

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ELMWOOD TERRACE LIMITED)
PARTNERSHIP,)
)
Petitioner,)
)
and)
)
RST FRUITLAND HOUSING, L.P.,)
)
Intervenor,)
)
vs.) Case No. 09-4682BID
)
FLORIDA HOUSING FINANCE)
CORPORATION,)
)
Respondent,)
)
and)
)
BROWNSVILLE VILLAGE, II, LTD.,)
)
Intervenor.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on September 23 through 25, 2009, in Tallahassee, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Wellington Meffert, Esquire
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For Intervenor Brownsville Village II, Ltd.:

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STATEMENT OF THE ISSUE

The issue in this case is whether the specifications, terms, and conditions of the Request for Proposals 2009-04 issued by Respondent are contrary to Respondent's governing statutes, rules, or policies.

PRELIMINARY STATEMENT

On July 31, 2009, Respondent, Florida Housing Finance Corporation (Florida Housing), issued Request for Proposals 2009-04 (the RFP), which solicited proposals from developers seeking funding for affordable housing projects in Florida. On August 5, 2009, Petitioner, Elmwood Terrace Limited Partnership (Elmwood), timely submitted a notice of intent to protest certain specifications in the RFP. Elmwood timely filed a Formal Written Protest and Petition for Administrative Hearing

(the Petition) on August 17, 2009.

The Petition was forwarded to the Division of Administrative Hearings on August 26, 2009. RST Fruitland Housing, L.P. (Fruitland), filed a Petition for Leave to Intervene on September 9, 2009. Brownsville Village II, Ltd. (Brownsville), filed a Petition for Leave to Intervene on September 10, 2009. By Order dated September 17, 2009, the petitions to intervene were granted.

At the commencement of the final hearing, Elmwood submitted a Motion to Amend Petition. The motion was orally granted at the final hearing. The parties submitted an executed Joint Pre-hearing Stipulation at the commencement of the final hearing. The Joint Pre-hearing Stipulation contained admitted facts on pages 8 through 19. To the extent relevant, those admitted facts have been incorporated into this Recommended Order.

At the final hearing, Elmwood called the following witnesses: Donald Paxton, Kevin Tatreau, and Rob Vogt. Fruitland called Michael Hartman as its witness. Florida Housing called Steve Auger as its witness and submitted the deposition of Laura Cox. Brownsville did not present any witnesses at the final hearing, but submitted the deposition of Lloyd Boggio.

Joint Exhibits 1 through 35 were admitted in evidence. Elmwood's Exhibits 1, 2, 3, 6, and 7 were admitted in evidence.

Fruitland's Exhibits 1 through 4 were admitted in evidence.

Florida Housing's and Brownsville's Joint Exhibits 1 through 8 were admitted in evidence.

The four-volume Transcript was filed on October 12, 2009. On October 21, 2009, Elmwood and Fruitland filed an Unopposed Motion for Leave to Exceed Page Limitation. The motion was granted by Order dated October 21, 2009. The parties timely filed their proposed recommended orders on October 22, 2006. The proposed recommended orders have been given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Elmwood is a Florida limited partnership and is engaged in the development of affordable housing in Florida.

2. RST is a Florida limited partnership authorized to do business in Florida and is in the business of providing affordable housing.

3. Florida Housing is a public corporation created by Section 420.504, Florida Statutes (2009),¹ to administer the governmental function of financing or refinancing of affordable housing and related facilities in Florida. Florida Housing's statutory authority and mandates are contained in Chapter 420, Part IV, Florida Statutes. Florida Housing is governed by a Board of Directors (Board), consisting of nine individuals appointed by the Governor and confirmed by the Senate.

4. On July 31, 2009, Florida Housing issued the RFP, setting forth criteria and qualifications for developers to seek funding for affordable housing projects from funds that Florida has received through the American Recovery and Reinvestment Act of 2009, PL 111-5 (ARRA). ARRA was enacted in 2009 by Congress as part of the federal economic stimulus efforts and was signed into law on February 17, 2009.

5. Elmwood and RST received notice of the RFP through e-mail notification on July 31, 2009. The RFP required applicants to submit proposals to Florida Housing no later than 2:00 p.m. on August 14, 2009. Elmwood and RST are "applicants" as defined in the RFP. Elmwood and RST submitted separate applications, intending to seek financing for their affordable housing projects by applying for funding from the sources that are proposed to be allocated through the RFP.

