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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WHALER'S COVE APARTMENTS, LLC,
AND LANDMARK DEVELOPMENT CORP.,
Petitioners,

FLORIDA HOUSING
FINANCE CORPORATION

vs.

FHFC Case No.: 2019-13BP
APPLICATION NO: 2019-063C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

**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" or "F.A.C."), Petitioners, Whaler's Cove Apartments, LLC, and Landmark Development Corp., (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. Petitioners' address is 3050 Biscayne Blvd., Suite 300, Miami, Florida 33137. Petitioners' telephone number is 305-538-9552. For purposes of this proceeding, Petitioners' address is that of its undersigned counsel.

3. Petitioner Whaler's Cove Apartments, LLC ("Whaler's Cove") is the Applicant entity of a proposed affordable housing development to be located in Miami-Dade County,

Application #2019-063C. Landmark Development Corp. (“Landmark”), is a “Developer” entity as defined by Florida Housing in Rule 67-48.002(28), Fla. Admin. Code.

4. Petitioners are challenging, through an administrative hearing before the Department of Administrative Hearing (“DOAH”), the eligibility for funding under Request for Applications 2018-111, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the “RFA” or “RFA 2018-111”) of applicant Lucida Apartments, Ltd. (“Lucida”).

Petitioners’ Counsel

5. Counsel for Petitioners and Petitioners’ address for this proceeding is:

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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 nonresponsiveness with respect to its Application.”

9. Furthermore, 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 pg. 6).

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

11. Florida Housing issued RFA 2018-111 on or about September 6, 2018. The application deadline for the RFA as modified was November 9, 2018 (“Application Deadline”).

12. 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. 2-65). The RFA sets forth on Pages 65 and 66, a list of mandatory Eligibility 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 pg. 65).

13. 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. 69-70).

APPLICATION SCORING

14. Applicants may earn “Total Possible Points” based on whether the applicant provided the appropriate principal disclosure form; satisfied withdrawal disincentive requirements and provided evidence of a contribution from a local government. Applicants can be awarded up to 15 Total Possible Points. (RFA at pg. 68).

15. Applications may also earn Proximity Points based upon the Development’s proximity to Transit Services and Community Services. Transit Services include Applicant provided private transportation, as well as various types of public transportation. Qualifying Community Services include a grocery store, medical facility, pharmacy, and public school. Proximity Points are not applied to the Total Possible Points score but are only used to determine whether an Applicant meets the required minimum proximity eligibility requirements and the Proximity Funding Preference. (RFA at p. 19). To satisfy RFA eligibility requirements, an applicant is required to achieve a minimum score of 10.5 Proximity Points. To qualify for the

Proximity Funding Preference, an Applicant is required to achieve a minimum score of 12.5 proximity points. (RFA at p. 19).

16. Whether to award Transit and Community Service points will vary depending upon whether the claimed service qualifies for the points and the type of service provided. In order to calculate the value of the points, an Applicant is required to include latitude and longitude coordinates attesting to the Development Location Point, the type of service claimed, the latitude and longitude coordinates for the claimed service and the distance (proximity) between the claimed service and the Development's Location Point.

17. Among other things, to satisfy eligibility requirements, the RFA requires that “[a]ll Applications must achieve a minimum number of Transit Service Points and achieve a minimum number of total proximity points to be eligible for funding.” (RFA at pg. 19). Relevant to these proceedings, the required minimum Transit Service Points is 2.0 points. (RFA at pg. 19). Because obtaining the required minimum Transit Score for Transit Service Points is considered an “Eligibility Item”, failure to comply deems the application ineligible for funding. (RFA at pg. 65).

18. Specifically, Florida Housing's solicitation process for RFA 2018-111, 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.

19. On or about January 23, 2019, the Review Committee, which consisted 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 their consideration. The Review Committee determined that Whaler’s Cove was eligible, but not selected for funding.

20. On February 1, 2019, 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 2018-111 Board Approved Preliminary Awards report, which reflected the preliminary funded applicants.

Notice of Agency Action

21. Petitioners received notice of Florida Housing’s Final Agency Action entitled “RFA 2018-111 Board Approved Preliminary Awards” dated February 1, 2019 (“Corporation’s Notice”), on or about February 1, 2019.

Notice of Protest

22. On February 5, 2019, Petitioners timely filed their Notice of Protest in which it challenged the selection of the applications in the Corporation’s Notice (See attached Exhibit “A”, which includes the Corporation’s Notice).

