

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DURHAM PLACE, LTD; AND DURHAM  
PLACE DEVELOPER, LLC,

Petitioners,

vs.

Case No. 19-1396BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

\_\_\_\_\_  
/ AMELIA COURT AT CREATIVE VILLAGE  
- PHASE II PARTNERS, LTD.,

Petitioner,

vs.

Case No. 19-1397BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

DURHAM PLACE, LTD; AND DURHAM  
PLACE DEVELOPER, LLC; AND  
HAWTHORNE PARK, LTD; AND  
HAWTHORNE PARK DEVELOPER, LLC,

Intervenors.  
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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 (2018),<sup>1/</sup> on April 15, 2019, in Tallahassee, Florida.

APPEARANCES

For Petitioners Durham Place, LTD.; and Durham Place Developer, LLC ("Durham Place") (Case No. 19-1936BID); and Intervenors Hawthorne Park, LTD; and Hawthorne Park Developer, LLC ("Hawthorne Park") (Case No. 19-1937BID):

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For Petitioner Amelia Court at Creative Village - Phase II Partners, LTD. ("Amelia Court") (Case No. 19-1937BID):

M. Christopher Bryant, Esquire  
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For Respondent Florida Housing Finance Corporation ("Florida Housing"):

Christopher Dale McGuire, Esquire  
Florida Housing Finance Corporation  
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STATEMENT OF THE ISSUE

The issue in this bid protest matter is whether Respondent, Florida Housing Finance Corporation's, intended award of funding under Request for Applications 2018-112 was contrary to its governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

This matter involves two protests to a Notice of Intent to Award issued by Florida Housing under Request for Applications 2018-112 ("RFA 2018-112"). On September 6, 2018, Florida Housing, through RFA 2018-112, solicited applications to allocate competitive tax credits for affordable housing developments located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas counties.

On February 1, 2019, Florida Housing posted notice of its intent to award funding in Orange County, Florida, to Hawthorne Park.

On February 15, 2019, Durham Place, the third ranked applicant, timely filed a formal written protest challenging Florida Housing's scoring of the second ranked applicant, Amelia Court (DOAH Case No. 19-1396BID).<sup>2/</sup> On February 18, 2019, Amelia Court timely filed a formal written protest of Florida Housing's award to Hawthorne Park (DOAH Case No. 19-1396BID). On March 15, 2019, Hawthorne Park filed a Notice of Intervention of a Specifically Named Party in Case No. 19-1397BID (Amelia Court's protest).<sup>3/</sup> On March 25, 2019, Durham Place also filed a Motion to Intervene in DOAH Case No. 19-1397BID, which was granted.<sup>4/</sup>

On March 15, 2019, Florida Housing referred both Durham Place's and Amelia Court's protests to the Division of

Administrative Hearings ("DOAH") for assignment to an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing. On March 20, 2019, DOAH Case Nos. 19-1396BID and 19-1397BID were consolidated pursuant to Florida Administrative Code Rule 28-106.108.

The final hearing was held on April 15, 2019. Joint Exhibits 1 through 7 were admitted into evidence. Amelia Court's Exhibits 7, 8, 10, 11, 13, and 14 were admitted into evidence.<sup>5/</sup> Florida Housing presented the testimony of Marisa Button. Amelia Court called Scott Culp to testify.

A one-volume Transcript of the final hearing was filed with DOAH on April 30, 2019. At the close of the hearing, the parties were advised of a ten-day time frame after receipt of the hearing transcript to file post-hearing submittals. 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 the State of Florida. For purposes of this administrative proceeding, Florida Housing is considered an agency of the State of Florida.

2. Hawthorne Park, Amelia Court, and Durham Place are all properly registered business entities in Florida and engage in the business of providing affordable housing.

3. The low-income housing tax credit program (commonly referred to as "tax credits" or "housing credits") was enacted to incentivize the private market to invest in affordable rental housing. The affordable housing industry relies heavily on public funding, subsidies, and tax credits to develop projects that are financially sustainable in light of the sub-market rents they charge. Because tax credits allow developers to reduce the amount necessary to fund a housing project, they can (and must) offer the tax credit property at lower, more affordable rents. Developers also agree to maintain rental prices at affordable levels for periods of 30 to 50 years.

4. Florida Housing has been designated as the housing credit agency for the state of 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 those credits. § 420.5099, Fla. Stat.

5. Florida Housing uses a competitive solicitation process to award low-income housing tax credits. Florida Housing initiates the solicitation process by issuing a request for

applications ("RFA"). §§ 420.507(48) and 420.5087(1), Fla. Stat.; and Fla. Admin. Code R. 67-60.009(4).

6. The RFA at issue in this matter is RFA 2018-112, entitled "Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties." The purpose of RFA 2018-112 is to distribute funding to create affordable housing developments in the State of Florida. Through RFA 2018-112, Florida Housing intends to provide an estimated \$17,314,387.00 of housing tax credits.

7. This bid protest concerns Florida Housing's intended award of tax credits to Hawthorne Park for its proposed housing development in Orange County, Florida. Amelia Court, the second ranked developer, challenges Florida Housing's determination of eligibility and award to Hawthorne Park. Durham Place, the third-place developer, challenges Florida Housing's ranking of Amelia Court.

8. Florida Housing issued RFA 2018-112 on September 6, 2018.<sup>6/</sup> Applications were due to Florida Housing by November 13, 2018.

