

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HTG HERON ESTATES FAMILY, LLC,

Petitioner,

vs.

Case No. 18-2130BID

FLORIDA HOUSING FINANCE
CORPORATION AND OCEAN BREEZE
EAST APARTMENTS, LLC,

Respondents.

_____/

CHANNEL SIDE APARTMENTS, LTD,

Petitioner,

vs.

Case No. 18-2132BID

FLORIDA HOUSING FINANCE
CORPORATION AND OCEAN BREEZE
EAST APARTMENTS, LLC,

Respondents,

and

HTG HERON ESTATES FAMILY, LLC,

Intervenor.

_____/

RECOMMENDED ORDER

On May 21, 2018, Administrative Law Judge Hetal Desai of the Florida Division of Administrative Hearings (DOAH) held a final evidentiary hearing in the above-styled consolidated cases in Tallahassee, Florida.

APPEARANCES

For HTG Heron Estates Family, LLC:

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
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Tallahassee, Florida 32308

For Florida Housing Finance Corporation:

Betty Zachem, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Ocean Breeze East Apartments, LLC:

Michael P. Donaldson, Esquire
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For Channel Side Apartments, LTD:

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Tallahassee, Florida 32302-1110

STATEMENT OF THE ISSUES

The issues presented for determination are whether Florida Housing Finance Corporation's determination that the three applicant-parties were eligible for the allocation of low-income housing tax credits; and its intended decision to award such tax credits to Ocean Breeze East Apartments, LLC, are contrary to governing statutes, rules, or the solicitation specifications.^{1/}

PRELIMINARY STATEMENT

On October 6, 2017, Respondent, Florida Housing Finance Corporation (Respondent or Florida Housing), issued a "Request for Applications 2017-113 Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties" (the RFA). The RFA solicited applications to compete for tax-credit funding for multifamily affordable housing developments.

On March 16, 2018, Florida Housing notified the public of its intended decision to award tax-credit funding to one applicant from each of the six counties. Germane to this consolidated proceeding, Florida Housing announced the results of its review and scoring of the applications, and its intent to award tax-credit funding for Palm Beach County to Ocean Breeze East Apartments, LLC (Ocean Breeze), as the eligible applicant receiving the maximum number of points and having the lowest tiebreaking lottery number.

Ocean Breeze; HTG Heron Estates Family, LLC (HTG Heron); and Channel Side Apartments, LTD (Channel Side) timely filed notices of intent to protest, followed by timely formal written protests, to contest Florida Housing's intended action for Palm Beach County, pursuant to section 120.57(3), Florida Statutes.

Following an unsuccessful resolution meeting pursuant to section 120.57(3)(d)1., Florida Housing referred the three

protests to DOAH and filed a motion requesting consolidation. The cases were consolidated and duly noticed for a final hearing.

A telephonic status conference hearing was held on May 3, 2018. During that conference the parties discussed the appropriateness of Ocean Breeze's administrative protest and its status as a party in the other two cases, in light of the fact it was the intended awardee. Ultimately, the undersigned determined Ocean Breeze had standing as a party (as opposed to an intervenor), severed the protest initiated by Ocean Breeze from the remaining consolidated cases, and relinquished jurisdiction of Ocean Breeze's petition to Housing Finance.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they set forth an extensive list of agreed upon facts and issues of law. The parties' stipulations have been incorporated below to the extent relevant.

At the outset of the hearing, a motion by HTG Heron requesting official recognition was addressed.^{2/} HTG Heron chose not to renew the request for official recognition and the documents at issue were not offered in evidence by HTG Heron.

The parties offered Joint Exhibits J-1 through J-8, which were admitted in evidence. Significantly, the RFA was Joint Exhibit J-1.

Florida Housing presented the testimony of Marisa Button, its corporate representative and the director of "Multifamily

Allocations.” Florida Housing offered no exhibits other than the joint exhibits.

HTG Heron presented no witnesses, but questioned Ms. Button and relied on the deposition transcript of Ms. Button. HTG Heron’s Exhibits 1 through 3 and 8 were admitted in evidence.

Channel Side presented no witnesses, but also questioned Ms. Button. Channel Side’s Exhibits 1 through 4 were admitted in evidence.

Ocean Breeze also questioned Ms. Button, and presented the testimony of the following witnesses: Lewis Swezy, its corporate representative; and Michael Simon, the executive director of Boynton Beach Community Redevelopment Agency (BBCRA). Ocean Breeze’s Exhibits 1 and 2 were admitted into evidence.

The hearing Transcript was filed on May 30, 2018. The parties timely filed their Proposed Recommended Orders (PROs) on June 11, 2018. The PROs have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Parties and Process

1. Florida Housing is a public corporation and, for the purposes of these proceedings, is an agency of the State of Florida.

