

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOUSTON STREET MANOR LIMITED
PARTNERSHIP,

Petitioner,

vs.

Case No. 15-3302BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

POWERS AVENUE SENIOR APARTMENTS,
LTD., d/b/a PINE GROVE SENIOR
APARTMENTS,

Intervenor.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge
John G. Van Laningham for final hearing on July 8, 2015,
in Tallahassee, Florida.

APPEARANCES

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For Respondent: Christopher D. McGuire, Esquire
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For Intervenor: Michael J. Glazer, Esquire
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STATEMENT OF THE ISSUES

The issues in this bid protest are whether Respondent's preliminary decision to award low-income housing tax credits to Intervenor should be implemented, notwithstanding the fact that, unbeknownst to Respondent during the evaluation and scoring of the competing applications, Intervenor's application contained a material misrepresentation about a transit service, which Intervenor urges is a minor irregularity that can be waived; and, if the preliminary decision is set aside, whether Respondent should award the credits to Petitioner, who is next in line, but whose application, Intervenor alleges, contains material deviations from the specifications that render it nonresponsive.

PRELIMINARY STATEMENT

On November 21, 2014, Respondent Florida Housing Finance Corporation issued Request for Applications 2014-115 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

solicitation, only one development in the "Family or Elderly Demographic Commitment" category will be funded in Duval County.

On May 8, 2015, Respondent announced its intent to select ten applicants for funding, including Intervenor Powers Avenue Senior Apartments, Ltd., d/b/a Pine Grove Senior Apartments, whose proposed development would serve the Elderly demographic in Duval County. Thereafter, Petitioner Houston Street Manor Limited Partnership timely notified Respondent of its intent to challenge the award to Intervenor, and on May 26, 2015, Petitioner filed a formal written protest alleging that Intervenor's application should be rejected as nonresponsive.

The case was referred to the Division of Administrative Hearings ("DOAH"), where the protest petition was filed on June 9, 2015. The next day, a Notice of Appearance was filed on behalf of Intervenor, who thereupon became a party to the proceeding.

The final hearing took place on July 8, 2015, as scheduled, with all parties present. The parties stipulated to a number of facts as set forth in their Joint Pre-Hearing Stipulation, and to the extent relevant these undisputed facts have been incorporated herein. Joint Exhibits 1 through 4 were admitted into evidence with the consent of all parties.

Petitioner elicited testimony from Ken Reecy, an employee of Respondent; and Ken Bowron, Jr., an employee of Petitioner.

In addition, Petitioner's Exhibits 5 and 6 were admitted into evidence. Intervenor offered, as Intervenor's Exhibits 1-3 respectively, the depositions of Amy Garmon, an employee of Respondent; and James Klement and Folks Huxford, employees of the City of Jacksonville. These depositions, together with their exhibits, were received in evidence. Respondent presented no evidence.

The final hearing transcript was filed on July 21, 2015, making the proposed recommended orders due on July 31, 2015, pursuant to the schedule established at the conclusion of the final hearing. Each party timely filed a Proposed Recommended Order. All of the parties' post-hearing submissions were carefully considered during the preparation of this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015.

FINDINGS OF FACT

1. Respondent Florida Housing Finance Corporation ("FHFC") is the housing credit agency for the state of Florida whose responsibilities include the awarding of low-income housing tax credits, which developers use to finance the construction of affordable housing. Tax credits are made available annually

pursuant to a competitive cycle that starts with FHFC's issuance of a Request for Applications.

2. On November 21, 2014, FHFC issued Request for Applications 2014-115 (the "RFA"), whose full title—"Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties"—generally describes the developments for which FHFC expects to award tax credits totaling up to approximately \$15.5 million to selected applicants proposing to construct such projects in accordance with the specifications of the RFA, FHFC's generally applicable standards, and all other governing laws. Applications were due on February 3, 2015.

3. Applicants were required to make a commitment to serve one of several populations: Family, Elderly, or Homeless. Under the selection process that the RFA prescribes, only one project targeted for either the Family or Elderly population in Duval County will be selected for funding. The dispute in this case arises from FHFC's preliminary decision regarding the award of credits for the Duval County development intended to serve the Family or Elderly demographic. Petitioner Houston Street Manor Limited Partnership ("Houston Street") and Intervenor Powers Avenue Senior Apartments, Ltd., d/b/a Pine Grove Senior Apartments ("Pine Grove") each timely submitted an application proposing to build affordable housing for elderly residents in

Duval County, making them direct competitors for the sole award available for such a project.

4. The RFA provided that applications would be evaluated and scored by a committee, with the scoring to be based on "Mandatory Items" and "Point Items" identified in a table included in the RFA. Upon completing its evaluation, the committee was required to list the eligible applications in order from highest total score to lowest total score, and to make a recommendation to FHFC's Board of Directors.

