

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HTG OSPREY POINTE, LLC,

Petitioner,

vs.

Case No. 18-0479BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SP LAKE, LLC,

Intervenor.

_____/

NORTHSIDE PROPERTY II, LTD,

Petitioner,

vs.

Case No. 18-0484BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SIERRA BAY APARTMENTS, LTD.,

Intervenor.

_____/

LIBERTY SQUARE PHASE TWO, LLC,

Petitioner,

vs.

Case No. 18-0485BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

WOODLAND GROVE APARTMENTS, LLC,

Intervenor.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569, and 120.57(1) and (3), Florida Statutes (2017),^{1/} on February 28, 2018, in Tallahassee, Florida.

APPEARANCES

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For Intervenor Sierra Bay Apartments, LTD ("Sierra Bay"):

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For Intervenors Woodland Grove Apartments, LLC ("Woodland
Grove"); and Harbour Springs, LLC ("Harbour Springs"):

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STATEMENT OF THE ISSUE

The issue to be determined in this bid protest matter is whether Respondent, Florida Housing Finance Corporation's, intended award of funding under Request for Applications 2017-108, entitled "SAIL Financing of Affordable Multifamily Housing Developments To Be Used In Conjunction With Tax-Exempt Bond Financing And Non-Competitive Housing Credits" was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

This matter involves a protest to a Notice of Intent to Award issued by Respondent Florida Housing. On August 31, 2017, Florida Housing, through Request for Applications 2017-108 ("RFA 2017-108"), solicited applications for an allocation of State Apartment Incentive Loan program funds, Multifamily Mortgage Revenue Bonds, and non-competitive housing credit financing for affordable housing.

On December 8, 2017, Florida Housing posted notice of its intent to award funding to 16 applicants. The applicants selected for funding included Intervenor SP Lake, Sierra Bay, Woodland Grove, and Harbour Springs.

Florida Housing also determined that Petitioners Osprey Pointe, Northside II and Liberty Square were eligible for consideration under RFA 2017-108. However, Florida Housing did

not select these entities for funding. All three Petitioners timely filed formal written protests with Florida Housing.^{2/}

On January 29, 2018, Florida Housing referred the protests in this matter to the Division of Administrative Hearings ("DOAH") for assignment to an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.^{3/}

The final hearing was held on February 28, 2018.^{4/} Joint Exhibits 1 through 14 were admitted into evidence. Included in the Joint Exhibits is the deposition testimony of Alberto Milo (a principal of Petitioner Liberty Square) (Joint Exhibit 13) and the deposition testimony of Heather Green (the Florida Housing employee who scored the "Proximity" component for RFA 2017-108) (Joint Exhibit 14). Liberty Square's Exhibit 1 was admitted into evidence. Florida Housing's Exhibits 1 and 2 were admitted into evidence. Florida Housing and Woodland Grove presented the testimony of Marisa Button (the Director of Multifamily Allocations for Florida Housing).

A one-volume Transcript of the final hearing was filed at DOAH on March 7, 2018. At the close of the hearing, the parties were advised of a ten-day timeframe after receipt of the hearing transcript to file post-hearing submittals. Liberty Square subsequently requested an additional two days to file its post-hearing submittal, which was granted.^{5/} All parties filed

Proposed Recommended Orders which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to provide and promote public welfare by administering the governmental function of financing affordable housing in Florida.

2. 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. As such, Florida Housing is authorized to establish procedures to distribute low income housing tax credits and to exercise all powers necessary to administer the allocation of these credits. § 420.5099, Fla. Stat. For purposes of this administrative proceeding, Florida Housing is considered an agency of the State of Florida.

3. To promote affordable housing in Florida, Florida Housing offers a variety of programs to distribute housing credits. (Housing credits, also known as tax credits, are a dollar-for-dollar offset of federal income tax liability.) One of these programs is the State Apartment Incentive Loan program ("SAIL"), which provides low-interest loans on a competitive basis to affordable housing developers. SAIL funds are available each year to support the construction or substantial

rehabilitation of multifamily units affordable to very low-income individuals and families. See § 420.5087, Fla. Stat. Additional sources of financial assistance include the Multifamily Mortgage Revenue Bond program ("MMRB") and non-competitive housing credits.

4. Florida Housing administers the competitive solicitation process to award low-income housing tax credits, SAIL funds, nontaxable revenue bonds, and other funding by means of request for proposals or other competitive solicitation. Florida Housing initiates the competitive application process by issuing a Request for Applications. §§ 420.507(48) and 420.5087(1), Fla. Stat.; and Fla. Admin. Code R. 67-60.009(4).