9. Florida Housing received 23 applications for housing credits under RFA 2018-112. Hawthorne Park, Amelia Court, and Durham Place all timely applied for funding to assist in the development of multi-family housing in Orange County, Florida.

10. RFA 2018-112 set forth certain information which each applicant was required to submit with the application. RFA 2018-112, Section Five, A.1, expressly stated that “[o]nly Applications that meet all of the following Eligibility Items will be eligible for funding and considered for funding selection.” Thereafter, Section Five, A.1, listed 45 separate Eligibility Items.

11. Pertinent to these bid protests, one Eligibility Item required each applicant to demonstrate that its housing project “[q]ualifies for Local Government Support.” An applicant satisfied this requirement by submitting a Florida Housing Local Government Verification of Contribution Form (a “Contribution Form”) as referenced in RFA 2018-112, Sections Four, A.11.a.(3), and A.11.b. Failure to show evidence of Local Government Support would render an application ineligible for funding.

12. In addition, RFA 2018-112, Section Four, A.3.c.(1), required each applicant to “state the name of each Developer, including all co-Developers” of the planned housing project. The application was also to include a “Principals of the Applicant and Developer(s) Disclosure Form.” See Fla. Admin. Code R. 67-48.002(93).

13. A total of six applicants applied for funding for Orange County. Upon receipt of the applications, Florida Housing assigned each applicant a lottery number. Hawthorne

Park was given a lottery number of 1. Amelia Court was assigned a lottery number of 24. Durham Place received a lottery number of 3.

14. Thereafter, Florida Housing selected a Review Committee from amongst its staff to score each application. The Review Committee reviewed, deemed eligible or ineligible, scored, and ranked applications pursuant to the terms of RFA 2018-112, as well as Florida Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.

15. The Review Committee met on January 22, 2019, to discuss their scores. The Review Committee found that Hawthorne Park's application satisfied all mandatory eligibility requirements for funding and awarded it 10 out of 10 Total Points. Amelia Court was also found to have satisfied all eligibility requirements for funding, and also received a score of 10 out of 10 Total Points. Finally, the Review Committee concluded that Durham Place satisfied the eligibility requirements for funding, and it too was given a score of 10 out of 10 Total Points.

16. On February 1, 2019, the Review Committee presented its recommendation of preliminary rankings and allocations to Florida Housing's Board of Directors. The Board of Directors also found that Hawthorne Park, Amelia Court, and Durham Place



all satisfied the mandatory and eligibility requirements for funding in Orange County.

17. Thereafter, per RFA 2018-112, Section Five, B.2., and Section Six, the Board of Directors selected Hawthorne Park to receive tax credits for its affordable housing development in Orange County. The Board of Directors chose Hawthorne Park based on the Review Committee's recommendation, RFA 2018-112's funding selection criteria, as well as the fact that Hawthorne Park held the lowest lottery number of 1.

18. The Board of Directors ranked Amelia Court's application the next highest based on the selection criteria. Durham Place's application placed third. Durham Place held a lower lottery number than Amelia Court. However, as addressed below, Amelia Court's application included Local Government Support in the form of Local Government Areas of Opportunity Funding ("Areas of Opportunity Funding"), as opposed to Local Government Contribution funding. Under the provisions of RFA 2018-112, applicants who obtained Areas of Opportunity Funding were given a ranking preference. Of the six applications for Orange County, only Hawthorne Park and Amelia Court claimed Areas of Opportunity Funding.

19. The Board of Directors approved \$2,300,000 in annual federal tax credits to help finance Hawthorne Park's 120-unit, Garden Apartment complex in Orange County.

I. AMELIA COURT'S CHALLENGE OF HAWTHORNE PARK:

20. Amelia Court protests Florida Housing's selection of Hawthorne Park instead of its own development. Amelia Court specifically challenges Florida Housing's determination that Hawthorne Park submitted a valid Contribution Form.<sup>7/</sup>

21. Amelia Court seeks an allocation of \$2,375,000 in tax credits to help finance its affordable housing project in the City of Orlando. If Amelia Court successfully demonstrates that Florida Housing erred in accepting, then scoring, Hawthorne Park's application, Amelia Court, by virtue of qualifying for Areas of Opportunity Funding, as well as holding the next lowest lottery number, stands in line to be selected for funding instead of Hawthorne Park.

22. As indicated above, RFA 2018-112, section Four, A.11, required applicants to provide evidence of Local Government Support for their proposed housing development. This support could come in the form of a grant, loan, fee waiver and/or a fee deferral from the local government entity. Florida Housing did not intend for this local funding to serve as the primary financial support for the housing project. Instead, Florida Housing established a contribution threshold amount which could be used to gauge the local government's interest in the proposed development.

23. An applicant could satisfy the Local Government Support requirement in two ways. An applicant could obtain either 1) a Local Government Contribution (Section Four, A.11.a.); or 2) Areas of Opportunity Funding (Section Four, A.11.b.).

24. RFA 2018-112 established the minimum financial commitment for the Local Government Contribution at \$75,000. Areas of Opportunity Funding contemplated much larger support from the local government. RFA 2018-112, Section Four, A.11.b., called for a cash loan and/or a cash grant in a minimum qualifying amount ranging from \$472,000 to \$747,000 depending on the building and construction type. Consequently, as set forth in RFA 2018-112, Section Five, B.3.e., and Section Six, Areas of Opportunity Funding enabled an application to receive a preference in the selection process.

