STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON HOLLOW, LLC, AND
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

vs. Case No. 15-3301BID

BRIXTON LANDING, LTD, AND
FLORIDA HOUSING FINANCE
CORPORATION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 3 and 4, 2015, at the Division of Administrative Hearings in Tallahassee, Florida, before Suzanne Van Wyk, a duly-appointed Administrative Law Judge.

APPEARANCES

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For Respondent Florida Housing Finance Corporation:

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For Respondent Brixton Landing, Ltd.

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STATEMENT OF THE ISSUE

Whether Florida Housing Finance Corporation's (Florida Housing) intended decision to award Respondent, Brixton Landing, Ltd., low-income housing tax credits is contrary to Florida Housing's governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

On November 21, 2014, Florida Housing issued Request for Applications 2014-115 (the RFA) for the purpose of awarding tax credits for the development of affordable housing in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. According to the terms of the RFA, only one development in the "Family or Elderly Demographic Commitment" category would be funded in Orange County.

On May 8, 2015, Florida Housing announced its intent to select 10 applicants for funding under the RFA, including Respondent, Brixton Landing. Petitioners, Madison Hollow, LLC, and American Residential Development, LLC (Madison Hollow or Petitioners), timely filed a Notice of Protest, and on May 22,

2015, filed their formal written notice of protest of the intended action. Florida Housing referred Madison Hollow's formal protest to the Division of Administrative Hearings on June 9, 2015. Brixton Landing became a party to the case when counsel for Brixton Landing filed a Notice of Appearance.

The final hearing took place on August 3 and 4, 2015, in Tallahassee, Florida. At the final hearing, Joint Exhibits J1 through J13 were admitted in evidence.

Petitioners presented the testimony of four witnesses: Ken Reecy, Director of Multifamily Programs for Florida Housing; David Evans, a civil engineer; Patrick Law, developer and owner of Madison Hollow; and Edward Williams, a land planner. Petitioners' Exhibits P1, portions of P3, P10 through P18, P23 (pages 2 and 3), P24 through P30, P33, and P34 were admitted in evidence. Petitioner proffered an audio recording of the July 7, 2007, meeting of the Orange County Board of County Commissioners.

Brixton Landing presented the testimony of three witnesses: Scott Culp, principal at Atlantic Housing Partners; Rick Baldocchi, a civil engineer; and Ken Reecy. Brixton Landing's Exhibits R1, R4, R16, R17, and R20 were admitted in evidence. Brixton Landing proffered audio

recordings of portions of the April 22, 2014, and November 11, 2014, meetings of the Orange County Board of County Commissioners.

The undersigned granted Petitioners' and Brixton Landing's requests for official recognition of specified portions of the Orange County Code of Ordinances.

Florida Housing called no witnesses and offered no exhibits in evidence.

A four-volume Transcript of the proceedings was filed on August 21, 2015. Respondents timely filed Proposed Recommended Orders on August 31, 2015. Petitioners filed a Proposed Recommended Order on September 1, 2015, to which no party objected. Unless otherwise stated, all statutory references are to the 2015 edition of the Florida Statutes.

FINDINGS OF FACT

1. Respondent, Florida Housing, is a public corporation created pursuant to section 420.504, Florida Statutes (2015). Its purpose is to promote the public welfare by administering the governmental function of financing affordable housing in Florida.

2. Petitioners, Madison Hollow, LLC, and American Residential Development, LLC (Madison Hollow or Petitioners),

are Florida limited liability corporations engaged in the business of affordable housing development.

3. Brixton Landing, is a Florida limited liability corporation also engaged in the business of affordable housing development.

4. Florida Housing is the housing credit agency for the State of Florida within the meaning of section 42(h)(7)(a) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits, which are made available to the states annually by the United States Department of the Treasury.

5. The State Housing Tax Credit Program is established in Florida under the authority of section 420.5093, Florida Statutes. Florida Housing is the designated entity in Florida responsible for allocating federal tax credits to assist in financing the construction or substantial rehabilitation of affordable housing.

6. Because the demand for tax credits provided by the federal government far exceeds the supply available under the State Housing Tax Credit Program, qualified affordable housing developments must compete for this funding.

