

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

HTG ADDISON II, LLC,

Petitioner,

vs.

Case Nos. 20-1770BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

TRANQUILITY AT MILTON, LLC, AND  
WESTSIDE PHASE I, LLLP,

Intervenors.

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ROCHESTER PARK, LTD., AND ROCHESTER  
PARK DEVELOPER, LLC,

Petitioners,

vs.

Case No. 20-1778BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

HTG EDGEWOOD, LTD.,

Intervenor.

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MADISON SQUARE, LLC, AND ARC 2019,  
LLC,

Petitioners,

vs.

Case No. 20-1779BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

DIPLOMAT SOUTH, LLC,

Intervenor.

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MADISON OAKS EAST, LLC, AND ARC  
2019, LLC,

Petitioners,

vs.

Case No. 20-1780BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

RETREAT AT COCOA COMMONS, LLC,  
AND TRANQUILITY AT MILTON, LLC,

Intervenors.

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RECOMMENDED ORDER

These cases came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings ("DOAH") for final hearing on May 8, 2020, by Zoom Conference.

APPEARANCES

For Petitioner HTG Addison II, LLC, and Intervenor HTG Edgewood, Ltd.:

Maureen McCarthy Daughton, Esquire  
Maureen McCarthy Daughton, LLC  
1400 Village Square Boulevard, Suite 3-231  
Tallahassee, Florida 32312

For Petitioners Madison Square, LLC, and Arc 2019, LLC; and Madison Oaks East, LLC, and Arc 2019, LLC:

J. Timothy Schulte, Esquire  
Zimmerman, Kiser & Sutcliffe, P.A.  
315 East Robinson Street  
Post Office Box 3000 (32802)  
Orlando, Florida 32801

For Petitioners Rochester Park, Ltd., and Rochester Park Developer, LLC:

Craig D. Varn, Esquire  
Manson Bolves Donaldson Varn, P.A.  
106 East College Avenue, Suite 820  
Tallahassee, Florida 32301

For Respondent Florida Housing Finance Corporation:

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

For Intervenors Tranquility at Milton, LLC; Diplomat South, LLC; and Westside Phase I, LLLP:

Michael P. Donaldson, Esquire  
Carlton Fields  
215 South Monroe Street, Suite 500  
Tallahassee, Florida 32302-0190

For Intervenor Retreat at Cocoa Commons, LLC:

Donna Elizabeth Blanton, Esquire  
Radey Law Firm, P.A.  
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Tallahassee, Florida 32301

### STATEMENT OF THE ISSUES

Whether Respondent, Florida Housing Finance Corporation's ("Florida Housing") intended action to award housing tax credit funding to Intervenors Westside Phase, I, LLLP ("Westside"), HTG Edgewood, Ltd. ("HTG Edgewood"), Diplomat South, LLC ("Diplomat"), and Tranquility at Milton, LLC ("Tranquility"), under Request for Applications 2019-113 Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA"), is contrary to governing statutes, rules, the RFA specifications, and clearly erroneous, contrary to competition, arbitrary, or capricious.

### PRELIMINARY STATEMENT

These cases involve multiple protests to a Notice of Intent to Award issued by Florida Housing. On August 20, 2019, Florida Housing issued the RFA, soliciting applications to compete for an allocation of Federal Low-Income Housing Tax Credit Funding ("housing tax credits") for the construction of affordable housing developments in medium and small counties.

Modifications to the RFA were issued on September 10, 2019. In response to the RFA, Florida Housing received 184 applications, including applications from Petitioners HTG Addison, II, LLC ("HTG Addison"); Rochester Park Ltd., and Rochester Park Developer, LLC ("Rochester"); Madison Square, LLC, and ARC 2019, LLC ("Madison Square"); and Madison Oaks East, LLC, and ARC 2019, LLC ("Madison Oaks").

On March 6, 2020, Florida Housing posted notice of its intended decision to award funding to 11 applicants, including Intervenors Westside, HTG Edgewood, Diplomat, and Tranquility. Petitioners timely filed Notices of Protest and Petitions for Formal Administrative Proceedings and Intervenors timely intervened. On April 9, 2020, Florida Housing referred the matters to DOAH to assign an Administrative Law Judge to conduct the final hearing.

