STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ST. ELIZABETH GARDENS
APARTMENTS, LTD.,

Petitioner,

vs. Case No. 16-4132BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ISLES OF PAHOKEE PHASE II, LLC;
HALEY SOFGE PRESERVATION PHASE
ONE; THREE ROUND TOWER A, LLC;
CATHEDRAL TOWERS, LTD.; AND SP
MANOR, LLC,

Intervenors.
_____/
MARIAN TOWERS, LTD.,

Petitioner,

vs. Case No. 16-4133BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ISLES OF PAHOKEE PHASE II, LLC;
HALEY SOFGE PRESERVATION PHASE
ONE; THREE ROUND TOWER A, LLC;
CATHEDRAL TOWERS, LTD.; AND SP
MANOR, LLC,

Intervenors.
_____/

WCAR, LTD.,

Petitioner,

vs. Case No. 16-4134BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC; AND CATHEDRAL TOWERS, LTD.,

Intervenors.
_____/

SJRAR, LTD.,

Petitioner,

vs. Case No. 16-4135BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC; AND CATHEDRAL TOWERS, LTD.,

Intervenors.
_____/

CPAR, LTD.,

Petitioner,

vs. Case No. 16-4136BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC; AND CATHEDRAL TOWERS, LTD.,

Intervenors.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 16, 2016, in Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners St. Elizabeth Gardens Apartments, Ltd., and Marian Towers, Ltd.:

Donna Elizabeth Blanton, Esquire
Radey Law Firm, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301-1706

For Petitioners WCAR, Ltd.; SJRAR, Ltd.; and CPAR, Ltd.:

M. Christopher Bryant, Esquire
Oertel, Fernandez, Bryant
& Atkinson, P.A.
Post Office Box 1110
2060 Delta Way
Tallahassee, Florida 32302-1110

For Respondent Florida Housing Finance Corporation:

Christopher Dale McGuire, Esquire
Betty Zachem, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenors Haley Sofge Preservation Phase One; Three Round Tower A, LLC; Cathedral Towers, Ltd.; and SP Manor, LLC:

Michael P. Donaldson, Esquire
Carlton Fields Jorden, Burt, P.A.
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302

For Intervenor Isles of Pahokee Phase II, LLC:

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
1725 Capital Circle Northeast, Suite 304
Tallahassee, Florida 32308

## STATEMENT OF THE ISSUE

The issue for determination in this consolidated bid protest proceeding is whether the Florida Housing Finance Corporation's ("FHFC") intended award of tax credits for the preservation of existing affordable housing developments was clearly erroneous, contrary to competition, arbitrary, or capricious.

## PRELIMINARY STATEMENT

On October 23, 2015, FHFC solicited applications for an allocation of federal low-income housing tax credits through a document entitled "Request for Applications 2015-111 for Housing Credit Financing for the Preservation of Existing Affordable Multifamily Housing Developments" ("RFA 2015-111"). On December 4, 2015, 24 developers (including Petitioners and Intervenors in the instant case) submitted applications in response to RFA 2015-111.

On June 24, 2016, FHFC posted notice of its intent to award funding to five applicants, including Intervenors Three Round Tower A, LLC ("Three Round"); Cathedral Towers, Ltd. ("Cathedral Towers"); Isles of Pahokee Phase II, LLC ("Isles of Pahokee"); and SP Manor, LLC ("Lummus Park").[1/] FHFC determined that Petitioners St. Elizabeth Gardens Apartments, Ltd. ("St. Elizabeth"); Marian Towers, Ltd. ("Marian Towers"); WCAR, Ltd. ("Woodcliff"); SJRAR, Ltd. ("St. Johns"); and CPAR, Ltd. ("Colonial"), were ineligible for funding. FHFC also determined that Intervenor Haley Sofge Preservation Phase One ("Haley Sofge") was eligible for funding, but Haley Sofge's application did not earn a sufficient score relative to those of the competing applicants.

Pursuant to section 120.57(3), Florida Statutes (2016),[2/] St. Elizabeth, Marian Towers, Woodcliff, St. Johns, and Colonial

filed timely notices of intent to protest followed by formal written protests. Those cases were referred to DOAH on July 22, 2016, and ultimately consolidated via an Order issued on August 10, 2016.

Initially, St. Elizabeth and Marian Towers were challenging FHFC's determination that arrearage issues rendered their applications ineligible. FHFC has since agreed that its initial determination was erroneous, and FHFC now agrees that St. Elizabeth's and Marian Tower's applications should be deemed eligible for funding. However, FHFC maintains that St. Elizabeth's and Marian Tower's applications were not entitled to funding.

