to previous Requests for Applications when Florida Housing used a different software program to plot Development Location Points. Florida Housing changed its software program in 2017. At this time (and for all current Requests for Applications), Florida Housing requires latitude/longitude coordinates recorded in "decimal degrees, rounded to at least the sixth decimal place."

^{12/} At the formal hearing, FOUR6 Skyway presented several examples of "minor irregularities" Florida Housing has waived in past competitive solicitations including:

a. HTG Heron Estates Family, LLC v. Fla. Hous. Fin. Corp., Case No. 18-2130BID (Fla. DOAH Jun. 29, 2018) (An error in the applicant's site control documentation that misidentified the property's seller, but had no effect on the applicant's control of the development site, was a "minor irregularity.").

b. HTG Osprey Pointe, LLC v. Fla. Hous. Fin. Corp., Case No. 18-0479BID (Fla. DOAH Apr. 19, 2018; Fla. FHFC May 4, 2018) (Florida Housing waived, as a "minor irregularity," the applicant's failure to place a negative sign before a longitude coordinate. Florida Housing also waived an applicant's failure to place its longitude coordinate on the correct line in its application.).

c. HTG Hammock Ridge, LLC v. Fla. Hous. Fin. Corp., Case No. 16-1137BID (Fla. DOAH Apr. 19, 2016; Fla. FHFC May 6, 2016) (Florida Housing waived a number of "minor irregularities," including the location of a pharmacy whose doorway threshold was off by 70 feet, and a bus transfer stop location that was off by 150 feet.).

d. Heritage at Pompano Hous. Partners, Ltd. v. Fla. Hous. Fin. Corp., Case No. 14-1361BID (Fla. DOAH Jun. 10, 2014; Fla. FHFC Jun. 13, 2014) (A surveyor's error in the distance between a bus stop and the Development Location Point (which did not change the number of proximity points awarded) was a waivable "minor irregularity.").

e. Rosedale Holding v. Fla. Hous. Fin. Corp. (Fla. FHFC Case No. 2013-038BP, Jun. 13, 2014) (Florida Housing waived, as a "minor irregularity," a multiplication error regarding a tax credit allocation. Florida Housing has also waived several errors in equity credit letters.).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 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.