

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

CAPITAL GROVE LIMITED
PARTNERSHIP,

Petitioner,

v.

FHFC CASE NO.: 2015-012BP
DOAH Case No.: 15-2386BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HTG WELLINGTON FAMILY, LLC,

Intervenor.

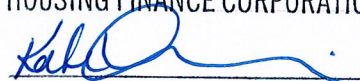
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FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on August 7, 2015. Petitioner Capital Grove Limited Partnership, (“Capital Grove”) timely submitted an Application for funding (“Application”) in response to Request for Applications 2014-114. The matter for consideration before this Board is a Recommended Order pursuant to §120.57(1) and (3), Fla. Stat. (2014).

1. Petitioner timely filed its Petition for Formal Administrative Hearing pursuant to §§120.569 and 120.57(1) and (3), Fla. Stat. (2014), (the “Petition”) challenging the preliminary agency action of Florida Housing Finance Corporation

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

 /PATL: 8-7-15

(“Florida Housing”) regarding the scoring of its Application and that of Intervenor HTG Wellington Family, LLC (“HTG”). HTG subsequently intervened in the proceeding.

2. Florida Housing reviewed the Petition pursuant to §120.569(2)(c), Fla. Stat. (2014), determined that the Petition raised disputed issues of material fact and referred the case to the Division of Administrative Hearings. Pursuant to §120.57(1), Fla. Stat. (2014), an informal hearing was held in this case on July 1, 2015, in Tallahassee, Florida, before Administrative Law Judge (ALJ) James H. Peterson, III. Following the hearing, Capital Grove, Florida Housing and HTG all timely filed Proposed Recommended Orders.

3. After consideration of the evidence and arguments presented at hearing and the Proposed Recommended Orders, the ALJ issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.” The ALJ recommended: that Florida Housing issue a Final Order affirming the Florida Housing’s scoring of the Capital Grove Application; finding that as a result Capital Grove lacks standing to challenge HTG’s Application; otherwise affirming Florida Housing’s scoring of the HTG Application; and recommending denial of the relief requested in the Petition.

4. §120.57(1)(k), Fla. Stat. (2014) provides a procedure for a Petitioner to challenge the findings of a Recommended Order entered pursuant to a formal

hearing. Capital Grove timely filed its Exceptions to the Recommended Order on August 5, 2015, a copy of which is attached hereto as “Exhibit B” and made a part hereof by reference. Florida Housing and HTG subsequently filed a Joint Response to Petitioners Exceptions (“Joint Response”) the following day, August 6, 2015, a copy of which is attached hereto as “Exhibit C” and incorporated herein by reference.

RULING ON EXCEPTIONS

5. Based on a review of the record and the arguments presented by the Parties, the Board specifically rejects Capital Grove’s enumerated Exceptions 1-5 for the reasons set forth in the Recommended Order and the Joint Response.

RULING ON THE RECOMMENDED ORDER

6. The Findings of Fact of the Recommended Order are supported by competent substantial evidence.

7. The Conclusions of Law of the Recommended Order are supported by competent substantial evidence.

8. The arguments presented in Capital Grove’s Exceptions 1-5 are specifically rejected on the grounds set forth in the Recommended Order and the Joint Response.

ORDER

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

9. 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.

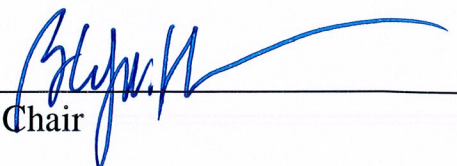
10. The Conclusions of Law of the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Florida Housing's scoring of the Capital Grove and HTG Applications is **AFFIRMED** and the relief requested in the Petition is **DENIED**.

DONE and ORDERED this 7th day of August, 2015.



FLORIDA HOUSING FINANCE CORPORATION

By: 
Chair

Copies to:

Hugh R. Brown
General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Ken Reecy
Director of Multifamily Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Michael P. Donaldson, Esquire
Carlton Fields Jordan Burt, P.A.
215 S. Monroe Street, Suite 500
Tallahassee, FL 32301

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE, Suite 304
Tallahassee, FL 32308

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, 300 MARTIN LUTHER KING, JR., BLVD., 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

CAPITAL GROVE LIMITED
PARTNERSHIP,

Petitioner,

vs.

Case No. 15-002386BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HTG WELLINGTON FAMILY, LLC,

Intervenor.

