

BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FINANCE CORPORATION

**KEYS AFFORDABLE
DEVELOPMENT IV, LLC**

Petitioner,

FHFC Case No. 2019-029BP

RFA No. 2019-110

App. No. 2019-394CS

vs.

**FLORIDA HOUSING
FINANCE CORPORATION.**

Respondent.

**FORMAL WRITTEN PROTEST AND PETITION
FOR ADMINISTRATIVE HEARING**

Petitioner, Keys Affordable Development IV, LLC, (“Petitioner” or “Keys Affordable”), pursuant to sections 120.57(1) and (3), Florida Statutes (“F.S.”) and Rules 28-110 and 67-60, Florida Administrative Code (“FAC”) hereby files this Formal Written Protest and Petition for Administrative Hearing (the “Petition”) regarding the scoring decisions of the Respondent, Florida Housing Finance Corporation (“Florida Housing”) to award funding to responsive Applicants pursuant to *RFA 2019-110 SAIL Financing for the Construction of Workforce Housing for Hurricane Recovery in Monroe County*. (hereinafter the “RFA”)

Introduction

1. This Petition is filed pursuant to sections 120.57(1) and (3), Florida Statutes, Rules 28-110 and 67-60, Florida Administrative Code.

Parties

2. Petitioner is a Florida limited liability company in the business of providing affordable housing. Petitioner’s address is P.O. Box 540337, Merritt Island, FL 32953. Petitioner’s address,

telephone number and email address are those of its undersigned counsel for purposes of this proceeding.

3. The affected agency is Florida Housing Finance Corporation. Florida Housing's address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329.

Notice

4. On February 5, 2019 Florida Housing issued the RFA.

5. On February 12, 2019, the RFA was modified by Florida Housing and a Notice of Modification of RFA 2018-111 was issued.¹

6. Applications in response to the RFA were due on or before February 20, 2019.

7. Florida Housing received three (3) applications in response to the RFA. Petitioner, in response to the RFA, requested an allocation of \$5,000,000.00 in Workforce SAIL funding for its proposed fifty-two (52) unit affordable housing development in Monroe County, Florida.

8. Petitioner received notice of the preliminary RFA scoring and rankings through electronic posting on Friday, March 22, 2019 at 10:40 am. A copy of the notices posted on the Corporations website are attached hereto as Exhibit "A". Petitioner was deemed ineligible for funding.

9. On Wednesday, March 27, 2019 at 8:27a.m., Petitioner timely submitted their Notice of Intent to Protest Florida Housing's intended decision. A copy of that Notice of Intent is attached hereto as Exhibit "B".

10. This Petition is timely filed in accordance with the provisions of section 120. 57(3) (b), Florida Statutes, and rules 28-110.004 and 67-60.009, Fla. Admin. Code.

Background

¹ The Notice of Modification of Request For Applications (RFA) 2019-110 was posted on the Corporations website and sent via electronic mail to persons registered on the Corporation's Multifamily Programs Registry.

11. Florida Housing is a public corporation created by section 420.504, Florida Statutes, to administer the governmental function of financing or refinancing affordable housing and related facilities in Florida. Florida Housing's statutory authority and mandates are set forth in Part V of Chapter 420, Florida Statutes. See, Sections 420.501-420.55, Fla. Stat. Florida Housing is designated as the Housing Credit agency for the State of Florida within the meaning of 42(h)(7)(A) of the IRC, and Chapters 67-48 and 67-60, Fla. Admin. Code.

12. Florida Housing administers a competitive solicitation process to implement the provisions of the housing credit program under which developers apply for funding. See Chapter 67-60, Fla. Admin. Code.