5. The Request for Application at issue in this matter is RFA 2017-108, entitled "SAIL Financing of Affordable Multifamily Housing Developments to Be Used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits." Florida Housing issued RFA 2017-108 on August 31, 2017. Applications were due by October 12, 2017.^{6/}

6. The purpose of RFA 2017-108 is to distribute funding to create affordable housing in the State of Florida. Through RFA 2017-108, Florida Housing intends to award approximately \$87,000,000 for proposed developments serving elderly and family demographic groups in small, medium, and large counties.

RFA 2017-108 allocates \$46,279,600 to large counties, \$32,308,400 to medium counties, and \$8,732,000 to small counties.

7. RFA 2017-108 established goals to fund:
 - a. Two Elderly, new construction Applications located in Large Counties;
 - b. Three Family, new construction Applications located in Large Counties;
 - c. One Elderly, new construction Application located in a Medium County; and
 - d. Two Family, new construction Applications located in Medium Counties.

8. Thirty-eight developers submitted applications in response to RFA 2017-108. Of these applicants, Florida Housing found 28 eligible for funding, including all Petitioners and Intervenors in this matter.

9. Florida Housing received, processed, deemed eligible or ineligible, scored, and ranked applications pursuant to the terms of RFA 2017-108, Florida Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.

10. RFA 2017-108 provided that applicants were scored based on certain demographic and geographic funding tests. Florida Housing sorted applications from the highest scoring to the lowest. Only applications that met all the eligibility requirements were eligible for funding and considered for selection.

11. Florida Housing created a Review Committee from amongst its staff to review and score each application. On November 15, 2017, the Review Committee announced its scores at a public meeting and recommended which projects should be awarded funding.

12. On December 8, 2017, the Review Committee presented its recommendations to Florida Housing's Board of Directors for final agency action. The Board of Directors subsequently approved the Review Committee's recommendations and announced its intention to award funding to 16 applicants.

13. As a preliminary matter, prior to the final hearing, Florida Housing agreed to the following reassessments in the scoring and selection of the applications for funding under RFA 2017-108:

a. SP Lake and Osprey Pointe: In the selection process, Florida Housing erroneously determined that SP Lake was eligible to meet the funding goal for the "Family" demographic for the Family, Medium County, New Construction Goal. (SP Lake specifically applied for funding for the "Elderly" demographic.) Consequently, Florida Housing should have selected Osprey Pointe to meet the Family, Medium County, New Construction Goal. Osprey Pointe proposed to construct affordable housing in Pasco County, Florida. Florida Housing represents that Osprey Pointe is fully eligible for funding under RFA 2017-108. (While Osprey

Pointe replaces SP Lake in the funding selection for the "Family" demographic, SP Lake remains eligible for funding for the "Elderly" demographic.)

b. Sierra Bay and Northside II: In the scoring process, Florida Housing erroneously awarded Sierra Bay proximity points for Transit Services. Upon further review, Sierra Bay should have received zero proximity points. Consequently, Sierra Bay's application is ineligible for funding under RFA 2017-108. By operation of the provisions of RFA 2017-108, Florida Housing should have selected Northside II (the next highest ranked, eligible applicant) for funding to meet the Elderly, Large County, New Construction Goal. Florida Housing represents that Northside II is fully eligible for funding under RFA 2017-108.

c. Harbour Springs: Florida Housing initially deemed Harbour Springs eligible for funding under RFA 2017-108 and selected it to meet the Family, Large County, New Construction Goal. However, because Harbour Springs and Woodland Grove are owned by the same entity and applied using the same development site, under rule 67-48.004(1), Harbour Springs is ineligible for funding. (Florida Housing's selection of Woodland Grove for funding for the Family, Large County, New Construction Goal, is not affected by this determination.)

14. The sole disputed issue of material fact concerns Liberty Square's challenge to Florida Housing's selection of Woodland Grove to meet the Family, Large County Goal.

15. Liberty Square and Woodland Grove applied to serve the same demographic population under RFA 2017-108. If Liberty Square successfully challenges Woodland Grove's application, Liberty Square, as the next eligible applicant, will be selected for funding to meet the Family, Large County Goal instead of Woodland Grove. (At the hearing on December 8, 2017, Florida Housing's Board of Directors awarded Woodland Grove \$7,600,000 in funding.)