25. To substantiate the receipt of Local Government Support, applicants were instructed to include with their applications a properly executed Contribution Form. With respect to Areas of Opportunity Funding, RFA 2018-112, Section Four, A.11.b., stated:

In order to be eligible to be considered Local Government Areas of Opportunity Funding, the cash loans and/or cash grants must be demonstrated via one or both of the Florida Housing Local Government Verification of Contribution forms (Form Rev. 08-16), called "Local Government

Verification of Contribution - Loan" form and/or the "Local Government Verification of Contribution - Grant" form.

26. Both the Local Government Verification of Contribution - Loan form (the "Contribution Form - Loan") and the Local Government Verification of Contribution - Grant form (the "Contribution Form - Grant") directed an applicant to include certain information. First, the loan or grant must be dedicated to the specific RFA at issue (RFA 2018-112 in this matter). Next, the Contribution Form must explicitly record the face amount or value of the Local Government Contribution, as well as the source of the local government loan or grant. In addition, the funds could not come from a prohibited source.

27. Finally, the Contribution Form had to be signed by a representative of the local government who certified the correctness of the loan amount and source. The Contribution Form expressed:

This certification must be signed by the chief appointed official (staff) responsible for such approvals, Mayor, City Manager, County Manager/Administrator/Coordinator, Chairperson of the City Council/Commission or Chairperson of the Board of County Commissioners. . . . The Applicant will not receive credit for this contribution if the certification is improperly signed.

28. RFA 2018-112, Section Four, A.11.b., also required that "funding . . . shall be paid in full by the local

jurisdiction no later than 90 days following the date the proposed Development is placed in-service.

29. Hawthorne Park, to establish its Areas of Opportunity Funding, included both a Contribution Form - Loan, as well as a Contribution Form - Grant, for a combined Local Government Support amount of \$567,500. Hawthorne Park's Contribution Form - Loan represented that Orange County had agreed to provide Hawthorne Park a reduced interest rate loan in the amount of \$317,500. This loan, by itself, was not large enough to meet the Areas of Opportunity Funding threshold. However, Hawthorne Park's Contribution Form - Grant identified an additional \$250,000 from Orange County in the form of a State Housing Initiative Partnership ("SHIP")<sup>8/</sup> grant. The combined loan and grant (if both are valid) established sufficient Local Government Support to qualify Hawthorne Park for the Areas of Opportunity Funding ranking preference.

30. Amelia Court alleges that the SHIP grant Hawthorne Park identified on its Contribution Form - Grant is illegal or invalid.<sup>9/</sup> To formally contest Orange County's SHIP grant, Atlantic Housing Partners, LLLP ("Atlantic Housing"), the developer of the Amelia Court housing project, sued Orange County and Wendover Housing Partners, LLC ("Wendover"), in the Circuit Court of the Ninth Judicial Circuit in Orange County, Florida, in a case entitled Atlantic Housing Partners, LLLP v.

Orange County, Florida, and Wendover Housing Partners, LLC, Case No. 2018-CA-12227-O. (The suit identifies Wendover as the developer of the Hawthorne Park housing project.)

31. In the circuit court action, Amelia Court specifically alleges that Orange County failed to follow its local housing assistance plan ("Assistance Plan") prior to offering the SHIP grant to Hawthorne Park. Amelia Court claims that the Assistance Plan required Orange County to initiate a competitive solicitation process (request for proposals) before awarding SHIP funds.<sup>10/</sup> Orange County undisputedly did not do so prior to issuing the SHIP grant to Hawthorne Park. Based on Orange County's failure to comply with its Assistance Plan, Amelia Court charges that Hawthorne Park's Contribution Form - Grant is invalid.

32. On January 21, 2019, the circuit court issued a Temporary Injunction. Agreeing with Atlantic Housing/Amelia Court, the circuit court held that "Orange County deviated from the requirements of its [Assistance Plan]." The circuit court found that, "[b]y the plain terms of its own [Assistance Plan], Orange County was required to conduct an [request for proposals] to award SHIP funds to Wendover."

33. Through the Temporary Injunction, the circuit court enjoined Orange County from conveying the SHIP funds to Wendover

for the Hawthorne Park development. The circuit court specifically ruled that Orange County and Wendover:

are temporarily enjoined, pending a final adjudication and the granting or [sic] permanent relief, from awarding SHIP funds to Wendover as [Areas of Opportunity Funding] for Orange County related to Hawthorne Park and the 2018 RFA.

The circuit court concluded that, "Wendover should not be permitted to compete given its illegal award of SHIP funds as an [Areas of Opportunity Funding] from Orange County in the first place."

34. Florida Housing, however, was not joined as a party to the circuit court action. Commenting on this fact, the circuit court inserted a footnote stating:

Inasmuch as [Florida Housing] is not a party to these proceedings, necessarily, this injunction does not enjoin any activity of [Florida Housing].

35. On January 22, 2019, Orange County and Wendover appealed the Temporary Injunction to the Fifth District Court of Appeal. The appeal is pending as of the date of this Recommended Order.

36. In the meantime, on January 31, 2019, the circuit court entered an Order Granting Motion to Vacate Stay. Consequently, the terms of the Temporary Injunction remain in effect pending the outcome of the appeal.

