

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

CLEARLAKE VILLAGE, LP,

Petitioner,
v.

DOAH Case No.: 15-2394BID
FHFC Case No.: 2015-010BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,
and

CLEARLAKE ISLES, LP,

Intervenor.

_____ /

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. The matter for consideration before this Board is a Recommended Order pursuant to §120.57(1) and (3), Fla. Stat. (2014). After a review of the record and being otherwise fully advised in these proceedings, this Board finds:

1. On or before January 22, 2015, Petitioner and Intervenor submitted applications to Florida Housing seeking allocations for low-income tax credits pursuant to RFA 2014-114. The Board announced its intention to fund certain projects on March 20, 2015.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

 /PATL: 8/7/15

2. Petitioner Clearlake Village, LP (“Clearlake Village”), timely filed a challenge to proposed funding awards pursuant to §120.57(3), Fla. Stat. (2014). Clearlake Isles, LP (“Clearlake Isles”), entered the case as an Intervenor in accordance with Fla. Admin. Code R. 28-106.205(3). A formal hearing was conducted pursuant to §§120.569 and 120.57(3), Fla. Stat. (2014), before Linzie F. Bogan, Administrative Law Judge, at the Division of Administrative Hearings in Tallahassee, Florida, on May 27, 2015.

3. The issue for determination was whether Respondent's intended decision to award low-income housing tax credits to Clearlake Isles, LP, was contrary to governing statutes, Florida Housing's rules, or the solicitation specifications. Following the hearing, Clearlake Village, Florida Housing, and Clearlake Isles each timely filed Proposed Recommended Orders.

4. After a review of the record and the Proposed Recommended Orders, the Administrative Law Judge issued a Recommended Order on June 25, 2015, which found that Clearlake Village failed to demonstrate that Florida Housing's proposed scoring of its Application was clearly erroneous, contrary to competition, arbitrary or capricious, and recommended that Florida Housing Finance Corporation enter a Final Order consistent with its initial decision to award funding for the Clearlake Isles proposed development; and dismissing the formal written protest of

Clearlake Village. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.”

5. On July 13, 2015, Clearlake Village filed “Petitioner’s Exceptions to Recommended Order,” challenging five Findings of Fact and five Conclusions of Law of the Recommended Order. Respondent Florida Housing filed its Response to Petitioner’s Exceptions to Recommended Order on July 27, 2015. Intervenor Clearlake Isles did not file a separate response, but joined in Florida Housing’s Response. By agreement of the parties, both filings were deemed timely.

RULING ON EXCEPTIONS

6. Exception 1: Finding of Fact 31 is supported by competent substantial evidence in the record, specifically Ms. Garmon’s testimony and Joint Exhibits 4, 4A, and 4B. This Board cannot disregard the Administrative Law Judge’s weighing and review of that evidence. Exception 1 is rejected.

7. Exception 2: The exception does not address whether Finding of Fact 32 is supported by competent substantial evidence in the record; it merely argues that the Administrative Law Judge “misunderstood the Petitioner’s argument and the applicability of the . . . term of the contract.” To the extent Exception 2 addresses the Finding of Fact, as in Exception 1, there is competent substantial evidence in the record. Exception 2 involves the contract interpretation issue addressed in

conclusion of Law 56, which is outside the substantive jurisdiction of this Board.

Exception 2 is rejected.

8. Exception 3: Finding of Fact 34 is supported by competent substantial evidence in the record; it is clear from Joint Exhibits 4, 4A, and 4B and testimony in the record that there was no written expression of seller's consent to the assignment in the record. This Board cannot disturb Finding of Fact 34. Exception 3 is rejected.

9. Exception 4: Finding of Fact 36 is supported by competent substantial evidence in the record. Petitioner would have this Board reweigh the testimony in the record, which the Administrative Law Judge chose to disregard. This Board cannot reweigh the testimony. Exception 4 involves the contract interpretation issue addressed in Conclusion of Law 48, which is outside the substantive jurisdiction of this Board. Exception 4 is rejected.

10. Exception 5: Finding of Fact 37 is supported by competent substantial evidence in the record, Ms. Garmon's testimony, thus this Board cannot disturb Finding of Fact 37. Exception 5 is rejected.

