

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

ROBERT KING HIGH PRESERVATION
PHASE ONE, LLC,

Petitioner,

v.

FHFC CASE NO.: 2014-062BP

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

COQUINA PLACE ASSOCIATES, LTD, and
TALCOCY TUSCANY COVE I, LLC,

Intervenors.

RECOMMENDED ORDER

Pursuant to notice, Sections 120.569, 120.57(2) and (3), Florida Statutes, and Rule 67-60, Florida Administrative Code, an informal administrative hearing was held in this case on July 18, 2014, in Tallahassee, Florida, before Florida Housing Finance Corporation's designated Hearing Officer, Junious D. Brown III.

APPEARANCES

For Petitioner Robert King High Preservation Phase One, LLC ("Robert King" or "Petitioner"):

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Tallahassee, Florida 32301-1866

For Respondent Florida Housing Finance Corporation ("Florida Housing"):

Hugh R. Brown
Deputy General Counsel
227 North Bronough Street, Suite 5000
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For Intervenor Talcoy Tuscany Cove I, LLC ("Tuscany Cove"):

Craig Varn
MansonBolves, P.A.
201 East Park Ave., 2d Floor
Tallahassee, Florida 32301

For Intervenor Coquina Place Associates, Ltd. ("Coquina Place" and, together with Tuscany Cove, the "Intervenors"):

J. Stephen Menton
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

STATEMENT OF THE CASE

The issue for determination in this case is whether Respondent Florida Housing's rejection of Petitioner Robert King's response (the "Application") to Request for Applications 2014-103: Financing of Affordable Multi-Family Housing Developments with SAIL Funding to be used in conjunction with Tax-Exempt Bond Financing and Non-competitive Housing Credits (the "RFA"), on the grounds that it did not meet the site control requirements of the RFA, was clearly erroneous, contrary to competition, arbitrary or capricious, or was contrary to Florida Housing's governing statutes, rules, policies or RFA specifications.

PRELIMINARY STATEMENT

In the instant proceeding there are no disputed issues of material fact. Accordingly, the proceeding was conducted as an informal hearing pursuant to Section 120.57(2) and (3), Florida Statutes. At hearing, the parties filed a Prehearing Stipulation. Joint Exhibits J-1 through J-7

were stipulated and admitted into evidence without objection. Prior to hearing, Robert King moved to amend its Petition to include additional arguments, which included the inclusion of a letter from Miami-Dade County (the "County") discussing the Site Control documents in its Application. Robert King also requested the Official Recognition of several resolutions issued by the County concerning Robert King's project and the documents submitted to demonstrate Site Control. At hearing, Florida Housing and Intervenors objected to both motions, specifically challenging whether the documents attached to the amended petition and the resolutions were the type of documents which could be considered in the bid protest proceeding pursuant to Section 120.57(3)(f), Florida Statutes. Ultimately, Robert King moved into evidence the letter and the Resolutions as Exhibits 1-3. I took both Motions as well as the admissibility of the documents under advisement at hearing and requested the parties to address the issues in their respective proposed recommended orders ("PROs"). Having considered the arguments and for the reasons explained in the Conclusions of Law Section of this Recommended Order both Motions are denied and Petitioner's Exhibits 1-3 are rejected.

At hearing, Florida Housing sought to introduce Exhibits 1-6, which include Scoring Summary sheets and other documents from the 2011 Universal Application Cycle. Florida Housing offered these exhibits as evidence that Robert King knew or should have known how to correctly provide site control documentation. Robert King objected to the admission of these documents based on relevancy grounds. I took the objection under advisement and again requested the parties to address the issue in their respective PROs. For the reasons stated in the Conclusions of Law Section of this Recommended Order, the admission of Florida Housing's Exhibits 1-6 is granted.

Finally, Intervenors attempted to raise additional scoring issues at hearing that were neither raised by Florida Housing in its preliminary action nor by Robert King's Petition in its challenge of Florida Housing's preliminary action. Robert King made an *ore tenus* motion to limit any argument in this proceeding to those scoring issues raised by Florida Housing. Robert King's *ore tenus* motion was granted and Tuscany Cove proffered its argument for the record. In response, Robert King proffered its Exhibits 4 and 5 as well as its argument in response to Tuscany Cove's new issue. For the reasons stated in the Conclusions of Law Section of this Recommended Order, the admission of the Intervenors' Exhibits 4 and 5 is not addressed.

