

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

ARTHUR MAYS VILLAS PHASE ONE, LLC,

Petitioner,

vs.

Case No. 21-0610BID

FLORIDA HOUSING FINANCE  
CORPORATION AND MHP FL I, LLC,

Respondents.

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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 (2020),<sup>1</sup> on March 16 and 19, 2021, by Zoom video conference in Tallahassee, Florida.

APPEARANCES

For Petitioner Arthur Villas Phase One, LLC:

Jason L. Maine, General Counsel  
Woodburn & Maine, Attorneys at Law  
204 South Monroe Street, Suite 201  
Tallahassee, Florida 32301

For Respondent Florida Housing Finance Corporation:

Christopher Dale McGuire, Esquire  
Florida Housing Finance Corporation  
227 North Bronough Street, Suite 5000  
Tallahassee, Florida 32301

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<sup>1</sup> Unless otherwise stated, all citations to the Florida Statutes are to the 2020 version.

For Respondent MHP FL I, LLC:

Tiffany A. Roddenberry, Esquire  
Holland & Knight, LLP  
315 South Calhoun Street, Suite 600  
Tallahassee, Florida 32301

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 2020-203 was contrary to its governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

This matter involves the protest by Petitioner Arthur Mays Villas Phase One, LLC ("Arthur Mays"), to a Notice of Intent to Award issued by the Florida Housing Finance Corporation ("Florida Housing") under Request for Applications 2020-203 ("RFA 2020-203").

On August 26, 2020, Florida Housing issued RFA 2020-203 soliciting applications to allocate competitive tax credits for affordable housing developments to be located in Miami-Dade County, Florida.

On January 22, 2021, Florida Housing posted notice of its intent to award funding for the development that qualified for the Urban Center Designation to MHP FL I, LLC ("MHP").

On February 8, 2021, Arthur Mays timely filed a formal written protest challenging the eligibility of MHP's application.

On February 15, 2021, Florida Housing referred Arthur Mays' protest to the Division of Administrative Hearings ("DOAH") for assignment to an

Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.<sup>2</sup>

The final hearing was held on March 16 and 19, 2021. Joint Exhibits 1 through 6 were admitted into evidence. MHP's Exhibit 1 was admitted into evidence. Florida Housing presented the testimony of Marisa Button. Arthur Mays called Lewis Swezy to testify. The parties also stipulated to a number of facts in a Joint Pre-Hearing Statement filed on March 12, 2021.

A two-volume Transcript of the final hearing was filed with DOAH on April 5, 2021. 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. Arthur Mays is a properly registered business entity in Florida and engaged in the business of providing affordable housing. Arthur Mays

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<sup>2</sup> On February 15, 2021, Florida Housing referred two other protests to RFA 2020-203 to DOAH, including DOAH Case Nos. 21-0611 and 21-0612. Florida Housing moved to consolidate all cases pursuant to Florida Administrative Code Rule 28-106.108, which was granted. As part of the Order of Consolidation, MHP, who was Petitioner in Case No. 21-0612, was joined as a Respondent in Case No. 21-0610. MHP subsequently moved to dismiss its separate, independent action in Case No. 21-0612, and continue as a party in Case No. 21-0610. Thereafter, Petitioner in Case No. 21-0611 (Hibiscus Grove, LP) voluntarily moved to dismiss its case, and the motion was granted.

submitted an application to RFA 2020-203 seeking funding to help finance its housing redevelopment project in Miami-Dade County known as Arthur Mays Senior Villas. Arthur Mays' application was deemed eligible for, but was not selected for an award of, housing credits under RFA 2020-203.

3. 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.

4. Florida Housing's low-income housing tax credit program (commonly referred to as "housing credits" or "tax 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 support projects that may not be 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.

5. As background, Florida Housing uses a competitive solicitation process to award low-income housing credits. Florida Housing initiates the solicitation process by issuing a request for applications ("RFA"). §§ 420.507(48) and 420.5093, Fla. Stat.; and Fla. Admin. Code Chapters 67-48 and 67-60.

6. The RFA competitive solicitation process begins when Florida Housing requests its Board of Directors (the "Board") to approve Florida Housing's plan for allocating resources through various RFAs. If the Board approves the plan, Florida Housing begins work on each individual RFA.

7. The RFA at issue in this matter is RFA 2020-203, entitled "Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County." The purpose of RFA 2020-203 is to distribute funding to create

affordable housing developments in Miami-Dade County, Florida. Through RFA 2020-203, Florida Housing intends to provide an estimated \$7,420,440.00 of housing tax financing. Florida Housing's goal under RFA 2020-203 is to fund developments that qualified for the demographic commitment of Family, Elderly, and Urban Center Designation, selecting one Applicant per category.

8. Florida Housing issued RFA 2020-203 on August 26, 2020.<sup>3</sup> The RFA set forth the information each Applicant was required to provide. This information included a number of submission requirements, as well as a general description of the type of project that would be considered for funding.

