

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LA ESTANCIA, LTD.,

Petitioner,

vs.

Case No. 20-3582BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

PARTNERSHIP IN HOUSING, INC.,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in Tallahassee, Florida, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings (“DOAH”), on September 10, 2020.

APPEARANCES

For Petitioner: M. Christopher Bryant, Esquire
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For Respondent: Christopher Dale McGuire, Esquire
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For Intervenor: Michael P. Donaldson, Esquire
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Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Florida Housing Finance Corporation's ("Florida Housing") review and scoring of the applications responding to RFA 2020-104 SAIL Funding for Farm Worker and Commercial Fishing Worker Housing ("the RFA") were clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

Florida Housing issued the RFA on April 15, 2020, seeking applications for financing to supplement the construction or rehabilitation of affordable housing for farm workers or commercial fishing workers. On May 19, 2020, La Estancia, Ltd. ("La Estancia"), and Partnership in Housing, Inc. ("Pueblo Bonito"), submitted applications in response to the RFA.

Florida Housing posted notice of its intent to award funding to Pueblo Bonito on July 17, 2020. La Estancia petitioned for a formal administrative hearing on August 3, 2020, alleging that its application should have received a higher score than Pueblo Bonito's and should have thus been selected for funding. Florida Housing referred this matter to DOAH on August 13, 2020, and the undersigned issued a Notice scheduling the final hearing for September 10, 2020. The undersigned also issued on August 18, 2020, an Order granting Pueblo Bonito's Motion to Intervene.

The final hearing took place as scheduled. Joint Exhibits 1 through 7 were accepted into evidence. La Estancia called Steve Auger as a witness and introduced Exhibits 2, 6, and 9 through 12 into evidence. Florida Housing

called Marisa Button as a witness and introduced no exhibits into evidence. Pueblo Bonito introduced Exhibits 1¹ through 4 and 7 into evidence but called no witnesses.

The final hearing Transcript was filed on September 14, 2020. By agreement of the parties, the proposed recommended orders were filed on September 25, 2020, and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, the record as a whole, the stipulated facts, and matters subject to official recognition, the following Findings of Fact are made:

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes (2020).² Its purpose is to promote public welfare by administering the financing of affordable housing in Florida.
2. Florida Housing is authorized by section 420.507(48), to allocate federal low income housing tax credits, State Apartment Incentive Loans (“SAIL”), and other funding by means of competitive solicitations. Florida Administrative Code Chapter 67-60 provides that Florida Housing will allocate its competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes.
3. Funding is available through a competitive application process commenced by the issuance of a Request for Applications, which is equivalent to a “request for proposal” as described in rule 67-60.009(4).

¹ Pueblo Bonito’s Exhibit 1 is the deposition of Nancy Muller of Florida Housing.

² Unless stated otherwise, all statutory references shall be to the 2020 version of the Florida Statutes.

4. Through the RFA, Florida Housing seeks to award up to an estimated total of \$5,131,050 in SAIL Financing for the construction or rehabilitation of affordable housing developments for farm workers and commercial fishing workers. The RFA was issued on April 15, 2020, and a modified version was issued on April 24, 2020. The application deadline was May 19, 2020.

5. La Estancia and Pueblo Bonito submitted applications proposing the rehabilitation of existing farm worker housing in Hillsborough and Lee Counties, respectively. Both applications were deemed eligible for funding.

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

7. The scoring of the applications was based on a 100-point scale. Applicants submitting a Principal Disclosure Form that had been stamped "pre-approved" received five points. The remaining points were awarded based on the subjective scoring of narrative sections within the applications, and the maximum points were available as follows:

- Current and Future Need for Farm Worker or Commercial Fishing Worker Housing in the Area ("Need"): 15 points
- Experience Operating and managing Farm Worker or Commercial Fishing Worker Housing ("Experience"): 20 points
- Outreach, Marketing, and Referral ("Outreach"): 30 points
- Resident Access to Onsite and Offsite Programs, Services, and Resources ("Access"): 30 points.