The parties agreed that there were no disputed issues of material fact. Accordingly, the final hearing was conducted pursuant to section 120.57(2) and took place as scheduled on August 16, 2016.

During the course of that final hearing, the undersigned accepted Joint Exhibits J-1 through J-14 into evidence. St. Elizabeth and Marian Towers presented the testimony of Kenneth Naylor (the Chief Operating Officer for Atlantic Pacific Communities) and offered Exhibits 1 through 5, which were accepted into evidence. Woodcliff, St. Johns, and Colonial presented the testimony of Angela Hatcher of Flynn Development Corporation and offered Exhibit 1 that was accepted into

evidence. Cathedral Towers presented the testimony of Shawn Wilson (the President of Blue Sky Communities) and offered Exhibit 1 that was accepted into evidence over objection. FHFC presented the testimony of Kenneth Reecy (the Director of Multifamily Programs for FHFC) and offered Exhibits FH-1 and FH-2 that were accepted into evidence.

Intervenors Three Round, Haley Sofge, Isles of Pahokee, and Lummus Park called no witnesses and offered no exhibits.

The parties stipulated to the official recognition of any rules or final orders issued by FHFC.

All of the parties filed timely proposed recommended orders that have been considered in the preparation of this Recommended Order.

## FINDINGS OF FACT

### FHFC and Affordable Housing Tax Credits

1. FHFC is a public corporation that finances affordable housing in Florida by allocating and distributing low income housing tax credits. See § 420.504(1), Fla. Stat. (providing that FHFC is "an entrepreneurial public corporation organized to provide and promote the public welfare by administering the governmental function of financing or refinancing housing and related facilities in this state."); § 420.5099(2), Fla. Stat. (providing that "[t]he corporation shall adopt allocation procedures that will ensure the maximum use of available tax

credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.").

2. The tax credits allocated by FHFC encourage investment in affordable housing and are awarded through competitive solicitations to developers of qualifying rental housing.

3. Tax credits are not tax deductions. For example, a $1,000 deduction in a 15-percent tax bracket reduces taxable income by $1,000 and reduces tax liability by $150. In contrast, a $1,000 tax credit reduces tax liability by $1,000.

4. Not surprisingly, the demand for tax credits provided by the federal government exceeds the supply.

5. A successful applicant/developer normally sells the tax credits in order to raise capital for a housing development. That results in the developer being less reliant on debt financing.

6. In exchange for the tax credits, a successful applicant/developer must offer affordable rents and covenant to keep those rents at affordable levels for 30 to 50 years.

The Selection Process

7. FHFC awards tax credits through competitive solicitations, and that process is commenced by the issuance of a Request for Applications ("RFA").

8. Florida Administrative Code Rule 67-60.009(2) provides that unsuccessful applicants for tax credits "may only protest the results of the competitive solicitation process pursuant to the procedures set forth in Section 120.57(3), F.S., and Chapter 28-110, F.A.C."

9. For purposes of section 120.57(3), an RFA is equivalent to a "request for proposal." See Fla. Admin. Code R. 67.60.009(4), F.A.C.

10. FHFC issued RFA 2015-111 on October 23, 2015, and responses from applicants were due on December 4, 2015.

11. Through RFA 2015-111, FHFC seeks to award up to $5,901,631 of tax credits to qualified applicants that commit to preserve existing affordable multifamily housing developments for the demographic categories of "Families," "the Elderly," and "Persons with a Disability."

12. FHFC only considered an application eligible for funding from RFA 2015-111, if that particular application complied with certain content requirements.

13. FHFC ranked all eligible applications pursuant to an "Application Sorting Order" set forth in RFA 2015-111.

14. The first consideration was the applicants' scores. Each application could potentially receive up to 23 points based on the developer's experience and the proximity to services needed by the development's tenants.

15. Applicants demonstrating that their developments received funding from a U.S. Department of Agriculture ("USDA") Rural Development program known as RD 515 were entitled to a 3.0 point proximity score "boost."

16. That proximity score boost was important because RFA 2015-111 characterized counties as small, medium, or large. Applications associated with small counties had to achieve at least four proximity points to be considered eligible for funding. Applications associated with medium-sized counties and those associated with large counties had to achieve at least seven and 10.25 proximity points respectively in order to be considered eligible for funding.

17. Because it is very common for several tax credit applicants in a particular RFA to receive identical scores, FHFC incorporated a series of "tie-breakers" into RFA 2015-111.