The parties stipulated, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of Florida Housing and to any applicable Rules promulgated by Florida Housing. The transcript of the hearing was filed on July 22, 2014. All parties timely submitted PROs on July 23, 2014. The parties' PROs have been given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Robert King is a Florida limited liability company in the business of providing affordable housing.
2. Florida Housing is a public corporation organized pursuant to Chapter 420, Part V, Florida Statutes (2013), and for the purposes of these proceedings, an agency of the State of Florida.
3. Coquina Place is a Florida limited partnership in the business of providing affordable housing units.
4. Tuscany Cove is a Florida limited liability company in the business of providing affordable housing units.

5. Florida Housing administers the State Apartment Incentive Loan ("SAIL") Program pursuant to Section 420.5087, Florida Statutes (2013).

6. On January 10, 2014, Florida Housing issued the RFA pursuant to Rules 67-48 and 67-60, Florida Administrative Code (2013).

7. On February 6, 2014, Robert King submitted its Application, #2014-309S, seeking \$1,618,750 in SAIL funding to assist in the development of a proposed 185-unit Elderly Development in Miami-Dade County.

8. On March 13, 2014, a Review Committee comprised of Florida Housing staff met and considered the Applications submitted in response to the RFA, and made recommendations regarding the scoring and ranking of the Applications to Florida Housing's Board of Directors (the "Board").

9. The Review Committee's recommendations included finding the Robert King Application was entitled to a maximum of 23 points, but was considered ineligible for funding for failing to meet threshold Site Control requirements. Specifically, the scorer responsible concluded:

The 1/27/14 ground lease includes a stipulation for automatic termination if approval by the Miami Dade County BOCC is not received. There was no evidence of an approval by the Miami Dade BOCC provided in this lease, therefore it cannot be determined if the lease is in effect.

10. On March 14, 2014, the Board met and adopted the recommendations of the Review Committee, including the rejection of the Robert King Application regarding Site Control requirements.

11. On March 18, 2014, Robert King timely filed its Notice of Intent to Protest the preliminary decision of the Board to deem its Application ineligible for failure to meet the Site Control requirements of the RFA.

12. On March 28, 2014, Robert King timely filed its Formal Written Protest and Petition for Administrative Hearing. On July 8, 2014, Robert King filed its Amended Formal Written Protest and Petition for Administrative Proceeding.

13. The issues raised in this surround whether Robert King demonstrated Site Control within the terms of the RFA. The RFA allows applicants to demonstrate Site Control in several ways including the submittal of an effective lease.

14. Specifically, Section Four, paragraph 7 of the RFA provides, in pertinent part:

The Applicant must demonstrate site control by providing, as Attachment 5 to Exhibit A, the documentation required in Items a., b., and/or c., as indicated below. If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites.

c. Lease - The lease must have an unexpired term of at least 50 years after the Application Deadline and the lessee must be the Applicant. If the owner of the subject property is not a party to the lease, all documents evidencing intermediate leases, subleases, assignments, or agreements of any kind between or among the owner, the lessor, or any sublessee, assignor, assignee, and the Applicant, or other parties, must be provided, and if a lease, must have an unexpired term of at least 50 years after the Application Deadline.

15. In response to the site control requirements of the RFA, Robert King submitted documents including a Ground Lease between Miami-Dade County (Landlord) and Haley Sofge Preservation Phase One, LLC (Tenant) (the "Haley Sofge Lease"), a Ground Lease between Miami-Dade County (Landlord) and Robert King High Preservation Phase One, LLC (Tenant) (the "Robert King Lease"), and a Sublease between Haley Sofge Preservation Phase One, LLC and Robert King High Preservation Lease Phase One, LLC (the "Robert King Sublease").

16. Both of the Intervenors are included on the list of projects tentatively selected for funding as a result of the Board's action on December 13, 2013.

17. The substantial interests of Petitioner and each Intervenor are subject to the determination in this proceeding and Petitioner and each Intervenor has standing to participate in this proceeding.

