

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

PINNACLE HEIGHTS, LLC,

Petitioner,
v.

DOAH Case No.: 15-3304BID
FHFC Case No.: 2015-025BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,
and

RIO AT FLAGLER, 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 September 18, 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. Petitioner and Intervenor submitted applications to Florida Housing seeking allocations for low-income tax credits pursuant to RFA 2014-116. The Board announced its intention to fund certain projects on May 8, 2015.
2. Petitioner Pinnacle Heights, LLC, ("Pinnacle Heights"), timely filed a challenge to proposed funding awards pursuant to §120.57(3), Fla. Stat. (2014). Rio

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

 /DATL: 9-21-15

at Flagler, LP (“Rio”), 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 D. R. Alexander, Administrative Law Judge, at the Division of Administrative Hearings in Tallahassee, Florida, on August 6, 2015.

3. The issue for determination was whether Respondent's intended decision to award low-income housing tax credits to Rio, was contrary to governing statutes, Florida Housing's rules, or the solicitation specifications. Following the hearing, Pinnacle Heights, Florida Housing, and Rio 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 August 31, 2015, which found that Florida Housing's proposed scoring of Rio's application was clearly erroneous, contrary to competition, arbitrary or capricious, and recommended that Florida Housing enter a Final Order finding Rio's application ineligible and selecting Pinnacle Heights' application for funding. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.”

5. On September 8, 2015, Rio filed “Rio at Flagler LP's Exceptions to Recommended Order,” challenging four Findings of Fact and Conclusions of Law of the Recommended Order. Respondent Florida Housing filed its Response to Rio

at Flagler, LP's Exceptions to Recommended Order on September 11, 2015. Petitioner Pinnacle Heights did not file a separate response. By agreement of the parties, both filings were deemed timely.

RULING ON EXCEPTIONS

6. Based on a review of the record and the arguments presented by the Parties, the Board grants Rio's Exception 1 to Finding of Fact 12 regarding Rio's representation of which qualifying routes were served by the selected bus stop.

7. Based on a review of the record and the arguments presented by the Parties, the Board specifically rejects Rio's enumerated Exceptions 2-4 for the reasons set forth in the Recommended Order and the Response filed by Florida Housing.

RULING ON THE RECOMMENDED ORDER

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

9. Finding of Fact 12 contains a scrivener's error and is accordingly amended below.

10. The Conclusions of Law of the Recommended Order are accepted without changes.

ORDER

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

11. The Findings of Fact 1-11 and 13-16 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.

12. In Finding of Fact 12, the language "Route 6 (Coconut Grove)" should be replaced with "Route 11 (Mall of Americas)".

13. As amended above, Finding of Fact 12 is adopted as Florida Housing's Finding of Fact and incorporated by reference as though fully set forth in this Order.

14. 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.

15. The Recommendation of the Recommended Order is adopted.

IT IS HEREBY ORDERED that Rio's application is ineligible for funding and that Pinnacle Height's application is selected for funding under RFA 2014-116.

DONE and ORDERED this 18th day of September, 2015.



FLORIDA HOUSING FINANCE
CORPORATION

By: _____

Chair

Copies to:

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

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

Michael P. Donaldson, Esquire
Carlton Fields Jorden Burt, PA
215 South Monroe Street, Suite 500
Tallahassee, FL 32301

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, FL 32301

Gary J. Cohen, Esquire
Shutts and Bowen, LLP
201 South Biscayne Boulevard
1500 Miami Center
Miami, FL 33131

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

PINNACLE HEIGHTS, LLC,

Petitioner,

vs.

Case No. 15-3304BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

RIO AT FLAGLER, LP,

Intervenor.

_____ /

RECOMMENDED ORDER

D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing on August 6, 2015, in Tallahassee, Florida.

