STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WARLEY PARK, LTD; WARLEY PARK DEVELOPER, LLC; AND STEP UP DEVELOPER, LLC,

Petitioners,

vs. Case No. 17-3996BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NORTHSIDE COMMONS RESIDENTIAL, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted before Administrative Law Judge Mary Li Creasy in Tallahassee, Florida, on August 18 and 25, 2017.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this bid protest are whether, in making the decision to award funding pursuant to Request for Applications 2017-103, Housing Credit and State Apartment Incentive Loan ("SAIL") Financing to Develop Housing in Medium and Large Counties for Homeless Households and Persons with a Disabling Condition (the "RFA"), Florida Housing Finance Corporation ("Florida Housing" or "Respondent"), acted contrary to a governing statute, rule, or solicitation specification; and, if so, whether such action was clearly erroneous, contrary to competition, arbitrary, or capricious.

The question of whether the application of Northside Commons Residential, LLC ("Northside"), met the requirements of the RFA with respect to demonstrating the availability of water and sewer services as of the Application Deadline is the only question at issue in this case. No other parts of its Application are being

challenged, and the parties all agree that its Application was otherwise properly scored. No parties have raised objections to any parts of Warley Park's application, and all parties agree that its Application was properly scored.

PRELIMINARY STATEMENT

On March 22, 2017, Florida Housing issued the RFA. On April 20, 2017, five entities submitted applications in response to the RFA, including Petitioners Warley Park, Ltd., Warley Park Developer, LLC, and Step Up Developer, LLC (collectively "Warley Park" or "Petitioner"), and Intervenor Northside. On June 16, 2017, the Board of Directors of Florida Housing approved the Review Committee's motion and staff recommendation to select three applicants, including Northside, for funding and invited them to enter credit underwriting.

Warley Park timely filed its notice of protest, followed by an Amended Formal Written Protest and Petition for Administrative Hearing ("Petition") pursuant to section 120.57(3), Florida Statutes, and Florida Administrative Code Rules 67-60.009 and 28-110.004.

On July 17, 2017, Florida Housing forwarded the Petition to the Division of Administrative Hearings ("DOAH"). As a specifically-named person whose substantial interests were being determined in the proceeding, Northside became a party by

entering an appearance pursuant to Florida Administrative Code Rule 28-106.205(3).

Although initially submitted as an informal hearing, all parties agreed that there were disputed issues of material fact that required resolution at the hearing. The parties submitted a Joint Pre-hearing Stipulation setting forth their positions, stipulated findings of fact, issues of fact or mixed questions of law or fact which remained to be litigated, agreed issues of law, and disputed issues of law.

The hearing was held on August 18 and August 25, 2017. On August 18, 2017, Mr. Ken Reecy, the Director of Multifamily Programs at Florida Housing for the last four years, who is responsible for the allocation process of funding by Florida Housing, initially testified that he considered the discrepancy between the named addressee of the water and sewer letter ("WASA letter") and the applicant to be a minor irregularity that could be waived. On cross-examination, Mr. Reecy learned that the addressee of the WASA letter had no principals in common with the applicant, but rather only with principals of one of the developers of the applicant.

Following Mr. Reecy's testimony, the witness for the Intervenor, Mr. Oscar Sol, testified that it was common practice for Florida Housing to accept WASA letters addressed to an entity that was not the applicant and without regard to whether there

were any common principals between the listed addressee and an applicant.

Florida Housing and Northside requested a continuance to give Mr. Reecy an opportunity to review Florida Housing's records regarding its past practice of accepting such WASA letters as described by Mr. Sol. The parties agreed to participate in a conference call at 4:30 p.m., and at that time, it would be announced whether Mr. Reecy would be revising his testimony based on his review of Florida Housing's records, requiring the hearing to be reconvened after providing the parties an opportunity to depose Mr. Reecy, or whether the parties were in agreement that no further testimony was needed.

During the 4:30 p.m. conference call, it was announced that Mr. Reecy would be revising his earlier testimony. DOAH ordered that any documents relied upon by Mr. Reecy to modify his testimony be produced by 1:00 p.m. on August 21, 2017, and Mr. Reecy would be available for deposition at 1:00 p.m. on August 23, 2017. Such occurred, and the hearing was reconvened on August 25, 2017, for the limited purpose of Mr. Reecy testifying concerning his review of the additional records and for Petitioner or Intervenor to call any additional witnesses necessary due to Mr. Reecy's anticipated change in testimony.

At the hearing, the following exhibits were admitted into evidence: Joint Exhibits 1 through 4; Petitioner's Exhibits 1,

2, 4, 5, 14, and Petitioner's Supplemental Exhibit 6; Respondent's Exhibit 1; Intervenor's Exhibits 1 and 2; and Intervenor's Additional Exhibits 1 through 10, 14, 19, 23, and 24.