9. Applications were due to Florida Housing by November 17, 2020. Arthur Mays and MHP both timely applied for funding.

10. Florida Housing appointed a Review Committee from amongst its staff to evaluate and score the applications. Florida Housing received 50 applications for housing credits under RFA 2020-203. The Review Committee reviewed, deemed eligible or ineligible, scored, and ranked applications pursuant to the terms of RFA 2020-203, as well as Florida Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.<sup>4</sup>

11. The Review Committee found 46 applications eligible for funding. Thereafter, through the ranking and selection process outlined in RFA 2020-203, the Review Committee recommended three applications to the Board for funding for the Family, Elderly, and Urban Center Designation categories.

12. On January 22, 2021, the Board formally approved the Review Committee recommendations. As part of its determinations, the Board selected MHP's development known as Southpointe Vista for the Urban

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<sup>3</sup> Florida Housing subsequently modified RFA 2020-203 on September 11, October 12, and November 9, 2020.

<sup>4</sup> No protests were made to the specifications or terms of RFA 2020-203.

Center Designation funding. The Board awarded \$2,882,000 in tax credits to MHP to help finance Southpointe Vista.

13. Arthur Mays protests the Board's selection of MHP's development instead of its own. Arthur Mays, the second ranked Applicant for the Urban Center Designation, challenges Florida Housing's determination of the eligibility of, and award to, MHP. If Arthur Mays successfully demonstrates that Florida Housing erred in accepting, then scoring, MHP's application, or the evidence demonstrates that MHP's application was ineligible or nonresponsive, then Arthur Mays will be entitled to an award of housing credits instead of MHP.<sup>5</sup>

14. Lewis Swezy testified on behalf of Arthur Mays. Mr. Swezy is a developer in South Florida and has vast experience developing major real estate developments in Miami-Dade County. Mr. Swezy also represented that he has significant experience with housing credit procurements having submitted well over 100 applications in response to Florida Housing RFAs. Mr. Swezy stated that Florida Housing has awarded him tax credits on approximately 20 occasions.

15. Mr. Swezy raised two objections to MHP's application. Mr. Swezy argued that these two alleged deficiencies render MHP's application ineligible for funding. Therefore, Florida Housing should have disqualified MHP from an award of housing credits under RFA 2020-203.

A. One of MHP's Principal Entities is not Registered to Transact Business in Florida as of the Application Deadline:

16. First, Arthur Mays claims that information MHP included on its Principals of the Applicant and Developer(s) Disclosures Form causes MHP's application to be ineligible for consideration for housing credits. Arthur Mays specifically complains that one of the Second Level Principals that MHP identifies on its Principal Disclosures for the Applicant form (the "Principal

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<sup>5</sup> No party alleged that Arthur Mays' application failed to satisfy all eligibility requirements or was otherwise ineligible for funding under RFA 2020-203.

Disclosures Form") is a foreign entity not authorized to do business in Florida. Arthur Mays argues that Florida law prohibits a corporate entity who has not obtained a certificate of authority from the Florida Department of State to transact business in Florida from serving as a principal of an Applicant for housing credits. Consequently, Florida Housing acted contrary to Florida statutes by considering MHP's application for housing credits under RFA 2020-203.

17. To set the stage, RFA 2020-203 requires an Applicant for housing credits to produce evidence that it is legally formed in the State of Florida. Specifically, RFA 2020-203 Section Four, A.3.a(2), directs that:

The Applicant must be a legally formed entity [i.e., limited partnership, limited liability company, etc.] qualified to do business in the state of Florida as of the Application Deadline. Include, as **Attachment 2** to Exhibit A, evidence from the Florida Department of State, Division of Corporations, that the Applicant satisfies the foregoing requirements. Such evidence may be in the form of a certificate of status or other reasonably reliable information or documentation issued, published or made available by the Florida Department of State, Division of Corporations.

Thereafter, RFA 2020-203 Section Four, A.3.c, entitled "Principals Disclosure for the Applicant and for each Developer," provides:

(1) Eligibility Requirements

To meet the submission requirements, upload the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 05-2019) ("Principals Disclosure Form") as outlined in Section Three above.

\* \* \*

To meet eligibility requirements, the Principals Disclosure Form must identify, pursuant to

Subsections 67-48.002(94), 67-48.0075(8) and 67-48.0075(9), F.A.C., the Principals of the Applicant and Developer(s) as of the Application Deadline. 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.

For Housing Credits, the investor limited partner of an Applicant limited partnership or the investor member of an Applicant limited liability company must be identified on the Principal Disclosure Form.

18. Rule 67-48.0075(8) further instructs that:

Unless otherwise stated in a competitive solicitation, disclosure of the Principals of the Applicant must comply with the following:

(a) The Applicant must disclose all of the Principals of the Applicant (first principal disclosure level).

