

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN RESIDENTIAL DEVELOPMENT
LLC; PATRICK LAW; MADISON
HIGHLANDS, LLC; JONATHAN L.
WOLF; BERKSHIRE SQUARE, LTD;
HAWTHORNE PARK, LTD; AND
SOUTHWICK COMMONS, LTD,

Petitioners,

vs.

Case Nos. 16-6698BID
16-6699BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HERITAGE OAKS, LLLP; AND
HTG ANDERSON TERRACE, LLC,

Intervenors.

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RECOMMENDED ORDER

This matter came before D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), after the parties waived a final hearing and submitted a stipulated record. The parties are represented as follows.

APPEARANCES

For Petitioners: Craig D. Varn, Esquire
Manson Bolves Donaldson Varn, P.A.
Suite 201
204 South Monroe Street
Tallahassee, Florida 32301-1591

For Respondent: Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

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

For Intervenor: Maureen McCarthy Daughton, Esquire
(HTG) Maureen McCarthy Daughton, LLC
Suite 304
1725 Capital Circle Northeast
Tallahassee, Florida 32308-0595

STATEMENT OF THE ISSUE

The issue is whether certain specifications in Request for Applications 2016-113 (RFA-113) issued by Respondent, Florida Housing Finance Corporation (Florida Housing), are contrary to Florida Housing's governing statutes, rules, or policies in violation of section 120.57(3)(f), Florida Statutes (2016).^{1/}

PRELIMINARY STATEMENT

After Florida Housing published its notice soliciting applications pursuant to RFA-113, on November 15, 2016, American Residential Development, LLC (ARD), Madison Highlands, LLC (Madison), and Patrick Law (Law) filed with Florida Housing a Petition for Administrative Determination of Invalidity of RFA-2016-113 (Petition). On the same date, Jonathan L. Wolf (Wolf), Berkshire Square, Ltd (Berkshire), Hawthorne Park, Ltd (Hawthorne), and Southwick Commons, Ltd (Southwick), filed with Florida Housing a second Petition challenging the same

specifications. The Petitions were referred by Florida Housing to DOAH with a request that a formal hearing be conducted. They were docketed as Case Nos. 16-6698 and 16-6699, assigned to Administrative Law Judge Peterson, consolidated, and then transferred to the undersigned. Intervenors Heritage Oaks, LLLP (Heritage), and HTG Anderson Terrace, LLC (HTG), who intend to file applications in response to the RFA-113 solicitation, were authorized to intervene in support of Florida Housing.

Because rule challenges related to RFA-113 were also filed by the same Petitioners, a separate final order was entered in Case Nos. 16-6610RU and 16-6611RU. See § 120.57(1)(e), Fla. Stat., which now authorizes a person challenging agency action to file a collateral rule challenge under section 120.56 regarding the agency's use of an invalid or unadopted rule in a section 120.57 proceeding.

All parties agreed to waive a final hearing and submit a stipulated record. The record consists of Joint Exhibits 1 through 3: RFA-113, as modified; 26 U.S.C.S. § 42 of the Internal Revenue Code (IRC); and Florida Housing's 2016 Qualified Allocation Plan (QAP). Also, Florida Housing offered Exhibit 1, which is the deposition of former Executive Director Steve Auger. Although Petitioners do not stipulate to any parts of the deposition, all exhibits are accepted in evidence.

Finally, the parties submitted a Joint Stipulation of certain facts.

Proposed recommended orders (PROs) were filed by Petitioners and Florida Housing, and they have been considered in the preparation of this Recommended Order. Intervenors have joined in Florida Housing's PRO.

FINDINGS OF FACT

A. The Parties

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 an RFA. This proceeding concerns RFA-113.

2. Petitioners ARD and Madison are developers of affordable housing units and submit applications for tax credits. Law and Wolf are principals of a developer of affordable housing units. Berkshire, Hawthorne, and Southwick are limited partnerships that have submitted applications for tax credits. All Petitioners intend to submit applications in response to RFA-113.