APPEARANCES

For Petitioner: J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301-1591

Gary J. Cohen, Esquire
Shutts and Bowen, LLP
1500 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-4329

For Respondent: Betty C. Zachem, Esquire
Florida Housing and Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1367

For Intervenor: Michael P. Donaldson, Esquire
Carlton Fields Jordan Burt, P.A.
Post Office Box 190
Tallahassee, Florida 32302-0190

STATEMENT OF THE ISSUE

The issue is whether Florida Housing and Finance Corporation's intended decision to award low income housing tax credits for an affordable housing development in Miami-Dade County to Rio at Flagler, LP (Rio), was contrary to solicitation specifications, and if so, whether that determination was clearly erroneous or contrary to competition.

PRELIMINARY STATEMENT

On November 21, 2014, Florida Housing Finance Corporation (Florida Housing or agency) issued Request for Applications 2014-116 (RFA), which solicited applications to compete for federal low-income housing tax credit funding (tax credits) for affordable housing developments in Miami-Dade County. Applications were submitted in response to the RFA by a number of developers, including Rio and Pinnacle Heights, LLC (Pinnacle). On May 8, 2015, Florida Housing posted a notice of its intended decision to award funding for family and elderly affordable housing to Rio and two other applicants not relevant here, whose applications were deemed to be eligible. Although

Pinnacle's application was also determined to be eligible, Rio had a lower tiebreaking lottery number than Pinnacle, and Rio was awarded the tax credits.

Pursuant to section 120.57(3), Florida Statutes (2015), Pinnacle timely filed a notice of intent to protest, followed by a formal written protest. In its formal written protest, Pinnacle alleged that but for Florida Housing erroneously scoring Rio's application, it would have received the requested funding. The matter was referred to DOAH to resolve the dispute. Prior to the hearing, Florida Housing changed its position and now contends that Rio's application was incorrectly scored and that Pinnacle, rather than Rio, should receive the funding.

At the final hearing, Petitioner presented the testimony of one witness. Petitioner's Exhibit 5 was accepted in evidence. Rio presented the testimony of one witness. Rio's Exhibits 2 through 4, 6, and 7 were accepted in evidence. Joint Exhibits 1 through 8 were also accepted in evidence.

A one-volume Transcript of the hearing was prepared. All parties filed proposed recommended orders, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504. One of its responsibilities is to

award low-income housing tax credits, which developers use to finance the construction of affordable housing. Tax credits are made available to states annually by the United States Treasury Department and are then awarded pursuant to a competitive cycle that starts with Florida Housing's issuance of a RFA.

2. In this case, the RFA was issued on November 21, 2014, modified slightly on January 30, 2015, and required the filing of applications by February 10, 2015. According to the RFA, Florida Housing is expected to award up to an estimated \$4,367,107 of housing credits for the following demographic set-aside: housing projects targeted for either the family or elderly population in Miami-Dade County. The credits will be awarded to the applicants with the highest total scores.

3. Pinnacle submitted Application No. 2015-211C seeking \$2,560,000.00 in annual allocation of housing credits to finance the construction of a 104-unit residential rental development to be known as Pinnacle Heights. Rio submitted Application No. 2015-217C seeking \$1,940,000.00 in annual allocation of housing credits to finance the construction of a 76-unit residential development to be known as Rio at Flagler.

4. The agency's Executive Director appointed a review committee comprised of Florida Housing staff to evaluate the applications for eligibility and scoring. Fifty-three applications were received, processed, deemed eligible or

ineligible, scored, and ranked pursuant to the terms of the RFA, administrative rules, and applicable federal regulations.

Applications are considered for funding only if they are deemed "eligible," based on whether the application complies with various content requirements. Of the 53 applications filed in response to the RFA, 43 were found to be eligible, and ten were found ineligible. Both Pinnacle and Rio were found eligible for the family/elderly demographic.

