STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

RENAISSANCE POINTE APARTMENTS, LLC,

Petitioner,

FHFC Case No.: 2018-055BP
DOAH Case No.: 18-3806BID

v.

FLORIDA HOUSING FINANCE CORPORATION AND MIDTOWN LOFTS, LTD.,

Respondents,

and

HTG RAINBOW, LLC,

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 14, 2018. Petitioner Renaissance Pointe Apartments, LLC ("Renaissance"), Respondent Midtown Lofts, Ltd., ("Midtown"), and Intervenor HTG Rainbow, LLC ("HTG") were applicants under Request for Applications 2018-102, Housing Credit Financing to Provide Affordable Multifamily Rental Housing that is a Part of Local Revitalization Initiatives (the "RFA"). The matter for consideration before this

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
DATE: 9/17/18

Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On January 23, 2018, Florida Housing Finance Corporation ("Florida Housing") issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. Midtown was preliminarily selected for funding as the highest ranked application with 100 points. Renaissance, the next highest ranked application with 99 points, was not selected for funding because the requested allocation amount exceeded the allocation amount remaining after funding Midtown's application. HTG was selected for funding as the next highest ranked application with a funding request amount that could be fully funding by the remaining allocation. Renaissance timely filed its notices of intent to protest followed by a formal written protest. Because its funding request amount was higher than Midtown's, if Renaissance were successful in its challenge to Midtown's application it would have been selected for funding, and neither Midtown nor HTG would have been selected for funding.

The protests were referred to the Division of Administrative Hearings ("DOAH"). A formal hearing took place on August 17, 2018, in Tallahassee, Florida, before Administrative Law Judge Robert E. Meale (the "ALJ"). Midtown and HTG timely intervened and Midtown was granted party status as a respondent.

At hearing, Renaissance argued that Midtown's application should be ineligible for funding because Midtown incorrectly responded to a question regarding the occupancy status of units on its development site. Florida Housing, Midtown, and HTG argued that the error in Midtown's response to the occupancy status question was a waivable minor irregularity because it did not affect competition and it did not adversely impact Florida Housing or the public. In an effort to get this matter to the September Board meeting, all parties, including the ALJ, agreed to expedited time frames. After the hearing, all parties timely filed Proposed Recommended Orders.

After consideration of the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the ALJ issued a Recommended Order on September 6, 2018. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ determined that Renaissance failed to prove that Florida Housing's decision to waive, as a minor irregularity, Midtown's incorrect response to the occupancy status question was clearly erroneous or contrary to Florida Housing's governing statutes, rules, policies or the terms of the RFA. The ALJ recommended that Florida Housing enter a Final Order dismissing the protest of Renaissance.

Florida Housing filed two Exceptions to the Recommended Order. No other party filed Exceptions, and no other party filed a response to Florida Housing's Exceptions.

RULINGS ON EXCEPTIONS

1. Florida Housing takes exception to Finding of Fact #13, arguing that the second, third, and fourth sentences are not based on competent substantial evidence, and are not relevant to the ultimate recommendation in the Recommended Order. A review of the record indicates that Florida Housing's argument is correct, and this exception is therefore accepted. Finding of Fact #13 is thus amended as follows:

> 13. In certain affordable housing solicitations, the disclosure of occupied dwelling units may respond to the requirement imposed by a federal or state agency, including FHFC, that the developer, at its expense, relocate certain occupants; however, the present solicitation includes no such requirement. ~~Even in a solicitation free of such a requirement, the disclosure of occupied dwelling units is relevant because the solicitation document may contemplate that the property will be clear of occupants during construction. Here, the above-quoted RFA provisions addressing occupied dwelling units clearly contemplate that the property will be clear of occupants during construction. Additionally, regardless of the provisions of the solicitation document, the disclosure of occupied dwelling units is relevant, for many projects, because holdover occupants would delay the start of construction on safety grounds.~~ Although the justification for asking about unoccupied dwelling units is unclear, the justification for asking about occupied dwelling units is ample.

