STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ROSEDALE HOLDINGS, LLC,
H&H DEVELOPMENT, LLC AND
BROOKESTONE I, LP,

FHFC Case No. 2013-038BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

PARADISE POINT SENIOR HOUSING, LLC,

Intervenor,

ARBOURS AT TUMBLIN CREEK, LLC,

Intervenor,

ARBOURS AT CENTRAL PARKWAY, LLC,

Intervenor,
_____/

OCDC PALM VILLAGE, LP,
PRESTWICK DEVELOPMENT
COMPANY, LLC,
AND OKALOOSA COMMUNITY
DEVELOPMENT CORPORATION

FHFC Case No. 2013-042BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

KATIE MANOR, LTD.,

Intervenor.
_____/

FRENCHTOWN SQUARE, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

_____/

FHFC Case No. 2013-043BP

JPM WESTBROOK I LIMITED PARTNERSHIP,

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent;

and

KATIE MANOR, LTD.,

Intervenor.

_____/

FHFC Case No. 2013-044BP

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

FOREST RIDGE AT BEVERLY HILLS, LTD.,

Intervenor,

_____/

FHFC Case No. 2013-047BP

RECOMMENDED ORDER

Pursuant to notice, on March 5, 2014, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing Finance Corporation's appointed Hearing Officer, Christopher McGuire.

APPEARANCES

For Petitioners:

Summerset Apartments Limited Partnership:	J. Stephen Menton, Esq. Rutledge Ecenia, P.A. 119 South Monroe Street, Suite 202 Tallahassee, Florida 32301
Frenchtown Square, LLC, JPM Westbrook One Limited Partnership, and OCDC Palm Village:	Michael P. Donaldson, Esq. Carlton, Fields, P.A. 215 South Monroe Street, Suite 500 Tallahassee, Florida 32302
Rosedale Holdings, LLC, H&H Development, LLC and Brookestone I, LP:	Lawrence E. Sellers, Jr., Esq. Karen D. Walker, Esq. Holland & Knight, LLP 315 South Calhoun Street, Suite 600 Tallahassee, Florida 32301
For Respondent:	Wellington H. Meffert II General Counsel Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, Florida 32301-1329
For Intervenors: Arbours at Tumblin Creek, LLC and Arbours at Central Parkway	Gary J. Cohen, Esq. Shutts & Bowen, LLP 1500 Miami Center 201 South Biscayne Boulevard Miami, Florida 33131
Katie Manor, LLC	Craig D. Varn, Esq. Manson Bolves 201 East Park Avenue, Suite 200 Tallahassee, Florida 32301; and Michael G. Maida, Esq. Michael G. Maida, PA 1709 Hermitage Blvd., Ste. 201 Tallahassee Florida 32308
Paradise Point Senior Housing, LLC	Michael P. Donaldson

STATEMENT OF THE CASE

The issue common to all the consolidated cases is whether Respondent Florida Housing Finance Corporation's ("Florida Housing") decisions to award or deny funding under Request for Applications ("RFA") 2013-001, as proposed on December 13, 2013, are contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. More specifically, whether Florida Housing's scoring and ranking decisions as to the following were within the bounds described above as to: acceptance of equity commitment letters for Arbours at Tumblin Creek, LLC, Arbours at Central Parkway, LLC, and Paradise Point Senior Housing, LLC; acceptance of documents establishing site control for Arbours at Tumblin Creek and Summerset Apartments Limited Partnership; acceptance of verification of local contribution for Katie Manor, LTD.; rejection of Frenchtown Square, LLC, for failure to provide principals of a co-developer; rejection of OCDC Palm Village, LP, for capital contribution not paid in prior to construction completion; and Florida Housing's decision to award funding to Pinnacle at Hammock Crossings, LLC, even though the applicant had sent a letter requesting to withdraw the application.

PRELIMINARY STATEMENT

On or before October 17, 2013, Petitioners and Intervenors submitted applications to Florida Housing seeking allocations for federal Low Income Housing Tax Credits pursuant to RFA 2013-001, to fund affordable housing projects in medium and small population counties throughout Florida.

Each Petitioner timely filed challenges to proposed funding awards pursuant to Section 120.57(3), Florida Statutes and Rule 28-110.004, Florida Administrative Code. Each Intervenor entered the several cases in accordance with Rule 106.205(3), Florida Administrative Code. An informal hearing was conducted pursuant to Sections 120.569 and 120.57(2) and (3), Florida

Statutes, before Florida Housing Hearing Officer Christopher McGuire on March 5, 2014. There are no disputed issues of material fact.

Challenges contained in Rosedale Holdings, LLC's petition against Madison Crossing, Application No. 2013-010C, and by Summerset against Forest Ridge at Beverly Hills, Ltd., Application No. 2013038C, were withdrawn by the respective Petitioners at hearing.

