

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON HIGHLANDS, LLC AND
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SP GARDENS, LLC; and
CITY EDGE SENIOR APARTMENTS, LTD,

Intervenors.

DOAH Case No: 18-1558BID

FHFC Case No.: 2016-006BP

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Tom Mlamary / DATE: 7/30/18

PETITIONERS' AMENDED* NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Petitioners, Madison Highlands, LLC and American Residential Development, LLC ("Petitioners"), appeal to the Fifth District Court of Appeal, the Final Order rendered by Florida Housing Finance Corporation on July 27, 2018.

The nature of the appeal is a Final Order entered in an administrative proceeding brought under Section 120.569 and 120.57(1) and (3), Florida Statutes. A conformed copy of the Final Order with its Exhibit "A" Recommended Order is attached.

* The Notice of Appeal is amended only with respect to the attachment, to include Exhibit "A" to the Final Order and the filing stamp of Florida Housing Finance Corporation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Amended Notice of Appeal has been filed with the Corporation Clerk by electronic mail (CorporationClerk@floridahousing.org) on this 30th day of July, 2018, and a copy of the original physically signed Notice of Appeal will be delivered within five business days of the copy sent by electronic mail, in accordance with Fla. Admin. Code R. 67-52.002. I further certify that a copy of the Amended Notice of Appeal will be filed with the Clerk of Court for the Fifth District Court of Appeal in accordance with Fla. App. P. 9110(c). I further certify that a copy of the Notice of Appeal has been furnished by electronic mail to the following: Craig D. Varn, Esquire, Manson Bolves Donaldson Varn, P.A., 106 E. College Avenue, Suite 820, Tallahassee, FL 32301-7740 (cvarn@mansonbolves.com); Douglas P. Manson, Esquire, Manson Bolves Donaldson Varn, P.A., 1101 W. Swann Avenue, Tampa, FL 33606-2637 (dmanson@mansonbolves.com); Amy Wells Brennan, Esquire, Manson Bolves Donaldson Varn, P.A., 1101 W. Swann Avenue, Tampa, FL 33606-2637 (abrennan@mansonbolves.com); William S. Bilenky, Esquire, Manson Bolves Donaldson Varn, P.A., 1101 West Swann Avenue, Tampa, FL 33606 (bbilenky@mansonbolves.com); Michael G. Maida, Esquire, Michael G. Maida, P.A., P.O. Box 12093, Tallahassee, FL 32317 (mike@maidalawpa.com); Kenneth B. Bell, Esquire, Gunster, Yoakley & Stewart, P.A., 215 S. Monroe Street, Suite 601, Tallahassee, FL 32301 (kbell@gunster.com); Bill Hugh R. Brown, General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301 (hugh.brown@floridahousing.org); Christopher McGuire, Esquire, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301 (Chris.McGuire@floridahousing.org); Lawrence E. Sellers, Jr., Esquire, Holland & Knight LLP, 315 S. Calhoun Street, Suite 600, Tallahassee, FL 32301 (larry.sellers@hkclaw.com); M. Christopher Bryant, Esquire, P. O. Box 1110, Tallahassee, FL 32302-1110 (cbryant@ohfc.com); Tiffany A. Roddenberry, Esquire, Suite 600, 315 S. Calhoun Street, Tallahassee, FL 32301 (tiffany.rodtenberry@hkclaw.com), this 30th day of July, 2018.



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FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on July 27, 2018. Madison Highlands, LLC, and American Residential Development, LLC, (collectively referred to as "Petitioners" or "Madison Highlands") applied under Request for Applications 2015-107 (the "RFA"). The matter for consideration before this Board is a Recommended Order pursuant to §§120.57(1) and (3), Fla. Stat., and Rule 67-60.009, Fla. Admin. Code, as well as Exceptions and Responses to the Recommended Order.

On September 21, 2015, Respondent Florida Housing Finance Corporation (“Florida Housing” or “Respondent”) issued the RFA which solicited applications to compete for an allocation of federal Low-Income Housing Tax Credit funding (“tax credits” or “housing credits”) for affordable housing developments located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. Applications were submitted on November 5, 2015, and on January 29, 2016, Florida Housing posted notice of its intended decision to award funding to several applicants, including Intervenors SP Gardens, LLC (“SP Gardens”) and City Edge Senior Apartments, Ltd (“City Edge”) as well as, West River Phase 2, LP (“Boulevard”), and West River Phase 1A, LP (“Bethune”). Petitioner Madison Highlands was scored as having satisfied all mandatory and eligibility requirements but was not selected for funding because it received fewer points.