18. Intervenors timely intervened in this matter.

19. Florida Housing's finding that Robert King's Application is ineligible is based on its conclusion that further documentation was required to establish the validity of the Haley Sofge Lease. Such finding is based upon Section 8.4(b) of the Haley Sofge Lease, which provides for "Automatic Termination" if:

Landlord and Tenant fail to obtain the final approval of this Lease by the Miami-Dade Board of County Commissioners, which shall be within the Board's sole discretion.

The Robert King Lease at Section 8.3(b) provides for "Termination" of such lease if:

Tenant and Landlord fail to obtain final approval of this Lease by the Miami-Dade Board of County Commissioners, which shall be within the Board's sole discretion (signature of this Lease by the Landlord shall be prima facie evidence of such approval).

20. On at least five (5) occasions during the 2011 Universal Application Cycle Florida Housing rejected applications (the "2011 Applications") that included ground leases regarding Petitioner or its affiliates and the County which included provisions similar to the one at issue in the Haley Sofge Lease.

21. The five 2011 Applications were submitted and cured by substantially the same entity and persons that comprise the Petitioner in the instant case, including Alberto Milo, Jr. as their primary contact person.

22. The five 2011 Applications that were penalized for submitting an invalid ground lease that was contingent upon approval by the Miami-Dade Board of County Commissioners (the "BOCC") were cured by their respective applicants by the submission of additional

documentation, amendments and exhibits showing that the contingency of BOCC approval of the ground lease had been met, thereby providing evidence that validated the ground lease. In each such instance, Florida Housing accepted this additional documentation as curing the ground lease defect.

23. The Robert King Application contained no evidence that the automatic termination clause in paragraph 8.4(b) of the Haley Sofge Lease was obviated by final approval of the lease by the BOCC.

CONCLUSIONS OF LAW

1. Pursuant to Section 120.569, Florida Statutes, Sections 120.57(2) and (3), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding.

2. Florida Housing determined that Robert King's Application was not eligible for funding. As a developer of affordable housing in need of supplemental funding, Robert King's substantial interests are affected by Florida Housing's decision and Robert King has standing to challenge Florida Housing's decisions in this proceeding. Rule 67-48.005(5), Florida Administrative Code.

3. Due to the limited amount of tax credits available, if Robert King was successful in this proceeding it would be entitled to be funded and Intervenors, Coquina Place and Tuscan Cove, could be affected. Therefore, this proceeding potentially affects Intervenors' substantial interests and, therefore, they are entitled to intervene in this administrative proceeding.

4. Petitioner herein challenges an action by the Florida Housing, a public instrumentality and agency of the State of Florida pursuant to Sections 120.52 and 420.504(2), Florida Statutes.

5. This competitive solicitation protest is governed by Section 120.57(3)(f), Florida Statutes, which provides in pertinent part:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive procurement protest, other than a rejection of all bids, proposals, or replies, the 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.

6. As the party claiming that Florida Housing's proposed action does not meet the standards in Section 120.57(3)(f), Florida Statutes, Robert King bears the burden of proof in this proceeding, i.e., that Florida Housing's rejection of its Application and its intended award of funding is clearly erroneous, contrary to competition, arbitrary or capricious. Section 120.57(3)(f), Florida Statutes; *Dep't of Transp. v. J.W.C. Co.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

7. The nature of the *de novo* review in a bid protest proceeding has been established as follows:

[T]he phrase 'de novo hearing' is used to describe a form of intra-agency review. 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. *Intercontinental Properties, Inc. v. State Department of Health and Rehabilitative Services*, 606 So. 2d 380 (Fla. 3d DCA 1992).

State Contracting and Engineering Corp v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

8. Agency action will be found to be "clearly erroneous" if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also*, *Pershing Indus., Inc. v. Dep't of Banking and Fin.*, 591 So. 2d 991, 993 (Fla. 1st DCA 1991).

Agency action may also be found to be "clearly erroneous" if the agency's interpretation of the applicable law conflicts with its plain meaning and intent. *Colbert v. Dep't of Health*, 890 So. 2d. 1165, 1166 (Fla. 1st DCA 2004). In such a case, "judicial deference need not be given" to the agency's interpretation. *Id.*

9. An act is "contrary to competition" if it runs contrary to the objectives of competitive bidding, which have been long held to be:

[T]o 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 various forms; [and] to secure the best values for the [public] at the lowest possible expense.