_____ /

RECOMMENDED ORDER

A final hearing was held in this matter on July 1, 2015, in Tallahassee, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Michael P. Donaldson, Esquire
Carlton Field Jordan Burt, P.A.
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302

For Respondent: Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Monroe Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor: Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
1725 Capital Circle Northeast, Suite 304
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Whether Florida Housing Finance Corporation's (Florida Housing, Corporation, or Respondent) rejection of the funding for the application submitted by Capital Grove Limited Partnership (Capital Grove) was contrary to Florida Housing's governing statutes, rules, policies, or the specifications of Request for Applications 2014-114 (the RFA). If so, whether Florida Housing's decision to fund the application submitted by HTG Wellington Family, LLC (HTG Wellington), is contrary to governing statutes, rules, policies, or the RFA specifications.

PRELIMINARY STATEMENT

Florida Housing issued the RFA on November 20, 2014, requesting applications for awards of low-income housing tax credits to assist in the development of affordable housing in medium and small counties (including Pasco County).

On March 20, 2015, Florida Housing's Board of Directors (the "Board") met to consider the recommendations of the staff Review Committee regarding the RFA, and posted its Notice of Intended Decision. This Notice set forth the scoring and ranking of the applications, in which HTG Wellington was found

eligible for funding, and Capital Grove's application was deemed ineligible and nonresponsive.

Capital Grove and another applicant, Woodland Lake Family Apartments Limited Partnership and Beneficial Communities (Woodland Lake), timely filed notices of intent to protest Florida Housing's preliminary decisions regarding the RFA, followed by formal written protests, pursuant to section 120.57(3), Florida Statutes.^{1/} Florida Housing subsequently referred these cases to the Division of Administrative Hearings, where the cases were consolidated and a hearing scheduled for June 1, 2015. The parties moved to continue the final hearing, which was granted and the final hearing rescheduled for July 1, 2015. On June 23, 2015, Woodland Lake filed its Notice of Voluntary Dismissal.

At the final hearing, the parties offered eight exhibits which were admitted into evidence as Joint Exhibits J-1 through J-8. The parties stipulated to the authenticity and admissibility of all Joint Exhibits admitted in this proceeding. Motions for Official Recognition filed by Capital Grove and HTG Wellington were granted.

At the beginning of the hearing, Capital Grove withdrew its allegations regarding HTG Wellington's Road Infrastructure Form as set forth in paragraphs 36-39g of its Amended Petition. Capital Grove presented the testimony of its corporate

representative, Brian Parent, and offered nine exhibits which were admitted into evidence as Petitioner's Exhibits P-1 through P-9.

Florida Housing presented the testimony of Ken Reecy, its Director of Multifamily Programs and corporate representative, but offered no additional exhibits beyond the Joint Exhibits.

HTG Wellington presented no testimony, and offered 11 exhibits which were admitted into evidence as Exhibits I-1 through I-11.

The proceedings were recorded and a one-volume Transcript of the final hearing was filed July 6, 2015. The parties were given until July 16, 2015, to file their respective Proposed Recommended Orders, all of which were timely filed and considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to promote the 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.

2. The low-income housing tax credit program was enacted by Congress in 1986 to incentivize the private market to invest in affordable rental housing. Tax credits are competitively awarded to applicants in Florida for qualified rental housing projects. Applicants then sell these credits to investors to raise capital (or equity) for their projects, which reduces the debt that the owner would otherwise have to borrow. Because the debt is lower, a tax-credit property can offer lower, more affordable rents.

3. Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their federal tax liability each year over a period of ten years. The amount of the annual credit is based on the amount invested in the affordable housing.

4. Tax credits are made available by the U.S. Treasury to the states annually.

5. Florida Housing is authorized to allocate tax credits 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 one for tax credits.

6. Rule 67-60.002(1) defines "Applicant" as "any person or legally-formed entity that is seeking a loan or funding from the

Corporation by submitting an application or responding to a competitive solicitation pursuant to this rule chapter for one or more of the Corporation's programs."

7. Applicants request in their applications a specific dollar amount of housing credits to be given to the applicant each year for a period of 10 years. Applicants typically sell the rights to that future stream of income tax credits (through the sale of almost all of the ownership interest in the Applicant entity) to an investor to generate the majority of the capital necessary to construct the Development. The amount of housing credits an Applicant may request is based on several factors, including but not limited to a certain percentage of the projected Total Development Cost; 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.

8. Florida Housing's competitive application process for the allocation of tax credits is commenced by the issuance of a Request for Applications. In this case, that document is Request for Applications 2014-114 (the RFA). The RFA was issued November 20, 2014, and responses were due January 22, 2015.

