

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

JOE MORETTI PHASE THREE, LLC,

Petitioner,

vs.

DOAH Case No.: 17-1543BID

FHFC Case No.: 2017-013BP

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

VERBENA, LLC, and GM SILVER CREEK, LTD.

Intervenors.

STIRRUP PLAZA PHASE THREE, LLC,

Petitioner,

vs.

DOAH Case No.: 17-1544BID

FHFC Case No.: 2017-014BP

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

VERBENA, LLC, and GM SILVER CREEK, LTD.

Intervenors.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Janice L. Marshall /DNL: 7/28/2017

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on July 28, 2017. Joe Moretti Phase III, LLC (“Moretti”), Stirrup Plaza Phase III, LLC (“Stirrup”) (“Petitioners”), GM Silver Creek, LTD (“Silver Creek”) and Verbena, LLC (“Verbena”) (“Intervenors”) were Applicants under Request for Applications 2016-114: Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the “RFA”). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(2) and (3)(e), Fla. Stat. (2016), and Fla. Admin. Code R. 67-60.009(3)(b), and the Exceptions to the Recommended Order, and Responses thereto.

On October 28, 2016, Florida Housing issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. Responses to the RFA were due on December 15, 2016. On December 15, 2016, Applications were submitted in response to the RFA by several Developers including Petitioners and Intervenors. On February 3, 2017, Florida Housing posted notice of its intended decision to award funding to three Applicants. Through the ranking and selection process outlined in the RFA, Intervenors Verbena and Silver Creek were deemed eligible for funding and Verbena was recommended for funding, as well as third-party Applicants Ambar Key, LLC, and Northside Property IV, Ltd.

Through a separate case regarding this RFA, which was settled with a consent agreement presented to and approved by the Board, third-party Applicant Ambar Key agreed it was ineligible for funding. Petitioners Moretti and Stirrup were determined to be ineligible for funding due to their proposed developments being subject to existing Extended Low-Income Housing Agreements (“EUAs”). Petitioners timely filed their notices of intent to protest followed by formal written protests. Motions to Intervene were filed by Verbena as well as Silver Creek; those motions were subsequently granted.

Page 7 of the RFA, Section 3.A states: “Applicants should review subsection 67-48.023(1), F.A.C., to determine eligibility to apply for the Housing Credits offered in this RFA.” Additionally, in Section 3.F.3, the RFA requires that Applicants funded under RFA 2016-114 must comply with Florida Administrative Code, Chapters 67-60 (Application requirements), 67-48 (credit underwriting and program requirements for Housing Credits), and 67-53 (Compliance requirements). In relevant part, Rule 67-48.023(1) of the Florida Administrative Code states:

Unless otherwise permitted in a competitive solicitation process, an Applicant is not eligible to apply for Competitive Housing Credits if any of the following pertain to the proposed Development:

...

(c) The proposed Development site or any part thereof is subject to any Land Use Restriction Agreement or Extended Use Agreement, or both, in conjunction with any Corporation affordable housing financing intended to

foster the development or maintenance of affordable housing...

The RFA also required that Applicants demonstrate that “as of the Application Deadline sewer capacity, package treatment or septic tank service is available to the entire proposed Development site...” The RFA instructed Applicants to provide, as Attachment 11, either the Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank form (Form Rev. 08-16) or a “letter from the waste treatment service provider that is Development-specific and dated within 12 months of the Application Deadline.”

Petitioners timely filed notices of intent to protest and formal written protests challenging the Board’s finding that they were ineligible for funding. Specifically, they alleged that they timely submitted a request to amend the EUAs on their proposed development sites to remove the proposed development sites from the EUAs prior to the Application deadline. In response to the protests, Verbena filed a Motion to Intervene, alleging that it could be displaced from funding if Moretti’s challenge was successful, and further alleging that Moretti’s Application was ineligible for funding not only due to the existence of an EUA on the proposed development site, but also because the Application contained a sewer letter that did not comply with the terms of the RFA. Moretti filed a Motion in Limine to preclude Verbena from bringing up any challenge to its sewer letter.

