

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HTG HAMMOCK RIDGE, LLC, AND
REDDING DEVELOPMENT PARTNERS,
LLC,

Petitioners,

vs.

Case Nos. 16-1137BID
16-1138BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

BROWNSVILLE MANOR, LP; GROVE
MANOR PHASE I, LTD; JIC GRAND
PALMS, LLC; MADISON PALMS, LTD;
AND RST THE PINES, LP,

Intervenors.

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RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division
of Administrative Hearings (DOAH), conducted the final hearing
on March 23, 2016, in Tallahassee, Florida.

APPEARANCES

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(HTG) Maureen McCarthy Daughton, LLC
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For Petitioner: M. Christopher Bryant, Esquire
(Redding) Oertel, Fernandez, Bryant
& Atkinson, P.A.
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For Respondent: Betty C. Zachem, Esquire
Eric S. Sonderling, Esquire
Florida Housing Finance Corporation
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For Intervenors: Michael P. Donaldson, Esquire
(Brownsville, Carlton Fields Jordan Burt, P.A.
The Pines, and Post Office Box 190
Grove Manor) Tallahassee, Florida 32302-0190

For Intervenor: Donna Elizabeth Blanton, Esquire
(Grand Palms) Radey Law Firm, P.A.
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For Intervenor: No appearance
(Madison Palms)

STATEMENT OF THE ISSUES

The issues are (1) whether Florida Housing Finance Corporation's (Florida Housing) intended decision to award low-income housing tax credits for an affordable housing development in medium-size counties to Grove Manor Phase I, LTD (Grove Manor), JIC Grand Palms, LLC (Grand Palms), Madison Palms, Ltd. (Madison Palms), and RST The Pines, LP (The Pines), was contrary to solicitation specifications, and if so, whether that determination was clearly erroneous, arbitrary, capricious, or contrary to competition; and (2) whether Florida Housing's determination that Brownsville Manor, LP (Brownsville), achieved the maximum available score of 28 points was contrary to solicitation specifications, and if so, whether that

determination was clearly erroneous, arbitrary, capricious, or contrary to competition.

PRELIMINARY STATEMENT

On September 3, 2015, Florida Housing issued Request for Applications 2015-106 (RFA), which solicited applications to compete for federal low-income housing tax credit funding (tax credits) for affordable housing developments in small and medium counties. Only the applications for developments in medium counties are at issue here. Ninety-eight applications were submitted in response to the RFA. On January 29, 2016, Florida Housing posted a notice of its intended decision to award funding for family and elderly affordable housing to eight applicants, including Grove Manor, Grand Palms, Madison Palms, and The Pines.

Pursuant to section 120.57(3), Florida Statutes (2015), HTG timely filed a formal written protest to the award of tax credits to Grove Manor. Although HTG and Grove Manor received the same score, Grove Manor had a more favorable lottery number than HTG and was preliminarily awarded the tax credits. The matter was referred to DOAH and assigned Case No. 16-1137BID.

In a separate formal written protest to the same RFA, Redding Development Partners, LLC (Redding), which was not awarded tax credits due to a higher lottery number, challenged the number of points given Grove Manor, The Pines, Grand Palms,

and Madison Palms. It also challenged the score of Brownsville, which was not awarded tax credits but ranked ahead of Redding due to a lower lottery number. The protest was assigned Case No. 16-1138BID. The two cases were consolidated by Order dated March 1, 2016. Redding was later granted leave to amend its protest.

In the parties' Joint Prehearing Stipulation, Madison Palms agreed that the public bus stop identified in its application is not a public bus stop as defined in the RFA, which results in a loss of proximity points and renders it ineligible for funding. Also, Grove Manor agreed that the public school identified in its application is not a public school as defined in the RFA, which results in a loss of proximity points. While still eligible, Grove Manor is no longer in the funding range. HTG is now ranked as the next eligible applicant for funding.

At the final hearing, Redding presented the testimony of four witnesses. Also, Redding Exhibits 1 through 6, 8, 9, 12 through 20, 22, and 28 were accepted in evidence. The Pines presented the testimony of one witness. Its Exhibits 1 through 5 were accepted in evidence. Brownville presented the testimony of four witnesses. Brownsville Exhibits 1 through 10 were accepted in evidence. Florida Housing, HTG, and Grand Palms presented no witnesses. HTG Exhibits 1 and 2 and Grand Palms Exhibits 1 through 3 were accepted in evidence. Finally, Joint

Exhibits 1 through 4 were accepted in evidence. Two depositions of Horace L. Jones, Director of Development Services for Escambia County, were late-filed by Redding and Brownsville.