Petitioner presented the testimony of Jon M. Dinges, P.E., a representative for Warley Park, and Ryan von Weller, an expert witness, at the hearing and the following through deposition: Douglas Pile, individually and as the corporate representative of the Miami-Dade County Water and Sewer Department; Mr. Reecy, Director of Multifamily Programs for Florida Housing, who also testified at the hearing for Respondent; and William Cobb, another representative of Florida Housing. Northside presented Mr. Sol, Manager and Member of one of the Developers for Northside.

The two-volume Transcript of the hearing was filed on August 19, 2017. All parties timely submitted proposed recommended orders on August 29, 2017. The parties' proposed recommended orders have been given due consideration in the preparation of this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes or rules of the Florida Administrative Code refer to the versions in effect at the time of the decision to recommend funding for Northside.

FINDINGS OF FACT

The Parties

1. Petitioner Warley Park, Ltd., is the applicant entity of a proposed affordable housing development to be located in Seminole County, Florida. Petitioners Warley Park Developer, LLC, and Step Up Developer, LLC, are Developer entities as defined by Florida Housing in Florida Administrative Code Rule 67-48.002(28).

2. Northside is a Florida limited liability company based in Miami-Dade County, Florida, in the business of providing affordable housing.

3. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to section 420.5099, Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low income housing tax credits.

The Programs

4. The low income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. These tax credits are awarded competitively to housing

developers in Florida for rental housing projects which qualify. These credits are then normally sold by developers for cash to raise capital for their projects. The effect of this is to reduce the amount that the developer would have to borrow otherwise. Because the total debt is lower, a tax credit property can (and must) offer lower, more affordable rents. Developers also covenant to keep rents at affordable levels for periods of up 50 years as consideration for receipt of the tax credits.

5. SAIL provides low-interest loans on a competitive basis to affordable housing developers each year. This money often serves to bridge the gap between the development's primary financing and the total cost of the development. SAIL dollars are available to individuals, public entities, not-for-profit, or for-profit organizations that propose the construction or substantial rehabilitation of multifamily units affordable to very low-income individuals and families.

6. Florida Housing is authorized to allocate housing tax credits, SAIL funding, and other funding by means of request for proposal or other competitive solicitation in section 420.507(48) and adopted chapter 67-60 to govern the competitive solicitation process for several different programs, including the program for tax credits. Chapter 67-60 provides that Florida Housing allocate its housing tax credits, which were made

available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3).

The RFA 2017-103

7. Housing tax credits and SAIL funding are made available through a competitive application process commenced by the issuance of a RFA. A RFA is equivalent to a "request for proposal" as indicated in rule 67-60.009(3). The RFA at issue here is RFA 2017-103, which was issued on March 22, 2017. A modification was issued on April 11, 2017, and responses were due April 20, 2017.

8. Through the RFA, Florida Housing seeks to award up to an estimated $6,075,000 of housing tax credits, along with $11,500,000 of SAIL financing, to qualified applicants to provide affordable housing developments.

9. A review committee, made up of Florida Housing staff, reviews and scores each application. Florida Housing scored applicants in six areas worth a total of 145 points: General Development Experience; Management Company Experience with Permanent Supportive Housing; Tenant Selection for Intended Residents; Community-Based General Services and Amenities Accessible to Tenants; Access to Community-Based Resources and Services that Address Tenants' Needs; and Approach Toward Income and Credit Status of Homeless Households Applying for Tenancy.

Florida Housing scored Northside as the highest scoring applicant, awarding it 128 points. Warley Park was the fourth highest scored applicant with 112 points.

10. These scores are presented in a public meeting and the committee ultimately makes a recommendation as to which projects should be funded. This recommendation is presented to Florida Housing's Board of Directors ("the Board") for final agency action.

11. On June 16, 2017, Petitioners and all other participants in RFA 2017-103 received notice that the Board had determined which applications were eligible or ineligible for consideration for funding and selected certain applications for awards of tax credits, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets, one listing the "eligible" and "ineligible" applications and one identifying the applications that Florida Housing proposed to fund, on Florida Housing's website, www.floridahousing.org.

12. Florida Housing announced its intention to award funding to three developments, including Northside. Warley Park's application was deemed eligible, but it was not selected for funding.