On April 9, 2020, Florida Housing also filed a motion to consolidate these matters with other matters filed by Turnstone Eustis, LP (DOAH Case No. 20-1775BID); Tranquility Milton, LLC ("Tranquility Milton")(DOAH Case No. 20-1776BID); and Meadowlark Court, Ltd. (DOAH Case No. 20-1777BID). On April 17, 2020, the undersigned entered an Order granting the motion and set the final hearing for May 8, 2020. On April 20, 2020, Rochester filed an unopposed motion to amend its petition. On April 27, 2020, Meadowlark Court, Ltd., filed a voluntary dismissal of its petition in DOAH Case No. 20-1777BID. On April 30, 2020, the undersigned entered an Order granting Rochester's motion. On May 4, 2020, Turnstone Eustis, LP, filed a voluntary dismissal of its petition in DOAH Case No. 20-1775BID and Madison Oaks filed a notice of voluntary dismissal of its challenge to the Retreat at Cocoa Commons, LLC, in DOAH Case No. 20-1780BID. On May 4, 2020, Rochester, Florida Housing, and HTG Edgewood also entered into a written stipulation in DOAH Case No. 20-1778BID for the entry of findings of fact and a recommended order deeming HTG Edgewood's application for funding ineligible and Rochester's application eligible for funding. On May 5, 2020, Tranquility filed an unopposed motion to amend its notice of appearance in DOAH Case No. 20-1780BID.

On May 5, 2020, the undersigned entered an Order closing DOAH Case Nos. 20-1775BID and 20-1777BID, and relinquishing jurisdiction of these cases to Florida Housing. On May 5, 2020, Madison Square, Florida Housing, and Diplomat entered into a written stipulation in DOAH Case No. 20-1779BID for the entry of findings of fact and a recommended order deeming Diplomat's application for funding ineligible and Madison Square's application eligible for funding. On May 6, 2020, Tranquility Milton filed a voluntary dismissal of its petition in DOAH Case No. 20-1776BID. On May 7, 2020, the undersigned entered an Order closing DOAH Case No. 20-1776BID and relinquishing jurisdiction of this case to Florida Housing.

The final hearing commenced as scheduled and concluded on May 8, 2020. At the hearing, the parties presented evidence as to DOAH Case Nos. 20-1780BID and 20-1770BID. Madison Oaks presented the testimony of Marisa Button and Stacy Banach. Tranquility presented the testimony of Todd Wind. HTG Addison presented the testimony of Marisa Button. Joint Exhibits 1 through 10 and 12 through 14 were received into evidence. Madison Oak's Exhibits 2 through 4, 6, 7, 11, and 13 were received into evidence. Tranquility's Exhibits 1 through 6 were received into evidence. HTG Addison's Exhibits 1 through 4 were received into evidence. Madison Square's Exhibit 2 was received into evidence.

The one-volume final hearing Transcript was filed on May 21, 2020. All of the parties except HTG Edgewood and Retreat at Cocoa Commons, LLC, timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. HTG Edgewood and Retreat at Cocoa Commons, LLC, did not file proposed recommended orders. The stipulated facts in the parties' stipulations filed May 4 and 5, 2020; the Joint Pre-hearing Stipulation filed May 6, 2020; and the Joint Stipulation filed May 20, 2020, have been incorporated herein as indicated below. Unless otherwise indicated, references to the Florida Statutes are to the 2019 version.

#### FINDINGS OF FACT

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

establish procedures for allocating and distributing low income housing tax credits.

2. 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. These housing tax credits are awarded competitively to housing developers in Florida for rental housing projects that qualify. These credits are then normally sold by developers for cash to raise capital for their projects. The effect is that the credits reduce the amount that the developer would otherwise have to borrow. Because the total debt is lower, a housing tax credit property can (and must) offer lower, more affordable rents. Developers also covenant to keep rents at affordable levels for periods of 30 to 50 years as consideration for receipt of the housing credits. The demand for housing tax credits provided by the federal government exceeds the supply.

#### The Competitive Application Process

3. Florida Housing is authorized to allocate housing tax credits and other funding by means of a request for applications or other competitive solicitation in section 420.507(48) and Florida Administrative Code Chapter 67-60, which govern the competitive solicitation process for several different programs, including the program for housing tax credits. Chapter 67-60 provides that Florida Housing allocate its competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes.<sup>1</sup>

4. In their applications, applicants request a specific dollar amount of housing tax credits to be given to the applicant each year for a period of ten years. Applicants normally sell the rights to that future stream of income housing tax credits (through the sale of almost all of the ownership interest in the applicant entity) to an investor to generate the amount of capital needed to build the development. The amount which can be received depends

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<sup>1</sup> A request for application is equivalent to a "request for proposal" as indicated in rule 67-60.009(3).

upon the accomplishment of several factors, such as a certain percentage of the projected total development cost; a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated areas of some counties. This, however, is not an exhaustive list of the factors considered.