16. The focus of Liberty Square's challenge is the information Woodland Grove provided in response to RFA 2017-108, Section Four, A.5.d., entitled "Latitude/Longitude Coordinates." Liberty Square argues that Woodland Grove's application is ineligible because its Development Location Point, as well as the locations of its Community Services and Transit Services, are inaccurate. Therefore, Woodland Grove should have received zero "Proximity" points which would have disqualified its application for funding.

17. RFA 2017-108, Section Four, A.5.d(1), states, in pertinent part:

All Applicants must provide a Development Location Point stated in decimal degrees, rounded to at least the sixth decimal place.

18. RFA 2017-108 set forth scoring considerations based on latitude/longitude coordinates in Section Four, A.5.e, entitled "Proximity." Section Four, A.5.e, states, in pertinent part:

The Application may earn proximity points based on the distance between the Development Location Point and the Bus or Rail Transit Service . . . and the Community Services stated in Exhibit A. Proximity points will not be applied to the total score. Proximity points will only be used to determine whether the Applicant meets the required minimum proximity eligibility requirements and the Proximity Funding Preference. . . ."

In other words, the Development Location Point identified the specific location of an applicant's proposed housing site.^{7/} Applicants earned "proximity points" based on the distance between its Development Location Point and selected Transit and Community Services. Florida Housing also used the Development Location Point to determine whether an application satisfied the Mandatory Distance Requirement under RFA 2017-108, Section Four A.5.f. To be eligible for funding, all applications had to qualify for the Mandatory Distance Requirement.

19. The response section to Section Four, A.5.d., is found in Exhibit A, section 5, which required each applicant to submit information regarding the "Location of proposed Development." Section 5 specifically requested:

- a. County;
- b. Address of Development Site;

- c. Does the proposed Development consist of Scattered Sites?;
- d. Latitude and Longitude Coordinate;
- e. Proximity;
- f. Mandatory Distance Requirement; and
- g. Limited Development Area.

20. Section 5.d. (Latitude and Longitude Coordinates) was subdivided into:

- (1) Development Location Point

Latitude in decimal degrees, rounded to at least the sixth decimal place

Longitude in decimal degrees, rounded to at least the sixth decimal place

21. In its application, Woodland Grove responded in section 5.a-d as follows:

- a. County: Miami-Dade

b. Address of Development Site: NE corner of SW 268 Street and 142 Ave, Miami-Dade, FL 33032.

- c. Does the proposed Development consist of Scattered Sites? No.

- d. Latitude and Longitude Coordinate;

- (1) Development Location Point

Latitude in decimal degrees, rounded to at least the sixth decimal place: 25.518647

Longitude in decimal degrees, rounded to at least the sixth decimal place: 80.418583

22. In plotting geographic coordinates, a "-" (negative) sign in front of the longitude indicates a location in the western hemisphere (i.e., west of the Prime Meridian, which is aligned with the Royal Observatory, Greenwich, England). A longitude without a "-" sign places the coordinate in the eastern hemisphere. (Similarly, a latitude with a negative value is south of the equator. A latitude without a "-" sign refers to a coordinate in the northern hemisphere.)

23. As shown above, the longitude coordinate Woodland Grove listed in section 5.d(1) did not include a "-" sign. Consequently, instead of providing a coordinate for a site in Miami-Dade County, Florida, Woodland Grove entered a Development Location Point located on the direct opposite side of the planet (apparently, in India).

24. At the final hearing, Florida Housing (and Woodland Grove) explained that, except for the lack of the "-" sign, the longitude Woodland Grove recorded would have fallen directly on the address it listed as its development site in section 5.b., i.e., the "NE corner of SW 268 Street and 142 Ave, Miami-Dade, FL 33032."

25. In addition to the longitude in section 5.d., Woodland Grove did not include a "-" sign before the longitude coordinates for its Transit Services in section 5.e(2)(b) or for any of the three Community Services provided in section 5.e(3).

Again, without a "-" sign, the longitude for each of these services placed them in the eastern hemisphere (India) instead of the western hemisphere (Miami-Dade County).