Substantial Interests

23. Petitioners timely submitted an application in response to the RFA, Application #2019-063C (“Application”). In their Application Petitioners sought an allocation of \$2,882,000

in annual federal tax credits¹ to help finance the development of their project, a 150-unit Garden Apartment complex. As reflected in RFA 2018-111 Board Approved Scoring Results Petitioners were assigned lottery number 12. Petitioners were scored as having satisfied all mandatory and eligibility requirements for funding, receiving a score of 15 out of 15 Total Points. Petitioners were also scored as having satisfied Proximity Funding Preference Requirements. (See RFA 2018-111 Board Approved Scoring Results).

24. Lucida timely submitted an application in response to the RFA, Application #2019-045C. In its application Lucida sought an allocation of \$1,875,000 in annual federal tax credits to help finance the development of its project, a 108-unit Garden Apartments complex. As reflected in RFA 2018-111 All Applications Report Lucida was assigned lottery number 7. Lucida was scored as having satisfied all mandatory and eligibility requirements for funding, receiving a score of 15 out of 15 Total Points. Lucida was also scored as having satisfied Proximity Funding Preference Requirements. (See RFA 2018-111 Board Approved Scoring Results).

¹ The United States Congress has created a program, governed by Section 42 of the IRC, by which federal income tax credits are allotted annually to each state on a per capita basis to help facilitate private development of affordable low-income housing for families. These tax credits entitle the holder to a dollar-for-dollar reduction in the holder's federal tax liability, which can be taken for up to ten years if the project continues to satisfy IRC requirements. The tax credits allocated annually to each state are awarded by state "housing credit agencies" to single-purpose applicant entities created by real estate developers to construct and operate specific multi-family housing projects. The applicant entity then sells this ten-year stream of tax credits, typically to a syndicator, with the sale proceeds generating much of the funding necessary for development and construction of the project. The equity produced by this sale of tax credits in turn reduces the amount of long-term debt required for the project, making it possible to operate the project at below-market-rate rents that are affordable to low-income and very-low-income tenants. Pursuant to section 420.5099, Fla. Stat., Florida Housing is the designated "housing credit agency" for the State of Florida and administers Florida's tax credit program under its Housing Credit Program ("HC Program"). Through the HC Program, Florida Housing allocates Florida's annual fixed pool of federal tax credits to developers of affordable housing.

25. Lucida failed to meet or satisfy RFA Transit Service and Community Service Points requirements, Proximity Funding Preference Requirements, as well as eligibility requirements. Lucida is not entitled to the eligibility determination, scoring and preliminary ranking of their application. As a result of the preliminarily ranking process, Lucida was incorrectly included in the “eligible” rankings but should have been scored as ineligible and therefore lower than Petitioners’ Application. As discussed below, Florida Housing improperly determined that Lucida satisfied RFA mandatory Transit Service and Community Service Points requirements, Proximity Funding Preference Requirements and eligibility requirements and improperly selected Lucida for funding.

26. Through this proceeding Petitioners challenge and are seeking a determination that Florida Housing erred in the preliminary scoring and eligibility determinations of the Lucida application, and the decision to award Housing Credits to Lucida. But for Florida Housing’s error in its scoring and eligibility decision as to the Lucida application, Petitioners would have been ranked in the funded range and would have been entitled to an allocation of housing credits from RFA 2018-111². The defect in each application will be addressed below.

Proximity Points
Transit Service Points

27. Relevant to these proceedings, an applicant is required to achieve a Minimum Transit Service Score of 2.0 points in order to satisfy RFA eligibility requirements. (RFA at pg. 19). The maximum point value for the various transit services include up to 6 points for a Public Bus Transfer Stop or a Public Bus Rapid Transit Stop. (RFA at pg. 21). The RFA defines these two services as:

² Although Berkeley Place is currently ranked below Whaler’s Cove, Berkeley Place has filed a notice of protest. In order to be ranked in the funded range, Berkeley Place will need to successfully challenge the ranking and scoring of the Whaler’s Cove Application. Whaler’s Cove is therefore challenging Berkeley Place’s Application.

Public Bus Transfer Stop

For purposes of proximity points, a Public Bus Transfer Stop means a 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 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis. This would include bus stations (i.e., hubs) and bus stops 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.

Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

Public Bus Rapid Transit Stop

A fixed location at which passengers may access public transportation via bus. The Public Bus Rapid Transit Stop must service at least one bus that travels at some point during the route in either a lane or corridor that is exclusively used by buses, and the Public Bus Rapid Transit Stop must service at least one route that has scheduled stops at the Public Bus Rapid Transit Stop at least every 20 minutes during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis.

Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

(RFA at pg. 73).

28. Lucida's application refers to a Public Bus Transfer Stop as its qualifying Transit Service. The application suggests that the claimed stop is 1.49 miles from the Development's Location Point. Had that information been correct, Lucida would have been entitled to 3.5 Transit Service Points. (RFA at p. 84). However, the proposed stop does not qualify as a Public Bus Transfer Stop.

29. The Public Bus Transfer Stop location identified in Lucida's application corresponds to bus stop #10388, which is located on the south side of NW 179th Street and east of NW 73rd Avenue in Unincorporated Miami-Dade County. As of the Application Deadline, bus stop #10388 was serviced by routes 73, 99, 183 and 286. Routes 99 and 286 do not stop hourly at the claimed bus stop between the hours of 7:00-9:00 a.m. or between the hours 4:00 p.m. to 6:00 p.m. Monday through Friday. Route 99 service fails to stop at the claimed bus stop with sufficient frequency to meet the RFA's hourly service requirements. Route 286 stops once at the claimed bus stop between the hours of 7:00-9:00 a.m. Monday through Friday. With respect to the hours between the hours of 4:00 p.m. to 6:00 p.m., route 286's last stop occurs prior to 5:00 p.m. Contrary to RFA requirements, passengers may not access at least three routes of public transportation with enough frequency such that the claimed bus stop qualifies as a Public Bus Transfer Stop. Therefore, Lucida is disqualified from receiving any Transit Service Points for its claimed Transit Service.

30. In light of the foregoing defects in its application, Lucida failed to select a qualifying Transit Service, failed to achieve even the Minimum Transit Service Score of 2.0 points and its application should be scored as ineligible for an award. (See RFA at p. 20).

Proximity Points
Community Service Points

31. Whether to award Community Service points and if so, and the number of points will vary depending upon whether the Applicant qualifies for the points and the type of service provided. Qualifying Community Services include a grocery store, medical facility, pharmacy, and public school. The maximum point value for the various Community Services is 4 points for each qualifying service. (RFA at p. 84).

32. Lucida identified in its application a grocery store, medical facility, and public school as its Community Services. If accurate, the point value for these combined services is 12 Proximity Points. Lucida identified Yapor Araceli, MD as its qualifying Medical Facility. (Lucida Application at pg. 6). Lucida's application suggests that the claimed Community Service is 0.30 miles from the Development Location Point. Lucida would have been entitled to 4.0 Proximity Points for this claimed Community Service had the service met the RFA requirements of a "Medical Facility." (RFA at p. 84). However, the claimed Medical Facility does not qualify for any proximity points.

33. The RFA defines a Medical Facility as:

A medically licensed facility that (i) employs or has under contractual obligation at least one physician licensed under Chapter 458 or 459, F.S. available to treat patients by walk-in or by appointment; and (ii) provides general medical treatment to any physically sick or injured person. Facilities that specialize in treating specific classes of medical conditions or specific classes of patients, including emergency rooms affiliated with specialty or Class II hospitals and clinics affiliated with specialty or Class II hospitals, will not be accepted.

(RFA at p. 72).

34. As of the Application Deadline, the claimed Medical Facility did not provide general medical treatment to any physically sick or injured person, contrary to RFA requirements.

35. Therefore, Yapor Araceli, MD does not qualify as a Medical Facility and Lucida is not entitled to the 4.0 Proximity Points claimed in its application for a Medical Facility. As a result of this reduction, even if Lucida qualifies for Transit Service Points, it would be entitled to only 11.5 Total Proximity Points. As previously discussed, in order to qualify for the Proximity Funding Preference an applicant is required to achieve 12.5 Total Proximity Points.

36. In light of Lucida's failure to satisfy Proximity Funding Preference requirements, Lucida's application should be ranked below Petitioners' Application.

