STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ST. ELIZABETH GARDENS APARTMENTS, LTD.,

Petitioner,

v.

DOAH CASE NO. 16-4132BID
FHFC CASE NO. 2016-031BP

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,

v.

DOAH Case No. 16-4133BID
FHFC Case No. 2016-032BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ISLES OF PAHOKEE PHASE II, LLC; HALEY SOFGE PRESERVATION

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Kate /DATE: 10-28-16

PHASE ONE; THREE ROUND TOWER A, LLC; CATHEDRAL TOWERS, LTD.; AND SP MANOR, LLC,

Intervenors.

_____/

WCAR, LTD.,

Petitioner,

v.

DOAH Case No. 16-4134BID
FHFC Case No. 2016-028BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.

_____/

SJRAR, LTD.,

Petitioner,

v.

DOAH Case No. 16-4135BID
FHFC Case No. 2016-030BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.

_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on October 28, 2016. All Petitioners in these consolidated cases were Applicants under Request for Applications 2015-111: Housing Credit Financing for the Preservation of Existing Affordable Multifamily Housing Developments (the "RFA"). The matter for consideration before this Board is a Recommended Order pursuant to §§120.57(2) and (3)(e), Fla. Stat. (2016), and Fla. Admin. Code R. 67-60.009(3)(b) (Rev. 10-18-14), the Exceptions to the Recommended Order, and Responses thereto.

On June 24, 2016 Florida Housing Finance Corporation ('Florida Housing") posted its notice of intended decision to award funding to five Applicants, including Intervenors Three Round Towers, Cathedral Towers, Isles of Pahokee Phase II, and SP Manor. All Petitioners herein were determined to be ineligible for funding. Intervenor Haley Sofge Preservation Phase One was found eligible but not entitled to funding based on the scoring and ranking criteria of the RFA.

All Petitioners timely filed notices of intent to protest followed by formal written protests pursuant to §120.57(3), Fla. Stat. (2016). After a review of the Petitions, Florida Housing determined that no disputes of material fact existed, and referred the cases to the Division of Administrative Hearings (DOAH) for informal proceedings per its contract with Florida Housing to provide informal hearing

officers. On July 22, 2016 the Administrative Law Judge acting as informal hearing officer consolidated the cases into this single action.

An informal hearing took place on August 16, 2016 in Tallahassee, Florida, before the Honorable Administrative Law Judge Garnett W. Chisenhall ("Hearing Officer"). Petitioners, Respondent and Intervenors timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order on October 18, 2016. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer therein recommended that Florida Housing issue a Final Order affirming Florida Housing's scoring and ranking decisions regarding all issues and parties.

On October 24, 2016 Petitioners Marian Towers, Ltd. and St. Elizabeth Garden Apartments, Ltd. filed Exceptions to Recommended Order, attached hereto as Exhibit B ("Exceptions"). These Petitioners object to the Findings of Fact in paragraphs 60, 62 and 67-69; the Conclusions of Law in paragraphs 84, 85 and 87; and to the Recommendation of the Recommended Order. On October 25, 2016, Florida Housing and the Intervenors filed Intervenor's Response to Joint Exceptions to Recommended Order attached hereto as "Exhibit C."

RULING ON EXCEPTIONS

Exception 1

1. Petitioners take exception to the Findings of Fact set forth in ¶60 of the Recommended Order.

2. The Board finds that it has substantive jurisdiction over the issues presented in ¶60 of the Recommended Order.

3. After a review of the record, the Board finds that the Findings of Fact set forth in ¶60 of the Recommended Order are supported by competent substantial evidence, and rejects Petitioners' Exception 1.

Exception 2

5. Petitioners take exception to the Finding of Fact set forth in ¶62 of the Recommended Order.

6. The Board finds that it has substantive jurisdiction over the issues presented in ¶62 of the Recommended Order.

7. After a review of the record, the Board finds that the Findings of Fact set forth in ¶62 of the Recommended Order are supported by competent, substantial evidence, and rejects Petitioners' Exception 2.

Exception 3

8. Petitioners take exception to the Finding of Fact set forth in ¶67 of the Recommended Order.

9. The Board finds that it has substantive jurisdiction over the issues presented in ¶67 of the Recommended Order.

10. After a review of the record, the Board finds that the Findings of Fact set forth in ¶67 of the Recommended Order are supported by competent, substantial evidence, and rejects Petitioners' Exception 3.

Exception 4

11. Petitioners take exception to the Finding of Fact set forth in ¶68 and 69 of the Recommended Order.

12. The Board finds that it has substantive jurisdiction over the issues presented in ¶68 and 69 of the Recommended Order.

13. After a review of the record, the Board finds that the Findings of Fact set forth in ¶68 and 69 of the Recommended Order are supported by competent, substantial evidence, and rejects Petitioners' Exception 4.

Exception 5

14. Petitioners take exception to the Conclusions of Law set forth in ¶84 and 85 of the Recommended Order in which the Hearing Officer concluded:

15. The Board finds that it has substantive jurisdiction over the issues presented in ¶84 and 85 of the Recommended Order.

16. After a review of the record, the Board finds that the Conclusions of Law set forth in ¶84 and 85 of the Recommended Order are reasonable and based upon competent, substantial evidence, and rejects Petitioners' Exception 5.