2. Pursuant to section 420.5099, Florida Statutes, 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.^{3/}

3. Florida Housing is authorized by law to allocate tax credits (and other funding) by means of requests for proposal or other forms of competitive solicitation. On October 6, 2017, Florida Housing published the RFA, starting the competitive application process being challenged in this proceeding. Completed applications were due December 28, 2017.^{4/}

4. As explained below, all of the non-agency parties (HTG Heron, Channel Side, and Ocean Breeze) in this case applied for funding for a proposed development in Palm Beach County.

5. According to the terms of the RFA, only one application for each county was to be funded. Moreover, the RFA's stated goal was to fund one application wherein the applicant applied and qualified as a non-profit applicant. This non-profit goal did not apply within each of the six counties included in this RFA; one non-profit applicant in any of the six counties could satisfy the non-profit applicant goal for the entire RFA.

6. No challenges were made to the terms or requirements of the RFA.

7. HTG Heron is an applicant to the RFA, requesting an allocation of \$1,541,751.00 in competitive tax credits. Its

application, assigned number 2018-289C, was deemed eligible for consideration but was not selected for funding under the RFA.

8. Channel Side is also an applicant to the RFA. It is requesting an allocation of \$2,100,000.00 in competitive tax credits. Its application, assigned number 2018-278C, was deemed eligible for consideration but was not selected for funding under the RFA.

9. Ocean Breeze is an applicant requesting an allocation of \$2,070,000.00 in competitive tax credits. Its application, assigned number 2018-286C, was deemed eligible for consideration and was selected for funding under the RFA, subject to a credit underwriting review process.

10. Florida Housing has adopted Florida Administrative Code Chapter 67-60 to govern the competitive solicitation process for several different programs, including the tax credit program. See § 420.507(48), Fla. Stat. The bid protest provisions of section 120.57(3) are adopted as part of the process for allocating tax credits, except that no bond is required. See Fla. Admin Code R. 67-60.009.

11. A review committee was appointed to evaluate the applications and make recommendations to Florida Housing's Board of Directors (the Board).

12. Thirty-three applications for the RFA were received, processed, deemed eligible or ineligible, scored, and ranked,

pursuant to the terms of the RFA; Florida Administrative Code Chapters 67-48 and 67-60; and applicable federal regulations.

13. The review committee found 25 applications eligible and eight applications ineligible. Through the ranking and selection process outlined in the RFA, seven applications were recommended for funding, including Ocean Breeze. The review committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

14. On March 16, 2018, the Board met and considered the recommendations of the review committee for the RFA. The same day, the applicants to the RFA received notice of the Board's determinations as to whether the applications were eligible or ineligible for consideration for funding, and which of the eligible applicants were selected for award of tax credits, subject to satisfactory completion of a credit underwriting process. Such notice was provided by the posting of two spreadsheets, one listing the "eligible" applications to the RFA and one identifying the applications which Florida Housing proposed to fund.^{5/}

15. Relevant to this proceeding, Florida Housing announced its intention to award funding for Palm Beach County to Ocean Breeze, which received the maximum points available. Channel Side and HTG Heron were deemed eligible and scored the maximum number of points, but were not recommended for funding.

16. Each applicant-party timely filed a Notice of Protest and Petition for Formal Administrative Proceedings.

RFA

17. The RFA contemplated a structure in which each applicant is scored on eligibility items and obtains points for other items. To determine if an application is eligible for funding, it must meet all of the requirements listed in section 5.A.1, of the RFA. The following eligibility terms and requirements are challenged in this proceeding:

- The evidence of control of the development site (site control) by Ocean Breeze and Channel Side; and
- The address of the development site provided by HTG Heron.

18. For scoring the applications, the RFA allows up to a total of 20 points with the following point allocations:

- Submission of Principal Disclosure form stamped by Corporation as "Pre-Approved" (5 points);
- Development Experience Withdrawal Disincentive (5 points); and
- Local Government Contribution Points (5 points) or Local Government Area of Opportunity Points (10 points).

19. As explained in pages 66-67 of the RFA, the first step in evaluating the applications is the sorting order. All

eligible applications are ranked by first sorting all eligible applications from the highest score to the lowest score, with any scores that are tied separated in the following order:

(1) First, by the Application's eligibility for the Proximity Funding Preference (which is outlined in Section Four A.5.e. of the RFA) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;

(2) Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.11.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(2) [sic] Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four A.4.b.(4) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(3) [sic] Next, by the Application's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification of A listed above Applications having the Classification of B);

(4) [sic] Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference); and

(5) [sic] And finally, by lottery number, resulting in the lowest lottery number receiving preference.