5. In theory, the award should go to the applicant with the highest score. Because of the likelihood, however, that multiple applications will get perfect scores—as it happened, all 49 of the eligible applications in the Family or Elderly Demographic Commitment category received the maximum score of 23 points—the RFA established a sequence of six tiebreakers, the sixth being a lottery, with the award falling to the application having the lowest, randomly assigned lottery number.

Knowledgeable developers understood that, in practice, most of the successful applications would be lottery winners owing their selection largely to luck.

6. It is therefore not surprising that all eight eligible applications proposing to serve the Family or Elderly population in Duval County received the full 23 points. None of the first five tiebreakers separated these applications, which forced a

lottery. Pine Grove had the lowest lottery number (14), followed by Houston Street Manor (25). Thus, Pine Grove was chosen for preliminary funding, as FHFC announced on May 8, 2015.

7. The RFA specifies two Point Items in the Family or Elderly Demographic Commitment category. One Point Item is "Local Government Contributions," for which a maximum of 5.0 points could be awarded. The other is "Proximity to Transit and Community Services," which was worth a maximum of 18 "proximity points." To be considered eligible for funding, an applicant needed to receive at least 10.25 proximity points, including a minimum of 2.0 points for Transit Services.^{1/} Significantly, an applicant who earned 12.25 or more proximity points would be given the maximum Total Proximity Score of 18. Thus, to be *eligible* an applicant needed to qualify for a Transit Service Score of at least 2.0 plus win 8.25 additional proximity points; to be *competitive*, however, it had to win at least 10.25 additional proximity points, to "bump up" to 18.

8. During the evaluation and scoring, Pine Grove received a Transit Service Score of 5.0, which, together with the 9.5 proximity points that Pine Grove earned for its proximity to other community services, gave Pine Grove a raw score of 14.5 and, consequently, a Total Proximity Score of 18—the maximum. Pine Grove's Transit Service Score, however, was based upon a

representation of material fact that—it is undisputed—was not correct. To understand the problem requires a more detailed explanation of the Transit Services criteria.

9. The RFA required an applicant to select one—and only one—Transit Service upon which its Transit Service Score would be based. The category of Transit Services comprises five specifically defined services divided into three subgroups as follows: (1) Private Transportation – 2 points; (2) Public Bus Stop – maximum 2 points; and (3) Public Bus Transfer Stop; Public Bus Rapid Transit Stop; or Public Rail Station – maximum 6 points. The services relevant to this case are Public Bus Stop and Public Bus Transfer Stop.

10. The RFA defines Public Bus Stop in relevant part as follows:

[A] Public Bus Stop means a fixed location at which passengers may access one or two routes of public transportation via buses. The Public Bus Stop must service at least one bus route with scheduled stops at least hourly during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis.

RFA at 21.

11. The pertinent provisions of the definition of Public Bus Transfer Stop provide as follows:

[A] Public Bus Transfer Stop means a fixed location at which passengers may access at least three routes of public transportation

via buses. Each qualifying route must have a scheduled stop at the Public Bus Transfer Stop at least hourly during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis. This would include both bus stations (i.e., hubs) and bus stops with multiple routes.

RFA at 21.

12. The number of proximity points that would be awarded for a Public Bus Stop or a Public Bus Transfer Stop, if an applicant chose one or the other as the sole service upon which its Transit Service Score would be based, was not committed to the discretion of the evaluators. Rather, the RFA prescribes the precise number of points to be assigned, based on an objective criterion, namely the distance in miles between the proposed development and the particular service. Thus, a Public Bus Stop would be scored as follows:

Public Bus Stop	
Proximity of Proposed Development's Development Location Point to a Public Bus Stop stated on the Form	Number of Proximity Points Awarded for Eligible Service
if less than or equal to 0.20 miles	2.0
if greater than 0.20 and less than or equal to 0.30 miles	1.5
if greater than 0.30 miles	0.0

RFA at 24.

13. A Public Bus Transfer Stop, in contrast, would be awarded points pursuant to the following schedule:

TriRail Station, SunRail Station, Public Bus Transfer Stop, or Public Bus Rapid Transit Stop	
Proximity of Proposed Development's Development Location Point to a TriRail Station, SunRail Station, a Public Bus Transfer Stop or a Public Bus Rapid Transit Stop stated on the Form	Number of Proximity Points Awarded for Eligible Service
if less than or equal to 0.25 miles	6.0
if greater than 0.25 and less than or equal to 0.50 miles	5.5
if greater than 0.50 and less than or equal to 0.75 miles	5.0
if greater than 0.75 and less than or equal to 1.00 miles	4.5
if greater than 1.00 and less than or equal to 1.25 miles	4.0
if greater than 1.25 and less than or equal to 1.50 miles	3.5
if greater than 1.50 and less than or equal to 1.75 miles	3.0
if greater than 1.75 and less than or equal to 2.00 miles	2.5
if greater than 2.00 miles	0.0

RFA at 25.