7. On November 21, 2015, Florida Housing issued Request for Applications 2014-115, Housing Credit Financing for Affordable Housing Developments in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the RFA). No challenge was filed to the terms, conditions, or requirements of the RFA.

8. According to the RFA, Florida Housing expected to award up to approximately $15,553,993 in tax credits for qualified affordable housing projects in those six large counties.

9. Florida Housing received approximately 58 applications in response to the RFA. Madison Hollow, Brixton Landing, Sheeler Club Apartments, Sheeler Club Apartments-Phase II, Banyan Station, Lauderdale Place, and Lake Sherwood timely submitted applications in response to the RFA requesting financing of their affordable housing projects from the funding proposed to be allocated through the RFA.

10. Petitioners requested an allocation of $2,110,000 in annual tax credits for their development, Madison Hollow, located in Orange County.

11. Brixton Landing requested an allocation of $1,330,000 in annual tax credits for Brixton Landing's proposed development in Orange County.

12. On May 8, 2015, the Board of Directors of Florida Housing approved the preliminary rankings and allocations, and issued its Approved Preliminary Awards/Notice of Intended Decision (Notice of Intended Decision), in which Florida Housing scored both Madison Hollow's and Brixton Landing's projects as eligible for funding and awarded each application 23 points. In addition, Sheeler Club Apartments, Sheeler Club Apartments-Phase II, Banyan Station, Lauderdale Place, and Lake Sherwood were all found to be eligible applications.

13. On that same date, Florida Housing published on its website the Notice of Intended Decision, which included a three-page spreadsheet listing all applications made in response to the RFA and identifying those which were eligible and ineligible.

Ranking and Selection Process

14. Applications were evaluated for eligibility and scoring by a Review Committee appointed by Florida Housing's executive director. Applications were considered for funding only if they were deemed "eligible," based on the terms of the RFA. Of the 58 timely-submitted applications, 52 were deemed eligible and six were deemed ineligible.

15. The highest scoring applications were determined by first sorting all eligible applications from highest score to

lowest score. Pursuant to the RFA, applicants could achieve a maximum score of 23 points. Eighteen (18) of those 23 points were attributable to "proximity" scores based on the distance of the proposed development from services needed by tenants. The remaining five points were attributable to Local Government Contributions.

16. In scoring housing tax credit applications, many applicants achieved tie scores. In anticipation of that occurrence, Florida Housing designed the RFA and rules to incorporate a series of "tie breakers" to separate any scores that tied as follows:

> a. First by the Application's eligibility for the "SAIL RFA 2014-111 Unfunded Preference", which is outlined in Section One 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 eligibility for the Development Category Funding Preference which is outlined in Section Four A.5.c.(1)(a)(iii) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);
>
> c. Next by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.12.e. of the RFA, (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

> d. Next by the Application's Leveraging Classification (applying the multipliers outlined in Exhibit C below and having the Classification of A be the top priority);
>
> e. Next by the Application's eligibility for the Florida Job Creation Preference which is outlined in Exhibit C below (with Applications that qualify for the preference listed above Applications that do not qualify for the preference); and
>
> f. Finally by lottery number, resulting in the lowest lottery number receiving preference.

17. The Leveraging Classification is essentially a ranking of eligible applications based upon the cost per unit (referred to in the RFA as Total Corporation Funding Per Set-Aside Unit), with the most cost-effective project at the top of the list and the least cost-effective at the bottom. The top 90 percent of applications on the list were classified as Group A and the bottom 10 percent of applications classified as Group B. Applicants in Group B are not eligible for funding until all applicants in Group A are funded.

18. Pursuant to Item 9 of Exhibit C to the RFA, Florida Housing classified Brixton Landing and Madison Hollow in the Group A Leveraging Classification, and classified Sheeler Club Apartments, Sheeler Club Apartments-Phase II, Banyan Station, and Lauderdale Place in the Group B Leveraging Classification.

19. Both Brixton Landing and Madison Hollow were scored identically by Florida Housing, and both developments are located in Orange County. Because the RFA provided that only one project will be funded in each county, and because Brixton Landing had a lower lottery number than Madison Hollow, Brixton Landing was selected for funding.