6. On August 5, 2009, Elmwood timely submitted notice of its intent to protest the RFP, and, on August 17, 2009, timely filed its Formal Written Protest and Petition for Administrative Hearing, in accordance with the provisions of Subsection 120.57(3)(b), Florida Statutes, and Florida Administrative Code Rule 28-110.004. As an interested developer, who intended to, and did, seek funding from the sources being allocated through the RFP, Elmwood's substantial interests are affected by the terms of the RFP.

7. On August 18, 2009, Florida Housing issued its RFP 2009-04 Statement of Necessity to Continue RFP Process After Bid Protest is Filed (Statement of Necessity), pursuant to Subsection 120.57(3)(c), Florida Statutes. The Statement of Necessity was not challenged. On August 20, 2009, Florida Housing proceeded with making determinations of eligibility for funding under the RFP.

8. Both RST and Brownsville were selected for funding and invited into credit underwriting as provided in the RFP. Elmwood was not selected for funding.

9. On September 9, 2009, RST filed its Petition for Leave to Intervene on behalf of Elmwood to challenge the minimum occupancy standard of 92% required in the RFP. On September 10, 2009, Brownsville filed its Petition for Leave to Intervene on behalf of Florida Housing.

10. Florida Housing administers several programs aimed at assisting developers to build affordable multi-family rental housing in an attempt to protect financially marginalized citizens in Florida from excessive housing costs. The programs through which Florida Housing allocates resources to fund such affordable housing in Florida include: a federally funded multi-family mortgage revenue bond program (MMRB), established under Section 420.509, et. seq., Florida Statutes; the State Apartment Incentive Loan Program (SAIL), created pursuant to

Section 420.5087, et seq., Florida Statutes; and the federal Low Income Housing Tax Credit Program (the Tax Credit Program), established in Florida pursuant to Section 420.5099, Florida Statutes.

11. These funding sources are allocated by Florida Housing to finance the construction or substantial rehabilitation of affordable housing. A portion of the units constructed based on funding from these programs must be set aside for residents earning a certain percentage of area median income (AMI). Generally, the units are targeted to tenants earning 60% of AMI or below. The primary program at issue in this proceeding is the Tax Credit Program.

12. The Tax Credit Program was created by the Federal Income Tax Reconciliation Act of 1986, as a means to induce the private sector to construct and manage affordable housing projects. The Tax Credit Program is governed by the Internal Revenue Code, 26 U.S.C. Section 42.

13. Low income housing tax credits (Tax Credits) come in two varieties: competitively awarded "9%" Tax Credits and non-competitively awarded "4%" Tax Credits. For the 9% Tax Credits, the federal government annually allocates a specific amount of Tax Credits to each state using a population-based formula.

14. Tax Credits are a dollar-for-dollar offset to federal income tax liability. Developers awarded the Tax Credits get

the credit amount every year for ten years. The developer will often sell the future stream of Tax Credits to a syndicator, who, in turn, sells them to investors seeking to shelter income from federal income taxes. For example, a developer who receives a \$1,000,000 award of Tax Credits is entitled to that amount of tax credit paid each year for ten years, for a face value of \$10,000,000. The developer sells the Tax Credits to a syndicator or investor who has tax liability sufficient to absorb the amount of credits. If the selling price is 85 cents on the dollar, the sale of the Tax Credits would generate \$8,500,000 cash.

15. Unlike a loan or the proceeds from issuance of bonds, a developer who is awarded Tax Credits and syndicates those Tax Credits receives cash equity with no debt associated with it. Thus, Tax Credits provide an attractive subsidy and, consequently, are a highly sought-after funding source.

16. Florida Housing is the designated agency in Florida to allocate Tax Credits to developers of affordable housing, pursuant to Section 420.5099, Florida Statutes. Every year since 1986, Florida has received an allocation of Tax Credits to be used to fund construction of affordable housing.

17. As required by Section 42 of the Internal Revenue Code, each year Florida Housing adopts a Qualified Allocation Plan (QAP), which sets forth the allocation methodology for the

competitive 9% Tax Credits. The QAP must be approved by the Governor each year. The QAP is also adopted and incorporated by reference into Florida Housing's rules. See Fla. Admin. Code R. 67-48.002(95).