11. Exception 6: Conclusion of Law 48 is supported by competent substantial evidence in the record, as noted in the discussion of Exception 1, above. Whether the use of "or assigns," in naming the Buyer acts as blanket consent to assign is contract interpretation issue which is outside the substantive jurisdiction of this Board. Exception 6 is rejected.

12. Exception 7: Conclusion of Law 51 is supported by competent substantial evidence in the record, as noted above in the discussion of Exception 1. This Board cannot disturb it. Exception 7 also addresses the legal effect of the term “or assigns,” and as noted above, is a contract interpretation issue which is outside the substantive jurisdiction of this Board. Exception 7 is rejected.

13. Exception 8: Conclusion of Law 55 is supported by competent substantial evidence in the record, in Finding of Fact 31. This Board cannot disturb it. Exception 8 again addresses the legal effect of the term “or assigns,” and as noted above, is a contract interpretation issue which is outside the substantive jurisdiction of this Board. Exception 8 is rejected.

14. Exception 9: Conclusion of Law 56 is supported by competent substantial evidence in the record, in Finding of Fact 31. Exception 9 argues the effect of the “typewritten term controls,” provision in the Contract. As noted above, this is a contract interpretation issue which is outside the substantive jurisdiction of this Board. This Board cannot disturb Conclusion of Law 56. Exception 9 is rejected.

15. Exception 10: Conclusion of Law 57 is correct. A complete demonstration of site control was a requirement contained in RFA 2014-114. Petitioner failed to show that Florida Housing added any further requirement to that already contained in the RFA. Exception 10 is rejected.

16. All exceptions are rejected, thus there is no reason to alter the Recommendation in the Recommended Order.

RULING ON THE RECOMMENDED ORDER

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

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

ORDER

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

19. 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.

20. 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.

21. The Recommendation of the Recommended Order is adopted.

IT IS HEREBY ORDERED that the Application of Clearlake Isles, LP, No. 201-073C, is granted its requested funding, subject to credit underwriting; and the formal written protest of Clearlake Village, LP, is hereby **DISMISSED**.

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



FLORIDA HOUSING FINANCE
CORPORATION

By: _____

Chair

Copies to:

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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

CLEARLAKE VILLAGE, L.P.,

Petitioner,

vs.

Case No. 15-2394BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

CLEARLAKE ISLES, L.P.,

Intervenor.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on May 27, 2015, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether Respondent Florida Housing Finance Corporation's intended decision to find the application of Clearlake Village, L.P., ineligible for funding is contrary to Respondent's governing statutes, rules, policies, or the solicitation specifications.

PRELIMINARY STATEMENT

On November 21, 2014, Florida Housing Finance Corporation (Respondent or Florida Housing) issued a Request for Applications 2014-114 (RFA). The RFA solicited applications to compete for federal low-income housing tax credit funding (tax credits or HC) for affordable housing developments in small and medium counties in Florida. Eighty-two applications were filed in response to the RFA, including applications by Petitioner Clearlake Village, L.P. (Petitioner), and Intervenor Clearlake Isles, L.P. (Intervenor).

On March 20, 2015, Florida Housing posted notice of its intended decision to award funding to 11 applicants, including

Intervenor. Petitioner's application was among 13 applications that Florida Housing found ineligible for funding. Petitioner timely filed a Notice of Intent to Protest and a Formal Written Protest pursuant to section 120.57(3), Florida Statutes (2014).^{1/} Petitioner's written protest raises one issue: whether Florida Housing incorrectly found that Petitioner failed to establish control of the development site as required by the RFA. If Petitioner's protest is successful, it will be elevated into the funding range because Petitioner and Intervenor had identical scores, and Petitioner's lottery number is lower than Intervenor's lottery number.

Following an unsuccessful resolution meeting pursuant to section 120.57(3)(d)1., Florida Housing referred Petitioner's protest to the Division of Administrative Hearings (DOAH), where a final hearing was held on May 27, 2015.

On May 22, 2015, the parties filed a Joint Prehearing Stipulation in which they set forth stipulations as to matters of fact and law. The parties' stipulations have been incorporated herein, to the extent relevant.