13. The RFA at Section Four A.5.g. requires the applicant to demonstrate its "Ability to Proceed" by including the following as attachments to its application:

> (4) Availability of Water. The Applicant must demonstrate that as of the Application Deadline water is available to the entire proposed Development site by providing as Attachment 9 to Exhibit A:
>
> (a) The properly completed and executed Florida Housing Finance Corporation Verification of Availability of Infrastructure – Water form (Form Rev. 08-16); or
>
> (b) A letter from the water service provider that is Development-specific and dated within 12 months of the Application Deadline. The letter may not be signed by the Applicant, by any related parties of the Applicant, by any Principals or Financial Beneficiaries of the Applicant, or by any local elected officials.
>
> (5) Availability of Sewer. The Applicant must demonstrate that as of the Application Deadline sewer capacity, package treatment or septic tank service is available to the entire proposed Development site by providing as Attachment 10 to Exhibit A:
>
> (a) The properly completed and executed Florida Housing Finance Corporation Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank form (Form Rev. 08-16); or
>
> (b) A letter from the waste treatment service provider that is Development-specific and dated within 12 months of the Application Deadline. The letter may not be signed by the Applicant, by any related parties of the Applicant, by any Principals or Financial

> Beneficiaries of the Applicant, or by any local elected officials. (emphasis added).

14. Section 5.g. of Exhibit A to RFA 2017-103, the Application and Development Cost Pro Forma, requires that the applicant include the following information:

> Ability to Proceed:
>
> As outlined in Section Four A.5.g. of the RFA, the Applicant must provide the following information to demonstrate Ability to Proceed:
>
> (4) Availability of Water. The Applicant must provide, as Attachment 9 to Exhibit A, an acceptable letter from the service provider or the properly completed and executed Florida Housing Finance Corporation Verification of Availability of Infrastructure – Water form (Form Rev. 08-16).
>
> (5) Availability of Sewer. The Applicant must provide, as Attachment 10 to Exhibit A, an acceptable letter from the service provider or the properly completed and executed Florida Housing Finance Corporation Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank form (Form Rev. 08-16).

15. The Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank form requires the service provider to certify that on or before the submission deadline for the RFA, "Sewer Capacity or Package Treatment is available to the proposed Development." Similarly, the Verification of Availability of Infrastructure – Water form

requires the service provider to certify that on or before the submission deadline for the RFA, "Potable water is available to the proposed Development." Each form also includes the following caveat:

> To access such [waste treatment] [water] service, the Applicant may be required to pay hook-up, installation and other customary fees, comply with other routine administrative procedures, and/or install or construct line extensions and other equipment, including but not limited to pumping stations, in connection with the construction of the Development.

16. The RFA does not define the term "Development-specific," and the term is not used in Section 5.g. of Exhibit A to RFA 2017-103 where the requirement for the water and sewer letters is included. Further, the term "Development-specific" is not defined in any Florida Housing rule.

17. Miami-Dade County has had a longstanding practice of refusing to complete Florida Housing's water and sewer verification forms. Florida Housing added the water and sewer letter as an additional method to demonstrate availability in light of the county's refusal. Thus, an applicant, such as Northside, has no alternative when proposing a Miami-Dade project other than providing a water and sewer letter as opposed to Florida Housing's Verification form.

Northside's Water and Sewer Letter

18. Accordingly, in response to this RFA requirement, Northside submitted a letter from Miami-Dade County Water and Sewer Department as Attachment 9 to its application. The letter was sought by Oscar Sol, one of the principals of the developer working with the applicant in the project at issue in this case.

19. The WASA letter at issue in this case was dated December 12, 2016. It was addressed to "Northside Commons LTD," and referenced water and sewer availability for "Northside Commons," construction and connection of 108 apartments, located at 8301 Northwest 27th Avenue, Miami-Dade County, Florida, Folio #30-3110-000-0210.

20. The identical WASA letter was submitted as Attachments 10 and 11 to application 2017-155C in response to a prior RFA, RFA 2016-114. That prior application was submitted by Northside Commons, Ltd., for a 108-unit elderly development called Northside Commons, located at 8301 Northwest 27th Avenue, Miami-Dade County, Florida, Folio #30-3110-000-0210. The application deadline for RFA 2016-114 was December 15, 2016.

21. In the present case, Northside's application for RFA 2017-103, application 2017-254CSN, was submitted by Northside Commons Residential, LLC. It was for an 80-unit development for homeless persons and persons with disabling conditions, also to be called "Northside Commons," located at 8301 Northwest 27th

Avenue, Miami-Dade County, Florida, Folio #30-3110-000-0210. The application deadline for RFA 2017-103 was April 20, 2017.

22. The WASA letter contains several paragraphs of details about hookups to water and sewer service, and also includes the following boilerplate language: "This letter is for informational purposes only and conditions remain in effect for thirty (30) days from the date of this letter. Nothing contained in this letter provides the developer with any vested rights to receive water and/or sewer service."

23. Warley Park raised three issues regarding the WASA letter. First, was the letter valid for more than 30 days after it was signed? Second, did the letter meet the requirement of the RFA that it be "development specific?" Third, did the letter demonstrate the availability of sewer services?

Was the WASA letter valid for more than 30 days after it was signed?

24. Florida Housing and Northside contend that there is no provision in the WASA letter stating that it becomes "invalid" after 30 days, or that water and sewer services will not be available after 30 days.