\* \* \*

(b) The Applicant must disclose all of the Principals of all the entities identified in paragraph (a) above (second principal disclosure level);

(c) The Applicant must disclose all of the Principals of all of the entities identified in paragraph (b) above (third principal disclosure level). Unless the entity is a trust, all of the Principals must be natural persons;

19. With its application, MHP submitted a Principals Disclosure Form per RFA 2020-203 Section Four, A.3.c. In the Principal Disclosures for the Applicant portion, in accordance with rule 67-48.0075(8), MHP disclosed three levels of principals. In the First Principal Disclosure Level, MHP listed "MHP FL I Manager, LLC" as both a "Manager" and "Non-Investor Member" of MHP. On the Second Principal Disclosure Level, MHP identified the principals associated with MHP FL I Manager, LLC, to include Archipelago



Housing, LLC ("Archipelago"), W. Patrick McDowell 2001 Trust, and Shear Holdings, LLC. On the Third Principal Disclosure Level, MHP named the "natural person" principals of Archipelago as Kenneth P. Lee and Michael C. Lee.

20. Arthur Mays, through Mr. Swezy, argues that Florida law requires all principals, i.e., Archipelago, to be legally formed entities authorized to do business in the State of Florida. At the final hearing, Mr. Swezy represented that Archipelago is legally registered in the State of Delaware. However, as of the application deadline for RFP 2020-203, Archipelago did not have a certificate of authority from the Florida Department of State to operate as a foreign limited liability company in Florida. Consequently, Florida Housing should have disqualified and rejected MHP's application.

21. As legal authority for its position, Arthur Mays asserts that the provisions of chapter 605, Florida Statutes, apply to this procurement.

Section 605.0902(1) states:

A foreign limited liability company may not transact business in this state until it obtains a certificate of authority from the [Department of State].

22. From a philosophical standpoint, Mr. Swezy urged that obtaining authority to transact business in Florida is more than a mere ministerial act. A foreign entity that secures the appropriate certification from the Department of State must disclose the identities of all of its directors and officers to the State of Florida. In addition, Mr. Swezy explained that Florida Housing maintains a "bad actors" list of those persons who are disqualified from an award of housing credits, such as: individuals in arrears to Florida Housing, individuals with certain felony convictions, and members of the Florida Housing Board, among others. Because Archipelago did not register with the Department of State, however, Florida Housing has no effective avenue to confirm whether Archipelago's management team (and hence

MHP's Third Level Principals) is eligible for an award of housing credits. Consequently, Florida Housing cannot know for certain whether MHP's Principal Disclosures Form is accurate. Florida Housing is also ignorant regarding what persons are actually making business decisions for MHP and/or its principals.

23. Mr. Swezy further asserted that, because MHP was not required to ensure that all its principals (i.e., Archipelago) obtained the necessary certification to transact business in Florida, MHP gained a competitive advantage over other Applicants who fully disclosed all their management team members. MHP garnered an unfair advantage because Florida Housing could more easily verify corporate information on other Applicants' principals who were registered with the State of Florida.

B. MHP's Site Control Documentation Contains a Material Misrepresentation:

24. Second, Mr. Swezy questioned whether MHP's site control documentation complies with RFA 2020-203 requirements. Specifically, Mr. Swezy asserted that MHP made a "material misrepresentation" in its application by artificially increasing the cost of the land it purchased for its development. This maneuver allegedly allowed MHP to request a higher amount of housing credits. Therefore, Mr. Swezy insisted that MHP's improper distortion of the price of its property should render its application ineligible for tax credit funding. *See* § 420.518(1)(a), Fla. Stat.

25. For the legal authority behind his argument, Mr. Swezy pointed to RFA 2020-203 Section Four, A.7, which required an Applicant to establish control over its development site. Under RFA 2020-203 Section Four, A.7.a, an Applicant demonstrated site control by submitting documentation showing "that it is a party to an eligible contract or lease, or is the owner of the subject property."

26. MHP, to demonstrate evidence of its site control, included in its application an Agreement, dated November 15, 2020, wherein MHP agreed to

buy certain real property from McDowell Acquisitions, LLC ("McDowell"), for a purchase price of \$7,000,000. As revealed in an "Underlying Contract" dated October 22, 2020, McDowell acquired the property from Cutler Ridge Investment Group, LLC ("Cutler Ridge"), also for the amount of \$7,000,000.

27. The property McDowell bought from Cutler Ridge consists of a two-acre parcel of land that was divided into two separate lots. However, the subsequent sale between MHP and McDowell, only involved one of the two lots.<sup>6</sup> Consequently, Mr. Swezy decried the fact that MHP agreed to pay \$7,000,000 for a piece of property that was worth half that amount one month earlier. Compounding this turn of events, MHP, in its application, reported the "Total Land Cost" of its one-acre development (Southpointe Vista) as \$7,000,000.

