

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

OASIS AT RENAISSANCE PRESERVE I,
LP,

Petitioner,

vs.

Case No. 17-0486BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

OSCEOLA PALOS VERDES, LTD.,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case on February 10, 2017, in Tallahassee, Florida, before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent: Betty Zachem, Esquire
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For Intervenor: M. Christopher Bryant, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Florida Housing Finance Corporation ("Florida Housing" or "Respondent") made a decision to determine Oasis at Renaissance Preserve I, LP ("Oasis" or "Petitioner") ineligible for SAIL funding for Request for Applications 2016-109 SAIL Financing of Affordable Multifamily Housing Developments to be used in Conjunction with Tax-Exempt Bond Financing and Non-competitive Housing Credits ("RFA"), that was contrary to a governing statute, rule, or solicitation specification, and, if so, whether that action was clearly erroneous, arbitrary, capricious, or contrary to competition.

PRELIMINARY STATEMENT

On September 19, 2016, Florida Housing issued the RFA, which solicited applications to compete for an allocation of State Apartment Incentive Loan ("SAIL") funding.

The RFA was modified on September 21, October 4, and October 5, 2016. On October 13, 2016, applications were submitted in response to the RFA by several developers, including Oasis and Osceola Palos Verdes, Ltd. ("Palos Verdes" or "Intervenor").

On December 9, 2016, Florida Housing posted notice of its intended decision to award funding to 13 applicants, including Palos Verdes. Petitioner was determined to be ineligible for funding. Oasis timely filed its notice of intent to protest followed by a formal written protest.

There being no disputed issues of material fact, this proceeding was conducted as an informal hearing pursuant to section 120.57(2), Florida Statutes (2016). On February 8, 2016, the parties submitted a Joint Pre-hearing Stipulation, in which all parties stipulated to the material facts. The facts, where appropriate, have been incorporated into this Recommended Order.

At hearing, the parties presented Joint Exhibits 1 through 13, which were admitted into evidence. No testimony was offered during the hearing. The parties provided legal arguments in support of their respective positions. The parties stipulated to the official recognition of any final orders of Florida Housing and to any applicable rules promulgated by Florida Housing.

Pursuant to the schedule established at the conclusion of hearing, the proposed recommended orders were due on February 20, 2017. The proceedings were transcribed, and the parties availed themselves of the right to submit proposed recommended orders. The Transcript of the hearing was filed with DOAH on February 21,

2017. The timely filed proposed recommended orders have been considered in the preparation of this Recommended Order.

FINDING OF FACT

1. Florida Housing is a public corporation organized pursuant to chapter 420, Part V, Florida Statutes, and for the purposes of these proceedings, an agency of the State of Florida.

2. Oasis is a Florida limited partnership in the business of providing affordable housing and is based in Atlanta, Georgia.

3. Palos Verdes is a Florida limited partnership in the business of providing affordable housing and based in Orlando, Florida.

4. Florida Housing administers the governmental function of awarding various types of funding for affordable housing in Florida. One of the programs administered by Florida Housing is the SAIL program, created in section 420.5087, Florida Statutes. The administrative rules governing the SAIL program are in Part II of Florida Administrative Code Chapter 67-48.

5. Florida Housing has the responsibility and authority to establish procedures for allocating and distributing various types of funding for affordable housing. In accordance with that authority, Florida Housing has adopted Florida Administrative Code Chapter 67-60, which governs the competitive solicitation process for several programs, including the SAIL program. Other administrative rule chapters relevant to the selection process

are chapter 67-48, which governs competitive affordable multifamily rental housing programs; Florida Administrative Code Chapter 67-21, which governs multifamily mortgage revenue bonds ("MMRB") and non-competitive housing credits; and Florida Administrative Code Chapter 67-53, which governs compliance procedures.

6. On September 19, 2016, Florida Housing issued the RFA. The RFA contained four funding goals, one of which is relevant to this litigation: the goal to fund one new construction development for elderly tenants in a medium county. The RFA designates by name which counties are small, medium, and large counties. Oasis and Palos Verdes both submitted applications that would satisfy the funding goal for a medium county new construction development for the elderly.

7. On September 21, 2016, notice was published in the Florida Administrative Register, Volume 42, Number 184, that Florida Housing issued a RFA, and it was open for applicants to respond. That Notice of Bid/Request for Proposal stated that "[a]ny modifications that occur to the Request for Applications will be posted at the web site [listed above] and may result in an extension of the deadline. It is the responsibility of the Applicant to check the website for any modifications prior to the deadline date."