9. Capital Grove submitted Application No. 2015-045C in RFA 2014-114 seeking \$1,509,500 in annual allocation of housing credits to finance the construction of a 94-unit residential

rental development in Pasco County (a Medium County), to be known as Highland Grove Senior Apartments. HTG Wellington submitted Application No. 2015-101C seeking \$1,510,000 in annual allocation of housing credits to finance the construction of a 110-unit multifamily residential development in Pasco County, Florida, to be known as Park at Wellington Apartments. Florida Housing has announced its intention to award funding to nine Medium County Developments, including Park at Wellington in Pasco County (Application No. 2015-101C), but not Highland Grove Senior Apartments.

10. Florida Housing received 82 applications seeking funding in RFA 2014-114, including 76 for Medium County Developments. The process employed by Florida Housing for this RFA makes it virtually impossible for more than one application to be selected for funding in any given medium county. Because of the amount of funding available for medium counties, the typical amount of an applicant's housing credit request (generally \$1.0 to \$1.5 million), and the number of medium counties for which developments are proposed, many medium counties will not receive an award of housing credit funding in this RFA. Florida Housing intends to award funding to nine developments in nine different medium counties.

11. The applications were received, processed, deemed eligible or ineligible, scored, and ranked, pursuant to the

terms of RFA 2014-114; Florida Administrative Code chapters 67-48 and 67-60; and applicable federal regulations. Florida Housing's executive director appointed a Review Committee of Florida Housing staff to evaluate the applications for eligibility and scoring. Applications are considered for funding only if they are deemed "eligible," based on whether the application complies with Florida Housing's various content requirements. Of the 82 applications submitted to Florida Housing in RFA 2014-114, 69 were found "eligible," and 13 were found ineligible, including Capital Grove. Florida Housing determined that Capital Grove was ineligible on the ground that its Letter of Credit was deficient under the terms of the RFA. A five-page spreadsheet created by Florida Housing, entitled "RFA 2014-114 - All Applications," identifying all eligible and ineligible applications was provided to all Applicants. In addition to scoring, Applicants received a lottery number to be applied in tie situations, with the lower number given preference. Capital Grove received lottery number 12. HTG Wellington received lottery number 9.

12. On March 11, 2015, the Review Committee met and considered the applications submitted in response to the RFA, and made recommendations regarding the scoring and ranking of the applications to Florida Housing's Board of Directors (the Board).

Capital Grove's Letter of Credit

13. The RFA provides for a Withdrawal Disincentive in which an applicant could either provide a \$25,000 check or a \$25,000 Letter of Credit that would be forfeited if the application was withdrawn by the applicant before a certain period of time. Applicants so withdrawing would also suffer a deduction from the full developer-experience point total in certain future Requests for Applications issued by Florida Housing.

14. According to specifications in the RFA, any Letter of Credit submitted must be in compliance with all the requirements of subsection 4.a. of Section Three, Procedures and Provisions of the RFA, which provides in pertinent part:

4. \$25,000 Letter of Credit. Each Applicant not submitting a \$25,000 Application Withdrawal Cash Deposit (as outlined in 3 above) must submit to the Corporation a letter of Credit that meets the following requirements with its Application:

a. The Letter of Credit must:

(1) Be issued by a bank, the deposits of which are insured by the FDIC, and which has a banking office located in the state of Florida available for presentation of the Letter of Credit.

(2) Be on the issuing bank's letterhead, and identify the bank's Florida office as the office for presentation of the Letter of Credit.

(3) Be, in form, content and amount, the same as the Sample Letter of Credit set out

in Item 14 of Exhibit C of the RFA, and completed with the following:

- (a) Issue Date of the Letter of Credit (LOC) which must be no later than January 22, 2015.
- (b) LOC number.
- (c) Expiration Date of the LOC which must be no earlier than January 22, 2016.
- (d) Issuing Bank's legal name.
- (e) Issuing Bank's Florida Presentation Office for Presentation of the LOC.
- (f) Florida Housing's RFA number RFA 2014-114.
- (g) Applicant's name as it appears on the Application for which the LOC is issued.
- (h) Development name as it appears on the Application for which the LOC is issued.
- (i) Signature of the Issuing Bank's authorized signatory.
- (j) Printed Name and Title of the Authorized Signatory.