28. Mr. Swezy argued that the two "eligible contracts" evince that MHP misrepresented the value for the land on which it intends to construct Southpointe Vista (\$7,000,000 versus \$3,500,000). Furthermore, based on this manipulation of the purchase price, Mr. Swezy asserts that MHP will be unjustly enriched by an additional \$300,000 in housing credits annually (or over three million dollars in the aggregate) in excess of what it should receive from Florida Housing had MHP reported the true value of the land on which it will locate its development.

29. Mr. Swezy stated that Arthur Mays computed the alleged housing credit overpayment using what he referred to as the "gap calculation" formula. Mr. Swezy explained that MHP sought \$2,882,000 in housing credits, which was the maximum amount available under RFA 2020-203. *See* RFP 2020-203 Section Four, A.10(1)(a). Mr. Swezy contended that the "gap calculation" formula indicates that if MHP recorded the "true" cost of its

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<sup>6</sup> Mr. Swezy remarked that the other one-acre lot was attached to another application for RFA 2020-203 from MHP MD Senior I, LLLP ("MHP Senior"), which shares some of the same principals with MHP. MHP Senior submitted an application for a project called Southpointe Senior. (The Southpointe Senior application was not selected for funding by Florida Housing.) MHP Senior also reported the total value of its one-acre piece of property as \$7,000,000.

property (\$3,500,000), then MHP would have been awarded only \$2,517,380 in housing credits for Southpointe Vista.<sup>7</sup>

30. Based on MHP's material misrepresentation, Mr. Swezy argues that Florida Housing should have deemed MHP's application ineligible for funding under RFA 2020-203. Instead, Florida Housing should have awarded housing credits to Arthur Mays as the next eligible Applicant. Otherwise, Florida Housing will be allowing MHP to receive an undeserved financial windfall.

31. Florida Housing, in support of its intended award to MHP, presented the testimony of Marisa Button. Ms. Button is Florida Housing's Director of Multifamily Allocations. In her job, Ms. Button oversees Florida Housing's RFA process. At the final hearing, Ms. Button testified that Florida Housing appropriately deemed MHP's application for Southpointe Vista eligible for funding.

32. Ms. Button agreed with Mr. Swezy that RFA 2020-203 required the Applicant (MHP) to demonstrate that it is a legally formed entity qualified to do business in the State of Florida. (Which MHP did.<sup>8</sup>) However, she advised that no language in chapter 420, chapter 67-48, or the RFA explicitly requires the Applicant to establish that its principals were also qualified to do business in Florida. Ms. Button specifically pointed to the language of RFA 2020-203 Section Four, A.3.a(2), which only directs the "Applicant" (and the "Developer entity") to be "a legally formed entity ... qualified to do business in the state of Florida as of the Application Deadline." *See also* RFP 2020-203 Section Five, A.1.

33. Conversely, Ms. Button testified that Florida Housing has never enacted or imposed a requirement that principals, other than the Applicant

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<sup>7</sup> As described in his testimony, the gap calculation determines the "gap need" between the total cost of the housing project and the housing credit financing actually needed to make the housing project feasible.

<sup>8</sup> MHP filed to operate as a limited liability company with the Florida Department of State on October 9, 2020.

itself, must register to transact business in Florida. The only related provision of RFA 2020-203 that applies to principals required that:

[t]he Applicant, the Developer and all Principals are in good standing among all other state agencies and have not been prohibited from applying for funding.<sup>[9]</sup>

Since the information in MHP's application reported that Archipelago was legally formed to operate in the State of Delaware, Ms. Button relayed that Florida Housing was satisfied that MHP met this condition at the time of the application deadline. Although, Ms. Button conceded that Florida Housing did not independently verify the veracity of MHP's Principal Disclosures Form. Instead, Florida Housing accepted MHP's application as valid on its face (as it did for all Applicants).

34. As Mr. Swezy commented, Ms. Button articulated that the purpose behind the Principal Disclosures Form is to allow Florida Housing the means to survey all names associated with an application to ensure that no principal (or Applicant or Developer) is included on Florida Housing's "bad actors" list. Such entities, which would include companies or individuals who owe arrearages to Florida Housing or have taken part in certain criminal activities, are prohibited from participating in a competitive solicitation for housing credits. *See Fla. Admin. Code R. 67-48.004(2)*. Consequently, an Applicant that does not fully disclose or misrepresents its principals may be rendered ineligible for an award through an RFA.

35. Regarding MHP's application, Ms. Button was not aware of any principal identified on MHP's Principal Disclosures Form (particularly Archipelago) who was precluded from participating in RFA 2020-203.

36. To further support her position, Ms. Button relayed that Florida Housing faced a similar situation in the case of *Heritage Village Commons, Ltd v. Florida Housing Finance Corporation*, FHFC Case No. 2012-013-UC

(Fla. FHFC RO May 23, 2012; FO June 8, 2012). In *Heritage Village*, following an informal hearing under section 120.57(2), Florida Housing ultimately determined that neither the administrative rules (at that time) nor the relevant solicitation specifications required the Developer of an Applicant to be a legally formed entity in the State of Florida. Florida Housing reasoned that, because the governing law did not require the Developer to be a legally formed entity, Florida Housing could not penalize the applicant "for failure to comply with a nonexistent rule."