37. Based on the Temporary Injunction, at this time, Orange County is not authorized to distribute the \$250,000 SHIP grant to Hawthorne Park to help fund its housing project. Without the SHIP grant, Hawthorne Park does not qualify for the Areas of Opportunity Funding selection preference. As a result, Amelia Court contends that Florida Housing should invalidate Hawthorne Park's Areas of Opportunity Funding, and select Amelia Court as the top ranked applicant for tax credits for Orange County.

38. In response to Amelia Court's challenge, Florida Housing takes the position that the Temporary Injunction is a preliminary determination, not a final adjudication. Consequently, the Temporary Injunction does not conclusively establish that the SHIP grant from Orange County is tainted by fraud or illegality, or is in some manner invalid. Therefore, the Contribution Form - Grant that Hawthorne Park provided with its application complied with the express terms of RFA 2018-112, and Hawthorne Park's application remains eligible for tax credit funding.

39. In support of its position, Florida Housing presented the testimony of Marisa Button, Florida Housing's Director of Multi-family Allocations. In her job, Ms. Button oversees Florida Housing's RFA process.



40. Ms. Button disagreed with Amelia Court's argument that Florida Housing should reject the Contribution Form - Grant based on the circuit court's Temporary Injunction. Ms. Button testified that, as a rule, Florida Housing assumes the correctness of a properly executed Contribution Form. Because Hawthorne Park's Contribution Form - Grant included the required information and signatory, Florida Housing did not question its underlying validity when scoring the applications.

41. Ms. Button further explained that Florida Housing does not have the authority to independently determine whether a local government followed the appropriate procedures to award a grant or loan. Therefore, Florida Housing defers to the local government's exercise of its own ordinances and processes. Similarly, Ms. Button maintained that the circuit court is the proper venue to determine the validity of the Orange County SHIP grant. Ms. Button declared that Florida Housing will be bound by the circuit court's ultimate ruling on the issue, whenever that decision becomes final.<sup>11/</sup> However, until the \$250,000 SHIP grant is found invalid or otherwise prohibited, Florida Housing considers its initial decision to award tax credits to Hawthorne Park to be appropriate and correct.

42. On the other hand, Ms. Button conveyed that if a court does rule that Orange County's SHIP grant is invalid or illegal, Florida Housing will deem Hawthorne Park's Contribution Form -

Grant as though it contained a material error. In other words, Florida Housing would treat the Contribution Form - Grant as nonresponsive, or as if it was left blank. Consequently, if Hawthorne Park's remaining Local Government Support (the \$317,500 loan from Orange County) did not reach the financial threshold to qualify for Areas of Opportunity Funding, Hawthorne Park would not receive a scoring preference.

43. Regarding the question of how Florida Housing will treat Hawthorne Park's application while the \$250,000 SHIP grant is temporarily enjoined, Ms. Button testified that Florida Housing would reevaluate the situation in its credit underwriting process. Ms. Button explained that after its Board of Directors selects an application, Florida Housing invites the applicant (Hawthorne Park) into credit underwriting. During that stage, the application is reexamined to ensure that it complies with all RFA eligibility requirements, including the obligation to secure sufficient Local Government Support.<sup>12/</sup> If Hawthorne Park has the necessary Areas of Opportunity Funding to ultimately finance its housing development, the award of tax credits proceeds. If an award is determined inappropriate based on the circumstances, then Florida Housing would likely not advance its efforts to fund Hawthorne Park's development.<sup>13/</sup>

44. That being said, Ms. Button stressed that, at this time, no court has conclusively invalidated the \$250,000 SHIP

grant to Hawthorne Park. Furthermore, the circuit court expressly stated that the Temporary Injunction "does not enjoin any activity" of Florida Housing. Therefore, Florida Housing takes the position that Hawthorne Park has not been formally disqualified from consideration under RFA 2018-112. Neither is Florida Housing prohibited from proceeding with an award of tax credits to Hawthorne Park.

45. In response to Amelia Court's challenge, Hawthorne Park concurs with Florida Housing that the Temporary Injunction is not a final judgment. Therefore, the Temporary Injunction does not preclude Florida Housing from awarding tax credits under RFA 2018-112 for Hawthorne Park's development.

46. Hawthorne Park points out that the Temporary Injunction is a provisional decision by the circuit court. The purpose of the Temporary Injunction is to maintain the status quo by temporarily enjoining Orange County from releasing SHIP funds for the Hawthorne Park housing project. However, the Temporary Injunction, without more, does not automatically void Orange County's selection of Wendover/Hawthorne Park for the SHIP grant. Therefore, the Contribution Form - Grant that Hawthorne Park submitted with its application remains in effect unless and until the circuit court issues a final ruling.

47. Furthermore, Hawthorne Park insists that Orange County's allocation of SHIP funds does not violate any law or

local ordinance. Hawthorne Park declares that the circuit court issued the Temporary Injunction based on a misunderstanding of the Orange County Assistance Plan. Hawthorne Park fully intends to fight Atlantic Housing/Amelia Court's allegations in circuit court where it will have a full opportunity to present its case.

II. DURHAM PLACE'S CHALLENGE OF AMELIA COURT:

48. Durham Place responded to RFA 2018-112 seeking an allocation of \$2,375,000 in tax credits to help finance its housing development in Orange County. Durham Place received the same score as Hawthorne Park and Amelia Court (10 out of 10 Total Points).