20. A total of 52 applications were found to be eligible for funding. According to the leveraging calculations, the Group B applications were removed from consideration for funding. Brixton Landing was number 45 on the list, thus classified in Group A. Brixton Landing will be moved to Group B classification, if at least two of the five applications in Group B are found to be ineligible. If Brixton Landing is moved into Group B, Madison Hollow will be eligible for funding.

The Challenged Applications

21. Madison Hollow alleges that the applications for Sheeler Club Apartments and Sheeler Club Apartments-Phase II should have each been found ineligible for failure to demonstrate the "ability to proceed" required in the RFA. Madison Hollow also alleges that the applications for Banyan Station and Lauderdale Place should have each been found ineligible for failure to fully disclose the principals of the applicant and developer.[1/]

22. Madison Hollow is thus in the unusual position of challenging four applicants who were not selected for funding and are not parties to this case. Brixton Landing is in the equally unusual position of defending the applications of those four unfunded applicants.

A. Sheeler Club

23. Atlantic Housing Partners (Atlantic) submitted two applications in response to the RFA. Sheeler Club Apartments was an application for development of affordable multifamily units to serve a family demographic. Sheeler Club Apartments-Phase II was an application for development of multi-family garden homes to serve an elderly demographic. The projects were proposed to be located adjacent to each other.

24. The RFA sets forth the following specific requirements for applicants to demonstrate the ability to proceed:

> 5.f. Ability to Proceed:
>
> The Applicant must demonstrate the following Ability to Proceed elements as of Application Deadline, as outlined below.
>
> * * *
>
> (1) Status of Site Plan Approval. The Applicant must demonstrate the status of site plan approval as of the Application Deadline by providing, as **Attachment 7** to Exhibit A, the properly completed and executed Florida Housing Finance Corporation Local Government Verification of Status of

> Site Plan Approval for Multifamily Developments form (Form Rev. 11-14).
>
> (2) Appropriate Zoning. The Applicant must demonstrate that as of the Application Deadline the proposed Development site is appropriately zoned and consistent with local land use regulations regarding density and intended use or that the proposed Development site is legally non-conforming by providing, as **Attachment 8** to Exhibit A, the applicable properly completed and executed verification form:
>
> > (a) The Florida Housing Finance Corporation Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form (Form Rev. 11-14); or
> >
> > (b) The Florida Housing Finance Corporation Local Government Verification that Permits are not Required for this Development form (Form Rev. 11-14).

25. Similarly, the RFA requires applicants to submit forms to demonstrate availability of electricity, water, sewer, and roads to serve the proposed development.

26. The Verification of Status of Site Plan Approval form (Site Plan form) must be completed by the local government official responsible for determination of issues related to site plan approval within the applicable jurisdiction. The official must choose between two optional paragraphs related to proposals for new construction: (1) the proposed development "requires additional site plan approval or similar process" and the "final

site plan . . . was approved on or before the submission deadline for the" RFA; or (2) the proposed development "requires additional site plan approval or similar process" and either (a) the jurisdiction requires preliminary or conceptual site plan approval, "which has been issued," or (b) the jurisdiction provides neither preliminary nor conceptual site plan approval, "nor is any other similar process provided prior to issuing final site plan approval," but the site plan, in the applicable zoning designation, has been reviewed.

27. Orange County provides neither preliminary nor conceptual site plan approval. Thus, the local government official must certify that the site plan for the proposed project has been reviewed.

28. The Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form (Zoning form), requires that the local government official responsible for issues related to comprehensive planning and zoning certify the following: (1) the zoning designation applicable to the property; (2) that the proposed number of units and intended use are consistent with current land use regulations and the zoning designation; (3) that there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density proposed; and (4) that there are no

known conditions that would preclude construction of the proposed development on the site.

29. It is undisputed that Atlantic submitted both verification forms with its application. Olan Hill, Chief Planner for Orange County, reviewed, completed, and signed each of these forms, attesting that in his opinion both of the proposed projects would be in compliance with local zoning and land use regulations. Mr. Hill was fully authorized to sign the forms on behalf of Orange County.

