

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

Petitioner,

CASE NO.: 2013-047BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

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

Summerset Apartments Limited Partnership (“Summerset” or the “Petitioner”) hereby files this formal written protest challenging the proposed tax credit allocation decisions released on December 13, 2013, by Respondent, Florida Housing Finance Corporation, for Request for Applications 2013-001. In support of this Petition, Summerset states as follows:

**Introduction**

1. This is a formal written protest filed pursuant to Sections 120.57(1) and (3), Florida Statutes,<sup>1</sup> Rule 28-110.004 and Rule 67-60.009(2), Florida Administrative Code. The Division of Administrative Hearings has jurisdiction over the subject matter and parties to this proceeding. See, Sections 120.569, 120.57(1), 120.57(3), Fla. Stat., and Rules 67-60.009(2) and (3), Fla. Admin. Code.

**Parties**

2. Summerset is a Florida Limited Partnership whose address is 2206 Jo-Ann Drive, Sarasota, Florida 34231. For purposes of this proceeding, the Petitioner’s address is that of its undersigned counsel.

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<sup>1</sup> All citations contained herein are to the official version of the 2013 Florida Statutes unless otherwise noted.

3. Petitioner is the owner of a proposed affordable housing development to be located in Pasco County. Petitioner's General Partner is a "Developer" as defined by Florida Housing Finance Corporation in Rule 67-48.002(28), Fla. Admin Code. Petitioner's General Partner and its affiliated entities have successfully completed the construction of several affordable housing developments from funding sources allocated by Florida Housing Finance Corporation.

4. The affected agency is the Florida Housing Finance Corporation ("Florida Housing" or "Respondent"). Florida Housing's address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329.

5. Florida Housing is a public corporation created by Section 420.504, Florida Statutes, to administer the governmental function of financing or refinancing affordable housing and related facilities in Florida. Florida Housing's statutory authority and mandates are set forth in Part V of Chapter 420, Florida Statutes. See, Sections 420.501-420.55, Fla. Stat.

#### **Background on Florida Housing's Programs**

6. Florida Housing administers several programs aimed at assisting developers in building affordable housing in the state in an effort to protect financially marginalized citizens from excessive housing costs. A portion of the units constructed with funding from these programs must be set aside for residents earning at or below a specified percentage of area median income ("AMI").

7. One of the programs through which Florida Housing allocates resources to fund affordable housing is the State Housing Tax Credit Program (the "Tax Credit Program"), which is established in Florida under the authority of Section 420.5093, Fla. Stat. Florida Housing is

the designated entity in Florida responsible for allocating federal tax credits to assist in financing the construction or substantial rehabilitation of affordable housing.

### **The RFA**

8. On September 19, 2013, Florida Housing issued Request for Applications 2013-001 (the “RFA”)<sup>2</sup> seeking applications for tax credit funding of affordable housing projects located in Medium and Small Counties. The RFA was issued pursuant to and in accordance with Rules 67-60.001 and 67-60.003, Florida Administrative Code.

9. Rule 67-60 establishes “the procedures by which the Corporation shall . . . [a]dminister the competitive solicitation processes to implement the provisions of the Housing Credit (HC) Program authorized by Section 42 of the IRC and Section 420.5099, F.S.” See, Rules 67-60.001 & 60.001(2), Fla. Admin. Code.

10. The RFA was issued by Florida Housing as the competitive selection method for allocating funding to competing affordable housing developments. The RFA solicited sealed proposals from qualified applicants who had previously constructed affordable housing units utilizing funding awarded by Florida Housing. Under the RFA, up to an estimated \$11,166,425 in housing tax credits were to be allocated for projects located in the Medium Counties and an estimated \$1,308,328 in tax credits were to be allocated to proposed developments located in Small Counties. Applications in response to the RFA were due on October 17, 2013.