26. In its protest, Liberty Square contends that, because Woodland Grove's application listed a Development Location Point in India, Florida Housing should have awarded Woodland Grove zero proximity points under Section Four, A.5.e. Consequently, Woodland Grove's application failed to meet minimum proximity eligibility requirements and is ineligible for funding. Therefore, Liberty Square, as the next eligible applicant, should be awarded funding for the Family, Large County Goal, under RFA 2017-108.^{8/}

27. Liberty Square asserts that a correct Development Location Point is critical because it serves as the beginning point for assigning proximity scores. Waiving an errant Development Location Point makes the proximity scoring meaningless. Consequently, any such waiver by Florida Housing is arbitrary, capricious, and contrary to competition.

28. At the final hearing, Woodland Grove claimed that it inadvertently failed to include the "-" sign before the longitude points. To support its position, Woodland Grove expressed that, on the face of its application, it was obviously applying for funding for a project located in Miami-Dade County, Florida, not India. In at least five places in its application,

Woodland Grove specified that its proposed development would be located in Miami-Dade County.

29. Moreover, several attachments to Woodland Grove's application specifically reference a development site in Florida. Woodland Grove attached a purchase agreement for property located in Miami-Dade County (Attachment 8). To satisfy the Ability to Proceed requirements in RFA 2017-108, Woodland Grove included several attachments which all list a Miami-Dade address (Attachments 9-14). Further, Woodland Grove submitted a Local Government Verification of Contribution - Loan Form executed on behalf of the Mayor of Miami-Dade County, which committed Miami-Dade County to contribute \$1,000,000.00 to Woodland Grove's proposed Development (Attachment 15). Finally, to qualify for a basis boost under RFA 2017-108, Woodland Grove presented a letter from Miami-Dade County's Department of Regulatory and Economic Resources, which also referenced the address of the proposed development in Miami-Dade County (Attachment 16).

30. In light of this information, Woodland Grove argues that its application, taken as a whole, clearly communicated that Woodland Grove intended to build affordable housing in Miami-Dade County. Nowhere in its application, did Woodland Grove reference a project in India other than the longitude coordinates which failed to include "-" signs. Accordingly,

Florida Housing was legally authorized to waive Woodland Grove's mistake as a "harmless error." Thus, Florida Housing properly selected the Woodland Grove's development for funding to meet the Family, Large County Goal.

31. Florida Housing advocates for Woodland Grove's selection to meet the Family, Large County Goal, under RFA 2017-108. Florida Housing considers the omission of the "-" signs before the longitude coordinates a "Minor Irregularity" under rule 67-60.002(6). Therefore, Florida Housing properly acted within its legal authority to waive, and then correct, Woodland Grove's faulty longitude coordinates when scoring its application.

32. In support of its position, Florida Housing presented the testimony of Marisa Button, Florida Housing's current Director of Multifamily Allocations. In her job, Ms. Button oversees the Request for Applications process; although, she did not personally participate in the review, scoring, or selection decisions for RFA 2017-108.

33. Ms. Button initially explained the process by which Florida Housing selected the 16 developments for funding under RFA 2017-108. Ms. Button conveyed that Florida Housing created a Review Committee from amongst its staff to score the applications. Florida Housing selected Review Committee participants based on the staff member's experience,

preferences, and workload. Florida Housing also assigned a backup reviewer to separately score each application.

34. The Review Committee members independently evaluated and scored their assigned portions of the applications based on various mandatory and scored items. Thereafter, the scorer and backup reviewer met to reconcile their scores. If any concerns or questions arose regarding an applicant's responses, the scorer and backup reviewer discussed them with Florida Housing's supervisory and legal staff. The scorer then made the final determination as to each application.

35. Ms. Button further explained that applicants occasionally make errors in their applications. However, not all errors render an application ineligible. Florida Housing is authorized to waive "Minor Irregularities." As delineated in RFA 2017-108, Section Three, A.2.C., Florida Housing may waive "Minor Irregularities" when the errors do not provide a competitive advantage or adversely impact the interests of Florida Housing or the public. See Fla. Admin. Code R. 67-60.002(6) and 67-60.008.

36. Such was the case regarding Woodland Grove's application. Heather Green, the Florida Housing staff member who scored the "Proximity" portion of RFA 2017-108, waived the inaccurate longitude coordinates as "Minor Irregularities."

Ms. Green then reviewed Woodland Grove's application as if the proposed development was located in Miami-Dade County, Florida.

37. Florida Housing assigned Ms. Green, a Multifamily Loans Manager, as the lead scorer for the "Proximity" portion of RFA 2017-108, which included the Development Location Point listed in Exhibit A, section 5.d. Ms. Green has worked for Florida Housing since 2003 and has scored proximity points for Request for Applications for over ten years. At the final hearing, Florida Housing offered the deposition testimony of Ms. Green.

