

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CREATIVE CHOICE XXV, LTD.,

Petitioner,

v.

FHFC CASE NO.: 2006-006GA

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on April 27, 2007. Petitioner sought funding through the Community Workforce Housing Innovation Pilot Program ("CWHIP") via response to RFP 2006-05. On December 15, 2006, Creative Choice XXV, Ltd. ("Petitioner") responded to RFP 2006-05, seeking \$ 5,000,000 in funding through the Community Workforce Housing Innovation Pilot Program ("CWHIP"), for a resort-style condominium complex in Brevard County, Florida, known as Villas at Palm Bay ("Development"). CWHIP was created by Chapter 2006-69, § 27, Laws of Florida, to incentivize production of innovative projects by public-private partnerships for the construction or rehabilitation of housing for essential service personnel and persons whose incomes generally do not exceed 140% of area median income.

In its Response, Petitioner described the development as "completed and ready for occupancy." On December 6, 2006, Florida Housing's RFP review committee found the

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

A. Rees /DATE. 4-27-07

development ineligible for funding, as it was neither “new construction” nor “rehabilitation,” based on Petitioner’s Response to the RFP.

On January 31, 2007, Florida Housing received Petitioner’s Notice of Intent to Protest. A copy of the Notice is attached as Exhibit B. On February 1, 2007, received “Formal Written Protest and Petition for Formal Administrative Hearing” (“Petition”), from Petitioner. A copy of the Petition is attached as Exhibit C.

After reviewing the Petition, Florida Housing determined that no disputed issue of material fact existed and on November 21, 2006, forwarded the Petition to Diane D. Tremor, Florida Housing Hearing Officer, for proceedings under Section 120.569 and 120.57(2), Florida Statutes. The hearing was held on March 6, 2007.

On April 2, 2007, the Hearing Officer issued a Recommended Order, a true and correct copy of which is attached hereto as “Exhibit A.” The Hearing Officer recommended that Florida Housing enter a Final Order finding that Petitioner’s project, as described in its Response to RFP 2006-05, is ineligible for funding.

RULING ON THE RECOMMENDED ORDER

The findings and conclusions of the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing, it is hereby **ORDERED**:

1. The findings of fact of the Recommended Order are adopted as Florida Housing’s findings of fact and incorporated by reference as though fully set forth in this Order.

2. The conclusions of law of the Recommended Order are adopted as Florida Housing's conclusions of law and incorporated by reference as though fully set forth in this Order.

3. Petitioner's project, as described in its Response to RFP 2006-05, is ineligible for funding through the Community Workforce Housing Innovation Pilot Program.

IT IS HEREBY ORDERED that the Petition is hereby DISMISSED.

DONE and ORDERED this 27th day of APRIL, 2007.

FLORIDA HOUSING FINANCE
CORPORATION

By: *Ryan M. Stultz*
Chairperson



Copies to:

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
337 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Vicki Robinson
Deputy Development Officer
Florida Housing Finance Corporation
337 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Donna E. Blanton, Esquire
Radey, Thomas, Yon & Clark, P.A.
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301

Michael P. Donaldson
Carlton, Fields, P.A.
215 South Monroe Street
Suite 500
Tallahassee, FL 32301

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CREATIVE CHOICE HOMES XXV, LTD.,

Petitioner,

vs.

Case No. 2007-006GA

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569, 120.57(2) and 120.57(3), Florida Statutes, the Florida Housing Finance Corporation, by its duly designated Hearing Officer, Diane D. Tremor, held an informal administrative hearing in Tallahassee, Florida, on March 6, 2007.

APPEARANCES

For Petitioner: Creative Choice
Homes XXV, Ltd.

Michael P. Donaldson, Esq.
Carlton Fields, P.A.
P. O. Drawer 190
215 S. Monroe St., Suite 500
Tallahassee, FL 32302

For Respondent: Florida Housing
Finance Corporation

Donna E. Blanton, Esq.
Radey Thomas Yon & Clark
301 S. Bronough St., Ste. 200
Tallahassee, FL 32301



1

and

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corp.
227 N. Bronough St., Ste. 5000
Tallahassee, FL 32301-1329

STATEMENT OF THE ISSUE

The issue for determination in this bid protest proceeding is whether Respondent's determination that Petitioner is not eligible to receive funding under the Community Workforce Housing Innovation Pilot Program, pursuant to Request for Proposal 2006-05, is clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

There are no disputed issues of material fact in this proceeding. The parties entered into a Prehearing Stipulation of Facts and agreed to the introduction into evidence of Joint Exhibits 1 through 10.

Prior to the hearing, the Respondent filed a Motion to Dismiss Petitioner's Petition on the ground that it constituted an improper and untimely challenge to the specifications of Respondent's Request for Proposals ("RFP") 2006-05. More specifically, Respondent argued that Petitioner's protest was a belated challenge to the specifications of the RFP which should have been filed within 72 hours of the issuance of the RFP, pursuant to Section 120.57(3)(b), Florida Statutes, and the terms of the RFP. Petitioner filed a Response to that Motion, and oral argument on

the Motion was heard at the beginning of the hearing. It appearing that the Petition challenges the Respondent's action of determining that Petitioner's Response was ineligible for funding, as opposed to challenging the specifications contained within the RFP, the Motion to Dismiss was denied.

Subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

Based upon the undisputed evidence adduced at hearing, the following facts are found:

1. Petitioner, Creative Choice Homes XXV, Ltd., is a Florida limited partnership in the business of providing affordable and workforce housing throughout Florida. Petitioner timely submitted a response to Respondent's RFP 2006-05, requesting proposals to provide affordable rental and homeownership community workforce housing for essential services personnel, pursuant to the Community Workforce Housing Innovation Pilot ("CWHIP") Program.

2. In 2006, the Legislature granted Respondent, Florida Housing Finance Corporation, the authority to implement the CWHIP Program. That Program was authorized by Section 27, 2006-69, Laws of Florida, now codified as Section 420.5095, Florida Statutes (2006).

3. CWHIP is a pilot program created to provide affordable rental and home ownership community workforce housing for essential services personnel affected by the high cost of housing. The Program is premised on the use of regulatory incentives and state and local funds to promote local public-private partnerships and leverage government and private resources. The legislation recognizes the need for innovative solutions for the provision of housing opportunities for essential services personnel due to the fact that rapid increases in the median purchase price of homes and the cost of rental housing have far outstripped the increases in median income in the state.

4. In order to promote solutions to the housing shortage problem and provide housing opportunities, Section 420.5095(4), Florida Statutes, authorizes Florida Housing to provide CWHIP loans to applicants for “**construction or rehabilitation of workforce housing** in eligible areas.” (Emphasis supplied) Florida Housing was authorized by the Legislature to establish a funding process and selection criteria for the CWHIP Program through either a rule or a request for proposals procurement process. Florida Housing did both.

5. Florida Housing issued its RFP 2006-05 (Joint Exhibit 2) on October 6, 2006 seeking proposals “from qualified Applicants that commit to **construct and/or rehabilitate housing** in accordance with the terms and conditions of this RFP, applicable laws, rules and regulations, and Florida Housing’s generally

applicable construction and financial standards.” (Joint Exhibit 2, page 2, emphasis supplied) The RFP further notes that the new legislation authorizes Florida Housing “to provide CWHIP loans **for new construction or Rehabilitation of Workforce Housing** in eligible areas.” (Joint Exhibit 2, page 2, emphasis supplied) An “applicant” is defined in the RFP as any public-private partnership seeking a loan “**for the new construction or rehabilitation of housing** under CWHIP; and who submits a Response to this RFP.” (Joint Exhibit 2, page 2, emphasis supplied) Applicants are required to state in their Responses to the RFP whether their project is “new construction or rehabilitation.” (Joint Exhibit 2, page 9) While the RFP defines the term “rehabilitation,” there is no definition in the RFP of the words “construction” or “new construction.”

6. Florida Housing has also adopted Chapter 67-58, Florida Administrative Code, to establish the procedures by which it will administer the credit underwriting and loan servicing of the CWHIP Program, pursuant to Chapter 2006-69, Section 27, Laws of Florida. Like the RFP, those rules define an “applicant” as a public-private partnership seeking a loan “**for the new construction or Rehabilitation of housing** under CWHIP.” Rule 67-58.002(2), Florida Administrative Code. And, again like the RFP, the rules contain a definition of “rehabilitation,” but provide no definition of the term “new construction.” Chapter 67-58 further sets forth the analysis required for credit

underwriting review, which includes various references to the general contractor (Rule 67-58.020(7) and (15)(b)) and his or her duties (Rule 67-58.020(19)), a guaranteed maximum price or stipulated sum construction contract (Rule 67-58.020(13)), a limitation on general contractor fees (Rule 67-58.020(18)), and a provision that loan proceeds shall be disbursed during the construction phase in an amount per draw (Rule 67-58.050). The Respondent's rules further provide that **"the proceeds of all loans shall be used for new construction or Rehabilitation of affordable, decent, safe and sanitary housing units."** (Rule 67-58.030(1)) These same requirements are again set forth in Rules 67-58.070, 67-58.080 and 67-58.090, Florida Administrative Code.

7. Petitioner timely submitted its Response to the RFP, indicating on its cover page that its project, a 160-unit apartment complex in Brevard County named Villas at Palm Bay, is "new construction" and that it is "recently just completed." Petitioner's RFP Response further states that the Villas of Palm Bay has "recently been completed and is available for immediate occupancy." In response to the requirement of the RFP regarding site control, Petitioner explained that "the Development has been recently completed and is in the process of obtaining final certificates of occupancy." (Joint Exhibit 3) Petitioner further stated in its Response that "[e]ach unit will be subsidized to reduce the sales price by \$30,000 to \$50,000." (Joint Exhibit 3, p. 0008) Its Project cost Pro Forma

demonstrates that this subsidy will come from the CWHIP funds. (Joint Exhibit 3, p. 0042)

8. The Respondent's RFP Review Committee, consisting of Florida Housing staff members, determined that Petitioner's proposal was ineligible under the law to be considered for funding because it was already built. (Joint Exhibit 4) For this reason, Petitioner's RFP Response was not scored.