14. The RFA required applicants to attach to their applications a Surveyor Certification Form completed and signed by a licensed surveyor. On this form, the surveyor must state the latitude and longitude coordinates for, among other things, the selected Transit Service, e.g., Public Bus Stop or Public Bus Transfer Stop, together with the distance in miles between such service and the proposed development. By signing the form, the surveyor declares, under penalties of perjury, "that the foregoing statement is true and correct." RFA at 86.

15. Pine Grove submitted a Surveyor Certification Form which identified a Public Bus Transfer Stop as its Transit Service:

Transit Service – State the latitude and longitude coordinates for one (1) Transit Service on the chart below.³

Public Bus Stop	Latitude			Longitude		
	N _____ Degrees	_____ Minutes	_____ Seconds (represented to 2 decimal places)	W _____ Degrees	_____ Minutes	_____ Seconds (represented to 2 decimal places)
Public Bus Transfer Stop	N <u>30</u> Degrees	<u>15</u> Minutes	<u>54.73</u> Seconds (represented to 2 decimal places)	W <u>81</u> Degrees	<u>37</u> Minutes	<u>04.49</u> Seconds (represented to 2 decimal places)
Public Bus Rapid Transit Stop	N _____ Degrees	_____ Minutes	_____ Seconds (represented to 2 decimal places)	W _____ Degrees	_____ Minutes	_____ Seconds (represented to 2 decimal places)
SunRail Station, MetroRail Station, or TriRail Station	N _____ Degrees	_____ Minutes	_____ Seconds (represented to 2 decimal places)	W _____ Degrees	_____ Minutes	_____ Seconds (represented to 2 decimal places)
Using the method described above*, the distance (rounded up to the nearest hundredth of a mile) between the coordinates of the Development Location Point and the coordinates of the Transit Service is:						<u>0.55</u> Miles

Joint Ex. 3 at 52 of 101. Because the distance between this service and the proposed development was stated to be 0.55 miles, Pine Grove received 5.0 proximity points pursuant to the schedule reproduced above.

16. The site whose coordinates are shown in Pine Grove's Surveyor Certification Form is, in fact, a bus stop, which the Jacksonville Transportation Authority ("JTA") refers to as Stop #4203. But, as the parties have stipulated, only two routes serve Stop #4203 during the morning and afternoon rush hours. Consequently, contrary to the representation in Pine Grove's application, Stop #4203 is not a Public Bus Transfer Stop as

that term is defined in the RFA, but a less-prized Public Bus Stop.

17. Houston Street raised this issue as a protest ground in its formal petition challenging the proposed award to Pine Grove. During discovery, Pine Grove confessed error and admitted that Stop #4203 is only a Public Bus Stop, not a Public Bus Transfer Stop. Thereafter, FHFC announced that it would side with Houston Street in arguing that Pine Grove's application must be rejected as ineligible since Stop #4203, as a Public Bus Stop greater than 0.30 miles from the proposed development, earns just 0.0 points under the applicable scoring schedule—2.0 points less than the Required Minimum Transit Service Score of 2.0.

18. Pine Grove would be dead in the water at this point but for an unlikely, yet undisputed, factual twist. It turns out that JTA Stop #1397, which is located 0.48 miles from Pine Grove's proposed development, happens to qualify as a Public Bus Transfer Stop. Had Pine Grove identified Stop #1397 as its Transit Service, it legitimately would have been entitled to 5.5 points. In other words, Pine Grove could have offered an actual Public Bus Transfer Stop that is closer to its proposed development than Stop #4203 (and thus more valuable in terms of proximity points), but instead it identified a Public Bus Stop—which it misrepresented as a Public Bus Transfer Stop—that was

worth less in proximity points than Stop #1397 even if it truly were a Public Bus Transfer Stop, and is worthless as the Public Bus Stop it truly is.

19. Houston Street and FHFC have framed their objection to Pine Grove's application in terms of responsiveness, contending that Pine Grove's failure to identify a Transit Service eligible for at least the Required Minimum Transit Service Score is a material deviation that the agency cannot waive. This has opened the door to Pine Grove's argument that falsely describing Stop #4203 in its Surveyor Certification Form as a Public Bus Transfer Stop worth 5.0 proximity points should be deemed a minor irregularity given the existence of Stop #1397, which everyone agrees is a Public Bus Transfer Stop that would have been worth 5.5 proximity points to Pine Grove, had Pine Grove relied upon Stop #1397. Pine Grove's position is part "no competitive advantage" (as indeed citing Stop #4203 was not advantageous in light of the superior alternative) and part "no harm, no foul."

