STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON POINT, LLC AND AMERICAN RESIDENTIAL DEVELOPMENT, LLC,

Petitioners,

vs.

DOAH Case No.: 17-3270BID
FHFC Case No.: 2017-031BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG HUDSON, LLC AND HERITAGE OAKS, LLLP,

Intervenors.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on September 22, 2017. Madison Point, LLC and American Residential Development, LLC (collectively referred to as "Petitioners" or "Madison Point"), Intervenor HTG Hudson, LLC ("HTG Hudson") and Intervenor Heritage Oaks, LLLP, ("Heritage Oaks") were Applicants under Request for Applications 2016-113: Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval,

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
J Marshall /DATE: 9/22/2017

Hillsborough, Orange, Palm Beach, and Pinellas Counties (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order, and Responses thereto.

On October 28, 2016, Florida Housing Finance Corporation ("Florida Housing") issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. Responses to the RFA were initially due on December 8, 2016. The RFA was modified on November 10, 2016, and the application period was extended to December 30, 2016. In response to the RFA, 43 developers (including Petitioners and Intervenors in this case) submitted applications.

On May 5, 2017, Florida Housing posted notice of its intended decision to award funding to seven Applicants, including Intervenor Heritage Oaks. Through the ranking and selection process outlined in the RFA, Petitioners Madison Point and Intervenor HTG Hudson were deemed eligible for funding but Petitioners' application was ranked lower than HTG Hudson and Heritage Oaks. While Florida Housing initially determined that HTG Hudson was eligible for funding, Florida Housing and HTG Hudson subsequently stipulated that HTG Hudson's application was ineligible for funding. Petitioners timely filed their notices of intent to protest followed by formal written protests. Notices of Appearance/Motions to Intervene

were filed by Heritage Oaks as well as HTG Hudson. Those motions were subsequently granted. Petitioners filed a Motion in Limine regarding Heritage Oaks' intervention, but ultimately withdrew the motion prior to hearing.

The protests were referred to the Division of Administrative Hearings (DOAH). A formal hearing took place on July 5, 2017, in Tallahassee, Florida before the Honorable Administrative Law Judge Yolonda Y. Green ("ALJ"). At hearing, Petitioners argued that Heritage Oaks' application should be ineligible for several reasons including: failure to select the appropriate Development Category, failure to accurately respond to the question regarding occupancy status, and failure to submit a proper Local Government Contribution Form. Based on information discovered through the course of the litigation, Florida Housing took the position at hearing that Heritage Oaks' application should be ineligible for failure to accurately respond to the question regarding occupancy status but disagreed with the other issues raised by Madison Point. Heritage Oaks argued that Florida Housing's preliminary agency action was correct and should be upheld. After the hearing, the parties timely filed Proposed Recommended Orders.

After consideration of the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the ALJ issued a Recommended Order on August 11, 2017. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ determined that Petitioners met their

burden to establish that Heritage Oaks' failure to accurately respond to the occupancy status of existing units was a false statement and material deviation. Therefore, Florida Housing's scoring decision regarding the occupancy status question was contrary to the terms of the RFA and clearly erroneous and Heritage Oaks is not eligible for funding. The Recommended Order recommended that Florida Housing enter a final order rescinding the intended award to Heritage Oaks and designating Petitioners as the recipients of funding under RFA 2016-113.

Heritage Oaks filed Exceptions to the Recommended Order and Petitioners and Florida Housing filed a Joint Response to Heritage Oaks' Exceptions to the Recommended Order, which are addressed as follows:

HERITAGE OAKS' EXCEPTIONS TO FINDINGS OF FACT

6. Heritage Oaks takes exception to the Findings of Fact set forth Paragraphs 45, 46, 48, and 50 of the Recommended Order.

7. After a review of the record, the Board finds that the Findings of Fact set forth in Paragraphs 45, 46, 48, and 50 of the Recommended Order are supported by competent, substantial evidence, and the Board rejects Heritage Oaks' Exceptions to the Findings of Fact set forth in Paragraphs 45, 46, 48, and 50 of the Recommended Order.

HERITAGE OAKS' EXCEPTIONS TO CONCLUSIONS OF LAW

8. Heritage Oaks takes exception to the Conclusions of Law set forth in Paragraphs 81, 82, and 83 of the Recommended Order.

9. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 81, 82, and 83 of the Recommended Order.

10. After a review of the record, the Board finds that the Conclusions of Law set forth in Paragraphs 81, 82, and 83 of the Recommended Order are reasonable and supported by competent, substantial evidence, and rejects Heritage Oaks' Exceptions to the Conclusions of Law presented in Paragraphs 81, 82, and 83 of the Recommended Order.