RFA 2019-110

13. This RFA was specifically targeted to provide much needed workforce housing in Monroe County, Florida. The introduction provides as follows,

This Request for Applications (RFA) is open to Applicants that applied and were unfunded under RFA 2018-115 and are proposing the construction of workforce housing in Monroe County.²

Florida Housing Finance Corporation... expects to have up to an estimated \$11,260,000 in State Apartment Incentive Loan (sail) Program funding by the 2018 Legislature to serve primarily low-income persons (i.e. households with incomes that do not exceed 80 percent of the Area median Income (AMI) as defined in Section 420.004, F.S.) and moderate-income persons (i.e., households with incomes that do not exceed 120 percent of the AMI as defined in Section 420.004, F.S). The Corporation also expects to have up to an estimated \$2,776,032 of Housing Credits available for award to proposed Developments serving low-income households at or below 60 percent of the AMI.

(RFA at 2) (emphasis supplied)

² RFA 2018-115 was likewise open to Applicants proposing the construction of workforce housing in Monroe County. Two (2) applicants out of five that applied under RFA 2018-115 were deemed eligible and selected for funding. The three unfunded applicants from RFA 2018-115 have all applied for funding under RFA 2019-110 and the amount of money available in RFA 2019-110 is exactly enough to fund all three applicants who were not funded in RFA 2018-115.

14. Appointed Review Committee members independently evaluate and score their assigned portions of the submitted applications based on various mandatory and scored items. (RFA at 48) The maximum point total that an applicant can receive is 15 points. (RFA at 47) Failure to meet all eligibility items results in an application being deemed ineligible. (RFA at 44).

15. The RFA provides that all eligible Applications will be ranked by sorting the Applications from the highest scoring Application to the lowest, with any scores that are tied separated as follows:

- a. First, by the Application's eligibility for the Proximity Funding Preference (which is outlined in Section Four A.5.e of the RFA) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;
- b. Next, by the Application's Total Eligible SAIL Request Amount per set aside unit (which is outlined in item 3 of Exhibit C) with Applications that have a lower amount of total SAIL funds per set-aside unit listed above Applications that have a higher amount of total SAIL funds per set-aside unit;
- c. Next, by the Application's eligibility for the Florida Job Creation Funding Preference (which is outlined in Item 4 of Exhibit C) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;
- d. Finally, by lottery number, with Applications that have a lower lottery number listed above Applications with a higher lottery number.

(RFA at 46-47)

16. The RFA mandates the Funding Selection Process (hereinafter "Selection Process"), as follows,

(a) The first Application(s) considered for funding will be the highest-ranking eligible Application(s) that can meet the Funding Test.

(sic)

(e) If funding remains after funding of all eligible Application(s) that can meet the Funding Test or because there is no eligible Application that can be fully funded, then no further Applications will be selected for funding and any remaining Total Remaining SAIL funding, as well as any unallocated 9% HC funding, will be distributed as approved by the Board.

(RFA at 48)

17. The selection process was carried out by the members of the Review Committee at a public meeting held on March 12, 2019.

18. The following eligible applications were selected for funding by Review Committee members,

-2019-393CS- Residences at Coco Plum

-2019-395CS- The Quarry III

19. The RFA provides flexibility to the Board in determining which applicants should be awarded funding,

The Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, *and any other information the Board deems relevant in its selection of Applicants to whom to award funding.*

(RFA at p. 48)(Emphasis Supplied)

20. Keys Affordable was the only applicant deemed ineligible. Keys Affordable believes that the ineligibility determination was a result of the Applicant setting aside 50% of its total units at or below 60% of AMI as opposed to 45%.

21. Keys Affordable met the requirements of the RFA by setting aside a minimum of 45% of the units at or below 60% AMI, and thus should be deemed eligible.

Set-Aside Commitments

22. The RFA defines a "Set-Aside Unit" in relevant part as,

...Units set aside at or below 60 percent of the Area Median Income for the County in which the Development is located.

(RFA at p. 60). In addition, in this RFA, "...100 percent of the units are considered to be Set-Aside units. (RFA at p. 68)

23. The RFA provides the following, under Section Four, *Information to be Provided in Application*

(1) **Total Set-Aside Commitment**

All Applicants must commit to set aside 100 percent of the total units, with the

required portion set aside as Housing Credit Set-Aside units, as outlined in (2) below, and the remaining units set aside as workforce housing units, as outlined in (3) below.