Exception 6

17. Petitioners take exception to the Conclusions of Law set forth in ¶87 of the Recommended Order.

18. The Board finds that it has substantive jurisdiction over the issues presented in ¶87 of the Recommended Order.

19. Petitioners and Respondents agree that certain language in ¶87 is inaccurate and not supported by competent, substantial evidence. Specifically, the parties object to the reference to "other comparable RFA language" and "the other RFA language," in that there is no other such comparable RFA language at issue in this proceeding, and therefore the references are not supported by competent, substantial evidence.

20. After a review of the record, the Board finds that the Conclusions of Law set forth in ¶87 of the Recommended Order are reasonable and supported by competent, substantial evidence, with the exception of that language noted above. The Board accepts Petitioners' Exception to the accuracy of the language of ¶87, but rejects the Exception as to the substantive conclusions thereof.

21. Accordingly, the Board grants Exception 6 in part, and denies it in part, and substitutes the following Conclusion of Law as reasonable as or more reasonable than that set forth in ¶87 of the Recommended Order:

> 87. As for St. Elizabeth's and Marian Towers' argument that other applicants with HUD or USDA letters referring to "subsidy layering review" or "other regulatory requirements" should have been assigned an RA level greater than one, Petitioners failed to carry their burden of proof on this point. As was explained in Findings of Fact 67 and 69, Petitioners failed to demonstrate that this additional language created conditions specific to any applications and failed to demonstrate that this additional language created any uncertainty as to the total number of units that would receive rental assistance.

Exception to Recommendation

22. Based on the foregoing, the Board rejects Petitioners' Exception to the Recommendation of the Recommended Order.

RULING ON THE RECOMMENDED ORDER

23. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence.

24. Except as noted below, the Conclusions of Law of the Recommended Order are reasonable and supported by competent, substantial evidence.

24. Petitioners' Exceptions to the Recommended Order are rejected, except for the objection to the inaccurate language in ¶87 as noted herein.

25. The Recommendation of the Recommended Order is reasonable and supported by competent, substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED:**

26. The Findings of Fact of the Recommended Order are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

27. The Conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law, with the exception of the Conclusions of Law in ¶87 of the Recommended Order.

20. The Conclusions of Law set forth in ¶87 of the Recommended Order are rejected and substituted as specified above and the substituted Conclusions of Law are incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Florida Housing's scoring and ranking of RFA 2015-111 is **AFFIRMED** is and the relief requested in the Petitions is **DENIED.**

DONE and ORDERED this 28th day of October, 2016.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

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.
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MARIAN TOWERS, LTD.,

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WCAR, LTD.,

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FLORIDA HOUSING FINANCE CORPORATION,

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

Intervenors.
_____/

SJRAR, LTD.,

Petitioner,

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FLORIDA HOUSING FINANCE CORPORATION,

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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.:

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For Respondent Florida Housing Finance Corporation:

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

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For Intervenor Isles of Pahokee Phase II, LLC:

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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
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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.

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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.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ST. ELIZABETH GARDENS APARTMENTS, LTD.,

Petitioner,

vs.

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.
_____/

DOAH Case No. 16-4132BID
FHFC Case No. 2016-031BP

MARIAN TOWERS, LTD.,

Petitioner,

vs.

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.
_____/

DOAH Case No. 16-4133BID
FHFC Case No. 2016-032BP

WCAR, LTD.,

Petitioner,

vs.

DOAH Case No. 16-004134BID
FHFC Case No. 2016-028BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.
_____/

SJRAR, LTD.,

Petitioner,

vs.

DOAH Case No. 16-004135BID
FHFC Case No. 2016-030BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.
_____/

CPAR, LTD.,

Petitioner,

vs.

DOAH Case No. 16-004136BID
FHFC Case No. 2016-029BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.
_____/

EXCEPTIONS AND OBJECTIONS OF PETITIONERS ST. ELIZABETH GARDENS APARTMENTS, LTD. AND MARIAN TOWERS, LTD. TO RECOMMENDED ORDER

Pursuant to section 120.57(3)(e), Florida Statutes, and rule 67-60.009(3)(b), Florida Administrative Code, Petitioners St. Elizabeth Gardens, Ltd. ("St. Elizabeth") and Marian Towers, Ltd. ("Marian Towers") file these exceptions and objections to certain Findings of Fact and Conclusions of Law in the Recommended Order dated October 18, 2016. Specifically, St. Elizabeth and Marian Towers object to Paragraphs 60, 62, 67, 68, and 69 of the Findings of Fact and to Paragraphs 84, 85, and 87 of the Conclusions of Law. Additionally, St. Elizabeth and Marian Towers object to the Recommendation of the Administrative Law Judge ("ALJ") on page 33 of the Recommended Order.[1]

Introduction

The issue in these exceptions and objections is whether Respondent Florida Housing Finance Corporation ("Florida Housing") erred by not assigning a Rental Assistance ("RA") Level of 1 to St. Elizabeth. Had St. Elizabeth been awarded an RA Level of 1, it would have been eligible

[1] Although the parties agreed that these consolidated cases involved no disputed issues of material fact and that the hearing could be conducted pursuant to section 120.57(2), Florida Statutes, evidence was presented at hearing by several parties, and the ALJ made Findings of Fact in addition to those agreed to by the parties in the Prehearing Stipulation. Thus, St. Elizabeth and Marian Towers take issue with certain Findings of Fact of the ALJ, as well as certain Conclusions of Law.

for funding.[2] Both St. Elizabeth and Marian Towers argued before the Division of Administrative Hearings ("DOAH") that St. Elizabeth should have received an RA Level of 1. However, in the event that Florida Housing's assignment of an RA Level of 2 for St. Elizabeth was upheld, Marian Towers contended that Intervenors Haley Sofge Preservation Phase One ("Haley Sofge") and Three Round Tower A, LLC ("Three Round") should also have their RA Levels changed because their applications contained the same deficiency that Florida Housing identified in scoring St. Elizabeth's application. The result of a determination that Haley Sofge and Three Round are ineligible for an RA Level of 1 would be that Marian Towers is eligible for funding.