49. For its application, Durham Place secured Local Government Support in the amount of \$75,000. This funding was sufficient to satisfy the Local Government Contribution eligibility requirements under RFA 2018-112, Section Four, A.11.a. However, this funding amount was not large enough to receive a selection preference as Areas of Opportunity Funding. Therefore, Durham Place's application fell behind Hawthorne Park and Amelia Court in RFA 2018-112's sorting methodology under RFA 2018-112, Section Five, B.2.

50. Nevertheless, if the evidence shows that Florida Housing should disqualify Hawthorne Park's Areas of Opportunity Funding, and the evidence further demonstrates that Amelia Court's application was nonresponsive or ineligible, then Durham

Place would be entitled to an award of tax credits as the third ranked qualified applicant.<sup>14/</sup>

51. Durham Place contests two aspects of Amelia Court's application. First, Durham Place claims that (similar to Hawthorne Park) Amelia Court did not qualify for the Areas of Opportunity Funding selection preference under RFA 2018-112, Section Four, A.11.b.

52. With its application, Amelia Court provided a Contribution Form - Grant from the City of Orlando purporting to commit \$625,750 to its housing project. The Contribution Form - Grant identifies the source of the grant as the "City of Orlando - Community Redevelopment Agency (CRA)." The Contribution Form - Grant was signed by Byron Brooks as the Chief Administrative Officer of the City of Orlando.

53. Durham Place questions whether Mr. Brooks is the proper signatory to certify a grant from the CRA. Durham Place implies that the CRA does not employ Mr. Brooks. Therefore, he is not "the chief appointed official (staff) responsible for such approvals" who could certify the legitimacy of CRA's grant to the Amelia Court housing project.

54. Second, RFA 2018-112, Section Four, A.3.c.(1), required each applicant to "state the name of each Developer, including all co-Developers" of the housing project. Durham Place alleges that Amelia Court failed to list all the

developers or co-developers of its housing project. In support of its argument, Durham Place points to a Condominium Purchase Agreement that Amelia Court included with its Site Control Certification Form to demonstrate its site control under RFA 2018-112, Section Four, A.7. The Condominium Purchase Agreement identified "Amelia Court Developers, LLC" ("Amelia Court Developers") as a "Developer" of its proposed housing site.

55. Durham Place argues that Amelia Court did not list Amelia Court Developers in its application as either a developer, co-developer, or principal. By failing to disclose either Amelia Court Developers as a co-developer of the project or list the names of the officers of Amelia Court Developers as principals, Durham Place asserts that Amelia Court failed to include a mandatory Eligibility Item.

56. Amelia Court refutes Durham Place's allegations. Regarding its Local Government Support, Amelia Court claims that the CRA is a valid source for its Areas of Opportunity Funding. Amelia Court's retort was essentially unrebutted. At the final hearing, Durham Place did not present any evidence showing that Mr. Brooks was not authorized to represent the CRA on the Contribution Form - Grant. No party called Mr. Brooks to testify.

57. Regarding Amelia Court's developers or co-developers, Amelia Court introduced the testimony of Scott Culp. Mr. Culp

asserted that Atlantic Housing is the sole developer of the Amelia Court tax credit project. As the developer, Atlantic Housing will manage the work on the condominium building, the professionals who will design it, as well as the contractor who will construct the affordable housing units. Mr. Culp declared that no other entity or individual will participate in the project as either a developer or co-developer.

58. Regarding the role of Amelia Court Developers, Mr. Cole explained that Amelia Court Developers is the leasehold owner pursuant to a ground lease, as well as created the legal structure of the condominium in which the Amelia Court project will be located. Amelia Court Developers hired Atlantic Housing to develop the Amelia Court housing community. However, Amelia Court Developers does not have the same roster of principals as Atlantic Housing. Neither will Amelia Court Developers play any other role in Amelia Court's application for tax credits under RFA 2018-112.

59. Ms. Button testified that, to date, Florida Housing is not aware of any evidence supporting Durham Place's claim that Mr. Brooks is not authorized to sign Amelia Court's Contribution Form on behalf of the CRA. Furthermore, as with Hawthorne Park's Contribution Form - Grant, Ms. Button did not believe that Florida Housing has the authority to make an independent determination whether the CRA failed to comply with the

appropriate procedures to award \$625,750 to the Amelia Court housing project.

60. Therefore (as with Hawthorne Park's application), after Florida Housing determined that Amelia Court's Contribution Form - Grant was properly executed, Florida Housing accepted it as valid on its face, and scored it accordingly. At the final hearing, Ms. Button maintained that, until Florida Housing receives some evidence that the Contribution Form - Grant is invalid, or tainted by fraud, illegality, or corruption, Amelia Court's second place ranking is appropriate.

61. Florida Housing reached a similar conclusion regarding Durham Place's allegation that Amelia Court did not identify all of its housing project's developers or co-developers. Ms. Button testified that, while Florida Housing did observe that Amelia Court Developers was connected to the proposed development through the Condominium Purchase Agreement, Florida Housing is not aware of any evidence indicating that Amelia Court Developers will serve as a developer or co-developer for Amelia Court's housing project.

62. Based on the evidence and testimony presented at the final hearing, Amelia Court did not establish, by a preponderance of the evidence, that Florida Housing's decision to consider, then rank, Hawthorne Park's application was clearly erroneous, contrary to competition, arbitrary, or capricious.



Accordingly, Amelia Court did not meet its burden of proving that Florida Housing's proposed action to award tax credit funding to Hawthorne Park under RFA 2018-112 was contrary to its governing statutes, rules or policies, or the provisions of RFA 2018-112.

