

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BERKELEY LANDING, LTD., and
BERKELEY LANDING DEVELOPER, LLC,

Petitioners,

FHFC Case No: 2019-102BP
APPLICATION NO: 2020-017D

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

PETITION FOR ADMINISTRATIVE HEARING

Pursuant to sections 120.569, 120.57(3), Florida Statutes (Florida Statutes.), and Chapter 28-106, Florida Administrative Code ("Florida Administrative Code."), Petitioners, Berkeley Landing, Ltd., and Berkeley Landing Developer, LLC (collectively "Berkeley Landing"), file this 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. Petitioner, Berkeley Landing, Ltd., is the Applicant entity of a proposed affordable housing development to be located in Palm Beach County, Application #2020-017D. Petitioner, Berkeley Landing Developer, LLC, is a "Developer" entity as defined by Florida Housing in rule 67-48.002(28), Florida Administrative Code.

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3. Berkeley Landing is challenging Florida Housing's eligibility determination regarding Berkeley Landing's eligibility for funding under Request for Applications 2019-102 through an administrative hearing before the Department of Administrative Hearing ("DOAH").

4. Counsel for Berkeley Landing and Berkeley Landing's address for this proceeding are: Craig D. Varn and Amy Wells Brennan, Manson Bolves Donaldson Varn, 109 North Brush Street, Suite 300, Tampa, Florida 33602.

Background

5. Florida Housing administers various affordable housing programs including the Housing Credit ("HC" or "tax credit") Program pursuant to Section 42 of the Internal Revenue Code (the "IRC" or "the Code") and section 420.5099, Florida Statutes, 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, Florida Administrative Code.

6. 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, Florida Administrative Code.

7. Florida Housing has established a competitive solicitation process known as the Request for Applications to assess the relative merits of proposed developments pursuant to Chapters 67-48 and 67-60, Florida Administrative Code.

8. Rule 67-60.006, Florida Administrative 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. On or about July 30, 2019, Florida Housing issued RFA 2019-102, Community Development Block Grant-Disaster Recovery (CDBG-DR) To Be Used In Conjunction With Tax-Exempt MMRB And Non-Competitive Housing Credits In Counties Deemed Hurricane Recovery Priorities (“RFA” or “RFA 2019-102”). The application deadline for the RFA was September 24, 2019 (“Application Deadline”).

10. By submitting an application, each applicant certifies that the “Proposed Developments funded under this RFA will be subject to the requirements of the RFA, the 2018 State of Florida Action Plan for Disaster Recovery including subsequent Substantial and Technical Amendments, inclusive of all Exhibits, the Application requirements outlined in Rule Chapter 67-60, F.A.C., and/or Rule Chapter 67-21, F.A.C., and the Compliance requirements of Rule Chapter 67-53, F.A.C.”

11. The RFA delineates the submission requirements and sets out the information required to be provided by an applicant. On pages 57-58, the RFA sets forth a list of mandatory “Eligibility Items” that must be included in an application.

12. The RFA requires all applicants to provide the Authorized Principal Representative. Pages 18-19 of the RFA states that the Authorized Principal Representative:

(a) must be a natural person Principal of the Applicant listed on the Principal Disclosure Form; (b) must have signature authority to bind the Applicant entity; (c) must sign the Applicant Certification and Acknowledgement form submitted in this Application; (d) must sign the Site Control Certification form submitted in this Application; and (e) if funded, will be the recipient of all future documentation that requires a signature.

13. The RFA also requires that the Principal Disclosure Form “identify the Principals of the Applicant and Developer(s) as of the Application Deadline and should include, for each applicable organizational structure, only the types of Principals required by Subsection 67-48.002(93), Florida Administrative Code.”

14. Florida Housing's solicitation process for RFA 2019-102 is governed by the provisions in rules 67-60.001 - .009, Florida Administrative Code.

15. Rule, 67-60.008, Florida Administrative Code, provides that the Corporation may waive minor irregularities. A "minor irregularities" is an irregularity in an application that does not:

- result in the omission of any material information;
- create any uncertainty that the terms and requirements of the competitive solicitation have been met;
- provide a competitive advantage or benefit not enjoyed by other Applicants;
- adversely impact the interests of the Corporation or the public.

Rule, 67-60.008, Florida Administrative Code.

AS noted above, Berkeley Landing's Application included the name of

Notice of Agency Action

16. Berkeley Landing received notice of Florida Housing's Final Agency Action entitled "RFA 2019-102 Board Approved Preliminary Awards" on or about December 13, 2019. ("Corporation's Notice").

Notice of Protest

17. On December 18, 2019, Berkeley Landing timely filed a Notice of Protest which challenged the selection of the applications in the Corporation's Notice.