9. Respondent's Board of Directors accepted the recommendations of the Review Committee regarding the ranking of applicants and its recommendation to reject twenty-one (21) RFP responses, including that of Petitioner. (Joint Ex. 9) Petitioner was found ineligible for funding "pursuant to Laws of Florida 2006-69, section 27, subparagraph (4). The Project was already built." (Joint Exhibit 9)

10. In response to an e-mail sent by a representative of Petitioner asking why its RFP Response was found ineligible, the Contracts Administrator responded by stating, in part: "The Project was already built. CWHIP funds can only be used for new construction or rehabilitation." (Joint Exhibit 7)

11. Petitioner timely filed its Notice of Intent to Protest and its Formal Written Protest.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569, 120.57(1) and 12057(3), Florida Statutes, this Hearing Officer has jurisdiction over the parties and the subject matter in this case.

The substantial interests of Petitioner, Creative Choice Homes XXV, Ltd., are affected by the proposed action of Florida Housing of declaring Petitioner's application ineligible for funding. Therefore, Petitioner has standing to bring this proceeding.

The prime issue for determination in this proceeding is whether Section 420.5095, Florida Statutes, which created the Community Workshop Housing Innovation Pilot Program, limits the provision of loans to only new construction or rehabilitation of workforce housing, as opposed to buildings already built, but not yet occupied. The burden and standard of proof in this case is set forth in Section 120.57(3)(f), Florida Statutes. In a competitive procurement process, such as the RFP in this proceeding, the burden of proof lies with the Petitioner, as the party protesting the proposed agency action. The issue is whether the agency's proposed action of declaring Petitioner's application ineligible for funding is contrary to the agency's governing statutes, the agency's rules or policies or the solicitation specifications. The standard of proof is whether the proposed agency action is clearly erroneous, contrary to competition, arbitrary or capricious. Section 120.57(3)(f), Florida Statutes.

In this proceeding, Petitioner makes a persuasive argument that the governing statute, Section 420.5095, Florida Statutes, does not limit funding with respect to construction only to “new” construction or projects not yet built. This argument is based on the language of Section 420.5095(4), which simply uses the word “construction,” and the overall purpose of the CWHIP Program to provide immediate solutions to housing opportunities for essential services personnel. Petitioner points to Section 420.5095(7)(b), Florida Statutes, which gives priority funding consideration to projects, *inter alia*, which are innovative “and include **new** construction or rehabilitation.”¹ Petitioner urges a consideration of the difference in language between subsections (4) and (7), and argues that when the legislature uses particular language in one section of a statute (i.e., the use of the words “new construction” in subsection (7)), but not in another section of the same statute (i.e., the word “construction” not modified by the word “new,” as in subsection (4)), the omitted language is presumed to have been excluded intentionally. Cason v. Crosby, 892 So.2d 536 (Fla. 1st DCA 2005). Petitioner argues that this shows that projects not using “new” construction are not eliminated from funding, but simply are not entitled to priority consideration for funding. It is

¹ Although not mentioned by the parties, subsection (11) of Section 420.5095 states that “[p]rojects may include manufactured housing constructed after June 1994 . . .,” thus lending some weight to Petitioner’s argument that loans are not restricted to brand new construction undertaken from the ground up.

Petitioner's contention that Respondent, Florida Housing, was clearly erroneous in interpreting the governing statute to exclude construction that is already complete.

In the alternative, Petitioner argues that even if the CWHIP Program were limited to only projects involving "new" construction, Petitioner's project, which is recently completed but not yet occupied, fits the definition of "new construction." Petitioner points to Florida Housing's own Rule 62-25.002(30), Florida Administrative Code, which governs Florida Housing's single family mortgage revenue bonds program, a program unconnected to the CWHIP Program. That rule defines "new construction" as "a residential dwelling unit which has not previously been occupied."² Florida Housing's rules governing the CWHIP Program contain no definition of "new construction," although said rules, like the RFP, are replete with references to "new construction."

Petitioner's interpretation of Section 420.5095, Florida Statutes, is both reasonable and somewhat compelling. However, it is not the interpretation given the statute by the agency charged with the responsibility of implementing the CWHIP Program. Florida Housing's interpretation of the CWHIP Program statute is that funding through loans is to be given only to projects to be built "from the ground up," as opposed to projects that are completed using some other means of

² Florida Housing candidly points to another rule, Rule 67-54.002 (21), Florida Administrative Code, with an identical definition of "new construction" for the purposes of Florida Housing's Mortgage Credit Certificates Program.

financing, even though such projects are not yet occupied. That interpretation is equally as reasonable as the interpretation offered by Petitioner. Respondent's interpretation finds support in other statements of legislative intent in the statute to provide for "innovative solutions" for the provision of housing, the use of "regulatory incentives," an expedited comprehensive plan amendment and review of development orders and permitting process, and the provision of "loans to an applicant for construction." Section 420.5095, Florida Statutes. It simply cannot be said that Respondent's statutory interpretation is clearly erroneous.