37. Ms. Button advanced that *Heritage Village* offers an instructive analysis to apply to the present matter. Ms. Button further commented that Florida Housing believes that *Heritage Village* creates a precedent that it should follow regarding the legal status of a principal of an RFA Applicant.

38. Regarding the applicability of chapter 605, Ms. Button asserted that chapter 605 does not control Florida Housing's competitive solicitation process. Instead, procurements involving housing credits are governed by the provisions of chapter 420, which do not contain any requirement that an Applicant's principals must be registered to transact business in the state of Florida. Ms. Button maintained that the specific language of section 605.0902(1) does not dictate who may receive housing credits under chapter 420 or chapters 67-48 and 67-60. Neither has Florida Housing incorporated section 605.0902 into the RFA competitive solicitation process. Similarly, Ms. Button stated that the terms of RFA 2020-203 only required MHP as the Applicant, as well as Southpointe Vista's Developer, to be legally formed entities qualified to do business in the state of Florida, not Archipelago, as one of MHP's Second Level Principals.

39. Finally, Ms. Button testified that whether MHP's principals were officially registered to transact business in Florida was not considered during the scoring of RFA 2020-203. Therefore, the fact that Archipelago was

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<sup>9</sup> See RFA 2020-203, Applicant Certification and Acknowledgement Form ("Certification and Acknowledgement Form"), para. 13.

registered in the State of Delaware, not Florida, did not have any impact on Florida Housing's selection of MHP's application for housing credits. Neither did it somehow give MHP's application a competitive advantage.

40. Accordingly, because Florida Housing's governing statutes, administrative rules, and the RFA 2020-203 specifications did not independently require an Applicant's principals to be registered to transact business in the State of Florida, Ms. Button took the position that MHP's application is eligible for funding, despite Archipelago's legal status in Florida as of the application deadline. Therefore, since MHP disclosed the required information regarding its principals in its application, Ms. Button declared that Florida Housing's decision to award housing credits to MHP did not contravene applicable law.

41. Regarding Arthur Mays' claim that MHP's application should be disqualified for misrepresenting the cost of the land MHP intends to use for its housing site, Ms. Button relayed that the property cost of a development's location has no relation to an Applicant's eligibility for housing credits. Therefore, the fact that MHP allegedly represented that its development property cost twice its actual value is not a "material" representation that would affect Florida Housing's award of tax credits. Ms. Button explained that Florida Housing only reviews the land cost during the credit underwriting phase, which occurs after the competitive solicitation process is

completed.<sup>10</sup> Consequently, the cost for MHP to obtain the Southpointe Vista property had no bearing on the Review Committee's evaluation of its application for tax credits under RFA 2020-203.

42. Expanding on her testimony, Ms. Button initially expressed that the cost of purchasing land is not an "eligible cost" that Florida Housing considers in determining whether an Applicant qualifies for housing credits. In practice, an Applicant is required to submit with their application information regarding its "Total Land Cost" on a Development Cost Pro Forma form (the "Development Cost Form"). *See* RFA 2020-203 Section Four, A.10.c, and Fla. Admin. Code R. 67-48.0075(3). The Development Cost Form reports an Applicant's funding "sources/uses." In layman's terms, to provide Florida Housing a better understanding of the financial viability of its housing development, the Applicant completes the Development Cost Form to identify its funding "sources," as well as the anticipated expenses (i.e., "uses") of bringing its development to fruition. If an Applicant shows that its "sources" equal or exceed its "uses," then the Development Cost Form demonstrates to Florida Housing that an Applicant's development is financially feasible.

43. MHP, on its Development Costs Form, wrote that its Total Land Cost was \$7,000,000 (as attested by Mr. Swezy). MHP included this figure in calculating its Total Development Cost, which MHP anticipated would reach

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<sup>10</sup> *See* RFA 2020-203 Section Four, A.7.a, which states that Florida Housing:

[W]ill 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 requirement of this RFA to demonstrate site control. ... During credit underwriting, if it is determined that the site control documents do not meet the above requirements, [Florida Housing] may rescind the award.



a combined amount of \$41,747,241. On the other side of the ledger, MHP reported that its anticipated funding sources equaled \$45,704,400. Based on these numbers, Ms. Button relayed that MHP showed that its development carries a funding surplus of \$3,957,159. Therefore, MHP demonstrated that its housing development, Southpointe Vista, is financially feasible.

(Conversely, if MHP's Development Cost Form revealed a funding shortfall, i.e., that the costs ("uses") to develop Southpointe Vista exceeded the funding "sources," then Florida Housing would have had serious concerns regarding the development's financial health, which would have led to Florida Housing finding MHP ineligible for funding.)