18. The 2009 QAP includes the following provision:

In order for the Corporation to implement the provisions of the Recovery and Reinvestment Act of 2009 (the "2009 Stimulus Act"), any funds received pursuant to 2009 Stimulus Act may be allocated by a competitive request for proposal or competitive application process as approved by the Board. Any such process will be governed by Section 42, IRC, and Chapter 67-48, F.A.C., as applicable, or, an emergency rule authorized by the Florida Legislature specifically for the 2009 Stimulus Act, if any.

The 2009 QAP was adopted as part of the 2009 Universal Cycle rules by Florida Housing's Board on March 13, 2009. At that time, Florida Housing had not yet received guidance from the federal government as to how the ARRA funds should be allocated.

19. The Florida Affordable Housing Guarantee Program was created in Section 420.5092, Florida Statutes, for the purposes of stimulating creative private section lending activities to increase the supply and lower the cost of financing or refinancing eligible housing, creating security mechanisms to allow lenders to sell affordable housing loans in the secondary market, and encouraging affordable housing lending activities that would not have taken place or that serve persons who would

not have been served but for the creation of this program. Florida Housing has accomplished these goals by issuing capitalizing bonds to create the Guarantee Fund, which lowers the interest paid on the MMRB bond debt by serving as a credit enhancer.

20. Since 2002, Florida Housing has allocated funding from the MMRB, SAIL, and Tax Credit Programs through a single annual competitive application process known as the "Universal Cycle," in which the applicants compete against one another for funding. The Universal Cycle and the attendant complex application review process are intended to equitably and reasonably distribute affordable housing throughout Florida.

21. Florida Housing has adopted rules which incorporate by reference the application forms and instructions for the Universal Cycle to govern the allocation of funds from the various programs it administers. Florida Housing amends its Universal Cycle rules, forms, and instructions every year. Following the completion of the Universal Cycle, Florida Housing engages in an extensive public comment process through which it solicits feedback and comments from developers for the next year's cycle. Any new amendments are adopted to take effect prior to an established Application Deadline for the ensuing year.

22. The process used by Florida Housing to review and approve the Universal Cycle applications is set forth in Florida Administrative Code Rule 67-48.004. Florida Housing reviews all timely-filed applications to determine if threshold requirements are met and scores each application based on factors such as programs for tenants, amenities of the development as a whole and of the tenants' units, local government contributions to the specific development, and local government ordinances and planning efforts that support affordable housing in general. The process includes a series of tiebreakers to choose among applications with otherwise equal scores.

23. After the initial review and scoring by Florida Housing, all applications and included exhibits, along with the scores for the applications, are posted on Florida Housing's website. Applicants are given a specific time period to alert Florida Housing of any errors they believe Florida Housing made in its initial scoring. Florida Administrative Code Rule 67-48.005 sets forth an appeal procedure for challenging the scores.

24. After any appeal proceedings, Florida Housing publishes final rankings which determine which applications are preliminarily selected for funding. The applicants for those applications selected are invited to participate in the credit underwriting process, which is governed by Florida

Administrative Code Rule 67-48.0072. A third party financial consultant, who is selected by Florida Housing but paid for by the individual applicant, determines whether the proposed project is financially sound. The credit underwriter reviews all aspects of the proposed development, including financing sources, plans and specifications, cost analysis, zoning, site control, environmental reports, construction contracts, and engineering and architectural contracts. Florida Administrative Code Rule 67-48.0072(10) requires an appraisal and market study. The credit underwriter is required to consider the market study, as well as the development's financial impact on other developments in the area previously funded by Florida Housing, and make a recommendation for approval or disapproval of funding.

25. Each year the Universal Cycle provides a mechanism for selecting applications to meet statutory geographic requirements; for certain targeting goals that address housing needs of particular demographic groups, such as farm workers, commercial fishery workers, the homeless, or the elderly; for specific set-asides or targeting goals aimed at addressing identified needs, such as the Florida Keys, inner city areas, or rural development; and for the preservation of existing affordable housing complexes. Each set-aside group essentially

has its own separate funding from its share of the funds distributed by Florida Housing.