20. Before examining the questions of whether Pine Grove's designating Stop #4203 as its Transit Service was a deviation from the specifications and, if so, whether such a lack of responsiveness should be considered a material deviation or a minor irregularity, the undersigned wants to mention a point that the parties have not raised, but which nevertheless

warrants consideration. Preliminarily, though, the undersigned stresses that no allegation was made, no evidence was received, and no finding is being made that Pine Grove intended to deceive FHFC by holding out Stop #4203 as a Public Bus Transfer Stop. Rather, although there is no direct evidence in the record, the logical and reasonable inference based on the circumstances is that Pine Grove simply made an unfortunate and costly mistake in failing timely to discover that Stop #4203 does not qualify as a Public Bus Transfer Stop, as Pine Grove honestly had believed.

21. That said, by identifying Stop #4203 in its Surveyor Certification Form as a Public Bus Transfer Stop, Pine Grove unequivocally represented that the material facts concerning this particular stop satisfied the RFA's definition of a Public Bus Transfer Stop—and they did not. Not to put too fine a point on it, the representation that Stop #4203 is a Public Bus Transfer Stop was a false statement of material fact—objective fact at that, not ultimate fact involving the exercise of discretion or judgment, and not opinion. To be sure, this material misrepresentation was not *intentionally* false. But it was *false*.

22. Like all applicants, Pine Grove was required to submit with its application a fully executed Applicant Certification and Acknowledgment Form. Among the statements therein whose truth Pine Grove confirmed is the following:

In eliciting information from third parties required by and/or included in this application, the Applicant has provided such parties information that accurately describes the Development as proposed in this Application. The Applicant has reviewed the third party information included in this Application and/or provided during the credit underwriting process and the information provided by any such party is based upon, and accurate with respect to, the Development as proposed in this Application.

Joint Ex. 3 at 26 of 101 (emphasis added). In signing this form, Pine Grove's agent "declare[d] and certif[ied] that [he] ha[d] read the foregoing and that the information is true, correct, and complete."

23. As is now known, a third party (Pine Grove's surveyor) provided information about Stop #4203 that was not accurate with respect to the proposed development. Pine Grove's submission of third party information that contained a false statement of material fact (i.e., that Stop #4203 is a Public Bus Transfer Stop located 0.55 miles from the proposed development) was a deviation from the RFA's specifications, including the provisions of the Applicant Certification and Acknowledgment Form set forth above. The undersigned is inclined to believe that a false statement of material fact in a bid or similar response to a public solicitation should almost always be deemed a material deviation. Agencies reasonably and justifiably rely upon the statements of fact contained in such documents, and

therefore the disincentives to making factual misstatements, even innocently, should be strong and consistently applied.

24. Here, however, as mentioned, no party has urged that Pine Grove's application be deemed nonresponsive for misrepresenting the true nature of Stop #4203, and therefore the undersigned will not recommend that the case be decided on this basis. Nevertheless, it should be stated that to treat Pine Grove's application as having accurately identified Stop #4203 as a Public Bus Stop, which is the premise behind Houston Street and FHFC's position, is to waive the material misrepresentation in Pine Grove's Surveyor Certification Form—a significant, and arguably unduly generous, threshold concession to Pine Grove.

25. Once the misrepresentation is overlooked, it is not obvious that a deviation exists that would make Pine Grove's application nonresponsive. Bus Stop #4203 meets the RFA's definition of a Public Bus Stop worth up to 2.0 points. Thus, it is an Eligible Service that does not depart from the specifications for a Public Bus Stop. Pine Grove's application was not "nonresponsive" for identifying a Public Bus Stop as its Transit Service.

26. Located at a distance of 0.55 miles from the proposed development, Bus Stop #4203 was entitled to a score of 0.0 according to the RFA's scoring schedule, which requires that 0.0 points be awarded to a Public Bus Stop that is farther than 0.30

miles from the proposed development. That Bus Stop #4203 must be awarded no points does not, of itself, make Pine Grove's application nonresponsive; it just means that the application will receive fewer points than the maximum available for this item. The RFA pointedly does not state that reliance upon a Public Bus Stop located more than 0.30 miles from the proposed development will result in a finding of noncompliance, and it strongly implies otherwise by instructing that distant Public Bus Stops shall be given a score, albeit a score of zero. Pine Grove's application was not "nonresponsive" merely for identifying a faraway Public Bus Stop as its Transit Service.

27. Because Bus Stop #4203 could be awarded no more than 0.0 points, however, Pine Grove's application fails to earn the Required Minimum Transit Service Score of 2.0, which makes it ineligible to be considered for funding. Being found ineligible for funding due to a low score is different from being deemed nonresponsive to the specifications. To be sure, in this instance the effect is the same, either way. But still, it is at best debatable whether there is any *deviation* here that FHFC could waive as a minor irregularity, even if it wanted to.