15. The Sample Letter of Credit included in Exhibit C, Item 14 of the RFA reads:

(Issuing Bank's Letterhead)

Irrevocable Unconditional Letter of Credit
To/Beneficiary: Florida Housing Finance Corporation
Issue Date: [a date that is no later than January 22, 2015]
Attention: Director of Multifamily Programs
227 N. Bronough Street, Suite 5000
Tallahassee, Florida 32301
Letter of Credit No.: _____
Expiration Date: [a date that is no earlier than January 22, 2016]
Issuing Bank:

Florida Presentation Office:

FHFC RFA # 2014-114

Applicant: _____

Development: _____

Gentlemen:

For the account of the Applicant, we, the Issuing Bank, hereby authorize Florida Housing Finance Corporation to draw on us at sight up to an aggregate amount of Twenty-Five Thousand and No/100 Dollars (\$25,000.00).

This letter of credit is irrevocable, unconditional, and nontransferable.

Drafts drawn under this letter of credit must specify the letter of credit number and be presented at our Florida Presentation Office identified above not later than the Expiration Date. Any sight draft may be presented to us by electronic, reprographic, computerized or automated system, or by carbon copy, but in any event must visibly bear the word "original." If the document is signed, the signature may consist of (or may appear to us as) an original handwritten signature, a facsimile signature or any other mechanical or electronic method of authentication.

Payment against this letter of credit may be made by wire transfer of immediately available funds to the account specified by you, or by deposit of same day funds in a designated account you maintain with us. Unless we notify you in writing at least thirty (30) days prior to the Expiration Date, the Expiration Date of this letter of credit must be extended automatically for successive one-month periods.

This letter of credit sets forth in full the terms of our obligations to you, and such undertaking shall not in any way be modified or amplified by any agreement in which this letter is referred to or to which this letter of credit relates, and any such reference shall not be deemed to incorporate herein by reference any agreement.

We engage with you that sight drafts drawn under, and in compliance with, the terms of this letter of credit will be duly honored at the Presentation Office.

We are an FDIC insured bank, and our Florida Presentation Office is located in Florida as identified above.

Yours very truly,
[Issuing Bank]

By

Print Name _____
Print Title _____

16. Despite these requirements, Capital Grove submitted an "Irrevocable Standby Letter of Credit" issued by PNC Bank National Association (PNC).

17. Capital Grove's Letter of Credit provides, in pertinent part:

Beneficiary:
Florida Housing Finance
Corp. Development, LLC
227 North Bronough Street
Suite 5000
Tallahassee, Fl 32301

Applicant:
Westbrook Housing Corp.
4110 Southpoint Blvd.,
Ste 206
Jacksonville, Fl 32216

ATTENTION: DIR. OF MULTI-
PROGRAMS

FBO CAPITAL GROVE FAMILY
LIMITED PARTNERSHIP

IRREVOCABLE STANDBY LETTER OF CREDIT

OUR REFERENCE: 18123166-00-00

AMOUNT: USD \$25,000.00

ISSUE DATE: JANUARY 20, 2015

EXPIRY DATE: JANUARY 22, 2016

EPIRY PLACE: OUR COUNTER

RE: FHFC RFA #2014-114

DEVELOPMENT: HIGHLAND GROVE SENIOR APARTMENTS

GENTLEMEN:

WE HEREBY ESTABLISH OUR IRREVOCABLE STANDBY LETTER OF CREDIT NO. 18123166-00-000 IN FAVOR OF FLORIDA HOUSING FINANCE CORPORATION FOR THE ACCOUNT OF WESTBROOK HOUSING DEVELOPMENT LLC AVAILABLE FOR PAYMENT AT OUR

COUNTERS IN AN AMOUNT OF USD \$25,000.00 (TWENTY FIVE THOUSAND AND 00/100 UNITED STATES DOLLARS) AGAINST BENEFICIARY'S PURPORTEDLY SIGNED STATEMENT AS FOLLOWS: "I (INSERT NAME AND TITLE) CERTIFY THAT I AM AN AUTHORIZED REPRESENTATIVE OF FLORIDA HOUSING FINANCE CORPORATION AND HEREBY DEMAND PAYMENT OF USD (INSERT AMOUNT) UNDER PNC BANK, NATIONAL ASSOCIATION LETTER OF CREDIT NO. 18123166-00-000. I FURTHER CERTIFY THAT WESTBROOK HOUSING DEVELOPMENT, LLC HAS FAILED TO COMPLY UNDER THE PROJECT NAME: HIGHLAND GROVE SENIOR APARTMENTS BETWEEN FLORIDA HOUSING FINANCE CORPORATION AND WESTBROOK HOUSING DEVELOPMENT, LLC."