Respondent's interpretation of the statute is clearly evident in the RFP and the administrative rules adopted to carry out the funding and selection process under the CWHIP Program. In addition to repeated references to "new" construction, the Credit Underwriting provisions in Chapter 67-58, Florida Administrative Code, clearly contemplate a project being built, as opposed to a project that is already built. The rules require the Credit Underwriter to require a guaranteed maximum price or stipulated sum construction contract, which may include change orders; to verify that the general contractor has the requisite knowledge and experience to complete the proposed project; to limit the general contractor's fee to 14% of the actual construction cost; and to ensure that not more than 20% of the construction cost is subcontracted to any one entity unless otherwise approved by the Board for a specific project. Loan proceeds are to be

distributed during the construction phase in an amount per draw. Rules 67-58.020 and 67-58.050, Florida Administrative Code. These requirements are applicable only to new construction, and not to a project which has already been built. It is clear from Respondent's rules that loan proceeds are to be used for construction (or rehabilitation) and not, as intended by Petitioner, to subsidize the reduction in the sales price of each unit.

With regard to other promulgated rules of Florida Housing defining "new construction" as dwelling units not previously occupied, Respondent points out that those rules pertain to programs not connected with the CWHIP Program. Respondent asserts that it is presumed to know its own rules and that had Florida Housing intended for that definition to apply to the CWHIP Program, it would have defined "new construction" in that same manner in Chapter 67-58, Florida Administrative Code. Unfortunately, Florida Housing provided no definition of "new construction" or "construction" in its rules implementing the CWHIP Program. However, as noted above, other provisions of its' rules governing the CWHIP Program clearly indicate that loan proceeds are to be used for construction only.

The law is clear that an agency's interpretation of its implementing statute which it is charged with enforcing is entitled to deference and great weight, and should not be overturned unless it is clearly erroneous or contrary to legislative

intent. Level 3 Commun., LLC v. Jacobs, 841 So.2d 447 (Fla. 2003). Here, Florida Housing's interpretation is clearly expressed in its RFP and its rules, and that interpretation is not contrary to Section 420.5095, Florida Statutes. Its proposed action of finding Petitioner's already completed project ineligible for funding is consistent with its duly adopted rules and the implementing statute. Giving due deference to the agency, it simply cannot be said that its interpretation of the controlling statute is clearly unauthorized or erroneous, contrary to legislative intent, or is otherwise arbitrary or capricious. Dravo Basic Materials Co., Inc. v. Department of Transportation, 602 So.2d 632 (Fla. 2d DCA 1992).

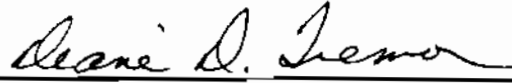
In summary, while Petitioner advances a reasonable and credible interpretation of the statute which would allow the funding of already completed projects, but not yet occupied, its burden of proof in this case has not been satisfied. Petitioner has failed to demonstrate that Florida Housing, through its' RFP, its' implementing rules and its' proposed agency action with respect to Petitioner's project, has acted in a clearly erroneous, or otherwise arbitrary and capricious, manner. No evidence or argument was adduced that Florida Housing's proposed action in this case was contrary to competition.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law recited herein, it is RECOMMENDED that a Final Order be entered determining that Petitioner's

project, as described in its Response to RFP 2006-05, is ineligible for funding under the CWHIP Program.

Respectfully submitted this 2nd day of April, 2007, in Tallahassee, Florida.



DIANE D. TREMOR
Hearing Officer for Florida Housing
Finance Corporation
Rose, Sundstrom & Bentley, LLP
2548 Blairstone Pines Drive
Tallahassee, Florida 32301
(850) 877-6555

Copies Furnished to:

Sherry M. Green, Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Michael P. Donaldson, Esq.
Carlton Fields, P.A.
P. O. Drawer 190
Tallahassee, FL 32302-0190

Donna E. Blanton, Esq.
Radey Thomas Yon & Clark, P.A.
301 S. Bronough St., Suite 200
Tallahassee, FL 32301

Wellington H. Meffert II
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301-1329

NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(3), Florida Administrative Code, all parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages. Written arguments must be filed with Florida Housing Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on April 9, 2007. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.



CREATIVE CHOICE

RECEIVED
2007 FEB -5 PM 1:44
Creative Choice Homes XXV, Ltd.
FLORIDA HOUSING
FINANCE CORPORATION

January 31, 2007

Ms. Sherry Green, Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street
Tallahassee, Florida 32301

Sent Via Facsimile - (850) 414-6548
Original to follow by U.S. Mail

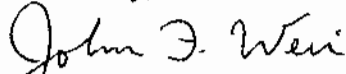
Re: Creative Choice Homes XXV, Ltd.
Villas at Palm Bay
RFP 2006-05 - CWHIP

Dear Ms. Green:

Please accept this letter as a Notice of Intent to Protest the decision of the Florida Housing Finance Corporation in the Request For Proposal 2006-05 for the Community Workforce Housing Innovative Pilot Program ("CWHIP") with respect to the above referenced project. This Notice of Intent to Protest is being filed in accordance to Florida Statute 120.57(3) by facsimile to meet the 8:00 am, February 1, 2007 deadline with the original letter to follow by mail. A formal written protest and bond will be filed within ten days.