26. After the set-aside goals are addressed, Florida Housing then uses the final rankings to try to achieve a distribution of affordable housing units among the county groupings (small, medium, and large, based on population) in accordance with the adopted percentages. Each of the three groups must receive at least 10% of the funds. Within the county size groups, Florida Housing uses a formula called SAUL, which is an acronym for Set-Aside Unit Limitation. The formula is set forth in the application instructions and incorporated by reference into the rules for each Universal Cycle in an attempt to evenly distribute the units.

27. As part of the Universal Cycle process, Florida Housing designates certain geographic areas of the state that are considered soft markets as "Location A" areas. Florida Housing first began incorporating into its application process a mechanism for identifying weak markets, known as "Location A" in 2003. The Location A designations are included in the Universal Cycle Application Instructions, which are incorporated by reference in the rules of Florida Housing.

28. Elmwood timely filed an application in the 2007 Universal Cycle, seeking an award of Tax Credits and a supplemental loan to construct a 116-unit family apartment

complex, Elmwood Terrace, in Fort Myers, Lee County, Florida. Elmwood's application received a perfect score and maximum tiebreaker points. As a result, Elmwood was allocated \$1,498,680 in Tax Credits. During the credit underwriting process, Elmwood committed to set aside more than the required units for Extremely Low-Income (ELI) households.

29. Based on the final ranking of its application, Elmwood was invited into the credit underwriting process. The credit underwriter designated by Florida Housing conducted the analysis required under Florida Housing's rules and issued a favorable recommendation for funding. The Credit Underwriting Report for Elmwood Terrace was accepted by the Florida Housing Board on September 22, 2008.

30. By the fall of 2008, significant changes were taking place in the economic environment and the housing market in particular, and it became evident that the market for Tax Credits had precipitously dropped. Tax credits had typically sold in the range of 85 to 95-cents on the dollar in recent years, but the value of Tax Credits had plummeted in the last two years. Sales, when a buyer can be found, are currently in the low 60-cents on the dollar range. Shortly before Elmwood was scheduled to close on its Tax Credits in the fall of 2008, the syndicator who had originally expressed its intent to

purchase Elmwood's Tax Credits informed Elmwood that it would not go forward with the syndication.

31. Many other projects that were awarded Tax Credits during the 2007 and 2008 Universal Cycles similarly experienced difficulty in finding syndicators to purchase the awarded Tax Credits and, thus, were unable to proceed to closing.

32. In order to accomplish the legislative mandate to pay, Florida Housing attempted to assist these troubled projects by granting extensions of time to meet various benchmarks in the Tax Credit program.

33. In January 2009, the Florida Legislature met in special session to address budget revenue shortfalls for the 2008-2009 fiscal year. Legislation was adopted and signed into law on January 27, 2009, which swept trust fund balances, transferred \$30 million from multi-family housing programs to the State Housing Initiative Partnership (SHIP) program, and required Florida Housing to pay \$190 million in previously appropriated funds to the treasury by June 1, 2009. These funds were to be taken first from developments that would provide new construction.

34. In order to accomplish the legislative mandate to pay \$190 million to the treasury, Florida Housing had to deobligate approximately \$80 to \$90 million of funds preliminarily committed to SAIL-funded projects and from funds preliminarily

committed to the Community Workforce Housing Innovation Pilot Program (CWHIP) projects. For the first time in Florida Housing's history, it was compelled to take money away from people at the Legislature's direction.

35. In early 2009, in recognition of the collapse of the housing market and the difficulty in marketing Tax Credits, the federal government, as part of its economic stimulus efforts, established mechanisms to assist in the development of affordable housing and offset some of the economic devastation to developers. Congress included specific provisions in ARRA intended to address the condition of the Tax Credit market.

36. Section 1602 of ARRA allows the state Tax Credit allocating agencies to return up to 40% of the state's annual Tax Credit allocation, as well as Tax Credits awarded in 2007 and 2008 to the federal government, to be exchanged for a cash distribution of 85 cents for each tax credit dollar returned. The exchange of Tax Credits generated a pool of \$578,701,964 for the State of Florida.

