STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON HIGHLANDS, LLC and
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

v.

Case No. 2016-006BP
Application No. 2016-109C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SP GARDENS, LLC

Intervenor,

_____/

ORDER DISMISSING PETITION WITH LEAVE TO AMEND

On February 12, 2016, Florida Housing Finance Corporation received a Petition, pursuant to Sections 120.569 and 120.57(3), from Madison Highlands, LLC and American Residential Development, LLC (Petitioners). On February 19, 2016, Florida Housing received an Amended Petition from Petitioners. This Amended Petition challenged Florida Housing's preliminary decision to award funding pursuant to Request for Applications (RFA) 2015-107 to four other applicants, and not to award funding to Petitioners. If Petitioner is successful in its challenges, and

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_____ /DATE 2-26-16

all four other applicants are found ineligible, Petitioner would then be recommended for funding. If Petitioner fails in one or more of its challenges, it would not be recommended for funding.

Section 120.569(2)(c), Fla. Stat., sets forth the procedures that an agency must follow upon receipt of a petition. It provides:

> (c) Unless otherwise provided by law, a petition or request for hearing shall include those items required by the uniform rules adopted pursuant to s. 120.54(5)(b). Upon the receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all of the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed. Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured.

The Uniform Rules are codified in Rule 28-106.201, Fla. Admin. Code. Among other things, the rules require:

> (2) All petitioners filed under these rules shall contain:
> (e) A concise statement of the ultimate facts alleged, including the specific facts the petitioner contends warrant reversal or modification of the agency's proposed action;
>
> (f) A statement of the specific rules or statutes the petitioner contends require reversal or modification of the agency's proposed action, including an explanation of how the alleged facts relate to the specific rules or statutes.

The Petition filed in this case is not in substantial compliance with the requirements of Section 120.569, Fla. Stat. The challenges to two of the other applicants fail to include any specific facts that warrant reversal of the agency's

proposed action, and fail to cite to any rules or statutes that require reversal of the agency's proposed action. To have standing to challenge the proposed award of a public contract, a bidder must have a substantial interest to be determined in the case. An applicant who submits the fifth lowest ranked proposal does not have a substantial interest, unless the applicant can establish that the four higher ranked applications must all be rejected. See Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3rd DCA 1981); Louis Berger Group, Inc. et. al. v. Florida Division of Emergency Management et. al., DOAH Case 15-2537BID (F.D.E.M. July 10, 2015).

Petitioner alleges that the application of City Edge Senior Apartments, Ltd ("City Edge") is deficient for failure to demonstrate site control. Specifically, Petitioner alleges the following:

> City Edge included in its application a Purchase and Sale Agreement between 301 and Bloomingdale, LLC (Seller) and The Richman Group of Florida (Purchaser) ("Original Contract") . ... Thereafter, The Richman Group of Florida (RCF) and City Edge (Buyer) ("City Edge Contract") executed Purchase and Sale Agreement, with a purchase price of $2,160,000, which is substantiality less than the purchase price on the Original Contract ... The RFA requires that the purchaser "MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant, is provided." See, RFA Pg. 32. In this case, City Edge is not the purchaser under the Original Contract. There is no assignment of contract which assigns the Original Contract to City Edge. As a result, City Edge cannot pursue specific performance of the City Edge Contract and cannot pursue specific performance against the Seller. A Mandatory Item is missing in the City Edge Application and the Application should be deemed to be ineligible."

Petitioner correctly recites the relevant facts involving the purchase and sale agreement, but fails to cite to any rule, statute, or provision of the RFA that is being violated. The RFA provides "If the owner of the subject property is not a party to the eligible contract, all documents evidencing intermediate contracts, agreements, assignments, options, or conveyances of any kind between or among the owner, the Applicant, or other parties, must be provided. . . ." In this case, the Applicant is the buyer (from Richmond), and a copy of the intermediate contract (between Richmond and 301) has been provided and meets all specified requirements for an intermediate contract.