44. Regarding Arthur Mays' allegation that MHP doubled the actual cost of its land from \$3,500,000 to \$7,000,000, Ms. Button was not alarmed that MHP may have overstated the value of the property on which it intends to locate Southpointe Vista. Because MHP reported a funding surplus, Ms. Button stated that even if the actual cost of the land was half of what MHP reported (\$3,500,000), MHP still would have reported a funding surplus for its project. (In fact, the surplus would have been \$3,500,000 larger.) Consequently, Ms. Button contended that the fact that MHP may have overvalued the cost of its property on its Development Cost Form did not affect MHP's eligibility for housing credits under the terms of RFA 2020-203.

45. Further, Ms. Button rejected Arthur Mays' charge that by increasing its land cost, MHP was able to improperly request a larger tax credit. Ms. Button relayed that after Florida Housing selects an application for award of housing credits, the Applicant is invited to enter the credit underwriting process. During this stage, Florida Housing underwriters will evaluate the application to ensure that it complies with all RFA eligibility

requirements.<sup>11</sup> As part of this review, a property appraisal report will typically be ordered to calculate the impact of the land cost on the Applicant's development. The credit underwriters also specifically assess the "gap calculation result" in recommending the actual housing credit allocation. *See* Fla. Admin. Code R. 67-48.0072(28)(e), (f), and (g) and 67-48.0075(3).

Ms. Button reemphasized that the property cost for MHP's development is only considered during the credit underwriting phase, not during the scoring of its application.

46. Ms. Button expressed that based on the results of the credit underwriting review, the total tax credits that MHP requested for Southpointe Vista are not necessarily the amount that it will receive. Ms. Button relayed that if credit underwriting determines that an award of housing credits to MHP would be inappropriate based on the circumstances, or that MHP materially misrepresented information in its application, then Florida Housing would likely reduce, if not completely reject, the award of housing credits for MHP's development.

47. Finally, Ms. Button reiterated that the development property cost that MHP associated with Southpointe Vista had no bearing on the Review

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<sup>11</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, prior to the closing on funding ... 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 a comprehensive analysis of the Applicant, *the real estate*, the economics of the Development, the ability of the Applicant and the Development team to proceed, the evidence of need for affordable housing in order to determine that the Development meets the program requirements and determine a recommended ... Housing Credit allocation amount ... , if any. (emphasis added)

Committee's evaluation of its application. The Review Committee did not consider land acquisition cost when it scored MHP's application. Therefore, Ms. Button maintained that the fact that MHP listed its Total Land Cost as \$7,000,000 did not give MHP a competitive advantage. Neither did the fact that MHP may have overstated its Total Land Cost by \$3,500,000 increase its chance of winning the housing credits. Consequently, the numbers MHP listed on its Development Costs Form did not adversely prejudice other Applicants. Neither did they provide MHP a scoring benefit during the competitive solicitation process. Ms. Button asserted that MHP's Total Land Cost did not have any impact on Florida Housing's decision to select MHP's development for award of tax credits under RFA 2020-203.

48. Ms. Button also testified that RFA 2020-203 did not require applicants to provide a property appraisal to substantiate the land cost recorded on the Development Cost Form. She further added that no evidence shows that MHP's agreement to purchase the property from McDowell was an invalid contract, or that \$7,000,000 was not a reasonable price for the one-acre lot for Southpointe Vista. Consequently, Ms. Button contended that the fact that MHP may have inflated the cost of its development site to twice its actual value is not a "material" representation that affected Florida Housing's award of tax credits to MHP.

49. Ms. Button's explanation detailing why MHP's application was eligible for consideration for housing credits under RFA 2020-203 is credible and is credited. Ms. Button persuasively testified that the information MHP included in its application legally complied with RFA requirements and allowed Florida Housing to effectively evaluate its request for funding for its housing development. Ms. Button further capably refuted Arthur Mays' allegation that MHP somehow received a competitive advantage during the solicitation process.

50. Accordingly, based on the evidence in the record, Arthur Mays did not demonstrate, by a preponderance of the evidence, that Florida Housing's

award of housing credits to MHP was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, Arthur Mays did not meet its burden of proving that Florida Housing's intended award of housing credit funding to MHP under RFA 2020-203 was contrary to its governing statutes, rules or policies, or the solicitation specifications.

#### CONCLUSIONS OF LAW

51. 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).

52. Arthur Mays challenges Florida Housing's selection of MHP's application for an award of housing credit funding under RFA 2020-203. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests with Arthur Mays as the party protesting the proposed agency action. *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.

53. The phrase "de novo proceeding" in section 120.57(3)(f) describes a form of intra-agency review. The purpose of the administrative law judge's ("ALJ") 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.

54. Accordingly, Arthur Mays, as the party protesting the intended award, must prove, by a preponderance of the evidence, that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of RFA 2020-203. The standard of proof that Arthur Mays must meet to establish that Florida Housing's intended award violates this statutory standard of conduct is that 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).