Wester v. Belote, 138 So. 2d 721, 723-24 (Fla. 1931); *see also, Harry Pepper & Ass'n, Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

10. Section 287.001, Florida Statutes, establishes the legislative intent that public procurement be intrinsically fair and open and that it also eliminate the appearance and opportunity for favoritism so as to preserve public confidence in the process, and provides as follows:

The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured.

11. The stated legislative intent has been applied to determine whether an action is contrary to competition as follows:

Thus, from Section 287.001 can be derived an articulable standard of review. Actions that are contrary to competition include those which:

- (a) create the appearance of and opportunity for favoritism;

- (b) erode public confidence that contracts are awarded equitably and economically;
- (c) cause the procurement process to be genuinely unfair or unreasonably exclusive;
or
- (d) are unethical, dishonest, illegal, or fraudulent.

SYSLOGIC Tech. Servs., Inc. v. So. Fla. Water Mgmt. Dist., Case No. 01-4385BID (DOAH Jan. 18, 2002; SFWMD Mar. 6, 2002).

12. An "arbitrary" action is "one not supported by facts or logic, or despotic." A "capricious" action is "one which is taken without thought or reason or irrationally." *Agrico Chemical Co. v. Dep't of Envtl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978); *see also, Hadi v. Liberty Behavioral Health Corp.*, 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *Dravo Basic Materials Co., Inc. v. Dep't of Transp.*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

13. Robert King has attempted, through both a (i) Motion to Amend Formal Written Protest and Petition for Administrative Proceeding ("Motion to Amend"), and (ii) Motion for Official Recognition, to introduce supplemental documentation to demonstrate that the Haley Sofge Lease is effective and that no further approvals are necessary. In its PRO Petitioner cites case law to support its position that, in Florida, amendments to pleadings should be liberally granted in the absence of any prejudice to the parties. Petitioner further states that there is no prejudice to the parties caused by the Motion to Amend and the amendment offered thereby. If granted, the documents Petitioner seeks to offer through its Motion to Amend would clearly prejudice Florida Housing and the Intervenors by offering information to supplement or amend Petitioner's Application after the application deadline.

14. Additionally, the proffered documents would impermissibly supplement Robert King's Application in violation of Section 120.57(3)(f), Fla. Stat., which provides, in pertinent part:

In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered.

15. The purpose of this proceeding is to determine whether Florida Housing's determination to disqualify Robert King's Application was clearly erroneous, contrary to competition, arbitrary or capricious. The application of Section 120.57(3)(f), Florida Statutes, to these proceedings precludes Florida Housing from accepting or considering any supplemental documents from Robert King in connection with its Application for funding in the RFA process after the application deadline. This statute also precludes me from accepting into evidence or even considering any documents from Robert King that would have the effect of amending or supplementing its Application. The scoring and eligibility decisions of Florida Housing must be judged in this proceeding based upon the information that was considered by Florida Housing. Documents and other information which were not included in the Application cannot be used as grounds to support the allegation that Florida Housing's decision was clearly erroneous, contrary to competition, arbitrary or capricious. Accordingly, the Haley Sofge Lease submitted with the Application, which contained the automatic termination provision at issue, is the only evidence of site control that can be considered.

16. Likewise, Robert King is prohibited from presenting argument or testimony in an attempt to amend or supplement its Applications. Any such evidence, testimony and argument is irrelevant to the issue of whether Florida Housing's rejection of the Application was clearly

erroneous, arbitrary, capricious or contrary to Florida Housings statutes, rules or the RFA specifications.

17. At hearing and in its PRO, Petitioner argues that the additional information offered was intended to "clarify" information provided in Robert King's Application. Florida Housing and Intervenors argue that the introduction of such documents instead "amend" or "supplement" Robert King's Application. Petitioner's argument is not persuasive. Petitioner has not successfully distinguish the alleged clarifying character of the documents it offers from documents that "amend" or "supplement" the Application. In fact, the nature of the additional documentation proffered by Petitioner is consistent with the definition of "supplemental" cited in Petitioner's PRO, in that they (i) supply something additional, and (ii) add what is lacking. This is not simply a case of clarifying or explaining what is already included in the Application; there is nothing in the Application that demonstrates final approval of the Haley Sofge Lease by the BOCC. Accordingly, the documentation included in the Application failed to demonstrate site control as required by the RFA. Neither the RFA nor the statute allows an applicant to supplement its application to cure a threshold defect.