18. The tie-breakers for RFA 2015-111, in order of applicability, were:

a. First, by Age of Development, with developments built in 1985 or earlier receiving a preference over relatively newer developments.

**b. Second, if necessary, by a Rental Assistance ("RA") preference. Applicants were to be assigned an RA level based on the percentage of units receiving rental assistance through either a U.S. Department of Housing and Urban Development ("HUD") or USDA Rural Development program. Applicants with an RA level of 1, 2, or 3 (meaning at least 75 percent of the units received rental assistance) were to receive a preference.**

c. Third, by a Concrete Construction Funding Preference, with developments incorporating certain specified concrete or masonry structural elements receiving the preference.

d. Fourth, by a Per Unit Construction Funding Preference, with applicants proposing at least $32,500 in Actual Construction Costs per unit receiving the preference.

e. Fifth, by a Leveraging Classification favoring applicants requiring a lower amount in housing credits per unit than other applicants. Generally, the least expensive 80 percent of eligible applicants were to receive a preference over the most expensive 20 percent.

**f. Sixth, by an Applicant's specific RA level, with Level 1 applicants receiving the most preference and Level 6 the least.**

g. Seventh, by a Florida Job Creation Preference, which estimated the number of jobs created per $1 million of housing credit equity investment the developments were to receive based on formulas contained in the RFA. Applicants achieving a Job Creation score of at least 4.0 were to receive the preference.

h. Eighth, by lottery number, with the lowest (smallest) lottery number receiving the preference.

19. Rental assistance from the USDA or HUD is provided to existing developments in order to make up for shortfalls in monthly rent paid by tenants. For example, if an apartment's base rent is $500 per month and the tenant's income limits him or her to paying only $250 towards rent, then the USDA or HUD rental assistance pays the other $250 so that the total rent received by the development is $500.

20. As evident from the tie-breakers incorporated into RFA 2015-111, the amount of rental assistance, or "RA Level," played a prominent role in distinguishing between RFA 2015-111 applicants having identical scores.

21. RFA 2015-111 required that applicants demonstrate RA Levels by providing a letter containing the following information: (a) the development's name; (b) the development's address; (c) the year the development was built; (d) the total number of units that currently receive PBRA and/or ACC;[3] (e) the total number of units that would receive PBRA and/or ACC if the proposed development were to be funded; (f) all HUD or RD financing program(s) originally and/or currently associated with the existing development; and (g) confirmation that the development had not received financing from HUD or RD after 1995 when the rehabilitation was at least $10,000 per unit in any year.

22. In order to determine an applicant's RA Level Classification, RFA 2015-111 further stated that

> Part of the criteria for a proposed Development that qualifies as a Limited Development Area (LDA) Development to be eligible for funding is based on meeting a minimum RA Level, as outlined in Section Four A.7.c of the RFA.
>
> The total number of units that will receive rental assistance (i.e., PBRA and/or ACC), as stated in the Development Category qualification letter provided as Attachment 7, will be considered to be the proposed Development's RA units and will be the basis of the Applicant's RA Level Classification. The Corporation will divide the RA units by the total units stated by the Applicant at question 5.e. of Exhibit A, resulting in a Percentage of Total Units that are RA units. Using the Rental Assistance Level Classification Chart below, the Corporation will determine the RA Level associated with both the Percentage of Total Units and the RA units. The best rating of these two (2) levels will be assigned as the Application's RA Level Classification.

23. RFA 2015-111 then outlined a Rental Assistance Level Classification Chart to delineate between the RA Levels. That chart described six possible RA Levels, with one being developments that have the most units receiving rental assistance and six pertaining to developments with the fewest units receiving rental assistance. A development with at least 100 rental assistance units and greater than 50 percent of the total units receiving rental assistance was to receive an RA Level of 1.

24. FHFC also utilized a "Funding Test" to assist in the selection of applications for funding. The Funding Test required that the amount of unawarded housing credits be enough to satisfy any remaining applicant's funding request. In other words, FHFC prohibited partial funding.

25. In addition, RFA 2015-111 applied a "County Award Tally" designed to prevent a disproportionate concentration of funded developments in any one county. As a result, all other applicants from other counties had to receive an award before a second application from a particular county could be funded.

26. After ranking of the eligible applicants, RFA 2015-111 set forth an order of funding selection based on county size, demographic category, and the receipt of RD 515 financing. The Order was:

a. One RD 515 Development (in any demographic category) in a medium or small county;

b. One Non-RD 515 Development in the Family Demographic Category (in any size county);

c. The highest ranked Non-RD 515 application or applications with the demographic of Elderly or Persons with a Disability; and

d. If funding remains after all eligible Non-RD 515 applicants are funded, then the highest ranked RD 515 applicant in the Elderly demographic (or, if none, then the highest ranked RD 515 applicant in the Family demographic).