2. Florida Housing takes exception to Finding of Fact #15, noting a typographical error and arguing that those portions of this finding regarding what

would happen should the Credit Underwriter discover or fail to discover occupied units on the Development site are not supported by competent substantial evidence. A review of the record indicates that Florida Housing's argument is correct and this exception is therefore accepted. Finding of Fact #15 is thus amended as follows:

> 15. It is unlikely that the seller on a $324,000 contract would have any difficulty in delivering sole and exclusion possession when, as is relevant here, the only impediment is two occupied dwelling units. But if the seller failed to deliver sole and exclusive ~~exclusion~~ possession of the property, the Credit Underwriter would likely have discovered the two occupied dwelling units. ~~and condition funding on the timely and appropriate relocation, at Midtown's expense, so that construction could commence timely. In the very unlikely event that the Credit Underwriter would have missed the two occupied dwelling units, as a practical matter, Midtown would have had to relocate the occupants prior to commencing construction. In sum, even ignoring the bargained-for undertaking in the agreement for purchase and sale to deliver sole and exclusive possession, there is no chance that Midtown's failure to disclose the two occupied 11 dwelling units would have allowed it to escape the relatively modest cost of relocating any occupants on the property, post-closing.~~

RULING ON THE RECOMMENDED ORDER

The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence, with the exception of those portions of Findings of Fact #13 and #15 noted above.

The Conclusions of Law of the Recommended Order are reasonable and supported by competent, substantial evidence.

The Recommendation of the Recommended Order is reasonable and supported by competent, substantial evidence.

Florida Housing's Exceptions to the Recommended Order are accepted.

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

The Findings of Fact of the Recommended Order, except for Findings of Fact #13 and #15, are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

Findings of Fact #13 and #15 are amended as noted above, and as such are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order.

The Conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

The Recommendation of the Recommended Order is adopted.

Florida Housing's scoring and ranking of RFA 2018-102 is **AFFIRMED** and the relief requested in the Petitions is **DENIED.**

DONE and ORDERED this 14th day of September, 2018.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

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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, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, 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

RENAISSANCE POINTE APARTMENTS, LLC,

Petitioner,

Case No. 18-3806BID

vs.

MIDTOWN LOFTS, LTD., AND FLORIDA HOUSING FINANCE CORPORATION,

Respondents,

and

HTG RAINBOW, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

On August 17, 2018, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing in Tallahassee, Florida.

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STATEMENT OF THE ISSUE

The issue is whether the decision of Respondent Florida Housing Finance Corporation (FHFC) to waive, as a minor irregularity, the failure of Respondent Midtown Lofts, LTD. (Midtown) to disclose in its application for federal low-income housing tax credits (LIHTC) the existence of two occupied dwelling units on the property proposed for development is clearly erroneous, contrary to competition, arbitrary, or capricious (Clearly Erroneous), as provided by section 120.57(3)(f), Florida Statutes.

PRELIMINARY STATEMENT

On January 23, 2018, FHFC issued a Request for Applications 2018-102 Housing Credit Financing to Provide Affordable Multifamily Rental Housing that is a Part of Local Revitalization Initiatives (RFA). The RFA imposed a deadline of March 8, 2018, for filing applications. Renaissance Pointe Apartments, LLC

(Petitioner), Midtown, and HTG Rainbow, LLC (Intervenor) timely filed applications.

On June 15, 2018, FHFC posted its notice of intent to award the LIHTCs to Midtown and Intervenor. Petitioner timely filed a notice of intent to protest on June 20 and a formal written protest on July 2.

FHFC transmitted the file to DOAH on July 18, 2018. On August 15, 2018, the parties filed a Joint Prehearing Stipulation.

At the hearing, the parties offered eight joint exhibits: Joint Exhibits 1 through 8. Petitioner called two witnesses and offered nine exhibits: Petitioner Exhibits 1 through 9. Midtown offered seven exhibits: Midtown Exhibits 1 through 7. FHFC called one witness. All exhibits were admitted, but Petitioner Exhibit 9 and Midtown Exhibit 7 were not admitted for the truth of their contents.

The court reporter filed the transcript on August 23, 2018. Pursuant to an expedited schedule agreed upon by the parties, they filed proposed recommended orders on August 27, 2018, and the administrative law judge agreed to issue the recommended order by September 7, 2018.

FINDINGS OF FACT

1. The purpose of FHFC is to administer programs to promote affordable housing, including a program to allocate LIHTCs,

pursuant to section 420.507(48). To make these allocations equitably, FHFC implements a competitive application process featuring a request for applications.

2. Stating that FHFC expects to offer approximately $2,465,000 in LIHTCs to the successful applicant or applicants, the RFA sets forth the requirements for applications for LIHTCs. The purpose of the LIHTCs is to support new construction, redevelopment, or rehabilitation of family or elderly properties in areas where local governments are implementing planned initiatives to partner with private or other public entities to rejuvenate an area.

3. The RFA identifies six scoring items. With a total of 118 points, the items are: the submission of a Principal Disclosure Form preapproved by FHFC (5 points), the experience of the developer or management company with local revitalization initiatives (15 points), the commitment to reserve a portion of the units as market rate (5 points), the alignment of the proposed development with local revitalization initiatives (45 points), access to community-based services and resources (28 points), and application and screening procedures for processing lease applications from households with a special-needs person (20 points). RFA, pp. 57-58.