Petitioners timely filed a notice of intent to protest followed by a formal written protest. The protest was dismissed by Florida Housing for lack of standing. Petitioners appealed the dismissal to the Fifth District Court of Appeal. Florida Housing issued invitations to the preliminarily funded applicants, including SP Gardens. In the case of Madison Highlands, LLC v. Florida Housing Finance Corporation, 220 So.3d 467 (Fla. 5th DCA 2017), the court reversed the dismissal of Petitioners’ protest. The Florida Supreme Court declined to accept jurisdiction and denied a petition for review.

The protest was referred to the Division of Administrative Hearings (“DOAH”) on March 26, 2018. On that same date, Petitioners filed a Third Amended Formal Written Protest of Award and Petition for Administrative Hearing. Bethune and Boulevard, which both filed Notices of Appearance in March of 2016, filed Notices of Withdrawal on April 3, 2018 stating that they are no longer substantially affected by the proceeding.

The central issue is whether Florida Housing’s intended decision to award tax credits in RFA 2015-107 was contrary to Florida Housing’s rules, policies, or solicitation specifications; and if so, whether that determination was clearly erroneous, contrary to competition, arbitrary, or capricious. Petitioners, Respondent, and Intervenors timely filed Proposed Recommended Orders. Specifically, the issue is whether Florida Housing’s determination that the applications of SP Gardens, City Edge, Boulevard, and Bethune were eligible was within the bounds described above. Only if all four of these applicants are ineligible would Madison Highlands have been selected for funding.

A formal hearing took place on April 12, 2018, in Tallahassee, Florida, before the Honorable Administrative Law Judge (“ALJ”) D. R. Alexander. At hearing, Florida Housing stipulated that Boulevard and Bethune’s applications should have been deemed ineligible. If Madison Highlands prevails in its challenges against

only Boulevard, Bethune, and SP Gardens, and not City Edge, then City Edge should be recommended for funding.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the ALJ issued a Recommended Order on June 6, 2018. A true and correct copy of the Recommended Order is attached hereto as Exhibit "A." The ALJ therein affirmed Florida Housing's determination that SP Gardens was properly awarded funding and recommended dismissing the Petition.

On June 18, 2018, Madison Highlands and City Edge filed Exceptions to the Recommended Order. On June 28, 2018, Florida Housing filed Responses to both Madison Highlands and City Edge's Exceptions. Also, on June 28, 2018, City Edge filed a Response to Madison Highland's Exceptions.

RULING ON PETITIONERS' EXCEPTIONS

Petitioners' Exception to City Edge's Standing

1. Petitioners take exception to the sentence in the Preliminary Statement of the Recommended Order in which the ALJ refers to the denial of Petitioners' Motion to Dismiss City Edge for Lack of Standing.

2. After a review of the record, the Board finds that the sentence in the Preliminary Statement of the Recommended Order in which the ALJ refers to the denial of Petitioners' Motion to Dismiss City Edge for Lack of Standing is

supported by competent, substantial evidence, and the Board rejects Petitioners' exception.

Petitioners' Exceptions to Findings of Fact

3. Petitioners take exception to the Findings of Fact set forth in Paragraphs 8, 11-14, 17, 18, and 20-23 of the Recommended Order.

4. After a review of the record, the Board finds that the Findings of Fact set forth in Paragraphs 8, 11-14, 17, 18, and 20-23 of the Recommended Order are supported by competent, substantial evidence, and the Board rejects Petitioners' Exceptions to the Findings of Fact set forth in Paragraphs 8, 11-14, 17, 18, and 20-23 of the Recommended Order.

Petitioners' Exceptions to Conclusions of Law

5. Petitioners take exception to the Conclusions of Law set forth in Paragraph 29 of the Recommended Order.

6. The Board finds that it has substantive jurisdiction over the issues presented in Paragraph 29 of the Recommended Order.

7. After a review of the record, the Board finds that the Conclusions of Law set forth in Paragraph 29 are reasonable and supported by competent, substantial evidence, and rejects Petitioners' Exception to the Conclusions of Law presented in Paragraph 29 of the Recommended Order.