8. With regard to Need, the 2019 Rental Market Study prepared for Florida Housing by the Shimberg Center for Housing Studies at the University of Florida determined that 14.2 percent of Florida's farm workers are employed in Hillsborough County and 2.55 percent are employed in Lee County. Pueblo Bonito noted in its application that its development is only three miles from the Collier County line, and 5.63 percent of the state's farm workers are employed in Collier County. La Estancia did not reference

Manatee County in its application but noted in its request for a formal administrative hearing that its development is a similar distance from Manatee County, and 6.88 percent of the state's farm workers are employed there.

9. The Shimberg study also calculated need for farm worker housing type by county with 3,813 multifamily units needed in Hillsborough County, 741 multifamily units needed in Lee County, 1,546 multifamily units needed in Collier County, and 2,337 multifamily units needed in Manatee County.

10. For some RFAs, Florida Housing imposes additional conditions on applications for developments located in Limited Development Areas ("LDAs"). The main purpose of an LDA is to protect Florida Housing's funded developments in a particular area. An LDA is generally an area that Florida Housing has placed a boundary around that limits different types of new development. Florida Housing annually publishes an LDA Chart on its website listing areas or counties that may apply in the RFA cycle for the coming year. The mere existence of an LDA does not prohibit development within the LDA. This is especially true for rehabilitation projects like those proposed in the instant case.

11. An RFA must specifically reference the LDA in order for the LDA to apply.

12. The first draft of the 2020 LDA Chart was not published by Florida Housing until May 29, 2020, and thus the modified RFA issued on April 24, 2020, included no reference to the LDA Chart. Nor did the RFA include any specific provisions regarding LDAs.

13. The first draft of the 2020 LDA Chart and each subsequent draft or amendment included Lee County for farm worker housing. Florida Housing indicated that the basis for Lee County's LDA designation was a downward trend in occupancy rates. The occupancy rate for the housing stock in Lee County for the period of August 2019 through January 2020 was 91.67 percent as compared to 95.83 percent for the period of September 2019

through February 2020. Based on this trend, Lee County was proposed as an LDA for the 2020/2021 Florida Housing RFA funding cycle, which became effective July 10, 2020.

14. The following table reflects how the review committee awarded points to the two applicants:

| | Pueblo Bonito | La Estancia |
|-------------------------------|---------------|-------------|
| Principal Disclosure Form (5) | 5 | 5 |
| “Need” (15) | 12 | 12 |
| “Experience” (20) | 16 | 17 |
| “Outreach” (30) | 27 | 27 |
| “Access” (30) | 25 | 24 |
| Total (100) | 85 | 85 |

15. In the event of a tie, Florida Housing designed the RFA and the associated rules to incorporate a series of “tie-breakers.” The tiebreakers, in the order of applicability, were:

- a. By points received for the Need criterion, with more points preferred. Both applicants received 12 points for need.
- b. By SAIL Request Amount Per Unit, with lower SAIL funds per unit preferred. Both applicants requested \$50,000 in SAIL funds per unit.
- c. By Total SAIL Request Amount as a percentage of Total Development Cost (“TDC”), with applicants whose SAIL request amount is 90 percent or less of TDC preferred. Both applicants’ Total SAIL Request Amount was 90 percent or less of their respective TDCs.
- d. By a Florida Job Creation Preference. Both applicants satisfied this preference.
- e. By lottery numbers randomly assigned to the applications when they were submitted to Florida Housing. Pueblo Bonito had lottery number 1, and La Estancia had lottery number 2.

16. Nancy Muller was the Review Committee member assigned to review and score the “Need” narrative section of the Applications responding to the RFA. Ms. Muller is currently a Policy Specialist with Florida Housing. Prior to her current position, Ms. Muller was, for many years, the Director of Policy and Special Programs.