RULING ON THE RECOMMENDED ORDER

15. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence.

16. The Conclusions of Law of the Recommended Order are reasonable and supported by competent, substantial evidence.

ORDER

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

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. The Conclusions of Law in the Recommended Order are

adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that the preliminary award to Heritage Oaks is rescinded, HTG Hudson and Heritage Oaks are ineligible, and Madison Point, LLC is a recipient of funding under RFA 2016-113.

DONE and ORDERED this 22nd day of September 2017.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail this 22nd day of September, 2017 to the following:

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J. Marshall
Corporation Clerk

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON POINT, LLC; AND AMERICAN RESIDENTIAL DEVELOPMENT, LLC,

Petitioners,

vs. Case No. 17-3270BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG HUDSON, LLC; AND HERITAGE OAKS, LLLP,

Intervenors.
_____/

RECOMMENDED ORDER

On July 5, 2017, Administrative Law Judge Yolonda Y. Green, of the Division of Administrative Hearings ("Division"), conducted a duly-noticed final hearing, pursuant to sections 120.57(1) and (3), in Tallahassee, Florida.

APPEARANCES

For Petitioner, Madison Point, LLC; and American Residential Development, LLC (collectively referred to as "Madison Point"):

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STATEMENT OF THE ISSUE

The issue for determination in this bid protest proceeding is whether the Florida Housing Finance Corporation's ("Florida Housing") intended award of tax credits for the preservation of

existing affordable housing developments was clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On October 28, 2016, Respondent, Florida Housing, solicited applications for an allocation of federal low-income housing tax credits through a Request for Applications 2016-113 for Housing Credit Financing for Affordable Housing Developments ("RFA 2016-113" or "RFA"). The RFA 2016-113 was issued for the purpose of development of affordable housing located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. The applications were initially due on December 8, 2016. The RFA was modified on November 10, 2016, and the application period was extended to December 30, 2016. In response to RFA 2016-113, 43 developers (including Petitioners and Intervenors in this case) submitted applications.

On May 5, 2017, Respondent posted notice of its intent to award funding to seven applicants, including Heritage Oaks, LLLP ("Intervenor" or "Heritage Oaks"). Florida Housing also determined that Petitioners, Madison Point, LLC, and American Residential Development, LLC ("Petitioners" or "Madison Point"), were eligible for funding but Petitioners' application did not earn a sufficient score to exceed the scoring for Heritage Oaks. Florida Housing initially determined that HTG Hudson, LLC ("HTG Hudson"), was eligible for funding. However, Florida Housing and

HTG Hudson subsequently stipulated that HTG Hudson's application was ineligible for funding.

On May 9, 2017, Petitioners timely filed their formal written protests. On June 7, 2017, this matter was referred to the Division for a final hearing.

This matter was assigned to the undersigned to conduct the final hearing. The undersigned issued a Notice of Hearing scheduling this matter for July 5 and 7, 2017. The hearing convened on July 5, 2017, as scheduled, and concluded on the same date.

During the final hearing, Joint Exhibits 1 through 7 were admitted into evidence. The deposition of Bruce Bussey, Planning Division Manager, Pinellas County, Florida, was offered by the parties as Joint Exhibit 7. The parties presented the live testimony of Ken Reecy, Director of Multifamily Programs, Florida Housing. Petitioners' Exhibits 2, 4, 5, 13, 17, and 27 were admitted into evidence. Petitioners presented Stacy Banach, who was accepted as an expert in affordable housing development in Florida. Respondent offered Exhibit 1, which was admitted. Intervenor Heritage Oaks' Exhibits 4, 6, and 7 were admitted over objection. Intervenor presented the live testimony of Brian Evjen, Director of Development, Norstar Development

USA, LP, and Debbie Blinderman, Affordable Housing Consulting, LLC, was accepted as an expert in affordable housing development in Florida.

The parties stipulated to findings of fact which have been incorporated into the Findings of Fact below to the extent they are relevant.

During preliminary matters, Petitioners withdrew their Motion in Limine.

The parties ordered a copy of the transcript of the proceeding. The one-volume Transcript was filed on July 12, 2017. All of the parties timely filed Proposed Recommended Orders that have been considered in preparation of this Recommended Order.