25. Douglas Pile, the representative for Miami-Dade County, testified that the second and third paragraphs of the letter included the conditions necessary to service the availability of water and sewer, and that it was these conditions that remained

in effect for 30 days. He described the purpose of the 30-day language as follows:

> We're not saying that availability disappears or terminates after 30 days. We're just saying this letter is good for informational purposes for 30 days. We don't want people to come back a year later and say I bought this property based upon this letter of availability saying I have water and sewer under certain conditions, and then a year later the conditions are different and maybe they have to put in a water main extension or maybe their local pump station is in moratorium.

When asked specifically whether the entire letter was valid for only 30 days, he responded, "Right. Well, the conditions are – the nearby water and sewer facilities that the project would connect to."

26. Mr. Pile explained that the letter is "a snapshot of what our facilities are at the time they make the request." He further stated that:

> the letter . . . has to have an expiration date either explicit or implicit. If a utility is going to give a letter saying they have water and sewer availability, that cannot be forever, you know. You assume a natural termination point . . . we just explicitly say this letter is good for 30 days.

27. In its Pre-Hearing Position Statement, Florida Housing argued that it did not interpret this language to mean that the letter became invalid after 30 days. However, according to Mr. Reecy,[1/] there was no "interpretation" done by Florida

Housing. Specifically, when asked how Florida Housing interpreted the phrase, he stated:

> We have basically ignored that phrase. We actually do not know what--given the context of this situation, how, within 30 days, the--that information is only good for 30 days. So we have not considered that to be a relevant factor in our consideration of the information provided in the letter.

28. A plain and common reading of the quoted language indicates Miami-Dade limited the validity of the information in the letters to 30 days. Florida Housing provided no explanation for its decision to ignore the language and made no attempt to inquire of Miami-Dade County as to what it intended by including the language.

29. This 30-day limitation is generally known by the applicants and nearly every previously funded application included a letter from Miami-Dade County dated within 30 days of the application deadline. Only one Miami-Dade WASA letter submitted by applicants within the last two RFAs was dated outside of the 30-day window. That letter was deemed ineligible for other reasons.

30. Had Petitioner wanted to demonstrate availability as of the application deadline, it only needed to request a letter from Miami-Dade County within the 30 days prior to the application deadline, giving Miami-Dade sufficient time to respond. In fact, the letter was initially submitted as part of a response to

RFA 2016-114, with a due date of December 15, 2016. Because the letter was issued on December 12, 2016, it remained valid through the application deadline for RFA 2016-114. There is no limit to the number of times a developer can obtain a letter of availability from Miami-Dade County.

31. The requirements of the RFA are clear that water and sewer availability must be shown "as of the Application Deadline." Because the WASA letter submitted with Petitioner's Application only provided a snapshot of availability for a 30-day window after the issuance of the letter (or until January 11, 2017), the letter failed to address the availability of water or sewer services as of April 20, 2017.

32. As a practical matter, the WASA letter provides that water hook-up is readily available to existing infrastructure and sewer availability is dependent upon a developer building a pumping station. It could be inferred that these conditions would remain available at this location for 12 months. However, the testimony of Mr. Pile makes clear that Miami-Dade County is not willing to make that assumption for a period beyond 30 days due to the possibility of intervening events.[2/] Presumably, this is why the vast majority of applicants for this type of RFA secures and provides a Miami-Dade WASA letter dated within 30 days of the RFA application deadline.

33. Because the WASA letter was not valid beyond January 11, 2017, Petitioner cannot demonstrate availability of water and sewer as of the Application Deadline. The fact that the WASA letter was no longer valid is fatal to Petitioner's application in that it failed to satisfy a mandatory requirement of RFA 2017-103, i.e., the availability of water and sewer services.

Was the WASA letter "development specific?"

34. The RFA requires that the Applicant demonstrate water and sewer service availability for "the entire proposed Development site," and it also requires that the letter from the service provider be "Development-specific." The application in this matter was filed by Northside Commons Residential, LLC, for an 80-unit development for the homeless and persons with disabling conditions. However, the WASA letter was issued to, and discussed the availability of water and sewer service for, a different entity, Northside Commons, Ltd., the applicant for a 108-unit elderly development.

35. According to Mr. Reecy, the reuse of a letter that was previously submitted in a different application does not follow the "letter" of the criteria in the RFA. Florida Housing and Northside even agree that the letter does not reference the specific proposed development that is at issue and instead focuses on the location of the proposed development.

36. Mr. Sol, Northside's representative, suggested that it is "irrelevant" to which entity the letter is issued because what is relevant is whether water and sewer availability exists. However, as stated by Mr. Reecy, what Florida Housing considers when determining whether a letter of availability is "Development-specific" is the location, the number of units, and the applicant. Because the WASA letter was issued to a entirely different applicant, based upon Mr. Reecy's testimony, it is not "Development-specific."