38. In her deposition, Ms. Green testified that she is fully aware that, to be located in the western hemisphere (i.e., Miami-Dade County), a longitude coordinate should be marked with a negative sign or a "W." Despite this, Ms. Green felt that the longitude coordinates Woodland Grove used without negative signs, particularly its Development Location Point, were clearly typos or unintentional mistakes. Therefore, Ms. Green waived the lack of a negative sign in front of the longitude coordinates in section 5.d. and section 5.e. as "Minor Irregularities." Ms. Green understood that she was authorized to waive "Minor Irregularities" by rule under the Florida Administrative Code.

39. Ms. Green felt comfortable waiving the inaccurate longitude coordinates because everywhere else in Woodland

Grove's application specifically showed that its proposed housing development was located in Miami-Dade County, not India. Accordingly, when scoring Woodland Grove's application, Ms. Green corrected the longitude entries by including a negative sign when she plotted the coordinates with her mapping software. Ms. Green then determined that, when a "-" was inserted before the longitude, the coordinate lined up with the address Woodland Grove listed for the Development Location Point. Therefore, Woodland Grove received proximity points and was eligible for funding under RFA 2017-108. (See RFA 2017-108, Section Five.A.1.) However, Ms. Green acknowledged that if she had scored the application just as it was presented, Woodland Grove would not have met the required qualifications for eligibility.

40. Ms. Button relayed that Florida Housing fully accepted Ms. Green's decision to waive the missing negative signs in Woodland Grove's response to section 5.d. and 5.e. as "Minor Irregularities." Ms. Button opined that Woodland Grove's failure to place a "-" mark before the longitude was clearly an unintentional mistake.

41. Ms. Button further commented that Florida Housing did not believe that scoring Woodland Grove's development as if located in the western hemisphere (instead of India), provided Woodland Grove a competitive advantage. Because it was evident on

the face of the application that Woodland Grove desired to develop a housing site in Miami-Dade County, Ms. Green's decision to overlook the missing "-" sign did not award Woodland Grove additional points or grant Woodland Grove an advantage over other applicants. Neither did it adversely impact the interests of Florida Housing or the public. However, Ms. Button also conceded that if Ms. Green had scored the application without adding the "-" sign, Woodland Grove would have received zero proximity points. This result would have rendered Woodland Grove's application ineligible for funding.

42. Ms. Button also pointed out that Ms. Green waived the omission of "-" signs in two other applications as "Minor Irregularities." Both Springhill Apartments, LLC, and Harbour Springs failed to include negative signs in front of their longitude coordinates. As with Woodland Grove, Ms. Green considered the development sites in those applications as if they were located in Miami-Dade County (i.e., in the western hemisphere).

43. Ms. Green also waived a mistake in the Avery Commons application as a "Minor Irregularity." The longitude coordinate for the Avery Commons Development Location Point (section 5.d(1)) was blank. However, Ms. Green determined that Avery Commons had placed the longitude in the blank reserved for Scattered Sites coordinates (section 5.d(2)). When scoring

Avery Commons' application, Ms. Green considered the coordinate in the appropriate section. According to Ms. Button, Florida Housing felt that this variation did not provide Avery Commons a competitive advantage. Nor did it adversely impact the interests of Florida Housing or the public.

44. Finally, Ms. Button explained that the application Florida Housing used for RFA 2017-108 was a relatively new format. In previous Request For Applications, Florida Housing required applicants to submit a Surveyor Certification Form. On the (now obsolete) Surveyor Certification Form, Florida Housing prefilled in an "N" in front of all the latitude coordinates and a "W" in front of all the longitude coordinates. However, the application used in RFA 2017-108 did not place an "N" or "W" before the Development Location Point coordinates.

45. Based on the evidence presented at the final hearing, Liberty Square did not establish, by a preponderance of the evidence, that Florida Housing's decision to award funding to Woodland Grove for the Family, Large County Goal, under RFA 2017-108 was clearly erroneous, contrary to competition, arbitrary, or capricious. Florida Housing was within its legal authority to waive, then correct, the missing "-" sign in Woodland Grove's application as "Minor Irregularity."

46. Therefore, the undersigned concludes, as a matter of law, that Petitioner did not meet its burden of proving that

Florida Housing's proposed action to select Woodland Grove for funding was contrary to its governing statutes, rules or policies, or the provisions of RFA 2017-108.