63. Similarly, Durham Place failed to demonstrate that Florida Housing's consideration of Amelia Court's application was contrary to its governing statutes, rules or policies, or the solicitation specifications.

#### CONCLUSIONS OF LAW

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

65. Amelia Court challenges Florida Housing's selection of Hawthorne Park for an award of tax credit funding under RFA 2018-112. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests with Amelia Court as the party protesting the proposed agency action. Similarly, Durham Place bears the burden of proving its protest of the award to Amelia Court. See 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 bid 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.

66. 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.

67. Accordingly, Amelia Court (and Durham Place) must prove, by a preponderance of the evidence, that Florida Housing's proposed action is: (a) contrary to its governing

statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of RFA 2018-112. The standard of proof Amelia Court must meet to establish that the award to Hawthorne Park 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.; and AT&T Corp. v. State, Dep't of Mgmt. Servs., 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

68. 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.

69. 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).

70. 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.

71. 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."

72. Further, 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).

73. According to rule 67-60.006(1):

The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with

respect to its Application. If a determination of nonresponsiveness is made by [Florida Housing], the Application shall not be considered.

74. In addition, by submitting an application, RFA 2018-112, Section Three, F.3., required each applicant to certify that:

Proposed Developments funded under this RFA will be subject to the requirements of the RFA, inclusive of all Exhibits, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the requirements outlined in Rule Chapter 67-48, F.A.C. and the Compliance requirements of Rule Chapter 67-53, F.A.C.

75. Turning to the protests at hand, notwithstanding the effect of the Temporary Injunction (discussed below), the undersigned finds that Florida Housing's decision to consider, then rank, Hawthorne Park's application, as well as Amelia Court's application, was not contrary to its governing statutes; its rules or policies; or the specifications of RFA 2018-112.

76. Regarding Amelia Court's protest, the evidence in the record establishes that Hawthorne Park's Contribution Form - Grant contained all the required information and was valid on its face on the date Hawthorne Park submitted its application to Florida Housing. No evidence shows that Orange County's commitment of SHIP funds was not effective as of the application deadline, or will not be paid in full within 90 days following the date Hawthorne Park's proposed development is placed into

service (again, notwithstanding the Temporary Injunction). Therefore, as an initial conclusion, Florida Housing properly acted within its authority to qualify Hawthorne Park for Areas of Opportunity Funding, and rank its application accordingly.

77. The central issue in Amelia Court's challenge is the impact of the Temporary Injunction. Amelia Court argues that the Temporary Injunction effectively invalidates Hawthorne Park's Contribution Form - Grant. Amelia Court contends that Florida Housing should treat the circuit court's preliminary ruling as a conclusive determination that Hawthorne Park will not receive \$250,000 in SHIP funds for its proposed housing development. Without the \$250,000 grant, Hawthorne Park will not qualify for the Areas of Opportunity Funding selection preference. Therefore, Florida Housing's award of tax credits to Hawthorne Park, as the top ranked developer, will be contrary to its governing statutes, rules, policies, or the solicitation specifications.

78. However, based on the applicable case law, Florida Housing and Hawthorne Park present the more persuasive argument that the Temporary Injunction does not constitute a binding or final ruling that the SHIP grant is invalid. Neither does the Temporary Injunction preclude Florida Housing from considering Hawthorne Park's application under the terms of RFA 2018-112.

Therefore, Florida Housing is free to proceed with the award of tax credits in Orange County to Hawthorne Park.

79. Florida case law establishes that “[a] temporary injunction is provisional by nature.” Planned Parenthood of Greater Orlando, Inc. v. MMB Props., 211 So. 3d 918, 924 (2017). “The purpose of a temporary injunction is not to resolve a dispute on the merits, but rather to preserve the status quo until the final hearing when full relief may be granted.” Planned Parenthood, 211 So. 3d at 924 (quoting Grant v. Robert Half Intern., Inc., 597 So. 2d 801, 801-02 (Fla. 3d DCA 1992)). See also Kozich v. DeBrino, 837 So. 2d 1041, 1043 (Fla. 4th DCA 2002) (“ A trial court’s findings on a preliminary injunction do not constitute “law of the case” on final hearing. . . . The findings of fact and conclusions of law made at a preliminary injunction hearing are not binding on the court on final hearing, where the parties present their full case to the court”); and Hasley v. Harrell, 971 So. 2d 149, 152 (Fla. 2d DCA 2007) (“a true temporary injunction is not law of the case.”).

80. The non-binding effect of a temporary injunction is explained in Klak v. Eagles’ Reserve Homeowners’ Association, Inc., 862 So. 2d 947, 952-53 (Fla. 2d DCA 2004) as follows:

The issuance or denial of a preliminary injunction is the paradigmatic circumstance where a determination is made by a court without the benefit of a full hearing of the issues. See Univ. of Tex. v. Camenisch,



451 U.S. 390, 395, 101 S.Ct. 1830, 68 L.Ed.2d 175 (1981) (“[T]he findings of fact and conclusions of law made by a court granting a preliminary injunction are not binding at trial on the merits.”) (citations omitted). Because a decision based on a less-than-full hearing—such as the issuance or denial of a preliminary injunction—is by its very nature provisional, it would be nonsensical to give it binding effect on the subsequent proceedings in the same case.