5. The RFA was issued on August 20, 2019, and responses were initially due October 29, 2019. The RFA was modified on September 10, 2019, and the application deadline was extended to November 5, 2019. No challenges were made to the terms of the RFA.

6. Through the RFA, Florida Housing expects to award up to an estimated \$14,805,028 of housing tax credits to proposed developments in medium counties and up to an estimated \$1,413,414 of housing credits to proposed developments in small counties. Florida Housing received 184 applications in response to the RFA.

7. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors (the "Board"). The review committee found 169 applications eligible and 15 applications ineligible. Through the ranking and selection process outlined in the RFA, 11 applications were preliminarily recommended for funding. The review committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

8. On March 6, 2020, the Board met and considered the recommendations of the review committee. Also, on March 6, 2020, at approximately 9:35 a.m., Petitioners and all other applicants received notice that the Board determined whether applications were eligible or ineligible for consideration for funding, and that certain eligible applicants were selected for award of housing credits, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets on the Florida Housing website, [www.floridahousing.org](http://www.floridahousing.org), one listing the Board



approved scoring results and one identifying the applications which Florida Housing proposed to fund.

9. In the March 6, 2020, posting, Florida Housing announced its intention to award funding to 11 applicants, including Westside, HTG Edgewood, Diplomat, and Tranquility. Petitioners timely filed notices of protest and petitions for formal administrative proceedings, and Intervenors timely intervened.

#### The RFA Ranking and Selection Process

10. The RFA contemplates a structure in which the applicant is scored on eligibility items and obtains points for other items. A summary of the eligibility items is available in section 5.A.1., beginning on page 64 of the RFA. Only applications that meet all the eligibility items will be eligible for funding and considered for funding selection.

11. There were two total point items scored in this RFA. Applicants could receive five points for Submission of Principals Disclosure Form, stamped by the Corporation as "Pre-Approved," and five points for Development Experience Withdrawal Disincentive, for a total application score of up to ten points.

12. The RFA has three funding goals:

a. The Corporation has a goal to fund four Medium County Developments that qualify for the Local Government Areas of Opportunity Funding Goal outlined in Section Four A.11.a. of the RFA.

b. The Corporation has a goal to fund two Developments with a Demographic commitment of Family that select and qualify for the Geographic Areas of Opportunity/SADDA Goal outlined in Section Four A.11.b. of the RFA.

c. The Corporation has a goal to fund one (1) Development that qualifies for the Local Community Revitalization Initiative Goal outlined in Section Four A.11.c. of the RFA.

\*Note: During the Funding Selection Process outlined below, Developments selected for these goals will only count toward one goal.

13. As part of the funding selection process, the RFA starts with the application sorting order on page 68. The highest scoring applications are determined by first sorting together all eligible applications from the highest score to lowest score, with any scores that are tied separated as follows:

(a) 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;

(b) Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.10.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(c) 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);

(d) 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);

(e) 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);

(f) And finally, by lottery number, resulting in the lowest lottery number receiving preference.

14. The RFA includes a Funding Test where small county applications will be selected for funding only if there is enough small county funding available to fully fund the eligible housing credit request amount, and medium county applications will be selected for funding only if there is enough medium county funding available to fully fund the eligible housing credit request amount.

15. The RFA outlines a specific County's Award Tally:

As each application is selected for tentative funding, the county where the proposed Development is located will have one Application credited towards the County's Award Tally. The Corporation will prioritize eligible unfunded Applications that meet the Funding Test and are located within counties that have the lowest County Award Tally above other eligible unfunded Applications with a higher County Award Tally that also meet the Funding Test, even if the Applications with a higher County Award Tally are higher ranked.

16. According to the RFA, the funding selection process is as follows:

a. The first Application selected for funding will be the highest ranking eligible Applications that qualifies for the Local Community Revitalization Initiative Goal.

b. The next four Applications selected for funding will be the highest ranking eligible Medium County Applications that qualify for the Local Government Areas of Opportunity Funding Goal, subject to the Funding Test and the County Award Tally.

c. The next two Applications selected for funding will be the highest ranking eligible Family Applications that qualify for the Geographic Areas of Opportunity/HUD-designated SADDA Goal, subject to the Funding Test and the County Award Tally.

d. The next Applications selected for funding will be the highest ranking eligible unfunded Small County Applications that (i) can meet the Small County Funding Test and (ii) have a County Award Tally that is less than or equal to any other eligible unfunded Small County Applications. If Small County funding remains and no unfunded eligible Small County Application can meet the Small County Funding Test, no further Small County Applications will be selected and the remaining Small County funding will be added to the Medium County funding amount.

e. The next Application(s) selected for funding will be the highest ranking eligible unfunded Medium County Applications that (i) can meet the Medium County Funding Test and (ii) have a County Award Tally that is less than or equal to any other eligible unfunded Medium County Applications.

f. If Medium County funding remains and no unfunded eligible Medium County Application can meet the Medium County Funding Test, no further Applications will be selected and the remaining funding will be distributed as approved by the Board.