28. Putting aside that technicality, the irreducible problem for Pine Grove is that, to remain in line for the award, it must receive at least 2.75 proximity points for its Transit Service. Pine Grove needs a Transit Service Score of 2.75 to

get a raw score of 12.25 and hence an adjusted Total Proximity Score of 18. Without a Total Proximity Score of 18, Pine Grove will not have a perfect overall score of 23, and without a perfect overall score, Pine Grove is out of the lottery.

29. Pine Grove's irreducible problem is insoluble because a Public Bus Stop such as Stop #4203 cannot receive more than 2.0 points, and Pine Grove needs 2.75. Therefore, even if FHFC could deem Pine Grove's reliance upon a Public Bus Stop that is situated beyond the 0.30-mile limit a "minor irregularity"; and even if FHFC could then award Pine Grove the full 2.0 points for Stop #4203, these extraordinary (and probably impermissible) steps still would be insufficient to keep Pine Grove in first place for preliminary funding. Obviously FHFC could not award Pine Grove more than the maximum score of 2.0 points for a "nonresponsive" distant Public Bus Stop.

30. The only way for Pine Grove to hold on to its preliminary funding would be for FHFC to treat Stop #4203 as a Public Bus Transfer Stop even though, pursuant to the unambiguous specifications of the RFA, it is a Public Bus Stop. This, it seems to the undersigned, would not be a matter of waiving a "minor irregularity," but instead would amount to pretending that one clearly defined Transit Service (Public Bus Stop) is another clearly defined Transit Service (Public Bus Transfer Stop), for the sole purpose of raising an applicant's

score above that which the RFA plainly requires. Such agency conduct would be both clearly erroneous and contrary to competition—in short, impermissible.

31. Pine Grove has a point when it asserts that the existence of Stop #1397 means that its proposed development actually would be located close to adequate transportation services—a fact that is undisputed—and therefore that the needs behind the Transit Services component of the proximity criteria would be fulfilled notwithstanding Pine Grove's misplaced reliance upon Stop #4203. Rejecting Pine Grove's application for lack of a nearby Transit Service while knowing that a nearby Transit Service exists does seem somewhat unfair. This sense of unfairness is ameliorated in part, however, by the recognition that Pine Grove's preliminary selection was, after all, the result of the "luck of the draw"—not qualitative superiority over other applicants. It is eliminated by the recognition that to accept Pine Grove's application as the winner would require FHFC to give Pine Grove a Transit Service Score to which it clearly is not entitled—in effect handing out "bonus points" ultimately explicable, if with a wink and a nod, only as an impermissible tribute to Stop #1397.^{2/}

32. In sum, Pine Grove's application was technically responsive to the RFA. Unbeknownst to Pine Grove and FHFC, however, Pine Grove's application contained a material

misrepresentation—namely that Stop #4203 is a Public Bus Transfer Stop—upon which FHFC reasonably relied in giving Pine Grove a Transit Service Score of 5.0, which, under the RFA's unambiguous scoring schedule, was the correct score to give for a Public Bus Transfer stop located 0.55 miles from the proposed development. As everyone now agrees, Stop #4203 is not a Public Bus Transfer Stop, but a Public Bus Stop—an Eligible Service, without question, but one which, under the RFA's scoring schedule, earns just 0.0 points. Adjusting Pine Grove's Transit Service Score to 0.0, as must be done after forgiving and correcting the misrepresentation, makes Pine Grove's application ineligible for further consideration for failure to achieve the Required Minimum Transit Score of 2.0. Even if eligible, however, Pine Grove necessarily would be out of the running, for with a Transit Service Score of 0.0 (ignoring eligibility), Pine Grove's overall score falls short of the perfect 23 that seven other competitors achieved.

33. If Pine Grove is eliminated from consideration, as the undersigned will recommend, the next applicant in line is Houston Street, holder of the second lowest lottery number. Pine Grove asserts that Houston Street's application is nonresponsive for two reasons: (1) failure to demonstrate site control and (2) failure to prove its ability to proceed. These issues will be taken up in turn.

34. "Evidence of Site Control" is an unscored Mandatory Item. The RFA instructs that the "Applicant must demonstrate site control by providing, as **Attachment 14** to Exhibit A, the documentation required . . . below. If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites." RFA at 31. As relevant to this case, the document necessary to establish site control is an "Eligible Contract," which is an instrument defined in pertinent part as follows:

For purposes of the RFA, an eligible contract is one that has a term that does not expire before July 31, 2015 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than July 31, 2015; specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant, is provided.

RFA at 31.