Substantial Interests

18. Berkeley Landing timely submitted an application in response to RFA 2019-102, Application #2020-017D ("Application"). In its Application, Berkeley Landing sought \$2.5 million in Land Allocation Program Funding, \$6.5 million Development Funding and

\$844,699.26 in annual federal tax credits to help finance the development of its project, 95 Garden Apartments.

19. Berkeley Landing was scored as having not satisfied the mandatory Eligibility Items for funding. Berkeley Landing was assigned lottery number 20 as reflected in the RFA 2019-102 Board Approved Scoring Results.

20. On December 13, 2019, Florida Housing's Board of Directors adopted the scoring committee's recommendations and tentatively authorized the selection for funding of those applications identified in the Corporation's Notice.

21. Florida Housing incorrectly determined Berkeley Landing failed to satisfy the RFA mandatory Eligibility Items. But for that determination, Berkeley Landing would have been ranked higher for a funding allocation than other applicants awarded funding. Therefore, Berkeley Landing should have been selected for funding.

22. Berkeley Landing is challenging and seeking a determination that Florida Housing erred in the scoring, eligibility and decision to not award funding to Berkeley Landing. Berkeley Landing is entitled to be ranked in the funded range and would have received an allocation of funding from RFA 2019-102 but for Florida Housing's error in its scoring, eligibility and funding decision.

Disputed Issues of Fact

Berkeley Landing Authorized Principal Representative

23. As stated above, only applications that meet the Eligibility Items are eligible for funding. To meet the Mandatory Item requirement for Development Location Point, the RFA requires the applicant to provide the Authorized Principal Representative.

24. The Board did not explain what Eligibility Item Berkeley Landing failed to satisfy, but it is presumed that its decision was based upon the recommendation of the Review Committee. In making its recommendation that Berkeley Landing did not satisfy all of the Eligibility Items, the Review Committee indicated “No” in the scoring matrix section labeled “Authorized Principal Representative provided and meets requirements.” However, this position is incorrect. The Authorized Principal Representative for Berkeley Landing, Jonathan Wolf, is provided in the Applicant Certification and Acknowledgement Form, among other locations, in the Berkeley Landing Application and meets the requirements identified above for being the Authorized Principal Representative.

25. In addition to signing the Applicant Certification and Acknowledgement Form, Mr. Wolf also signed the Site Control Certification Form where he is specifically identified as the Authorized Principal Representative of the Applicant. Mr. Wolf also signed all of the necessary contracts and agreements supporting the application, including the Purchase and Sale Agreement between East Coast Property Investment Group & Berkeley Landing, the Purchase and Sale Agreement between EC Commercial Properties & Berkeley Landing, the Assignment of Purchase and Sale Agreement, the Assignment of Purchase and Sale Agreement, the Lease Agreement, the Equity Commitment Letter and the Loan Commitment Letter.

26. In completing the application, on Page 3, in the section for the Authorized Principal Representative/Contact Person, the Contact Person, Jenny Lagmay, was placed over, the Authorized Principal Representative, Jonathan Wolf. Nevertheless, the correct Authorized Principal Representative was provided, therefore it is unclear how the Review Committee answered “No” in scoring matrix section labeled “Authorized Principal Representative provided and meets requirements.”

27. To the extent this issue was determined to cause an internal inconsistency in the Authorized Principal Representative requirement, the error should be waived as a minor irregularity.

Minor Irregularity

28. To be considered a “minor irregularity” an error in an application must not:

- result in the omission of any material information;
- create any uncertainty that the terms and requirements of the competitive solicitation have been met;
- provide a competitive advantage or benefit not enjoyed by other Applicants;
- adversely impact the interests of the Corporation or the public.

Rule, 67-60.008, Florida Administrative Code.

29. As mentioned above, the Authorized Principal Representative for Berkeley Landing, Jonathan Wolf, is provided in the Applicant Certification and Acknowledgement Form, included in Attachment 1 to the Berkeley Landing Application.

30. To satisfy the requirements of the RFA, the Authorized Principal Representative:

(a) must be a natural person Principal of the Applicant listed on the Principal Disclosure Form; (b) must have signature authority to bind the Applicant entity; (c) must sign the Applicant Certification and Acknowledgement form submitted in this Application; (d) must sign the Site Control Certification form submitted in this Application; and (e) if funded, will be the recipient of all future documentation that requires a signature.

Pages 18-19 of the RFA. Mr. Wolf is the only natural person Principal of the Applicant listed in the Principal Disclosure Form and, therefore, is the only person that meets the requirements of the RFA. Mr. Wolf has the signature authority to bind the Berkeley Landing, signed the Applicant Certification and Acknowledgement form submitted in the Application and signed the Site Control Certification form submitted in the Application. Mr. Wolf, as in all the prior applications submitted through Wendover Housing Partners, LLC, will be the recipient of all

future documentation that requires a signature. Most importantly, the Department is well aware of the fact that Mr. Wolf is the Authorized Principal Representative for those applications submitted through Wendover Housing Partners, LLC. Therefore, there can be no good faith suggestion that there was any uncertainty that the terms and requirements of the competitive solicitation were met.