At the hearing, Joint Exhibits 1 through 4, 4-A, and 4-B were admitted into evidence, as were: Petitioner's Exhibits 1, 2, and 5 through 10; and Intervenor's Exhibit 1. Florida Housing did not offer any exhibits.

Petitioner presented the testimony of Ms. Amy B. Garmon, Florida Housing's multi-family programs manager, and Mr. Kevin Young, principal of DPKY, Development Company, LLC. Intervenor presented the testimony of Ms. Elena Adames, vice-president of Royal American Development, which serves as Intervenor's general partner. Florida Housing presented no witnesses.

A Transcript of the final hearing was filed with DOAH on June 5, 2015. The parties filed Proposed Recommended Orders, which have been considered by the undersigned.

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 Statutes, Florida Housing is designated as the housing credit agency for Florida for purposes of allocating low-income housing tax credits.

2. The low-income housing tax credit program incentivizes the private market to invest in affordable rental housing. Tax credits are competitively awarded to housing developers in Florida for qualified rental housing projects. Developers then sell these credits to investors to raise capital (or equity) for their projects, which reduces the debt that the developer would otherwise have to borrow.

3. When sold to investors, the tax credits provide equity that reduces the debt associated with the project. With lower debt, the affordable housing tax credit property can (and must) offer lower, more affordable rent. As consideration for receipt of tax credits, developers covenant to keep rent at affordable levels for periods of 30 to 50 years. The demand for tax credits provided by the federal government far exceeds the supply.

A. The Competitive Application Process

4. Florida Housing is authorized to allocate tax credits and other funding by means of requests for proposals or other competitive solicitations allowed by section 420.507(48), Florida Statutes. Florida Housing adopted Florida Administrative Code Chapter 67-60 to govern the competitive solicitation process for several different programs, including the one for tax credits.

5. Chapter 67-60 was adopted on August 20, 2013, replacing prior procedures used by Florida Housing for allocating tax credits, and provides that the bid protest provisions of section 120.57(3) govern its process for allocating tax credits.

6. Applicants request in their applications a specific dollar amount of housing tax credits to be given to the applicant each year for a period of 10 years. The amount of housing tax 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.

7. On November 21, 2014, Florida Housing issued the RFA at issue in the instant dispute. According to the RFA, Florida Housing expects to award an estimated \$12,914,730 of housing tax credits which are available for award to proposed developments located in medium counties, and up to an estimated \$1,513,170 of housing tax credits available for award to proposed developments located in small counties.

8. On January 21, 2015, Petitioner, in response to the RFA, submitted an application seeking \$1,418,185 in housing tax credits to finance the construction of an 80-unit residential rental development in Brevard County, Florida (a medium county), to be known as Clearlake Village. Though Petitioner has submitted other applications for housing tax credits, this is the first time Petitioner has done so in Florida. Petitioner's application was assigned lottery number 4 by Florida Housing.

9. On January 20, 2015, Intervenor, in response to the RFA, submitted an application requesting \$1,475,000 in housing tax credits to support the construction on an 80-unit affordable housing development also in Brevard County.

10. As part of the RFA process, Florida Housing announced its intention to award funding to nine medium county

developments, including Intervenor's application number 2015-073C for Brevard County.

B. Notice

11. On March 20, 2015, Petitioner received notice that Florida Housing intended to designate Petitioner's application ineligible for funding and that other applications were selected for funding, subject to satisfactory completion of the credit underwriting process.

12. In response to Respondent's notice of intended action, Petitioner timely filed a Notice of Protest, and Petitioner's Formal Written Protest and Petition for Formal Administrative Proceedings.

C. RFA 2014-114 Ranking and Selection Process

13. Florida Housing received 82 applications seeking funding in response to the RFA, including 76 for medium county developments. Developments were proposed in 21 different medium counties throughout the State, including four in Brevard County. 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, many medium counties will not receive an award of housing tax credit funding in this RFA, due to the typical amount of an applicant's housing tax credit request (generally \$1.0 to \$1.5 million), and the number of

medium counties for which developments are proposed. Florida Housing intends to award funding to nine developments in nine different medium counties.

14. The RFA requires that applicants file an online electronic application with development cost pro forma. Each applicant is also required to submit several hard copies of its application and attachments. One of the applications is designated by the applicant as the "original," which must contain an original signature in blue ink; and two others it designates as "copies," which are used by Florida Housing staff to score the applications. Florida Housing scans the application attachments from the original and posts the online application with the scanned attachments on its web page.