RULING ON INTERVENOR'S EXCEPTIONS

Intervenor's Exceptions to Findings of Fact

8. Intervenor takes exception to Findings of Fact set forth in Paragraphs 13 and 14 of the Recommended Order.

9. After a review of the record, the Board finds that the Findings of Fact set forth in Paragraphs 13 and 14 of the Recommended Order are supported by competent, substantial evidence, and the Board rejects Petitioners' Exceptions to the Findings of Fact set forth in Paragraphs 13 and 14 of the Recommended Order.

Intervenor's Exceptions to Conclusions of Law

10. Intervenor takes exception to Conclusions of Law set forth in Paragraph 29 of the Recommended Order.

11. The Board finds that it has substantive jurisdiction over the issues presented in Paragraph 29 of the Recommended Order.

12. After a review of the record, the Board finds that the Conclusions of Law set forth in Paragraph 29 are reasonable and supported by competent, substantial evidence, and rejects Petitioners' Exception to the Conclusions of Law presented in Paragraph 29 of the Recommended Order.

RULING ON THE RECOMMENDED ORDER

13. The Findings of Fact set out in the Recommended Order are supported by competent, substantial evidence.

14. The Conclusions of Law of the Recommended Order are reasonable and supported by competent, substantial evidence.

ORDER

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

15. The Findings of Fact of the Recommended Order are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

16. The Conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.


17. The Recommendation of the Recommended Order is adopted.

IT IS HEREBY ORDERED that the relief requested in the Petition is **DENIED**, the Petition is **DISMISSED**, and Florida Housing's decision to award tax credits to SP Gardens is **AFFIRMED**.

DONE and ORDERED this 27th day of July, 2018.

FLORIDA HOUSING FINANCE
CORPORATION



By: 
Chair

Copies furnished to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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SP GARDENS, LLC, AND CITY EDGE
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Intervenors.
_____ /

RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a final hearing in this case on April 12, 2018, in Tallahassee, Florida.

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STATEMENT OF THE ISSUE

The issue is whether Florida Housing Finance Corporation's (Florida Housing) intended decision on January 29, 2016, to award low-income housing tax credits for an affordable housing development in Hillsborough County pursuant to Request for Applications 2015-107 (RFA-107) was contrary to Florida Housing's rules, policies, or solicitation specifications; and, if so, whether that determination was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On September 21, 2015, Florida Housing issued RFA-107, which solicited applications to compete for federal low-income housing tax credit funding (tax credits) for affordable housing developments in six counties, including Hillsborough County. Applications in response to the Hillsborough County portion of the RFA were submitted by six applicants, including Madison Highlands, LLC (Madison); American Residential Development, LLC (ARD); SP Gardens, LLC (SP Gardens); City Edge Senior Apartments, Ltd. (City Edge); and three non-parties, West River 1A, LP (Bethune); West River Phase 2, LP (The Boulevard); and Mango Blossoms. The RFA provided that only one award for Hillsborough County would be made. On January 29, 2016, Florida Housing posted a notice of its intended decision to award funding to the top-ranked applicant, SP Gardens. Non-winners with eligible applications, in order of ranking, were Bethune, The Boulevard, City Edge, and Petitioners.

After Petitioners filed a formal written protest challenging the intended award, the protest was dismissed by Florida Housing for lack of standing on the ground the protest did not contain adequate allegations against all of the four higher-ranked applicants that, if proven, would result in Petitioners being ranked highest. Petitioners then sought review of their dismissal in the Fifth District Court of Appeal. Notwithstanding

the appeal, Florida Housing awarded tax credits to the highest ranked eligible applicant, SP Gardens. Later on, in the case of Madison Highlands, LLC v. Florida Housing Finance Corporation, 220 So. 3d 467 (Fla. 5th DCA 2017), the court reversed the dismissal of Petitioners' protest. The Supreme Court declined to accept jurisdiction and denied a petition for review. Fla. Hous. Fin. Corp. v. Madison Highlands, LLC, 2017 Fla. LEXIS 2086 (Fla. Sup. Ct. Oct. 20, 2017). On remand, the parties engaged in settlement negotiations but did not resolve the dispute.

On March 26, 2018, Petitioners filed a Third Amended Formal Written Protest of Award and Petition for Administrative Hearing (Protest). On the same date, Florida Housing forwarded the Protest to the Division of Administrative Hearings to resolve the dispute. In their Joint Pre-hearing Stipulation, the parties have agreed that this challenge will not affect the award of tax credits to SP Gardens. They also agree that if Petitioners can establish that the applications of SP Gardens and City Edge are ineligible for funding, Petitioners will be funded through a forward allocation. Finally, they agree that if only SP Gardens' application is determined to be ineligible, at the discretion of Florida Housing, City Edge may be awarded a forward allocation of credits.