The matters were referred to the Division of Administrative Hearings (DOAH) and consolidated. A formal hearing took place on April 12, 2017, in Tallahassee, Florida before the Honorable Administrative Law Judge Garnett W. Chisenhall (“Hearing Officer”). The parties filed timely 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 June 9, 2017. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.” The Hearing Officer determined Florida Housing’s actions or inactions pertaining to the Moretti and Stirrup EUA amendment requests were not arbitrary, capricious, or contrary to competition, resulting in Moretti and Stirrup remaining ineligible for funding under RFA 2016-114. The Recommended Order recommended that Florida Housing:

[I]ssue a final order awarding funding to Ambar Key, Ltd.; Verbena, LLC; and Northside Property IV, Ltd.

The Parties filed various Exceptions to the Recommended Order and Responses to Exceptions, which are addressed as follows:

RULING ON INTERVENOR SILVER CREEK AND FLORIDA HOUSING’S JOINT EXCEPTION TO RECOMMENDATION

1. Silver Creek and Florida Housing filed a Joint Exception to the recommendation set forth in the Recommended Order to the extent the

Recommended Order recommended Florida Housing award funding to third-party Applicant Ambar Key.

2. The basis for the exception is the consent agreement between Silver Creek and Ambar Key, wherein Ambar Key conceded its application was ineligible for funding.

3. Florida Housing and Silver Creek request a Final Order be entered which: a) dismisses the formal written protests filed by Moretti and Stirrup; and b) distributes funding under RFA 2016-114 through the ranking and selection process conducted pursuant to the RFA and the outcome of pending litigation under the same RFA.

4. No parties filed a response to the Joint Exception.

5. After a review of the record, the Board finds that the Exception to and requested modification to the Recommendation set forth in the Recommended Order are reasonable and accepts the Joint Exception.

RULING ON PETITIONERS' EXCEPTIONS

Petitioners' Exceptions to Findings of Fact

6. Petitioner takes exception to the Findings of Fact set forth Paragraphs 85, 86, 87, and 88 of the Recommended Order.

7. After a review of the record, the Board finds that the Findings of Fact set forth in Paragraphs 85, 86, 87, and 88 of the Recommended Order are supported

by competent, substantial evidence, and the Board rejects Petitioners' Exceptions to the Findings of Fact set forth in Paragraphs 85, 96, 87, 88 of the Recommended Order.

Petitioners' Exceptions to Conclusions of Law

8. Petitioner takes exception to the Conclusions of Law set forth in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order.

9. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order.

10. After a review of the record, the Board finds that the Conclusions of Law set forth in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order are reasonable and supported by competent, substantial evidence, and rejects Petitioner's Exceptions to the Conclusions of Law presented in Paragraphs 108, 109, 110, 112, 120, 121 of the Recommended Order.

RULING ON INTERVENOR VERBENA'S EXCEPTIONS

Verbena's Exception to Conclusion of Law Footnote 8 of Paragraph 121

11. Verbena seeks an Exception to Footnote 8 to Conclusion of Law Paragraph 121, where the Hearing Officer ALJ denied Moretti's Motion in Limine as being moot because the ALJ determined that Florida Housing did not act in an arbitrary or capricious manner. Verbena's exception seeks clarification in the Final

Order that the merits of its argument against Moretti's sewer letter have not been addressed or resolved.

12. The Board finds that it does not have substantive jurisdiction over the issue presented in Footnote 8 to Paragraph 121 of the Recommended Order, because the ruling is a procedural determination by the Hearing Officer. Accordingly, The Board rejects Petitioners' Exception to Footnote 8 to Conclusion of Law Paragraph 121.