The ALJ in his Recommended Order found that Florida Housing's assignment of an RA Level of 2 to St. Elizabeth was not clearly erroneous, contrary to competition, or arbitrary or capricious. Conclusions of Law, ¶ 84. Additionally, the ALJ apparently determined that St. Elizabeth and Marian Towers did not prove that Haley Sofge and Three Round should have their RA Levels changed, though his Conclusions of Law on this point are unclear and confusing. *See* Conclusions of Law, ¶ 87.

Standard of Review

Section 120.57(1)(l), Florida Statutes, addresses an agency's authority to modify Findings of Facts and Conclusions of Law in a Recommended Order. Concerning Findings of Fact, an "agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were

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[2] The basis for Florida Housing's assignment of an RA Level of 2 to St. Elizabeth was language behind an asterisk in a required letter from the U.S. Department of Housing & Urban Development (HUD"). That language stated that HUD was processing a request to transfer one subsidized unit from another development to St. Elizabeth, which would mean that St. Elizabeth would have 100 subsidized units. Florida Housing treated the asterisk language as conditional, and assumed St. Elizabeth would have only 99 subsidized units. The result was that St. Elizabeth was not eligible for an RA Level of 1. *See* Prehearing Stipulation, ¶¶ 37-42.

not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." § 120.57(1)(l), Fla. Stat. Agencies have more flexibility to change Conclusions of Law. Section 120.57(1)(l) provides in relevant part:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

(Emphasis supplied). As the state agency statutorily charged with awarding tax credits, Florida Housing has substantive jurisdiction over the Conclusions of Law relating to the process for awarding those credits.

St. Elizabeth and Marian Towers are required to file these exceptions and objections in order to preserve their right to seek appellate review of these issues. *See Kantor v. School Bd. of Monroe Co.*, 648 So. 2d 1266, 1267 (Fla. 3d DCA 1995) (appellant cannot argue on appeal matters that were not properly excepted to or challenged before the agency); *Couch v. Commission on Ethics,* 617 So.2d 1119, 1124 (Fla. 5th DCA 1993) (same); *Environmental Coalition of Florida, Inc. v. Broward County,* 586 So.2d 1212, 1213 n. 1 (Fla. 1st DCA 1991) (same).

St. Elizabeth and Marian Towers take exception to the Findings of Fact and Conclusions of Law described below.

Exception 1

Finding of Fact ¶ 60

St. Elizabeth and Marian Towers take exception to Finding of Fact Paragraph 60, which provides:

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.

The sole basis in the record for this Finding of Fact appears to be the following exchange between Mr. Reecy and counsel for Three Round, Haley Sofge and certain other Intervenors:

Q. (Mr. Donaldson): Now, we talked about conditions and non-conditions all morning and into the afternoon. I don't like that word conditions. I'm going to try it a different way.

If there was no asterisk on this letter, is there any condition there?

A. (Mr. Reecy): Not to us.

Q. (Mr. Donaldson): So the asterisk is additional information than was actually required by the RFA, is that correct?

A. (Mr. Reecy): That's the way I look at it.

Q. (Mr. Donaldson): So when you talk about there's numerous conditions, is that what you are talking about, there may be HUD letters that have additional information that you have to consider?

A. (Mr. Reecy): Correct.

Q. (Mr. Donaldson): So whether we call it a condition or not, it is additional information that you would consider?

A. (Mr. Reecy): Yes, it is.

Q. (Mr. Donaldson): And in this instance, the additional information that you were to consider impacted one of the answers to the specific RFA requirement, didn't it?

A. (Mr. Reecy): It did.

Tr., pp. 145-46 (emphasis supplied).

Despite this brief exchange, where counsel for Three Round and Haley Sofge elicited agreement from Mr. Reecy that what he had been referring to throughout the proceeding as a "condition" was really "additional information," the greater weight of the evidence demonstrates

that Mr. Reecy considered the asterisk language in the HUD letter from St. Elizabeth to be a "condition." Moreover, he considered language in other letters from HUD or the Rural Development ("RD") program – including the HUD letters submitted by Haley Sofge and Three Round – to be conditional.

This characterization began with Mr. Reecy's deposition on August 10, 2016 (admitted into evidence at the Final Hearing as St. Elizabeth's and Marian Towers' Exhibit 4) when the following exchange occurred:

> Q. (Ms. Blanton): Okay. And is the language behind the asterisk, is that the reason that St. Elizabeth was assigned an RA level of 2 instead of 1?
>
> A. (Mr. Reecy): Yes.
>
> Q. (Ms. Blanton): And explain to me what your thought process was in making that decision.
>
> A. (Mr. Reecy): The thought process was that the fact that HUD qualified their answer on this letter with the asterisk and pointed out that they were processing a request, which meant that it was not – that it was a conditional situation as far as the hundredth (subsidized unit) was concerned . . . .

St. Elizabeth's and Marian Towers' Exh. 4, pp. 24-25; *see also id.* at p. 27, where Mr. Reecy refers to the language behind the asterisk in the HUD letter for St. Elizabeth as a "conditional situation."