Thank you in advance for your attention to this matter.

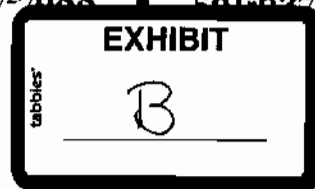
Sincerely,


John F. Weir
Senior Vice President
of the General Partner

JW/kl

cc: Ms. Robin Grantham

4243-D Northlake Boulevard • Palm Beach Gardens, Florida 33410
561-627-7088 • 561-627-3218



ORIGINAL

BEFORE THE STATE OF FLORIDA
HOUSING FINANCE CORPORATION

CRATIVE CHOICE HOMES XXV, LTD.,

Petitioner,

vs.

CASE NO. 2007-006 GA

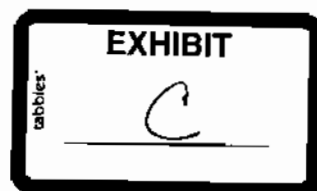
FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**FORMAL WRITTEN PROTEST AND
PETITION FOR FORMAL ADMINISTRATIVE HEARING**

Petitioner, CREATIVE CHOICE HOMES XXV, LTD. ("Creative Choice"), pursuant to sections 120.57(3), Florida Statutes ("F.S."), and Rule 28-110, Florida Administrative Code ("FAC") hereby files its Formal Written Protest and Petition for Formal Administrative Hearing regarding the decision of Respondent, FLORIDA HOUSING FINANCE CORPORATION ("FHFC") to award contracts to responsive bidders for the provision of workforce housing pursuant to the Community Workforce Housing Innovation Program ("CWHIP Program"). In support, Creative Choice states as follows:

1. Creative Choice is a Florida limited partnership in the business of providing affordable and workforce housing throughout the State of Florida. Creative Choice is located at 4243-D Northlake Blvd., Palm Beach, FL 33410. For the purposes of this proceeding, Creative Choice's phone number is that of its undersigned attorneys.
2. FHFC is the agency of the State of Florida that was granted the authority to implement the CWHIP Program and issued RFP 2006-05 for the purpose of providing affordable



rental and home ownership community workforce housing for essential services personnel.

FHFC's address is 227 North Bronough Street, Tallahassee, Florida 32301.

3. The CWHIP Program is the result of House Bill ("HB") 1363, which was passed by the Legislature on May 2, 2006, and became effective on July 1, 2006. The CWHIP Program is a pilot program created to provide affordable rental and homeownership workforce housing for essential services personnel and others affected by the high cost of housing. The Program uses regulatory incentives and state and local funds to promote local public private partnerships that leverage government and private resources. In essence, the CWHIP Program is the legislature's attempt to expeditiously address an affordable housing shortage that now affects more than just low income citizens.

4. The CWHIP Program funding is to be targeted to projects in areas where the disparity between the area median income and median sales price for a single family home is greatest, and for Projects in areas where population growth as a percentage rate of increase is greatest. FHFC may also fund Projects in areas where innovative regulatory and financial incentives are made available. FHFC shall fund at least one eligible Project in as many counties as possible.

5. Section 27 of HB 1363 authorized FHFC to provide CWHIP Program loans for the construction or rehabilitation of workforce housing in eligible areas. FHFC established a funding process and selection criteria using the RFP.

6. The Legislature granted FHFC the authority to administer the CWHIP Program and allocate \$50 million on a competitive basis through the RFP process to public-private entities seeking to build affordable housing for Florida's workforce. Typically, essential service personnel include teachers, police officers, sheriff departments, firefighters, etc.

7. As it relates to the specific authority to issue the RFP, Section 27, subparagraph (4), Laws of Florida, grants FHFC the following specific authority:

The FHFC is authorized to provide Community Workforce Housing Innovation Pilot Program loans to an applicant for **construction or rehabilitation** of workforce housing in eligible areas. FHFC shall establish a funding process and selection criteria by rule or request for proposals. This funding is intended to be used with other public and private sector resources.

(Emphasis added.)

8. On or about October 6, 2006, FHFC issued Florida Housing Finance Corporation Community Workforce RFP Housing Innovation Pilot Program Request for Proposals 2006-05. ("RFP"). The RFP was FHFC's mechanism for implementing the CWHIP Program.

9. By issuing the RFP, FHFC sought to solicit proposals from qualified Applicants that commit to construct and/or rehabilitate housing in accordance with the terms and conditions of the RFP, applicable laws, rules, and regulations.

10. On December 15, 2006, Creative Choice submitted a Response to the RFP which included information concerning a 160-unit apartment complex in Brevard County named Villas at Palm Bay. Through the Response, Creative Choice requested \$5,000,000.00 in funding assistance for the project which has an overall development cost of \$23,200,000.00. Creative Choice believed that it had satisfied all requirements of the RFP. Thirty-two other Applicants responded to the RFP as well to provide various projects throughout the State.