CONCLUSIONS OF LAW

For want of a "-" sign;
Is the Application lost?

47. DOAH has jurisdiction over the subject matter and the parties of this competitive procurement protest pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. See also Fla. Admin. Code R. 67-60.009(2).

48. Liberty Square challenges Florida Housing's selection of Woodland Grove to meet the Family, Large County Goal, under RFA 2017-108. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests with Liberty Square as the party protesting the proposed agency action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Section 120.57(3)(f) further provides that in a competitive-procurement protest:

[T]he 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.

49. The phrase "de novo proceeding" describes a form of intra-agency review. The purpose of the ALJ's review is to "evaluate the action taken by the agency." J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and State Contracting, 709 So. 2d at 609. A de novo proceeding "simply means that there was an evidentiary hearing . . . for administrative review purposes" and does not mean that the ALJ "sits as a substitute for the [agency] and makes a determination whether to award the bid *de novo*." J.D., 114 So. 3d at 1133; Intercontinental Props., Inc. v. Dep't of Health & Rehab. Servs., 606 So. 2d 380, 386 (Fla. 3d DCA 1992). "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, 709 So. 2d at 609.

50. Accordingly, Liberty Square, as the party protesting Florida Housing's intended award, must prove, by a preponderance of the evidence, that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of RFA 2017-108. The standard of proof Liberty Square must meet to establish that the award to Woodland Grove violates this statutory standard of conduct is whether Florida Housing's decision was: (a) clearly erroneous, (b) contrary to

competition; or (c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.

51. The "clearly erroneous" standard has been defined to mean "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004); see also Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956) (when a finding of fact by the trial court "is without support of any substantial evidence, is clearly against the weight of the evidence or . . . the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous.'"). However, if "the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." Colbert, 809 So. 2d at 1166.

52. An agency action is "contrary to competition" if it unreasonably interferes with the purpose of competitive procurement. As described in Wester v. Belote, 138 So. 721, 722 (Fla. 1931):

The object and purpose [of the bidding process] . . . is 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 its various forms; to secure the best values . . . at the lowest possible expense; and to afford an

equal advantage to all desiring to do
business . . . , by affording an opportunity
for an exact comparison of bids.

In other words, the "contrary to competition" test forbids agency actions that: (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. See § 287.001, Fla. Stat.; and Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

53. Finally, section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary, or capricious." An "arbitrary" decision is one that is "not supported by facts or logic, or is despotic." Agrico Chemical Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." Id.

54. To determine whether an agency acted in an "arbitrary, or capricious" manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v.

Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in Dravo Basic Materials Co. v. Department of Transportation, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

55. Turning to the protest at hand, the central question is whether Florida Housing was legally authorized to waive the missing "-" sign in the Woodland Grove application as a "Minor Irregularity." If Florida Housing's scoring of Woodland Grove's application did not follow its governing statutes, rules, policies, or the solicitation specifications (i.e., by making a determination that is clearly erroneous, contrary to competition, or arbitrary, or capricious), then its decision to select Woodland Grove for funding must be set aside.

56. Section 420.5087(1) instructs Florida Housing to make SAIL funds available through a competitive solicitation process in a manner that meets the need and demand for very-low-income housing throughout the state. Pursuant to its rulemaking authority under section 420.507(12), Florida Housing adopted chapter 67-60 to administer the competitive solicitation process. See Fla. Admin. Code R. 67-60.001(1).

57. The governing rules authorize Florida Housing to waive "Minor Irregularities" in an application submitted in a competitive solicitation for funding. As provided in rule 67-60.008:

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

58. "Minor Irregularity" is defined in rule 67-60.002(6) as:

[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.

59. According to these rules, Ms. Green was authorized to treat the longitude coordinates in Woodland Grove's application as "Minor Irregularities" if they constituted "variations" that, 1) did not provide a competitive advantage over other applicants, and 2) did not adversely impact the interests of Florida Housing or the public. At that point, if Ms. Green did conclude that the inaccurate coordinates were "Minor Irregularities," she was permitted to both waive, and correct, the longitude points if she determined that they were "mistakes clearly evident . . . on the face of the Application, such as . . . typographical errors."^{9/}