20. In other words, those competing for the RFA must first submit an application that meets all the eligibility criteria and does not have any significant omissions or errors before it is scored.

21. After scoring, any tiebreakers are determined strictly by the luck of the draw. After applications are filed, but before they are scored, Florida Housing randomly assigned each a lottery number, and the highest scoring applicant with the lower number wins any ties, thus becoming the intended funding recipient.

22. The notice of the intended award does not end the process, and the selection of an applicant for funding does not guarantee distribution of tax credits to that applicant. Florida Housing's representative, Ms. Button, explained at the hearing:

Q Okay. What happens once a preliminary agency action from Florida Housing becomes final agency action?

A The awardees who are recommended or preliminarily approved for funding, once that becomes final, those applicants are then invited to credit underwriting by Florida Housing.

* * *

Q Can you provide some general information about credit underwriting?

A Credit underwriting is essentially a de novo review of all the information that the applicant has provided in their application to proceed forward with the proposed development. Florida Housing

retains their party underwriters who review that information and provide recommendations to Florida Housing.

23. Similarly, the RFA provides that each selected awardee must complete a credit underwriting process before receiving funding or credits. The RFA states on page 68:

Notwithstanding an award by the Board pursuant to his RFA, funding will be subject to a positive recommendation from the Credit Underwriter based on criteria outlined in the credit underwriting provisions in Rule Chapter 67-48, F.A.C.

24. Rule 67-48.0072, in turn, provides in part:

Credit underwriting is a de novo review of all information supplied, received or discovered during or after any competitive solicitation scoring and funding preference process, prior to the closing on funding, including the issuance of IRS Forms 8609 for Housing credits. The success of an Applicant in being selected for funding is not an indication that the Applicant will receive a positive recommendation from the Credit Underwriter or that the Development team's experience, past performance or financial capacity is satisfactory.

25. Thus, an application might fail in this de novo credit underwriting phase and never receive funding, even though it was "awarded" tax-credit funding as a result of a proceeding such as this one. In that event, page 67 of the RFA provides:

4. Returned Allocation

Funding that becomes available after the Board takes action on the [Review] Committee's recommendation(s), due to an Applicant withdrawing its Application, an

Applicant declining its invitation to enter credit underwriting, or an Applicant's inability to satisfy a requirement outlined in this RFA and/or Rule Chapter 67-48, F.A.C., will be distributed as approved by the Board.

26. Therefore, if an intended applicant (such as Ocean Breeze), was nominally selected for funding at the end of the eligibility and scoring phase, but failed to garner a positive recommendation from the credit underwriting process, the next eligible applicants in the queue (such as HTG Heron and Channel Side) would be awarded the tax credits. As a result, in this consolidated proceeding, the objective of Petitioners is to displace any and all applicants in more favorable positions.

27. Here, Petitioner Channel Side challenges the eligibility of both the Ocean Breeze and HTG Heron applications; and Petitioner HTG Heron challenges the eligibility of Ocean Breeze. Ocean Breeze, in turn, challenges both HTG Heron's and Channel Side's eligibility. The specific issues raised as to the three challenged applications will be discussed below.

OCEAN BREEZE APPLICATION

28. HTG Heron and Channel Side challenge Ocean Breeze's eligibility based on the RFA requirements relating to site control. The parties have stipulated, and the undersigned finds, that site control must have been demonstrated as of the application deadline of December 28, 2017.

29. The RFA provides three ways an applicant can demonstrate site control: (1) eligible contract, (2) deed or certificate of title, or (3) lease.

30. Ocean Breeze utilized the first method to satisfy the site control requirement by submitting a document titled "Purchase and Development Agreement" (PDA) as Exhibit 8 to its Application. The PDA included two attachments: the "Legal Description" and a "Reverter Agreement."

31. Petitioners challenge the enforceability of the PDA on two apparent grounds: (1) it was not executed by the applicant^{6/}; and (2) it was executed before the applicant was properly incorporated to do business within the State of Florida.

32. The RFA, however, does not mention "enforceability" of a contract in its definition for "Eligible Contract." The requirements for establishing site control through an eligible contract are found on page 30 through 31 of the RFA.

Eligible Contract - For purposes of this RFA, an eligible contract is one that has a term that does not expire before June 30, 2018 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than June 30, 2018; specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the

Applicant, is provided. Any assignment must be signed by the assignor and the assignee. If the owner of the subject property is not a party to the eligible contract, all documents evidencing intermediate contracts, agreements, assignments, options, or conveyances of any kind between or among the owner, the Applicant, or other parties, must be provided, and, if a contract, must contain the following elements of an eligible contract: (a) have a term that does not expire before June 30, 2018 or contain extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than June 30, 2018, and (b) specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance.