35. Houston Street's proposed development would be located on property comprising two contiguous parcels, each of which Houston Street has under contract to purchase. Houston Street provided both contracts as evidence of site control, attaching them to its application as instructed.

36. One of the two parcels is 0.09 acres owned by Kesher Investments, LLC ("Kesher"), for which Houston Street has agreed to pay \$750,000. Based on the Real Estate Purchase Agreement supplied as evidence of site control, the Kesher parcel remained on the market as of the date Houston Street submitted its application to FHFC. Paragraph 18 of the contract provides:

RIGHT OF FIRST REFUSAL. It is understood that Purchaser is planning to apply for housing tax credits from the FHFC. Seller shall continue to market the property until FHFC approved or denies Purchasers application for tax credits, bonds or other similar financing. If any other written purchase offer for Property is submitted and deemed acceptable to Seller, the offer shall be presented to Purchaser and Purchaser shall have ten (10) days in which to match the terms of written offer or terminate this Agreement and receive a full refund of the Deposit and neither party shall have any further obligations under this Agreement. Only exception to this First Right of Refusal is if such submitted written offer is from an entity that would be a competitor for FHFC tax credits, bonds or other type of similar financing then that offer will be deemed unacceptable.

Joint Ex. 2 at 65 of 111.

37. The Real Estate Purchase Agreement requires the parties to close on the Kesher parcel "no later than August 31st, 2015, unless the closing date is extended."

Joint Ex. 2 at 59 of 111. The agreement provides extension options, as follows:

Purchaser shall have the right to extend the closing for the payment of Two Thousand Five Hundred Dollars (\$2,500) per 30 day ("Extension Period") for Four (4) Extension Periods. The extension fee(s) shall be released to Seller by the Escrow Agent immediately upon notice from Purchaser to Seller to extend the contract. Payment of extension fee(s) to be deducted from the Earnest Money Deposit. All extension fee(s) released to Seller through Escrow Agent shall be non-refundable, but applicable to the purchase price, and shall be deemed to be liquidated damages in the event this transaction does not close and is earned as such by Seller.

Joint Ex. 2 at 59 of 111.

38. The other parcel is owned by Downtown Station, LLC. It is 0.50 acres, and Houston Street has agreed to purchase the property for \$975,000. Like the Kesher parcel, this half-acre piece of land remained on the market as of the date Houston Street submitted its application, according to a provision of the Real Estate Purchase Agreement which provides as follows:

Continued Marketing/Right of First Refusal.
It is agreed that Seller herein, shall continue to market the subject Property and entertain any and all offers to purchase the said Property by others. Should Seller receive an offer to purchase the subject property from any other person or entity, with terms and conditions acceptable to Seller, Seller shall provide Purchaser herein notice of same. Purchaser shall have ten (10) days from notice of the foregoing that it wishes to purchase the subject property on the same terms and conditions as offered by another buyer. If Purchaser herein does not agree to purchase the subject property in accordance with said

terms and conditions, then Seller shall have the right to proceed to sell the subject property to the subsequent buyer and this Agreement shall be null and void, at which time any and all deposits placed by Purchaser herein shall be returned to Purchaser.

Joint Ex. 2 at 80 of 111.

39. Closing on the Downtown Station parcel is to occur "no later than August 31st, 2015, unless the closing date is extended." Joint Ex. 2 at 74 of 111. The purchase and sale agreement gives the buyer four successive options to extend the closing date for 30-day periods, respectively, upon payment of \$2,500 for each extension, pursuant to a provision which is identical to the one in the Kesher agreement, quoted above.

40. Pine Grove argues that Houston Street has failed to demonstrate site control because the properties it has under contract are still for sale, and because exercising a right of first refusal could require Houston Street to meet conditions besides the payment of additional monies. Pine Grove's position first raises the question of whether both of the agreements Houston Street provided with its application satisfy the definition of an "Eligible Contract." If this question were answered in the negative, then Houston Street's application would be nonresponsive because the submission of an Eligible Contract is necessary to demonstrate site control. If the answer were affirmative, however, a second question would arise,

and that is whether an Eligible Contract is sufficient to demonstrate site control. If so, then Houston Street's application would be responsive. If not, then it would be necessary to scrutinize the terms and conditions of the Eligible Contracts to ascertain whether they demonstrate site control or (as Pine Grove maintains) a lack thereof.

41. The contracts that Houston Street submitted satisfy the plain and literal meaning of the language used in the RFA to define an Eligible Contract. Neither agreement expires before July 31, 2015, and in any event both agreements contain extension options which Houston Street can exercise solely by paying additional monies. The other requirements of the relevant definition, e.g., the availability of specific performance as a buyer's remedy, are met. Therefore, Houston's Street's application is responsive to the specifications mandating that an Eligible Contract be provided as evidence of site control.