Unless otherwise stated, all references to statutes or rules are to those in effect in 2016.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at hearing, and the entire record in this proceeding, the Findings of Fact are as follows:

Parties

1. Petitioner, Madison Point, is a Florida limited liability company and the designated applicant for funding through the RFA to construct an 85-unit development for low-income elderly persons in Pinellas County, Florida. Petitioner,

American Residential Development, LLC, is the designated developer for the proposed development.

2. Intervenor, Heritage Oaks, is a Florida limited liability limited partnership in the business of providing affordable housing. Heritage Oaks is an applicant for financing in response to the RFA to construct an 85-unit development for low-income elderly persons in Pinellas County, Florida.

3. Intervenor, HTG Hudson, is a Florida limited liability company in the business of developing affordable housing. HTG Hudson was an applicant for financing in response to the RFA to construct an 87-unit development for low-income elderly persons in Pinellas County, Florida. However, all issues regarding HTG Hudson have been resolved pursuant to a settlement agreement which was attached as Exhibit "A" to the Joint Prehearing Stipulation. Pursuant to the settlement agreement, HTG Hudson's application is ineligible for funding.

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

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

Affordable Housing Tax Credits

5. The low-income housing tax credit program (commonly referred to as "tax credits" or "housing credits") was enacted to incentivize the private market to invest in affordable rental housing. These tax credits are awarded competitively to housing developers in Florida for rental housing projects which qualify. These credits are then normally sold by developers for cash to raise capital for their projects. The effect is that it reduces the amount that the developer would have to borrow otherwise. Because the total debt is lower, a tax credit property can (and must) offer lower, more affordable rents. Developers also covenant to keep rents at affordable levels for periods of 30 to 50 years as consideration for receipt of the tax credits.

6. The demand for tax credits provided by the federal government exceeds the supply.

7. Florida Housing is authorized to allocate tax credits, State Apartment Incentive Loan ("SAIL") funding, and other funding by means of request for proposal or other competitive solicitation in section 420.507(48), and adopted Florida Administrative Code Chapter 67-60, to govern the competitive solicitation process for several different programs, including the program for tax credits. Chapter 67-60 provides that Florida

Housing allocate its tax credits, which were made available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3).

Application Process

8. In their applications, applicants request a specific dollar amount of housing credits to be given to the applicant each year for a period of 10 years. Applicants will normally sell the rights to that future stream of income tax credits (through the sale of almost all of the ownership interest in the applicant's entity) to an investor to generate the amount of capital needed to build the development. The amount which can be received depends upon the accomplishment of several factors such as a certain percentage of the projected "total development cost" (total costs incurred in the completion of a development); a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated areas of some counties. This, however, is not an exhaustive list of the factors considered.

9. Tax credits are made available through a competitive application process commenced by the issuance of an RFA. An RFA is equivalent to a "request for proposal" as indicated in rule 67-60.009(3). The RFA at issue here is RFA 2016-113, Housing Credit Financing for Affordable Housing Developments Located in

Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas counties.

10. The RFA was issued on October 28, 2016, and responses were initially due December 8, 2016. The RFA was modified on November 10, 2016, and, among other revisions, the application deadline was extended to December 30, 2016.

11. Through the RFA, Florida Housing seeks to award up to an estimated $14,669,052 of housing credits to qualified applicants in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas counties.

12. In response to RFA 2016-113, 43 applications were submitted for funding, including Madison Point and Heritage Oaks.

13. Madison Point submitted application No. 2017-232C seeking $1,660,000 in annual allocation of housing credits to finance the construction of an 80-unit development in Pinellas County.

14. Heritage Oaks submitted application No. 2017-201C, seeking $1,660,000 in annual allocation of housing credits to finance the construction of an 85-unit development in Pinellas County.

15. The RFA sets forth the information required to be provided by an applicant, which includes a general description of the type of projects that will be considered eligible for funding and delineates the submission requirements. In order to be

considered for funding selection, the application must meet all of the eligibility requirements set forth in the RFA. The eligibility requirements include, among other things, "[a]ll "Mandatory Items" described in section five of the RFA." The RFA sets forth a list of mandatory items that must be included in a response including, but are not limited to, appropriate zoning, site control, development category, and occupancy status of any existing units.

16. As part of the general development information, the RFA requires applicants to select a development category applicable to its proposed development. This is a mandatory item of the RFA.