33. The initial paragraph of the PDA identifies the parties to the PDA as "Boyton Beach Community Redevelopment Agency," as the "Seller," and "Ocean Breeze East Apartments, LLC" as the "Purchaser."

34. Paragraph 14 of the PDA designates the following for purposes of notices:

If to Purchaser: Ocean Breeze East Apartments, LLC
Attn: Lewis Swezy
7735 NW 146 Street, Suite 306
Miami Lakes, FL 33016

35. Under the signature block, however, the PDA states it was executed on behalf of the "Purchaser" by "OCEAN BREEZE APARTMENTS LLC By Ocean Breeze East GP LLC" and signed by Lewis Swezy, "Title: Authorized Member" on December 8, 2017.

36. "Ocean Breeze East, GP, LLC" does not exist and never has in Florida. The parties admit that this entity was not in existence on December 8, 2017, and was never subsequently formed. Ocean Breeze admits the identification of "Ocean Breeze East, GP, LLC" was in error.

37. The PDA was executed on behalf of the "Seller" by BBCRA and signed by Steven B. Grant, "Title: Chair" on December 15, 2017.

38. Paragraph 4 of the PDA indicates that its effective date is the date when the last party signed the PDA; in this case being the date the BBCRA executed the document--December 15, 2017.

39. The Reverter Agreement is executed by the "Purchaser" "Ocean Breeze East Apartments, LLC" and signed by Lewis Swezy, "Title: Manager of Manager," on December 12, 2017.

40. The Reverter Agreement is executed by the "Seller," BBCRA, and signed by Steven B. Grant, "Title: Chairman" on December 15, 2017.

41. Mr. Swezy testified Ocean Breeze complied with all the terms of the PDA, including submitting an initial \$25,000 deposit within two days of full execution of the PDA and a second deposit within 30 days.

42. The Articles of Organization for Ocean Breeze East Apartments, LLC were filed on December 19, 2017, and effective December 14, 2017.

43. Rachael Grice, Florida Housing Multifamily Programs Manager, scored the site control portion for this RFA based on the information in the application. Mrs. Grice found that Ocean Breeze met the RFA requirements for site control.

44. It is unnecessary, and beyond the scope of the undersigned's jurisdiction, to make a factual or legal determination as to the enforceability of the PDA. The RFA does not mention enforceability or validity as requirements for an "Eligible Contract" for site control purposes.

45. There is no dispute that on its face, the PDA with the Reverter Agreement satisfied the RFA's requirements for an "Eligible Contract" listed on page 30 and 31. In fact, as of the date of the application deadline the following was true:

- Ocean Breeze East Apartments, LLC, was listed as the applicant for the RFA.

- Ocean Breeze East Apartments, LLC, was listed as the "Purchaser" on the PDA.

- Mr. Swezy had signature authority to bind Ocean Breeze and was listed on the Ocean Breeze application as the "Authorized Representative."

- Ocean Breeze East Apartments, LLC, and Mr. Swezy were identified in the notice provision in the PDA.
- The Reverter Agreement, which was signed after the PDA, correctly identified the applicant entity as Ocean Breeze East Apartments, LLC.
- Effective December 14, 2017, Ocean Breeze was incorporated. The PDA was fully executed on December 15, 2017.

46. HTG Heron and Channel Side have not established that the PDA was fatally flawed or that Florida Housing erred in accepting the PDA as an "eligible contract" satisfying the RFA's site control requirement.

47. Even if the PDA contained errors by listing "Ocean Breeze East GP, LLC" in the signature block or was prematurely signed before Ocean Breeze was effectively incorporated, the evidence at the hearing established that it was a minor irregularity waivable by Florida Housing, and that Florida Housing would have waived any such errors.

48. If the PDA is ultimately determined to be unenforceable and site control is not established at the credit underwriting stage, Petitioners would be next in line to be selected to receive the tax credits under the terms of the RFA.

49. The preponderance of the evidence established that Ocean Breeze's application is eligible for funding, it received

the proper scoring, and should be the intended award for Palm Beach County.

HTG HERON APPLICATION

50. Channel Side and Ocean Breeze challenge the eligibility of the HTG Heron application because they claim it fails to satisfy the RFA eligibility requirement to provide a correct address of the proposed development site. Page 18 of the RFA requires in relevant part:

Indicate (1) the address number, street name, and name of city, and/or (2) the street name, closest designated intersection, and either name of city or unincorporated area of county.