17. According to the terms of the RFA:

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, will be distributed as approved by the Board.

18. All 184 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.

HTG Edgewood's Application (DOAH Case No. 20-1778BID)

19. During scoring, Florida Housing determined that the HTG Edgewood application was eligible and, pursuant to the terms of the RFA, selected HTG Edgewood for funding.

20. HTG Edgewood, Florida Housing, and Rochester now agree that HTG Edgewood's application is ineligible for consideration for funding and the application of Rochester is eligible for funding. Accordingly, HTG Edgewood, Florida Housing, and Rochester agree that Florida Housing should deem the HTG Edgewood application ineligible for funding and Rochester's application eligible for funding.

Diplomat's Application (DOAH Case No. 20-1779BID)

21. During scoring, Florida Housing deemed the Diplomat application eligible and, pursuant to the terms of the RFA, preliminarily selected Diplomat for funding.

22. Diplomat and Madison Square now agree that Diplomat is ineligible for funding. Florida Housing does not contest Diplomat's admission of ineligibility.

23. Madison Square, Diplomat, and Florida Housing agree that Madison Square is eligible for funding.

Tranquility's Application (DOAH Case No. 20-1780BID)

24. Florida Housing deemed the Tranquility application eligible for funding, and pursuant to the terms of the RFA, Tranquility was selected for preliminary funding.

### Tranquility's Principals Disclosure Form

25. Madison Oaks contests Florida Housing's preliminary selection of Tranquility for an award of housing tax credits. In its challenge, Madison Oaks argues that Tranquility failed to correctly complete its Principals Disclosure Form by not identifying the multiple roles of its disclosed principal. Specifically, Madison Oaks argues that Tranquility failed to list Tranquility Milton Manager, LLC, which is disclosed as a manager, as a non-investor member as well. Accordingly, Madison Oaks contends Tranquility is not eligible or should lose five points.

26. The purpose of the Principals Disclosure Form is to allow Florida Housing to track an entity's past and future dealings with Florida Housing so that Florida Housing is aware of the entity with which it is dealing. In regard to principal disclosure, the RFA states, in relevant part:

c. Principals Disclosure for the Applicant and for each Developer (5 points)

(1) Eligibility Requirements

To meet the submission requirements, the Applicant must upload the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 05-2019)("Principals Disclosure Form") with the Application and Development Cost Pro Forma, as outlined in Section Three above. Prior versions of the Principal Disclosure Form will not be accepted.

The Principals Disclosure Form must identify, pursuant to subsections 67-48.002(94), 67-48.0075(8) and 67-48.0075(9), the Principals of the Applicant and Developer(s) as of the Application Deadline. The investor limited partner of an Applicant limited partnership or the investor member of an Applicant limited liability company investor must be identified. A Principals Disclosure Form should not include, for any organizational

structure, any type of entity that is not specifically included in the Rule definition of Principals.

(2) Point Item

Applicants will receive 5 points if the uploaded Principal Disclosure Form was stamped "Approved" during the Advance Review Process. The Advance Review Process for Disclosure of Applicant and Developer Principals is available on the RFA Website and also includes samples which may assist the Applicant in completing the required Principals Disclosure Form.

Note: It is the sole responsibility of the Applicant to review the Advance Review Process procedures and to submit any Principals Disclosure Form for review in a timely manner in order to meet the Application Deadline.

27. The RFA website provides guidance and instructions to assist applicants in completing the principal disclosure. The instructions state: "List the name of each Member of the Applicant Limited Liability Company and label each as either non-investor Member or investor Member (i.e., equity provider and/or placeholder), as applicable."

28. The RFA website guidance and instructions further provides Frequently Asked Questions ("FAQ's") concerning principal disclosures.

29. FAQ number 4 states:

Q: If the Applicant entity is a member managed limited liability company, how should it be reflected on the form since there is no "member-manager" choice at the First Principal Disclosure Level?