8. The RFA was modified on September 21, October 4, and October 5, 2016. The modification on September 21, 2016, affected provisions of the RFA not at issue in this litigation. The modification on October 4, 2016, contained the revisions that are relevant to the instant litigation, specifically, the Applicant Certification and Acknowledgement Form of the RFA, as well as other changes to the RFA that do not affect this case. The modification posted on October 5, 2016, extended the Application Deadline and is not at issue in this litigation.

9. Florida Housing issued an email notification to those that subscribed to Florida Housing's webBoard with each RFA modification. The webBoard announcement for the October 4, 2016, modification was entitled "Second Modification of RFA 2016-109 SAIL with Bonds" and was issued on that same day at approximately 5:12 p.m. The webBoard announcement explained, among other revisions to the RFA, that the modification affected the Applicant Certification and Acknowledgment.

10. The webBoard notified applicants that the Applicant Certification and Acknowledgment Form reflecting the second modification ("modified form") was required in place of the original ("unmodified form"). The webBoard announcement stated, "[f]or the Application to be eligible for funding, the Applicant Certification and Acknowledgment form reflecting the

2nd Modification posted on 10-4-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA."

11. A comparison of the unmodified and modified versions of the forms indicates that the modified version has "RFA as modified on 9-21-16 and 10-4-16" in the top right corner. Both versions have RFA 2016-109 on the bottom left corner. Page 78 added the following language to the modified version "and stating whether the bond application process was competitive or non-competitive." Page 83 added the language "and if applicable, Exhibit E of the RFA."

12. The Applicant Certification and Acknowledgment Form is not an item that is scored during the RFA process. Applicants do not receive points by completing the form.

13. The RFA outlines how applicants must submit applications to Florida Housing. Specifically, RFA Section 3.A.1.e mandates applicants must:

[P]rovide to the Corporation by the Application Deadline sealed package(s) containing four (4) printed copies of the final Uploaded Application (consisting of the Complete Online Submission Package) with all applicable attachments, as outlined in Section Four, with each copy housed in a separate 3-ringbinder with numbered divider tabs for each attachment. The final assigned Response Number should be reflected on each page of the printed Application, Development Cost Pro Forma, and Principals Disclosure Form.

(1) One (1) printed copy of the complete Uploaded Application with all applicable attachments must be labeled "Original Hard Copy" and must include the following items:

(a) The required non-refundable \$3,000 Application fee, payable to Florida Housing Finance Corporation (check or money order only); and

(b) The Applicant Certification and Acknowledgement form with an original signature (blue ink preferred).

(2) The remaining three (3) printed copies of the complete Uploaded Application with all applicable attachments should be labeled "Copy."

If the Applicant does not provide the Uploaded Application and the materials listed in (1) and (2) above as required by the Application Deadline, the Application will be rejected and no action will be taken to score the Application.

14. RFA Section 3.F.3. requires applicants for funding pursuant to RFA 2016-109 to comply with provisions of the RFA and each of the following chapters 67-60, 67-48, 67-21, and 67-53.

15. Section 4.A.1. of the RFA sets forth the Submission Requirement for the Applicant Certification and Acknowledgement Form and provides in pertinent part:

The Applicant must provide a completed Application, Development Cost Pro Formas, and Principals Disclosure Form (Form Rev. 08-16), along with all applicable attachments thereto, including the applicable certification and verification forms set out in Exhibit B of the RFA, which includes the following information:

A. Exhibit Items:

1. Submission Requirement:

The Applicant must include a signed Applicant Certification and Acknowledgement form as Attachment 1 to Exhibit A to indicate the Applicant's certification and acknowledgement of the provisions and requirements of the RFA. The form included in a copy of the Application labeled "Original Hard Copy" must reflect an original signature (blue ink is preferred). The Applicant Certification and Acknowledgement form is provided in Exhibit B of this RFA and on the Corporation's Website <http://www.floridahousing.org/Developers/MultiFamilyPrograms/Competitive/2016-109/RelatedForms/> (also accessible by clicking here). Note: If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.

16. On October 13, 2016, Oasis timely submitted its application, #2016-372S, seeking \$6,000,000 in SAIL funding, \$526,500 in ELI Loan funding, and \$702,270 in Non-Competitive Housing Credits to assist in the development of a proposed new-construction, development for the elderly in Lee County. In its application and attachments, Oasis also indicated that it intended to use "Non-Corporation-issued Tax-Exempt Bonds."