18. As to its Motion for Official Recognition, Petitioner cites Florida law to support its position that a court may take judicial notice of resolutions of the type offered by Petitioner. However, even if the documents themselves are the subject of official recognition or judicial notice, the facts expressed therein are still subject to exclusionary rules. As stated by Professor Charles Ehrhardt:

Taking judicial notice of a fact does not dispense with the evidence meeting the requirements of the other exclusionary rules.

(C. Ehrhardt, *Florida Evidence* §201.1 (2011 Edition), as quoted in *Marcia L. 'Hamilton, Employee/Claimant v. Escambia County School District, et al.*, 2011 WL 10510692 (December 16, 2011).

The exclusionary rule applicable here is Section 120.57(3)(f), Fla. Stat., *supra*.

19. Accordingly, while the documents requested for official recognition by Robert King may meet the legal requirements for such a status, I cannot consider them in determining the central issue of this case – whether Florida Housing’s scoring of the Robert King Application was clearly erroneous, arbitrary, capricious or contrary to Florida Housing’s statutes, rules or the RFA specifications.

20. Petitioner has cited several recent Florida Housing cases regarding the extent to which an unsuccessful bidder may present evidence to support or explain facts expressed in its Application. See *ARC of Martin County v. Florida Housing Finance Corporation*, Final Order No. 2013-037BP (Fla. HFC 13 March 14, 2013); *City Vista Associates, LLC v. Florida Housing Finance Corporation*, Final Order No. 2014-049BP (Fla. HFC June 13, 2014); *Heritage at Pompano Housing Partners, Ltd., et al. v. Florida Housing Finance Corporation*, Final Order No. 2014-050BP (Fla. HFC June 13, 2014); and *Pinnacle Rio, LLC, et al. v. Florida Housing Finance Corporation*, Final Order No. 2014-051BP (Fla. HFC June 13, 2014). However, these cases, which collectively distinguish documents offered to clarify or explain something already included in an application from documents offered to supplement or amend an application, do not support Petitioner’s position that the documents offered by Robert King do not amend or supplement the Application but instead clarify that (i) the Haley Sofge Lease was in effect when the Application was filed, and (ii) final approval of the Board of County Commissioners had been obtained. Instead, Petitioner attempts to introduce a new fact not evident in its original

Application, a fact without which the Haley Sofge Lease must be presumed to have automatically terminated. This is a different matter than proving the underlying truth of a fact already expressed – essentially adding an exhibit to the Haley Sofge Lease that was not there in the first place. Since this fact was not available to Florida Housing for scoring purposes, it may not be considered in this proceeding to determine whether Florida Housing correctly scored the Robert King Application based on the facts it expressed therein.

21. As evidenced by Robert King’s Motion to Amend and Request for Official Recognition, additional documentation directly related to the term of the Haley Sofge Lease was necessary to show that such Lease had not automatically terminated. This documentation should have been included in the Robert King Application, and to allow Petitioner to supplement its Application with this documentation now, in violation of Section 120.57(3)(f), Florida Statutes, and detrimental to the substantial interests of other parties that submitted their documents on or before the application deadline, would be arbitrary and capricious.

22. At the hearing and in its proposed recommended order, Petitioner suggests that Florida Housing determination should be reversed because of the County’s financial commitment and loan provide collateral evidence of the County’s intent to grant Site Control for the project to Robert King. While this argument is somewhat persuasive in showing intent, the RFP also requires evidence of an effective lease. Unfortunately, the Haley Sofge Lease and other supporting documentation was also necessary to evidence site control. Florida Housing’s sole reliance on the County’s provision of such financial commitment and loan, without specific evidence of the BOCC’s final approval of the Haley Sofge Lease would most certainly have been clearly erroneous, contrary to competition, arbitrary or capricious, or contrary to Florida Housing’s governing statutes, rules, policies or the RFA specifications.