17. Applicants are instructed to select amongst the following categories:

a) New Construction (where 50 percent or more of the units are new construction)

b) Rehabilitation (where less than 50 percent of the units are new construction)

c) Acquisition and Rehabilitation (acquisition and less than 50 percent of the units are new construction)

d) Redevelopment (where 50 percent or more of the units are new construction)

e) Acquisition and Redevelopment (acquisition and 50 percent or more of the units are new construction)

18. Once disclosed in the application, the development category cannot be changed. In the RFA, "new construction" while capitalized is not a defined term. However, rule 67-48.002(98), defines "redevelopment" as follows:

> (a) With regard to a proposed Development that involves demolition of multifamily rental residential structures currently or previously existing that were originally built in 1986 or earlier and either originally received financing or are currently financed through one or more of the following HUD or RD programs: Sections 202 of the Housing Act of 1959 (12 U.S.C. §1701q), 236 of the National Housing Act (12 U.S.C. §1701), 514, 515, or 516 of the U.S. Housing Act of 1949 (42 U.S.C. §1484), 811 of the U.S. Housing Act of 1937 (42 U.S.C. §1437), or have PBRA; and new construction of replacement structures on the same site maintaining at least the same number of PBRA units; or
>
> (b) With regard to proposed Developments that involve demolition of public housing structures currently or previously existing on a site with a Declaration of Trust that were originally built in 1986 or earlier and that are assisted through ACC; and new construction of replacement structures on the same site, providing at least 25 percent of the total new units with PBRA, ACC, or both, after Redevelopment.

19. Although the Rehabilitation Category is defined, it is not relevant for purposes of this proceeding.

20. Additionally, the RFA requires applicants to answer whether the proposed development consists of: a) 100 percent new construction units; b) 100 percent rehabilitation units; or

c) a combination of new construction units and rehabilitation units, and state the quantity of each type. This is a mandatory item of the RFA.

Selection Process

21. Florida Housing received 43 applications seeking funding in RFA 2016-113. Florida Housing's executive director appointed a Review Committee of Florida Housing staff to evaluate the applications for eligibility and scoring and to make recommendations to Florida Housing's Board of Directors. Pursuant to the terms of the RFA, the applications were received, processed, deemed eligible or ineligible, scored, and ranked.

22. The Review Committee determined that, among other applicants, the applications of Heritage Oaks and Madison Point were eligible for funding. Through the ranking and selection process outlined in the RFA, Heritage Oaks was recommended to the Board of Directors to be selected for funding within Pinellas County. The Review Committee developed a chart listing its funding recommendations for the RFA to be presented to Florida Housing's Board of Directors.

23. On May 5, 2017, Florida Housing's Board of Directors met and considered the recommendations of the Review Committee for RFA 2016-113. Also, on May 5, 2017 following the Board meeting, Petitioners, and all other applicants in RFA 2016-113, received notice that Florida Housing's Board of Directors

determined whether applications were eligible or ineligible for consideration for funding, and that certain eligible applicants were selected for award of tax credits. Such notice was provided by the posting of two spreadsheets, one listing the "eligible" and "ineligible" applications in RFA 2016-113 and one identifying the applications which Florida Housing proposed to fund on the Florida Housing website, www.floridahousing.org. Of the 43 applications submitted, 37 were deemed "eligible" and six were deemed "ineligible."

24. In that May 5, 2017, posting, Florida Housing announced its intention to award funding to seven applications, including Heritage Oaks. Madison Point was deemed eligible but not selected for funding.

25. Madison Point timely filed a Notice of Protest and Petition for Formal Administrative Proceedings. Heritage Oaks intervened as a named party and intervention was granted.

26. The scoring decisions at issue in this proceeding are related to Florida Housing's decision to award funding to Heritage Oaks based on its responses regarding occupancy status and local government contribution.

27. The RFA specifies an "application sorting order" to rank applicants for potential funding. The first consideration in sorting eligible applications for potential funding is

application score. The maximum score an applicant can achieve is 28 points.

28. In the case of a tie score, Florida Housing incorporated a series of "tie breakers" into the sorting process. The tiebreakers for this RFA, in order of applicability, are:

a) First, by Development Category Funding Preference;

b) Second, by a Per Unit Construction Funding Preference;

c) Third, by a Leveraging Classification based on the amount of total Florida Housing funding per set-aside unit;

d) Fourth, by the eligibility for the 75 or More Total Unit Funding Preference;

e) Fifth, by satisfaction of a Florida Job Creation Funding preference, which applies a formula to reflect the estimated number of jobs created per $1 million of funding;

f) Lastly, if necessary, by randomly assigned lottery number.

29. The RFA set out a selection process for eligible applicants, after the sorting and ranking process outlined above. That selection process consisted of selecting the highest ranking eligible application for a proposed development in each of the following counties first: Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas. If funding remained after those selections, then the highest ranking eligible unfunded application in Broward would be selected next.