At the informal hearing the Parties filed a Prehearing Stipulation. The Prehearing Stipulation is attached to this Recommended Order as Attachment A, and the facts recited therein are incorporated in this Recommended Order. Some of those facts are reiterated below. The parties also stipulated, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of Florida Housing and to any applicable rules promulgated by Florida Housing.

At the hearing Joint Exhibits J-1 through J-22 were admitted without objection, as was Paradise Point's Exhibit 1. In addition, Summerset, Frenchtown Square, and JPM Westbrook proffered several exhibits that were not admitted into evidence.

The final hearing was recorded, and the transcript was received on March 14, 2014. All parties timely submitted Proposed Recommended Orders on April 1, 2014. The parties' Proposed Recommended Orders have been given consideration in the preparation of this Recommended Order.

EXHIBITS

The parties offered the following joint exhibits into evidence:

Exhibit 1: Prehearing Stipulation.

Exhibit 2: RFA 2013-001 Medium-Small County Geographic RFA

Exhibit 3: RFA 2013-001 Medium-Small County Geographic RFA Recommendations

Exhibit 4: RFA 2013-001 Medium-Small RFA Applications Sorting Order

Exhibit 5: Email and letter requesting withdrawal of Hammock Crossings Application

Exhibit 6: Transcript of December 13, 2013, FHFC Board Meeting, (pp. 8-18)

Exhibit 7: Pages 1 and 2 of, and Attachments 3 and 4 to, Application 2013-083C (Frenchtown Square)

Exhibit 8: Attachment 13 to Application 2013-046C (Tumblin Creek)

Exhibit 9: Attachment 13 to Application 2013-089C (Central Parkway)

Exhibit 10: Attachment 3 and 8 to Application 2013-046C (Tumblin Creek)

Exhibit 11: Attachment 8 to Application 2013-008C (Summerset)

Exhibit 12: Attachment 9 to application 2013-009C (Katie Manor)

Exhibit 13: Attachment 13 to Application 2013-011C (Palm Village)

Exhibit 14: Attachment 12 to Application 2013-080C (Paradise Point)

Exhibit 15: Finance Scoring Template for RFA 2013-001

Exhibit 16: E-mail dated Friday, October 18, 2013 from Kevin Tatreau to Wayne Conner transmitting Finance Scoring Template.

Exhibit 17: Page 4 of RFA 2014-103

Exhibit 18: Deposition transcript of Ken Reecy

Exhibit 19: Deposition transcript of Amy Garmon

Exhibit 20: Deposition transcript of Jade Grubbs

Exhibit 21: Attachment 3 to Application 2013-089C (Central Parkway)

Exhibit 22: Composite Exhibit of Documents Regarding Application 2014-03C (Janie's Garden.)

Petitioner Paradise Point offered the following exhibit:

Paradise Point's Exhibit 1: Application 080C Pro Forma, pp. 11-15

Petitioner Summerset offered the following exhibit:

Summerset's Exhibit 1: Summerset Affidavit (Not admitted)

Petitioner Frenchtown Square offered the following exhibit:

Frenchtown Square Exhibit 1: Elizabeth Thorpe's Scoring Sheet RFA 2013-001 (Not Admitted)

Petitioner Westbrook offered the following two exhibits:

JPM Westbrook Exhibit 1: Composite of Attachment 9's from various 2013-001 Applications (Not Admitted)
JPM Westbrook Exhibit 2: City of Crestview Ordinance No. 1512 (Not Admitted)

FINDINGS OF FACT

1. Florida Housing is, under Section 420.5099, Florida Statutes and 26 USC 42, the low income housing tax credit allocating agency for the State of Florida and is granted the authority under Section. 420.507(48), Florida Statutes, to issue competitive solicitations for the purpose of providing affordable housing in Florida. Florida Housing's address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301.

2. On September 17, 2013, Florida Housing issued RFA 2013-001 to award an estimated amount of $11,166,425 of competitive Low Income Housing Tax Credits for proposed developments in medium counties and $1,308,328 of Tax Credits for proposed developments in small counties.

3. Through the issuance of the RFA Florida Housing sought to solicit proposals from qualified Applicants that would commit to construct and/or rehabilitate housing in accordance with the terms and conditions of the RFA, applicable laws, rules, and regulations.

4. Section Four of the RFA lists those items that had to be included in a response to the RFA as found in Exhibit A. Exhibit A requires certain information be provided concerning the Applicant and the Developer.

5. The RFA provides for the Applications to be evaluated and scored by a Review Committee. Each Application can receive a maximum of 27 points consisting of two different types of point items: (1) Proximity to Transit and Community Services, worth a maximum of 22 points; and (2) Local Government Contributions, worth a maximum of 5 points. These scores play a significant role in Florida Housing's funding decisions.