11. Florida Housing received 96 applications in response to the RFA. Summerset timely submitted an application in response to the RFA requesting financing for its affordable housing project from the funding that is proposed to be allocated through the RFA. More specifically, Summerset requested an allocation of \$1,501,257 in annual tax credits for the development of Summerset Apartments, a 96-unit project located in Pasco County.

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<sup>2</sup> A true and correct copy of the RFA is attached hereto as Exhibit A.



12. The RFA sets forth the information required to be provided by an applicant and provides a general description of the type of projects that will be considered eligible for funding. See, Exhibit A, pgs. 4-36. The RFA also delineates the funding selection criteria on page 2.

13. The evaluation and scoring of the RFA responses was conducted initially by a Review Committee comprised of Florida Housing staff assigned to score specific portions of the responses. The Review Committee members consulted with non-committee Florida Housing staff and legal counsel as necessary. See, Exhibit A, p. 40. The Review Committee scored the applications and developed a Sorting Order Chart listing the eligible and ineligible Applications in order from highest totals score to lowest totals score. The Review Committee also applied the funding selection criteria set forth in the RFA to develop a proposed allocation of housing tax credits to eligible applicants. The Sorting Order Chart and recommended funding allocations were presented to the Florida Housing Board of Directors (“Board”) for approval at a meeting on December 13, 2013.

14. At the meeting of the Board on December 13, 2013, the Board approved a preliminary allocation of tax credits for the RFA. A copy of the preliminary allocations approved by the Board is attached as Exhibit B. The RFA and applicable rules provide an opportunity for applicants to file administrative challenges to the scoring and rankings set forth in the preliminary allocations. After the resolution of the administrative challenges, results will be presented to the Board for final approval prior to issuing invitations to the applicants in the funding range to enter the credit underwriting process.

15. As set forth below, the preliminary allocations approved by the Board on December 13 do not include Summerset in the funding range. The exclusion of Summerset from the preliminary funding range is the result of the Sorting Order Chart presented by the Review

Committee erroneously indicating that only partial funding is available for Summerset. Based upon the provisions in the RFA, if only partial funding is available for a development, the allocation is to be awarded to the next highest-scored applicant for which full funding could be made. However, as set forth below, a proper application of the funding selection criteria in the RFA and a correct determination of the developments eligible for funding under the RFA would have resulted in an allocation of full funding being available for Summerset. Because of errors in the scoring and ranking process, and due to the failure of the Review Committee to recognize that a competing, higher-ranked development had withdrawn its application, the preliminary allocations incorrectly concluded full funding was not available for Summerset. In fact, full funding is available for Summerset and it should be deemed to be within the funding range in the final rankings.

16. Petitioner received notice of the preliminary RFA allocation awards through e-mail notification and electronic posting on December 13, 2013.

17. On December 19, 2013, Summerset timely submitted its Notice of Intent to Protest the intended awards.<sup>3</sup> This Formal Written Protest and Petition for Administrative Hearing is timely filed in accordance with the provisions of Section 120.57(3)(b), Florida Statutes, and Rules 28-110.004 and 67-60.009, Florida Administrative Code.

18. As the owner of a development seeking funding from the sources being allocated through the RFA, Summerset is substantially affected by the proposed allocations posted for the RFA. The results of this and related proceedings may affect Summerset's ability to obtain funding through the RFA. Consequently, Summerset has standing to initiate and participate in this and related proceedings.

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<sup>3</sup> A true and correct copy of the Petitioner's Notice of Intent to Protest is attached hereto as Exhibit C.



### Problems with the Preliminary Allocations

19. Based upon the information available to date, it appears that inaccurate, incomplete or inconsistent information was utilized in determining the developments delineated for funding in the posted preliminary allocations. As a result, the proposed allocation of funding under the RFA is flawed, based on inaccurate and incomplete information and based on erroneous or faulty assumptions or conclusions.