37. However, Mr. Reecy noted that such a letter could be considered a Minor Irregularity if there is some commonality between the applicant entities. Northside argues that the failure of the letter to be "Development-specific" should be waived as a Minor Irregularity. This issue was not considered during scoring, nor was it a determination made by the Board of Florida Housing prior to awarding funding to Northside.

38. Mr. Reecy acknowledged that it is a judgment call when determining whether a letter addressed to a different entity with different principals is a Minor Irregularity. That call depends upon the number of common principals. While the number of principals that must be the same is discretionary, there must be at least some commonality of principals for it to be considered a Minor Irregularity.

39. The principals of Northside Commons, Ltd., the entity to which the letter was actually issued and the applicant that originally submitted the WASA letter, are completely different from the principals of Northside Commons Residential, LLC. Despite a full understanding of all the similarities between the two applications and the differences in the requirements of the RFA and being given a number of opportunities to change his position, Mr. Reecy repeatedly declined to do so.

40. Mr. Sol suggested that it is common practice for Florida Housing to accept letters issued to entities other than the applicant and with different principals. After hearing Mr. Sol's opinion and discussing the issue further with Northside, Mr. Reecy remained steadfast in his position that the error in the Letter could not be waived as a Minor Irregularity.

41. At the request of Northside, Mr. Reecy agreed to review past practices of the agency during a break in the hearing. As stated by counsel for Florida Housing, if it is established that Florida Housing has a long-standing practice of accepting similar letters, then the question is whether Northside Commons may rely upon that practice.

42. The review during the break was limited to the issue of whether Florida Housing had previously accepted Miami-Dade letters addressed to an entity who was not the applicant and who

shared no principals in common with the applicant. No such long-standing practice was demonstrated.

43. Mr. Reecy directed staff to pull all of the Miami-Dade letters of availability from the last two RFAs, to determine, first, whether or not there were sewer letters addressed to someone other than the applicant entity. Second, for those so identified, staff was to compare the principals of the applicant entity and the entity that was the addressee for commonality. Mr. Reecy was provided a list of approximately a dozen letters from the past several RFAs that compared the applicant entity and the addressee entity. This list did not identify whether or not the letters were submitted by successful credit applicants.

44. Based upon this list, Mr. Reecy then reviewed each letter to determine whether or not it was issued to the applicant. He then reviewed the principals list for the applicant as identified in the application and compared that to data from the state of Florida's Sunbiz.org website for the addressee of the letter. Mr. Reecy compared this information to determine if the two had any principals in common.

45. After reviewing this information, Mr. Reecy recanted his earlier testimony and stated that he felt that Florida Housing historically accepted letters with addressees that were not the applicant entity and did not have common principals.

Mr. Reecy further testified that based upon this understanding of Florida Housing's past practice, the Northside's letter should be accepted.

46. The information Mr. Reecy reviewed, specifically that obtained from the state of Florida's Sunbiz.org website, did not demonstrate, as Mr. Reecy believes, that Florida Housing previously accepted Miami-Dade WASA letters from applicants in a similar position to that of Northside. Notably, Florida Housing does not accept documentation from the Sunbiz.org website to demonstrate the principals of the Application as required by this and other RFAs. The Sunbiz.org website does not identify the level of detail of principals which Florida Housing requests in its "Principals of the Applicant and Developer(s) Disclosure Form".

47. Further, even if Sunbiz.org did identify all of the principals Florida Housing requires to be disclosed, in this case, the Sunbiz.org information reviewed was dated 2017.[3/] As this information was filed after the application deadlines for the respective RFAs, it fails to identify any of the principals related to the entities in the "comparable" letters for the 2015 and 2016 RFAs. No information was provided as to any of the principals in either 2015 or 2016.

48. Accordingly, Mr. Reecy and Mr. Sol's belief that Florida Housing had previously accepted letters in a similar

position to that of Northside Commons' letter has not been demonstrated. Because Mr. Reecy's new position, that Northside Commons' letter should be accepted, is based upon this incorrect understanding, and the alleged prior agency action was not demonstrated, Mr. Reecy's initial testimony is found to be more credible. Therefore, the record demonstrates that the WASA letter was not "Development-specific" and, therefore, contrary to the solicitation specifications.

Did the letter demonstrate availability of sewer services?

49. The RFA requires each applicant to provide a form or letter demonstrating that "as of the Application Deadline sewer capacity, package treatment or septic tank service is available to the entire proposed Development site." Petitioner presented the testimony of Jon Dinges, P.E., an environmental engineer with expertise in designing wastewater systems who was accepted as an expert in civil engineering, specifically in the area of sewer infrastructure and design. Mr. Dinges' testimony was simply that the problem with the WASA letter in this case is that it does not actually say that capacity is available.