15. The applications were received, processed, deemed eligible or ineligible, scored, and ranked, pursuant to the terms of the RFA, Florida Administrative Code Rule Chapters 67-48 and 67-60, and applicable federal regulations. Applications are considered for funding only if they are deemed "eligible," which means that the application complies with Florida Housing's various content requirements. Of the 82 applications submitted to Florida Housing for the RFA, 69 were found "eligible," and 13 were found ineligible. Petitioner's application was found ineligible. A five-page spreadsheet created by Florida Housing, entitled "RFA 2014-114 - All Applications," which identifies all

eligible and ineligible applications, was provided to each applicant.

16. The first consideration in sorting eligible applications for funding is application scores. Applicants can achieve a maximum score of 23 points. Eighteen of those 23 points are attributable to "proximity" scores based on the distance of the proposed development from services needed by tenants and the remaining five points are attributable to local government contributions. All 69 eligible applications received the maximum score of 23 points. Petitioner's application was not fully scored, because it was deemed ineligible. If Petitioner's application had been scored, rather than being found ineligible, it would have received a score of 23.

17. Many applicants achieve tie scores, and in anticipation of that occurrence Florida Housing designed the RFA and rules to incorporate a series of "tie breakers," the last of which is randomly assigned lottery numbers. Lottery numbers have historically played a significant role in the outcome of Florida Housing's funding cycles, and lottery numbers were determinative of funding selections in the current RFA.

18. Florida Housing employs a "funding test" to be used in the selection of medium county applications for funding in this RFA. The "funding test" requires that the amount of tax credits remaining (unawarded) when a particular medium county application

is being considered for selection must be enough to fully fund that applicant's request amount, and partial funding will not be given.

19. The RFA also specifies a sorting order for funding selection, with applications first arranged from highest score to lowest. Applicants with tie scores are separated based on criteria not relevant to resolving the instant protest.

20. Suffice to say that Petitioner's application qualified for each funding preference and it had a better lottery number than Intervenor.

C. County Award Tally

21. In selecting among eligible applicants for funding, Florida Housing also applies a "County Award Tally." The County Award Tally is designed to prevent a disproportionate concentration of funded developments in any one county. Generally, before a second application can be funded in any given county, all other counties that are represented by an eligible applicant must receive an award of funding. As there were eligible medium county applications submitted from 21 different counties for the RFA, there cannot be more than one applicant funded from any given medium county.

22. The nine medium county applicants selected for funding had lottery numbers 1, 2, 6, 7, 9, 20, 26, 27, and 28. The applicant with lottery number 6 (Intervenor), is from Brevard

County. If Petitioner is deemed eligible, it would be selected for funding because it has a lower lottery number (4) than Intervenor and would displace Intervenor as the only project funded in Brevard County.

D. Basis for Petitioner's Ineligibility

23. Florida Housing reviewed Petitioner's application and determined that it was ineligible as it failed to meet the RFA requirement that applicants must demonstrate control of the site upon which the development is to be constructed. Florida Housing rejected Petitioner's site control documentation.

24. Site control is an important element of an application--the "meat and potatoes of the application." Proof that the applicant has control of the development site is a matter of "do or die if you miss a document." The RFA has a general requirement that each application be complete, and must include all applicable documentation.

25. Site control can be established through a deed, a long-term lease, or a contract for purchase and sale. In each case, the entity with control of the site must be the applicant entity. If the purchaser under a contract for purchase and sale is not the applicant, then the application must contain one or more assignments that give the applicant all rights and remedies of the purchaser.

26. Section 4.A.7 of the RFA, at page 23, lists the requirements for site control. The instructions provide, in relevant part:

(1) Site Control:

The Applicant must demonstrate site control by providing, as Attachment 7 to Exhibit A, the documentation required in Items a., b., and/or c., as indicated below.

a. Eligible Contract - For purposes of the RFA, an eligible contract is one that[:] has a term that does not expire before a date that is six (6) months after the Application Deadline or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than six (6) months after the Application Deadline; specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant, is provided.