Issues of Material Fact and Law

37. 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 provisions of the RFA have been followed with respect to the preliminary allocation of tax credits under the RFA or correct eligibility determinations have been made based on the provisions of the RFA;
- b) Whether the proposed allocations of the tax credits are consistent with the RFA, the requirements of a competitive procurement process and Florida Housing's rules and governing statutes;
- c) Whether the RFA's criteria for determining eligibility, ranking and evaluation of proposals were properly followed;
- d) Whether the preliminarily rankings properly determine the eligibility of potential applicants for funding in accordance with the standards and provisions of the RFA;
- e) Whether the rankings and proposed awards are consistent with the RFA and the disclosed basis or grounds upon which tax credits are to be allocated;
- f) Whether the rankings and proposed awards are based on a correct determination of the eligibility of the applicants or correct scoring and ranking criteria in the RFA;
- g) Whether the rankings and proposed awards are consistent with fair and open competition for the allocation of tax credits;
- h) Whether the rankings and proposed awards are based on clearly erroneous or capricious eligibility determinations, scoring or ranking;
- i) Whether the proposed awards improperly incorporate new policies and interpretations that impermissibly deviate from the RFA specifications, existing rules or prior Florida Housing interpretations and precedents;
- j) Whether the Lucida application should be deemed ineligible under the RFA because of its failure to satisfy RFA requirements with respect to minimum Transit Service Points;

k) Whether Lucida should be entitled to be awarded Transit Service Points for its claimed Public Bus Transfer Stop and Public Bus Rapid Transit Stop, respectively.

l) Whether Lucida's application should be entitled to be awarded Community Service Points for its claimed Medical Facility;

m) Whether Lucida's application should be entitled to be scored as having achieved Proximity Funding Preference Requirements;

n) Whether the criteria and procedures for the scoring, ranking and eligibility determination of Lucida's application is arbitrary, capricious, contrary to competition, contrary to the RFA requirements, or contrary to prior Florida Housing interpretations of the applicable statutes and administrative rules;

o) Whether the RFA's criteria for determining eligibility, ranking and evaluation of Lucida's application were properly followed;

p) Whether Lucida's eligibility determination and ranking are consistent with fair and open competition for the allocation of tax credits;

q) Whether Lucida's eligibility determination and ranking are based on clearly erroneous or capricious eligibility determination, scoring or ranking;

r) Whether Lucida'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,

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

38. 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

39. As a matter of ultimate fact and law Lucida failed to complete their applications in accordance with the competitive solicitation; their applications were not responsive to and failed to comply with RFA 2018-111; and, therefore, their applications should not have been considered for funding or scored as being an eligible application.

40. As a matter of ultimate fact and law Florida Housing improperly determined that Lucida applications was completed in accordance with the competitive solicitation; was

responsive to RFA 2018-111 and, was eligible for funding or scored as being an eligible application under RFA 2018-111.

41. As a matter of ultimate fact and law Florida Housing improperly scored the Lucida application as having satisfied all mandatory element requirements as of the Application Deadline.

42. As a matter of ultimate fact and law, Florida Housing improperly determined that Lucida was eligible for funding and satisfied RFA eligibility requirements.

43. As a matter of ultimate fact and law, Florida Housing improperly determined that Lucida was scored as an eligible application.

44. As a matter of ultimate fact and law, Florida Housing improperly determined that Lucida's claimed Medical Facility satisfied RFA requirements.

45. As a matter of ultimate fact and law, Florida Housing improperly determined that Lucida's application satisfied requirements to achieve Proximity Funding Preference

46. As a matter of ultimate fact and law, but for the scoring errors and eligibility determinations in Lucida's application, Petitioners would have been entitled to an allocation of its requested tax credit 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 refer 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 enter a Recommended Order determining that:

1) Lucida failed to complete its applications in accordance with the competitive solicitation; that its applications was non-responsive to and failed to comply with RFA 2018-111; that its application should not have been scored as having satisfied mandatory eligibility, Transit Service Points or Community Service Points requirements as prescribed by RFA 2018-111; and that Lucida's application should not have been scored as having satisfied Proximity Funding Preference requirements as prescribed by RFA 2018-111;

2) Florida Housing improperly determined that the application submitted by Lucida was completed in accordance with the competitive solicitation;

3) Florida Housing improperly determined that the application submitted by Lucida was responsive to RFA 2018-111;

4) Florida Housing improperly determined that the Lucida application was eligible for funding under RFA 2018-111;

C. The Administrative Law Judge enter a Recommended Order recommending Florida Housing award Petitioners their requested tax credit funding;

D. Florida Housing enter a Final Order awarding Petitioners their requested tax credit funding; and,

E. 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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