A two-volume Transcript of the hearing was prepared. The parties filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504. One of its responsibilities is to award low-income housing tax credits, which developers use to finance the construction of affordable housing. Tax credits are made available to states annually by the United States Treasury Department and are then awarded pursuant to a competitive cycle that starts with Florida Housing's issuance of an RFA.

2. On September 3, 2015, Florida Housing issued an RFA in which it expected to award up to an estimated \$10,763,426.00 of tax credits for affordable housing developments in medium counties. The RFA also requested proposals for housing developments in small counties, but that portion of the RFA is not at issue. All applicants in this proceeding proposed developments in medium counties. They include Redding (Seminole County), HTG (Hernando County), Brownsville (Escambia), Grove Manor (Polk County), Grand Palms (Manatee County), Madison Palms (Brevard County), and The Pines (Volusia County).

3. Florida Housing retained the right to "waive Minor Irregularities in an otherwise valid Application" filed pursuant to the RFA. Fla. Admin. Code R. 67-60.008. A "minor irregularity" is defined as "a variation or condition of the Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of the Corporation or the public." Fla. Admin. Code R. 67-60.002(6). These rules are particularly relevant in this case, as during the scoring process Florida Housing waived minor irregularities for several applicants.

4. Florida Housing's Executive Director appointed a review committee comprised of Florida Housing staff to evaluate the applications for eligibility and scoring. Ninety-eight applications were received, processed, deemed eligible or ineligible, scored, and ranked pursuant to the terms of the RFA, administrative rules, and applicable federal regulations. Applications are considered for funding only if they are deemed "eligible," based on whether the application complies with various content requirements. Of the 98 applications filed in response to the RFA, 88 were found to be eligible, and ten were found ineligible. All applicants in this case were preliminarily deemed to have eligible applications and received a maximum score of 28 points.

5. The RFA specifies a sorting order for funding eligible applicants. Recognizing that there would be more applications than available credits, Florida Housing established an order for funding for applicants with tied scores using a sequence of five tie breakers, with the last being a lottery number assigned by the luck of the draw. Applications with lower lottery numbers (closer to zero) are selected before those with higher lottery numbers.

6. On January 29, 2016, Florida Housing posted a notice informing the participants that it intended to award funding to eight developments in medium counties, including those of Grove Manor, Grand Palms, Madison Palms, and The Pines. While the applications of HTG, Brownsville, and Redding were deemed to be eligible, they were not entitled to a preliminary award of funding because of their lottery number ranking. The randomly assigned lottery numbers of those applicants are as follows: HTG (14), Brownsville (16), and Redding (17).

7. HTG and Redding timely filed formal written protests. HTG's protest is directed only at Grove Manor's application. Because Grove Manor agreed that its score should be adjusted downward, HTG is the next applicant in the funding range and should be awarded tax credits, assuming it successfully emerges from the credit underwriting process. No party has challenged the scoring of HTG's application.

8. Redding's protest is directed at the applications of The Pines, Madison Palms, Grand Palms, and Grove Manor, who were selected for funding. Redding also contends that Brownsville, which has a lower lottery number, should have been deemed ineligible or assigned a lower score so that it would no longer be in the funding range. In an unusual twist of events that occurred after the posting of the notice on January 29, 2016, Madison Palms and Grove Manor agreed that they are either ineligible or out of the funding range. Therefore, assuming that adequate funds are available, in order for Redding to be awarded credits, it must establish that at least one of its remaining targets (Grand Palms, Brownsville, and The Pines) is ineligible or should be assigned fewer points. No party has challenged the scoring of Redding's application.

9. Under the RFA, applicants are awarded points in three categories: general development experience, local government contributions, and proximity to services. Depending on whether family or elderly units are being proposed, to obtain proximity to service points, an applicant may select among several types of community services, including transit, a grocery store, a medical facility, a pharmacy, or a public school. Redding has challenged the number of proximity points awarded to The Pines for proximity to a medical facility and public school, Grand Palms for proximity to a pharmacy, and Brownsville for proximity

to a public bus transfer stop. Based on Florida Housing's preliminary review of the applications, all three achieved a total proximity score of 18 points.

10. The RFA requires that an applicant submit a Surveyor Certification Form with its application. The form identifies a Development Location Point (DLP), which is representative of where the development is located and must be on or within 100 feet of an existing residential building or a building to be constructed. The DLP is represented by a latitude and longitude coordinate. The distance from the DLP to the selected service is how the proximity points are awarded.