55. 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). A factual determination is "clearly erroneous" when the reviewer is "left with a definite and firm conviction that [the fact-finder] has made a mistake." *Tropical Jewelers Inc. v. Bank of Am., N.A.*, 19 So. 3d 424, 426 (Fla. 3d DCA 2009); *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.'").

56. 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, 723-24 (Fla. 1931):

[T]he 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. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

57. 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 Envtl. 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.* *See also Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 40 (Fla. 1st DCA 2006).

58. To determine whether an agency acted in an "arbitrary" or "capricious" manner, consideration must be given to "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 Envtl. 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."

59. Florida Housing's governing statutes, rules, or policies include section 420.518, which states:

(1) An applicant ... may be precluded from participation in any [Florida Housing] program if the applicant ... has:

(a) Made a material misrepresentation or engaged in fraudulent actions in connection with any corporation program.

60. In addition, pursuant to its rulemaking authority under section 420.507(12), Florida Housing adopted chapter 67-60 to administer the competitive solicitation process. 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 be considered ineligible.

61. Finally, RFA 2020-203 Section Three, F.3, provides that, by applying, each Applicant certifies 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.

The Merits of Arthur Mays' Protest:

62. Turning to the merits of Arthur Mays' protest, the undersigned concludes that Florida Housing's decision to award housing credits under

RFA 2020-203 to MHP is not contrary to its governing statutes, rules or policies, or the solicitation specifications. The evidence presented at the final hearing shows that MHP's application complied with the applicable statutes, rules, and criteria set forth in the RFA, and was fully eligible to receive funding under RFA 2020-203. Accordingly, Florida Housing's intended award to MHP for the Southpointe Vista development was not clearly erroneous, contrary to competition, arbitrary, or capricious and should not be overturned.

63. Regarding the specific allegations, Arthur Mays did not prove that MHP's application is ineligible for housing credits based on the fact that MHP's principal, Archipelago, was not legally registered to transact business in the State of Florida as of the application deadline. The applicable legal authority supports Ms. Button's testimony that neither Florida Housing's governing statutes, rules, policies, nor the solicitation specifications require an Applicant's principal to obtain a certificate of authority from the Florida Department of State prior to applying for funding.

64. Under rule 67-48.002(9), an "Applicant" is defined as:

[a]ny person or legal entity of the type and with the management and ownership structure described herein that is seeking a loan or funding from [Florida Housing] by submitting an Application or responding to a competitive solicitation pursuant to rule Chapter 67-60, F.A.C., for one or more of [Florida Housing's] programs.

RFA 2020-203 Section Four, A.3.a(2), directs that:

The Applicant must be a legally formed entity qualified to do business in the state of Florida as of the Application Deadline.

65. Rule 67-48.002(94)(c) separately defines "Principal" as:

For a limited liability company, each manager and each member of the limited liability company.



Rule 67-48.002(94) requires that a principal "must be a legally formed entity as of the Application deadline."

66. In this case, MHP is the Applicant. Therefore, pursuant to RFA 2020-203 Section Four, A.3.a(2), MHP is required to be "a legally formed entity ... qualified to do business in the state of Florida." Archipelago on the other hand is only a principal of MHP. Unlike the Applicant, no provision of rule 67-48.002, or any other governing statute, rule, or RFA 2020-203 specification directs that a principal must be held to the same standard as an Applicant regarding the state in which it is authorized to conduct business. The only applicable legal authority, rule 67-48.002(94), simply requires a principal to "be a legally formed entity as of the Application deadline." The testimony at the final hearing evinces that Archipelago was legally formed in the State of Delaware at the time MHP applied for housing credits. Based on this fact, the information MHP included on its Principals Disclosure Form met all necessary eligibility prerequisites for an award of housing credits.

67. The undersigned is not persuaded by Arthur Mays' argument that the phrase "good standing among all other state agencies" included in the RFA 2020-203 Certification and Acknowledgement Form should be interpreted to mean that a principal must be "qualified to do business in the state of Florida" as that statement is used in RFA 2020-203 Section Four, A.3.a(2). Ms. Button persuasively testified that Florida Housing intended this provision to direct that a principal (and the Applicant and Developer) must be in good standing with the housing finance agencies of other states, not

other Florida state agencies (such as the Florida Department of State).<sup>12</sup> Similarly, the undersigned does not conclude that Archipelago is "transacting business" under section 605.0902(1) by virtue of being listed as a principal on an application for housing credit financing pursuant to chapter 420 and rule 67-48.