23. Without the consideration of evidence not included in the Robert King Application, the Haley Sofge Lease must stand on its own to meet the RFA requirements for site control. Florida Housing cannot ignore the plain language of the automatic termination clause of such Lease, nor can it conclude that the Haley Sofge Lease is valid based on the signature of the parties with a seal – which only makes the automatic termination clause effective in the first place. The signatures and seal are evidence that the parties intend to bind themselves to the terms of the Lease, including the automatic termination clause. They do not demonstrate the prima facie approval of the BOCC, as argued by Petitioner. Were it as Petitioner has argued, that the signatures evidence final BOCC approval, then the automatic termination provision would be meaningless and unnecessary. Additionally, the Haley Sofge Lease is void of the provision found in the Robert King Lease which renders the County's signature as prima facie evidence of final BOCC approval. I find unpersuasive Petitioner's argument that the Haley Sofge Lease must be read so as to find that such provision is immaterial and does not exist. As far as Florida Housing could tell from the Application, further and "final" approval was required from the BOCC to prevent the Lease from automatically terminating pursuant to the terms thereof. Accordingly, Robert King's Motion to Amend is denied, and the evidence and documentation presented in its Request for Official Recognition is disregarded.

24. Principals of the Petitioner in this case have in the past been penalized for and cured this lease termination issue in applications for funding. In five instances during the 2011 Universal Cycle, an Application involving the same contact person as Robert King was preliminarily rejected by Florida Housing for including a clause making a lease contingent on approval of the Miami-Dade BOCC. As cures were allowed in the 2011 Universal Cycle, the applicants were permitted to submit additional documentation – the same kind of documentation

Petitioner attempts to introduce herein. In those five instances, Florida Housing accepted the additional documentation as showing the submitted lease was valid, but again, this was done in a context where such additional documentation was not barred by statute.

25. In a similar case from the 2004 Universal Cycle, *Creative Choice Homes XXX, Ltd. v. Florida Housing Finance Corporation*, Final Order No. 2004-027UC (Fla. HFC October 14, 2004), a lease submitted for site control was initially rejected because it contained a provision that made the lease contingent on approval by the Seller's Board of Directors, and that evidence of such approval was not included in the Application. As was the case with the five examples from 2011 described above, the Applicant in this case was permitted to cure the defect in their Application by submitting additional evidence through the prescribed cure process, a process unavailable to Petitioner in the instant case.

26. While Petitioner has questioned the probative value of these previous scoring decisions and cures thereto, they show that Florida Housing has consistently scored this issue in the same manner scored here, and that to depart from that precedent without sufficient distinguishing circumstances – which do not exist in the instant case – and in violation of the Final Orders cited herein, would be arbitrary and capricious. Petitioner knew or should have known that Florida Housing would require additional documentation in the Application to show that the Haley Sofge Lease containing the automatic termination provisions present was valid and acceptable for scoring purposes. Accordingly, Robert King has failed to carry its burden of showing that Florida Housing has acted clearly erroneous, contrary to competition, arbitrary or capricious or contrary to its statutes, rules or the RFA specifications. Florida Housing's decision to disqualify Robert King was based on the clear language of the Haley Sofge Lease and the failure of the Applicant to provide documentation to confirm that such lease was effective.

27. In Intervenors' PRO, they argue that, based on the RFA and the Notice of Intended Decision, only unsuccessful Applicants could file a notice of protest and formal written protest. Intervenors further argue that because they were awarded funding, they were not provided an express point of entry to file a notice of protest and a formal written protest. Intervenors also argue that a ruling in favor of Petitioner in this proceeding would change Florida Housing's funding determinations which could impact Intervenors' funding. Given my finding that Robert King has failed to carry its burden of showing that Florida Housing has acted clearly erroneous, contrary to competition, arbitrary or capricious or contrary to its statutes, rules or the RFA specifications, Intervenors do not need to further protect their substantial interests. Accordingly, I have not addressed the issues set forth in Intervenors' PRO.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered affirming Florida Housing's scoring of the Robert King Application and denying all relief requested by Petitioner.

Respectfully submitted this 31st day of July, 2014.

/s/ Junious D. Brown III

Junious D. Brown III
Hearing Officer for Florida Housing
Finance Corporation