A: Each member-manager entity/person should be listed twice—once as a non-investor member and once as a manger. If Housing Credits are being requested, the investor-member(s) must also be listed in order for the form to be approved for a Housing Credit Application.

30. On its Principals Disclosure Form, Tranquility listed two entities at the first principal disclosure level: Tranquility Milton Manager, LLC, identified as a manager of the applicant and Timshel Partners, LLC, identified as an investor member of the applicant. However, Tranquility failed to identify the dual role of Tranquility Milton Manager, LLC, as a non-investor member in addition to its disclosed role as a manager.

31. Nevertheless, Tranquility's equity proposal letter submitted as part of its application identified Tranquility Milton Manager, LLC, as a member of the LLC because according to the equity proposal, Tranquility Milton Manager, LLC, would retain a .01% ownership interest in the company. Thus, the role of Tranquility Milton Manager, LLC, as a member is available within Tranquility's application.

32. Tranquility participated in Florida Housing's Advance Review Process, and on October 17, 2019, Florida Housing approved the Principals Disclosure Form submitted by Tranquility during the Advance Review Process for an award of housing credits. During scoring, Tranquility received five points for having its Principals Disclosure Form stamped "Approved" by Florida Housing.

33. Tranquility's Principals Disclosure Form met the eligibility requirements of the RFA and Tranquility is entitled to the five points.

34. In addition, Ms. Button persuasively and credibly testified that even if Tranquility's failure to list the dual role of its disclosed principal on the Principals Disclosure Form is an error, it is so minor as to constitute a waivable, minor irregularity. As detailed above, Tranquility Milton Manager, LLC, was specifically designated as a manager on the form and information identifying Tranquility Milton Manager, LLC's, additional role as a member is included in the equity proposal letter submitted with the application.



Madison Oak's Application (DOAH Case No. 20-1779BID)

35. Madison Oaks' application was deemed eligible for funding, but pursuant to the terms of the RFA, Madison Oaks was not selected for preliminary funding.

Madison Oaks Site Control Certification

36. Florida Housing and Tranquility now argue that Madison Oaks failed to demonstrate site control. As an eligibility item, the RFA requires applicants to demonstrate site control by providing a properly completed and executed Florida Housing Finance Corporation Site Control Certification form ("Site Control Form"). For the Site Control Form to be considered complete, the applicant must attach documentation demonstrating that it is a party to an eligible contract or lease or is the owner of the subject property.

37. Applicants can demonstrate site control by providing documentation that meets the requirements in the RFA for an eligible contract, deed or certificate of title, or a lease.

38. An eligible contract must meet all of the following conditions:

- (a) It must have a term that does not expire before April 30, 2020 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 April 30, 2020;
- (b) It must specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance;
- (c) The Applicant must be the buyer unless there is an assignment of the eligible contract, signed by the assignor and the assignee, which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant; and
- (d) The owner of the subject property must be the seller, or is a party to one or more intermediate contracts, agreements, assignments, options, or

conveyances between or among the owner, the Applicant, or other parties, that have the effect of assigning the owner's right to sell the property to the seller. Any intermediate contract must meet the criteria for an eligible contract in (a) and (b) above.

39. In demonstrating site control, the RFA states:

Note: The Corporation will not review the site control documentation that is submitted with the Site Control Certification form during the scoring process unless there is a reason to believe that the form has been improperly executed, nor will it in any case evaluate the validity or enforceability of any such documentation. During scoring, the Corporation will rely on the properly executed Site Control Certification form to determine whether an Applicant has met the requirements of this RFA to demonstrate site control. The Corporation has no authority to, and will not, evaluate the validity or enforceability of any eligible site control documentation that is attached to the Site Control Certification form during the scoring process. During credit underwriting, if it is determined that the site control documents do not meet the above requirements, the Corporation may rescind the award.

40. Additionally, the RFA requires that the site control "documentation include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases."

41. In the instant case, Madison Oaks attached a Purchase and Sale Agreement ("Madison Oaks Agreement") to its Site Control Form.

42. The Madison Oaks Agreement lists West Oak Developers, LLC, as the "Seller" and Madison Oaks East, LLC, as the "Purchaser."

43. However, the City of Ocala owns the property in question.

44. The Madison Oaks Agreement in section 12 states that: "Seller has a valid and binding agreement with the City of Ocala, Florida pursuant to which Seller has the right to acquire fee simple title to the Property ...."

45. Tranquility and Florida Housing contend that Madison Oaks failed to demonstrate site control because Madison Oaks failed to include the City of Ocala Redevelopment Agreement for Pine Oaks ("Redevelopment Agreement") in its site control documentation.