5. The RFA specifies a sorting order for funding eligible applicants. All eligible applicants in the family/elderly demographic, including Pinnacle and Rio, achieved the maximum score of 23 based on criteria in the RFA. Recognizing that there would be more applications than available credits, Florida Housing established an order for funding for applicants with tied scores using a sequence of six tiebreakers, with the last being a lottery number assigned by the luck of the draw. Applications with lower lottery numbers (closer to zero) are selected before those with higher lottery numbers.

6. Both Pinnacle and Rio received the maximum 23 points and met all tiebreaker criteria. In other words, both had so-called "perfect" applications. The ultimate deciding factor for perfect applications is a randomly generated lottery number that is assigned at the time each application is filed. Rio's number is four, while Pinnacle's number is six. Because Rio had a

lower lottery number than Pinnacle, Florida Housing issued its notice of intent to award tax credits to Rio and another applicant (with a lower lottery number) not relevant here.

7. Pinnacle timely filed a formal written protest. As amended, Pinnacle's protest is narrowed to a single issue -- whether the bus stop identified in Rio's application is a Public Bus Transfer Stop, as defined in the RFA. A failure to comply with this provision would lower Rio's total proximity score and make it ineligible to receive tax credit funding.

8. The RFA specifies two Point Items in the family/elderly demographic category. The first Point Item is "Local Government Contributions," for which a maximum of five points could be awarded. The second is "Proximity to Transit and Community Services," for which points are awarded based on the distance between the proposed development and the selected transit and community service. A maximum of six proximity points are allowed for Transit Services, while a maximum of 12 proximity points are allowed for Community Services for a total maximum of 18 proximity points. Under the terms of the RFA, if an applicant achieves a minimum of 12.25 proximity points for Community Services and Transit Services, a "point boost" up to the maximum total score of 18 proximity points is added to the applicant's score. Rio's transit score of six points is the focus of this dispute.

9. The RFA lists five types of Transit Services that an applicant can self-select to obtain proximity points, including Public Bus Stop (maximum two points) and Public Bus Transfer Stop (maximum six points). Applicants may select only one type of transit services on which to base their transit score. Depending on the type of transit service selected, an applicant may receive up to a maximum of six points for Transit Services. To verify the information in the application, an applicant must submit a Surveyor Certification Form, which is completed and signed by a licensed surveyor. In making its preliminary decision to award tax credits, Florida Housing relies on the information provided in the form and does not second-guess the surveyor. Issues regarding the accuracy of the information in the form are presented through challenges by other applicants.

10. Because Rio had only ten points for proximity to Community Services, it needed at least 2.25 transit points in order to obtain the minimum 12.25 proximity points necessary to achieve a point boost up to 18 points and be in the running for funding. Accordingly, Rio's application sought six points for the project site's proximity to a Public Bus Transfer Stop. A Public Bus Transfer Stop is defined on page 19 of the RFA as follows:

This service may be selected by Family and Elderly Demographic Applicants. 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 7 a.m. to 9 a.m. and also during the times of 4 p.m. to 6 p.m. Monday through Friday, excluding holidays, on a year-round basis. This would include both 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.

11. In sum, a Public Bus Transfer Stop is a fixed location at which passengers may access "at least three routes of public transportation via buses," with each route having a scheduled stop at that location at least hourly during morning and afternoon rush hours, Monday through Friday, on a year-round basis.

12. To comply with this requirement, and based upon oral information provided by customer service at Miami-Dade Transit Authority (Authority), Rio selected a bus stop located at West Flagler Street and Northwest 8th Avenue. Rio represented that this location was served by three qualifying routes: Route 6 (Coconut Grove), Route 11 (Florida International University-University Park Campus), and Route 208 (Little Havana Circulator).

13. The RFA requires that a bus route be established or approved by the "local government department" that manages

public transportation, in this case the Authority. Florida Housing defers to the local government in determining whether a selected bus route is a qualifying bus route within the meaning of the RFA.