60. Based on the evidence of record, Liberty Square did not prove that Ms. Green improperly considered the errant longitude coordinates in Woodland Grove's application as "Minor Irregularities." Initially, Liberty Square did not show that Ms. Green's award of proximity points to Woodland Grove gave it a competitive advantage over other applicants. By synchronizing the longitude coordinates with the Miami Dade County addresses in its application, Ms. Green did not provide Woodland Grove the opportunity to modify its proposed housing site or recalculate location of nearby Transit or Community Services. Further, Woodland Grove did not receive any scoring advantage or benefit by omitting the "-" sign in its application or "misrepresenting" that its proposed development was located in India. Ms. Green scored Woodland Grove's application using the exact same methodology and standards as all other applications for development sites with addresses in Florida. Finally, Ms. Green was consistent in that she treated three other applications that failed to include a negative sign before a longitude coordinate just the same as Woodland Grove's application.

61. Further, no evidence indicates that Ms. Green's decision to award Woodland Grove proximity points adversely impacted the interests of Florida Housing or the public. Adding a "-" sign before the Development Location Point did not change the actual location of Woodland Grove's proposed development

(based on the street address) or modify any material representations in its application. Neither did it interfere with the goals or purposes of RFA 2017-108.

62. Because the evidence establishes that Ms. Green was justified in considering Woodland Grove's inaccurate longitude coordinates as "Minor Irregularities," the next question becomes whether she was authorized to waive, then correct, the missing "-" signs. Rule 67-60.008 instructs that Florida Housing may correct mistakes that are "clearly evident . . . on the face of the Application, such as . . . typographical errors."

63. The undersigned finds that Woodland Grove's application "clearly" indicates, on its face, that it applied for funding for a housing development located in Miami-Dade County, despite the fact that the longitude coordinates in section 5.d and 5.e placed the site in India. Florida Housing (and Woodland Grove) present the more persuasive argument that the omission of a "-" sign before the longitude was an inadvertent error. Thereafter, Ms. Green reasonably used her experience and the abundance of information contained in Woodland Grove's application to "correct" the longitude coordinates and plot the development in Miami-Dade County.

64. Liberty Square asserts that Ms. Green could not accurately determine Woodland Grove's Development Location Point because an errant longitude coordinate cannot be verified by

simply using a street address. RFA 2017-108 required both addresses and coordinates for a distinct purpose. Therefore, Woodland Grove's failure to designate its longitude coordinates in the western hemisphere was a material deviation that could not be corrected.

65. Liberty Square also presses the point that, with a Development Location Point in India, Woodland Grove's application should have garnered zero proximity points. Therefore, had Ms. Green not corrected the error, Woodland Grove would have been ineligible for any funding under RFA 2017-108. Consequently, waiving the missing negative sign is contrary to competition because it made an otherwise ineligible application become eligible.

66. However, Florida Housing credibly testified that Ms. Green was able to accurately determine, then plot, the Woodland Grove development location based on the information contained within the four corners of an application. Further, as discussed above, Woodland Grove did not enjoy a competitive advantage, either material, substantial, or otherwise, over other applicants because of Ms. Green's decision to "correct" the development's longitude coordinate to reflect the Miami-Dade County address. See Tropabest Foods, Inc. v. State, Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986) ("although a bid containing a material variance is unacceptable, not every

deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition."); and Harry Pepper, 352 So. 2d at 1193 ("The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by the other bidders").

67. In sum, the evidence in the record demonstrates that Ms. Green's consideration of the longitude coordinates in Woodland Grove's application as "Minor Irregularities" fell within a permissible interpretation and application of rules 67-60.002(6) and 67-60.008. No evidence indicates that Ms. Green corrected the missing "-" signs because she colluded with or favored Woodland Grove, or that she acted in a dishonest, fraudulent, illegal, or unethical manner. Neither did her decision cause the procurement to be "genuinely unfair or unreasonably exclusive." On the contrary, Ms. Green scored all applications on identical terms and afforded an equal opportunity for all applicants to earn proximately points. As such, Florida Housing's selection of Woodland Grove for funding was not "contrary to competition." Finally, Liberty Square did not establish that Ms. Green's decision was "arbitrary or capricious." Ms. Greene rationally and reasonably used her

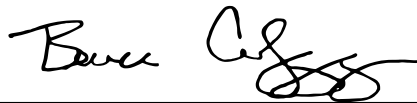
experience, as well as the numerous references in Woodland Grove's application, to plot the proposed development in Miami-Dade County as opposed to India.