Verbena's Exception to Conclusion of Law Paragraph 121

13. Verbena's Exception to Conclusion of Law Paragraph 121 seeks a modification to the Final Order, clarifying that Florida Housing's determination that the Petitioners' Applications were ineligible for funding because the existing EUA covering the development sites for each Application was consistent with the requirements of Rule 67-48.023(1), F.A.C., consistent with the terms of the RFA, and that Florida Housing's actions were not contrary to its governing statutes, agency rules or policies, or the terms of the RFA.

14. The Board finds that Verbena's Exception to Conclusion of Law Paragraph 121 with requested modification is reasonable, and supported by competent substantial evidence because the Hearing Officer found that Florida Housing's actions or inactions pertaining to the Moretti and Stirrup EUA amendment requests were not arbitrary, capricious, or contrary to competition, and

that the Petitioners' development sites were subject to existing EUAs which rendered them ineligible for funding pursuant to Rule 67-48.023(1), F.A.C. Accordingly, the Board accepts Verbena's Exception with requested modification to Conclusion of Law Paragraph 121.

RULING ON THE RECOMMENDED ORDER

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

16. The Conclusions of Law of the Recommended Order are reasonable and supported by competent, substantial evidence with the exception of Paragraph 121 of the Conclusions of Law, which should be modified to reflect that Florida Housing's determination was consistent with the requirements of Rule 67-48.023(1), F.A.C., consistent with the terms of the RFA, and that Florida Housing's actions were not contrary to its governing statutes, agency rules or policies, or the terms of the RFA.

17. The Recommendation of the Recommended Order should be modified to:

- a. dismiss the formal written protests filed by Joe Moretti Phase Three, LLC and Stirrup Plaza Phase Three, LLC, and
- b. distribute funding under RFA 2016-114 through the ranking and selection process conducted pursuant to the RFA and the outcome of pending litigation under the same RFA.

ORDER

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

18. 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.

19. The Conclusions of Law in the Recommended Order are adopted with the exception of Conclusion of Law Paragraph 121, which is modified to state:

121. Therefore, Florida Housing's actions or inactions pertaining to the Moretti Phase Three and Stirrup Plaza Phase Three requests were not arbitrary, capricious, or contrary to competition.¹ Florida Housing's determination that the Petitioners' Applications were ineligible for funding was consistent with the requirements of Rule 67-48.023(1), F.A.C., and consistent with the terms of the RFA. Florida Housing's actions were not contrary to its governing statutes, agency rules or policies, or the terms of the RFA.

IT IS HEREBY ORDERED that the relief requested in the Petitions is **DENIED**, the Petitions are **DISMISSED**, and Florida Housing's scoring and ranking of RFA 2016-114 is **AFFIRMED**, and funding under RFA 2017-114 shall be distributed through the ranking and selection process conducted pursuant to the RFA.

¹ In light of this ruling, there is no need to address Moretti Phase Three's Motion in Limine. Accordingly, it is denied as being moot.

DONE and ORDERED this 28th day of July 2017.

FLORIDA HOUSING FINANCE
CORPORATION

By: _____

Chair

Copies to:

Michael Donaldson
Florida Bar No. 0802761
Carlton Fields, P.A.
P.O. Drawer 190
Tallahassee, Florida 32302
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
mdonaldson@carltonfields.com

J. Stephen Menton, Esq.,
Tana D. Storey, Esq.,
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202,
Tallahassee, Florida 32301,

smenton@rutledge-ecenia.com,
tana@rutledge-ecenia.com

Derek Bruce, Esq.,
Sarah K. Vespa, Esq.,
Gunster, Yoakley & Stewart, P.A.,
200 South Orange Avenue, Suite 1400,
Orlando, Florida 32801,
dbruce@gunster.com,
svespa@gunster.com

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

Ken Reecy
Director of Multifamily Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

Trey Price
Interim Executive Director
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

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, 2000 DRAYTON DRIVE, 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.