3. Intervenors Heritage and HTG are developers of affordable housing who intend to file applications pursuant to RFA-113.

B. Background

4. On October 28, 2016, Florida Housing published on its website proposed solicitation RFA-113, a 121-page document inviting applications for the award of up to \$14,669,052.00 in housing tax credits for the development of affordable, multifamily housing located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. After Petitioners gave notice of their intent to challenge RFA-113, Florida Housing attempted to resolve the dispute by modifying the solicitation on November 13, 2016. The modification did not resolve the dispute.

5. On November 15, 2016, Petitioners timely filed with Florida Housing two Petitions, each challenging the same specifications in RFA-113, as modified.

C. The RFA Process

6. The federal Low-Income Housing Credit Program is governed by 26 U.S.C.S. § 42 (section 42). The program allocates federal income tax credits to states annually on a per capita basis to help facilitate private development of affordable low-income housing.

7. As the housing credit agency for the State of Florida, Florida Housing has the authority to administer various federal and state affordable housing programs, including the Low-Income Housing Credit Program. See § 420.5099(1), Fla. Stat.

8. Because the demand for housing credits exceeds the amount available, Florida Housing administers the program through a competitive process using RFAs. Based upon factors in the RFAs, the applications are scored and competitively ranked by an evaluation committee to determine which applications will be allocated tax credits.

9. Selection and preference criteria for the low-income housing tax credit programs are found in the 2016 QAP adopted by Florida Administrative Code Rule 67-48.002(95). These criteria are intended to provide general, but not specific, guidance for the entire housing credit program, and not just RFA-113. More specific guidance is found in the individual RFAs, tailored to each type of solicitation.

10. Florida Housing issues around 15 to 20 RFAs annually. The specifications being challenged in this case are found in RFA-113. The Petitions raise two broad areas of concern, which are labeled in Petitioners' PRO as "Exclusion of Eligible Developments from Funding" and "Illegal Delegation to Local Governments."

D. Exclusion of Eligible Developments

11. A new eligibility provision in RFA-113 is the Racially and Ethnically Concentrated Areas of Poverty (RECAP). RECAP areas make up less than 3.5 percent of all census tracts in the State and are defined in the RFA as an area where "at least 40 percent of the population is living below the poverty line and in which a concentration of individuals who identify as other than non-Hispanic White exceeds 50 percent of the population of the census tract." Jt. Ex. 1, p. 2. Florida Housing has placed a link on its website identifying each RECAP area in the State. Petitioners do not contend they were unaware of RECAP areas before RFA-113 was issued.

12. The RECAP concept was developed after a series of workshops, public dialogue, and discussions with stakeholders. The purpose of the concept is to allow Florida Housing to "appropriately balance" the location of affordable housing projects. Without the RECAP limitation, described below, Florida Housing is concerned that developers would choose to build low-income housing only in the poorest areas of a county or areas with the highest concentration of minorities. The RECAP limitation ensures that affordable housing will be available throughout the county. Whether this concept will be a permanent fixture in future RFAs depends on whether RECAP achieves its intended purpose.

13. RFA-113 provides that five categories of development are eligible for receiving tax credits: new construction, rehabilitation, acquisition and rehabilitation, redevelopment, and acquisition and redevelopment. See § 4A.5.c.(2).

14. Section 4A.5.c.(1) provides the following limitation on eligibility for tax credit funding for three categories of development located within a RECAP area:

With one exception, proposed Developments that select a Development Category of New Construction, Rehabilitation, or Acquisition and Rehabilitation at question 5.c.(2) of Exhibit A are not eligible to receive funding under this RFA if any part of the proposed Development is located in a RECAP designated area. The one exception to the above prohibition is for a proposed Development where the Applicant selects and qualifies for Local Government Areas of Opportunity Funding points as outlined in Section Four A.10.(b) of the RFA. Proposed Developments that are located in a RECAP designated area where the Applicant selects and qualifies for the Development Category of Redevelopment or Acquisition and Redevelopment at question 5.c.(2) of Exhibit A are eligible for funding under this RFA.