Mr. Reecy also testified in his deposition that the language concerning a subsidy layering review in the HUD letters submitted by Haley Sofge and Three Round was conditional, *id.*, p. 37 ("you could consider it conditional"), as was the language submitted in the RD letters submitted by certain other applicants, which required that all regulatory requirements be met. *Id.*, p. 37 ("there are conditional circumstances in this in many regards"). In fact, Mr. Reecy explained in his deposition that there's an "overarching conditionality to everything that we do" and that the "all regulatory requirements" language in the RD letters is "an overarching conditional situation to the whole deal, if you will." *Id* at p 41.

His characterization of the language in St. Elizabeth's letter from HUD as conditional continued in the Final Hearing, where he attempted to distinguish the various types of conditions that appear in the letters from HUD and the RD program and said he differentiates among them by making "assumptions" that are either "negative" or "positive." Tr., pp. 122-23.

The ALJ's Finding of Fact that Mr. Reecy does not consider the language behind the asterisk in the HUD letter submitted by St. Elizabeth to be a "condition" is not supported by competent substantial evidence and should be rejected by Florida Housing.

Exception 2

Finding of Fact ¶ 62

St. Elizabeth and Marian Towers take exception to Finding of Fact Paragraph 62, which provides:

> 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.

(Emphasis Supplied)

The evidence demonstrated that "a degree of uncertainty" exists concerning every application submitted to Florida Housing until the credit underwriting process is completed. As Mr. Reecy testified at the Final Hearing, there are "so many . . . factors that can contribute to a failure" of an application during the credit underwriting process. Tr., p. 159. He also testified that all conditions contained in applications are reviewed and verified during the credit underwriting process. *Id.*, pp. 112-113, and that "[t]here are a myriad of things that must be determined in due

diligence, many of which could ultimately not bear out. . . .[T]here's just too many things to almost name in credit underwriting, et ceterea. [*sic*]" *Id.*, p. 122.

No credible evidence was presented as to why the "condition" associated with the asterisk language in the HUD letter concerning St. Elizabeth should be treated differently from other conditions that are verified during the credit underwriting process. Mr. Reecy conceded at the Final Hearing that all conditions contained in HUD and RD letters are resolved as part of Florida Housing's credit underwriting process, which reviews essentially all aspects of an Application to determine if it ultimately will receive funding. Tr., pp. 112-13. He also conceded that if St. Elizabeth were invited to credit underwriting, Florida Housing would confirm whether or not it received its additional subsidized unit from HUD. *Id.*, p. 113.[3]

No competent substantial evidence was presented as to why the "degree of uncertainty" that Florida Housing found in connection with St. Elizabeth's Application is substantially different from the other uncertainties associated with the Applications selected for an allocation of housing credits. For that reason, Florida Housing's assignment of an RA Level of 2 to St. Elizabeth was arbitrary and capricious.

Exception 3

Finding of Fact ¶ 67

St. Elizabeth and Marian Towers take exception to Finding of Fact Paragraph 67, which provides:

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[3] As noted by the ALJ in his Recommended Order, St. Elizabeth introduced evidence at hearing that the transfer of the additional unit had been approved, which would have been confirmed by Florida Housing in the credit underwriting process.

> 67. However, St. Elizabeth and Marian Towers failed to demonstrate that the language cited above[4] 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.

Three letters from the RD program concerning Applications for funding under RFA 2015-111 were admitted into evidence. Jt. Exhs. 5, 6, and 7 (associated with the Applications of Petitioners St. Johns, Woodcliff, and Colonial in DOAH Case Nos. 16-004134, 16-004135, and 16-004136). Each of these letters contained the conditional language relating to "all regulatory requirements" being met. No one from the RD program was called as a witness to explain the meaning of this language, and Mr. Reecy testified at this deposition that this language represented an "overarching conditional situation to the whole deal . . . ." St. Elizabeth's and Marian Towers' Exh. 4, pp. 41-42.

Regarding the "subsidy layering review" referenced in the HUD letters concerning Haley Sofge and Three Round, Mr. Reecy testified that such review could affect an applicant's RA Level, though he described that possibility as "remote." St. Elizabeth's and Marian Towers' Exh. 4, p. 38. Moreover, not all of the HUD letters submitted in connection with RFA 2015-111 referenced a "subsidy layering review." Most did not. Thus, the ALJ's finding that "all" applications are subject to a subsidy layering review by HUD is not supported by competent substantial evidence.

Florida Housing and Intervenors Haley Sofge and Three Round argued that because the conditional language in the HUD and RD letters is general, as supposed to specific, that Florida Housing should not treat the language as conditional and should not assign an RA Level greater

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[4] In the previous paragraph, the ALJ discussed the language in the RD letters concerning the number of subsidized units. That language provides: "USDA Rural Development will consent to the transfer if all regulatory requirements are met." Recommended Order, ¶ 66 (emphasis supplied).

than one because of the conditions in the letters. However, no competent substantial evidence was presented to support the ALJ's Finding of Fact that the distinction in the conditional language is whether all applications are subjected to a subsidy layering review or to a requirement that "all regulatory requirements" be met. Additionally, no competent substantial evidence was presented equating the subsidy layering review in the HUD letters to the "all regulatory requirements" condition in the RD letters. Instead, Mr. Reecy, the only witness called to testify concerning Florida Housing's review of the RD and HUD letters, described how he parses conditional language in applications by variously applying "negative" and "positive" assumptions. Tr., pp. 122-23; St. Elizabeth's and Marian Towers' Exh. 4, p. 43. At the Final Hearing, he explained these distinctions are follows:

> Well, both are assumptions, we are not going to assume something fails, negative; we are not going to assume something succeeds. They are both assumptions perhaps going in different directions.