30. The two Atlantic projects are proposed adjacent to one another on a site which has a Planned Development (PD) zoning approval for development of 152 single-family townhome units in the Medium Density Residential Future Land Use category (MDR), which allows a maximum density of 20 units per acre.

31. The County's PD zoning approval was based on review of Atlantic's Land Use Plan (LUP) for the site. According to Mr. Hill, the LUP is a "bubble plan" outlining the general entitlements and development program for the site.

32. In the case at hand, the Atlantic site also has an approved preliminary subdivision plan (PSP), which is the first step to subdivide the property. Under the PSP, the property is

proposed to be subdivided into 152 lots for development of single-family townhomes.

33. For purposes of certifying the Site Plan and Zoning forms, Mr. Hill reviewed the PD LUP, not the PSP.

34. Regarding the Site Plan form, Mr. Hill certified that, although the County requires no preliminary or conceptual site plan approval process and the final site plan approval has not yet been issued, the site plan for the project in the applicable zoning classification, the PD LUP, had been reviewed.

35. With respect to the Zoning form, Mr. Hill first certified that the proposed number of units and intended use are consistent with current land use regulations and the PD zoning designation. The PD LUP limits the total number of units to 152, which would accommodate either of the Sheeler Club applications (Sheeler Club Apartments proposes 88 units, while Sheeler Club-Phase II proposes 64 units). The MDR land use category allows the multi-family uses proposed for the development up to 20 units per acre. Under the MDR category, the 21.4-acre site could be approved for well over 152 units.

36. Mr. Hill next certified that there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density described in that zoning classification. The PD zoning is final and is not dependent

upon whether Atlantic goes forward with subdivision of the property as proposed in the existing PSP. Atlantic could subdivide the property for a different number of lots, or in a different configuration, without changing the zoning of the property.

37. Finally, Mr. Hill certified that there are no known conditions that would preclude construction of the referenced Development on the proposed site, assuming compliance with the applicable land use regulations.

38. There are numerous county approvals needed throughout the development approval process. The Zoning form does not require the local government official to certify that no additional approvals are needed following site plan review, or that the proposed project is ready to begin construction.

39. Petitioners contend that neither of the Sheeler Club applications should have been deemed eligible because, despite Mr. Hill's authorized certifications to the contrary, the projects do not have the ability to proceed.

40. Petitioners do not contend that Mr. Hill was not authorized to execute the forms, or that the certifications were obtained through fraud or other illegality.

41. As to the Site Plan form, Petitioners contend first that Mr. Hill did not review a site plan for either project

proposed by Atlantic: Sheeler Club Apartments, 88 multi-family units; or Sheeler Club Apartments-Phase II, 64 garden apartments. Instead, Mr. Hill reviewed and certified the site plan for Sheeler Avenue Townhomes PD, which provides for development of single-family townhomes in a single phase over the entire site.

42. Petitioners argue that the PD is conditioned upon development of townhomes in single ownership complying with section 38-79(20) of the Orange County Code of Ordinances, which is unrelated to construction of the "garden apartments" proposed by Atlantic in its application to Florida Housing for financing. Thus, Petitioners conclude, Mr. Hill has not reviewed a site plan for either Sheeler Club Apartments or Sheeler Club Apartments-Phase II.

43. Mr. Hill testified that his certification did not depend on whether either or both of the proposed projects was eventually developed, but that the overall site has a PD zoning approval for a total of 152 units.

44. Ken Reecy is the Director of Multi-family Programs for Florida Housing. He testified the purpose of the Site Plan form, and, for that matter, the Zoning form, is to verify "high-level" approval of the site. For example, if the applicant

proposes a 64-unit project, Florida Housing wants verification that the developer will be able to deliver 64 units.

45. As to the Zoning form, Petitioners present a parade of objections. Petitioners argue that the proposed use of the property for multi-family apartments and garden apartments is inconsistent with the zoning approval for single-family townhomes; thus, additional land use regulation approvals are required, contrary to the certified Zoning form.

46. Petitioners point to the PSP approved for the subdivision of the property and argue that neither Sheeler Club project could be built in conformity with the PSP, which proposes to subdivide the property into 152 townhome lots.