11. Consistent with the primary mission and goal of the CWHIP Program, the Villas at Palm Bay development is proposed to provide essential services personnel residing in Brevard County an opportunity to participate in quality home ownership. The proposed Villas at Palm Bay will provide one, two and three bedroom apartments initially for rent at reduced and affordable rates and subsequently for purchase for between \$135,000.00 and \$155,000.00 per

unit. Without the CWHIP Program funds, Creative Choice will be unable to offer the Villas at Palm Bay units at the affordable prices proposed in the Response.

12. To offer this project consistent with the requirements of the CWHIP Program, Creative Choice partnered with the Brevard County Housing and Human Services Department ("County"). In fact, the County has committed to invest in the project in the amount of \$3,500,000.00, which includes funding commitments, as well as various waivers of impact fees.

13. As indicated in the Creative Choice Response, one of the benefits of the proposed Villas at Palm Bay is that it will use newly completed units, which will be immediately available for occupancy by essential services personnel in Brevard County. Indeed, this is why the County is committing funds to the project. While the project is substantially completed at this time, it does not as of yet have Certificates of Occupancy for its residential units and, accordingly, those units have never been occupied.

14. The RFP at Section Four lists those items which must be included in the RFP. The total points available for the RFP were 215.

15. The RFP at Section Six describes the evaluation process as follows:

- A. The Committee will evaluate the Responses based on the criteria described below. The Committee expects to conduct one or more public, noticed meetings during which it will discuss the Responses. The Committee will recommend none or one or more of the Responses to the Board for full or partial funding on such schedules and terms as Florida Housing deems appropriate based on its own review and the review of its credit underwriters and any others contractors.
- B. An Applicant's past and current performance in Florida Housing's programs may be considered in reviewing its Response. Florida Housing reserves the right not to issue, or to rescind if already issued, an award to any Applicant if it has been determined that the Applicant, any member of an Applicant that consists of multiple people or entities, or an officer, director, manager, or principal of an Applicant or member of an Applicant is not in compliance or is in financial arrears as to any Florida Housing program and has not taken satisfactory steps to remedy such non-compliance and/or financial arrearages as determined by Florida Housing.

- C. For purposes of scoring, ranking, and selection Lease/Purchase units shall be treated as rental units.
- D. Notwithstanding an award by the Board pursuant to this RFP, funding will be subject to a positive recommendation from Florida Housing’s Credit Underwriter.
- E. Florida Housing reserves the right to assign its technical assistance provider if deemed necessary.
- F. The following Section Four items will be evaluated and scored accordingly. Failure to provide the Threshold Items shall result in rejection of the Response.

<u>Item Reference</u>	<u>Maximum Points</u>
A. Contact Information Sheet	0 points
B. Project Description and Detailed Plan	20 points
C. Public Private Partnership	Threshold Item
D. Applicant Experience	10 points
E.1. Innovation – Land Use Strategies	35 points
E.2. Innovation – Local Financial Strategies ...	35 points
E.3 Other Innovative Strategies	20 points
F.1. Development Cost Pro Forma.....	Threshold Item
F.2.a. Contribution Evidence	Threshold Item
F.2.b. Contribution in Excess of 15%	35 points
G.1. Affordability Period	30 points
G.1. Affordability Period Minimums.....	Threshold Item
H. Set-Asides	30 points
H. Set Aside Minimums.....	Threshold Item
I. Site Control	Threshold Item
J. Infrastructure Availability.....	Threshold Item
K. Demand and Need	Threshold Item
L. Certification Statement.....	Threshold Item
Total Points Available.....	215 points

16. On January 5, 16 and 19, the CWHIP Review Committee met and considered the responses to the RFP and made recommendations to the FHFC Board of Directors for their consideration. The Committee was made up of FHFC staff. In its consideration, the Committee apparently determined that the Creative Choice Response should be considered ineligible for funding because the project had completed construction. Accordingly, Creative Choice’s Response was not scored and evaluated.

17. In a communication with the FHFC Contracts Administrator to question the Committee's decision, Creative Choice was advised the following:

The Review Committee deemed Creative Choice Homes XXV, Ltd. – Ineligible for funding pursuant to laws of Florida 2006-69, Section 27, subparagraph (4); The Project was already built. CWHIP funds can only be used for **new construction or rehabilitation**.

(Emphasis added.)

18. On January 26, 2007, FHFC's Board of Directors accepted the CWHIP Review Committee's ranking as presented by Attachment A. Also during the January 26, 2007 meeting the FHFC Board of Directors accepted the CWHIP Review Committee's recommendation to reject 21 RFP responses based on alleged failures to comply with the requirements of the RFP. This included Creative Choice's Response.

19. On January 31, 2007, Creative Choice timely filed its Notice of Intent to Protest. This Formal Written Protest, with the requisite cashier's check in lieu of bond, is being timely filed.

20. As disclosed in FHFC Board meeting Agenda Package, the Creative Choice RFP response was rejected for the following reason:

Ineligible for funding pursuant to Laws of Florida 2006-69, Section 27, subparagraph (4); the Project was already built.

21. In essence, FHFC failed to consider or score Creative Choice's Response not because it failed one of the numerous threshold requirements listed in the RFP at Section 4 or 6, but rather FHFC went outside the review criteria listed in the RFP and determined that Creative Choice's proposed project was "already built" and therefore not "new construction." Accordingly, FHFC concluded that Creative Choice's Response was ineligible for funding under the CWHIP Program.