27. Draft versions of every RFA are posted on-line in order for stakeholders to provide FHFC with their comments. In addition, every RFA goes through at least one workshop prior to being finalized.

28. FHFC often makes changes to RFAs based on stakeholder comments.

29. No challenge was filed to the terms, conditions, or requirements of RFA 2015-111.

30. A review committee consisting of FHFC staff members reviewed and scored all 24 applications associated with RFA 2015-111. During this process, FHFC staff determined that none of the RD-515 applicants satisfied all of the threshold eligibility requirements.

31. On June 24, 2016, FHFC's Board of Directors announced its intention to award funding to five applicants, subject to those applicants successfully completing the credit underwriting process. Pineda Village in Brevard County was the only successful applicant in the Non-RD 515 Family Demographic. The four remaining successful applicants were in the Non-RD 515 Elderly or Persons with Disability Demographic: Three Round Tower in Miami-Dade County; Cathedral Towers in Duval County; Isles of Pahokee in Palm Beach County; and Lummus Park in Miami-Dade County.

32. The randomly-assigned lottery number tie-breaker played a role for the successful Non-RD 515 applicants with Three Round Tower having lottery number one, Cathedral Towers having lottery number nine, and Isles of Pahokee having lottery number 18.

33. While Lummus Park had a lottery number of 12, the County Award Tally prevented it from being selected earlier because Three Round Tower had already been selected for funding in Miami-Dade County. However, after the first four applicants were funded, only $526,880 of credits remained, and Lummus Park was the only eligible applicant with a request small enough to be fully funded.

34. All Petitioners timely filed Notices of Protest and petitions for administrative proceedings.

The Challenge by Woodcliff, Colonial, and St. Johns

35. Woodcliff is seeking an award of tax credits in order to acquire and preserve a 34-unit development for elderly residents in Lake County.[4/]

36. Colonial is seeking an award of tax credits in order to acquire and preserve a 30-unit development for low-income families in Lake County.[5/]

37. St. Johns is seeking an award of tax credits to acquire and preserve a 48-unit development for elderly residents in Putnam County.[6/]

38. FHFC deemed Woodcliff, Colonial and St. Johns to be ineligible because of a failure to demonstrate the existence or availability of a particular source of financing relied upon in their applications. Specifically, FHFC determined that the availability of USDA RD 515 financial assistance was not properly documented.

39. For applicants claiming the existence of RD 515 financing, RFA 2015-111 stated:

> (2) If the proposed Development will be assisted with funding under the United States Department of Agriculture RD 515 Program and/or RD 538 Program, the following information must be provided:
>
> (a) Indicate the applicable RD Program(s) at question 11.b.(2) of Exhibit A.
>
> (b) For a proposed Development that is assisted with funding from RD 515 and to qualify for the RD 515 Proximity Point Boost (outlined in Section Four A.6.b.(1)(b) of the RFA), the Applicant must:
>
> (i) Include the funding amount at the USDA RD Financing line item on the Development Funding Pro Forma (Construction/Rehab Analysis and/or Permanent Analysis); and
>
> (ii) Provide a letter from RD, **dated within six (6) months of the Application Deadline**, as Attachment 17 to Exhibit A, which includes the following information for the proposed Preservation Development:
>
> • Name of existing development;
> • Name of proposed Development;

> • Current RD 515 Loan balance;
> • Acknowledgment that the property is applying for Housing Credits; and
> • Acknowledgment that the property will remain in the USDA RD 515 loan portfolio.

(emphasis added).

40. FHFC was counting on the letter mentioned directly above to function as proof that: (a) there was RD 515 financing in place when the letter was issued; and that (b) the RD 515 financing would still be in place as of the application deadline for RFA 2015-111.

41. FHFC deemed Woodcliff, Colonial and St. Johns ineligible because their RD letters were not dated within six months of the December 4, 2015, deadline for RFA 2015-111 applications. The Woodcliff letter was dated May 15, 2015, the Colonial letter was dated May 15, 2015, and the St. Johns letter was dated May 5, 2015.

42. FHCA had previously issued RFA 2015-104, which also proposed to award Housing Credit Financing for the Preservation of Existing Affordable Multifamily Housing Developments. The deadline for RFA 2015-104 was June 23, 2015, and Woodcliff, Colonial, and St. Johns applied using the same USDA letter that they used in their RFA 2015-111 applications.