Tr., p. 122-23. In fact, Mr. Reecy assumed that St. Elizabeth would not receive the additional subsidized unit, while he assumed that other applicants would pass the subsidy layering review and would meet "all regulatory requirements." Mr. Reecy did not specifically testify that the difference in Florida Housing's treatment of the conditional language in RD and HUD letters is whether it applies to all applications or just to a single application.

Because Finding of Fact Paragraph 67 is not supported by competent substantial evidence, it should be rejected.

Exception 4

Findings of Fact ¶¶ 68 and 69

St. Elizabeth and Marian Towers take exception to Findings of Fact Paragraphs 68 and 69, which provide:

> 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.

In Paragraphs 68 and 69, the ALJ abandons the distinction he made in Paragraph 67 between conditions that apply to all applications and those that apply to a single application. Unquestionably, the condition addressed in Paragraphs 68 and 69 applies only to one application submitted in connection with RFA 2015-104: St Andrew Tower II. That application was awarded an RA Level of 1 even though its HUD letter also contained an asterisk with 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." St. Elizabeth's and Marian Towers' Exh. 2 (emphasis supplied); St. Elizabeth's and Marian Towers' Exh. 3.

In his deposition, Mr. Reecy stated: "I don't know that we've seen this, and – or I've never seen this. It was never brought to my attention, and I do not know if it has any bearing on the number of units that were approved for RA." St. Elizabeth's and Marian Towers' Exh. 4, p. 34. At the Final Hearing, Mr. Reecy testified that Florida Housing accepted the asterisk language in the HUD letter for St. Andrew Tower II because "we felt that the number would not – would not change." Tr., p. 121. He acknowledged, however, that HUD is required to consider the request to bifurcate the St. Andrew project and that the letter was conditional. *Id.*

The argument consistently made by St. Elizabeth and Marian Towers throughout these proceedings is that conditional language should be treated similarly among all applicants. If the specific condition in the St. Elizabeth's HUD letter should affect its RA Level scoring, then the specific condition in the St. Andrew Tower II HUD letter should have affected its RA Level scoring. Florida Housing had no way of knowing whether bifurcation of the current St. Andrew project would be approved by HUD. If it were not, then St. Andrew Tower II would not have the number of proposed subsidized units in its application. That most certainly would affect the Applicant's RA Level.

In Paragraphs 68 and 69, the ALJ also ignores the standard he set in Paragraph 62 of a "degree of uncertainty" being a suitable basis for reducing an Applicant's tiebreaker score, as there was clearly some degree of uncertainty about HUD's approval of splitting St Andrew Tower in half, which could have affected the RA Level of St Andrew Tower II. If a "degree of uncertainty" triggered by an asterisk and pending HUD process is indeed an applicable standard, it is clearly not a standard applied consistently by FHFC.

Florida Housing should have treated St. Elizabeth's HUD letter the same way that it did the St. Andrew Tower II HUD letter, i.e., allowed the requested approval from HUD to be verified in underwriting by assigning St. Elizabeth an RA Level of 1. Because Findings of Fact 68 and 69 are not supported by competent substantial evidence, these Findings of Fact should be rejected.

Exception 5

Conclusions of Law ¶¶ 84 and 85[5]

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5 Arguments made in connection with objections and exceptions to the specific Findings of Fact are incorporated by reference into St. Elizabeth's and Marian Towers' objections and exceptions to the Conclusions of Law to the extent the ALJ's Findings and Conclusions relate to the same subjects.

St. Elizabeth and Marian Towers take exception to Conclusions of Law Paragraphs 84 and 85, which provide:

> 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.[6]

As St. Elizabeth and Marian Towers argued in their Proposed Recommended Order, the actions of Florida Housing in failing to assign an RA Level of 1 to St. Elizabeth are clearly erroneous, arbitrary, and capricious. Mr. Reecy was unable to credibly articulate why the "asterisk" language in St. Elizabeth's HUD letter was any more conditional than the language in the letters submitted by Haley Sofge, Three Round, St. Johns, Woodcliff, and Colonial in connection with RFA 2015-111 and by St. Andrew Tower II in RFA 2015-104. Florida Housing assumed St.

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[6] The ALJ added a footnote at this spot (designated as footnote 9 in the Recommended Order) stating as follows:

> 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 by 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.
>
> (Emphasis in the original).

Elizabeth's request to transfer one subsidized unit from another development to St. Elizabeth's would fail, while Florida Housing accepted at face value that the other applicants would succeed, namely that Haley Sofge and Three Round would be unaffected by HUD's subsidy layering review and that the proposed RD developments would meet "all regulatory requirements." Similarly, in connection with St. Andrew Tower II in RFA 2015-104, Florida Housing assumed that HUD would approve the required bifurcation.

Additionally, Florida Housing had no problem with the "asterisk" language in the HUD letter submitted in response to RFA 2015-104 on behalf of St. Andrew Tower II, which plainly stated that HUD "will consider a request" to bifurcate the St. Andrew Tower development to facilitate the separate funding of each tower.