51. Ms. Button testified the purpose of the address requirement in the RFA is to allow parties, including Florida Housing, to know where the proposed development will be built and to ensure the property has access to utility and other services. In that vein, the RFA does not require the street identified in an application to be a publicly maintained street.

52. In its application, HTG Heron provided the address of the proposed development as "W 17th Ct., W 17th Ct. and North Congress Ave., Riviera Beach," along with latitudinal and longitudinal coordinates of the development location.

53. Ryan McKinless, Multifamily Programs Senior Analyst for Florida Housing, scored the development address section for this RFA. Mr. McKinless found that HTG Heron met the

requirements in the RFA for providing an address of the proposed development.

54. Here, Channel Side and Ocean Breeze argue Florida Housing erred in accepting the "W. 17th Ct." address provided by HTG Heron because the address does not exist. They point to the site sketch submitted by HTG Heron in support of its application which references a "W. 17th Street" (not "W. 17th Ct.") and has "W. 17th Street" intersecting with "Congress Avenue Extension," (not "N. Congress Ave."). In support of this position that "W. 17th Ct." does not exist, Ocean Breeze and Channel Side also rely on a 1975 plat and a 1999 City of Rivera Beach Ordinance.

55. The sketches attached to HTG Heron's application each contain the disclaimer "NOT A SURVEY."

56. Although the sketches contain a reference to an abandonment relating to "W. 17th Ct.," the 1999 Ordinance describing the abandonment relied on by Channel Side and Ocean Breeze was not submitted to Florida Housing.

57. Regardless, this plat and ordinance information was not required by the RFA nor was it considered by Florida Housing in determining whether to accept the address submitted by HTG Heron for eligibility determination purposes.

58. There was no evidence at the hearing that the "W. 17th Court" address misled Florida Housing (or anyone else) or caused confusion as to the location of HTG Heron's proposed development.

To the contrary, other information in the application supports accepting the provided address.

- The "Local Government Verification of Status of Site Plan Approval for Multifamily Developments" form executed by the City Manager of Riviera Beach affirms the "W. 17th Ct." address.

- The "Local Government Verification that Development is Consistent with Zoning and Land Use Regulations" form executed by the City Manager of Riviera Beach affirms the "W. 17th Ct." address.

- The "Verification of Availability of Infrastructure-Electricity" form executed by an Associate Engineer from Florida Power and Light affirms the "W. 17th Ct." address.

- The "Verification of Availability of Infrastructure" form for water and sewer services executed by a Utilities Engineer from City of Riviera Beach affirms the "W. 17th Ct." address.

- The "Verification of Availability of Infrastructure-Roads" form executed by a City Engineer from the City of Riviera Beach affirms the "W. 17th Ct." address.

- The "Local Government Verification of Contribution-Grant" form executed by the Interim City Manager of Riviera Beach affirms the "W. 17th Ct." address.

- The acting director of the City of Riviera Beach, Department of Community Development confirms by letter that the property at the "2003 W. 17th Court (adjacent to North Congress Avenue)" address is located with a "Qualified Census Tract for 2017 and 2018" and attaches a diagram of that tract.

- Documentation from the Palm Beach County Property Appraiser's website lists the address location as "2003 W. 17th Ct."

59. Given that the purpose of providing an address was fulfilled and there was no ambiguity as to the actual location of the HTG Heron's development site, Channel Side and Ocean Breeze failed to prove that Florida Housing erred in accepting HTG Heron's address for the purposes of eligibility.

60. At the hearing, HTG Heron also submitted a certified copy of a 2017 map from the Palm Beach County Property Appraiser's Office for range 43, township 42, which includes the area of the proposed development in HTG Heron's application, and indicates there is a "W. 17th Ct." that intersects with "N. Congress Avenue."

61. There was a preponderance of evidence establishing HTG Heron's designation in its application of "W 17th Ct., W 17th Ct. and North Congress Ave., Riviera Beach" was not an error, and that HTG Heron's application is eligible for funding.

CHANNEL SIDE APPLICATION^{7/}

62. To satisfy the Site Control requirements Channel Side submitted a Purchase and Sale Agreement that lists among the sellers an entity named "MWCP, Inc., f/k/a Blueprint Properties, Inc., a Delaware corporation whose post office address is 248 Columbia Turnpike Florham Park, NJ ('Blueprint')" in the initial paragraph.

63. MWCP, Inc. (MWCP) did not exist in Florida when the Purchase and Sale Agreement was executed. The parties stipulated that the reference in the Channel Side site control documents to MWCP was erroneous and that the owner of the property for the Channel Side's proposed development as of the application deadline was a Delaware corporation known as Blueprint Properties, Inc., which has never operated as, or been corporately related to, MWCP.