47. Relying on the PSP, Petitioners also argue that Sheeler Club Apartments-Phase II has no public road access without the Sheeler Club Apartments development, thus, Mr. Hill's certification as to Phase II was incorrect and the project is not ready to proceed. Moreover, Petitioners argue that Atlantic "gerrymandered" the boundaries of the two projects in order to secure the most advantageous location for the "development location point"; therefore, the lot layout proposed in the PSP cannot be achieved on either of the two projects. Likewise, Petitioners argue the boundary is a change from the

approved PSP, which requires additional land use approvals from the Board of County Commissioners.

48. It is Florida Housing's practice to accept the zoning and land use certifications by local officials, which it followed in this case. Florida Housing does not have the expertise, resources, or authority to evaluate local zoning and land use decisions.

49. Petitioners would have the undersigned perform the analysis that Florida Housing did not and make a determination whether the Atlantic projects, as proposed, meet the requirements for zoning and land use approvals set forth in the certifications signed by Mr. Hill. Petitioners would have this tribunal interpret the Orange County Code of Ordinances and make findings regarding: whether the LUP PD would have to be amended for Atlantic to build the projects proposed in its funding application to Florida Housing; whether said amendments would constitute "substantial changes" to the approved PD, thus requiring additional public hearings; and, ultimately, whether the Site Plan and Zoning forms were executed in error.

50. The undersigned declines to do so, as set forth more fully in the Conclusions of Law.

51. In this particular case, Mr. Reecy testified that Orange County was aware of the issues raised by Madison Hollow

and that he relied on Mr. Hill's knowledge to make the right call on these forms. While there was certainly an abundance of testimony attempting to call into question the decisions of the Orange County authorities, the evidence does not support a finding that Florida Housing's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications, or that it was clearly erroneous, contrary to competition, arbitrary, or capricious.

52. In light of that finding, the audio recordings of Orange County Commission Meetings proffered by both Petitioners and Brixton Landing are not admitted. The recordings are irrelevant in this proceeding and have not been relied upon by the undersigned.

B. Banyan Station and Lauderdale Place

53. Madison Hollow alleges that two other applications, Banyan Station and Lauderdale Place, should have been found ineligible for failure to disclose the principals of the applicant and the developers, as required by RFA section Four.A.3.

54. Both the applicants for, and developers of, Banyan Station and Lauderdale Place are limited liability companies (LLCs). Section Four.A.3.d.(2) requires applicants that are LLCs to provide a list identifying the principals of the

applicant and the principals of each developer as of the application deadline.

55. The RFA also directs applicants to Section 3 of Exhibit C "to assist the [a]pplicant in compiling the listing." Exhibit C provides, "[t]he Corporation is providing the following charts and examples to assist the Applicant in providing the required list[.] The term Principal is defined in Section 67-48.002, F.A.C."

56. Florida Administrative Code Rule 67-48.002(93) reads, in relevant part, as follows:

> (93) 'Principal' means:
>
> (c) With respect to an Applicant or Developer that is a limited liability company, any manager or member of the Applicant or Developer limited liability company, and, with respect to any manager or member of the Applicant or Developer limited liability company that is:
>
> 3. A limited liability company, any manager or member of the limited liability company.

57. Exhibit C provides the following chart applicable to disclosures by LLC applicants:

Identify All Managers	**And**	**Identify all Members**

and

For each Manager that is a Limited Partership:	**For each Manager that is a Limited Liability Company:**	**For each Manager that is a Corporation:**
Identify each General Partner	Identify each Manager	Identify each Officer

and	and	and
Identify each Limited Partner	Identify each Member	Identify each Director
		and
		Identify each Shareholder

and

For each Member that is a Limited Partnership:	**For each Member that is a Limited Liability Company:**	**For each Member that is a Corporation:**
Identify each General Partner	Identify each Manager	Identify each Officer
and	and	and
Identify each Limited Partner	Identify each Member	Identify each Director
		and
		Identify each Shareholder

For any Manager and/or Member that is a natural person (i.e., Samuel S. Smith), no further disclosure is required.

58. Exhibit C further provides examples of fictitious applicants and developers followed by disclosure listings of managers, members, general and limited partners, officers, directors, and shareholders, as applicable.