22. FHFC's decision to find Creative Choice's Response ineligible for this specific reason is contrary to the RFP requirements and FHFC's governing statutes (specifically, Laws of Florida 2006-69,

Section 27, subparagraph 4) to such an extent as to be clearly erroneous, arbitrary and capricious, and contrary to competition. FHFC's decision must be reversed for several reasons.

23. Initially, Creative Choice in its Response has satisfied all listed RFP threshold requirements and to find otherwise is erroneous.

24. FHFC opines that the Villas of Palm Bay is not "new construction" and therefore ineligible for funding. However, there is no RFP requirement which makes such a finding a threshold requirement. Moreover, there is no definition in the RFP of what "new construction" is. Apparently, because the residential buildings are in FHFC's determination, then the project is not "new construction." For FHFC to use this undefined criteria to now reject Creative Choice's RFP Response is arbitrary and capricious.

25. FHFC attempts to support its rejection not by citing to a specific threshold requirement, but instead cites to the Laws of Florida 2006-69, Section 27, subparagraph (4) as the basis for its finding. Reliance on this section is misplaced. Indeed, subparagraph 4 does not limit funding under the CWHIP Program to only those projects proposing "new construction." Rather, subparagraph 4 grants FHFC the authority to provide loans to applicants for **construction or rehabilitation of workforce housing**. There is no expressed limitation of funding to only "new" construction as alleged by FHFC. Ironically, the word "new" is not even found in the section.

26. While FHFC may desire that the statutory language include a limitation to "new construction," it is clear that it lacks the specific statutory authority to change the language to do so. As Florida law makes clear, an agency has only that authority specifically delegated to it by statute. *Ocampo v. Department of Health*, 806 So. 2d 633 (Fla. 1st DCA 2002); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696 (Fla. 1st DCA 2001); *Department of Highway Safety and Motor Vehicles v. German*, 451 So. 2d 1013, 1015 (Fla. 3d DCA

1984). In that regard, “the powers of administrative agencies are measured and limited by the statutes or acts in which such powers are expressly granted or implicitly conferred.” *Coastal Petroleum Co. v. Department of Environmental Protection*, 649 So. 2d 930, 931 (Fla. 1st DCA 1995).

27. The Legislature did not at Subsection (4) limit the award CWHIP Program funds to projects using only “new construction.” If one questions the Legislative intent concerning the specific phrase “new construction” and how that term fits into the CWHIP Program, one only need look at Section 27, subparagraph 7(b) where a **priority** is given for a project which includes “new construction.” This clearly shows that while a priority may be given for projects using “new construction,” a proposed project is not ineligible simply because it is not using “new construction.” Had the Legislature so desired to limit CWHIP Program funding to only projects using “new construction,” it could have simply, as FHFC has attempted to do, added the word “new” at subparagraph 4. The Legislature did not choose to do so. Rather, the Legislature clearly wanted to find innovative approaches to satisfying the lack of affordable workforce housing. Creative Choice’s Response does just that.

28. To the extent FHFC maintains projects other than what it considers “new construction” to be ineligible for funding, such an action exceeds the statutory authority granted it by Section 27, subparagraph 4, and all action it has taken in issuing and scoring the RFP should be declared invalid as being beyond the scope of FHFC’s statutory authority.

29. Even if such a limitation does exist, the Villas at Palm Bay is “new construction.” While again “new construction” is not defined, it typically refers in the real estate context to buildings in various stages of construction which have not yet received Certificates of Occupancy and have not yet been occupied. As the RFP Response provides, while the buildings have been substantially completed, Creative Choice at the time of filing this protest is still in the process of obtaining Certificates of

Occupancy for the residential units. This means that the residential buildings are indeed new but not as of yet occupied. Accordingly, this is “new construction” as that phrase is generally used. (See RFP Response at Project Description and Detailed Plan Section at Subsection I Site Control).

30. Unlike projects that don’t yet have proper zoning, infrastructure and building permits in place and will take up to two years to complete, this newly constructed complex is immediately available for occupancy by essential service personnel, which will immediately address the purposes of the CWHIP Program. FHFC has arbitrarily turned this positive component of Villas of Palm Bay into a negative and rejected a proposal that would immediately provide much needed housing. Such a conclusion is clearly erroneous and contrary to the very purpose of the CWHIP Program.

31. Material issues to be resolved:

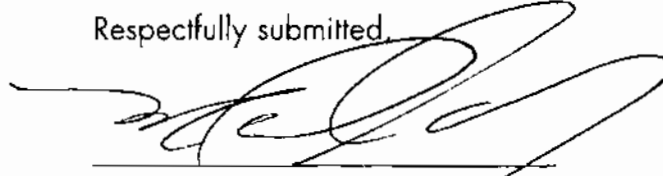
- a. Whether Creative Choice’s RFP Response has satisfied all RFP threshold requirements.
- b. Whether a proposed CWHIP project must be “new construction” to satisfy threshold or otherwise be eligible for funding.
- c. Whether Creative Choice’s proposed project is “new construction.”
- d. Whether FHFC has the statutory authority to limit funding pursuant to the CWHIP program to only projects which it considers as “new construction.”
- e. Whether FHFC’s decision to find Creative Choice’s Response to be ineligible for funding under the CWHIP Program is arbitrary or capricious, clearly erroneous, or contrary to competition.