37. The Tax Credit Assistance Program (TCAP), a separate provision in ARRA, includes a direct allocation of funds to state housing finance agencies from the Department of Housing and Urban Development to provide gap financing for affordable housing projects that have been affected by the economic downturn. These funds were allocated to the states to "resume

funding of affordable rental housing projects across the nation while stimulating job creation in the hard-hat construction industry."

38. Florida Housing issued the RFP as the method for allocating the Exchange Funds and to provide an opportunity for applicants to request TCAP funds. The RFP solicits proposals from applicants with an "Active Award" of Tax Credits who were unable to close and are seeking alternate funding to construct affordable housing utilizing Exchange Funds from the Tax Credit Exchange Program authorized under Section 1602 of ARRA.

39. Section 4D.2 of the RFP provides:

2. Proposed Developments located within a 2009 Location A Area are eligible to apply only under the following circumstances:

a. Developments where the original Application for the Proposed Development was funded under the Housing Credit Hope VI goal.

b. Developments where the Original Application for the Proposed Development reflects the Housing Credit Preservation Designation.

c. Proposed Developments that are located in a 2009 Location A Area that **does not** have a Guarantee Fund Development with the same Demographic category located in the same county. (Emphasis in original)

40. The Location A areas in the RFP are the Location A areas in the rules adopted for the 2009 Universal Cycle. The Elmwood Terrace project is located in Lee County, which was not

designated as a part of Location A in the 2007 Universal Cycle. The rules for the 2008 Universal Cycle provided that Location A included that part of Lee County lying south of State Road 80 and the Caloosahatchee River. The 2008 Location A for Lee County did not specify demographic categories. For the 2009 Universal Cycle, all of Lee County was designated Location A for both the family and elderly designations.

41. The Universal Application Package, which is incorporated by reference in Florida Administrative Code Rule 67-48.004(1)(a), provides:

(1) Set-Aside Location A Development
(Threshold)

A proposed Development qualifies as a Set-Aside Location A Development if the location of the proposed Development is within a Set-Aside Location A Area and the Applicant selected the applicable Demographic Commitment (Elderly or Family) at Part III.D of the Application. The only exception to this provision is if the proposed Development also qualifies as a HOPE VI Development at Part III.A.2.d. of the Application.

Applicants with a Set-Aside Location A Development must meet the following set-aside requirements:

- (a) Applicants requesting Competitive HC must commit to set aside 100 percent of the Development's residential units at 50 percent AMI or less; or
- (b) Applicants requesting MMRB must commit to set aside at least 85 percent of the Development's residential units at 50 percent AMI or less.

(c) All Applicants must meet the minimum ELI Set-Aside threshold set out in Part III E.1.b.(2)(a)(iii) of these instructions.

42. Because Elmwood's proposed development is located in Lee County, Florida, the specifications of the RFP prohibit Elmwood from being considered for the allocation of funds in exchange for its Tax Credits.

43. The RFP provides that any project that receives an allocation of Exchange Funds and/or TCAP Funds will be required to go through the credit underwriting process, including an assessment of market need and impact.

44. Section 5B.1b of the RFP states that a tentative funding award under the RFP will be rescinded "if the submarket of the Proposed Development does not have an average occupancy rate of 92% or greater for the same Demographic population, as determined by a market study ordered by the Credit Underwriter, and analyzed by the Credit Underwriter and Florida Housing staff, as well as approved by the Board."

45. The term "submarket" is used in Florida Housing's credit underwriting rules in Florida Administrative Code Rule 67-48.0072. "Submarket" and "primary market area" are synonymous terms. Determining a submarket or primary area market is very subjective; even two adjacent sites may have different submarkets. Determination of a submarket is an art that involves making judgments. The market analysis, which is

required to be done as part of the credit underwriting process, will delineate the primary market area or submarket area of the proposed project. Such delineation will be based on criteria which may be unique to that proposed site. Thus, it is not practical to specify what criteria are used to establish the primary market area or submarket area of a proposed project.

46. The RFP provides that the demographic grouping submitted in the original application cannot be changed. The RFP allows applicants to change other aspects of their original proposal, including that an applicant may increase the number of proposed units.