18. Ken Reecy, Director of Multifamily Programs for Florida Housing, personally reviewed all Letters of Credit submitted by RFA applicants, and reported his findings to the Review Committee.

19. The Review Committee recommended finding Capital Grove's application nonresponsive and ineligible for funding because Capital Grove failed to include a responsive Letter of Credit.

20. The Review Committee also found four other applications ineligible for failing to meet the Letter of Credit requirements, all of which used PNC Bank and involved entities related to Capital Grove, including Westbrook Housing Development, LLC, appearing as Co-Developer. All such PNC Letters of Credit failed for the same reasons.

21. Mr. Reecy and the Review Committee found that the Letters of Credit from PNC Bank (including that submitted by Capital Grove) did not meet the facial requirements of the RFA,

in that the Letters of Credit were not in the name of the applicant.

22. The General Partner of the applicant, Capital Grove Limited Partnership, is Capital Grove GP, LLC. The Co-Developer entities are JPM Development, LLC, and Westbrook Housing Development, LLC.

23. Co-Developer Westbrook Housing Development, LLC, a Michigan Company authorized to conduct business within the State of Florida, is a different legal entity from Co-Developer JPM Development, LLC.

24. Mr. Reecy and the Review Committee also found the PNC Letters of Credit (including that submitted by Capital Grove) nonresponsive to the specification of the RFA because the Letters included a condition requiring Florida Housing, in order to draw on the Letter of Credit, to certify that the Co-Developer (and not the applicant) had "failed to comply under the project name: Highland Grove Senior Apartments." However, under the RFA specifications, the action that is the basis for the presentment of the Letter of Credit is a withdrawal of the application by the applicant, not the developer.

25. Only an applicant may withdraw an application.

26. If the Letter of Credit cannot be drawn upon, the RFA provides that the applicant, "shall be responsible for the payment of the \$25,000 to the Corporation; payment shall be due

from the applicant to the Corporation within 10 calendar days following written notice from the Corporation.”

27. Applicant Capital Grove is a single-purpose entity that has no assets.

28. In order to collect on the Letter of Credit submitted by Capital Grove, Florida Housing would have to submit a different certification than that called for under the RFA sample letter of credit.

29. According to Kathleen Spiers, Vice President of PNC Bank, to draw down the Letter of Credit, Florida Housing would have to copy the statement outlined in paragraph 2 of the Capital Grove Letter of Credit, sign it, and submit it to PNC to draw upon the letter of credit.

30. At the final hearing, Mr. Reecy testified, “I am not prepared to certify to something that isn’t true. I am not going to certify that the developer didn’t comply by the Applicant withdrawing.”

31. All other Letters of Credit submitted by applicants under this RFA were accepted as responsive.

HTG Wellington’s Unit Count

32. HTG Wellington indicated in its application to Florida Housing that its proposed Park at Wellington Development would be 110 multifamily units. In its application for Local Government Support, HTG Wellington described the Development as

a 120-unit, multifamily development in five three-story buildings.

33. The RFA requires a minimum \$50,000 Local Government Contribution in Pasco County for an applicant to receive the maximum of five points.

34. In order to obtain a Local Government Contribution, tax credit developers must submit an application to Pasco County at least six weeks before the matter is presented to the Board of County Commissioners for approval. Pasco County, in turn, has their underwriter, Neighborhood Lending Partners ("NLP"), organize the applications and create an underwriting package. NLP does not make a recommendation to the Board of County Commissioners for funding. Rather, NLP alerts Pasco County if there is a red flag concerning the Development and scores the applications based upon financial stability of the organization, financing of the project, and the development pro forma.

35. HTG Wellington submitted an application for Local Government Contribution to Pasco County in November 2014. The application contemplated a 120-unit development.

36. Impact fees schedules are adopted by the Pasco County Board of Commissioners. Pasco County has established an impact fee rate for affordable and non-affordable development and the difference between the two is multiplied by the number of units to determine the impact fee amount.

37. The impact fee waiver amount approved for Park at Wellington Apartments was \$219,600. This amount was calculated based upon 120 units contemplated in November 2014, multiplied by \$1830.00, which is the difference between the normal impact fee rate, minus the rate for affordable housing development. The \$219,600 figure was used in HTG Wellington's application.

38. At 110 units (as opposed to 120 units), the total Local Government Contribution available to HTG Wellington is \$201,300.

39. Either amount (\$219,600 or \$201,300) meets the minimum for HTG Wellington to receive five points for its Local Government Contribution. The change in the contribution amount would have no effect on the scoring of the HTG Wellington application.