14. The head of the local government department that manages public transportation is Gerald Bryan, the chief of service planning and scheduling. By deposition, Mr. Bryan testified that the location selected by Rio has only two qualifying routes: 11 and 208. Route 6, the third route relied upon by Rio, does not run hourly during the requisite rush hour times as required by the RFA and therefore is not a qualifying route. With only two qualifying routes, the transit service selected by Rio is a Public Bus Stop for which only two points, rather than six, can be awarded. Had this information been available to Florida Housing when it reviewed Rio's application, Rio's proximity score would have been less than 12.25, making it ineligible to receive a point boost and achieve the maximum total score of 18 proximity points.

15. Because Rio is ineligible for funding, the next applicant in line is Pinnacle, as it has the next lowest lottery number among the eligible applications that received 23 points.

16. Rio does not dispute that Route 6 fails to make the requisite stops during rush hours to be considered a qualifying route. However, it contends that Route 11 functionally serves

as two distinct routes because it has two separate destinations: the Mall of the Americas and Florida International University Park Campus. But whether Route 11 is a single route or two routes is a determination that must be made by the local government, and not the applicant. Mr. Bryan testified that the Authority established Route 11 as a single route with two separate termination points. He further explained that it is a standard practice for a single route, such as Route 11, to have more than one terminus in order to provide a higher level of customer service. Because Florida Housing does not second guess the determination of the local government, the undersigned has rejected Rio's assertion that the bus stop is a Public Bus Transfer Stop. Without the inclusion of the six proximity points for this type of transit service, Rio's application is not eligible for funding in this cycle.

CONCLUSIONS OF LAW

17. Pinnacle's protest to Florida Housing's proposed contract award is governed by section 120.57(3)(f), as follows:

In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was

clearly erroneous, contrary to competition, arbitrary, or capricious.

18. Pinnacle has the burden of proof to establish that Florida Housing's proposed action is: (1) contrary to its governing statutes, (2) contrary to its rules or policies, or (3) contrary to the RFA specifications. Pinnacle's formal protest alleges that the scoring of Rio's application is contrary to the RFA specifications.

19. To prevail, Pinnacle must prove, by a preponderance of the evidence, that Florida Housing's proposed action is: (1) clearly erroneous; (2) contrary to competition; or (3) arbitrary or capricious, that is, an abuse of discretion. See, e.g., 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). The formal protest asserts that the proposed action is clearly erroneous and contrary to competition.

20. 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." U.S. v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948).

21. An act is contrary to competition if it (1) creates the appearance of 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 (SFWMMD Mar. 6, 2002).

22. For the reasons previously found, the proximity scoring for Rio upon which the preliminary allocation was based is clearly erroneous and contrary to the RFA specifications. The deviation from specifications is not a minor irregularity. To allow the initial scoring for Rio to stand would not only be contrary to the RFA, it would be contrary to competition and give Rio a competitive advantage. The agency itself agrees that the preliminary scoring of Rio's application was incorrect. Pinnacle has satisfied its burden of proof.

23. With the correction of scoring, Rio is ineligible for funding, and Pinnacle should be moved into the funding range.

RECOMMENDATION

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

RECOMMENDED that the Florida Housing Finance Corporation enter a final order finding that Rio's application is ineligible for funding and that Pinnacle's application should be selected for funding under RFA 2014-116.

DONE AND ENTERED this 31st day of August, 2015, in
Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2015.

COPIES FURNISHED:

Kate Fleming, Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1367
(eServed)

Michael P. Donaldson, Esquire
Carlton Fields Jordan Burt, P.A.
Post Office Box 190
Tallahassee, Florida 32302-0190
(eServed)

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1367
(eServed)

Betty C. Zachem, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1367
(eServed)

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301-1591
(eServed)

Gary J. Cohen, Esquire
Shutts and Bowen, LLP
1500 Miami Center
201 South Biscayne Boulevard
Miami, Florida 33131-4329
(eServed)

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days of the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will render a final order in this matter.