On April 3, 2018, Bethune and The Boulevard, who each had filed a Notice of Appearance and Request to Intervene with

Florida Housing in March 2016, filed a Notice of Withdrawal stating that they no longer were substantially affected by the proceeding. Florida Housing now agrees that the applications of Bethune and The Boulevard are ineligible for funding because they failed to disclose all principals. Accordingly, Petitioners' unopposed Motion for Order of Dismissal of Bethune and The Boulevard is granted. Petitioners' Motion to Dismiss City Edge for lack of standing was denied at the outset of the hearing.

At the final hearing, Petitioners presented the testimony of one witness. Petitioners' Exhibits 1 through 18 were accepted in evidence. Florida Housing presented the testimony of one witness. SP Gardens presented no witnesses or exhibits. City Edge presented the testimony of one witness. A ruling was reserved on City Edge Exhibit 1. That exhibit is accepted. Finally, Joint Exhibits 1 through 7 were accepted.

A one-volume Transcript of the hearing was prepared. All parties filed proposed recommended orders (PROs), which have been considered.

FINDINGS OF FACT

A. The Parties

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. One of its responsibilities is to award low-income housing tax credits, which developers use to finance the construction of affordable

housing. Tax credits are made available to states annually by the United States Treasury Department and then are awarded pursuant to a competitive cycle that starts with Florida Housing's issuance of an RFA. This proceeding concerns RFA-107.

2. Madison is an applicant entity for a proposed affordable housing development in Hillsborough County. ARD is a developer entity of affordable housing.

3. SP Gardens and City Edge are entities in the business of providing affordable housing and filed applications pursuant to RFA-107.

B. Background

4. On September 21, 2015, Florida Housing published on its website proposed solicitation RFA-107, inviting applications for the award of tax credits for the development of affordable housing located in six counties, including Hillsborough County. The RFA provided that only one applicant would be awarded tax credits for Hillsborough County.

5. In response to the RFA, six applications were submitted for Hillsborough County. A scoring committee appointed by Florida Housing evaluated the applications and submitted a recommendation to the Board of Directors (Board). On January 29, 2016, all participants received notice that the Board had determined which applicants were eligible or ineligible for

consideration of funding. Only the application filed by a non-party, Mango Blossoms, was found ineligible.

6. The Board determined that SP Gardens and City Edge satisfied all mandatory and eligibility requirements for funding and received "perfect" scores of 28 points out of a total of 28 points. They were ranked one and four, respectively, based on random lottery numbers assigned by the luck of the draw. Because Bethune and The Boulevard are no longer parties, and their applications have been deemed to be ineligible by Florida Housing, SP Gardens and City Edge are now ranked one and two. The Board also determined that Petitioners satisfied all mandatory and eligibility requirements for funding; however, they received a score of 23 out of 28 total points, and were ranked below SP Gardens and City Edge.

7. In this bid dispute, Petitioners contend that Florida Housing erred in the scoring, eligibility, and award decision of the applications of SP Gardens and City Edge. But for the incorrect scoring of those two applications, Petitioners argue they would have been entitled to an allocation of housing credits or would have been moved up in the ranking.

C. SP Gardens

8. Consistent with its policy, even though an appeal was taken by Petitioners, in 2016, Florida Housing awarded tax credits to the highest ranked applicant, SP Gardens. On

April 21, 2016, Florida Housing issued an invitation to credit underwriting, which was accepted by the applicant on April 25, 2016. SP Gardens closed on the purchase and sale agreement, as amended, on June 15, 2016, and Florida Housing issued a carry-over allocation agreement on August 5, 2016. The applicant has since completed a credit underwriting with a positive recommendation, closed on the financing with the tax credit investor, and commenced construction of its development.

9. Petitioners contend the application of SP Gardens is deficient in three respects, which renders the applicant ineligible for funding. First, they contend SP Gardens failed to demonstrate control over the site of the project, as required by the RFA. Second, they contend the purchase and sale agreement is invalid because the applicant cannot enforce the specific performance of the contract. Finally, they contend the development location point (DLP) is not located on the parcel where most of the units will be constructed.