40. Pasco County's Manager of Community Development and Officer of Community Development, George Romagnoli, testified that for approximately 15 years, Pasco County has employed a strategy to approve all applications for Local Government Contribution and then let Florida Housing choose which Development will receive tax credits.

41. Pasco County is not concerned about the ultimate accuracy of the number of units submitted for a Contribution -- as stated by Mr. Romagnoli: "We funded 84, 120, whatever. It's really not material to the approval one way or the other."

42. Although Florida Housing approved HTG Wellington's application before discovering the discrepancy, had Florida Housing discovered the discrepancy in the number of units during the scoring process, the discrepancy would have been deemed a minor irregularity unless the discrepancy resulted in a change in scoring or otherwise rendered the application nonresponsive as to some material requirement and the discrepancy would generally be handled with a simple adjustment to the amount presented on the application Pro Forma, if necessary.

43. Additionally, changes to the number of units in a development may be increased (but not decreased) under certain circumstances during the credit underwriting process which follows the competitive solicitation process.

44. The discrepancy in the number of units does not provide any competitive advantage to HTG Wellington.

45. The discrepancy in the number of units does not provide a benefit to HTG Wellington not enjoyed by others.

46. Florida Housing's waiver of the discrepancy in the number of units does not adversely impact the interests of the public.

HTG Wellington's Bus Stop

47. The RFA allows an applicant to obtain 18 proximity points, including six points for a Public Bus Transfer Stop.

Florida Housing awarded HTG Wellington 4.5 proximity points for its purported Public Bus Transfer Stop.

48. The RFA defines a Public Bus Transfer Stop as:

This service may be selected by all Applicants, regardless of the Demographic Commitment selected at question 2 of Exhibit A. For purposes of proximity points, a Public Bus Transfer Stop means fixed location at which passengers may access at least three routes of public transportation via buses. Each qualifying route must have a scheduled stop at the Public Bus Transfer Stop at least hourly during the times of 7 am to 9 am and also during the times of 4 pm to 6 pm Monday through Friday, excluding holidays on a year-round basis. This would include both bus stations (i.e. hub) and bus stop with multiple routes. Bus routes must be established or approved by a Local Government department that manages public transportation. Buses that travel between states will not be considered.

49. In response to this requirement HTG Wellington submitted a Surveyor Certification Form which lists coordinates submitted to qualify for a Public Bus Transfer Stop. The site identified by HTG Wellington as a Public Bus Transfer Stop, however, is not a fixed location where passengers may access at least three routes of public transportation. While another bus stop which serves an additional two routes is within 700 feet, stops cannot be combined for purposes of the RFA. Therefore, the site designated as a Public Bus Transfer Stop by HTG Wellington is not a "fixed location" for purposes of the RFA and

HTG Wellington is not entitled to obtain proximity points for a Public Bus Transfer Stop.

50. Not including the 4.5 proximity points for a Public Bus Transfer Stop, HTG was awarded 11.5 total proximity points for selected Community Services.

51. The required minimum total of proximity points for developments located in a medium county that must be achieved in order to be eligible to receive the maximum amount of 18 points as set forth in the RFA is 9.

52. HTG had more than the required minimum total of proximity points to receive the maximum award of 18 proximity points based on its Community Services score alone.

53. The disqualification of HTG's submitted Public Bus Transfer Stop would have no effect on the scoring or ranking of the HTG Wellington application, nor affect its ranking relative to any other application, nor affect the ultimate funding selection.

54. The RFA requires each applicant to read and sign at Attachment A, an Applicant Certification and Acknowledgement Form (the Form). The signing of the Form is mandatory.

55. Page 5, Paragraph 8 of the Form provides:

In eliciting information from third parties required by and/or included in this Application, the Applicant has provided such parties information that accurately describes the Development as proposed in

this Application. The Applicant has reviewed the third party information included in this Application and/or provided during the credit underwriting process and the information provided by any such party is based upon, and accurate with respect to, the Development as proposed in this Application.

56. Even though there was a discrepancy in the unit numbers submitted to Pasco County for a Local Government Contribution and its application submitted in response to the RFA, HTG signed the Form. No evidence was submitted indicating that HTG signed the Form with knowledge of the discrepancy.

CONCLUSIONS OF LAW

57. DOAH has jurisdiction over the parties and subject matter of this proceeding, pursuant to section 120.57(3).

58. For purposes of section 120.57(3), the RFA is equivalent to a "Request for Proposal." Fla. Admin. Code R. 67-60.009(3).