Petitioner alleges that City Edge will not be able to pursue specific performance against either Richmond or 301. Petitioner does not present any rationale for this allegation and does not cite to any rule, statute, or RFA provision that is being violated. The RFA defines an "eligible contract" as one that "specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance." The contracts for sale between the Applicant and Richman, and between Richman and 301, state: "If Seller is otherwise in default under the terms and provisions of this Agreement . . . (ii) Purchaser may seek specific performance of Seller's obligations hereunder, unless specific performance is not available to Purchaser." Whether or not a court, in the case of a contract dispute, would or would not require specific performance, is entirely speculative and well

beyond the authority of Florida Housing to determine. ("The decision whether to decree specific performance of a contract to convey real property is a matter of judicial discretion." Jacobs et al. v. Berlin, 158 Fla. 259, 28 So.2d 539, 540 (1946).)

Petitioner alleges that SP Gardens, LLC ("Laburnum Gardens") is also deficient for failure to demonstrate site control. Like City Edge, Laburnum Gardens submitted a purchase and sale contract in order to demonstrate site control. This contract identified the property to be sold by reference to a street address, and also included a relatively detailed sketch of the property. No legal description was provided, and in fact the contract clearly provided that the parties would provide a legal description at some point in the future. Petitioner's allegation concerning this contract is as follows:

> It is well established under Florida law that where a document purporting to be an agreement for the purchase and sale of real property does not contain either a legal description of the property to be sold or a sketch from which a surveyor could locate the land and establish the boundaries, no contract exists. . . A surveyor would not be able to locate the land and establish the boundaries with the sketch. In the absence of a specific legal description or a sketch adequately describing the property for a surveyor, the Laburnum 'contract' is nonexistent.

Florida Housing is not required to accept a Petitioner's characterization of Florida Law as correct. What is "well established" in Florida law is that determinations of the validity of a contract are judged case by case, and that courts can consider evidence outside the four corners of the contract when making this determination. In Jordan v. Boisvert, 632 So.2d 254 (Fla. 1st DCA 1994), the court

stated: "Fundamental to a grant of specific performance of a contract for purchase and sale of real property is "whether a surveyor with the deed before him and with or without the aid of extrinsic evidence can locate the land and establish the boundaries. Mogee v. Haller, 222 So.2d at 469. *See also* Whaley v. Wotring, 225 So.2d 177, 180 (Fla. 1st DCA 1969)." In Bajrangi v. Magnethel Enterprises, Inc., 589 So.2d 416 (Fla. 5th DCA 1991), the court held that it is permissible to consider parol evidence with respect to a description of real property, so long as the instrument itself shows that the parties were contemplating a particular piece of property. In Bajrangi, the court actually determined that a street address would have been a sufficient description of the property, and that parol or extrinsic evidence should be considered by the court to address any additional words or surplusage.

Clearly, Petitioner's allegation that no surveyor would be able to locate the land and establish the boundaries based solely on the sketch is entirely speculative, but even if taken as true it would still not be determinative of whether or not the contract is a contract. Even if a surveyor could not locate the property based solely on the sketch, he or she might very well be able to do so after looking at additional extrinsic evidence, including the street address, any other documents indicating the intention of the parties, and even parol evidence from the parties themselves.

Petitioner does not allege that the Laburnum Gardens contract is deficient in any other way. Petitioner does not cite to any rules, statutes, or RFA provisions that

are being violated or that would require reversal of the agency's proposed action. Petitioner is essentially asking Florida Housing to determine that a contract otherwise meeting all of the RFA requirements is nonetheless invalid based upon its best guess as to what a court might decide in the event of a contract dispute. Such a determination is beyond the authority or expertise of this agency. It is possible that there may be circumstances where the invalidity of a contract is so indisputable that Florida Housing would consider it to be nonresponsive to an RFA requirement. Based upon the allegations in the Petition, this is not such a case.

For these reasons, the petition is DISMISSED. Petitioner shall have seven days from the date of execution of this Order to file an amended petition meeting the requirements of Section 120.569(2)(c), Fla. Stat., and Rule 28-106.201, Fla. Admin. Code. Failure of Petitioner to file an amended petition within this time shall be considered a waiver of its rights to file any administrative challenge in this matter.

Done this 26th day of February, 2016.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished this 26th day of February, 2016 by electronic mail to the following:

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