47. Subsequent to the withdrawal of its anticipated equity syndicator in September 2008, Elmwood explored other options that could potentially enable it to proceed to closing. One option that Elmwood proposed to Florida Housing was to change the demographic grouping of Elmwood Terrace to an elderly project. Elmwood formally requested a change to its demographic grouping in a letter from Elmwood's attorney, Warren Husband, to Florida Housing's deputy development officer, Deborah Blinderman, dated January 26, 2009. That request was not approved.

48. Elmwood contends that the prohibition on changing a development's demographic grouping is contrary to Florida Housing's policy of allowing other developers to change their

demographic groupings. Florida Housing did allow two developments to change their demographic groupings.

49. On April 24, 2009, the Board granted River Trace Senior Apartments' request to change its demographic grouping from elderly to family. River Trace Senior Apartments was a development which had been funded in 2000 as an elderly development. It operated for eight years as an elderly development without achieving satisfactory occupancy in its 178 units. Based on the development's history, the Board allowed a demographic grouping change in hopes of achieving satisfactory occupancy levels. Unlike Elmwood's proposed development, River Trace Senior Apartments was a housing development, which was already built and in operation.

50. In October 2008, Florida Housing approved a request for a change in demographic grouping in a proposed project. The proposed development, Bradenton Village II, was the third phase of a large HOPE VI redevelopment project and consisted of 36 units designated as family units. During the permitting process, the City of Bradenton informed the developer that the proposed site could not accommodate the number of parking spaces required for a family development, but the required parking could be provided if 32 of the units were designated as elderly units. Bradenton Village had an investor who was willing to

remain in and go forward with the project redesignated as elderly.

51. Florida Housing did not allow changes in pending deals after the Legislature's special session budget action in January 2009 because of the large number of projects that had lost their funding and proposed changing the scope of their projects to qualify for ARRA funds. These included a number of CWHIP projects. The director for Florida Housing felt that he could not justify allowing Elmwood to change its demographic designation while refusing to allow the deobligated CWHIP developers to change their target markets.

52. The evaluation process for the RFP is set forth in Section 7 of the RFP and provides that the Florida Housing Review Committee will:

[S]elect Applicants most likely to be considered for award, make any adjustments deemed necessary to best serve the interest of Florida Housing's mission, and develop a recommendation or series of recommendations to the Board. The Committee will then rank the Applications deemed eligible for funding with preference given to Applications that are Shovel-Ready. The Board may use the Proposals, the Committee's scoring, and any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in the selection of Applicants to whom to award funding.

CONCLUSIONS OF LAW

53. The Division of Administrative Hearings has

jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat.

54. Florida Housing has challenged Fruitland's standing to intervene in this bid protest. Fruitland's substantial interests are affected by the specifications that deal with the 92% occupancy requirement. Although Fruitland has moved to the credit underwriting process, it is still affected by this requirement. Therefore, Fruitland has standing to intervene.

55. Brownsville also has standing to intervene. Like Fruitland, Brownsville has moved into the credit underwriting process, and a change in the specifications could affect its ability to continue in the process.

56. As the party protesting the specifications of the RFP, Elmwood has the burden of proof. See State Contracting and Engineering Corp. v. Dept. of Transportation, 709 So. 2d (Fla. 1st DCA 1998). Subsection 120.57(3)(f), Florida Statutes, provides:

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. In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent.

57. Elmwood is contesting certain terms, conditions, and specifications of the RFP. Thus, the issue is whether those terms, conditions, and specifications are contrary to Florida Housing's governing statutes, rules, or policies. Section 420.5099, Florida Statutes, designates Florida Housing as the housing credit agency for Florida within the meaning of Subsection 42(h)(7)(A) of the Internal Revenue Code of 1986 and gives Florida Housing "the responsibility and authority to establish procedures necessary for proper allocation and distribution of low-income housing tax credits and [to] exercise all powers necessary to administer the allocation of such credits." Subsection 420.507(10), Florida Statutes, gives Florida Housing the authority to accept grants from the United States government.

58. Pursuant to ARRA, Florida Housing is the recipient of a Grant to States for Low-Income Housing Projects in Lieu of Low-Income Housing Credits for 2009 (Grant) in which Tax Credits are exchanged for cash. Florida Housing is required to use the Grant to make subawards to finance the construction or

acquisition and rehabilitation of qualified low-income buildings. Subsection 1602(c)(2) of ARRA further requires that “[a]ny such subaward with respect to any qualified low-income building shall be made in the same manner and shall be subject to the same limitations (including rent, income, and use restrictions on such building) as an allocation of housing credit dollar amount allocated by such State housing credit agency under section 42 of the Internal Revenue Code of 1986.”