43. Woodcliff, Colonial, and St. Johns argued during the final hearing that FHFC should have accepted their letters

because: (a) they gained no competitive advantage by using letters that were more than six months old; (b) waiving the six-month "shelf life" requirement would enable FHFC to satisfy one of its stated goals for RFA 2015-111, i.e., funding of an RD 515 development; and (c) other forms of financing (such as equity investment) have no "freshness" or "shelf life" requirement.

44. However, it is undisputed that no party (including Woodcliff, Colonial, and St. Johns) challenged any of the terms, conditions, or requirements of RFA 2015-111.

45. In addition, Kenneth Reecy (FHFC's Director of Multifamily Programs) testified that there must be a point at which FHFC must ensure the viability of the information submitted by applicants. If the information is "too old," then it may no longer be relevant to the current application process.

46. Under the circumstances, it was not unreasonable for FHFC to utilize a six-month shelf life for USDA letters.[7/]

47. Furthermore, Mr. Reecy testified that excusing Woodcliff, Colonial, and St. Johns' noncompliance could lead to FHFC excusing all deviations from all other date requirements in future RFAs. In other words, applicants could essentially rewrite those portions of the RFA, and that would be an unreasonable result.

48. Excusing the noncompliance of Woodcliff, Colonial, and St. Johns could lead to a "slippery slope" in which any shelf-life requirement has no meaning. The letters utilized by Woodcliff, Colonial, and St. Johns were slightly more than six months old. But, exactly when would a letter become too old to satisfy the "shelf life" requirement? If three weeks can be excused today, will four weeks be excused next year?

St. Elizabeth's and Marian Towers' Challenge

49. St. Elizabeth is seeking low-income housing tax credit financing in order to acquire and preserve a 151-unit development for elderly residents in Broward County, Florida.

50. Marian Towers is an applicant for RFA 2015-111 funding seeking low-income housing tax credits to acquire and preserve a 220-unit development for elderly residents in Miami-Dade County, Florida.

51. The same developer is associated with the St. Elizabeth and Marian Towers projects.

52. In its scoring and ranking process, FHFC assigned St. Elizabeth an RA Level of two. RFA 2015-111 requires that Applicants demonstrate RA Levels by providing a letter from HUD or the USDA with specific information. That information is then used to establish an RA Level for the proposed development.

53. As noted above, the RFA requires the letter to contain several pieces of information, including: (a) the total number

of units that currently receive PBRA and/or ACC; and (b) the total number of units that will receive PBRA and/or ACC if the proposed development is funded.

54. RFA 2015-111 provided that a development with at least 100 rental units would receive an RA Level of one.

55. St. Elizabeth included with its application a letter from HUD's Miami field office stating in pertinent part that:

> (iv) Total number of units that currently receive PBRA and/or ACC: 99 units.
>
> (v) Total number of units that will receive PBRA and/or ACC if the proposed Development is funded: 100 units*.

56. The asterisk in the preceding paragraph directed readers of St. Elizabeth's HUD letter to a paragraph stating that:

> HUD is currently processing a request from the owner to increase the number of units subsidized under a HAP Contract to 100 by transferring budget authority for the one additional unit from another Catholic Housing Services Section 8 project under Section 8(bb) in accordance with Notice H-2015-03.

57. Because of the foregoing statement from HUD, FHFC concluded that St. Elizabeth did not have 100 units receiving rental assistance as of the application deadline. Accordingly, FHFC used 99 units as the total number of units that would receive rental assistance when calculating St. Elizabeth's RA

Level, and that led to FHFC assigning an RA Level of two to St. Elizabeth's application.[8/]

58. If St. Elizabeth had been deemed eligible and if FHFC had used 100 units as the total number of units that would receive rental assistance, then St. Elizabeth would have received an RA Level of one. Given the application sorting order and the selection process outlined in RFA 2015-111, St. Elizabeth (with a lottery number of six) would have been recommended for funding by FHFC, and that outcome would have resulted in Intervenors Isles of Pahokee and Lummus Park losing their funding.

59. St. Elizabeth asserted during the final hearing that the 100th unit had obtained rental assistance financing since the application deadline on December 4, 2015. However, FHFC could only review, score, and calculate St. Elizabeth's RA Level based on the information available as of the application deadline.

60. While St. Elizabeth argues that the asterisk paragraph sets forth a "condition," Kenneth Reecy (FHFC's Director of Multifamily Housing) agreed during the final hearing that the asterisk paragraph was more akin to information that was not explicitly required by RFA 2015-111.