31. Finally, given Florida Housing's past application of the minor irregularity rule, recognition of this issue as a "minor irregularity" would not provide a competitive advantage or benefit not enjoyed by other Applicants or adversely impact the interests of the Corporation or the public. For example, Florida Housing has waived the following issues in prior applications:

- a closing date in a Real Estate Purchase Agreement which violated the RFA's requirement;
- errors in a Pro Forma that were considered mathematical;
- an "incorrect" buyer in a Contract for Purchase and Sale of Real Property;
- an incomplete equity letter;
- a missing negative sign for the Development Location Point ("DLP") coordinates;
- the placement of the DLP longitude coordinates in a blank reserved for scattered sites coordinates; and,
- the failure to complete the mandatory Unit Mix chart.

Given that these errors were waived by Florida Housing, it would be arbitrary to not consider Berkeley Landing's issue also waivable.

Disputed Issues of Law

32. The issues of law in this matter include but are not limited to the following
- a) Whether the correct eligibility determination has been made for Berkeley Landing based upon the provisions of the RFA;

- b) Whether the preliminary rankings properly support the eligibility determinations of applicants for funding in accordance with the standards and provisions of the RFA;
- c) Whether the RFA's criteria for determining eligibility, ranking and evaluation of proposals were properly applied;
- d) Whether the correct allocation funding determination has been made for Berkeley Landing consistent with the requirements for the competitive procurement process in the RFA and Florida Housing's rules and governing statutes;
- e) Whether the criteria and procedures followed in reaching the proposed ineligibility determination for Berkeley Landing are arbitrary, capricious, contrary to competition, contrary to the RFA requirements, an abuse of discretion or are contrary to prior Florida Housing interpretations of the applicable statutes and administrative rules;
- f) Whether the rankings and proposed awards are consistent with fair and open competition for the allocation funding;
- g) Whether the rankings and proposed awards are based upon clearly erroneous or capricious eligibility determinations, scoring or ranking;
- h) 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;
- i) Whether error of typing over Mr. Wolf's information with Ms. Lagmay's information should have been deemed a minor irregularity and, therefore, waived;
- j) Whether failure to waive the alleged error as a minor irregularity was an abuse of discretion;
- k) Such other issues as may be revealed during the protest process.

33. Petitioners reserve the right to seek leave to amend this Petition to include additional material facts and issues of law that may become known through discovery.

Statement of Ultimate Facts and Law

34. As a matter of ultimate fact and law, Florida Housing failed to properly and/or consistently apply the RFA specifications, existing rules or prior Florida Housing interpretations and precedents.

35. As a matter of ultimate fact and law, Florida Housing incorrectly determined that Berkeley Landing was ineligible for an allocation of funding.

36. As a matter of ultimate fact and law, Florida Housing's failure to waive the Authorized Principal Representative issue as a minor irregularity was an abuse of discretion.

37. As a matter of ultimate fact and law, Petitioners would have been entitled to an allocation of its requested funding but for the error in scoring of its application.

Statutes and Rules

38. Statutes and rules governing this proceeding are Chapter 420 and sections 120.569, 120.57(3), Florida Statutes, and Chapters 28-106, 28-110, 67-48 and 67-60, Florida Administrative Code.

WHEREFORE, Petitioners request that:

A. An administrative hearing be conducted pursuant to section 120.57(3), Florida Statutes, to review Florida Housing's scoring determination as it affects Berkeley Landing's Application;

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

- 1) Berkeley Landing properly completed its application in accordance with the competitive solicitation; that its applications was responsive to and complied with RFA 2019-102; and that its application should have been considered for funding and scored as having satisfied all mandatory Eligibility Items;
- 2) Florida Housing erred in determining that the application submitted by Berkeley Landing was not completed in accordance with the competitive solicitation; and;
- 3) To the extent there was any error in the identification of the Authorized Principal Representative, Florida Housing's failure to waive such error as a minor irregularity was an abuse of discretion;

C. The Administrative Law Judge enter a Recommended Order recommending that Florida Housing award Petitioners their requested allocation of funding;

D. Florida Housing enter a Final Order finding Berkeley Landing's Application eligible for funding and awarding Berkeley Landing its requested allocation of funding; and,

E. Berkeley Landing be granted such other relief as may be deemed appropriate.

RESPECTFULLY SUBMITTED this 30th day of December, 2019.

A handwritten signature in blue ink, appearing to read "C. D. Varn", is written over a horizontal line.

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