64. Rachel Grice, Florida Housing Multifamily Programs Manager, scored the Site control portion of this RFA based on the information in the Application. Mrs. Grice found that Channel Side met the RFA requirements for Site control.

65. The RFA does not require the listing of related names of any corporations other than the applicant or developer. Thus, the error in the Purchase and Sale Agreement does not seem to affect Channel Side's satisfaction of any requirement of the RFA.

66. The error is insignificant and immaterial. There was no evidence presented at the hearing that Channel Side received a competitive advantage by identifying "MWCP, Inc. f/k/a Blueprint Properties, Inc." instead of simply "Blueprint Properties" as the seller. The slight error conferred no competitive advantage on Channel Side; its application received no more points than it was entitled to by reason of the mistake.

67. Ms. Button reasonably testified that had Florida Housing known about the mistaken listing of MWCP as the seller, it would have waived the error as a minor irregularity.

68. The applicant-parties failed to prove that Channel Side's application reflecting the "wrong corporate entity" as the seller was an error affecting eligibility of Channel Side's application, or that Florida Housing erred in accepting the Purchase and Sale Agreement as proof of site control.

69. The mistake was, at worst, a minor, inconsequential error that was waivable.

70. Based on the preponderance of the evidence, Channel Side's application is eligible for funding.

CONCLUSIONS OF LAW

71. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), (3), Fla. Stat.

72. All of the applicant-parties have standing. Specifically, Petitioners have standing to protest the proposed decisions to fund Ocean Breeze; Channel Side and Ocean Breeze have standing to challenge the determinations that HTG Heron's application is eligible for funding; and Ocean Breeze and Channel Side have standing to challenge the determinations that HTG Heron's application is eligible for funding. Madison Highlands, LLC v. Fla. Housing. Fin. Corp., 220 So. 3d 467, 474 (Fla. 5th DCA 2017) (finding standing where "Madison Highlands . . . alleges that the applications of the four higher-ranked applicants had deficiencies and that if the FHFC had properly scored or considered the higher-ranked applicants, it would have been awarded the housing tax credits for the Hillsborough County development.").

73. Section 420.507 provides the statutory authority for Florida Housing to award low-income housing tax credits by requests for proposals or other competitive solicitation.

74. These consolidated competitive solicitation protests are governed by section 120.57(3)(f), which provides as follows:

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. (emphasis added).

75. As the parties protesting Florida Housing's proposed action, Petitioners bear the burden of proof by a preponderance of the evidence. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.

76. Although competitive-solicitation protest proceedings are described in section 120.57(3)(f) as de novo, courts have held these hearings are a "form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

77. A new evidentiary record is developed in the administrative proceeding for the purpose of evaluating the proposed action taken by the agency. See J.D. v. Dep't of Child. & Fams., 114 So. 3d 1127 (Fla. 1st DCA 2013) (describing administrative hearings to review agency action on applications for exemption from disqualification as akin to bid protest proceedings under section 120.57(3)).

78. Contrary to the arguments at the hearing, although section 120.57(3)(f) states new evidence cannot be offered to

amend or supplement a party's application, the administrative law judge is not confined to only the information submitted to the agency. Instead, new evidence may be offered in a competitive protest proceeding to prove that there was an error in another party's application. Intercontinental Props. Inc. v. Dep't of Health and Rehab Servs., 606 So. 2d 380 (Fla. 3d DCA 1992). Conversely, a party may present new evidence to prove that an error in a party's application is a minor irregularity that should be waived. Id.

79. A "minor irregularity" is defined by rule as follows:

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

Fla. Admin. Code R. 67-60.002(6). Pursuant to rule 67-60.008 and the RFA, Florida Housing may waive errors that are not material or that are "minor irregularities." See Pinnacle Rio, LLC v. Fla. Housing Fin. Corp., Case No. 14-1398BID, 2014 Fla. Div. Adm. Hear. LEXIS 285, *30-32 (Fla. DOAH June 4, 2014, FHFC June 13, 2014) (where information omitted from one part of RFA document but found in other parts of document, Florida Housing had discretion to consider omission a minor irregularity). A deviation "is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles

competition.” Tropabest Foods, Inc. v. Dep’t of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

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

81. The “clearly erroneous” standard has been applied to both factual determinations and interpretations of statute, rule, or specification. A factual determination is “clearly erroneous” when the reviewer is “left with a definite and firm conviction that [the fact-finder] has made a mistake.” Tropical Jewelers, Inc. v. Bank of Am., N.A., 19 So. 3d 424, 426 (Fla. 3d DCA 2009). As applied to legal interpretations, the “clearly erroneous” standard was defined by the court in Colbert v. Department of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), to mean that “the interpretation will be upheld if the agency’s construction falls within the permissible range of interpretations. If, however, the agency’s interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it.” (citations omitted).