20. The Review Committee met on November 5, 2013, and November 21, 2013, for the purpose of adopting the preliminary funding recommendations that were to be presented to the Board. In the course of identifying specific applications recommended for funding, the Review Committee took into consideration the relative scores of the applications and also applied a number of ranking factors, including:

- (a) The county in which the project is located – The RFA provided that only a single project in each county would be funded. So, for example, if a project in Osceola County was recommended for funding, then the second-ranked Osceola County project would be skipped over for funding in favor of a lower-scoring project located in a different county.
- (b) The size of the project's tax credit funding request relative to the remaining tax credits available – The RFA generally provided that an application would be selected for funding only if the amount of remaining tax credits available was sufficient to fully fund the application's tax credit request. So, for example, if the funding of higher scoring applications left only \$1 million in tax credits available and the next ranked application had requested \$2 million in tax credits, then the application would be skipped over in favor of the next application down the scoring list with a tax credit request of \$1 million or less.

21. Florida Housing's rules expressly authorize an applicant to "request in writing to withdraw its Application at any time prior to a vote by the Corporation's Board regarding any Applications received." Rule 67-60.004(2), Fla. Admin. Code.

22. Apparently, because the remaining amount of tax credits available for Medium County projects was limited, the second of these ranking factors resulted in the Review

Committee skipping over Summerset in order to recommend funding of an application with a relatively low tax credit request of \$766,666 -- Arbours at Central Parkway (#2014-089C) ("Arbours"). However, as there were adequate tax credits available to fully fund Summerset, there was no need or basis to skip over Summerset and allocate funding to the lower-ranked Arbours.

23. Among the higher-ranked applications recommended by the Review Committee for funding was the Pinnacle at Hammock Crossings (#2014-092C) ("Hammock Crossings"). However, by letter dated December 11, 2013, Hammock Crossings withdrew its application. Thus, the tax credits preliminarily allocated to Hammock Crossings were available to fully fund Summerset. In other words, a correct application of the funding selection criteria should exclude the withdrawn Hammock Crossings application resulting in full funding being available for Summerset under the RFA specifications and the applicable rules.

24. In reaching its proposed award decisions at the meeting on December 13, 2013, the Board failed to take into consideration the withdrawal of the Hammock Crossings application two days earlier, on December 11, 2013. The Board erroneously adopted the recommendations of the Review Committee meeting of November 21, 2013, which included funding for Hammock Crossings even though that application had already been withdrawn "prior to a vote by the Corporation's Board regarding any Applications received." See, Rule 67-60.004(2), Fla. Admin. Code. By not taking into account all of the tax credits available after the withdrawal of the Hammock Crossings application and the resulting effect on the rankings, the preliminary selection of projects for funding is in error and should be revised to include Summerset. The preliminary allocations are contrary to Florida Housing's governing statutes and rules, the RFA specifications, and are clearly erroneous, contrary to competition, arbitrary and/or capricious.



25. The need for a re-ranking following the withdrawal of the Hammock Crossings application was not recognized by the Board at the December 13 meeting, thus the Board mistakenly and/or erroneously approved the November 21 recommendations of the Review Committee without adjustment.

26. Under the existing rules and the RFA, the pre-award withdrawal of the Hammock Crossings application must be factored into the proposed awards. The tax credits allocated by the Board to Hammock Crossings should have been deemed to be available to the next highest-scoring eligible unfunded Medium County application that can be fully funded: Summerset. Modifying the rankings to account for the withdrawal of the Hammock Crossings application results in an increase in available tax credits that is sufficient to fully fund Summerset, which was scored higher and entitled to funding ahead of the Arbours.

27. RFA 2013-001, Section Four B.8. & B.8.c. (at pp. 39-40) of the RFA, provided for the reallocation of “[f]unding that becomes available after the Board takes action on the Committee’s recommendation(s), due to an Applicant declining its invitation to enter credit underwriting or the Applicant’s inability to satisfy a requirement outlined in this RFA and/or Rule Chapter 67-48.” These provisions are not applicable to the Hammock Crossings withdrawal which occurred before the Board meeting and before Hammock Crossings received an invitation to credit underwriting. Hammock Crossings has not been deemed unable to satisfy any requirement of RFA. Thus, the final allocation of tax credits under the RFA must be based on applications that are still pending at the time of final award following the conclusion of this administrative challenge.