46. Madison Oaks maintains that the City of Ocala is a seller, pursuant to the Joinder and Section 28 of the Madison Oaks Agreement, and therefore, the Redevelopment Agreement did not need to be included. However, the Madison Oaks Agreement clearly identifies West Oak as the "Seller" and the City of Ocala as the "City."

47. At hearing, Ms. Button persuasively and credibly testified that the Madison Oaks application is ineligible because it did not include the Redevelopment Agreement, which is a relevant agreement for purposes of demonstrating site control. The Redevelopment Agreement was a relevant intermediate contract, which was required to be included in Madison Oak's application. Madison Oak's failure to include the Redevelopment Agreement renders its application ineligible.

48. Madison Oaks contends that including the Redevelopment Agreement in its application was unnecessary because of a joinder provision within the Madison Oaks Agreement. The Madison Oaks Agreement contains a Joinder and Consent of the City of Ocala approved by the City Council ("the Joinder"), whereby the City of Ocala joined and consented to the Madison Oaks Agreement "solely for the purposes set forth in, and subject to, Section 28 herein."

49. The Madison Oaks Agreement in Section 28 states that: "Seller hereby acknowledges and agrees that in the event of Seller's default hereunder, that is not timely cured, or Seller's refusal to close hereunder, Purchaser shall be entitled to close on the property subject to this Agreement ... directly with the City on the terms and conditions set forth in this Section 28."

50. However, Section 28 only applies in the event of a default by West Oaks that is not timely cured or West Oak's refusal to close. There is no

information within the Madison Oaks application to determine whether a default or termination of the Redevelopment Agreement occurred as of the application deadline.

Westside's Application (DOAH Case No. 20-1770BID)

51. Florida Housing deemed Westside's application eligible and, pursuant to the terms of the RFA, Westside was preliminary selected for funding to meet the goal to fund one development that qualifies for the Local Community Revitalization Initiative Goal.

Westside's Election to Compete for the Local Community Revitalization Initiative Goal

52. In order to qualify for the Local Community Revitalization Initiative Goal, the RFA states:

Applicants for proposed Developments that are part of a local revitalization plan may elect to compete for this goal. To qualify for this goal, the Applicant must submit the properly completed Florida Housing Finance Corporation Local Government/Community Redevelopment Agency Verification That Development Is Part Of A Local Community Revitalization Plan form (Form Rev. 08-2019) as Attachment 18. The form is available on the RFA Website.

Included with the form must be either (1) a link to the local community revitalization plan or (2) a copy of the local community revitalization plan. The plan must have been adopted on or before January 1, 2019.

53. Florida Housing, pursuant to the terms of the RFA, also has a goal to fund four medium county developments that qualify for the Local Government Areas of Opportunity Funding Goal.

54. Westside included an executed Florida Housing Finance Corporation Local Government/Community Redevelopment Agency Verification that Development is Part of a Local Community Revitalization Plan form (the

"Local Community Revitalization Plan Form") and a link to the local government revitalization plan at Attachment 18 of its application.

55. At question 11.c. in the application, applicants are asked to select "Yes" or "No" from a drop-down menu in response to the question: "Is the proposed Development eligible for the Local Community Revitalization Initiative Goal?"

56. Westside selected "No" from the Yes/No drop-down menu in answering question 11.c. regarding the Local Community Revitalization Initiative Goal.

57. At question 11.a. in the application, applicants are asked to select "Yes" or "No" from a drop-down menu in response to the question: "Is the proposed Development eligible for the Local Government Areas of Opportunity Funding Goal?"

58. Westside selected "Yes" from the Yes/No drop-down menu in answering questions 11.a. regarding the Local Government Areas of Opportunity Funding Goal.

59. During scoring, Westside was deemed to have qualified for the Local Government Areas of Opportunity Funding Goal and the Local Community Revitalization Initiative Goal. During the funding selection process, Westside was selected for funding to meet the Local Government Community Revitalization Initiative Goal.

60. HTG Addison selected "Yes" from the Yes/No drop-down menu in answering question 11.c. regarding the Local Community Revitalization Initiative Goal.

61. HTG Addison included an executed Local Community Revitalization Plan Form at Attachment 18 of its application.

62. HTG Addison selected "No" from the Yes/No drop-down menu in answering question 11.a. regarding the Local Government Areas of Opportunity Funding Goal.

63. HTG Addison is the next highest ranked eligible applicant qualified for the Local Community Revitalization Initiative Goal after Westside. If

Westside is deemed not to have qualified for the revitalization goal, then HTG Addison, as the next highest ranked eligible applicant, would qualify for that goal.