27. As an overall submittal requirement, the RFA requires that each application be complete and include all "applicable documentation." The RFA process does not provide an opportunity for applicants to cure errors or omissions discovered after submission of an application to Florida Housing.

28. Petitioner's application sought to establish site control through attachment 13 to its application, which includes, among other things, a vacant land contract, and an assignment and

assumption agreement. The vacant land contract pertains to the land that Petitioner intends to use for the site identified in its application.

29. The vacant land contract was prepared using a Florida Association of Realtors form contract. Paragraph 12 of the vacant land contract contains boilerplate language which reads as follows: "ASSIGNABILITY; PERSONS BOUND: Buyer may not assign this Contract without Seller's written consent." According to Petitioner, the word "not" was struckthrough in the following manner, to wit: ~~not~~.

30. Amy Garmon, Florida Housing's multi-family programs manager, scored the site control element of all 82 applications filed in response to the RFA. Ms. Garmon has scored site control applications for nine to ten years, and is very familiar with the Florida Association of Realtors' form contract, having scored hundreds of contracts submitted on that form.

31. Ms. Garmon reviewed paragraph 12 of the vacant land contract submitted by Petitioner and concluded that the language set forth therein does not allow for an assignment of the contract without written consent from the seller. Ms. Garmon reached her conclusion because in her opinion, the strikethrough of the word "not" in paragraph 12, although the word itself appears somewhat darker and not as clear as some of the other words in the paragraph, is not sufficiently obvious so as to

alert a reader to the presence of the strikethrough. Upon review of paragraph 12, the undersigned agrees with Ms. Garmon, and concludes that the strikethrough of the word "not" is not sufficiently observable so as to alert a reviewer to the presence of the strikethrough.

32. Given the findings in paragraph 31, the provision of the vacant land contract which provides that "[h]andwritten or typewritten terms inserted in or attached to th[e] contract prevail over preprinted terms" is not triggered because the purported strikethrough of the word "not" in paragraph 12 of the contract, given its ambiguity, does not rise to the level of constituting a "handwritten or typewritten" modification of a preprinted contractual term. Additionally, the finding in paragraph 31 also means that Petitioner, in order to demonstrate site control, must prove that the seller gave written consent to DPKY Development Company's assignment of its interest in the vacant land contract to Petitioner.

33. Petitioner also submitted with its application an assignment and assumption agreement which relates to paragraph 12 of the vacant land contract. The assignment and assumption agreement provides that DPKY Development Company, LLC, is assigning to Petitioner its interest in the vacant land contract it has with William T. Taylor.

34. The vacant land contract provides that "William T. Taylor, in his capacity as trustee of the Hidden Creek Land Trust Agreement dated January 15, 2004," is the "seller" of the land and "DPKY Development Company, LLC, or assigns" is the "buyer" of land. While the assignment and assumption agreement lists the name of the seller, it does not include a signature line for the seller or any other acknowledgement by the seller expressing consent to the assignment. Petitioner does not dispute that the assignment and assumption agreement is deficient in this regard.

35. Turning to the vacant land contract, Petitioner contends that the first page of the vacant land contract identifies the buyer as "DPKY Development Company, LLC, or assigns," and because the seller initialed the bottom of the first page of the vacant land contract this means that Respondent should have reasonably known that the presence of seller's initials means that the seller is consenting to the assignment of DPKY Development Company's interest in the property. The portion of page one of the vacant land contract initialed by the seller provides that "Buyer (____) and Seller (____) acknowledge receipt of a copy of this page, which is page 1 of 7."

36. Contrary to Petitioner's assertion, the introductory provision of the vacant land contract that identifies the "buyer" as "DPKY Development Company, LLC, or assigns," cannot be read in isolation when there is another provision in the contract which

specifically addresses the issue of assignability, to wit:

"[b]uyer may not assign th[e] contract without [s]ellers written approval." The introductory provision of the vacant land contract relied upon by Petitioner may have conveyed a stronger expression of the seller's purported intent to consent to an assignment if Petitioner removed from paragraph 12 of the vacant land contract any reference to assignability. Because Petitioner failed to do so, the fact that the seller acknowledged that it received a copy of the page of the contract identifying the buyer as "DPKY Development Company, LLC, or assigns" is not sufficient, in itself, to establish that the seller consented to DPKY Development Company's assignment of its interest in the contract to Petitioner.^{2/}

37. Ms. Garmon, after determining that the required consent of the seller to the assignment was not included in the original copy of Petitioner's application, reviewed each of the other copies of Petitioner's application in Respondent's possession. Ms. Garmon's review of the other copies of Petitioner's application confirmed that the seller's written consent to assignment was not a part of Petitioner's application. The evidence supports the conclusions reached by Ms. Garmon and Florida Housing.