59. Subsection 42(m)(1)(C) of the Internal Revenue Code of 1986 requires that Florida Housing set forth its selection criteria for the allocation of Tax Credits in a qualified allocation plan. Florida Housing has adopted rules which establish the criteria to be used for the allocation of Tax Credits. Those rules are contained in Florida Administrative Code Chapter 67-48. The QAP, which sets out the allocation for the competitive award of Tax Credits, is incorporated by reference in Florida Administrative Code Rule 67-48.002(95). The QAP provides that any funds received pursuant to ARRA will be allocated by a competitive request for proposal or competitive allocation process as approved by the Board. It further provides that the selection process will be governed by Section 42 of the Internal Revenue Code and Florida Administrative Code Chapter 67-48, as applicable,² or an emergency rule authorized by the Florida Legislature for ARRA,

if any. There were no emergency rules authorized by the Legislature, and none were adopted by Florida Housing.

60. Subsection 420.507(41), Florida Statutes, provides that Florida Housing has the authority "[t]o conduct and fund, solely from funds derived from amounts other than those deposited into the State Housing Trust Fund, demonstration programs and projects which further the statutory purposes of the corporation, including the power to establish selection criteria by rule or by means of requests for proposals." No evidence was presented to definitively establish that the Grant funds are not deposited in the State Housing Trust Fund. Based on the terms and conditions of the Grant, Florida Housing is required to "open a new account (Grant Account) with a financial institution for the purpose of receiving grant election amounts, for making distributions of grant election amounts to other agencies within the State, and for making subawards." It appears that the monies received from the Grant are not funds that are deposited in the State Housing Trust Fund. Additionally, any interest earned in the Grant Account above \$200 must be returned to the United States Treasury.

61. The Grant is not a demonstration program and is not a project; thus, the provisions of Subsection 420.507(41), Florida Statutes, are not applicable to the RFP at issue. Assuming, arguendo, that the Grant is a demonstration program or a

project, Florida Housing elected to establish the selection criteria by rule when it included the allocation of ARRA in the 2009 QAP, which was incorporated by reference in Florida Administrative Code Rule 67-48.002(95).

62. Based on the requirement of Subsection 1602(c)(2) of ARRA that the allocation of the Grant funds be allocated in the same manner and subject to the same limitations as an allocation of Tax Credits and the requirement in the 2009 QAP that the selection process will be governed by Section 42 of the Internal Revenue Code and Florida Administrative Code Chapter 67-48 that are applicable to the allocation of Tax Credits, it is concluded that the RFP specifications are governed by Florida Administrative Code Chapter 67-48, as applicable to the allocation of Tax Credits, and Section 42 of the Internal Revenue Code.

63. Florida Administrative Code Rule 67-48.004(1)(a) incorporates by reference the Universal Application Package, which is Form UA1016 and which includes the Universal Cycle Application Instructions.

64. Elmwood challenges the RFP specification that prohibits the consideration of developments located in a Location A area. The RFP specifications relating to Location A developments are contrary to the rules which govern Florida Housing's allocation of ARRA funds. The Universal Application

Package does not prohibit an applicant from being considered for Tax Credits if the applicant commits to set aside 100% of its residential units at 50% AMI or less. The RFP uses the Location A areas as a bar to being considered without consideration of whether the applicant is willing to commit to setting aside 100% of the residential units at 50% AMI or less and includes criteria not set forth in the Universal Application Package such as precluding consideration of developments in a Location A area that contains a Guarantee Fund Development.

65. The RFP specifications precluding consideration of developments located in a Location A area without consideration of whether the applicant is willing to set aside 100% of its units at 50% AMI or less is clearly erroneous because it is contrary to the Universal Application Package.

66. Elmwood challenges the RFP requirement that the submarket of the development proposed by an applicant must have a 92% or greater occupancy rate for the same demographic population. Florida Administrative Code Rule 67-48.0072(10) provides that, in order for the credit underwriter to make a favorable recommendation, the submarket of the proposed development must have an average occupancy rate of 90% or greater. The RFP requirement for the 92% occupancy rate is clearly erroneous because it is contrary to Florida Housing's governing rules.