64. HTG Addison alleges that Westside should not be selected to meet the Local Community Revitalization Initiative Goal because Westside selected "No" from the drop-down menu in response Question 11.c.

65. Ms. Button persuasively and credibly testified that Florida Housing does not rely on the drop-down responses to questions 11a., b., or c. in determining whether an applicant "elects to be eligible for a certain goal" because answering "Yes" or "No" to these requirements is not a requirement of the RFA.

66. Rather, Ms. Button persuasively and credibly testified that in determining whether an applicant qualifies for a funding goal, Florida Housing relies on the documentation submitted with the application that is required for the funding goal.

67. In the instant case, Westside included the executed Florida Housing Finance Corporation Local Government Revitalization Plan form and a link to the local community revitalization plan at Attachment 18 of its application.<sup>2</sup>

68. In addition, Ms. Button persuasively and credibly testified that even if Westside erred in selecting "Yes" in response to question 11.c., it is so minor as to constitute a waivable, minor irregularity because Florida Housing has the required information within the application (the executed form and a link to the local community revitalization plan at Attachment 18).

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<sup>2</sup> Notably, another applicant responding to the RFA, Tranquility at Ferry Pass, selected "Yes" in response to question 11.c., but failed to include at Attachment 18 either a copy of or a link to the local community revitalization plan. During scoring, Florida Housing determined that Tranquility at Ferry Pass did not qualify for the revitalization goal. Florida Housing's scoring of the Westside application is consistent with its scoring of the Tranquility at Ferry Pass application because in both cases, Florida Housing scored the application based on the requirements of the RFA for the revitalization goal and the documentation submitted in response to those requirements. Florida Housing did not rely on the applicant's response to question 11.c. regarding the applicant's expressions of its own eligibility.

## CONCLUSIONS OF LAW

69. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

70. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioners as the parties opposing the proposed agency action. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioners must sustain their burden of proof by a preponderance of the evidence. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

71. Section 120.57(3)(f) provides, in part, 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.

72. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes 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*, 709 So. 2d at 609.

73. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record based upon the facts established at DOAH is developed. *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

74. After determining the relevant facts based on the evidence presented at hearing, Florida Housing's intended action will be upheld unless it is contrary to the governing statutes, the corporation's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

75. The Florida Supreme Court explained the "clearly erroneous" standard as follows:

[A] finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

*Dorsey v. State*, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

76. The "contrary to competition" standard precludes actions, which, at a minimum: (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.



*Ambar Riverview, Ltd. v. Fla. Hous. Fin. Corp.*, Case No. 19-1261BID (Fla. DOAH May 21, 2019; FHFC June 21, 2019).

77. 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. Behav. Health Corp.*, 927 So. 2d 34, 38-9 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *J.D.*, 114 So. 3d at 1130. Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." *Adam Smith Enters., Inc. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision.

*Id.*

78. Moreover, it has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. State, Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

79. Pursuant to rule 67-60.008, Florida Housing has reserved the right to waive minor irregularities in an application. Under this rule, minor irregularities are those errors "that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a

competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public."

80. In *Ambar Riverview, Ltd.*, Ambar argued that Las Brisas should be ineligible or lose five points because Las Brisas failed to identify the multiple roles of a disclosed principal. However, the multiple roles of the disclosed principal could be found within the four corners of the application. The undersigned concluded there was no requirement to include the multiple roles of the disclosed principal in the Principal Disclosures Form and, in any event, Las Brisas's failure to identify the multiple roles of its disclosed principals on the form was, at most, a waivable, minor irregularity.

81. However, in *HTG Village View, LLC v. Florida Housing Finance Corporation*, Case No. 18-2156BID (Fla. DOAH July 27, 2018; FHFC Sept. 17, 2018), Administrative Law Judge Yolonda Y. Green properly found Marquis Partners ineligible by failing to disclose Leon Wolfe as a manager of Cornerstone Marquis, LLC, on its Principals Disclosure Form. In *Blue Broadway, LLC v. Florida Housing Finance Corporation*, Case No. 17-3273BID (Fla. DOAH Aug. 29, 2017; FHFC Sept. 22, 2017), Administrative Law Judge Linzie F. Bogan properly found an intervenor ineligible by failing to disclose two officers (Jason Pritchard and Nathan Barth) on its Principals Disclosure Form.