10. Section 4.A.8.a. of the RFA requires in part that the applicant demonstrate site control in the following manner:

The Applicant must demonstrate site control by providing, as Attachment 15 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.

11. SP Gardens submitted documentation to satisfy item a., which requires that an "eligible contract" be provided with the application in order to demonstrate control over the project site. An applicant typically submits an address, property description, metes and bounds, folio number, intersections of streets, or other information that describes the subject property. Florida Housing's practice is to accept the representations of an applicant. SP Gardens' purchase and sale agreement (contract) identifies the subject property using an engineer's drawing with sketched hash marks, a description of the property as "approximately two acres," and an address of "1108 E. Bloomingdale Avenue" in Valrico. County records do not reflect that such an address exists. However, the records do indicate an address of 1108 East Bloomindale Avenue that is on the proposed site and is owned by GF Financial, LLC, the seller of the property. Except for this scrivener's error, the purchase and sale agreement is otherwise an acceptable agreement.

12. An eligible contract must include a specific performance remedy. Petitioners contend the purchase and sale agreement cannot be enforced because of various alleged deficiencies in the agreement, including a failure to provide a legal description of the property and language in the agreement which does not reflect a meeting of the minds of the buyer and seller. However, a legal description of the property is not

required. Then, too, Florida Housing does not attempt to determine if there was a meeting of the minds of the parties or if the agreement is legally enforceable. Only a circuit court may do so. See § 26.012, Fla. Stat.

13. Petitioners also contend the DLP is not located on a parcel where most of the units will be constructed. The DLP is located on the property that is identified in the purchase and sale agreement. Whether or not the property ends up consisting of scattered sites will be addressed during the credit underwriting process. Florida Administrative Code Rule 67-48.0072 provides in part that "credit underwriting is a de novo review of all information supplied, received or discovered during or after any competitive solicitation scoring and funding preference process, prior to the closing on funding." Pursuant to this rule, during the credit underwriting process, a scattered site applicant must demonstrate compliance with the RFA. Also, in the final site plan approval process, the configuration of the proposed development will be fleshed out. With the advantage of hindsight in this case, this is exactly what SP Gardens did after it was issued an invitation to credit underwriting. By providing all required forms, a DLP, and appropriate assurances that it would comply with all RFA terms, SP Gardens has satisfied all RFA requirements. See, e.g., Brownsville Manor, LP v. Redding Dev. Partners, LLC, 224 So. 3d 891, 894 (Fla. 1st DCA 2017).

14. The preponderance of the evidence supports a finding that the application of SP Gardens is eligible for funding.

D. City Edge

15. Petitioners allege that City Edge failed to disclose all of the principals of the applicant and developer. They also contend that City Edge is unable to pursue specific performance of its sale and agreement contract against the developer or the seller of the property.

16. The RFA requires an applicant to "provide a list identifying the principals for the applicant and for each developer." The application identifies City Edge as the applicant entity. It also identifies the general partner of the applicant entity, City Edge Senior GP, LLC, and its limited partner, The Richman Group of Florida, Inc. (TRGF). TRGF is both the limited partner of the applicant entity and the developer entity for City Edge.

17. City Edge identified the principals for TRGF as of the application deadline. Florida Housing determined that this form was adequate to meet the requirements of the RFA. The application names James P. Hussey as the developer entity's Treasurer. At hearing, Mr. Hussey's position with TRGF was verified by TRGF's vice president and a corporate document.

18. Petitioners point out that, according to a printout of the annual report filed by TRGF with the Secretary of State, as

shown on the SunBiz website, at the time the application was filed, the Treasurer of TRGF was Doreen Cole, and not Mr. Hussey. However, the evidence shows that Ms. Cole was removed from the position of Treasurer on or about September 1, 2015, and she subsequently separated from the company in late 2015. Through sworn testimony and a corporate record, City Edge established that Mr. Hussey was Treasurer at the time of the application deadline, November 5, 2015.

19. Notably, Florida Housing does not rely on SunBiz for establishing who the principals of an entity are as of the application deadline. This is because SunBiz does not definitively identify the corporate officers as of the application deadline, and it sometimes contains errors. See, e.g., Warley Park, LTD v. Fla. Housing Fin. Corp., Case No. 17-3996BID (Fla. DOAH Oct. 19, 2017; FHFC Dec. 8, 2017). For this reason, Florida Housing does not require applicants to provide SunBiz printouts to verify the names of the principals.

