

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

DURHAM PLACE, LTD.,
AND DURHAM PLACE
DEVELOPER, LLC

Petitioners,

FHFC Case No.: 2019-012BP

vs.

APPLICATION NO: 2019-108C

REQUEST FOR APPLICATIONS: 2018-112

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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**AMENDED FORMAL WRITTEN PROTEST OF AWARD
AND PETITION FOR ADMINISTRATIVE HEARING**

Pursuant to Sections 120.569 and 120.57(3), Florida Statutes, and Chapter 28-110 and Rules 28-106.201 and 28-106.202, Florida Administrative Code (“Fla. Admin. Code”), Petitioners, Durham Place, Ltd. and Durham Place Developer, LLC., (collectively, “Petitioners”), file this Amended Formal Written Protest of Award and Petition for Administrative Hearing and state:

Affected Agency

1. The agency affected is the Florida Housing Finance Corporation (“Florida Housing”), 227 N. Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329. The telephone number is 850-488-4197.

Petitioners

2. Durham Place, Ltd (“Durham Place”) is the Applicant entity for a proposed affordable housing development to be located in Orange County, Application #2019-108C. Durham Place, Developer, LLC (“Durham Place, Developer”) is the “Developer” entity as defined by Florida Housing in Rule 67-48.002(28), Fla. Admin. Code.

3. Petitioners' address is 1105 Kensington Park Drive, Ste. 200, Altamonte Springs, Florida 32714. Petitioners' telephone number is 407-333-3233. For purposes of this proceeding, Petitioners' address is that of its undersigned counsel.

4. Petitioners are challenging the eligibility of the applicants named in this petition for their failure to meet Eligibility or Proximity Funding Preference Point requirements for an award of Housing Credits ("HC") for funding under Request for Applications 2018-112, Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach and Pinellas Counties (the "RFA" or "RFA 2018-112") through an administrative hearing before the Department of Administrative Hearing ("DOAH").

Petitioners' Counsel

5. Counsel for Petitioners and Petitioners' address for this proceeding are:

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BACKGROUND

6. Florida Housing administers various affordable housing programs including the Housing Credit (HC) Program pursuant to Section 42 of the Internal Revenue Code (the "IRC" or "the Code") and Section 420.5099, Florida Statutes ("Fla. Stat."), under which Florida Housing is designated as the Housing Credit agency for the State of Florida within the meaning of Section 42(h)(7)(A) of the IRC, and Chapters 67-48 and 67-60, Fla. Admin. Code.

7. Florida Housing administers a competitive solicitation process to implement the provisions of the housing credit program under which developers apply for funding. Chapter 67-60, Fla. Admin. Code.

8. Rule 67-60.006, Fla. Admin. Code, provides that “[t]he 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 non-responsiveness with respect to its Application.”

9. By applying, each Applicant certifies that:

Proposed Developments funded under this RFA will be subject to the requirements of the RFA, inclusive of all Exhibits, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the requirements outlined in Rule Chapter 67-48, F.A.C. and the Compliance requirements of Rule Chapter 67-53, F.A.C.

(RFA at p. 6).

10. Qualified affordable housing developments must compete for this funding because the demand for HC funding exceeds the available funding under the HC Program. Florida Housing has established by rule a competitive solicitation process known as the Request for Applications to assess the relative merits of proposed developments, pursuant Chapters 67-48 and 67-60, Fla. Admin. Code.

11. Specifically, Florida Housing’s solicitation process for RFA 2018-112, as set forth in Rules 67-60.001-.009, Fla. Admin. Code, involves the following:

- a) Florida Housing publishes its competitive solicitation (RFA) in the Florida Administrative Register;
- b) applicants prepare and submit their response to the competitive solicitation;
- c) Florida Housing appoints a scoring committee (“Review Committee”) to evaluate the applications;

- d) the scoring committee makes recommendations to Florida Housing's Board, which are then voted on by the Board; and
- e) applicants not selected for funding may protest the results of the competitive solicitation process.

12. Florida Housing issued RFA 2018-112 on or about September 6, 2018, and subsequently modified the RFA on October 4, and October 18, 2018. The application deadline for the RFA as modified was November 13, 2018 ("Application Deadline").

13. 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. (RFA at pp. 2-68). The RFA sets forth on pages 69, 70 and 72, a list of mandatory Eligibility and Point Items that must be included in a response. The RFA expressly provides that "[o]nly Applications that meet all of the Eligibility Items will be eligible for funding and considered for funding selection." (RFA at p. 69).