17. Also on October 13, 2016, Palos Verdes timely submitted its application, #2016-380BS, seeking \$5,200,000 in SAIL funding, \$552,300 in ELI Loan funding, \$10,000,000 in Florida Housing issued MMRB funds, and \$566,696 in Non-Competitive Housing

Credits to assist in the development of a proposed new construction, development for the elderly in Osceola County.

18. Pursuant to the requirements of the RFA, Oasis submitted four printed copies of its application with attachments in separate three-ring binders by the deadline. The binder marked "Original" contained the application and attachments. As Attachment 1, in the "Original" binder, a copy of the unmodified version of the Applicant Certification and Acknowledgment Form was included with an original signature in blue ink. For all three of the binders marked "Copy," the modified version of the Applicant Certification and Acknowledgment Form was included as Attachment 1.

19. Florida Housing selected a review committee to score the applications submitted by the applicants interested in SAIL funding. Elizabeth "Libby" O'Neill ("O'Neill") was the member of the Review Committee responsible for determining eligibility based on the submission requirements. In conducting her review, O'Neill opened the Oasis sealed application package and discovered that the unmodified form was submitted with the binder stamped Original.

20. During O'Neill's review, she also discovered the modified form submitted in each of the Oasis binders marked Copy. O'Neill had all the information, a modified and an unmodified version of the form, required to review Oasis' application.

Oasis accepted the terms of the modified RFA by submitting the modified version. O'Neill "defaulted" to the Original application and determined that the Oasis application was ineligible because applicants were required to submit the modified version. O'Neill also confirmed her decision with legal staff.

21. O'Neill also found one other applicant ineligible for not submitting the modified form. Unlike Oasis, that applicant failed to include the modified form in either its Original binder or the three binders marked Copy.

22. The Review Committee issued a recommendation of preliminary rankings and allocations and the Board of Directors ("Board") of Florida Housing approved these recommendations on December 9, 2016.

23. The Board found Palos Verdes eligible for funding and awarded funding to Palos Verdes to meet the funding goal of one elderly, new construction application in a medium county.

24. Oasis was found ineligible for funding on the basis that it failed to meet one submission requirement, Applicant Certification and Acknowledgment Form.

25. Individual members of the Review Committee independently reviewed and scored their respective portions of all applications, including the Oasis application. However, because Oasis was deemed ineligible, the Review Committee as a

whole did not compile and submit a scoring recommendation for the Oasis application to the Board. Instead, the Review Committee's recommendation to the Board was that the Oasis application be deemed ineligible, and the Board adopted that recommendation.

26. Had the Oasis application been deemed eligible for consideration for funding, Oasis would have been recommended by Florida Housing staff for selection to meet the funding goal of one new construction elderly development in a medium county instead of Palos Verdes.

27. On December 13, 2016, Oasis timely filed a Notice of Intent to Protest. On December 22, 2016, Oasis timely submitted a Formal Written Protest and Petition for Administrative Hearing. On December 30, 2016, Palos Verdes filed its Unopposed Petition for Leave to Intervene.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat. Florida Housing has contracted with DOAH to provide an Administrative Law Judge to conduct the informal hearing in this matter.

29. Competitive procurement protests are governed by section 120.57(3)(f), which provides 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.

30. The burden of proof resides with Oasis, the party contesting Florida Housing's action. This de novo proceeding was conducted for the purpose of evaluating the action that was taken by Florida Housing in an attempt to determine whether that action is contrary to Florida Housing's governing statutes, Florida Housing's rules or policies, or the solicitation specifications. See § 120.57(3)(f), Fla. Stat.; and State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998).

31. In addition to proving that Florida Housing violated its statutorily required conduct, to prevail, Oasis must also prove by a preponderance of the evidence that Florida Housing's action is: (1) clearly erroneous; (2) contrary to competition; or (3) arbitrary or capricious. § 120.57(3)(f), Fla. Stat.

32. All parties have standing to participate in this proceeding. No party disputes standing.

33. Although competitive solicitation protest proceedings are described in section 120.57(3)(f) as de novo, courts

acknowledge that a different kind of de novo is contemplated than for other substantial interest proceedings under section 120.57. Hearings under section 120.57(3)(f) have been described as a "form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d at 609.