68. Further bolstering Florida Housing's decision to award funding to MHP is its reliance on the precedent it set in *Heritage Village*. As recounted by Ms. Button, *Heritage Village* involved a similar question regarding whether a Developer should be a legally formed entity as of the application deadline based on the operative procurement instructions. Florida Housing ultimately concluded that the Applicant should not be penalized "for failure to comply with a nonexistent rule." *Heritage Village*, RO at 7. Ms. Button cogently reasoned that, in light of its decision in *Heritage Village*, if Florida Housing deemed MHP's application ineligible for the reasons advanced by Arthur Mays, Florida Housing would be enforcing a nonexistent rule or specification. Consequently, Florida Housing would be making a decision that was not only contrary to its own precedent, but arguably arbitrary, capricious, and/or erroneous.<sup>13</sup>

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<sup>12</sup> See, e.g., *Madison Landing II, LLC v. Fla. Hous. Fin. Corp.*, Case No. 21-0146BID (Fla. DOAH Mar. 29, 2021; FHFC Apr. 30, 2021), at pg. 16-17, wherein Judge B. Finkbeiner reached the well reasoned conclusion that:

To conflate the phrase "in good standing among all other state agencies" with "legally formed entity" would negate the drafters' decision to use different phrases in different parts of the RFA. Use of the words "in good standing with all other state agencies," with respect to Principals, signals that the language means something different.

<sup>13</sup> The undersigned likewise favorably notes Judge Finkbeiner's conclusion in *Madison Landing* which considered the effect of *Heritage Village* on an analogous fact pattern. Judge Finkbeiner opined that, "Florida Housing is statutorily required to follow its own stated policy or prior practice, pursuant to section 120.68(7)(e)3. ... Florida Housing's reliance on *Heritage Village* remains valid despite changes in the process and governing law." *Madison Landing*, at pg. 16-17.

69. Finally, Ms. Button persuasively attested that MHP did not gain a competitive advantage due on the fact that Archipelago was not registered to do business in Florida. Ms. Button credibly explained that the Review Committee did not consider whether the principals of any Applicant officially registered to transact business in Florida when it scored the applications. Therefore, Florida Housing did not act "contrary to competition" by evaluating MHP's application for housing credits.

70. Accordingly, as to Arthur Mays' first argument, the undersigned concludes that the fact that one of MHP's principals was not "qualified to do business in the state of Florida as of the Application Deadline" did not render MHP's application ineligible for funding under RFA 2020-203. On the contrary, based on the weight of the credible evidence, as well as the language of RFA 2020-203 and the governing statutes and rules, Florida Housing did not contravene the applicable legal authority through the process by which it determined that MHP's application was eligible for an award of housing credits.

71. As to Arthur Mays' second point, Arthur Mays also failed to prove that Florida Housing should not have considered MHP's application due to a "material misrepresentation" regarding the Total Land Cost of its development. On the contrary, Ms. Button persuasively testified that the amount MHP reported as its Total Land Cost (\$7,000,000) had no effect on Florida Housing's selection of Southpointe Vista for funding. Ms. Button credibly established that its Review Committee did not consider the property cost of MHP's development when it scored MHP's application. Instead, as Ms. Button convincingly explained, the Total Land Cost is analyzed during the credit underwriting phase, which only occurs after the competitive solicitation process is completed. Ms. Button further effectively represented that the fact that MHP reported its Total Land Cost as \$7,000,000 was not a "material" representation in that the figure stated did not provide MHP's application a competitive or unfair advantage.

72. Accordingly, based on the testimony introduced at the final hearing, Florida Housing presented the more persuasive evidence that the amount MHP wrote as its Total Land Cost did not render its application ineligible. Consequently, Florida Housing was free to consider MHP's application in accordance with the terms and conditions of RFA 2020-203. Therefore, as a matter of law, Florida Housing is entitled to proceed with the award of housing credits to MHP.

73. In sum, based on the evidence and testimony in the record, Arthur Mays did not demonstrate that Florida Housing's award of housing credits under RFA 2020-203 was made in a manner that was clearly erroneous, contrary to competition, arbitrary, or capricious. At the final hearing, Florida Housing articulated good faith factual and legal reasons why MHP's principal (Archipelago) did not need to be registered to transact business in the State of Florida as of the application deadline. Further, Florida Housing persuasively explained why the amount MHP reported as its Total Land Cost (\$7,000,000) was not a "material misrepresentation" that required Florida Housing to disqualify MHP's application for consideration for funding. Finally, Arthur Mays did not prove that Florida Housing provided MHP an unfair competitive advantage when it considered, then selected, its application. Consequently, Arthur Mays did not meet its burden of proving that Florida Housing's decision to award housing credits to MHP for the Southpointe Vista development is contrary to Florida Housing's governing statutes, rules, or policies, or the solicitation specifications. Therefore, no legal basis exists to set aside Florida Housing's award to MHP.

#### 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 protest of Arthur Mays. It is further recommended that the Florida Housing Finance Corporation select MHP's application as the

recipient of housing credit funding for the Urban Center Designation under RFA 2020-203.

DONE AND ENTERED this 26th day of May, 2021, in Tallahassee, Leon County, Florida.



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J. BRUCE CULPEPPER  
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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.