68. Accordingly, the undersigned concludes that, for want of a "-" sign, Woodland Grove's application is not lost. Liberty Square did not meet its burden of proving, by a preponderance of the evidence, that Ms. Green's decision to waive, then correct, the missing "-" signs in Woodland Grove's application as "Minor Irregularities" was "clearly erroneous, contrary to competition, or arbitrary, or capricious." Therefore, Liberty Square failed to establish that Florida Housing's selection of Woodland Grove for funding is contrary to its governing statutes, rules, or policies, or RFA 2107-108's terms or provisions. Florida Housing's award of funding to Woodland Grove should not be set aside.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order dismissing the protest by Liberty Square. It is further recommended that Florida Housing Finance Corporation rescind the intended awards to Sierra Bay, SP Lake, and Harbour Springs, and instead designate Northside II, Osprey Pointe, and Pembroke Tower Apartments as the recipients of funding under RFA 2017-108.^{10/}

DONE AND ENTERED this 19th day of April, 2018, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2018.

ENDNOTES

^{1/} Unless otherwise stated, all citations to the Florida Statutes and Florida Administrative Code are to the 2017 versions.

^{2/} No protests were made to the specifications or terms of RFA 2017-108.

^{3/} Initially, all protests were consolidated at DOAH. Prior to the final hearing, Florida Housing resolved protests involving Oasis at Renaissance Preserve I, LP (DOAH Case No. 18-0476BID); SP West LLC and Southport Development, Inc., d/b/a Southport Development Service, Inc. (DOAH Case No. 18-0483BID); as well as HTP Anderson Terrace, LLC, and The Village Miami Phase II, LTD.

^{4/} Prior to the final hearing, all parties agreed that, except for the specific issues identified and discussed below, there were no disputed issues of material fact requiring resolution at an evidentiary hearing. Towards this end, the parties submitted a Pre-hearing Stipulation agreeing to a number of facts regarding Florida Housing's review and scoring of RFA 2017-108. Unless otherwise set forth in the Findings of Fact section, the undersigned adopts the stipulated facts in the Pre-hearing Stipulation into this Recommended Order.

^{5/} By requesting a deadline for filing post-hearing submissions beyond ten days after the final hearing, the 30-day time period for filing the Recommended Order was waived. See Fla. Admin. Code R. 28-106.216.

^{6/} RFA 2017-108 was modified on September 13, 2017; September 15, 2017; and October 3, 2017. The October 3, 2017, modification extended the application due date to October 12, 2017.

^{7/} See Rule 67.48.002(33), which defines "Development Location Point" to mean:

[A] single point selected by the Applicant on the proposed Development site that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development.

^{8/} Liberty Square's longitude coordinates in section 5 of its application were all preceded by a negative sign.

^{9/} Liberty Square does not dispute that Woodland Grove's application was "otherwise valid" aside from the longitude coordinates.

^{10/} In the Pre-hearing Stipulation, all parties agreed to a specific ranking and scoring scenario if SP Lake is not selected for funding in the "Family" demographic, and both Sierra Bay and Harbour Springs are ineligible for funding under RFA 2017-108. In light of this agreement, the undersigned recommends Florida Housing select the following proposed developments for funding:

a. Two Elderly, Large County, New Construction Applications:

- 1) Brisas del Rio Apartments, Application #2018-030BS
- 2) Northside Transit Village II, Application #2018-047BS

b. Three Family, Large County, New Construction Applications:

- 1) The Waves, Application #2018-039S
- 2) Palmetto Pointe, Application #2018-024S

- 3) Woodland Grove, Application #2018-044BS
- c. One Elderly, Medium County, New Construction Application:
 - 1) Providence Reserve Seniors, Application #2018-032BS
- d. Two Family, Medium County, New Construction Applications:
 - 1) Parrish Oaks, Application #2018-041BS
 - 2) Hibiscus Apartments, Application #2018-035BS
- e. Small County Application:
 - 1) Springhill Apartments (currently known as Madison Heights Apartments), Application #2018-026S
- f. Medium County Applications:
 - 1) Osprey Pointe, Application #2018-050BS
 - 2) Lofts on Lemon, Application #2018-029BS
 - 3) Choctaw Village, Application #2018-019BS
 - 4) Venetian Walk II, Application #2018-017S
- g. Large County Applications:
 - 1) Pembroke Tower Apartments, Application #2018-040BS
 - 2) Water's Edge Apartments, Application #2018-025BS
 - 3) Citadelle Village, Application #2018-033BS

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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.