14. The highest scoring Applications are determined by first sorting together all eligible Applications from highest to lowest score, with any scores that are tied further separated by the following progression: (1) Applications eligible for Proximity Funding Preference will be ranked higher than those Applications that do not qualify for the preference; (2) Applications eligible for Per Unit Construction Funding Preference will be ranked higher than those Applications that do not qualify for the preference; (3) Applications eligible for Development Category Funding Preference will be ranked higher than those Applications that do not qualify for the preference; (4) Applications having a leveraging Classification of A will be ranked higher than those Applications having a leveraging Classification of B, with the leveraging Classification using a series of multipliers to group applications based on the amount of funding per unit; (5) Applications eligible for Florida Job Creation Funding Preference will be ranked higher than

those Applications that do not qualify for the preference; and (6) Applications with the lowest lottery number will receive preference. (RFA at pp. 72-73).

15. On or about January 22, 2019, the Review Committee, consisting of Florida Housing staff, met and considered the applications responding to the RFA. At the meeting the Review Committee listed and input the scores for each application and ultimately made recommendations to the Florida Housing Board of Directors (“Board”) for its consideration. The Review Committee determined that Durham Place was eligible, but not selected for funding.

16. On May 4, 2018, Florida Housing’s Board of Directors adopted the Review Committee’s recommendations and tentatively authorized the selection for funding of those applications identified in RFA 2018-112 Board Approved Preliminary Awards report, which reflected the preliminary funded applicants.

NOTICE OF AGENCY ACTION

17. Petitioners received notice of Florida Housing’s Agency Action, the RFA 2018-112 Board Approved Preliminary Awards report, on or about February 1, 2019 (“Notice”).

NOTICE OF PROTEST

18. On February 5, 2019, Petitioners timely filed their Notice of Protest challenging the selection of the applications in the Corporation’s Notice. (See attached Exhibit A, which includes the Corporation’s Notice reflecting the preliminarily funded applicants).

SUBSTANTIAL INTERESTS

19. Petitioners timely submitted an application in response to the RFA, Application #2019–108C (“Application”). In their Application, Petitioners sought an allocation of \$2,375,000 in annual federal tax credits to help finance the development of their project, a 112-unit Garden Apartment complex in Orange County. As reflected in RFA 2018-112, Board Approved Scoring Results, Petitioners were assigned lottery number 3. Petitioners were scored

as having satisfied eligibility requirements for funding, satisfied Proximity Funding Preference requirements and scored 10 out of 10 Total Points. (See RFA 2018-112 All Applications Report).

20. Amelia Court at Creative Village - Phase II Partners, Ltd. (“Amelia Court”) submitted an application in response to the RFA, Application #2019-106C. Amelia Court sought an allocation of \$2,375,000 in annual federal tax credits to help finance the development of its project, a 105-unit Mid-Rise, 5 to 6-stories complex in Orange County. As reflected in RFA 2018-112 Board Approved Scoring Results, Amelia Court was assigned lottery number 24.

21. Amelia Court was scored as having satisfied eligibility requirements for funding, satisfied Proximity Funding Preference requirements, and scored 10 out of 10 Total Points.

22. Amelia Court failed to meet or satisfy RFA eligibility, Proximity Funding Preference, or other requirements, and is not entitled to the eligibility determination, scoring, and preliminary ranking of its application. As discussed below, Florida Housing improperly determined that this applicant satisfied RFA mandatory, eligibility requirements.

23. Amelia Court is not identified on Florida Housing’s Approved Preliminary Awards list. However, under the RFA scoring matrix, Amelia Court is next in line for funding behind Hawthorne Park and could be entitled to funding if Hawthorne Park is displaced but for the fact that its application is flawed. On February 18, 2019, Amelia Court filed a petition challenging the award to the Hawthorne Park. Petitioners will be entitled to an award of funding if Hawthorne Park is displaced and Florida Housing correctly determines that Amelia Court’s application is flawed.

LOCAL GOVERNMENT SUPPORT

24. Demonstration of Local Government Support is a mandatory Eligibility Item in the RFA. (RFA at p. 70). If an Applicant does not adequate Local Government Support as

required by the RFA, then the Application must be deemed nonresponsive and ineligible for consideration of funding. Rule 67-60.006(1), Fla. Admin. Code.