28. The Board’s preliminary rankings that include Hammock Crossings and pass over Summerset in favor of the Arbours are inconsistent with the manner in which withdrawals have



been treated in previous Universal Application Cycles. Adoption of a new policy regarding withdrawals cannot be accomplished without adoption of new rules or a specific RFA provision.

29. Under the state's procurement and bid protest processes, all bidders are entitled to be considered and ranked based upon disclosed, consistent criteria, ensuring a fair and open competition resulting in the best value for the state. Bidders are entitled to challenge their own ranking and the ranking of their competitors based upon the disclosed criteria. The procurement process is halted and no awards are final until all challenges are resolved. Thus, the Board's approval of an allocation to the Arbours is not final until this protest is concluded.

30. The allocation of public funds should not be predicated on the ad hoc approach reflected in the preliminary allocations. The purpose of a competitive bidding process is in part to ensure that public entities do not arbitrarily or capriciously discriminate between bidders or make an award of a public contract or expend public funds on the basis of personal preference. See, Engineering Contractors Ass'n of S. Fla., Inc. v. Broward County, 789 So. 2d 445, 450 (Fla. 4th DCA 2001).

31. The failure to elevate Summerset to the funding level after the Hammocks Crossing application was withdrawn is contrary to competition, contrary to the RFA and contrary to the requirements of a competitive bidding process. The failure to revise the rankings to reflect the withdrawal of the Hammock Crossings application would be contrary to competition because it would unjustifiably fund and therefore reward projects that are ranked below Summerset.

32. In addition to the grounds set forth above relating to the withdrawal of the Hammock Crossings application, there may be additional grounds for including Summerset in the funding range. From the information available to date, it appears that the preliminary allocations approved by the Board may be based on scoring and ranking errors related to other

applications. For example, Forest Ridge Application No. 3004-038C does not appear to contain an original signature of the applicant on page 10 as required under the RFA. Page 37 of the RFA expressly requires an original applicant signature on the original hard copy of the application. The online copy of the Forest Ridge application does not include an original signature. The failure to include the original signature results in the application being ineligible for funding. Consequently, Forest Ridge's application should not have been allocated funding. Summerset would be eligible for funding if the Forest Ridge allocation is deemed ineligible.

33. In addition, the equity commitment letters for Arbours at Tumberlin Creek, Application No. 2014-046C and Arbours at Central Parkway, Application No. 2014-089C are deficient because they fail to expressly contain three of the required elements. The deficiencies in the equity commitment letters should result in the developments being deemed ineligible for funding. If the Arbours at Tumberlin Creek application is deemed ineligible, then Summerset would advance even further in the rankings and would be eligible for funding.

34. Summerset reserves the right to identify and raise additional scoring and ranking errors based upon information revealed during the protest process.

35. Summerset is entitled to a formal administrative hearing pursuant to Sections 120.57(1) and 120.57(3), Florida Statutes, to resolve the issues set forth in this Petition. See, Fairbanks, Inc. v. State, Dep't of Transp., 635 So. 2d 58 (Fla. 1st DCA 1994).