81. Furthermore, by the circuit court’s express terms, the Temporary Injunction does not prevent “any activity” of Florida Housing, including an award of tax credits to Hawthorne Park. (Neither does the Temporary Injunction inhibit the actions of the administrative law judge in this matter.) The Temporary Injunction only controls the actions of Orange County and Wendover/Hawthorne Park “pending a final adjudication and the granting [of] permanent relief.”

82. Accordingly, Florida Housing’s decision to award funding to Hawthorne Park at this stage in the solicitation process is appropriate and correct under the circumstances. Ms. Button credibly testified (and the evidence shows) that Hawthorne Park’s Contribution Form – Grant was properly executed and valid at the time Florida Housing accepted it. Consequently, until a court issues a final decision to the contrary, Florida Housing must consider, and rank, Hawthorne Park’s application in accordance with the terms and conditions of RFA 2018-112. Therefore, as a matter of law, Florida Housing may proceed with

the award of tax credits to Hawthorne Park until it is affirmatively determined that Hawthorne Park cannot, or will not, receive the \$250,000 SHIP grant.

83. This matter is analogous to Brownsville Manor, LP v. Redding Development Partners, LLC, 224 So. 3d 891 (Fla. 1st DCA 2017). In Brownsville, the housing developer (Brownsville) appealed a Florida Housing final order finding it ineligible for funding. Following an administrative hearing, Florida Housing determined that Brownville's application did not qualify because Brownsville had not finalized its development location point (a "scattered site") at the time it submitted its application. Brownsville conceded that "it had not definitively determined the development's site configuration" at the application stage. However, Brownsville argued that it had submitted all the forms the RFA required, and it intended to comply with all RFA requirements should it be awarded tax credits. Brownsville further asserted that it intended to confirm its development location point "at the final site plan approval phase, which occurs during the credit underwriting process, not at the application stage."<sup>15/</sup>

84. In reversing Florida Housing's final order, the appellate court opined that:

Florida Housing was required to interpret the RFA consistently with its plain and unambiguous language. . . . Brownsville

clearly complied with all of the RFA requirements at the application stage by submitting the required forms, providing a [development location point], and providing the appropriate assurances that it intended to comply with all of the RFA terms. Brownsville, 224 So. 3d at 894.

85. Therefore, because “nothing in the RFA required Brownsville to begin the clustering process or guarantee approval as of the application stage,” Florida Housing should not have found Brownsville’s application ineligible “if the configuration of a proposed development would be fleshed out in the final site plan approval process, which occurs after the application stage during the credit underwriting.” Brownsville, 224 So. 3d at 895. Consequently, even though the true configuration of Brownsville’s development was “unknown at the application stage,” because Brownsville “complied with all that was required of it at the application stage under the plain and unambiguous terms of the RFA,” the appellate court ordered Florida Housing to reinstate Brownsville’s eligibility for funding.

86. Similarly, in this matter, the Temporary Injunction causes the availability of the Orange County SHIP grant to be “unknown at the application stage.” However, the evidence in the record establishes that Hawthorne Park provided the required Contribution Forms and complied with all RFA mandatory Eligibility Items when it submitted its application. Moreover, RFA 2018-112, Section Four, A.11.b., informed the applicants that

Areas of Opportunity Funding "shall be paid . . . no later than 90 days following the date the proposed Development is placed in-service." This provision appears to allow Florida Housing the flexibility to confirm the certainty of a local government grant during credit underwriting; where, pursuant to Brownville, Florida Housing may "flesh out" the viability of the Areas of Opportunity Funding status. Accordingly, at this stage in the application process, Florida Housing appropriately deemed Hawthorne Park's application eligible for an award of tax credit funding in Orange County.

87. Similar to Amelia Court's protest, Durham Place asserts that Amelia Court's Contribution Form - Grant should be considered non-responsive because the individual who signed the form (Mr. Brooks) lacked the authority to certify the source of the CRA grant. However, the evidence shows that the Contribution Form - Grant was valid on the face of the document when Amelia Court applied for funding. In addition, at the final hearing, Durham Place did not produce any substantive evidence or testimony that Mr. Brooks was not authorized to certify the validity of the CRA grant. Neither did Durham Place prove that the CRA will not pay \$625,750 to Amelia Court for its housing development. Accordingly, Durham Place did not meet its burden of proving that Florida Housing's decision to deem Amelia Court eligible for Areas of Opportunity Funding was contrary to

Florida Housing's governing statutes, rules or policies, or the specifications of RFA 2018-112.

88. Further, the evidence does not support Durham Place's claim that Amelia Court should have identified Amelia Court Developers as a developer or co-developer of its housing project. Mr. Culp credibly testified that Atlantic Housing is the only entity that will serve as the developer for Amelia Court. The fact that Amelia Court Developers is identified in a Condominium Purchase Agreement is not sufficient, without more information, to establish that it will participate as another tax credit developer for Amelia Court. Therefore, Florida Housing appropriately considered and ranked Amelia Court's application.

89. In sum, the evidence in the record establishes that Florida Housing's award to Hawthorne Park followed the selection process outlined in RFA 2018-112. At the final hearing, Florida Housing presented good faith, factual, and logical reasons why it found Hawthorne Park's application complied with the mandatory Eligibility Items detailed in RFA 2018-112, and then ranked Hawthorne Park higher than its competitors. (The undersigned reaches the same conclusion regarding Amelia Court's second ranked application.)