82. Whether an agency action is "contrary to competition" must be determined on a case-by-case basis. See R.N. Expertise, Inc. v. Miami-Dade Co. Sch. Bd., Case No. 01-2663BID, 2002 Fla. Div. Adm. Hear. LEXIS 163, *55-58 (Fla. DOAH Feb. 4, 2002; Miami-Dade Co. Sch. Bd., Mar. 13, 2002). Examples of such actions include those which:

(a) create the appearance of and opportunity for favoritism;

(b) erode public confidence that contracts are awarded equitably and economically;

(c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or

(d) are unethical, dishonest, illegal, or fraudulent." Id. at 58.

83. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38 (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 action is neither arbitrary nor capricious. See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

OCEAN BREEZE'S APPLICATION

84. As previously determined, the PDA with the Reverter Agreement submitted by Ocean Breeze satisfied the definition for an "eligible contract" and the requirements for Site Control in the RFA. Florida Housing's acceptance of the PDA was not clearly erroneous, contrary to competition, arbitrary or capricious.

85. With regard to the site control challenge, HTG Heron and Channel Side argued that the original contract was fatally flawed because Ocean Breeze was not a legal entity, therefore Mr. Swezy could not have had authority to enter into the PDA, and the PDA could not be considered an "eligible contract." Challenges to viability of contracts such as the PDA may only be resolved by a circuit court; enforceability cannot be determined by Florida Housing or an administrative law judge. See Madison Highlands, LLC, and Am. Residential Dev., LLC v. Fla. Housing Fin. Corp., Case No. 18-1558BID, RO at 12 (Fla. DOAH Jun. 6, 2018; final order not entered as of the date of this Order) (citing § 26.012, Fla. Stat.).^{8/}

86. Regardless, the issue is not whether the PDA was legally enforceable, but rather, whether it met the definition of "Eligible Contract" in the RFA.

87. The PDA submitted by Ocean Breeze satisfies the purpose of showing site control, and the plain and literal meaning of the language used in the RFA to define an Eligible Contract.

88. Petitioners failed to meet their burden to show Ocean Breeze should have been ineligible based on the validity of the PDA, and to prove Florida Housing's decision to award tax-credit funding to Ocean Breeze was contrary to statutes, rules, or the RFA specifications. See Pinnacle Rio, LLC, 2014 Fla. Div. Admin. Hear. 285, *50-51 (deeming application eligible even though its site control documentation contained an error in the purchaser's signature block); Houston Street Manor LP v. Fla. Housing Fin. Corp., Case No. 15-3302BID, 2015 Fla. Div. Adm. Hear. LEXIS 329, *23-32 (Fla. DOAH Aug. 18, 2015; FHFC Sept. 21, 2015) (finding no clear error of finding site control requirement satisfied; addressing the meaning of "Eligible Contract" where applicant demonstrated site control adequately, even though property continued to be marketed where purchasing agreement contained right of first refusal).

89. Additionally, although not relevant to the issue of eligibility, the undersigned rejects the argument that if Florida Housing determines during the credit underwriting process the PDA is unenforceable, the tax credits would somehow sit fallow. The RFA specifically provides a remedy for reassigning the funding award to the applicant next in line.

HTG HERON APPLICATION

90. With regard to the challenge to HTG Heron's eligibility, the evidence did not demonstrate that Florida

Housing's acceptance of the address was clearly erroneous, contrary to competition, arbitrary, or capricious. Instead, as found above, the evidence adduced at hearing established that HTG Heron met the RFA specifications.

91. Even if it had been shown that HTG Heron had deviated from the RFA instructions by not providing the correct current address, the actual development site was identifiable and could have been gleaned from other documentation provided in the application, such as the coordinate sites and maps. Moreover, even if the use of "W. 17th Court" was erroneous, which it was not, such an error was not shown to give HTG Heron a competitive advantage. Thus, if an error had been established, it would be a minor irregularity that could have been waived. See HTG Osprey Pointe, LLC v. Fla. Housing Fin. Corp., Case No. 18-0479BID, 2018 Fla. Div. Adm. Hear. LEXIS 235, *21 (Fla. DOAH Apr. 19, 2018) (finding submission of opposite coordinates for longitude entries was waivable error where elsewhere in application it was clear the proposed housing development was in Miami-Dade county, and not in India).