4. The RFA states: "Only Applications that meet all of the following Eligibility Items will be eligible for funding and

considered for funding selection." RFA, p. 55. The RFA lists 40 Eligibility Items, including the Submission Requirements, which include a requirement to submit an application by the stated deadline (RFA, p. 56); the disclosure of the "[o]ccupancy status" of any existing units; a statement of evidence of site control; and a total score of at least 70 points. RFA, p. 55.

5. Evidence of site control is evidenced by the applicant's "providing . . . the documentation required in items (1), (2) and/or (3), as indicated below. . . .

> (1) Eligible Contract--. . . an eligible contract is one that has a term that does not expire before September 30, 2018 . . .; 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. . . .
>
> (2) Deed or certificate of title . . ..
>
> (3) Lease . . ..

RFA, pp. 25-26.

6. Other provisions of the RFA include a statement that FHFC reserves the right to waive "Minor Irregularities" and a provision allowing a protest the specifications of the RFA. RFA, p. 5.

7. Addressing the issue of this case, the RFA states:

> The Applicant must indicate whether there are any existing units on the Development

> site as of the Application Deadline, and if so, the occupancy status of such units. If the Applicant indicates that there are existing occupied units and if the Development is funded, the Applicant will be required to provide to the Credit Underwriter a plan for relocation of existing tenants . . ..

RFA, p. 19. Pursuant to this requirement, the application form attached to the RFA directs each applicant to indicate one of the following:

> The Applicant must indicate which of the following applies to the Development site as of Application Deadline:
>
> (1) Existing units are current occupied.
>
> (2) Existing units are not currently occupied.
>
> (3) There are no existing units.

RFA, p. 65. The RFA details additional requirements of any relocation plan. RFA, p. 94.

8. The reference to the Credit Underwriter refers to a unique feature of solicitations conducted by FHFC, including solicitations involving the LIHTC allocation program: credit underwriting. The application process that culminates in FHFC's selection of an applicant to receive an award of LIHTCs does not result in the allocation of LIHTCs to the winning applicant. As the RFA explains, "[n]othwithstanding an award by [FHFC] pursuant to this RFA, funding will be subject to a positive recommendation from the Credit Underwriter based on criteria outlined in the

credit underwriting provisions in Rule Chapter 67-48, F.A.C." RFA, p. 59. In reality, the award is no more than an "invitation to enter credit underwriting." RFA, p. 60.

9. Florida Administrative Code Rule 67-48.0072 explains credit underwriting as follows:

> Credit underwriting is a de novo review of all information supplied, received or discovered during or after any competitive solicitation scoring and funding preference process, prior to the closing on funding, including the issuance of IRS Forms 8609 for [LIHTCs]. The success of an Applicant in being selected for funding is not an indication that the Applicant will receive a positive recommendation from the Credit Underwriter or that the Development team's experience, past performance or financial capacity is satisfactory. The credit underwriting review shall include a comprehensive analysis of the Applicant, the real estate, the economics of the Development, the ability of the Applicant and the Development team to proceed, [and] the evidence of need for affordable housing in order to determine that the Development meets the program requirements and determine a recommended . . . Housing Credit allocation amount[.]

10. An applicant that has earned an award may decline its invitation to enter credit underwriting. Rule 67-48.0072(3). The Credit Underwriter is required to report any "inconsistencies, . . . discrepancies, or changes" to the applicant's application during credit underwriting. Rule 67-48.0072(7). In credit underwriting, the applicant and development must meet numerous conditions, including satisfactory

performance in producing affordable housing and acceptable debt service ratios on first and second mortgages. Rule 67-48.0072(6) and (11). In sum, the Credit Underwriter subjects the winning applicant and the proposed development to a rigorous examination prior to making a recommendation on funding.

11. Sixteen applicants, including Petitioner, Midtown, and Intervenor, timely submitted applications in response to the RFA. FHFC deemed only one applicant ineligible for earning only 56 points, if not also for other reasons. Midtown earned the highest score, so FHFC allocated its applied-for amount of LIHTCs, $1,510,000. Petitioner earned the second highest score, but it had applied for $1,632,887 in LIHTCs. Because this amount would have exceeded the total allocation of LIHTCs available in the RFA, FHFC chose Intervenor, which had submitted the eligible application with the next highest score that sought an allocation that, when combined with Midtown's allocation, would not exceed the total of $2,465,000 in LIHTCs. If FHFC had selected Petitioner instead of Midtown, Intervenor would not have been awarded an allocation because there would not have been sufficient LIHTCs to allocate the LIHTCs for which Intervenor has applied.