59. Banyan Station, applicant, HTG Banyan is a limited liability company. HTG Banyan listed its managers as Matthew and Randy Rieger, and its members as Camillus-Banyan, LLC, and Housing Trust Group, LLC. It then listed Camillus House, Inc., and RER Family Partnership, Ltd., as sole members of those LLCs, respectively.

60. Applicant's developer is also a limited liability company, HTG Banyan Developer, LLC. HTG Banyan Developer listed Matthew and Randy Rieger as the developer's managers, and Camillus-Banyan, LLC, HTG Affordable, LLC, and Reiger Holdings, LLC, as its members. It listed Camillus House, Inc., RER Family Partnership, Ltd., and Balogh Family Investments Limited Partnership, as members of those LLCs. HTG Banyan Developer disclosed Matthew Reiger as the sole member of Rieger Holdings.

61. Likewise, Lauderdale Place applicant, HTG Anderson, LLC, identified its managers and members, although some members were identified as LLCs.

62. In each case, the applicant identified the principals of the applicant and the developer down "two levels" of organizational structure, even though in some cases this did not result in the disclosure of natural persons.

63. Petitioners urge an interpretation of the disclosure requirement that would require an LLC to continue to identify members and managers until natural persons are identified. Respondents maintain that the rule and the RFA require disclosure of only "two levels" of organizational structure, as shown on the charts in Exhibit C.

64. Petitioners did not make a showing that Florida Housing's interpretation of the rule and the RFA is

unreasonable. The definition of "principal" of an LLC includes members which are likewise LLCs. The assistive chart includes disclosures at only two levels of organizational structure. Furthermore, in Exhibit C, example 3, the disclosure for ABC, LLC, includes XYZ, LLC, as a member without further disclosure.

65. In support of its argument, Petitioners rely upon the language below the chart which states, "[f]or any Manager and/or Member that is a natural person (i.e., Samuel S. Smith), no further disclosure is required."

66. The plain language of the chart states that when disclosing managers and members of an LLC, for any manager or member who is a natural person, no further disclosure is required. The language does not state, as Petitioners would prefer, when disclosing managers and members of an LLC, disclosure must be made until all natural persons are disclosed.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2015). Florida Housing's decisions in this case affected the substantial interests of each of the parties, and each has standing to challenge Florida Housing's scoring and review decisions.

68. The burden of proof in this case rests with the parties opposing the proposed agency action, see State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998), which must establish their allegations by a preponderance of the evidence. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

69. Section 120.57(3)(f) sets forth the rules of decision applicable in bid protests, as follows:

> 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.

70. Although chapter 120 uses the term "de novo" when describing competitive solicitation protest proceedings, courts have recognized that a different kind of de novo is contemplated than for other substantial interest proceedings under section 120.57. Bid disputes are a "form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to

evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609.

71. Accordingly, competitive bid protest proceedings, such as the instant case, remain de novo in the sense that the Administrative Law Judge is not confined to a record review of the information before Florida Housing. Instead, a new evidentiary record is developed in the hearing for the purpose of evaluating the proposed agency action. See Intercontinental Prop., Inc. v. Dep't of HRS, 606 So. 2d 380 (Fla. 1st DCA 1992); Sunshine Towing at Broward, Inc. v. Dep't of Transp., Case No. 10-0134BID (DOAH April 6, 2014; DOT May 7, 2010).

72. After determining the relevant facts based upon evidence presented at hearing, the agency's intended action must be considered in light of those facts, and the agency's determinations must remain undisturbed unless clearly erroneous, contrary to competition, arbitrary, or capricious. A proposed award will be upheld unless it is contrary to governing statutes, the agency's rules, or the solicitation specifications.

73. The "clearly erroneous" standard is generally applied in reviewing a lower tribunal's findings of fact and interpretations of the statutes and rules it is charged with enforcing. In a de novo proceeding, the Administrative Law

Judge is not bound by factual determinations made previously by the agency, but an agency's conclusions and applications of the law to the facts are due some deference according to the clearly erroneous standard of review. An agency's interpretation and application of a rule is clearly erroneous when it "clearly contradicts the unambiguous language of the rule." Woodley v. Dep't of HRS, 505 So. 2d 676, 678 (Fla. 1st DCA 1987). An agency's finding is clearly erroneous when it is "without support of any substantial evidence, is clearly against the weight of the evidence or [if the agency] has misapplied the law to the established facts." Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956). "Where a protester objects to a proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the objection turns on the meaning, which is in dispute, of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith)." Sunshine Towing, supra, at 38. See also Level 3 Communications, Inc. v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003).

74. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

75. The "contrary to competition" standard, unique to bid protests, is a test that applies to agency actions that do not turn on the interpretation of a statute or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact. This standard is not defined in statute or rule; however, the legislative intent found in section 287.001, Florida Statutes, is instructive.[2/]

76. Actions that are contrary to competition include those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Sunshine Towing, supra, at 48. See R.N. Expertise, Inc. v. Miami-Dade

Cnty. Sch. Bd., Case No. 01-2663BID (DOAH Feb. 4, 2002; Sch. Bd. of Miami-Dade Cnty. March 14, 2002); E-Builder v. Miami-Dade Cnty. Sch. Bd., Case No. 03-1581BID (DOAH Oct. 10, 2003; Sch. Bd. of Miami-Dade Cnty. Nov. 26, 2003).

77. The instant case is not one of first impression. A similar situation was presented in the recent case of Houston Street Manor LP v. Florida Housing Finance Corporation, Case No. 15-3302BID (DOAH Aug. 18, 2015; FHFC Sept. 21, 2015). In that case, Intervenor Pine Grove Senior Apartments asserted that the Houston Street application did not meet the "ability to proceed" requirement, despite the local official's certifications. Pine Grove argued that the project had not undergone conceptual site plan approval, which was available from the local government. Thus, Pine Grove argued, the Site Plan and Zoning forms were invalid because the project did not meet the requirements for certification stated in the forms.

78. In his Recommended Order, Judge Van Laningham made the following findings:

> 51. A good place to start in evaluating Pine Grove's position is with a look at the site-plan status form's purpose. It is clear from the language of the form that what FHFC wants, in a nutshell, is an authoritative statement from the local government advising that the local government either has approved, or is currently unaware of grounds for

disapproving, the proposed development's site plan. The relevance of this statement lies not so much in its being correct, per se, but in the fact that it was made by a person in authority whose word carries the weight of a governmental pronouncement. Put another way, the statement *is* correct *if* made by an official with the authority to utter the statement on behalf of the local government; it is a verbal act, a kind of approval in itself.

52. FHFC might, of course, deem a fully executed site-plan status form nonresponsive for a number of reasons. If it were determined that the person who signed the form lacked the requisite authority to speak for the government; if the statement were tainted by fraud, illegality, or corruption; or if the signatory withdrew his certification, for example, FHFC likely would reject the certification. No such grounds were established in this case, or anything similar.

53. Instead, Pine Grove contends that Mr. Huxford simply erred, that he should not have signed the Local Government Verification of Status of Site Plan Approval. Pine Grove makes a reasonable, or at least plausible, case to this effect. The fatal flaw in Pine Grove's argument, however, is that the decision whether to grant or deny this particular form of (preliminary) local governmental approval to Houston Street's site plan must be made by the local government having jurisdiction over the proposed development, i.e, the City of Jacksonville——not by Pine Grove, Houston Street, FHFC, or the undersigned. Mr. Huxford was empowered to make the statement for the city. He made it. No compelling reason has been shown here to disturb FHFC's acceptance of Mr. Huxford's

> certification as a valid expression of the City of Jacksonville's favorable opinion, as of the application submission deadline, regarding Houston Street's site plan.
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> * * *
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> 55. Pine Grove claims that Houston Street's Local Government Verification That Development Is Consistent With Zoning and Land Use Regulations form is incorrect and nonresponsive because Houston Street has not yet obtained all the necessary land use approvals, including the allegedly available conceptual site plan approval mentioned previously. Pine Grove's argument in this regard is identical to its objection to Houston Street's site-plan status form, which was rejected above. For the reasons previously given, therefore, it is found that FHFC did not err in accepting Mr. Huxford's verification of consistency with local zoning and land use regulations as a valid expression of the City of Jacksonville's position on these matters in relation to Houston Street's proposed project.