Florida Housing's disparate treatment of conditional language in the letters from HUD and the RD program is not informed by any statute or rule and appears to be based on the inconsistent whim of Florida Housing's reviewers. No competent substantial evidence was presented suggesting that Florida Housing considers all relevant factors in determining whether an Applicant's RA level should be affected by conditional language in these letters. Rather, Florida Housing makes assumptions that do not appear to have any consistent logical foundation. Thus, Florida Housing's decision to assign an RA Level of 2 to St. Elizabeth because of the "asterisk" language in the HUD letter is both arbitrary and capricious. Adam Smith Enterprises v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

The ALJ's footnote at the end of Paragraph 85 is particularly perplexing, in that he states that the arguments of St. Elizabeth and Marian Towers concerning the "Application Deadline" language in the RFA "would have appeal if St. Elizabeth's failure to definitely have 100 units receiving rental assistance as of the application deadline had rendered St. Elizabeth's application

ineligible for funding." (Emphasis in the original). He goes on to state that "[i]nstead, the uncertainty regarding the 100th unit merely led to St. Elizabeth receiving a lower score on the RA Level tie-breaker." Recommended Order, ¶ 85, n.9.

The distinction the ALJ makes is one without a difference. All parties stipulated in this proceeding that the assignment of any RA Level other than 1 means that an applicant has zero chance of being funded. Paragraph 39 of the Prehearing Stipulation (entered into by all parties) provides as follows: "While the RA Level is used as one of the scoring "tie-breakers" (described in Paragraph 22 above) rather than an eligibility criteria, the practical effect in this RFA is that an Applicant must be assigned an RA Level of 1 in order to be selected for funding." Prehearing Stip., ¶ 39. (Emphasis supplied).

As explained in St. Elizabeth's and Marian Towers' Proposed Recommended Order, Florida Housing's assertion that HUD's approval of the transfer had to be in place as of the Application Deadline is not well-founded, as nothing in the RFA so states. That is in sharp contrast to other sections of the RFA, which plainly provide that Applicants must have certain specific assurances in place "as of the Application deadline." For example, Applicants must certify that they have site plan approval, appropriate zoning, and that services such as electricity and water are available "as of the Application deadline." Jt. Exh. 1, pp. 16-17. If Florida Housing intended that all HUD and RD conditions be met "as of the Application deadline," the RFA could have required that. It did not. Moreover, the RFA does not require the Applicant, HUD, or RD to certify that no additional approvals are necessary concerning the number of units that will be subsidized.

Indeed, the RFA seeks future information about the number of units that will be subsidized if a particular Application is funded. By asking about the number of units that currently are subsidized and then asking about the number of units that will be subsidized, Florida Housing is

asking about something that will occur in the future if the Application is funded. Plainly, the RFA asks about two time periods: the present and the future. Under Florida Housing's interpretation, the words "will be" are simply read out of the RFA, leaving an open question as to why the RFA requests information about "current" subsidized units and future subsidized units.

The ALJ does not explain why he finds a difference between the assignment of an RA Level as a scoring issue verses an eligibility criterion. Given the language of the Prehearing Stipulation, his Conclusion of Law in footnote 9 has no basis in fact or in law. The ALJ's Conclusions of Law in Paragraphs 84 and 85 should be rejected.

Exception 6

Conclusions of Law ¶ 87[7]

St. Elizabeth and Marian Towers take exception to Conclusions of Law Paragraph 87, which provides:

> 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]less otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action.").
>
> (Emphasis supplied).

This paragraph is perplexing because there is no "other comparable RFA language" at issue in this proceeding. The parties stipulated as to the relevant language in RFA 2015-111, and there

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[7] Arguments made in connection with objections and exceptions to the specific Findings of Fact are incorporated by reference into St. Elizabeth's and Marian Towers' objections and exceptions to the Conclusions of Law to the extent the ALJ's Findings and Conclusions relate to the same subjects.

is no dispute that is says what it says. Prehearing Stip., ¶¶ 37, 38, 39. The ALJ presumably is referring to the language in the various Applicants' letters from HUD and the RD program that St. Elizabeth and Marian Towers alleged and Florida Housing acknowledged are "conditional." If so, he completely misses the point of St. Elizabeth's and Marian Towers' arguments.

Throughout these proceedings, St. Elizabeth and Marian Towers have argued that conditional language in letters from HUD and RD should be treated similarly. As discussed above, Mr. Reecy conceded that all of the letters admitted into evidence contain conditions. However, all but St. Elizabeth's letter was accepted at face value, even though Mr. Reecy testified that all conditions in all letters would be reviewed and verified during the credit underwriting process. While the condition in the letter relating to St. Elizabeth happened to relate specifically to the number of units that would be subsidized, the conditions in the other letters related to other issues, such as whether the applicants would pass a subsidy layering review, whether they could meet all regulatory requirements, or whether the project could be bifurcated. If they did not, their RA Levels could have been affected, but how that would occur would depend on the specific deficiencies found by HUD or RD.

The issue never was just whether an Applicant's RA Level would be affected, but whether other conditions called into question the viability of the proposed development for any number of reasons, which could have affected an Applicant's RA Level, as well as created other problems. St. Elizabeth's and Marian Towers' argument is that Florida Housing may not pick and choose among the conditions it chooses to ignore and those it chooses to deem problematic such that they affect an Applicant's scoring. Conditional language in the letters from HUD and RD either affect an Applicant's scoring or they do not. Any other practice is arbitrary and capricious. The ALJ's Conclusions of Law in Paragraph 87 should be rejected.