30. Heritage Oaks and Madison Point selected the elderly non-Assisted Living Facility ("ALF") demographic and the proposed developments were located in Pinellas County. Florida Housing's preliminary agency action selected Heritage Oaks for funding for Pinellas County.

Heritage Oaks' Application

31. Heritage Oaks' proposed development site consists of approximately 4.99 acres.

32. Heritage Oaks' proposed development site contains existing roads owned by Pinellas County. Heritage Oaks indicates that its proposed development site was comprised of scattered sites.

33. There are existing housing units on Heritage Oaks' development site. However, Heritage Oaks' application indicates that "there are no existing units."

34. Heritage Oaks' application selected "new construction" as its development category.

35. Heritage Oaks' proposed development involves demolition of currently-occupied, multifamily, public housing rental structures that were originally built in 1986 or earlier and either originally received financing or are currently financed through one or more of the following HUD or RD programs: Sections 202 of the Housing Act of 1959 (12 U.S.C. § 1701 q); 236 of the National Housing Act (12 U.S.C. § 1701); 514, 515, or

516 of the U.S. Housing Act of 1949 (42 U.S.C. § 1484); and 811 of the U.S. Housing Act of 1937 (42 U.S.C. § 1437).

Development Category

36. In response to the RFA requirements, Heritage Oaks selected "New Construction" as its development category. Heritage Oaks also indicated that its proposed development consists of 100 percent new construction. Mr. Evjen acknowledged that Heritage Oaks' proposed development involves the demolition of existing structures on the proposed development site and the construction of 85 new units. Mr. Evjen explained that the proposed development includes 71 senior units in a three-story, mid-rise building, and seven duplex buildings, which would include the other 14 units on the proposed development site.

37. The testimony at hearing indicated that at the time of the application deadline, Heritage Oaks' proposed development did not satisfy all of the criteria set forth in the definition of redevelopment, as set forth in paragraph 18, supra. At hearing, Mr. Evjen and Ms. Blinderman testified that to qualify as redevelopment, at least 25 percent of the new units must receive Project Based Rental Assistance ("PBRA"). PBRA units are those with a rental subsidy through a contract with the United States Department of Housing and Urban Development ("HUD") or the Rural Development Services (formerly the Farmer's Home Administration)

of the United States Department of Agriculture. See Fla. Admin. Code Rules 67-48.002(72), (85), and (98).

38. Heritage Oaks intends to develop the proposed development with Pinellas County Housing Authority ("Housing Authority"). At the time of the application deadline, the Housing Authority was in discussions with HUD regarding the final count, if any, of PBRA units. The lack of a resolution with HUD is beyond the authority of Heritage Oaks and remains uncertain. As of the application deadline, Heritage Oaks could not know if 25 percent of its new units would receive PBRA and, therefore, could not classify the proposed development as redevelopment. While it may be possible that Heritage Oaks' proposed development may meet the definition of redevelopment at some point in the future, at the time of the application it did not meet the definition. At hearing, no testimony or documentary evidence was offered to establish that the proposed development currently falls within the definition of redevelopment. Respondent found this classification to be acceptable. Petitioners assert that it is reasonable that Heritage Oaks would meet the threshold to satisfy the criteria for the redevelopment category. However, it was more reasonable that Heritage Oaks would not meet the threshold and be ineligible for funding, if the redevelopment category had been incorrectly selected. Therefore, the evidence

supports that it was reasonable for Heritage Oaks to identify its development project as new construction.

Occupancy Status

39. Petitioners also argue that Heritage Oaks should not be awarded funding because it failed to disclose the occupancy status of existing units on the proposed development site.

40. In the RFA, the subheading and language for section four (A)(5)(e)(3) provides as follows:

> e. Number of Units in Proposed Development:
>
> (3) The Applicant must indicate which of the following applies with regard to the occupancy status of any existing units:
>
> (a) Existing units are currently occupied
>
> (b) Existing units are not currently occupied
>
> (c) There are no existing units

The section then instructs the applicant to refer to section four (A)(5)(e) of the RFA instructions before answering the occupancy status question.

41. The RFA instructions at section four (A)(5)(e) provide as follows:

> e. Number of Units in Proposed Development:
>
> (1) The Applicant must state the total number of units.