12. After FHFC announced that Midtown had won the right to enter credit underwriting, Petitioner's principal discovered that Midtown had failed to disclose in its application the existence

on the property of two occupied dwelling units, as of the application deadline. When the Prehearing Stipulation was filed, only one dwelling unit remained occupied.

13. In certain affordable housing solicitations, the disclosure of occupied dwelling units may respond to the requirement imposed by a federal or state agency, including FHFC, that the developer, at its expense, relocate certain occupants; however, the present solicitation includes no such requirement. Even in a solicitation free of such a requirement, the disclosure of occupied dwelling units is relevant because the solicitation document may contemplate that the property will be clear of occupants during construction. Here, the above-quoted RFA provisions addressing occupied dwelling units clearly contemplate that the property will be clear of occupants during construction. Additionally, regardless of the provisions of the solicitation document, the disclosure of occupied dwelling units is relevant, for many projects, because holdover occupants would delay the start of construction on safety grounds. Although the justification for asking about unoccupied dwelling units is unclear, the justification for asking about occupied dwelling units is ample.

14. Midtown's documented evidence of control of the site is an agreement of purchase and sale, which the buyer has assigned to Midtown. The agreement provides that, at closing, the buyer

agrees to pay $324,000, and the seller agrees, among other things, to deliver to the buyer "[s]ole and exclusive possession" of the property. By this agreement, to which a portion of the purchase price may be attributed, the seller has assumed the responsibility for ensuring that no tenant would occupy any dwelling unit on the property as of the closing date. Additionally, in the agreement, the seller warrants that it has not entered into any contracts, leases, or other agreements that will not have been terminated or expired prior to closing.

15. It is unlikely that the seller on a $324,000 contract would have any difficulty in delivering sole and exclusion possession when, as is relevant here, the only impediment is two occupied dwelling units. But if the seller failed to deliver sole and exclusive possession of the property, the Credit Underwriter would likely have discovered the two occupied dwelling units and condition funding on the timely and appropriate relocation, at Midtown's expense, so that construction could commence timely. In the very unlikely event that the Credit Underwriter would have missed the two occupied dwelling units, as a practical matter, Midtown would have had to relocate the occupants prior to commencing construction. In sum, even ignoring the bargained-for undertaking in the agreement for purchase and sale to deliver sole and exclusive possession, there is no chance that Midtown's failure to disclose the two occupied

dwelling units would have allowed it to escape the relatively modest cost of relocating any occupants on the property, post-closing.

CONCLUSIONS OF LAW

16. DOAH has jurisdiction. §§ 120.569, 120.57(1) and (3), and 420.507(48); rule 67-60.009(4). Section 420.507(48) authorizes FHFC to allocate LIHTCs by a request for proposal or other competitive solicitation, and rule 67-60.009(1), (2), and (4) applies section 120.57(3) to the subject proceeding and treats a protest of a competitive solicitation involving LIHTCs as a protest of a request for proposals.

17. As the applicant with the second-highest score, Petitioner is an adversely affected person. § 120.57(3)(b); rule 67-60.009(2); Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524, 525 (Fla. 3d DCA 1981). Midtown and Intervenor are properly parties. Rule 67-60.009(3).

18. Petitioner bears the burden of proof. § 120.57(3)(f). The standard of proof is "whether the proposed agency action was [Clearly Erroneous]." Id. The purpose of the proceeding, which is de novo, is 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." Id.

19. A material variance is a discrepancy, relative to the bid document, that confers an advantage upon the bidder over

other bidders, such as when a discrepancy allows a bidder a choice, post-award, whether to conform its bid to the specifications or to abandon the bid. See, e.g., Tropabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986); Harry Pepper & Assocs. v. Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

20. Consistent with this case law, FHFC adopted rule 67-60.008, which, as in effect when the RFA was issued, stated:

> [FHFC] may waive Minor Irregularities in an otherwise valid Application. Mistakes clearly evident to [FHFC] on the face of the Application, such as computation and typographical errors, may be corrected by [FHFC]; however, [FHFC] shall have no duty or obligation to correct any such mistakes.

Likewise, former rule 67-60.002(6), also as in effect when the RFA was issued, defined a "minor irregularity" as "a variation . . . that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of [FHFC] or the public."

21. The nondisclosure of the two occupied dwelling units in Midtown's application is a minor irregularity. It conferred no competitive advantage upon Midtown for three reasons. First, the application question about occupied dwelling units is not a scoring item, so Midtown did not receive an inflated score due to this discrepancy. Second, Petitioner failed to prove that any

costs with the relocation of two occupied dwelling units were material in the context of this RFA.