50. In a prior RFA, Florida Housing rejected an application that included a Miami-Dade WASA letter because it specifically stated that no gravity sewer capacity analysis had been conducted. According to Mr. Dinges, without conducting a gravity sewer capacity analysis, it is not possible to determine whether

capacity, if any, exists. However, the RFA makes no mention of requiring a gravity sewer capacity analysis to demonstrate availability.

51. Mr. Reecy testified that Florida Housing has been accepting WASA letters without mention of gravity analysis from Miami-Dade County for many years. He stated that the detailed description of how a proposed project could connect to an existing sewer service met the requirement of the RFA that the Applicant demonstrate the availability of sewer service. He also testified that if Florida Housing were to change its position and determine that the form of the letter was not adequate to demonstrate capacity, it would do so in a public process.

52. The testimony was clear that Florida Housing does not do any independent analysis of whether water and sewer service is actually available to a proposed development, but instead relies on the expertise of the local government to do this analysis. Applicants are not required to include or demonstrate the specific requirements or technical specifications of how a connection to water or sewer services will be made. This interpretation is consistent with the specifications of the RFA.

CONCLUSIONS OF LAW

53. Pursuant to sections 120.569 and 120.57(2) and (3), DOAH has jurisdiction of the parties and the subject matter of this proceeding. Florida Housing's decision in this case affects

the substantial interests of each of the Petitioners, and each has standing to challenge Florida Housing's scoring and review decisions. The substantial interests of Warley Park are affected because it is next in line for a funding award under RFA 2017-103, and Warley Park would be the proposed recipient of funding if Northside is deemed ineligible. See, e.g., Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981)(second lowest bid establishes substantial interest in bid protest).

54. Northside has standing to intervene in this proceeding. Fla. Admin. Code R. 28-106.205(3). In addition to being specifically named in the Petition, the "substantial interests" of Northside, as the proposed recipient of funding pursuant to RFA 2017-103, are affected because Warley Park has alleged that Florida Housing made a mistake in considering Northside's Application. Warley Park alleges that Northside failed to demonstrate its Ability to Proceed, specifically water and sewer availability.

55. This is a competitive procurement protest proceeding and, as such, is governed by section 120.57(3)(f), which provides:

> 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.

See also State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998); Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

56. Pursuant to section 120.57(3)(f), the burden of proof rests with Warley Park as the party opposing the proposed agency action to prove "a ground for invalidating the award." See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d at 609. The First District Court of Appeal has interpreted the de novo process set forth in section 120.57(3)(f) as follows:

> 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. v. Dep't of Transp., 709 So. 2d at 609.

57. 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." Warley Park must establish that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. §§ 120.57(3)(f), Fla. Stat.

58. Agency action will be found to be "clearly erroneous," if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see also Pershing Indus., Inc. v. Dep't of Banking & Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991). Agency action may also be found to be "clearly erroneous" if the agency's interpretation of the applicable law conflicts with its plain meaning and intent. Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). In such a case, "judicial deference need not be given" to the agency's interpretation. Id.

59. An act is "contrary to competition" if it runs contrary to the objectives of competitive bidding, which have been long held:

> to 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 . . .

Wester v. Belote, 138 So. 2d 721, 723-24 (Fla. 1931); see also Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977). In that regard, public officials do not have the power "to make exceptions, releases and modifications in the contract after it is let, which will afford opportunities for favoritism, whether any such favoritism is practiced or not." Wester v. Belote, 138 So. 2d at 724. The public policy regarding exceptions and releases in contracts applies with equal force to the contract procurement.

60. An "arbitrary" action is "one not supported by facts or logic, or despotic." A "capricious" action is "one which is taken without thought or reason or irrationally." Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978); see also Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action 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., Inc. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

61. Rule 67-60.006 is titled, "Responsibility of Applicants." Subsection (1) of the rule provides as follows:

> (1) The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

62. Rule 67-60.008 provides:

> The 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.

63. Rule 67-60.002(6) defines "Minor Irregularity" to mean "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 the Corporation or the public."

64. Additionally, rule 67-60.006(1) provides that "the failure of an Applicant to supply required information in connection with any Competitive Solicitation pursuant to this rule chapter shall be grounds for a determination of non-responsiveness." This language is consistent with section 287.012, Florida Statutes, which indicates a responsive bid must

"conform in all materials respects to the solicitation." The burden is thus on the applicant to provide a complete and responsive response to the RFA.

65. To establish water and sewer availability, the RFA requires letters from the water and sewer service providers that are "Development-specific," dated within 12 months of the application, and show availability "as of the Application Deadline."

66. Although Northside's WASA letter was dated within 12 months of the application, it failed to show water and sewer availability as of the Application Deadline, and was not development specific.

67. Florida Housing argues that the 30-day validity language of the WASA letter is boilerplate that is routinely accepted and interpreted as only limiting the "conditions" described in the letter, rather than the letter itself. This argument is unconvincing. These conditions are the same provisions which Mr. Reecy believes "imply" the availability of water and sewer service into the future.