Standing

59. As an applicant that was awarded tax credits and whose application was challenged in this proceeding, HTG Wellington's substantial interests are affected by the outcome of this proceeding, and HTG Wellington has standing to participate as a party. Agrico Chem. Co. v. Dep't of Env'tl. Reg., 406 So. 2d 478 (Fla. 2d DCA 1981).

60. As the party claiming that Florida Housing's proposed agency action does not meet the standards in section 120.57(3)(f), Capital Grove bears the burden of proof. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

61. Florida Administrative Code Rule 67-60.006(1) provides:

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.

62. Even without the express requirement that applicants be both responsive and responsible, these factors are inherently part of the standing requirement in a competitive solicitation, as it is incumbent upon a protesting party to demonstrate that its substantial interests are affected. Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA 1981).

63. In order for Capital Grove to have standing to challenge the scoring and ranking of the HTG Wellington application, it must first prove that its application was eligible; otherwise, it has no substantial interests which could be affected by Florida Housing's scoring and ranking of HTG Wellington.

64. Even if Capital Grove could overcome the ineligibility issue, it must still knock out HTG Wellington, which has a better lottery number (9), to be in the funding.

Standard of Review

65. Although chapter 120 uses the term "de novo" when describing competitive solicitations protest proceedings, a different kind of de novo is contemplated than that applied in other types of substantial interest proceedings under section 120.57. Bid disputes are a "form of intra-agency review" in which the object is to evaluate the action taken by the agency. State Contracting & Eng'g Corp v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

66. Accordingly, competitive bid protest proceedings such as the instant case remain de novo in the sense that the proceedings are not confined to a record review of the information before Florida Housing. Instead, a new evidentiary record is developed for the purpose of evaluating the proposed agency action. See e.g., Asphalt Pavers, Inc. v. Dep't of Trans., 602 So. 2d 558 (Fla. 1st DCA 1992).

67. Section 120.57(3)(f) provides, in pertinent part:

In a protest to [a] . . . request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered 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

68. To find Florida Housing's scoring in this case to be "clearly erroneous," it must be shown that Florida Housing's rejection of the Capital Grove Letter of Credit falls outside the permissible range of interpretations [of the RFA specifications]. Colbert v. Dep't of Health, 890 So. 2d. 1165, 1166 (Fla. 1st DCA 2004).

69. In order to conclude that Florida Housing's scoring of the Capital Grove application was arbitrary or capricious, it must be shown that the scoring in question was performed without the support of facts or logic (arbitrary), or taken without thought or reason or irrationally (capricious). Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979).

70. To find that Florida Housing's scoring in this case was "contrary to competition" requires evidence demonstrating that the scoring unreasonably interferes with the purposes of competitive procurement. In Wester v. Belote, 138 So. 721, 723-

724 (Fla. 1931), the Supreme Court of Florida, with further elaboration, agreed with the contention that:

[T]he object and purpose of [the competitive bidding law] is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense, to close all avenues to favoritism and fraud in its various forms; to secure the best values . . . at the lowest possible expense; and to afford an equal advantage to all desiring to do business [with the State], by providing an opportunity for an exact comparison of bids.

71. In this case, Capital Grove failed to establish and the evidence was otherwise insufficient to reasonably suggest that Florida Housing's scoring was clearly erroneous, contrary to competition, arbitrary, or capricious.

Capital Grove's Letter of Credit

72. The Letter of Credit submitted by Capital Grove in its application for funding does not meet the facial requirements of the RFA. As set forth in Section Three , subsection 4.a.(3). of the RFA, "The Letters of Credit must . . . [b]e, in form, content and amount, the same as the Sample Letter of Credit set out in Item 14 of Exhibit C of the RFA." Rather than being a mere example that applicants may or may not choose to follow, the RFA makes it clear that any Letter of Credit must match the Sample Letter provided in form, content, and amount.

73. Capital Grove's Letter of Credit differs from the mandatory Sample Letter in two significant and material aspects: (1) it is not in the name of the applicant; and (2) it includes conditions not appearing in the Sample Letter. In fact, the Sample Letter required the Letter of Credit to be unconditional. Florida Housing's determination that Capital Grove's Letter of Credit was nonresponsive was not clearly erroneous, contrary to competition, arbitrary, or capricious. Rather, in its determination, Florida Housing followed and applied the plain language of the RFA specifications.

74. Nor can the errors present in the Capital Grove Letter of Credit be waived as a minor irregularity. Rule 67-60.008 provides Florida Housing with the authority to waive minor irregularities in applications. Rule 67-60.002(6) defines a "minor irregularity" as:

[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.