(2) Housing Credit Commitments

All Applicants must meet the **minimum HC set-aside requirements** of Section 42 of the IRC, as well as the Corporation's set-aside requirements that go beyond those required by Section 42 of the IRC.

Housing Credits claimed under this RFA will be limited to the units set aside as Housing Credit Set-Aside units, as selected by the Applicant in the Application.

(a) Minimum Set-Aside per Section 42 of the IRC

Per Section 42 of the IRC, the Applicant must elect one (1) of the following minimum set-aside commitments:

- 20% of the units at 50% or less of the Area Median Income (AMI)
- 40% of the units at 60% or less of the AMI
- Average Income Test³

(b) ELI Set-Aside Units

Applicants electing the minimum set-aside of 20% of the total units at 50% AMI or 40% of the total units at 60% AMI must set aside 5 percent of the total units for ELI Households at 25 percent of the AMI. (Emphasis supplied)

If the Set-Aside Breakdown Chart reflects more than the applicable required percentage of the total units at the ELI AMI level for Monroe County, during the credit underwriting process the Credit Underwriter will determine whether the Applicant's ELI Set-Aside unit commitment **will need to be reduced by increasing the set-aside units at AMI level(s) above the ELI level. Any such reduction in the ELI Set-Aside units would be no lower**

³The Average Income Test requires that (a) forty percent or more of the residential units in the Development be both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the Applicant with respect to the respective unit, subject to the special rules relating to income limitation which (b) require the Applicant to designate the imputed income limitation of each unit taken into account under (a) above, such that the average of the imputed income limitations of all units designated by the Applicant shall not exceed 60 percent of the area median income. The designated imputed income limitation of any such unit shall be in 10 percent increments as follows: 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of the area median income.

than the applicable required ELI Set-Aside percentage. (Emphasis supplied)

(3) Workforce Housing Commitment

The units that are **not set aside as Housing Credit Set-Aside units** under (2) above (**i.e., the remaining units in the proposed Development**) must be set aside as workforce housing at or below 80 percent or 120 percent of the AMI.

(RFA at p. 14-15)

24. The RFA requires that each Applicant complete a Total Set-Aside Breakdown Chart.

The Total Set-Aside Breakdown Chart must reflect all income set-aside commitments (**required set-asides and additional set-asides, including all required ELI Set-Asides**) and the required total set-aside percentage (as further outlined below)

(RFA at 17).

25. Keys Affordable elected the minimum HC set-aside commitment of 40% at 60% AMI. The RFA directed that upon this selection the Applicant's total set-aside commitment will be outlined as follows,

- 40 percent of the total units, rounded up to the next whole unit, must be set aside at or below 60 percent of the AMI as the Applicant's Minimum IRC HC Set-Aside;
- 5 percent of the total units, rounded up to the next whole unit, must be set aside as HC Set-Aside Units at 25 percent of the ELI AMI; and
- 55 percent of the total units must be set aside as workforce housing at or below 80 percent or 120 percent AMI.

Note: If the Applicant elects this minimum HC set-aside commitment, a total of 45 percent of the total units, rounded up to the next whole unit, must be set-aside as HC Set-Aside Units as outlined above.

26. The Keys Affordable application included the Total Set-Aside Breakdown Chart, which set forth the following,

Type of Set-Aside Units	Percentage of Residential Units	AMI
Housing Credit Set -Aside Units	5%	At or Below 25%
	Enter Number %	At or Below 28%
	Enter Number %	At or Below 30%
	Enter Number %	At or Below 33%
	Enter Number %	At or Below 35%
	Enter Number %	At or Below 40%
	Enter Number %	At or Below 45%
	Enter Number %	At or Below 50%
	45%	At or Below 60%
Workforce Housing Set-Aside Units OR	50%	At or Below 80%
Workforce Housing Set-Aside Units	Enter Number %	At or Below 120%
100%		Total Set-Aside %

27. Keys Affordable, committed to constructing 52 units, 26 of which would be Housing Credit Set-Aside Units, with two (2) units at or below 25% of AMI and the remaining 24 units at or below 60% of AMI. The remaining 26 units are Workforce Housing Set-Aside Units at or below 80% of AMI.