> Note: The proposed Development must consist of a minimum of 50 total units. Proposed Developments consisting of 75 or more total units will be eligible for the 75 or More Total Unit Funding Preference (outlined at Section Four B.2. of the RFA). If the Elderly Demographic Commitment (ALF or Non-ALF) is selected at question 2.b. of Exhibit A, the proposed Development cannot exceed the maximum total number of units outlined in Item 1 of Exhibit C of the RFA.
>
> (2) The Applicant must indicate whether the proposed Development consists of (a) 100% new construction units, (b) 100% rehabilitation units, or (c) a combination of new construction units and rehabilitation units, and state the quantity of each type.
>
> (3) The Applicant must indicate the occupancy status of any existing units at question 5.e.(3) of Exhibit A.
>
> Developments that are tentatively funded will be required to provide to the Credit Underwriter a plan for relocation of existing tenants, as outlined in Item 2.b.(6) of the Applicant Certification and Acknowledgement form. The plan shall provide information regarding the relocation site; accommodations relevant to the needs of the residents and length of time residents will be displaced; moving and storage of the contents of a resident's dwelling unit; as well as the approach to inform and prepare the residents for the rehabilitation activities.

42. In response to this RFA requirement and the cited RFA Instructions concerning Occupancy Status, Heritage Oaks indicated that "there are no existing units" in its proposed development. However, Mr. Evjen testified that there were

existing units on the development site as of the application deadline and some of those units were occupied.

43. Heritage Oaks pointed out that a review of the RFA reflects that it is organized in an outline format with headings and subheadings. For example, section four concerns information to be provided in the application. Section four A(5) then requests general development information. Section four (A)(5)(e) requests information concerning the number of units in the proposed development.

44. Mr. Evjen further testified that, based on review of the RFA and the instructions, Heritage Oaks took a three-step approach in responding to the occupancy status question. Heritage Oaks properly answered the first two questions. First, Heritage Oaks provided the total number of units as 85. Second, Heritage Oaks indicated that "all 85 units would be new construction."

45. In the final question, Heritage Oaks considered whether any existing units would remain as a "part of its proposed development." Because no existing units would be part of its proposed development, Heritage Oaks responded "there are no existing units" in its proposed development. However, the term "proposed" was not used in question 5.e.(3) as was the case in the prior questions in the same subsection. Mr. Evjen also testified that he read the question as "if there are

rehab[ilitation] units, are they occupied? Heritage Oaks' erroneous interpretation of the question resulted in its failure to provide an accurate answer. The question simply requested the "occupancy status of *any* existing units." The question was clear and unambiguous.

46. The parties have stipulated that there are existing housing units on the Heritage Oaks proposed development site. However, Heritage Oaks' application indicates that there are no existing units. The representation that there were no existing units was a false statement of material fact. It is worth noting that the parties stipulated at the beginning of the hearing that there is no allegation of fraud or intentional deception. There is also no evidence in the record of intentional deception and therefore, there is no finding by the undersigned that Heritage Oaks engaged in intentional misconduct. However, whether intentional or not, Heritage Oaks' representation of no existing units is a false statement.

47. According to Mr. Reecy, Florida Housing asks the question regarding occupancy status of existing units because Florida Housing wants to make sure that the developer can handle the cost issues related to relocation and that the relocation needs of the existing tenants will be met. Additionally, Mr. Reecy testified that Florida Housing relies upon applicants

to accurately respond to questions in the RFA because, at the time of scoring, no independent research is conducted to verify responses.

48. Regarding a relocation plan, Heritage Oaks relies on the Declaration of Trust's requirement to have a tenant relocation plan as a remedy for the failure to properly respond to the occupancy status question. However, the Declaration of Trust is a HUD requirement that is not controlled by Florida Housing. In fact, Mr. Evjen testified that Heritage Oaks' co-developer was researching terminating the Declaration of Trust. Given the fact that Heritage Oaks could terminate its Declaration of Trust, the Declaration of Trust does not provide adequate assurance that the tenants in the existing housing units will be adequately relocated once Florida Housing allocates its funding.

49. Florida Housing has a material interest in ensuring that tenants located in existing housing units are properly and adequately relocated during the development phase of any Florida Housing-funded development.

50. Accordingly, Florida Housing's scoring decision with regard to Heritage Oaks' response to the occupancy status question was contrary to the terms of the RFA and clearly erroneous. Heritage Oaks is ineligible for funding under RFA 2016-113.

Local Government Contribution

51. At section four (A)(10)(b), an applicant can obtain 10 points if it can demonstrate a high level of local government interest in its project via an increased amount of local government contribution. To satisfy this requirement, an applicant must attach a properly completed and executable Florida Housing Finance Corporation Local Government Verification of Contribution-Loan Form ("loan form"). The RFA establishes a contribution threshold amount which qualifies an application for the local government area of opportunity points. The RFA defines "local government areas of opportunity" as follows:

> Developments receiving a high level of Local Government interest in the project as demonstrated by an irrevocable funding contribution that equals or exceeds 2.5 times the Total Development Cost Per Unit Base Limitation (exclusive of any add-ons or multipliers), as provided in Item 7 of Exhibit C to the RFA, for the Development Type committed to for the proposed Development.