11. The services on which an applicant intends to rely must also be identified on the form, along with the location of the service, as well as the latitude and longitude coordinates for each service. The RFA requires that the coordinates "represent a point that is on the doorway threshold of an exterior entrance that provides direct public access to the building where the service is located." Jt. Ex. 1, p. 25.

12. Redding contends that the coordinates for certain services selected by The Pines, Grand Palms, and Brownsville are not on the "doorway threshold of an exterior entrance that provides direct public access to the building where the service is located." Accordingly, it argues that the number of proximity points awarded to each applicant must be lowered.

13. The Pines selected a public school that has no doors allowing direct public access to the facility. Instead, the school is a series of buildings and classrooms connected by sidewalks and covered breezeways, making a primary "doorway threshold" problematic. The office is interior to the school. Given this unusual configuration, The Pines placed the coordinates at a student drop-off area in front of the school, where students then walk under the covered breezeways to their classrooms, and members of the public walk to offices and/or classrooms. Even if Redding's desired point for the coordinates was used, there would be no difference in the awarded proximity points, as the change in distance would be minimal. The coordinates for The Pines' medical facility are approximately 90 feet from the door that provides direct public access. This was due to an error by the surveyor, who used the back of the facility, rather than the front doorway threshold. Even if the front door had been used for the threshold, The Pines would still be entitled to the same amount of proximity points, as the change in distance would be minimal and not change the scoring. The slight error in the form is a waivable minor irregularity.

14. Brownsville selected a public bus transfer stop for its transit service. Due more than likely to a digital error in one of the satellites used to pinpoint the spot, the coordinates were approximately 150 feet from the canopy where passengers

load and unload. Even if the correct point had been used, it would not change the amount of proximity points awarded to Brownsville. The slight error in the form is a waivable minor irregularity.

15. Finally, Grand Palms selected a pharmacy for one of its services. During the process of locating the doorway threshold at the pharmacy, a traverse point was established 70 feet east of the doorway threshold. This was necessary because of an overhang above the doorway threshold. A measurement was then made from the traverse point to the doorway threshold. By mistake, the coordinates on the form represented the location of the traverse point, instead of the doorway threshold of the pharmacy. However, this 70-foot error did not affect the distance from the pharmacy to the DLP or the points awarded to Grand Palms for proximity to a pharmacy. The slight error in the form is a waivable minor irregularity.

16. Florida Housing determined that the coordinates used by The Pines, Brownsville, and Grand Palms yielded the same proximity point score had they been located at the "doorway threshold" and/or "embark/disembark location" as defined in the RFA. Because there is no language in the RFA that provides direction on how to treat these types of minor errors, or mandates that Florida Housing treat them as a non-waivable item, Florida Housing considers them to be a minor irregularity that

can be waived. In sum, the deviations were immaterial, no competitive advantage was realized by the applicants, and they were entitled to the proximity points awarded during the preliminary review.

17. Redding also contends that Brownsville is ineligible for funding because it failed to comply with a material requirement in the RFA. In its application, Brownsville stated that it intends to place an 87-unit development on a "scattered site" consisting of two parcels (Site I and Site II) with an intervening roadway (North X Street) between them. The RFA defines a development which consists of a scattered site "to mean a single point on the site with the most units that is located within 100 feet of a residential building existing or to be constructed as part of the required Development." Jt. Ex. 1, p. 25. Stated another way, if multiple parcels are used for the development, the DLP must be located on the site which contains the majority of the residential units. Florida Housing considers this to be a material, non-waivable requirement of the RFA.

18. In Brownsville's Surveyor Certification Form, the DLP is located on Site I, a 1.49-acre parcel that is zoned Commercial and lies west of Site II. In making its preliminary decision to award funding to Brownsville, Florida Housing relied upon the validity of the DLP as of the application deadline and

assumed that Site I would have the majority of the units. It had no way to verify the accuracy of that information during the initial scoring process.

19. The RFA requires an applicant to attach to its application a form entitled, "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations." Brownsville's verification form was signed by Horace L. Jones, Director of Development Services for Escambia County, who confirmed that the intended use of the property was consistent with local zoning regulations. The verification forms do not include any information regarding the number of units on each parcel of the site. Florida Housing defers to the local government in determining whether local zoning requirements will be met.