34. Simply put, after determining the relevant facts based upon evidence presented at hearing, the undersigned's role is to evaluate the agency's intended action in light of those facts. The agency's determinations must remain undisturbed unless clearly erroneous, contrary to competition, arbitrary, or capricious. A proposed award will be upheld unless it is contrary to governing statutes, the agency's rules, or the solicitation specifications.

35. The "clearly erroneous" standard has been applied to both factual determinations and interpretations of statute, rule, or specification. A factual determination is "clearly erroneous" when the reviewer is "left with a definite and firm conviction that [the fact-finder] has made a mistake." Tropical Jewelers, Inc. v. Bank of Am., N.A., 19 So. 3d 424, 426 (Fla. 3d DCA 2009).

36. As applied to legal interpretations, the "clearly erroneous" standard was defined by the court in Colbert v.

Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), to mean that "the interpretation 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." (citations omitted).

37. 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)).

38. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006); Agrico

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

39. If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the action 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).

40. Oasis admits that the submission of the unmodified form with the Original binder was a technical deviation from the RFA requirement. However, Oasis argues that Florida Housing should not have determined that the Oasis application was ineligible because the unmodified form submitted with the Original application was neither a fatal nor material deviation. Instead, Oasis maintains that the deviation was a minor irregularity that Florida Housing should have waived.

41. A "minor irregularity" is defined by rule 67-60.002(6) and provides in pertinent part:

"Minor Irregularity" means a variation in a term or condition of an Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of [Florida Housing] or the public.

42. Under criteria set forth in applicable case law, Petitioner has successfully established that the facts of this case fall well within the parameters of a "minor irregularity"

because (a) Florida Housing had the modified form in the three-copy binders, as well as the unmodified form to review; (b) Oasis did not gain a competitive advantage; (c) the minor deviation could be corrected locating and confirming missing information elsewhere; (d) the deviation was insignificant to scoring issues and no points resulted from the mistake; and (e) the deviation does not adversely impact the interest of the Corporation or public.

43. Rule 67-60.008 sets forth the guidelines for Florida Housing to waive minor irregularities and provides in pertinent part:

Corporation may waive Minor Irregularities in an otherwise valid Application. Mistakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors, may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes.

44. Although the undersigned agrees with Oasis that its deviation of providing the unmodified form with the Original application binder is a minor irregularity, rule 67-60.008 utilizes the word "may" and affords Florida Housing discretionary authority when it comes to waiving minor irregularities.

45. When evaluating the action taken by Florida Housing in this proceeding, the credible evidence shows Florida Housing exercised its discretion provided in rule 67-60.008 not to waive

any minor irregularity regarding the Applicant Certification and Acknowledgment Form.

46. The undersigned is persuaded that Florida Housing properly notified the applicants that it was not waiving the Applicant Certification and Acknowledgement Form at the beginning of the RFA process and with an update on the webBoard in the following notifications: RFA Section 3.A.1.e, which mandated that the "(4) printed copies of the final Uploaded Application . . . with all applicable attachments be provided"; RFA Section 4.A.1., which expressly states, "[i]f the Applicant provides any version of the Applicant Certification and Acknowledgement Form other than the version included in this RFA, the form will not be considered"; and, the webBoard notice, which provides "[f]or the Application to be eligible for funding, the Applicant Certification and Acknowledgement Form reflecting the 2nd Modification posted on 10-4-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA."

47. Therefore, Florida Housing operated within its authority by using its discretion provided in rule 67-60.008 to not waive the Oasis deviation. Florida Housing also acted appropriately by following the specifications of RFA in Section 4.A.1. and rejecting the Oasis Original application that did not have the modified form. The record is void of any allegations of statutory violations. Therefore, Oasis failed to

meet its burden and demonstrate Florida Housing's actions were contrary to its governing statutes, rules, policies or RFA specifications.

48. Additionally, Oasis failed to carry its burden of proof and establish that Florida Housing's decision to find Oasis's application ineligible was clearly erroneous, arbitrary or capricious, or was contrary to competition. Instead, the evidence confirmed the correctness of Florida Housing's determination.

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 consistent with its initial decisions: (1) dismissing the formal written protests of Oasis at Renaissance Preserve I, LP, and (2) awarding funding to Osceola Palos Verdes, Ltd.

DONE AND ENTERED this 15th day of March, 2017, in Tallahassee, Leon County, Florida.



JUNE C. MCKINNEY
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Filed with the Clerk of the
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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.