52. The minimum local government areas of opportunity funding amounts are outlined in section four A.10.b. of the RFA. A single jurisdiction (i.e., the county or a municipality) may not contribute cash loans and/or cash grants for any other proposed development applying in the same competitive solicitation in an amount sufficient to qualify as Local

Government Areas of Opportunity, per the competitive solicitation.

53. In response to this RFA requirement, Heritage Oaks submitted Attachment 15, a loan form from Pinellas County, Florida, in the amount of $551,000. Based upon the minimum local government area of opportunity funding amounts established in the RFA, this amount qualified Intervenor Heritage Oaks for 10 points.

54. Petitioners challenge Intervenor Heritage Oaks' loan form for two reasons. First, Petitioners opine that the face value of the commitment and the net present value included in the loan form cannot be the same amount and, therefore, a calculation error must have occurred. Petitioners rely on examples of various calculations found in the RFA. Next, Petitioners allege that the loan form was not properly signed and no final approval was given by Pinellas County.

55. Intervenor Heritage Oaks provided a loan form from Pinellas County. The loan form committed Pinellas County to a loan in the amount of $551,000. Mr. Bussey, the individual who processed the application and award of commitment, indicated that the commitment was a loan that would be forgiven as long as certain requirements were met and kept.

56. Mr. Bussey further indicated that there were no loan payments or interest rates associated with the loan.

Accordingly, he indicated that the loan value was the net present value of the loan, which means the commitment amount and the net present value for the Pinellas County loan is the same number, $551,000.

57. While Petitioners allege that the loan form was not appropriately signed and no final approval had occurred, the greater weight of the evidence shows otherwise. Specifically, Petitioners opine that either a resolution or some action by the Pinellas County Board of County Commissioners or the County Administrator was necessary as asserted by their witness, Mr. Banach. While Mr. Banach was critical of the loan verification form, he acknowledged that he is not an expert regarding the process for Pinellas County loan contribution and he did not process the loan application. He further acknowledged that Mr. Bussey, the individual who processed the loan, found no error with the form.

58. The evidence shows that the loan form was executed by Charles Justice, who at the time of the loan form's execution was the Chairman of the Pinellas County Board of County Commissioners. Mr. Bussey explained the process for approving the loan form and indicated that Mr. Justice, as Chairman, had the authority to sign the loan form. Mr. Bussey also pointed out language in the loan form which provides as follows: "This certification must be signed by the chief appointed official

(staff) responsible for such approval, . . . Chairperson of the Board of the County Commissioners."

59. Mr. Justice is one of the designated individuals the form itself indicated is acceptable. Mr. Bussey indicated that no further approvals were necessary. At hearing, Florida Housing indicated that the loan form submitted by Heritage Oaks satisfied the requirements of the RFA and this position was not shown to be erroneous or unreasonable.

CONCLUSIONS OF LAW

60. Pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes, the Division has jurisdiction of the parties and the subject matter of this proceeding. Florida Housing's decisions in this case affected the substantial interests of each of the parties, and each has standing to challenge Florida Housing's scoring and review decisions.

61. This is a competitive procurement protest proceeding and as such is governed by section 120.57(3)(f), which provides as follows, in pertinent part:

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard

> of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .

62. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioners as the parties opposing the proposed agency action. See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioners must prove by a preponderance of the evidence that Florida Housing's proposed action is arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat.

63. The First District Court of Appeal has interpreted the process set forth in section 120.57(3)(f) as follows:

> A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes (Supp. 1996) provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken

> by the agency. See Intercontinental Properties, Inc. v. Dep't of Health and Rehab. Services, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

64. The ultimate issue in this proceeding is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications." In addition to proving that Florida Housing breached this statutory standard of conduct, Petitioners also must establish that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

65. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law will be upheld "if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004)(citations omitted); see also Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528

(1985)("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

66. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

> [T]o 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 various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977)(quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931)).

67. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if it is not supported by facts or logic. See Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

68. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "whether the agency: (1) has considered all relevant factors; (2) has given actual,

good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

69. However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632 n.3 (Fla. 2d DCA 1992).

70. Rule 67-60.006 is titled, "Responsibility of Applicants." Section (1) of the rule provides as follows:

> (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 the Corporation, the Application shall not be considered.