28. The ineligibility determination is apparently the result of the set-aside commitment of two units which are currently set aside at or below 60% AMI as opposed to at or below 80% AMI.

29. The RFA specifically allows for ELI units to be reduced during the Credit Underwriting process, if the Set-Aside Chart reflects more than 5% of the set-aside units are ELI Units.

Specifically stating,

“If the Set-Aside Breakdown Chart reflects more than the applicable required percentage of the total units at ELI AMI level for Monroe County, during the credit underwriting process *the Credit Underwriter will determine whether the Applicant’s ... commitment will need to be reduced by increasing the set-aside units at AMI levels above the ELI level...*”

(RFA at 15) (Emphasis supplied).

30. This statement in and of itself makes clear that having *more units* or a *higher percentage of units* than the *minimum* HC set-aside Commitment of 40% at 60% AMI is not an eligibility issue.

31. If the percentages set forth in the RFA for the 40% at 60% Set-Aside were intended to be a ceiling for eligibility purposes, an applicant would never get to credit underwriting as described above. Instead an applicant, like Keys Affordable, would be deemed ineligible since committing to more ELI units necessarily results in committing to a lower percentage of units at other AMI limits. Whether the lower percentage would be for units that do not exceed 60% AMI or workforce units at 80% or 120% AMI, one of these will be different than the percentages outlined in the RFA. In terms of determining eligibility, the only reasonable interpretation is that the set-aside percentages are minimums.

32. Moreover, with respect to a minimum number of units set-aside at 80%AMI level, by definition 100% of the proposed 52 units will be serving the needs of Low-income and Moderate income persons as defined in Section 420.004(11) and (12), F.S. All units set-aside at or below 60% AMI (the HC units) are also necessarily set aside at or below 80% AMI.

33. If an applicant chose to commit to a higher percentage of ELI units, than one of the other percentages would necessarily be less. The same principal applies to Keys Affordable, where a

higher percentage of HC units means, *strictly speaking*, a lower percentage of workforce units. However, the HC units are at a lower AMI limit than the workforce AMI limits and thus qualify as workforce units. In fact, none of the units committed to in the set-aside chart exceed 80% AMI limits.

34. Petitioner challenges and is seeking a determination that Florida Housing erred in the preliminary eligibility determination of the Keys Affordable application. But for this error, Keys Affordable would have been eligible and funded and the legislative mandate of funding workforce housing in Monroe County would have been met.

Substantial Interests Affected

35. If Florida Housing had followed the specifications of the RFA, then Keys Affordable, would have been deemed eligible and selected as the third Monroe County applicant.

36. Petitioner is substantially affected by the evaluation and scoring of the responses to the RFA. The results of the scoring have affected Petitioners ability to obtain funding through the RFA. Consequently, Petitioners have standing to initiate and participate in this and related proceedings.

37. Petitioner is entitled to a Formal Administrative Hearing pursuant to Sections 120.57(1) and 120.57(3), Florida statutes, to resolve the issues set forth in this Petition.

Disputed Issues of Material Fact and Law

38. Disputed issues of material fact and law exist and entitle Petitioners to a Formal Administrative Hearing pursuant to Section 120.57(1), Florida Statutes. The disputed issues of material fact and law include, but are not limited to, the following:

- a. Whether the RFA's criteria for determining eligibility were properly followed;
- b. Whether the proposed awards are based on a correct determination of eligibility of the applicants;

- c. Whether Florida Housing's determination that the Keys Affordable application is ineligible is clearly erroneous and arbitrary and capricious;
- d. Whether Florida Housing's determination that the Keys Affordable application was ineligible is clearly erroneous;
- e. Whether Florida Housing's determination that the Keys Affordable application was ineligible is contrary to competition;
- f. Such other issues as may be revealed during the protest process.