42. The foregoing determination gives rise to the question of whether an Eligible Contract is sufficient to establish site control. On this point, the RFA is ambiguous. The provisions dealing with site control reasonably could be understood as directing that the submission of an Eligible Contract is both necessary and sufficient to establish the requisite degree of control over the proposed development site. Under this

interpretation, the inquiry into Houston Street's site control ends, for Houston Street provided FHFC with Eligible Contracts relating to the parcels it hopes to develop.

43. Alternatively, the RFA's site control provisions reasonably could be read as directing that the submission of an Eligible Contract is necessary, but not sufficient, to prove the requisite degree of site control. Pine Grove has offered evidence showing that, in past cycles, FHFC has examined the terms and conditions of "Qualified Contracts" (the substantial equivalent of Eligible Contracts under the RFA) to determine the existence of site control, and found the site-control evidence to be insufficient. This suggests that providing the necessary contract does not necessarily demonstrate site control.

44. Indeed, Pine Grove asserts that under FHFC's previous interpretations of "site control," Houston Street's documentation should be found wanting. In one earlier instance, FHFC expressed concern over a Qualified Contract that was *subject to* a right of first refusal belonging to a third party. In other words, by exercising its right of first refusal, a third party over whom the applicant had no control could purchase the proposed development site, and the applicant had no contractual means of stopping such a sale, which would deprive the applicant of the subject site. In another past instance, FHFC found fault with a provision in a Qualified Contract which

gave the seller the right (until a certain date) to sell the property to a third party *but did not grant the applicant a right of first refusal*. Here then, once again, a third party over whom the applicant had no control could purchase the proposed development site, and the applicant had no contractual means of stopping such a sale, which would deprive the applicant of the subject site.

45. Despite some superficial similarities, Houston Street's situation is distinguishable from these historical situations because Houston Street, as a holder of first-refusal rights, possesses a measure of control over the potential sale(s) of the development site(s) to a third party or parties that the previous applicants lacked. Unlike them, Houston Street has at its disposal contractual means of stopping another person from buying the subject parcel(s). The decision whether to meet the terms and conditions of a competing offer is Houston Street's to make; therefore, Houston Street controls its own destiny with regard to the purchase of the proposed development site.

46. Consequently, assuming that an Eligible Contract is not sufficient under the RFA to prove site control, but instead must be examined to ascertain whether site control exists, the undersigned determines that Houston Street's sellers' continued marketing of the parcels comprising the development site subject

to Houston Street's rights of first refusal is not inconsistent with Houston Street's retention of adequate control over its acquisition of the site. In short, it is determined, as a matter of ultimate fact, that Houston Street has demonstrated site control adequately for purposes of the RFA. At the very least, it is determined that FHFC's determination to the same effect was not clearly erroneous.^{3/}

47. The RFA requires that an applicant provide documentation establishing its "Ability to Proceed," including the following items:

- (1) Status of Site Plan Approval. The Applicant must provide, 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 provide, as Attachment 8 to Exhibit A, the applicable properly completed and executed verification form: (a) Florida Housing Finance Corporation Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form (Form Rev. 11-14) or (b) Florida Housing Finance Corporation Local Government Verification that Permits are not Required for this Development form (Form Rev. 11-14).

RFA at 60.

48. Attachment 7 relates to the status of the project's site plan approval. The form directs the person who signs it to mark one of three alternative statements to signify which is applicable to the proposed development. On the form attached to Houston Street's application, the following statement was selected:

- 2. o The above-referenced Development is (a) new construction, or (b) rehabilitation with new construction, or (c) rehabilitation, without new construction, that requires additional site plan approval or similar process, and (i) this jurisdiction provides either preliminary site plan approval or conceptual site plan approval which has been issued, or (ii) site plan approval is required for the new construction work and/or the rehabilitation work; however, this jurisdiction provides neither preliminary site plan approval nor conceptual site plan approval, nor is any other similar process provided prior to issuing final site plan approval. Although there is no preliminary or conceptual site plan approval process and the final site plan approval has not yet been issued, the site plan, in the zoning designation stated above, has been reviewed.

The necessary approval and/or review was performed on or before the submission deadline for the above referenced FHFC Request for Proposal/Application by the appropriate City/County legally authorized body; e.g. council, commission, board, department, division, etc., responsible for such approval process.

Joint Ex. 2 at 39 of 111.

49. The Local Government Verification of Status of Site Plan Approval must be "signed by the applicable City's or County's Director of Planning and Zoning, chief appointed official (staff) responsible for determination of issues related to site plan approval, City Manager, or County Manager/Administrator/Coordinator." Houston Street's form was signed by Folks Huxford, Chief of the Current Planning Division for the City of Jacksonville. By signing the form, Mr. Huxford certified that he had the authority "to verify status of site plan approval as specified above and . . . that the information stated above is true and correct." Mr. Huxford was an acceptable signatory.