61. FHFC did not use that additional information to declare St. Elizabeth's application ineligible for funding.

Despite being assigned an RA Level of two, St. Elizabeth's application still could have been selected for funding because RFA 2015-111 merely established RA Level as a basis for breaking ties among competing applications. However, too many applicants for RFA 2015-111 had identical scores, and RFA 2015-111's use of RA Level as a tiebreaker forced St. Elizabeth's application out of the running.

62. Under the circumstances, FHFC's treatment of St. Elizabeth's application was not clearly erroneous, contrary to competition, arbitrary, or capricious. As noted above, tie-breakers are very important, because there is often very little to distinguish one application for tax credits from another. Given that there was a degree of uncertainty about whether St. Elizabeth's would have 100 qualifying units, FHFC acted reasonably by assigning St. Elizabeth's application an RA Level of two for this tie-breaker rather than an RA Level of one.

63. St. Elizabeth and Marian Towers argue that other applications contained language that indicated a degree of uncertainty. Nevertheless, those other applications received an RA Level of one.

64. For example, FHFC assigned an RA Level of one to Three Round and Haley Sofge even though their HUD letters stated that both developments would be "subject to a Subsidy Layering Review to be conducted by HUD."

65. Marian Towers argued that if FHFC does not accept HUD or RD letters containing conditional language about the number of units that will be subsidized, then FHFC should have assigned an RA Level of six to Three Round and Haley Sofge. If Three Round and Haley Sofge had been assigned an RA Level of six, then Marian Towers (with a lottery number of five) would have been recommended for funding.

66. St. Elizabeth and Marian Towers cited another instance in which an application received an RA Level of one, even though its application contained a letter from the RD program stating that "USDA Rural Development will consent to the transfer if all regulatory requirements are met." (emphasis added).

67. However, St. Elizabeth and Marian Towers failed to demonstrate that the language cited above applied only to those particular applications rather than to all applications for tax credits. For example, if all applications are subject to a subsidy layering review and compliance with all regulatory requirements, then inclusion of such language in a HUD letter (in and of itself) should not prevent an applicant from being assigned an RA Level of one.

68. St. Elizabeth and Marian Towers also cited a HUD Letter used in another recent RFA by an applicant that received an RA Level of one. The HUD letter in question contained an asterisk followed by the following statement: "It is HUD's

understanding that two separate applications are being submitted – one for each tower comprising St. Andrew Towers. If funded, HUD will consider a request from the owner to bifurcate the St. Andrew Towers HAP contract in order to facilitate the separate financing of each tower."

69. However, St. Elizabeth and Marian Towers failed to demonstrate why the language quoted directly above should have resulted in the applicant in question being awarded an RA Level less than one. There is no indication that the total number of units receiving rental assistance would change.

CONCLUSIONS OF LAW

70. Florida Housing has jurisdiction over this matter, pursuant to sections 120.569, 120.57(2), and 120.57(3), Florida Statutes. Florida Housing has contracted with DOAH to provide an Administrative Law Judge to conduct the informal hearing in this case.

71. It has been stipulated that all parties have standing to participate in this proceeding. §§ 120.52(13) and 120.569(1), Fla. Stat. The evidence demonstrated that this proceeding and the various potential outcomes could impact the parties in many different ways.

72. This is a competitive procurement protest proceeding and, as such, is governed by section 120.57(3)(f), which provides as follows in pertinent part:

> 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. . . .

73. Pursuant to section 120.57(3)(f), Petitioners (as the parties opposing the proposed agency action) had the burden of proving "a ground for invalidating the award." See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

74. Moreover, Petitioners must prove by preponderance of the evidence that FHFC's proposed award of tax credits to the successful applicants is arbitrary, capricious, or beyond the scope of FHFC's discretion as a state agency. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat.

75. The First District Court of Appeal has interpreted the process set forth in section 120.57(3)(f) as follows:

> A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes

> (Supp. 1996) provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used to describe 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. See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

76. The ultimate issue in this proceeding is "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." In addition to proving that FHFC breached this statutory standard of conduct, Petitioners also must establish that FHFC's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

77. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law will be upheld "if the agency's construction falls within the permissible range of

interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004)(citations omitted). See also Anderson v. Bessemer City, 470 U.S. 564, 573-74; 105 S. Ct. 1504, 1511; 84 L. Ed. 2d 518, 528 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

78. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977)(quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931)).

79. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if it is not supported by facts or logic.

See Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

80. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enters. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

81. However, if a decision 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. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

The Challenge by Woodcliff, Colonial, and St. Johns

82. Woodcliff, Colonial, and St. Johns argued during the final hearing that FHFC should have accepted their letters because: (a) they gained no competitive advantage by using letters that were more than six months old; (b) waiving the six month "shelf life" requirement would enable FHFC to satisfy one of its stated goals for RFA 2015-111, i.e., funding of an RD 515 development; and (c) other forms of financing (such as equity investment) have no "freshness" or "shelf life" requirement.

83. However, during the time period when stakeholders could have objected to one of RFA 2015-111's provisions, Woodcliff, Colonial, and St. Johns did not challenge the portion of RFA 2015-111 requiring that the USDA letters be no more than six months old at the application deadline. As a result, Woodcliff, Colonial, and St. Johns have waived this argument. See Optiplan, Inc. v. School Bd., 710 So. 2d 569, 572-73 (Fla. 4th DCA 1998)(stating that "with respect to the constitutional challenge to the RFP's specifications because it was awarded points tied to race-based classifications, we agree with the hearing officer that Optiplan waived its right to contest the School Board's use of the criteria by failing to formally challenge the criteria within 72 hours of the publication of the specifications in a bid solicitation protest. The purpose of such a protest is to allow an agency to correct or clarify plans and specifications prior to accepting bids in order to save expense to the bidders and to assure fair competition among them. See Capeletti Bros., Inc. v. Dep't of Transp., 499 So. 2d 855, 857 (Fla. 1st DCA 1986). (Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, Optiplan has waived its right to challenge the criteria."); Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004)(stating that "[a] further bar to appellant's

attempt to inject the cost issue into this proceeding is its failure to timely protest the provisions of the RFP with respect to the financial aspects of the project. Because Consultech failed to file a protest to the terms and conditions of the RFP as required by section 120.57(3), Florida Statutes, its belated attempt to challenge the award to ISF on this basis must fail.").

St. Elizabeth's and Marian Tower's Challenge

84. St. Elizabeth argues that FHFC erred by assigning its application an RA Level of two rather than an RA Level of one. However, St. Elizabeth fails to demonstrate that FHFC's action was clearly erroneous, contrary to competition, or arbitrary and capricious.

85. As noted above, there is very little to differentiate applications for tax credits, and several of the applicants for RFA 2015-111 had identical scores. FHFC designated RA Level as a tie-breaker among competing applications. Given the uncertainty about whether St. Elizabeth would have 100 units receiving rental assistance after the application deadline, FHFC acted appropriately by giving St. Elizabeth's application less than a perfect score for RA Level. Even if the degree of doubt that St. Elizabeth would ultimately have 100 units receiving rental assistance was low, FHFC acted appropriately by

distinguishing St. Elizabeth's application from those that had no such uncertainty.[9/]

86. St. Elizabeth argues that the undersigned should have accounted for St. Elizabeth allegedly gaining that 100th unit following the application deadline. However, that would have been contrary to section 120.57(3)(f), which provides that "[i]n a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered."

87. As for St. Elizabeth's and Marian Towers' argument that other comparable RFA language did not result in applicants being assigned a score less than an RA Level of one, St. Elizabeth and Marian Towers failed to carry their burden of proof on this point by demonstrating that: (a) the other RFA language pertained to a specific applicant rather than all applicants seeking tax credit funding; or that (b) the language in question should have led to the applicant(s) receiving an RA Level less than one. See § 120.57(3)(f), Fla. Stat. (providing that "[u]nless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action").

## 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 awarding funding to Three Round Tower A, LLC; Cathedral Towers, Ltd; Isles of Pahokee Phase II, LLC; SP Manor, LLC; and Pineda Village.

DONE AND ENTERED this 18th day of October, 2016, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G.W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of October, 2016.

## ENDNOTES

[1/] The fifth funded applicant, Pineda Village, did not intervene in this proceeding and is not a party.

[2/] Unless stated otherwise, all statutory references will be to the 2016 version of the Florida Statutes.

[3/] A website operated by the National Council of State Housing Agencies (www.ncsha.org) describes PBRA as follows: "Project-based Section 8 rental assistance (PBRA) contracts provide subsidies for affordable multifamily rental developments to lower rental costs for low-income families and to help offset

construction, rehabilitation, and preservation costs. PBRA makes up the difference between market rents and what low-income tenants can afford, based on paying 30 percent of household income for rent." See generally Oken v. Williams, 23 So. 3d 140, 148 n.2 (Fla. 1st DCA 2009)(noting several instances in which courts have taken judicial notice of information found on-line). As for ACC, 24 C.F.R. § 982.151(a)(1) states that "[a]n annual contributions contract (ACC) is a written contract between HUD and [a public housing agency]. Under the [ACC], HUD agrees to make payments to the [public housing agency], over a specified term, for housing assistance payments to owners and for the [public housing agency] administrative fee. The ACC specifies the maximum payment over the ACC term. The [public housing agency] agrees to administer the program in accordance with HUD regulations and requirements."