15. Therefore, new construction, rehabilitation, and acquisition and rehabilitation categories are not eligible to receive funding if any part of the proposed development is located in a RECAP area. If, however, such a development is in a RECAP area and qualifies for Local Government Areas of Opportunity Funding points, the project is eligible for funding.

16. A Local Government Area of Opportunity is defined in Section Two of the RFA as follows:

Developments receiving a high level of Local Government interest in the project as demonstrated by an irrevocable funding contribution that equals or exceeds 2.5 times the Total Development Cost Per Unit Base Limitation (exclusive of any add-ons or multipliers), as provided in Item 7 of Exhibit C to the RFA, for the Development Type committed to for the proposed Development.

17. In plainer terms, in order for an applicant to receive points for a local government contribution, it must demonstrate that the county has contributed a cash loan or grant for the proposed development. See § 4A.10.b. Having done so, the applicant is then eligible for funding even if all or part of the proposed development lies within a RECAP area.

18. Petitioners contend the specifications which limit funding for certain types of projects violate section 42 and are illegal. But they cite no provision in section 42 which requires Florida Housing to conform to every requirement in the IRC in order to allocate housing credits. And nothing in the IRC prevents local housing agencies from setting eligibility requirements for funding, or requires that all projects located in low-income areas are automatically eligible for funding.

19. Petitioners also assert the limitations in the RFA run afoul of chapter 420. However, Florida Housing has the

authority to adopt allocation procedures that take into account a number of considerations during the competitive solicitation process. They include "the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the application to proceed to completion of the project in the calendar year for which the credit is sought." § 420.5099(2), Fla. Stat. The challenged specifications address these considerations.

20. In conjunction with their RECAP argument, Petitioners contend the limitations prevent the same three categories of development from receiving a 30 percent "boost" in their cost basis, which allows them to receive a larger allocation of tax credits and makes the project more financially feasible. They argue this violates section 42. For the reasons cited above, this contention is rejected. Notably, an application without a boost could be selected for funding, while an application receiving one is not automatically selected for funding.

E. Illegal Delegation to Local Governments

21. Petitioners generally contend Florida Housing has unlawfully delegated authority to local governments to select eligible applications. More specifically, they assert Florida Housing has failed to establish any standards to be used by

local governments when providing cash or loans; the local government essentially picks the winner, as RFA section 2 limits funding eligibility to only one locally-funded developer for each jurisdiction; and section 4A.6.a.(2) allows a locally-funded developer to receive preferential treatment in the award process by waiving two eligibility requirements.

22. For many years, Florida Housing has considered local government input in the selection process by giving applicants points for local government contributions and requiring forms signed by the local government officials certifying compliance with zoning, site plan, and infrastructure requirements. Thus, reliance on local government input is not a new concept in the solicitation process.

23. Florida Housing relies on local governments to evaluate such things as the location of the proposed housing project, the relative need in the area for low-income housing, the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project. This is because without local input, it would be difficult, if not impossible, for Florida Housing to evaluate these factors for every applicant for every RFA. Florida Housing also takes into account a local government's revitalization plan in making its funding selection, a requirement in the QAP. See Jt. Ex. 3, p. 1, § I.B.

(in allocating credits, the agency must consider the "project's characteristics including housing as part of a community revitalization plan").

24. Other than establishing the minimum amount and type of funding by a local government, Florida Housing does not direct local governments how to evaluate or select projects to receive local approvals or funding. Attempting to provide specific criteria for local governments would be impractical, as there are hundreds of local jurisdictions in the State, and Florida Housing believes that local governments, and not someone in Tallahassee, can best evaluate local concerns for revitalizing those communities. Notably, local governments do not have a final say over which projects get funded and which do not, and local funding does not guarantee an applicant will be awarded tax credits.

CONCLUSIONS OF LAW

25. This case involves a protest to specifications in RFA-113. Section 120.57(3)(f) provides:

Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. 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 shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

26. Petitioners must demonstrate the factual basis for their challenge by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1), Fla. Stat.