71. Rule 67-60.008 provides:

> The Corporation may waive Minor Irregularities in an otherwise valid Application. Mistakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes.

72. Rule 67-60.002(6) defines "minor irregularity" to mean "a variation in a term or condition of an Application pursuant

to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of the Corporation or the public." See Tropabest Foods, Inc. v. State, Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986); Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

73. In the instant case, Florida Housing provided adequate, reasonable justification for its determination that Heritage Oaks' selection of the development category of "new construction" satisfied the terms of the competitive solicitation.

74. Mr. Evjen testified regarding the uncertainty on whether the Heritage Oaks proposed development would receive PBRA from HUD and, therefore, qualify for the redevelopment category.

75. On the other hand, the RFA clearly provides that New Construction is "where 50% or more of the units are new construction," and is without requirements regarding PBRA. Since the Heritage Oaks proposed development is 100 percent new construction, the selection of the development category of new construction was reasonable and consistent with the terms of the RFA.

76. Regarding the loan contribution form, Petitioners made numerous plausible arguments as to why the loan verification forms may be in error. However, Petitioners offered no

compelling reason to disturb Florida Housing's acceptance of Mr. Justice's determination. The decision whether to grant or deny this particular form of (preliminary) local governmental approval for a loan application must be made by the local government having jurisdiction over the proposed development. Mr. Justice was the local official with authority to sign the form. Mr. Bussey testified that the verification forms were properly executed and accurate, and there was no evidence to support a conclusion that his determination was tainted by fraud or illegality.

77. Petitioners failed to demonstrate that Florida Housing's reliance on the loan verification form was clearly erroneous. Having considered the evidence presented at the final hearing, the undersigned was not left with either a definite or firm conviction that a mistake was made when Florida Housing relied upon Mr. Justice's certification.

78. Thus, Petitioners failed to demonstrate that Florida Housing's reliance on the loan verification forms was arbitrary or capricious. It is reasonable for Florida Housing to rely upon the local government official's determination regarding the loan approval for funding affordable housing projects.

79. Finally, but most important here, is the issue regarding Heritage Oaks' response regarding the occupancy status of existing units on the proposed development site. Heritage

Oaks did not disclose in its application that there are existing units on the proposed development site. Heritage Oaks argues that the non-disclosure of this information should be treated as a minor irregularity that may be waived at Florida Housing's discretion.

80. Mr. Reecy credibly testified that Florida Housing uses the applicant's response to the occupancy status question to determine whether to impose a requirement on applicants that are tentatively selected for funding to submit a tenant relocation plan during credit underwriting. More importantly, Florida Housing has a material interest in ensuring that tenants located in existing housing units are properly and adequately relocated during the development phase of any Florida Housing-funded development. As stated by Mr. Reecy, an incorrect answer regarding occupancy status of existing units has an adverse effect on the interests of Florida Housing and the public in ensuring the process protects the welfare of the current housing residents.

81. Heritage Oaks asserts that the Declaration of Trust's requirement to have a tenant relocation plan could serve as a remedy for the failure to properly disclose the existence of occupied units on the development site. However, the Declaration of Trust is a HUD requirement that is not controlled by Florida Housing. Furthermore, Mr. Evjen testified that

Heritage Oaks' co-developer (the Housing Authority), is considering terminating the Declaration of Trust. Given the fact that Heritage Oaks could terminate its Declaration of Trust, the Declaration of Trust does not provide adequate assurance that the tenants in the existing housing units will be adequately relocated once Florida Housing allocates its funding. Thus, the suggested remedy is not sufficient to overcome the material deviation.

82. The greater weight of the evidence establishes that Heritage Oaks' failure to disclose the existing, occupied housing units on the proposed development site is a material deviation from the requirements of the RFA, which renders the Heritage Oaks application ineligible for funding under the RFA.

83. Based on the foregoing, the undersigned concludes that Petitioners met their burden to establish that Heritage Oaks' failure to accurately respond to the occupancy status of existing units was a false statement and material deviation. Therefore, Florida Housing's scoring decision regarding the occupancy status question was contrary to the terms of the RFA and clearly erroneous. As a result, Heritage Oaks is not eligible for funding.

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 rescinding the intended award to Heritage Oaks and designating Madison Point and America Residential Development, LLC, as the recipients of the funding under RFA 2016-113.

DONE AND ENTERED this 11th day of August, 2017, in Tallahassee, Leon County, Florida.

Yolonda Y. Green

YOLONDA Y. GREEN
Administrative Law Judge
Division of Administrative Hearings
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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.