82. Applying the foregoing legal principles to the instant case, Florida Housing's proposed action in awarding the housing tax credits to Tranquility, and not Madison Oaks, is not contrary to the governing statutes, rules, the RFA specifications, clearly erroneous, contrary to competition, arbitrary, or capricious.

83. As detailed above, Tranquility identified Tranquility Milton Manager, LLC, on the Principals Disclosure form as a manager. The information regarding Tranquility Milton Manager, LLC's, additional role as a member was also available within the equity proposal included within Tranquility's

application. This is not a situation, as in the cases of *HTG Village View, LLC*, and *Blue Broadway, LLC*, where an applicant failed to identify a principal.

84. At most, the failure of Tranquility to identify Tranquility Milton Manager, LLC's, additional role as a member on the Principals Disclosure Form is a waivable, minor irregularity. Madison Oaks failed to demonstrate that Florida Housing's proposed action finding the Tranquility application eligible and awarding it five points is contrary to governing statutes, rules, the RFA specifications, or clearly erroneous, contrary to competition, arbitrary, or capricious. In sum, Tranquility is eligible for funding and should not lose any points.

85. On the issue of site control, Madison Oaks substantially deviated from the requirements of the RFA and is ineligible by failing to submit the Redevelopment Agreement with its site control documentation. The Redevelopment Agreement is a relevant, intermediate agreement required to be included within the site control documentation. *Flagship Manor, LLC v. Fla. Hous. Fin. Corp.*, 199 So. 3d 1090 (Fla. 1st DCA 2016)(upholding Florida Housing's conclusion that applicant was ineligible for failing to provide exhibit to site control contract and that failing to provide document was not minor irregularity).

86. Madison Oaks' reliance on *VLX Properties, Inc. v. Southern States Utilities, Inc.*, 792 So. 2d 504 (Fla. 5th DCA 2001), is misplaced. That case involved a claim for inverse condemnation and has no application to the instant case. Moreover, as detailed above, the Joinder in the instant case only applies in the event of a default by West Oaks that is not timely cured or West Oak's refusal to close. There is no information within the Madison Oaks application to determine whether a default or termination of the Redevelopment Agreement occurred as of the application deadline.

87. Tranquility sufficiently demonstrated that Florida Housing's proposed action finding the Madison Oaks application eligible is contrary to the governing statutes, rules, the RFA specifications, clearly erroneous, contrary

to competition, arbitrary, or capricious. In sum, Madison Oaks is not eligible for funding.

88. Finally, as to Westside's application and the Local Community Revitalization Initiative Goal, the failure to check "Yes" from the drop-down menu in response to Question 11.c. did not relate to a requirement of the RFA. As detailed above, Ms. Button persuasively and credibly testified that in determining whether an applicant qualifies for a funding goal, Florida Housing relies on the documentation submitted with the application that is required for the funding goal. In the instant case, Westside included the executed Florida Housing Finance Corporation Local Government Revitalization Plan form and a link to the local community revitalization plan at Attachment 18 of its application.

89. In addition, Ms. Button persuasively and credibly testified that even if Westside erred in selecting "Yes" in response to question 11.c., it is so minor as to constitute a waivable, minor irregularity because Florida Housing has the required information within the application (the executed form and a link to the local community revitalization plan at Attachment 18).

90. HTG Addison's reliance on *Berkeley Landing, Ltd., and Berkely Landing Developer, LLC v. Florida Housing Finance Corporation*, Case No. 20-0140BID (Fla. DOAH Apr. 6, 2020; FHFC Apr. 17, 2020), is misplaced. That case involved materially contradictory information regarding an eligibility requirement of the RFA. The Berkeley Landing application named an individual as its authorized principal representative, but that individual did not meet the requirements of the RFA to be an authorized principal representative. As detailed above, the answer to Question 11.c. in the instant case did not relate to a requirement of the RFA and Westside submitted the proper documentation required by the RFA to demonstrate it qualifies for the funding goal.

91. In sum, HTG Addison failed to demonstrate that Florida Housing's proposed action finding the Westside application eligible is contrary to

governing statutes, rules, the RFA specifications, or clearly erroneous, contrary to competition, arbitrary, or capricious. In sum, Westside is eligible for funding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order: (1) dismissing the protests of HTG Addison and Madison Oaks; (2) finding the HTG Edgewood, Diplomat, and Madison Oaks applications ineligible for funding; and (3) finding the Rochester, Madison Square, Tranquility, and Westside applications eligible for funding.

DONE AND ENTERED this 19th day of June, 2020, in Tallahassee, Leon County, Florida.



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DARREN A. SCHWARTZ  
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Filed with the Clerk of the  
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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.