Statutes and Rules Entitling Relief

39. Petitioner is entitled to relief pursuant to Section 120.569 and 120.57, Florida Statutes, Chapters 28-106, 28-110, and 67-60, Florida Administrative Code.

Concise Statement of Ultimate Fact and Law, Including the Specific Facts Warranting Reversal of the Agency's Intended Award

40. Petitioner participated in the RFA process to compete for an award of Housing Credit funds based upon the delineated scoring and ranking criteria in the RFA. Keys Affordable which proposed development in Monroe County, is eligible for funding.

41. Unless the scoring and eligibility determination is corrected, and the preliminary allocation revised, Petitioner will be excluded from funding contrary to the provisions of the RFA and Florida Housing's governing statutes and rules.

42. A correct application of the eligibility, scoring and ranking criteria will result in funding for the Petitioner.

Right to Amend the Petition

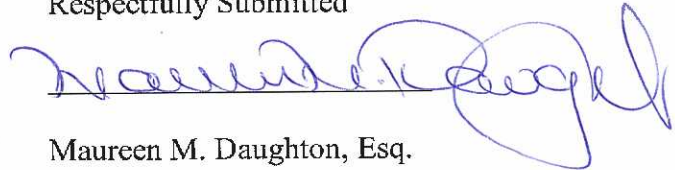
43. Petitioner reserves the right to amend this Petition if additional disputed issues of material fact are identified during the discovery process in this case.

WHEREFORE, pursuant to section 120.57(3), Florida Statutes, and rule 28-110.004, Florida Administrative Code, Petitioner's request the following relief:

- a) An opportunity to resolve this protest by mutual agreement within seven days of the filing of this Petition as provided by Section 120.57(3)(d)(1), Florida Statutes.
- b) If this protest cannot be resolved within seven days, that the matter be referred to the Division of Administrative Hearings for a formal hearing to be conducted before an Administrative Law Judge (“ALJ”) pursuant to Section 120.57(1) and (3), Florida Statutes.
- c) The ALJ enter a Recommended Order determining that the Corporations should have deemed Keys Affordable eligible for funding pursuant to the terms of the RFA and award funding to the Petitioner.
- d) That the Corporation adopt the Recommended Order of the ALJ.

Dated this 8th day of April 2019.

Respectfully Submitted

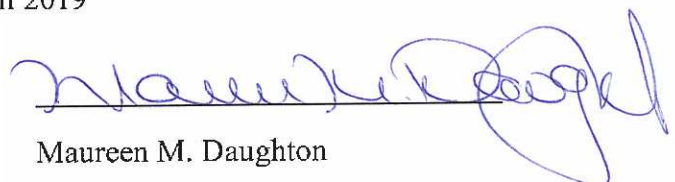


Maureen M. Daughton, Esq.
FBN 0655805
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE, Ste 304
Tallahassee, Florida 32308

Counsel for Keys Affordable IV, LLC

CERTIFICATE OF SERVICE

I CERTIFY that the original of this Formal Written Protest and Petition for Administrative Hearing was filed by electronic mail and U.S. Mail with the Corporation Clerk and Hugh Brown; General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, on this 8th day of April 2019



Maureen M. Daughton

RFA 2019-110 Board Approved Scoring Results

Application Number	Name of Development	County	Name of Authorized Principal Representative	Name of Developers	Workforce SAIL Request Amount	Competitive HC Request Amount	Total Units	Eligible For Funding?	Total Points	Total Workforce SAIL Request/ Units	Florida Job Creation Preference	Lottery Number
Eligible Applications												
2019-393CS	Residences at Coco Plum	Monroe	Robert G. Hoskins	NuRock Development Partners, Inc.	2,520,000.00	925,344.00	64	Y	10	39,375.00	Y	1
2019-395CS	The Quarry III	Monroe	Elena M. Adames	Ambar3, LLC	3,740,000.00	925,344.00	57	Y	5	65,614.04	Y	2
Ineligible Applications												
2019-394CS	Boatworks Residences	Monroe	Martin C. Flynn, Jr.	Quint Development, LLC	5,000,000.00	925,344.00	52	N	5	96,153.85	Y	3

On March 22, 2019, the Board of Directors of Florida Housing Finance Corporation approved the Review Committee's motion to adopt the scoring results above.