27. Petitioners are substantially affected by the challenged specifications and have standing to bring this action. Intervenors also have standing to participate.

28. Petitioners are challenging the specifications in the RFA as opposed to challenging an award of tax credits. Therefore, "a challenge to the [RFA] must be directed to specifications that are so vague that applicants cannot formulate an accurate [application], or are so unreasonable that they are either impossible to comply with or too expensive to do so and remain competitive." Advocacy Ctr. for Pers. with Disab., Inc. v. Dep't of Child. & Fam. Servs., 721 So. 2d 753, 755 (Fla. 1st DCA 1998). See also Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006) (to prevail in a challenge to specifications, a challenger must show the agency's decision to include the specifications in the solicitation was arbitrary or capricious).

29. Petitioners do not claim the challenged specifications are so vague that they cannot formulate an accurate application. Rather, they contend the specifications are unreasonable and arbitrary and capricious. On these issues, the record shows the RECAP specifications were adopted after a thoughtful and deliberative process which included workshops, public dialogue, and discussions with stakeholders, including presumably Petitioners. Their purpose is to ensure low-income affordable housing is available throughout the local jurisdiction, and not just in limited areas. Similarly, reliance on local government input was shown to be necessary, as the local governments provide essential insight and information on how tax credits can best be used to revitalize their communities. The specifications are neither unreasonable nor arbitrary or capricious.

30. Throughout their PRO, Petitioners argue that Florida Housing has violated section 42 by excluding certain developments from funding and illegally delegating authority to local governments. But federal law does not govern this proceeding, and there is no evidence that the Department of Housing and Urban Development or the Internal Revenue Service has mandated that Florida Housing comply with section 42, word for word, as a condition precedent to serving as the state's housing credit agency. Absent a statutory requirement that

Florida Housing seek pre-approval from the federal government or adopt procedures that are identical to federal procedures, allegations concerning a deviation from federal standards cannot be adjudicated in this forum. See, e.g., Bridges of Am., Inc. v. Dep't of Corr., Case No. 16-5237BID (Fla. DOAH Nov. 23, 2016; Fla. DOC Dec. 15, 2016).

31. Finally, nothing in chapter 420 prevents Florida Housing from setting eligibility requirements for funding, excluding certain categories of projects from eligibility, or receiving local government input in the manner that it does.

32. In summary, Petitioners have failed to prove the specifications are contrary to Florida Housing's governing statutes, rules, or policies or that they are unreasonable, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

RECOMMENDATION

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

RECOMMENDED that Florida Housing Finance Corporation enter a final order dismissing the Petitions.

DONE AND ENTERED this 25th day of January, 2017, in
Tallahassee, Leon County, Florida.

D. R. Alexander

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 25th day of January, 2017.

ENDNOTE

^{1/} As a basis for relief, the Petitions allege RFA-113 exceeds the agency's grant of legislative authority; enlarges, modifies, or contravenes the specific provisions of law implemented; and contains "non-rule policies that are arbitrary and capricious." Petitions, pp. 17 and 18. None implicate section 120.57(3)(f). In the parties' Joint Stipulation, however, the issue is broadly redefined as "[w]hether the terms, conditions and specifications of RFA 2016-113 are invalid pursuant to Section 120.57(3), F.S." Jt. Stip., ¶ H.4.

COPIES FURNISHED:

Kate Flemming, Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

Craig D. Varn, Esquire
Manson Bolves Donaldson Varn, P.A.
204 South Monroe Street, Suite 201
Tallahassee, Florida 32301-1591
(eServed)

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

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

Douglas P. Manson, Esquire
Manson Bolves Donaldson Varn, P.A.
1101 Swann Avenue
Tampa, Florida 33606-2637
(eServed)

Maureen M. Daughton, Esquire
Maureen McCarthy Daughton, LLC
1725 Capital Circle Northeast, Suite 304
Tallahassee, Florida 32308-0595
(eServed)

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

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.