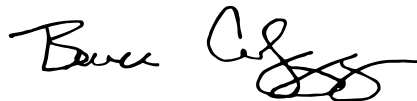
90. Conversely, Amelia Court failed to demonstrate that Florida Housing's award of tax credits to Hawthorne Park was made in a manner that was clearly erroneous, contrary to

competition, arbitrary, or capricious. Therefore, Amelia Court did not meet its burden of proving that Florida Housing's decision to provide tax credit funding for Hawthorne Park's proposed housing development was contrary to its governing statutes, rules, or policies, or RFA 2018-112's terms or provisions. Florida Housing's selection of Hawthorne Park should not be set aside.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order dismissing the protests of both Amelia Court and Durham Place. It is further recommended that the Florida Housing Finance Corporation select Hawthorne Park as the recipient of tax credit funding for Orange County under RFA 2018-112.

DONE AND ENTERED this 7th day of June, 2019, in Tallahassee, Leon County, Florida.



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J. BRUCE CULPEPPER  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 7th day of June, 2019.

ENDNOTES

<sup>1/</sup> Unless otherwise stated, all citations to the Florida Statutes and Florida Administrative Code are to the 2018 versions.

<sup>2/</sup> Durham Place subsequently amended its formal written protest to include allegations challenging Florida Housing's award to Hawthorne Park.

<sup>3/</sup> Under Florida Administrative Code Rule 28-106.205(3), specifically-named persons, whose substantial interests are being determined in the proceeding, may become a party by entering an appearance and need not request leave to intervene.

<sup>4/</sup> No protests were made to the specifications or terms of RFA 2018-112.

<sup>5/</sup> Following the final hearing, Hawthorne Park, with the undersigned's acquiesce, filed a Second Request for Official Recognition attaching numerous filings and pleadings from the related action pending in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida. Hawthorne Park proposed that these documents would help establish the timeline of the circuit court proceedings. Upon review, however, the only documents relevant to this administrative matter are those accepted into evidence as Amelia Court Exhibits 7 and 8. Therefore, Hawthorne Park's Second Request for Official Recognition is denied.

<sup>6/</sup> Florida Housing subsequently modified RFA 2018-112 on October 4 and October 18, 2018.

<sup>7/</sup> Hawthorne Park's Contribution Form - Grant is the only portion of its application challenged in this bid protest.

<sup>8/</sup> The SHIP Act is governed by sections 420.907-.9079. Under the SHIP Act, Florida Housing provides funds to local governments "as an incentive for the creation of local housing partnerships, to expand production of and preserve affordable housing, to further the housing element of the local government

comprehensive plan specific to affordable housing, and to increase housing-related employment.” § 420.9072, Fla. Stat.

<sup>9/</sup> With the exception of the legitimacy of the SHIP grant, no party has alleged any other material errors in Hawthorne Park’s application.

<sup>10/</sup> The circuit court specifically referenced the Assistance Plan, section II.E.a., which states:

[t]he availability of funding will be marketed to the multi-family affordable housing development community and in accordance with SHIP requirements; the availability of SHIP funds, services and selection criteria will be advertised . . . through a request for proposals for private developers.

<sup>11/</sup> Towards this end, at the final hearing, Florida Housing submitted a Motion in Limine seeking to preclude the entry of any argument, evidence, or testimony regarding whether Orange County failed to act in accordance with its ordinances or procedures, except as might be relevant to prove that the person who signed a Contribution Form lacked the requisite authority to speak for the government entity, or that the grant was tainted by fraud, illegality, or corruption. No party objected to Florida Housing’s motion. The undersigned granted the motion. See, e.g., Houston Street Manor LP v. Fla. Housing Fin. Corp., Case No. 15-3302 (Fla. DOAH Aug. 18, 2015), *adopted in toto* (FO Sept. 21, 2015).

<sup>12/</sup> Florida Housing’s credit underwriting procedures are described in rule 67-48.0072, which provides:

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. . . . 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. The credit



underwriting review shall include . . . the ability of the Applicant and the Development team to proceed. . . .

<sup>13/</sup> Ms. Button cautioned, however, that her testimony was not intended to serve as an advisory opinion or in some manner bind Florida Housing's future decisions on the award of tax credits to Hawthorne Park. Ms. Button urged that, as of the final hearing, she could not determine with any certainty whether or not Hawthorne Park would be able to proceed with its application for funding following the credit underwriting review.

<sup>14/</sup> No party alleged that Durham Place's application failed to satisfy all eligibility requirements or was otherwise ineligible for funding under RFA 2018-112.

<sup>15/</sup> In describing the basis for Florida Housing's final order, the appellate court referred to the ALJ's comments regarding Brownsville's reliance "on the future potential for clustering" as an approach to designate its development's location point. While the ALJ found that Brownsville proposed a "potentially viable process, Brownsville had not started the process before its application and there was no guarantee clustering would be approved as per [the local government representative's] testimony that he was not sure if the density transfer was even a viable option." Brownsville, 224 So. 3d at 894; Redding Dev. Partners, LLC v. Brownsville Manner, LP, et. al., Case No. 16-1138BID (Fla. DOAH Apr. 19, 2016), amended (FHFC FO Dec. 11, 2017). Florida Housing's final order adopted the ALJ's conclusion that Brownsville's application included a material, non-waivable deviation from the terms of the RFA that rendered Brownsville ineligible for funding.

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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.