68. Florida Housing defers to local governments with respect to the interpretation of the local government's documents that are submitted as part of an RFA. Madison Hollow, LLC v. Fla. Hous. Fin. Corp., Case No. 15-3301BID (Fla. DOAH Oct. 28, 2015; FHFC Dec. 11, 2015). Mr. Pile was very clear that Miami-

Dade issued the letter for a 30-day period only because it is meant to be a "snapshot" of availability at the time the letter is requested. Florida Housing provided no reasoning as to why it chose to ignore this interpretation and to revive this expired letter. Doing so is a clearly erroneous and arbitrary act.

69. To allow Northside's award to remain eligible without satisfying this requirement would be clearly erroneous and contrary to competition. Houston Street Manor Ltd. P'ship v. Fla. Hous. Fin. Corp., Case No. 15-3302BID (Fla. DOAH Aug. 18, 2015; FHFC Sept. 18, 2015)(ignoring express requirements of RFA would be both clearly erroneous and contrary to competition).

70. This failure to demonstrate water and sewer availability as of the Application Deadline is not a minor irregularity that can be waived. In fact, Florida Housing undertook no analysis during the application review process to deem this as an irregularity or determine whether it was minor or major.

71. There is no suggestion that the WASA letter's 30-day limitation was a computation or typographical error. The submission of the expired letter was not an error that Florida Housing could overlook or Northside could correct after the fact. HTG Hammock Ridge, LLC v. Fla. Hous. Fin. Corp., Case No. 16-1137BID (Fla. DOAH Apr. 19, 2016; FHFC May 6, 2016)(material error is not waivable).

72. More importantly, the interest of Florida Housing in maintaining the credibility and integrity of its bidding process requires that it enforce the "Mandatory Item" when no prospective vendor has contested its use via a challenge to the RFA specifications. See Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004)(vendor waived right to challenge agency's weighting of cost proposals by failing to timely file a specifications protest); Optiplan, Inc. v. Sch. Bd. of Broward Cnty., 710 So. 2d 569, 572 (Fla. 4th DCA 1998)(by failing to timely file specifications protest, vendor waived right to challenge evaluation criteria in its award challenge).

73. The need for these Mandatory Items is not ambiguous. Waiving such a specific Mandatory Item in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. St. Elizabeth Gardens v. Fla. Hous. Fin. Corp., Case No. 16-4133BID (Fla. DOAH Oct. 18, 2016), adopted in relevant part, Case No. 16-032BP (FHFC Oct. 28, 2016). As noted by the Administrative Law Judge in JPM Outlook One Ltd. Partnership v. Florida Housing Finance Corp., Case No. 17-2499BID (Fla. DOAH June 29, 2017)(Recommended Order):

> [a]pplicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for

> another bidder, thus undermining public confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.

Id. at p. 51.

74. A strict objective review of the four corners of an application may lead to results that appear harsh in individual cases, but has the virtue of treating all applicants equally and enabling Florida Housing to process the volume of applications before it in a timely fashion. No rationale was proffered as to why the inconsistency in the instant case became so trivial as to be disregarded, when similar or even more trivial inconsistencies in other cases were cause for rejection. See Douglas Gardens V, Ltd. v. Fla. Hous. Fin. Corp., Case No. 16-0418BID (Fla. DOAH Sept. 5, 2012; FHFC Nov. 2, 2012)(use of wrong form, though identical to current form, not a "minor irregularity"); JPM Outlook One Ltd. P'ship v. Fla. Hous. Fin. Corp., Case No. 17-2499BID (Fla. DOAH June 29, 2017)(Recommended Order)(use of wrong verification form not waivable); Culmer Place v. Fla. Hous. Fin. Corp., Case No. 12-003UC (FHFC May 23, 2012), adopted in relevant part, (FHFC June 12, 2012)(failure to include sheet showing computation by which fee waiver was calculated valid basis for awarding no points); St. Elizabeth Gardens v. Fla. Hous. Fin. Corp., Case No. 16-4132BID (Fla. DOAH Oct. 18, 2016), adopted in

relevant part, (FHFC Oct. 28, 2016)(letter dated outside allowed period).

75. Florida Housing's precedents demonstrate that it places a high priority on establishing a bright line for applicants: the applicant is responsible for the accurate completion of each page and applicable exhibit; Florida Housing does not assist the applicant nor does it engage in speculation as to the applicant's intent; inconsistencies or ambiguities on the face of applications cause rejection. See Collins Park Apts., LLC v. Fla. Hous. Fin. Corp., Case No. 12-043UC (FHFC Sept. 5, 2012), adopted in relevant part, (FHFC Nov. 2, 2012); Bonita Cove, LLC v. Fla. Hous. Fin. Corp., Case No. 08-056UC, ¶ 9 (FHFC Sept. 8, 2008; FHFC Sept. 26, 2008); APD Housing Partners 20, LP v. Fla. Hous. Fin. Corp., Case No. 09-069 (FHFC Feb. 4, 2010; FHFC Feb. 26, 2010).