CHANNEL SIDE APPLICATION

92. Lastly, as to the challenge to Channel Side's error of listing among the sellers an entity named "MWCP, Inc. f/k/a Blueprint Properties, Inc., a Delaware corporation" instead of "Blueprint Properties, Inc.," the evidence did not demonstrate

that Florida Housing's acceptance of Channel Side's application was clearly erroneous, contrary to competition, arbitrary, or capricious. See Heritage at Pompano Housing Partners, Ltd. v. Fla. Housing Fin. Corp., Case No. 14-1361BID, 2014 Fla. Div. Adm. Hear. LEXIS 296, *36 (Fla. DOAH June 10, 2014; FHFC June 13, 2014) (deeming application eligible even though its site control documentation contained an error in identifying the seller of the property).

93. Instead, the error was simply a mistake that had no effect on Channel Side's actual control of the site or eligibility. The error would have to be considered a minor irregularity that should be waived by Florida Housing.

94. Based on the foregoing standards, the challengers failed to meet their burden to prove that Florida Housing's determinations related to eligibility were contrary to the governing statutes, rules, policies, or the RFA provision; or that Florida Housing's award of funding to Ocean Breeze should be set aside.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Florida Housing Finance Corporation, enter a final order consistent with its initial decisions: (1) finding the applications of Ocean Breeze, HTG Heron, and Channel Side eligible for funding; (2) awarding the

RFA Palm Beach County funding for the Ocean Breeze proposed development; and (3) dismissing the formal written protests of HTG Heron and Channel Side.

DONE AND ENTERED this 29th day of June, 2018, in
Tallahassee, Leon County, Florida.



HETAL DESAI
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2018.

ENDNOTES

^{1/} All references to the Florida Administrative Code and the Florida Statutes are to the 2017 versions.

^{2/} On May 15, 2018, HTG Heron filed its Motion for Official Recognition pursuant to Florida Administrative Code Rule 28-106.213(6), and sections 90.202 and 90.203, Florida Statutes (2017). On May 18, 2018, this motion was denied without prejudice to renew the motion at the hearing.

^{3/} Florida Housing's mission is to promote the public welfare through governmental financing for affordable housing in Florida.

^{4/} Although not crucial to the bid protest analysis, an explanation of the low-income housing tax credit program (tax credit program) is helpful in understanding the competitive nature of the RFA process. The U.S. Treasury makes tax credits available to the state of Florida. As explained by Judge

Elizabeth McArthur in Heritage at Pompano Housing Partners, Ltd. v. Florida Housing Finance Corporation, Case No. 14-1361BID (Fla. DOAH June 10, 2014; FHFC June 13, 2014), the tax credit program was enacted by Congress to incentivize private investors to develop affordable rental housing. These are tax credits, not tax deductions. For example, a \$1,000 deduction in a 15-percent tax bracket reduces taxable income by \$1,000 and reduces tax liability by \$150. However, a \$1,000 tax credit reduces tax liability by \$1,000. Moreover, investors receive a dollar-for-dollar credit against their federal tax liability each year over a period of ten years. The amount of the annual credit is based on the amount invested in affordable housing. As such, they are highly sought after among developers.

Obviously, developers can use the awarded tax credits, but most do not. Rather, more often developers sell the tax credits to investors to raise equity capital for their projects. The sale of purchased tax credits can be used for ten years by the investors that provide the equity. Theoretically, it is a "win-win" for investors, developers and the tenants. When sold, the investors provide equity which, in turn, reduces the debt associated with the project, which, in turn, lowers the developer's debt. As a result, the housing property can (and must) offer lower, more affordable rent. In order to receive the tax credits, a developer must agree to keep rents at an affordable level for periods of 30 to 50 years.

^{5/} These charts were posted online at www.floridahousing.org and submitted at the hearing as Joint Exhibits 3 and 4.

^{6/} Although in the Joint Stipulation HTG Heron Estates withdrew its challenge as to whether Ocean Breeze East GP, LLC, was a validly formed entity and named as a proper entity in the application, it is unclear whether Channel Side asserted this argument as well. Because it was addressed in some of the PROs, the undersigned has addressed the issue in this Recommended Order.

^{7/} Although not addressed in the hearing, the issue of Channel Side's eligibility is noted as a disputed issue in the Joint Stipulation and addressed in all the PROs submitted except for HTG Heron.

^{8/} The subsequent actions of Ocean Breeze and the BBCRA--the payment of the deposits, and acceptance of benefits under the contract--would seem to serve as ratification of the PDA. See,

e.g., New Testament Baptist Church, Inc. v. Dep't of Transp., 993
So. 2d 112 (Fla. 4th DCA 2008).

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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.