CONCLUSIONS OF LAW

38. The Division of Administrative Hearings has jurisdiction to hear this protest and to issue a recommended order. §§ 120.569 and 120.57, Fla. Stat.

39. This is a de novo proceeding to determine whether Florida Housing's proposed decision to find Petitioner's application not eligible for funding is contrary to Florida Housing's governing statutes, rules, or policies or to the RFA specifications. § 120.57(3)(f), Fla. Stat. Although this is a de novo proceeding, DOAH does not substitute its judgment for that of Florida Housing. Instead, DOAH engages in a form of "inter-agency review," the object of which is to evaluate the action taken by Florida Housing. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

40. Petitioner has the burden of proof. Petitioner must establish that Florida Housing's proposed action is either: (1) contrary to the agency's governing statutes, (2) contrary to the agency's rules or policies, or (3) contrary to the RFA specifications. § 120.57(3)(f), Fla. Stat.

41. To prevail, Petitioner must prove that the agency's proposed action is: (1) clearly erroneous; (2) contrary to competition; or (3) arbitrary or capricious (that is, an abuse of discretion). R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; Sch. Bd. Miami-Dade

Mar. 20, 2002). Petitioner must establish one of the above by a preponderance of the evidence. Id.

42. Agency action will be found to be clearly erroneous if it is without rational support and, consequently, the Administrative Law Judge has a "definite and firm conviction that a mistake has been committed." United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948); see also Pershing Indus., Inc. v. Dep't of Banking & Fin., 591 So. 2d 991, 993 (Fla. 1st DCA 1991).

Agency action may also be found to be clearly erroneous if the agency's interpretation of the applicable law conflicts with the law's plain meaning and intent. Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004).

43. An act is contrary to competition if it (1) creates the appearance of an opportunity for favoritism; (2) erodes public confidence that contracts are awarded equitably and economically; (3) causes the procurement process to be genuinely unfair or unreasonably exclusive; or (4) is unethical, dishonest, illegal, or fraudulent. Syslogic Tech. Servs., Inc. v. S. Fla. Water Mgmt. Dist., Case No. 01-4385BID (Fla. DOAH Jan. 18, 2002), modified in part, Case No. 2002-051 (Fla. SFWMD Mar. 6, 2002).

44. An arbitrary decision is one not supported by facts or logic or one that is despotic. Agrico Chem. Co. v. State Dep't of Env'tl. Reg., 386 So. 2d 759, 763 (Fla. 1st DCA 1978). To act capriciously is to act without thought or reason or to act

irrationally. Id. If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

45. The issue in this proceeding is limited to the legal interpretation of whether Petitioner has satisfied the RFA requirements by providing acceptable site control documentation and whether Florida Housing's decision that it did not is clearly erroneous as not being consistent with the RFA specifications, controlling law, or Florida Housing's rules.

46. The RFA, at section three, requires a complete application which consists of the "Application with Development Cost Pro Forma found at Exhibit A of the RFA, the Applicant Certification and Acknowledgment Form and other applicable Verification Forms found at Exhibit B of the RFA, as well as all other applicable documentation" to be provided by the applicant, as outlined in section four of the RFA.

47. Additionally, rule 67-60.006(1) provides that "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 non-responsiveness." This language is consistent with section 287.012, Florida Statutes, which indicates a responsive bid must

"conform in all material respects to the solicitation." The burden is thus on the applicant to provide a complete and responsive response to the RFA.