25. Local Government Support must be demonstrated as of the Application Deadline. In order to satisfy the Local Government Support requirement, an application must qualify with either a Local Government Contribution or Local Government Areas of Opportunity Funding. With respect to Local Government Areas of Opportunity Funding, the RFA states:

In order to be eligible to be considered Local Government Areas of Opportunity Funding, the cash loans and/or cash grants must be demonstrated via one or both of the Florida Housing Local Government Verification of Contribution forms (Form Rev. 08-16), called “Local Government Verification of Contribution – Loan” form and/or the “Local Government Verification of Contribution – Grant” form. The forms must meet the requirements outlined in 10.c.(2)(a) above, the qualifying funding must be reflected as a source on the Development Cost Pro Forma, and the applicable form(s) must be provided as **Attachment 17** to the Application.

(RFA at p. 67) (emphasis in original).

26. The Florida Housing Finance Corporation Local Government Verification of Contribution - Grant Form (Form Rev. 08-16) (“Local Government Verification Form”), is specifically incorporated into the RFA and requires three things with respect to funding. The Local Government Verification Form must include the “face amount and/or the contribution value of amount of the Local Government contribution” and the source of the grant.

27. In an attempt to demonstrate that its proposed development satisfied the requirements for Local Government Areas of Opportunity Funding, Amelia Court provided a Local Government Verification Form from the City of Orlando purporting to commit \$625,750 to the project. The purported source of the grant was identified as the City of Orlando Community Redevelopment Agency (“CRA”). However, the CRA never committed any of its funds to Amelia Court; especially not the \$625,750 suggested in the application.

28. Amelia Court's Local Government Verification Form is signed by Byron Brooks as Chief Administrative Officer. Mr. Brooks is not employed by the CRA, instead he is the Chief Administrative Officer of the City of Orlando and, as such, has no authority to commit CRA funds to Amelia Court or any other project.

29. In light of the foregoing, Amelia Court's Local Government Verification Form does not qualify as Local Government Areas of Opportunity Funding and Amelia Court is not eligible for funding.

DEVELOPER DISCLOSURE REQUIREMENTS

30. The RFA requires each applicant to identify the name of each Developer, including all co-Developers. (RFA at p. 8). Each Developer must meet a number of requirements of the RFA and provide documentation to support the satisfaction of those requirements. (RFA at pp. 8-10).

31. Disclosure of principals for each developer is a Mandatory Item of the RFA. Section Four (A)(3)d. of the RFA provides the following with respect to the required disclosure of principals: "All Applicants must provide a list, as **Attachment 4** to Exhibit A, identifying the Principals for the Applicant and for each Developer...."

32. Rule 67-48.002(93), Fla. Admin. Code, defines the term "principal." Relevant to Amelia Court, rule 67-48.002(93), Fla. Admin. Code, provides that Principal means:

(c) With respect to an Applicant or Developer that is a limited liability company, any manager or member of the Applicant or Developer limited liability company, and, with respect to any manager or member of the Applicant or Developer limited liability company that is:

1. A corporation, any officer, director or shareholder of the corporation,

33. In its application, at Attachment 8 (Site Control Documentation), the Amelia Court at Creative Village - Phase II Partners, Ltd. Condominium Purchase Agreement, it states

that the Developer of the project is Amelia Court Developers, LLC. Amelia Court Developers, LLC is not identified in the Amelia Court application as a developer nor is it identified on the principal disclosure form attached to application.

34. By failing to disclose either Amelia Court Developers, LLC as a co-Developer or the officers of Amelia Court Developers, LLC, the Amelia Court application fails to satisfy the Mandatory Item of disclosure of the developer and its principals and, therefore, must be determined to be ineligible.

ISSUES OF MATERIAL FACT AND LAW

35. Disputed issues of material fact and law include those matters pled in this petition, and include but are not limited to the following:

- a) Whether the criteria for determining eligibility, ranking and evaluation of proposals in the RFA were properly followed;
- b) Whether the preliminarily rankings properly determine the eligibility of potential applicants for funding in accordance with the standards and provisions of the RFA;
- c) Whether the rankings are consistent with the RFA and the disclosed basis or grounds upon which tax credits are to be allocated;
- d) Whether the rankings are based on a correct determination of the eligibility of the applicants or correct scoring and ranking criteria in the RFA;
- e) Whether the rankings are consistent with fair and open competition for the allocation of tax credits;
- f) Whether the rankings are based upon clearly erroneous or capricious eligibility determinations, scoring or rankings;
- g) Whether the rankings improperly incorporate new policies and interpretations that impermissibly deviate from the RFA specifications, existing rules or prior Florida Housing interpretations and precedents;
- h) Whether Amelia Court's Application should be deemed ineligible for funding under the RFA because of its failure to satisfy RFA requirements with respect to Local Government Support;

i) Whether Amelia Court's Application should be deemed ineligible for funding under the RFA because of its failure to satisfy RFA requirements with respect to Developer and Developer Principals Disclosure;

j) Whether the criteria and procedures for the scoring, ranking and eligibility determination of Amelia Court are arbitrary, capricious, contrary to competition, contrary to the RFA requirements, or are contrary to prior Florida Housing interpretations of the applicable statutes and administrative rules;

k) Whether the RFA's criteria were properly followed in determining eligibility, ranking and evaluation of the Amelia Court Application;

l) Whether Amelia Court's eligibility determination and ranking is consistent with fair and open competition for the allocation of tax credits;

m) Whether Amelia Court's eligibility determination and ranking are based on clearly erroneous or capricious eligibility determination, scoring or ranking;

n) Whether Amelia Court's eligibility determination and ranking improperly incorporate new policies and interpretations that impermissibly deviate from the RFA specifications, existing rules or prior Florida Housing interpretations and precedents; and,

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

36. Petitioners reserve the right to seek leave to amend this petition to include additional disputed issues of material fact and law that may become known through discovery.

STATEMENT OF ULTIMATE FACTS AND LAW

37. As a matter of ultimate fact and law, Amelia Court failed to complete its applications in accordance with the competitive solicitation; its application was not responsive to and failed to comply with relevant portions of the RFA 2018-112; and, therefore, its application should not have been considered for funding or scored as being an eligible application.

38. As a matter of ultimate fact and law Florida Housing improperly determined that Amelia Court's application was completed in accordance with the competitive solicitation; was responsive to all applicable provisions of the RFA 2018-112 and, and as a result was eligible for funding under RFA 2018-112.

39. As a matter of ultimate fact and law Florida Housing improperly scored Amelia Court's Application as having satisfied all mandatory eligibility requirements as of the Application Deadline.

40. As a matter of ultimate fact and law, Florida Housing improperly determined that Amelia Court was eligible for funding.

41. As a matter of ultimate fact and law, but for the errors in Amelia Court's Application, Petitioners would have been ranked as the second highest applicant for tax credit funding in Orange County. As the second highest ranked application, if the highest ranked application is displaced, Petitioners would be eligible for funding.

STATUTES AND RULES

Statutes and rules governing this proceeding are Sections 120.569 and 120.57(3), and Chapter 420, Fla. Stat., and Chapters 28-106, 67-48 and 67-40, Fla. Admin. Code.

WHEREFORE, Petitioners request that:

A. Florida Housing refers this Petition to the Division of Administrative Hearings for a formal administrative hearing and the assignment of an Administrative Law Judge pursuant to Section 120.57(3), Fla. Stat.;

B. The Administrative Law Judge consolidate this petition with that filed by Amelia Court challenging the award to Hawthorne Park, Ltd.;

C. The Administrative Law Judge enter a Recommended Order determining that:

- 1) Amelia Court failed to complete its applications in accordance with the competitive solicitation; that its application was non-responsive to and failed to comply with RFA 2018-112; and that its application should not have been scored as having satisfied mandatory eligibility requirements as prescribed by RFA 2018-112;

- 2) Florida Housing improperly determined that the application submitted by Amelia Court was completed in accordance with the competitive solicitation;
- 3) Florida Housing improperly determined that the application submitted by Amelia Court was responsive to RFA 2018-112; and,
- 4) Florida Housing improperly determined that Amelia Court's application was eligible for funding under RFA 2018-112.

D. Should Hawthorne Park, Ltd.'s application be deemed ineligible, the Administrative Law Judge enter a Recommended Order recommending Florida Housing award Petitioners their requested tax credit funding;

E. Florida Housing enter a Final Order awarding adopting these recommendations; and,

F. Petitioners be granted such other relief as may be deemed appropriate.

Respectfully submitted this 1st day of March, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed with the Clerk of Florida Housing and served via electronic mail on the following this 1st day of March, 2019:

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