Conclusion

For the reasons expressed, St. Elizabeth and Marian Towers respectfully request that upon consideration of these objections and exceptions, Florida Housing enter a Final Order that rejects the identified Findings and Conclusions of the ALJ and determines that St. Elizabeth's Application is eligible for funding in connection with RFA 2015-111. In the alternative, if Florida Housing determines St. Elizabeth must be assigned an RA Level of 2, St. Elizabeth and Marian Towers request that Haley Sofge and Three Round be assigned an RA Level of 6, as it not possible to determine the number of subsidized units available if they do not satisfy the conditions imposed by HUD. In that case, St. Elizabeth and Marian Towers respectfully request that Florida Housing determine that Marian Towers' Application is eligible for funding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served this 24th day of October 2016, by email, to the following:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ST. ELIZABETH GARDENS APARTMENTS, LTD.,

Petitioner,

vs.

DOAH Case No. 16-4132BID
FHFC Case No. 2016-031BP

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.

DOAH Case No. 16-4133BID
FHFC Case No. 2016-032BP

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.

DOAH Case No. 16-004134BID
FHFC Case No. 2016-028BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.
_____/

SJRAR, LTD,

Petitioner,

vs.

DOAH Case No. 16-004135BID
FHFC Case No. 2016-030BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.
_____/

CPAR, LTD,

Petitioner,

vs.

DOAH Case No. 16-004136BID
FHFC Case No. 2016-029BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SP MANOR, LLC,

Intervenor.
_____/

RESPONDENT'S AND INTERVENORS' JOINT
RESPONSE TO PETITIONERS' EXCEPTIONS

Respondent Florida Housing Finance Corporation, and Intervenors Isles of Pahokee Phase II, LLC, Haley Sofge Preservation Phase One, Three Round Tower A, LLC, Cathedral Towers, Ltd, And SP Manor, LLC, hereby submit their Response to Petitioners St. Elizabeth Gardens Apartments, LTD and Marian Towers, LTD's Exceptions to Recommended Order.

Section 120.57(1)(k), Florida Statutes, sets forth the standards by which an agency must consider exceptions filed to a Recommended Order, and in relevant part provides:

> The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

Section 120.57(1)(l), Florida Statutes, provides, in pertinent part:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Petitioners make no allegations in their Exceptions that the proceedings on which the findings were based did not comply with the essential requirements of law. Accordingly, the Board must decide whether the challenged Findings of Fact are based on competent substantial evidence.

The role of the Administrative Law Judge ("ALJ") in the administrative adjudication process must be taken into account when considering exceptions to findings of fact:

> Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer[1] as the finder of fact. It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Walker v. Board of Professional Engineers, 946 So.2d 604 (Fla. 1st DCA 2006), quoting *Heifetz v. Department of Business Regulation,* 475 So.2d 1277 (Fla. 1st DCA 1985) And, where there is conflicting or differing evidence, and reasonable people can differ about the facts, an agency is bound by the hearing officer's reasonable inference based on the conflicting inferences arising from the evidence. *Greseth v. Department of Health and Rehabilitative Services*, 573 So.2d 1004, 1006–1007 (Fla. 4th DCA 1991).

It is the job of the ALJ to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. *Rogers v. Department of Health*, 920 So.2d 27 9Fla. 1st DCA 2005). *B.J. v. Department of Children and Family Services,* 983 So.2d 11 (Fla. 1st DCA 2008) "Competent substantial evidence," is defined as: "[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Dept. of Highway Safety and Motor Vehicles v. Wiggins*, 151 So.3d 457 (Fla. 1st DCA 2014), quoting *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957)

Section 120.57(1)(l), Florida Statutes, further provides:

1 DOAH "hearing officers," were reclassified as "administrative law judges," in 1996. Ch. 96-159, s. 31, Laws of Fla.

> The agency in its final order may reject or modify the ***conclusions of law over which it has substantive jurisdiction*** and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. *(Emphasis added)*

Response to Exception 1.

Petitioners take Exception to Finding of Fact #60, in which the ALJ found that Florida Housing's witness agreed that the language after the asterisk in the HUD letter was more akin to additional information than to a condition. Petitioners point to several instances in his testimony where the witness referred to this language as being conditional in nature. There is, however, competent substantial evidence that the witness did consider this language to contain additional information, whether or not it could also be characterized as "conditional." Petitioners have also failed to offer any persuasive argument as to why the way this language is described is relevant to the ultimate outcome of this proceeding. In essence the center piece of Petitioner's arguments throughout their exceptions is that what they denominate as "conditional" language existed in all the challenged letters, and that this "conditional" language was all equivalent but was not reviewed or considered in a consistent fashion by Florida Housing. In reality, as the ALJ pointed out, the "conditional" language was not the same throughout all the HUD letters and was in fact language that Florida Housing needed to review on a case by case basis. If in fact the additional language impacted the actual information being requested by the RFA - i.e. number of units receiving funding – then an increase in the RA level could result. Here, despite Petitioners' arguments to the contrary, the "conditional" language they point to in the other letters did not

create uncertainty about the number of units that will receive rental assistance. By comparison the "conditional" language in the St. Elizabeth letter did impact the number of units that will receive rental assistance. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Exception 2

Petitioners take Exception to Finding of Fact #62, in which the ALJ found that there was a degree of uncertainty about whether St. Elizabeth would have sufficient qualifying units, and that Florida Housing acted reasonably by assigning St. Elizabeth an RA Level of 2. This finding was supported by competent substantial evidence in the record (T. 111-112, 117, 158) Petitioners argue that a degree of uncertainty that an applicant will complete the credit underwriting process is present in all cases, and while this may be true, it is not relevant to the question of whether an applicant has demonstrated how many units will have rental assistance. When reviewing applications prior to making recommendations for funding, Florida Housing does not make any assumptions about whether or not the applicant will fail to complete the credit underwriting process. (St. Elizabeth Ex. 4 pp. 37-38) The ALJ found that St. Elizabeth's application included a degree of uncertainty that it would have 100 units receiving rental assistance while the other relevant applications did not, and this finding was supported by competent substantial evidence. This exception should therefore be rejected.