79. Judge Van Laningham's findings, which were adopted in Florida Housing's Final Order, are persuasive. In this case, Petitioners made numerous plausible arguments as to why the Site Plan and Zoning verification forms may be in error. However, Petitioners offered no compelling reason to disturb Florida Housing's acceptance of Mr. Hill's determinations. As was noted in Houston Street Manor, the decision whether to grant or deny this particular form of (preliminary) local governmental approval to Atlantic's applications must be made by the local

government having jurisdiction over the proposed development. Mr. Hill was the local official with authority to sign both forms. Mr. Hill testified that the verification forms were properly executed and accurate, and there was no evidence to support a conclusion that his determination was tainted by fraud or illegality.

80. Petitioners failed to demonstrate that Florida Housing's reliance on the Site Plan and Zoning forms was clearly erroneous. Having considered the extensive evidence presented at the final hearing, the undersigned was not left with either a definite or firm conviction that a mistake was made when Florida Housing relied upon Mr. Hill's certifications.

81. Petitioners failed to demonstrate that Florida Housing's reliance on the Site Plan and Zoning forms was arbitrary or capricious. It is reasonable for Florida Housing to rely upon the local government official's interpretation of its site plan review process and zoning requirements in processing applications for funding affordable housing project applications.

82. Petitioners failed to demonstrate that Florida Housing's acceptance of the executed Site Plan and Zoning forms was contrary to competition. Every applicant is required to submit properly-executed Site Plan and Zoning forms, and no

evidence was introduced to support a finding that Atlantic's applications were treated differently from other applications.

83. Both Banyan Station and Lauderdale Place disclosed the principals of the applicant and the developer as required by the RFA and by rule 67-48.002(93). Florida Housing's interpretation of the RFA and the rule is entitled to deference. Petitioners failed to establish that Florida Housing's interpretation of the disclosure rule--requiring disclosure of only "two levels" of organizational structure--is unreasonable.

84. Petitioners failed to establish that Florida Housing's decision that Banyan Station and Lauderdale Place met the disclosure requirements of the RFA was contrary to a governing statute, rule, or solicitation specification, or was clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order affirming Brixton Landing for funding under RFA 2014-115.

DONE AND ENTERED this 29th day of October, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of October, 2015.

ENDNOTES

[1/] In their Proposed Recommended Order, Petitioners further allege that the Sheeler Club applications are non-responsive because they: (1) violate Florida Administrative Code Rule 67-48.004, which limits submissions to one project per subject property; and (2) contain an invalid "development location point."

Section 120.57(3)(b), Florida Statutes, pertaining to agency bid protests, requires that the formal written protest "shall state with particularity the facts and law upon which the protest is based." Petitioners did not raise either of these issues in their Formal Written Protest and Petition for Administrative Hearing.

Florida Administrative Code Rule 28-106.202 allows for amendment of the petition at any time prior to designation of the presiding officer, and "thereafter . . . only upon order of the presiding officer." Although amendments should be liberally allowed, an amendment to a bid protest petition offered after the case is referred to the division "should be scrutinized carefully because an agency might have chosen a different forum under those circumstances." Optiplan v. Sch. Bd. of Broward

Cnty., 710 So. 2d 569, 571 (Fla. 4th DCA 1998)(quoting Silver Express Co. v. Dist. Sch. Bd. of Miami-Dade Cmty. College, 691 So. 2d 1099 (Fla. 3d DCA 1997)(Nesbit, J., dissenting)(citations omitted). Nevertheless, Petitioners neither moved to amend their Petition to include the two newly-identified issues at any time prior to the final hearing, nor moved to conform their petition to the evidence presented at the final hearing. Nor was the issue tried by consent of Respondents. Further, despite the undersigned's invitation to do so, Petitioners did not cite in their Proposed Recommended Order any authority for the undersigned to consider those issues during the final hearing. [T4.597:5-7]. For this reason, the undersigned does not include in this Recommended Order any findings related to those two allegations.

[2/] Section 287.001, Florida Statutes, reads as follows:

> The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured. It is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services; that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained; and that adherence by the agency and the vendor to specific ethical considerations be required.

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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.