Any unsuccessful Applicant may file a notice of protest and a formal written protest in accordance with Section 120.57(3), Fla. Stat., Rule Chapter 28-110, F.A.C., and Rule 67-60.009, F.A.C. Failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.

- Exhibit A -

RFA 2019-110 Board Approved Preliminary Awards

Total Workforce Available	11,260,000
Total Workforce Allocated	6,260,000
Total Workforce Remaining	5,000,000

Total HC Available	2,776,032
Total HC Allocated	1,850,688
Total HC Remaining	925,344

Application Number	Name of Development	County	Name of Authorized Principal Representative	Name of Developers	Workforce SAIL Request Amount	Competitive HC Request Amount	Total Units	Eligible For Funding?	Total Points	Total Workforce SAIL Request/Units	Florida Job Creation Preference	Lottery Number
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On March 27, 2019, the Board of Directors of Florida Housing Finance Corporation approved the Review Committee's motion and staff recommendation to select the above Applications for funding and invite the Applicants to enter credit underwriting.

Any unsuccessful Applicant may file a notice of protest and a formal written protest in accordance with Section 120.57(3), Fla. Stat., Rule Chapter 28-110, F.A.C., and Rule 67-60.009, F.A.C. Failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.

Maureen McCarthy Daughton, LLC

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www.mmd-lawfirm.com

Via Hand Delivery and Email
March 27, 2019

Ms. Ana McGlamory CP, FCP, FRP (Ana.McGlamory@Floridahousing.org)
Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough, Suite 5000
Tallahassee, Florida 32301

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FLORIDA HOUSING FINANCE CORPORATION

RE: Notice of Intent to Protest, Request for Applications (RFA) 2019-110 Proposed Funding Selections and Scoring and Rankings

Dear Corporation Clerk:

On behalf of Applicant, Keys Affordable Development IV, LLC, Application No. 2019-394CS, we hereby give notice of our intent to protest the Award Notice and Scoring and Ranking of RFA 2019-110 posted by Florida Housing Finance Corporation on March 22, 2019 at 10:40am concerning *SAIL Financing for the Construction of Workforce Housing for Hurricane Recovery in Monroe County*. (See Attached).

A formal written petition will be submitted within ten (10) days of this Notice as required by law.

Respectfully Submitted,


Maureen M. Daughton

cc: Hugh Brown, General Counsel

- Exhibit B -

RFA 2019-110 Board Approved Scoring Results

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2019-395CS	The Quarry III	Monroe	Elena M. Adamus	Ambera, LLC	3,746,000.00	925,344.00	57	Y	5	55,614.04	Y	2
Ineligible Applications												
2019-394CS	Boatworks Residences	Monroe	Martin C. Flynn, Jr.	Quint Development, LLC	5,000,000.00	925,344.00	52	N	5	96,153.85	Y	3

On March 22, 2019, the Board of Directors of Florida Housing Finance Corporation approved the Review Committee's motion to adopt the scoring results above.

Any unsuccessful Applicant may file a notice of protest and a formal written protest in accordance with Section 120.57(3), Fla. Stat., Rule Chapter 28-110, F.A.C., and Rule 67-60.009, F.A.C. Failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.

RFA 2019-110 Board Approved Preliminary Awards

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On March 22, 2019, the Board of Directors of Florida Housing Finance Corporation approved the Review Committee's motion and staff recommendation to select the above Applications for funding and invite the Applicants to enter credit underwriting.

Any unsuccessful Applicant may file a notice of protest and a formal written protest in accordance with Section 120.57(3), Fla. Stat., Rule Chapter 28-110, F.A.C., and Rule 67-60.005, F.A.C. failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.