WHEREFORE, Creative Choice requests a hearing involving any disputed issues of material fact and entry of an order determining that:

- (a) FHFC’s determination that Creative Choice’s Response is ineligible to receive funding under the CWHIP Program is contrary to the RFP specifications and to FHFC’s governing statutes, rules and policies to such an extent as to be arbitrary, capricious, contrary to competition, and clearly erroneous. Creative Choice’s Response should be scored and, to the extent it falls within the funding range, should be funded.

- (b) In the alternative, Creative Choice requests a hearing involving the disputed issues of material fact and entry of an order determining that to the extent FHFC concludes that the RFP limits eligibility of the CWHIP Program to only proposed projects that include "new construction," the RFP issued by FHFC, and all subsequent action regarding the RFP should be declared invalid as being beyond the scope of the FHFC's authority conferred on it by statute.

Respectfully submitted,

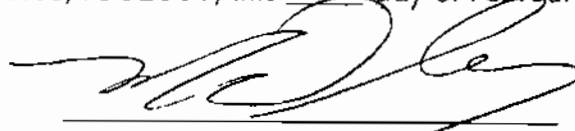


MICHAEL P. DONALDSON
Florida Bar No. 0802761
CARLTON, FIELDS, P.A.
Post Office Drawer 190
215 S. Monroe St., Suite 500
Tallahassee, Florida 32302
Telephone: 850/224-1585
Facsimile: 850/222-0398

Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and two copies of the foregoing has been filed by Hand Delivery to the Agency Clerk, Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301, this ^{12th} day of February, 2007.



MICHAEL P. DONALDSON

**Notice of Award for Request for Proposals (RFP) #2006-05
Community Workforce Housing Innovation Pilot Program (CWHIP)**

At its January 26, 2007 meeting, Florida Housing's Board of Directors (Board) accepted the CWHIP Review Committee's ranking as presented. Eleven (11) Projects were selected for funding and one (1) Project, The Preserve at Boynton, was placed on the waiting list.

The Final Ranking spreadsheet which reflects those eleven (11) Projects selected by the Board for funding is provided on the following page.

Please note, any unsuccessful applicant may file a notice of protest and a formal written protest in accordance with Section 120.57(3), Fla. Stat., and Rule Chapter 28-110, F.A.C. Failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., et. al. or failure to post the bond or other security required by law within the time allowed for filing a bond shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.

Submitted by:

Robin L. Grantham
Contracts Administrator
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
Phone: (850) 488-4197
Facsimile: (850) 414-6549
E-mail: robin.grantham@floridahousing.org

**FLORIDA HOUSING FINANCE CORPORATION
RFP 2006-05 (CWHIP) FINAL RANKING**

Application #	PROPERTY NAME/LOCATION	AMOUNT OF FUNDS REQUESTED	Number of Proposed Units	Threshold	High Cost Tier Level	High Growth Tier Level	Average Innovation Score	Average Overall Score	Leveraging	Lottery
30	Village of Quillen/Indiantown area/Martin County	\$5,000,000.00	H - 50	Y	1	3	63.43	169.71	\$100,000.00	25
32	Merry Place at Pleasant City/West Palm Beach/Palm Beach County	\$5,000,000.00	H - 114	Y	1	2	66.14	164.00	\$43,860.00	5
31	Wolf Creek Village/Freepoint/Walton County	\$5,000,000.00	H - 242	Y	1	1	64.57	138.29	\$20,661.00	12
10	Boulevard of the Arts Residences/City of Sarasota/Sarasota County	\$2,560,000.00	H - 28	Y	2	2	60.57	156.14	\$91,429.00	13
High Growth										
28	The Preserve/City of St. Cloud/Osceola County	\$5,000,000.00	MF - 120	Y	3	1	52.43	141.57	\$41,667.00	31
18	Homes of West Augustine/West Augustine/St. Johns County	\$5,000,000.00	H - 111	Y	2	1	56.29	132.43	\$45,045.00	23
16	Verde/City of Orlando/Orange County	\$5,000,000.00	MF - 97	Y	2	2	34.14	151.57	\$51,546.00	1
Innovation										
17	Ridgeview Subdivision and The Villas at Kenilworth/Sebring/Highlands County	\$5,000,000.00	H - 100	Y	3	3	51.86	137.86	\$50,000.00	10
33	Westshore Landings One/Tampa/Hillsborough County	\$4,000,000.00	H - 57	Y	3	2	49.00	133.14	\$70,175.00	14
23	Miktown Delray/City of Delray Beach/Palm Beach County	\$5,000,000.00	H - 32	Y	1	2	57.29	163.71	\$156,250.00	8
11	Hatton Street Houses/City of Sarasota/Sarasota County	\$2,440,000.00	H - 40	Y	2	2	57.00	148.00	\$61,000.00	29