#### **Disputed Issues of Material Fact and Law**

36. Disputed issues of material fact and law exist and entitle Summerset to a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes. The disputed issues of material fact and law include, but are not limited to, the following:



- a. Whether legal authority exists to support the proposed funding for projects scored lower than Summerset;
- b. Whether the provisions of the RFA have been followed in the preliminary allocation of the tax credits under the RFA and/or whether erroneous or undisclosed interpretations and criteria have been applied;
- c. Whether the proposed allocations are consistent with the RFA, the requirements of a competitive procurement process and Florida Housing's rules and governing statutes;
- d. Whether the criteria and procedures followed in reaching the proposed awards are arbitrary, capricious, contrary to competition and/or prior Florida Housing interpretations of the applicable statutes and administrative rules and/or the prior approach for allocating limited resources;
- e. Whether the RFA's criteria for ranking and evaluation of proposals were properly followed;
- f. Whether the rankings preliminarily approved by the Board properly determine the eligibility of potential applicants for funding in accordance with the standards and provisions of the RFA;
- g. Whether the proposed awards are consistent with the RFA and the disclosed bases or grounds upon which tax credits are to be allocated;
- h. Whether the proposed awards are based on a correct determination of the eligibility of the applicants;
- i. Whether the proposed awards are consistent with fair and open competition for the allocation of tax credits;

j. Whether the proposed awards are based on clearly erroneous and/or capricious scoring and ranking criteria;

k. Whether the proposed awards improperly incorporate new policies and interpretations that impermissibly deviate from the RFA specifications, existing rules and/or prior Florida Housing interpretations and precedents;

l. Such other issues as may be revealed during the protest process.

**Statutes and Rules Entitling Relief**

37. The statutes and rules which are applicable in this case and that require modification of the proposed allocations include, but are not limited to, Sections 120.57(3) and Chapter 420, Part V, Florida Statutes, and Chapters 28-110 and 67-60, Florida Administrative Code.

**Concise Statement of Ultimate Fact and Law, Including the Specific Facts Warranting Reversal of Agency's Intended Action**

38. Summerset participated in the RFA process in order to compete for an award of tax credits with other developers based upon the delineated scoring and ranking criteria. Other developments have been unjustifiably elevated ahead of Summerset in the preliminary allocations and Summerset will be denied funding if the current proposed awards are allowed to become.

39. Unless the preliminary allocations are corrected, Summerset will be excluded from funding and developers with lower scores will be awarded tax credits from the 2013 cycle contrary to the provisions of the RFA and Florida Housing's governing statutes and rules.

40. The RFA sets forth the process for determining the projects that are selected for funding. The Board is assigned responsibility for determining funding allocations based upon



the RFA and the adopted rules of Florida Housing. A correct application of the scoring and ranking criteria for the RFA results in an allocation of funding to Summerset.

41. The basis and criteria upon which the preliminary funding allocations were made to Hammock Crossings and the Arbours are not set forth in the RFA and are contrary to competition. The erroneous scoring and assumptions used to develop the preliminary allocations approved by the Board effectively exclude Summerset from obtaining a funding award.

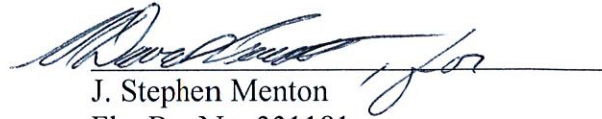
WHEREFORE, pursuant to Section 120.57(3), Florida Statutes, and Rule 28-110.004, Florida Administrative Code, Summerset requests the following relief:

a) That it be provided an opportunity to resolve this protest by mutual agreement within seven days of the filing of this Petition as provided by Section 120.57(3)(d)1., Florida Statutes.

b) That if this protest cannot be resolved within seven days, that the matter be referred to the Division of Administrative Hearings for a formal hearing to be conducted before an Administrative Law Judge pursuant to Sections 120.57(1) and (3), Florida Statutes.

c) That Recommended and Final Orders be entered determining that Summerset is eligible and entitled to an allocation of the requested tax credits under the RFA.

RESPECTFULLY SUBMITTED this 30th day of December, 2013.



J. Stephen Menton  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that this original has been hand delivered to the Agency Clerk, Florida Housing Finance Corporation, and a copy to Wellington Meffert, General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000 Tallahassee, Florida 32301; this 30th day of December, 2013.



Attorney