76. The waiver of a deviation that might disqualify an otherwise winning bid gives the beneficiary of the waiver an advantage or benefit over the other bidders. Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982); Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case 06-4499BID, ¶ 59 (Fla. DOAH Mar. 19, 2007; BCSB May 8, 2007). Accepting an expired letter from one entity would provide a benefit over those who otherwise obtained a valid letter.

77. Northside Common's application also fails because the WASA letter is not "Development-specific" as required by Section Four A.5.g. of RFA 2017-103. While the folio number, property address, and name ("Northside Commons") in the WASA letter for the proposed 2016 project are identical for the 2017 proposed project, the number of units, type of housing, and the principals of the applicants are not.

78. "Development-specific" is not a term defined in the RFA. Northside Commons and Florida Housing argue that the RFA does not require that the principals of the addressee of the WASA letter and the principal of the applicant match. However, Mr. Reecy indicated his belief that a WASA letter is sufficiently "Development-specific" if it focuses on the same types of units (multi-family or single family), number of units (equal to or less than the proposed project), and there is some commonality of principals between the addressee of the letter and the current applicant submitting the letter.

79. According to Mr. Reecy's original testimony, the complete lack of any shared principals between the addressee of the WASA letter and the applicant, standing alone, made this application non-responsive to RFA 17-103, and this was not a minor irregularity which could be waived.

80. Mr. Reecy's review of additional documents resulted in his changed testimony that in recent responses to RFA's, at least

ten applicants lacked any commonality among the principals of the addressees of the WASA letters and the applicants. Based upon this additional information, Florida Housing and Northside argue that "past practice" dictates that a lack of commonality does not play a part in the decision of whether a letter is "Development-specific," or at most it is a waivable minor irregularity.

81. In reality, Florida Housing has no "past practice" entitled to deference on this issue. In reviewing the applications in response to RFA 2017-103, Florida Housing did not recognize a difference between the addressee, Northside Commons, Ltd., and the applicant, Northside Commons Residential, LLC. Nor has Florida Housing ever undertaken such a review of comparing addressees to applicants of the WASA letters because until this hearing, no prior applicant raised the issue.

82. Assuming for argument's sake that the lack of commonality is not an issue, no evidence or explanation was presented to explain how a letter for a 108-unit development for the elderly was also "Development-specific" for an 80-unit development for homeless persons and persons with disabling conditions.

83. Florida Housing and Northside suggest that the only relevant question is whether the WASA letter verifies water and sewer availability at a particular location. This interpretation cannot be accepted as it is contrary to Mr. Reecy's testimony

and, more importantly, would render meaningless the requirement that the letters demonstrating availability be "Development-specific." Gulfstream Park Racing Ass'n v. Tampa Bay Downs, Inc., 948 So. 2d 599, 606 (Fla. 2006)("elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage").

84. For the reasons above, Florida Housing's acceptance of Northside's WASA letter, upon which the preliminary agency action was based, is clearly erroneous and contrary to the specifications of RFA 2017-103, and the deviation from the specifications is not a Minor Irregularity. Therefore, it is concluded that Warley Park has carried its burden of proving that Florida Housing's proposed decision regarding the eligibility of Northside in this case was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

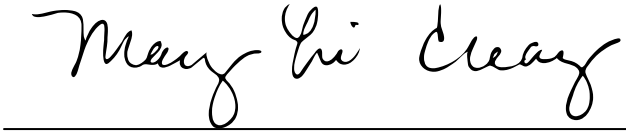
RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order amending its preliminary decision awarding funding to Warley Park by:

(1) finding Northside ineligible for funding; and

(2) awarding funding to Warley Park as the next highest scoring eligible applicant.

DONE AND ENTERED this 19th day of October, 2017, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2017.

ENDNOTES

[1/] As the Director of Multifamily Programs at Florida Housing, Mr. Reecy is the final arbiter of whether an error was made in scoring an application. Further, he has the authority to say that Florida Housing is going to change its position if he finds that Florida Housing improperly accepted a letter of availability.

[2/] Indeed, Hurricane Irma recently demonstrated the destructive power of storms to unexpectedly wipe out infrastructure in a matter of hours in South Florida.

[3/] All but one of the documents from Sunbiz.org were filed in 2017; the exception being Calpesa Holdings, LLC. Its documents were filed with the Secretary of State in February 2015, over a month after the application was filed with Florida Housing.

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NOTICE OF RIGHT TO FILE OBJECTIONS

All parties have the right to submit written objections within 5 days from the date of this Recommended Order. Any objections to this Recommended Order should be filed with the agency that will issue the final order in this case and shall be filed and served exclusively by email.