48. In the instant case, Florida Housing concluded that Petitioner failed to provide appropriate documentation to demonstrate site control. This decision was based on a review of the vacant land contract that Petitioner itself submitted in its application. Ms. Garmon read the vacant land contract to say that the buyer may "not" assign the contract without seller's written approval. Because no written approval was provided by the seller, Ms. Garmon considered the site control documents to be incomplete. Petitioner argues that the "not" has actually been struckthrough to reflect the parties' intent that written approval of the seller is not necessary. The fact that paragraph 12 of the vacant land contract fails to clearly express an intent to strikethrough the word "not" makes Ms. Garmon's reading of the contract reasonable.

49. Again, the burden is on the applicant to provide an application that satisfies all RFA requirements. It was incumbent on Petitioner to review the documentation submitted to Florida Housing before submitting its application to ensure that all documents conveyed what Petitioner intended for them to convey.

50. The burden is not on Ms. Garmon, or any other Florida Housing staff member, to guess the intent of the parties to the vacant land contract. To place such a burden on Florida Housing staff is unreasonable.

51. Petitioner also argues that the designation of the buyer as "DPKY Development Company, LLC, or assigns" in the introductory paragraph of the vacant land contract somehow constitutes a blanket recognition that the parties intended to assign the contract. While this may be true, paragraph 12 of the contract still requires that the seller must by means separate and apart from the introductory paragraph consent to any assignment of the contract. There is no evidence indicating that the seller actually consented to any such assignment.

52. In Florida, an attempt to assign a contract or lease without a seller's or lessor's consent, where same is required as a term of contract, cannot convey the assignor's interest. E.g., Fin. Bus. Servs., Inc., v. Schmitt, 272 So. 2d 536 (Fla. 4th DCA 1973); Revlon Grp., Inc. v. LJS Realty, Inc., 579 So. 2d 365 (Fla. 4th DCA 1991) (lease was breached when assigned without the required consent of the lessor, provided consent was not unreasonably withheld); Tallahassee Mall, Inc. v. Rogers, 352 So. 2d 1272 (Fla. 1st DCA 1977).

53. Florida Administrative Code Rule 67-60.008 provides that "[t]he Corporation may waive Minor Irregularities in an

otherwise valid Application [and] [m]istakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors, may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes.”

54. The mistake committed by Petitioner in the instant case cannot be considered a “minor irregularity” for several reasons. First, Petitioner’s failure to clearly strikethrough the word “not” in the vacant land contract is not a mistake that should have been or was clearly evident to Florida Housing. Second, and perhaps more importantly, the demonstration of site control is a mandatory element of the RFA that cannot be waived. See Am. Lighting and Signalization v. Dep’t of Transp., DOAH Case No. 10-7669BID (Fla. DOAH, Dec. 1, 2010; Fla. DOT Dec. 30, 2010); Robinson Elec. Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

55. Florida Housing reviewed the vacant land contract and reasonably concluded that the document failed to provide acceptable evidence of site control. Ms. Garmon, the reviewer of the site control documents for the RFA, has approximately a decade’s experience in reviewing such documents, and correctly observed that the form contract did not clearly establish DPKY’s authority to assign its interest in the vacant land contract to Petitioner, absent written consent of the seller.

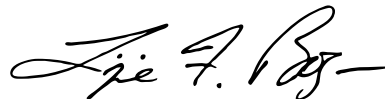
56. Petitioner also points out that section 11, which provides that "Handwritten or typewritten terms inserted in or attached to this Contract prevail over preprinted terms." This provision only applies where the handwritten or typewritten term is evident and clear. As previously noted, the purported strikethrough of the word "not" in paragraph 12 of the vacant land contract is neither evident nor clear.

57. Based on the foregoing, Petitioner has failed to carry its burden of showing that Florida Housing's decision to find its application ineligible for funding was clearly erroneous; arbitrary; capricious; contrary to the governing statutes, rules or RFA specifications; or contrary to competition.

RECOMMENDATION

Based on the Findings of Fact and Conclusions of Law, it is recommended that Petitioner's protest be dismissed.

DONE AND ENTERED this 25th day of June, 2015, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2015.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2014, unless otherwise indicated.

^{2/} The only evidence regarding assignability other than that contained on the face of the Vacant Land Contract itself is the testimony of Mr. Young that the Buyer entity, DPKY, understood the contract was freely assignable without Seller's consent. Mr. Young's testimony addresses only the intent of the buyer, and not the intent of, or consent by, the seller.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.