20. Mr. Jones later testified by deposition that Escambia County zoning regulations allow only "25 dwelling units per acre" on Site I. Therefore, on a 1.49-acre parcel, the maximum number of units allowed is 36, or less than a majority of the 87 units. Because Brownsville did not comply with a material requirement of the RFA for a scattered site, Florida Housing now considers the DLP for proximity purposes to be invalid. Had it concluded otherwise, Brownsville would be given a competitive advantage over the other applicants.

21. Brownsville contends, however, that during the County site review process, it will utilize a procedure by which the County can consider the two parcels as a "Single Unified Development" and "cluster" the dwelling units. Although the County has a process to allow the transfer of density from one parcel to another, Brownsville had not started this process as of October 15, 2015, the due date for all applications and the cutoff date for any changes. Also, this process would entail a public hearing before the Board of County Commissioners (Board), and there is no guarantee that the Board would approve the density transfer. In fact, Mr. Jones testified that he was not sure if the density transfer was even a viable option. Therefore, the application of Brownsville contains a material deviation from the RFA and is not eligible for funding.

CONCLUSIONS OF LAW

22. All parties have standing to participate in this proceeding. No one contended otherwise.

23. HTG's and Redding's protests to Florida Housing's proposed contract award are governed by section 120.57(3)(f), which provides as follows:

In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the

solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

24. HTG and Redding have the burden of proof to establish that Florida Housing's proposed action is: (1) contrary to its governing statutes, (2) contrary to its rules or policies, or (3) contrary to the RFA specifications. Here, Petitioners allege only that Florida Housing's proposed agency action is contrary to RFA specifications.

25. To prevail, HTG and Redding must prove by a preponderance of the evidence that Florida Housing's proposed action is: (1) clearly erroneous; (2) contrary to competition; or (3) arbitrary or capricious, that is, an abuse of discretion. See, e.g., R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; Sch. Bd. Miami-Dade Mar. 20, 2002). The two formal protests assert that the proposed agency action is clearly erroneous, contrary to competition, arbitrary, or capricious.

26. Because Grove Manor has stipulated that the public school selected for proximity points is not a public school as defined by the RFA, its score for proximity points must be reduced by 4.0 points. Therefore, it is no longer in the funding range of this RFA. HTG should accordingly be recommended for full funding, subject to credit underwriting.

27. Madison Palms has agreed that the public bus stop identified in its application is not a public bus stop as defined in the RFA. Therefore, it is no longer in the funding range of the RFA.

28. Redding contends that the applications of The Pines, Grand Palms, and Brownsville have coordinates for services that do not represent a point that is on the doorway threshold of an exterior entrance that provides direct public access to the building where the service is located. While this assertion is correct, the deviations on the form were immaterial, they did not affect the scoring, and they gave no competitive advantage to the applicants. Absent any language in the RFA mandating that these deviations are non-waivable, Florida Housing has the discretion to treat the mistakes or errors as minor irregularities. See Pinnacle Rio, LLC v. Fla. Hous. Fin. Corp., Case No. 14-1398BID (Fla. DOAH June 4, 2014, FHFC June 13, 2014) (where information omitted from one part of RFA document but found in other parts of document, Florida Housing had discretion to consider omission a minor irregularity); Heritage at Pompano Hous. Partners, Ltd. v. Fla. Hous. Fin. Corp., Case No. 14-1361BID (Fla. DOAH June 10, 2014, FHFC June 13, 2014) (coordinates placed at exit rather than entrance of public school considered a minor irregularity); Fla. Admin. Code R. 67-60.002(6) and 67-60.008.

29. By a preponderance of the evidence, Redding has established that it was contrary to RFA specifications to award proximity points to Brownsville when its DLP was on a parcel that Brownsville could not place a majority of its residential units. The error is material and non-waivable. Florida Housing now agrees that to award points under these circumstances would be clearly erroneous and give Brownsville a competitive advantage over the other applicants. See, e.g., U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist., Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002), modified in part, Case No. 2002-051 (SFWMD Mar. 6, 2002).

30. In summary, the preliminary award of tax credits to Grove Manor and Madison Palms should be rescinded; Brownsville's application should be deemed to be ineligible for funding; and HTG and Redding should be awarded tax credits.

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 Grove Manor Phase I, Ltd. and Madison Palms, Ltd.; determining that Brownsville Manor, LP, is ineligible for funding; and designating HTG Hammock Ridge, LLC, and Redding Development

Partners, LLC, as the recipients of tax credits being made available for developments in RFA 1015-106.

DONE AND ENTERED this 19th day of April, 2016, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2016.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.