Response to Exception 3

Petitioners take exception to Finding of Fact #67, in which the ALJ found that Petitioners had failed to demonstrate that language included in other letters from HUD and USDA relating to "all regulatory requirements" and "subsidy layering review" applied only to those particular applications rather than to all applications. Read in context with other previous Findings of Fact,

it is clear that the ALJ is saying that since all of the other applications using HUD subsidies along with other funding are subject to subsidy layering review (T. 148), and since all other applications are subject to other regulatory requirements, the fact that this language is included in some of the applications does not create any additional uncertainty concerning the number of units that will receive rental assistance. In fact, the quoted language concerning other regulatory requirements is found in three letters and appears to be addressing the issue of transferring the Development to the new owner as part of the acquisition and preservation process. (St. Elizabeth Ex. 4 pp. 52-53) Petitioners' basic argument is that all "conditional" language is equivalent, and that any conditions in the USDA or HUD letters, whether specific to that application or not, should create the same degree of uncertainty. This is clearly a false assumption, and Florida Housing's witness testified that he reads different "conditional" language differently. (T. 122-123) There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Exception 4

Petitioners take exception to Findings of Fact #68 and 69, in which the ALJ found that "conditional" language in a HUD letter submitted in a different RFA did not indicate that the total number of units that will receive rental assistance was uncertain. To the extent this language is considered "conditional" it applies to a totally separate question than the number of units that will receive rental assistance. (St. Elizabeth Ex. 4 pg. 34-35; T. pg. 121) And even if it were to have been demonstrated that Florida Housing erred when scoring this previous application, Petitioners have not presented a valid argument why Florida Housing should be required to compound such an error in all future RFAs. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Exception 5

Petitioners takes exception to Conclusions of Law #84 and 85, in which the ALJ concluded that Florida Housing's decision to award St. Elizabeth an RA level of 2 had not been shown to be clearly erroneous, contrary to competition, or arbitrary and capricious. He also explained that because of the uncertainty over the number of units that will receive rental assistance, it was appropriate for Florida Housing to award it a higher RA level than other applicants that lacked this degree of uncertainty. This conclusion was supported by competent substantial evidence, and Petitioners have not made a persuasive argument as to why Florida Housing should substitute this conclusion for a more reasonable one. These exceptions should therefore be rejected.

Conclusion of Law #85 also contained a footnote in which the ALJ discussed Petitioners' argument concerning whether the RFA required certain forms and information to be finalized by the application deadline. The ALJ noted that this argument "would have appeal" if Florida Housing had found St. Elizabeth's application to be ineligible. However, Florida Housing did not find St. Elizabeth ineligible, and whether a legal argument in a hypothetical situation may or may not have some appeal has no bearing on the outcome of this case. Petitioners' exception to this footnote is not relevant to the outcome of this case and should therefore be rejected.

Response to Exception 6

Petitioners take exception to Conclusion of Law #87, in which the ALJ addressed the argument that other applicants with HUD or USDA letters containing "conditional" language should have been assigned an RA level of more than one. As Petitioners have correctly pointed out, the language used in this conclusion is not entirely accurate. The reference to "other comparable RFA language," read in context with Findings of Fact #63-69, should be read to

mean the language in other applications referring to "subsidy layering review" and "other regulatory requirements." In Findings of Fact #67 and 69, the ALJ found that St. Elizabeth and Marian Towers had failed to demonstrate that this language should have resulted in any other applications being assigned an RA level of more than one, and the only conclusion that can be drawn from these findings is that Petitioners failed to demonstrate that Florida Housing's scoring of these applications was clearly erroneous, contrary to competition, or arbitrary and capricious. The following should be substituted for Conclusion of Law #87

> 87. As for St. Elizabeth's and Marian Towers' argument that other applicants with HUD or USDA letters referring to "subsidy layering review" or "other regulatory requirements" should have been assigned an RA level greater than one, Petitioners failed to carry their burden of proof on this point. As was explained in Findings of Fact #67 and 69, Petitioners failed to demonstrate that this additional language created conditions specific to any applications and failed to demonstrate that this additional language created any uncertainty as to the total number of units that would receive rental assistance.

Petitioners' substantive argument against this Conclusion of Law is that Florida Housing should have treated all "conditional" language equivalently, regardless of its meaning or context, an argument that must be rejected. Florida Housing's witness testified that he considered not simply whether there was a "condition" in a letter, but that he also considered the nature of the condition. (T. 122-123, 145) Petitioners' exception to the accuracy of the language used in Conclusion of Law #87 should be accepted, but their exception as to the substantive meaning of this conclusion should be rejected.

WHEREFORE, Florida Housing and Intervenors respectfully request that the Board of Directors reject the arguments presented in Petitioners' Exceptions, and adopt the Findings of Fact, Conclusions of Law (as modified herein) and Recommendation of the Recommended Order as its own and issue a Final Order consistent with same in this matter.

Respectfully submitted this 25th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail this 25th day of October, 2016 to the following:

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