[4/] If Woodcliff had been deemed eligible, it would have been the first applicant selected for funding, since it is an RD-515 assisted applicant from a Medium County. Its lottery number is 19, which places it as the third best lottery number among RD-515 applicants, but the two applicants with better lottery numbers were deemed ineligible by FHFC and did not file a formal written protest.

[5/] If Colonial had been deemed eligible, it may have been selected for funding. Colonial's lottery number is 22, which places it as the fifth best lottery number among RD-515 applicants, but the two RD-515 applicants with the best lottery numbers were deemed ineligible. If Woodcliff, is also successful in its challenge, then Woodcliff would be the first applicant selected to satisfy the funding goal for an RD 515 applicant in a medium or small county. Following selection of the highest ranked Non-RD 515 applicants and depending on the amount of tax credits awarded to such applicants, there may be sufficient funding to fund Colonial.

[6/] If St. Johns had been deemed eligible, it could have been the second RD applicant selected for funding, depending on which Non-RD applicants are ultimately selected for funding. St. Johns' lottery number is 21, which places it as the fourth best lottery number among RD-515 applicants, but the two RD 515 applicants with the best lottery numbers were deemed ineligible by FHFC. The third best lottery number among RD-515 applicants, Woodcliff, would have been selected first in order to satisfy the RD 515 Development in a medium or small county funding goal. If sufficient funds remained after funding

Non-RD applicants, St. Johns would have been selected as the highest ranked RD 515 applicant in the Elderly demographic.

[7/] Cathedral Towers presented the testimony of Shawn Wilson (the President of Blue Sky Communities), and Mr. Wilson testified that it typically takes one to two weeks to obtain a letter from HUD or the USDA. Mr. Wilson further testified that RFA applicants can even ask HUD or the USDA to revise a letter's wording if that wording does not strictly adhere to a particular RFA's requirements.

[8/] In response to a previous RFA (2015-104), St. Elizabeth submitted a similar RFA letter dated June 18, 2015, which had an asterisk paragraph stating that "[i]f funded, HUD will consider a request from the owner to increase the number of units subsidized under a HAP Contract to 100 by transferring budget authority for the one additional unit from another Catholic Housing Management Section 8 project under Section 8(bb) in accordance with Notice H-2014-14, or such other allowable action which would increase the total number of subsidized units at the property to 100." FHFC awarded St. Elizabeth's application an RA Level of two for that RFA. The foregoing language is strikingly similar to the asterisk paragraph at issue in the instant case. As a result, St. Elizabeth was familiar with how FHFC treated such language.

[9/] During the Final Hearing and in its Proposed Recommended Order, St. Elizabeth argued that there were numerous instances in which RFA 2015-111 expressly required that certain forms and other information be finalized by the "Application Deadline." However, there was nothing in RFA 2015-111 requiring that the number of units that will be subsidized if the proposed development is funded be finalized by the "Application Deadline." This argument would have appeal if St. Elizabeth's failure to definitively have 100 units receiving rental assistance as of the application deadline had rendered St. Elizabeth's application ineligible for funding. Instead, the uncertainty regarding the 100th unit merely led to St. Elizabeth receiving a lower score on the RA Level tie-breaker.

COPIES FURNISHED:

Donna Elizabeth Blanton, Esquire
Radey Law Firm, P.A.
Suite 200
301 South Bronough Street
Tallahassee, Florida 32301-1706
(eServed)

Betty Zachem, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301
(eServed)

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
Suite 304
1725 Capital Circle Northeast
Tallahassee, Florida 32308
(eServed)

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301
(eServed)

Michael P. Donaldson, Esquire
Carlton Fields Jorden Burt, P.A.
Suite 500
215 South Monroe Street
Tallahassee, Florida 32302
(eServed)

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301-1329
(eServed)

M. Christopher Bryant, Esquire
Oertel, Fernandez, Bryant
& Atkinson, P.A.
Post Office Box 1110
2060 Delta Way
Tallahassee, Florida 32302-1110
(eServed)

Kate Flemming, Corporation Clerk
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301-1329
(eServed)

## 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.