67. Elmwood has also challenged the 92% occupancy requirement because the term "submarket" is not defined. Florida Administrative Code Chapter 67-48 uses, but does not define, the term "submarket." Elmwood has not established that the lack of criteria for determining a submarket in the market study is arbitrary, capricious, clearly erroneous, or contrary to competition. The market studies are site specific, and the results of the market study can be challenged.

68. The Universal Application Package, which is incorporated by reference in Florida Administrative Code Rule 67-48.004, provides detailed evaluation criteria for the applications that are submitted for Tax Credit developments. Section 7 of the RFP sets forth the evaluation process that is to be used in allocation of funds for the Tax Credit Exchange Program. The RFP provides that the review committee will select applicants "most likely to be considered for award, make any adjustments deemed necessary to best serve the interests of Florida Housing's mission and develop a recommendation or series of recommendations to the Board." The review committee will rank the applications deemed eligible for funding and give preference to applications that are shovel ready. The Board then makes an award using the "Proposals, the Committee's scoring, and 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." The RFP is contrary to the Florida Housing's governing rules as set forth in Florida Administrative Code Rule 67-48.004, which incorporates by reference the evaluation process that is to be used in the selection of applications for awards of Tax Credits.

69. In a competitive bidding process, it is important to have uniform standards for evaluating the proposals and for such standards to be published at the outset of the process. Otherwise, there is no way to determine whether each proposal is being measured by the same yardstick. The principle was succinctly summarized in Deloitte & Touche LLP v. Dept. of Health and Rehabilitative Services, Case No. 95-0727BID (DOAH May 12, 1995)(citations omitted)(quoting Courtenay v. Dept. of Health and Rehabilitative Services, 12 F.A.L.R. 2226 (1990)).

Part of the reciprocity achieved under the competitive bidding process is achieved in the bid specifications and weighted criteria. Potential bidders are advised in advance of the requirements to be met in order to receive the contract award, as well as the standards by which each bid will be evaluated by the agency and each standard's relative importance to the agency. . . . Therefore, central to the integrity and reciprocity of the competitive bidding process is the requirement that an agency's action on a bid can be expressed within the bid specifications and evaluation criteria which it created.

70. The QAP provides that the Board's determination of funding for applications must be consistent with the provisions of the QAP. Section 7 of the RFP gives the reviewing committee and the Board unbridled discretion in determining which applicants will be allocated funds. The method of selection is not clearly stated. No criteria are set forth for the ranking of the applications. No criteria are given for how the applications will be scored. Such discretion is contrary to competition, arbitrary, and clearly erroneous.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding:

1. The specifications of the RFP which exclude consideration of funding for projects located in a Location A area without regard to whether the applicant is willing to lower the AMI for its units to 50% or less are contrary to Florida Housing's governing statutes.

2. The provision in the RFP which precludes the applicant from changing its demographic grouping is not contrary to Florida Housing's policies.

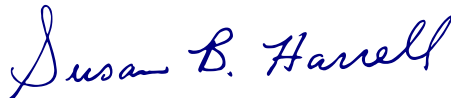
3. The provision of the RFP which requires 92% occupancy is contrary to Florida Housing's governing statutes.

4. The lack of a definition of "submarket" in the RFP is not arbitrary, capricious, clearly erroneous, or contrary to competition.

5. The provisions of the RFP which eliminate from consideration for funding any project in a county with a Guarantee Fund development is contrary to Florida Housing's governing statutes.

6. The evaluation criteria in Section 7 of the RFP which sets forth the evaluation procedure is contrary to the Florida Housing's governing rules and statutes.

DONE AND ENTERED this 12th day of November, 2009, in Tallahassee, Leon County, Florida.



SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of November, 2009.

ENDNOTES

^{1/} Unless otherwise indicated, all references to the Florida Statutes are to the 2009 version.

^{2/} Florida Administrative Code Chapter 67-48 deals with other programs in addition to Tax Credit. Therefore, only those provisions of Florida Administrative Code Chapter 67-48 dealing with Tax Credits would be applicable.

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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.