17. In reviewing and scoring the applications submitted to Florida Housing in the instant case, Ms. Muller indicated that she first read the narrative question of the RFA and broke the question down into four separate component parts. The components included: (a) current and future need for farm workers over the next 10 to 15 years; (b) location and proximity of farms and other types of farm work that typically use farm worker labor; (c) information concerning the types of crops, seasons, etc. and the demand for specific farm worker housing; and (d) whether waivers have been requested or granted for either the proposed Development or Developments in the area. Next, Ms. Muller reviewed each application against those component parts and ultimately awarded La Estancia and Pueblo Bonito 12 points each for their respective response to the need section.

18. Marisa Button, Florida Housing’s corporate representative, testified that just because the documented need for farm worker housing is higher in Hillsborough County than it is in Lee County does not mean that La Estancia should have received a higher score in the narrative section than Pueblo Bonito because the RFA “sets forth a much more nuanced request for the description of the current and future needs in the area for the proposed development. So it’s not limited to just a flat-out look at the county under the Shimberg study. If [that] were the case, we wouldn’t need to have a narrative scoring component of the RFA.”

19. Ms. Muller and Ms. Button persuasively testified that numeric need was just one of the components an applicant needed to address in responding to the needs question. In fact, Ms. Muller indicated she recognized the greater numeric need for farm worker housing in Hillsborough County, and

the greater need factored into her consideration of that particular component. However, Ms. Muller pointed out that because both proposed projects were rehabilitation of existing units, neither was actually addressing nor reducing the numeric need for new units. Ms. Muller acknowledged that La Estancia's response at this component of the need analysis was "stronger" because of the greater need.

20. Nevertheless, Ms. Muller indicated that while La Estancia demonstrated a greater numeric need, Pueblo Bonito's response was "stronger" in other areas of the overall need response. Specifically, Pueblo Bonito provided a stronger response as to the location and proximity of farms and other types of farm work that use farm worker labor. Ms. Muller considered and evaluated the strengths and weaknesses of each response and no one component was weighted greater than any other component.

21. Based on the scoring and tie-breakers, the review committee recommended Pueblo Bonito for funding. However, the Board's deliberations were not to be limited to the review committee's recommendation or information provided by the review committee. With regard to the Board's funding selection, the RFA stated that:

[t]he Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding.

22. The Board met on July 17, 2020, to consider the review committee's recommendation and preliminarily selected Pueblo Bonito for funding, subject to satisfactory completion of the credit underwriting process.³ Florida

³ The RFA also employed a "Funding Test" to be used in the selection of applications for funding. The "Funding Test" required that the amount of unawarded SAIL funding must be enough to fully fund that applicant's SAIL request amount. After the selection of Pueblo Bonito for funding, there was only \$1,131,050 in SAIL funding remaining, and that was not enough to fund La Estancia's \$4,200,000 SAIL request.

Housing staff did not inform the Board that Lee County had been designated as an LDA for farm worker housing on the 2020 LDA Chart. Also, there is no evidence that any Board member knew of Lee County's LDA status or of declining farm worker housing occupancy when they voted to select Pueblo Bonito for funding.

23. La Estancia could not have presented the information regarding Lee County's LDA status to the Board. The RFA contains a "noninterference" clause prohibiting an applicant or its representative from contacting Board members or Florida Housing's staff "concerning their own or any other Applicant's Application" during the period beginning with the application deadline and continuing until the Board "renders a final decision on the RFA." If an applicant makes such contact in an attempt to influence the selection process, then that applicant's application is disqualified. As a result, La Estancia was unable to correct the review committee's omission of information regarding declining farm worker housing occupancy levels in Lee County.

24. Ms. Button testified that it was Florida Housing's practice not to apply new standards or requirements that changed after the application deadline when scoring applications. She stated that Florida Housing scores "based on the terms of the RFA and we wouldn't retroactively apply something to those applications after they've been submitted." She specifically testified that if a county is designated as an LDA after the application deadline, Florida Housing would not apply that designation to the application. She also testified that one of the reasons for not considering new requirements after the application deadline is that applicants would not be allowed to amend their applications to address these new requirements.