22. Third, the discrepancy did not change the competitive positions of the applicants. An applicant that bid a property without occupied dwelling units would have no cost in relocating the occupants, and an applicant that bid a property with occupied dwelling units would incur a cost in relocating the occupants, who did not relocate at their own initiative--regardless of whether the applicant disclosed the existence of such units in its application. Obviously, the costs of relocating the occupants of 100 dwelling units would exceed the costs of relocating the occupants of two dwelling units, but each applicant selects its property, so the difference in relocation costs is relevant only to underscore the relatively lower costs associated with the appropriate relocation of the occupants of the property that is the subject of Midtown's application.

23. As noted above, the purchase price of the property included consideration for the seller's undertaking to deliver sole and exclusive possession and warranty of no outstanding leases or other agreements as of closing, so Midtown will absorb the relocation cost when it pays the purchase price at closing. In the unlikely event that the seller failed to perform this insubstantial obligation as to two occupied dwelling units on a property with a sale price of $324,000, Midtown has the option of

pursuing specific performance of these obligations by the seller or itself performing these relocation obligations. In the latter case, Midtown would bear the financial cost of relocation twice--in the purchase price and during credit underwriting or shortly before construction commenced.

24. It is true that Midtown could seize upon the existence of occupants as an excuse, post-award, not to perform the project that it has described in its application. Although this is mentioned in the above-described cases as a material factor in determining that a discrepancy is a material variance, this factor has little weight in the present case because of the right of the winning applicant to decline the invitation to enter credit underwriting: in other words, all winning applicants may abandon their projects, post-award.

25. A final issue is whether an agency may excuse a discrepancy when it applies to a mandatory item for bid responsiveness, which, in the RFA, is called an Eligibility Item. Perhaps the more interesting question is whether a discrepancy as to a provision in a bid solicitation that is neither a scoring or responsiveness item ever rises to the level of a material variance. Returning, though, to Petitioner's argument, in Hewitt Contracting Co. v. Melbourne Regional Airport Authority, 528 So. 2d 122 (Fla. 5th DCA 1988), an agency issued an invitation for bids that, unsurprisingly, included a deadline for submitting

bids. The spare opinion offers no description of the bid document, but typically a bid deadline receives the same rhetorical emphasis as responsiveness mandatories; in the RFA, as noted above, the application deadline is an Eligibility Item. In Hewitt, a bidder submitted a bid a few minutes after the deadline, but before the agency representative had opened the first bid. The court affirmed the trial court's ruling that the agency had the authority to waive such an irregularity.

26. The argument that an agency may not waive a mandatory item--when the discrepancy confers no competitive advantage on the bidder--elevates form over substance. The whole point of the body of law allowing agencies to waive minor irregularities is to ensure that, when the integrity of public procurement permits, substance prevails over form--even when the form is in boldface and large font.

27. Petitioner cited in its proposed recommended order three recommended orders--all sustaining the determination of FHFC that a discrepancy was a material variance--that warn of a "slippery slope," if the discrepancy were found to be a minor irregularity. A fourth recommended order, in which FHFC shifted its position as to a discrepancy, trumpets a "bright line" test. As always, a minor irregularity/material variance case presents the competing considerations of the predictability of enforcing the letter of the solicitation document against the flexibility of forgiving

immaterial departures from the solicitation document. But the proper analysis focuses on materiality in terms of competitive advantage and examines the agency's proposed characterization of the discrepancy in the context of this analysis. As distinct from the responsibilities of the agency in determining if a discrepancy is a minor irregularity or a material variance and, if a minor irregularity, whether to waive the discrepancy, the responsibilities of the administrative law judge would extend to commentary on the predictability/flexibility spectrum only in a very close case. At the factfinding level, it is mostly verbiage that, in finding a material variance, hails the bright line of predictability and decries the slippery slope of flexibility or, in finding a minor irregularity, acclaims the justice of flexibility and denounces the foolish extravagance of predictability.

28. For these reasons, Petitioner has failed to prove that the decision of FHFC to waive, as a minor irregularity, the failure of Midtown to disclose in its LIHTC application the existence of two occupied dwelling units on the property is Clearly Erroneous or that the ensuing decision of FHFC to invite Midtown and Intervenor to Credit Underwriting is contrary to the FHFC's governing statutes, rules, or policies or the RFA.

RECOMMENDATION

It is

RECOMMENDED that Florida Housing Finance Corporation enter a final order dismissing the formal written protest of Petitioner.

DONE AND ENTERED this 6th day of September, 2018, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.