20. Petitioners also contend that because of various deficiencies, the purchase and sale agreement cannot be enforced in circuit court. For the reasons expressed above, this determination does not lie within the jurisdiction of Florida Housing. In any event, the RFA requires that if the owner of the property is not a party to the eligible contract, the applicant must submit documents evidencing intermediate agreements between

or among the owner, or other parties, and the applicant. Here, City Edge included in its application: (a) a purchase and sale agreement between 301 and Bloomingdale, LLC (the seller), and TRGF (the purchaser), and (b) a purchase and sale agreement between TRGF (the seller) and City Edge (the buyer). The latter document is the intermediate contract and meets all RFA-specified requirements for an intermediate contract.

21. The documents reflect that TRGF possesses a specific performance remedy to compel 301 and Bloomingdale, LLC, to sell the property, and City Edge possesses the right to compel TRGF to perform under the intermediate contract. For purposes of ascertaining compliance with the RFA, the documents submitted by City Edge suffice.

22. In a similar vein, Petitioners contend City Edge did not demonstrate site control because it did not include an eligible contract. Currently, 301 and Bloomingdale, LLC, is the owner of the property on which the housing will be built. City Edge attached to its application a purchase and sale agreement and an intermediate contract. The two contracts satisfy the elements of an eligible contract necessary to demonstrate control over the project site, they provide a specific performance remedy, and they conform to the RFA.

23. The preponderance of the evidence supports a finding that City Edge's application is eligible for funding.

CONCLUSIONS OF LAW

24. Petitioners' protest to Florida Housing's proposed contract award is governed by section 120.57(3)(f) as follows:

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.

25. To prevail, Petitioners must prove, by a preponderance of the evidence, that Florida Housing's proposed scoring action is either contrary to its governing statutes, contrary to its rules or policies, or contrary to the specifications of the RFA. The standard of proof Petitioners must meet to establish that the scoring action violates this statutory standard of conduct is whether Florida Housing's decision was clearly erroneous, contrary to competition, or arbitrary or capricious, that is, an abuse of discretion. See, e.g., R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; Sch. Bd. Miami-Dade Mar. 20, 2002).

26. 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).

27. An act is contrary to competition if it: (1) creates the appearance of opportunity for favoritism; (2) erodes public confidence that contracts are awarded equitably and economically; (3) causes the procurement process to be genuinely unfair or unreasonably exclusive; or (4) is unethical, dishonest, illegal, or fraudulent. Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist., Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002), modified in part, Case No. 2002-051 (SFWMD Mar. 6, 2002).

28. Finally, section 120.57(3)(f) requires an agency action to be set aside if it is "arbitrary, or capricious." If the decision is not supported by facts or logic or is despotic, it is an arbitrary decision. A capricious decision is one taken without thought or reason.

29. For the reasons previously found, Petitioners have failed to demonstrate that Florida Housing's scoring decision was contrary to the agency's governing statutes, rules, or solicitation specifications, or that the action was clearly erroneous, arbitrary or capricious, or contrary to competition. Therefore, Florida Housing's determination that SP Gardens is eligible for funding under RFA 107 is correct. Because only one award will be made, and City Edge and Petitioners are ranked

number two and three, respectively, no allocation of tax credits should be made to those applicants.

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 of Petitioners. It is further recommended that Florida Housing reaffirm its decision to award tax credits to SP Gardens.

DONE AND ENTERED this 6th day of June, 2018, in Tallahassee, Leon County, Florida.

D.R. Alexander

D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
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this 6th day of June, 2018.

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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.

CERTIFICATION


I, Ana F. McGlamory, Corporation Clerk and Custodian of Records, HEREBY certify the following to be true and correct as on file with Florida Housing Finance Corporation.

Attached is a true and correct copy of the Petitioners' Amended Notice of Appeal of FHFC Case No. 2016-006BP, as maintained by the Florida Housing Finance Corporation. The attached is a regularly received and retained record of Madison Highlands, LLC and American Residential Development, LLC, v. Florida Housing Finance Corporation and SP Gardens, LLC, and City Edge Senior Apartments, Ltd., and is retained in the ordinary course of business of Florida Housing Finance Corporation.

As the Corporation Clerk and Custodian of Records, I am the keeper of the seal and certify that the seal affixed to this document is the true seal for Florida Housing Finance Corporation.

Certified this 1st day of August, 2018.





Ana F. McGlamory, CP, ICP, FRP
Corporation Clerk