25. Even if the July 10 LDA designation had applied to this RFA, there is no evidence that it would have changed Florida Housing's scoring decision. The primary purpose for the LDA designation is to discourage new construction that could harm existing developments. In this case, both

applicants are proposing to rehabilitate existing developments, and the evidence shows that Florida Housing would not prohibit the funding of a rehabilitation project even if it were in an LDA. Florida Housing has funded the rehabilitation of farm worker developments located in LDAs since 2013 or 2014. In RFA 2017-104, the only previous farm worker RFA in evidence, the LDA designation did not even apply to rehabilitation projects that were in Florida Housing's portfolio. Ms. Muller testified that because the two applicants in this case both involved rehabilitation of developments in Florida Housing's portfolio, the LDA designation would have been "moot," unless the physical occupancy rates were dire, which they were not. She also testified that "preservation of existing developments is of much less, if any, importance related to LDA."

26. Ms. Button testified that she did not specifically inform the Board of the LDA designation "because it's not relevant to the terms for which the applications were scored for this RFA, it was not a part of the RFA terms, and the applicants did not, you know, apply with that designation put in place. It's for a future prospective funding cycle and it was not effective until after the application due date."

27. The greater weight of the evidence indicates that Florida Housing's review and scoring of the applications responding to the RFA were not clearly erroneous, contrary to competition, arbitrary, or capricious.

CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat.

29. The protest to Florida Housing's proposed actions is governed by section 120.57(3)(f), which provides as follows:

"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."

30. *Colbert v. Department of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it."

31. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has been described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931), as protecting the public against collusive contracts and to secure fair competition upon equal terms to all bidders.

32. A capricious action "is taken without thought or reason or irrationally." *Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). "An arbitrary decision is one that is not supported by facts or logic[.]" *Id.* The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "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 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). *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), stated that "[i]f 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.”

33. Although competitive-procurement protest proceedings are described in section 120.57(3)(f) as *de novo*, competitive-procurement protest hearings are a “form of intra-agency review[,]” in which the object is to evaluate the action taken by the agency. *State Contracting and Eng’g Corp. v. Dep’t of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998)

34. La Estancia failed to demonstrate that Florida Housing’s review and scoring of the applications responding to the RFA were clearly erroneous, contrary to competition, arbitrary, or capricious.

35. La Estancia argues that either the scorer, the Review Committee, or the Board should have given more weight to the Shimberg study’s conclusions that there were more farm workers in Hillsborough County than in Lee County, and that more new housing units were needed in Hillsborough County than in Lee County. The evidence shows that Florida Housing did consider this study in the scoring of the applications, but that it did not rely on it to the exclusion of the actual narrative responses in the applications. Ms. Muller sufficiently explained her well-reasoned process for evaluating the narrative portions of the applications, and there is no question that she was qualified to perform that evaluation. Her scoring of the application section was a rational, good faith exercise of her honest judgment based on consideration of the relevant factors.

36. La Estancia also argues that the designation of Lee County as an LDA for farm worker housing in the upcoming RFA cycle should have been considered when scoring the RFA. The evidence is clear, however, that the 2020 LDA chart was inapplicable to the applications in the RFA, and that even if it had been, it would not necessarily have changed the scoring or selection process. If Florida Housing had used the 2020 LDA chart in its determination, that might well have been considered clearly erroneous, contrary to competition, arbitrary, or capricious.

37. Despite the fact that the LDA Chart did not exist as of the application deadline and the fact that the LDA Chart was not referenced in the RFA or specifically considered by Ms. Muller, La Estancia argues that the Board should have been advised of its existence. If it had been so advised, La Estancia further argues that the Board could have awarded funding to it rather than to Pueblo Bonito. In support of this argument, La Estancia notes the RFA's statement that:

[t]he Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding.

38. Ms. Button provided a rational explanation for why Florida Housing's staff did not inform the Board at the July 17, 2020, meeting that Lee County had been designated as an LDA for farm worker housing or the reasons why it had been so designated on the LDA Chart.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a Final Order dismissing La Estancia, Ltd.'s formal written protest and awarding funding to Partnership in Housing, Inc.

DONE AND ENTERED this 1st day of October, 2020, in Tallahassee, Leon
County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 1st day of October, 2020.

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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.