50. Pine Grove asserts that Houston Street did not obtain the conceptual site plan approval for which local law allegedly provides, and therefore that Houston Street's Local Government Verification of Status of Site Plan Approval form is incorrect and, accordingly, nonresponsive. Pine Grove bases its argument on certain provisions of the Jacksonville, Florida, Code of Ordinances, about whose meaning Pine Grove disagrees with Mr. Huxford, and on the fact that no conceptual site plan approval had been issued for Houston Street's proposed development.

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.

54. Attachment 8 relates to local zoning and land use regulations and requires a local official to confirm the following representations:

The proposed number of units and intended use are consistent with current land use regulations and the referenced zoning designation or, if the Development consists of rehabilitation, the intended use is allowed as a legally non-conforming use. To the best of my knowledge, there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density described herein. Assuming compliance with the applicable land use regulations, there are no known conditions which would preclude construction or rehabilitation (as the case may be) of

the referenced Development on the proposed site.

Joint Ex. 2 at 41 of 111. Mr. Huxford signed Houston Street's form, verifying that the proposed development is consistent with the City of Jacksonville's "local land use regulations and the [applicable] zoning designation." Mr. Huxford had the authority to make this statement on the city's behalf.

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.

56. Thus, it is determined, as matters of ultimate fact, that Houston Street's application satisfied the RFA's specifications pertaining to Evidence of Site Control and

Ability to Proceed, and that FHFC made no mistakes in deeming the application compliant with these requirements.

CONCLUSIONS OF LAW

57. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. See also Fla. Admin. Code R. 67-60.009. FHFC's decisions in this competitive process determine the substantial interests of Pine Grove and Houston Street, each of whom therefore has standing to participate in this proceeding.

58. Pursuant to section 120.57(3)(f), the burden of proof rests with the party 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), who must establish its allegations by a preponderance of the evidence. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

59. Section 120.57(3)(f), Florida Statutes, spells out the rules of decision applicable in bid protests. In pertinent part, the statute provides:

In a competitive-procurement protest, other than a rejection of all bids, 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 bid or proposal specifications. The standard of proof for such proceedings shall be whether the

proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

60. The undersigned has discussed elsewhere, at length, the meaning of this statutory language, the analytical framework established thereby, and the levels of deference to be afforded to the agency's preliminary findings and conclusions. See, e.g., Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Adm. Hear. LEXIS 3, 41-55 (Fla. DOAH Jan. 2, 2014). It is not necessary to review these principles here.

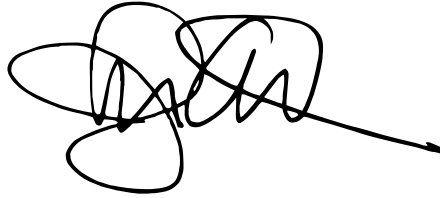
61. FHFC's intended decision cannot stand, as the agency itself realizes, because Pine Grove's application, after fixing the factual misstatement about Stop #4203, fails to earn enough points to remain competitive or even eligible. Pine Grove urges the undersigned to recommend that FHFC waive a minor irregularity in its application—meaning not the material misrepresentation (which FHFC is willing to overlook), but the reliance on Stop #4203 instead of Stop #1397. What Pine Grove really seeks (and needs) is the waiver of the RFA scoring specifications so that at least 2.75 points could be awarded for a faraway Public Bus Stop. Such an action would be, of course, clearly contrary to the specifications; it cannot be recommended.

62. The undersigned found no variance, material or otherwise, between Houston Street's application and the RFA specifications relating to Evidence of Site Control and Ability to Proceed. Therefore, it is concluded that Pine Grove's objections establish no grounds for disqualifying Houston Street's application as nonresponsive.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a Final Order rescinding the preliminary award to Pine Grove and designating Houston Street as the recipient of the tax credits being made available for the development in the "Family or Elderly Demographic Commitment" category to be built in Duval County.

DONE AND ENTERED this 18th day of August, 2015, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of August, 2015.

ENDNOTES

^{1/} For some applicants, the required minimum Transit Service Score was 1.5. This reduced threshold is not applicable, however, in the instant case.

^{2/} Section 120.57(3)(f), Florida Statutes, forbids consideration of "submissions made after the bid or proposal opening which amend or supplement the bid or proposal." Thus, FHFC is not permitted to award an applicant points, even (or perhaps especially) if only by implication, for a quality established exclusively by information or evidence submitted post-opening.

^{3/} In light of these determinations, it is not necessary for the undersigned to resolve the ambiguity in the RFA's site control provisions. To avoid future uncertainty, however, FHFC might want to make clear its interpretation of these provisions in its Final Order, or to consider tightening the pertinent provisions in its next request for applications.

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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.