75. The errors present in the Capital Grove Letter of Credit constitute a significant departure from the proscribed Sample Letter and RFA specifications and they cannot reasonably be waived as a minor irregularity. The Letter of Credit submitted by Capital Grove includes impermissible conditions

contrary to the Sample Letter, and is issued in the name of an entity that is not the applicant. While Capital Grove argues that these differences are meaningless in light of the Letter being drafted "for the benefit of" the applicant, the fact remains that it does not meet the form or content of an unconditional letter of credit required by the RFA as specified in the Sample Letter.

76. Moreover, the terms "Applicant" and "Developer" are separately defined in the rules governing the competitive solicitation funding process. See Fla. Admin. Code R. 67-48.002.

77. Under the facts and circumstances, Florida Housing's decision to reject the Capital Grove application for failing to meet submission requirements was not clearly erroneous, contrary to completion, arbitrary, or capricious, nor was it contrary to the RFA specifications, or any of Florida Housing's policies, rules, or governing statutes.

78. Accordingly, Capital Grove lacks standing to bring allegations against HTG Wellington. See paragraphs 60-64, supra.

79. Even if Capital Grove had demonstrated that its letter of credit should be accepted, it failed to prove that its substantial interests are affected by the award to HTG Wellington.

80. It is uncontested that the discrepancy in the number of units in the HTG Wellington application (110) versus a number appearing in documentation filed with Pasco County (120) makes no difference in the scoring or ranking of HTG Wellington's application, and thus cannot affect the substantial interests of any other applicant, including Capital Grove.

81. Both representatives for Florida Housing (Ken Reecy) and Pasco County (George Romagnoli) provided uncontroverted testimony that the discrepancy in the number of units -- particularly where the Local Government was promised more than that proposed to Florida Housing -- was of no concern in terms of the eligibility of the proposed Development for its Local Government Contribution. The change in the amount of the Contribution does not cause it to fall below the \$50,000 minimum to receive 5 points under the RFA specifications.

82. Capital Grove presented no evidence or testimony in this proceeding to show how this discrepancy could affect the scoring or ranking of these applications. Under such circumstances, the unit-count discrepancy lands squarely within the definition of a minor irregularity. It does not result in a scoring change, and so cannot provide any advantage or benefit to HTG Wellington not enjoyed by other applicants, and does not adversely impact the interests of the Corporation or the public.

83. Capital Grove further argues that errors in HTG Wellington's unit count make HTG's Applicant Certification false and therefore, HTG Wellington's application should be rejected as nonresponsive. While Florida Housing and HTG Wellington concede that the unit count differs from that shown in certain documentation filed with Pasco County, it creates no discrepancy in the application, where HTG Wellington consistently presents 110 as its unit count. Notably, nothing in the application, the testimony, or evidence presented in this proceeding prevents HTG Wellington from increasing its unit count from 110 to 120 during credit underwriting, should it so choose.

84. Moreover, having determined that the unit count discrepancy qualifies as a minor irregularity, it follows that the discrepancy cannot form the basis for rejection of the HTG Wellington application on the grounds that its Application Certification is no longer valid. To conclude otherwise would elevate the importance of an error that is insubstantial and immaterial to the competitive scoring process.

85. The same reasoning applies to the issue regarding HTG Wellington's designated Public Bus Transfer Stop. While the bus stop provided in the HTG Wellington application was not valid for the 4.5 proximity points it was awarded, it was stipulated that, even without those 4.5 points, HTG Wellington's proximity

score was higher than the nine proximity points necessary for the 18-point boost to its overall score.

86. Accordingly, disqualification of the bus stop proximity points does not result in any change to HTG Wellington's overall score and ranking among applications. Thus, HTG Wellington's loss of the bus stop points cannot affect the substantial interests of Capital Grove or any other competing applicant as it has no effect on the scoring or ranking of the HTG Wellington application or any other applicant.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Florida Housing Finance Corporation enter a final order:

1. Rejecting Capital Grove's application as nonresponsive and denying the relief requested in its Petition;
2. Concluding that Capital Grove lacks standing to bring allegations against HTG Wellington; and,
3. Upholding Florida Housing's scoring and ranking of the HTG Wellington application.

DONE AND ENTERED this 3rd day of August, 2015, in
Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
The Desoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 3rd day of August, 2015.

ENDNOTE

^{1/} All references to Florida Statutes and the Florida
Administrative Code are to current versions unless otherwise
indicated.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.