6. The RFA also provides for a lottery number to be randomly assigned to each Application as a tie-breaker between applications with the same score. Where, as here, all the parties' applications received a perfect score, lottery numbers will determine the funding order, subject to the Funding and County tests of the RFA.

7. The deadline for receipt of applications was 2:00 p.m. on October 17, 2013.

8. Florida Housing received 96 applications in response to the RFA. Each Petitioner and each Intervenor timely responded to the RFA, and each is an Applicant within the meaning of Rule 67-48.002(9), Florida Administrative Code.

9. Florida Housing's Executive Director designated five Florida Housing staff members to serve as the Review Committee for the RFA. This Committee met on November 5 and November 21, 2013 and considered the Applications submitted in response to the RFA. A list including scores and recommendations for funding was presented to the Board of Directors of Florida Housing.

10. On December 13, 2013, Florida Housing's Board approved the Review Committee's scoring ranking and funding recommendation and tentatively selected 11

applications for funding including Hammock Crossings, application #2014-092C, which had submitted a notice of withdrawal of its application prior to the meeting.

11. On December 13, 2013, Florida Housing posted on its website its Notice of Intended Decision, consisting of two documents: (1) a document entitled "RFA 2013-001 Medium-Small RFA Received Applications," the scores awarded to the applications, the preferences for which they qualify, and their lottery number, and (2) the RFA 2013-001 Medium-Small County Geographic RFA Recommendations.

12. None of the Petitioners were included on the list of projects tentatively selected for funding as a result of the Board's action on December 13, 2013.

13. Each of the Intervenors was included on the list of projects tentatively selected for funding as a result of the Board's action on December 13, 2013.

14. Each Petitioner timely filed a notice of intent to protest under Section 120.57(3)(b), Florida Statutes, and a formal protest of the award as required by Section 120.57(3)(b), Florida Statutes.

15. The substantial interests of each Petitioner and each Intervenor are subject to determination in this proceeding and each Petitioner and Intervenor has standing to participate in this proceeding.

Frenchtown Square

16. On October 17, 2013, Petitioner Frenchtown submitted its Application #2014-083C in response to the RFA that included information concerning a proposed 72-unit apartment complex in Leon County named Frenchtown Square. Through the Application, Frenchtown requested $1,510,000 in Tax Credit funding assistance for the project, which has an overall

development cost of $16,498,431. The proposed Frenchtown Development would provide one, two and three bedroom apartments for lease at reduced and affordable rents.

17. The Review Committee determined that the Frenchtown Application had a perfect score of 27 points, but that the Application was ineligible for funding due to a threshold failure, described as a failure to identify the Principals of the "Co-Developer" as required in Section Four, Attachment 4 to Exhibit A of the RFA. As disclosed in the notes of the Review Committee and as disclosed orally during the Review Committee meeting held November 21, 2013, the Frenchtown Application was specifically found ineligible for the following reason: "Did not provide principals required for co-developer RUDG, LLC."

18. On December 13, 2013, Florida Housing's Board of Directors adopted the Review Committee's scoring ranking and tentative funding recommendation and in so doing found Frenchtown's Application ineligible.

19. The RFA Application at Paragraph 3 requires the Applicant to state the name of each Developer, including all co-Developers, and to provide evidence in Attachment 4 to Exhibit A that each Developer and Co-Developer is a legally formed entity qualified to do business in Florida. The RFA also requires that the Applicant provide a list in Attachment 3 to Exhibit A identifying the Principals for the Applicant and each Developer and co-Developer. With respect to a Developer that is a limited liability company, the Developer is required to identify the managers and members of each of its managers and members. Finally, the Application requires that the Applicant provide a prior experience chart for "each experienced Developer entity."

20. In Section 3A of its Application, in response to the direction that the Applicant "state the name of each Developer (including all co-Developers)," Frenchtown listed three entities: Frenchtown Square Developer, LLC, Big Bend Community Development Corporation, and

RUDG, LLC. In Attachment 4 to Exhibit A of its Application, in response to the direction that the Applicant provide documentation that each Developer is a legally formed entity, Frenchtown included such documentation for Frenchtown Square Developer, LLC, Big Bend Community Development Corporation, and RUDG, LLC.

21. In Attachment 3 to Exhibit A in its Application, Frenchtown provided the principals of Developer Frenchtown Square Developer, LLC. This exhibit identified Big Bend Community Development Corporation and RUDG, LLC as principals, but did not list them as Developers, nor did it provide all of the principals of RUDG, LLC.

22. In Attachment 4 to Exhibit A in its Application, Frenchtown identified RUDG, LLC as the Principal with experience, and listed Frenchtown Square Developer, LLC as the Developer for which RUDG, LLC is a Principal. There is no requirement that the Applicant list all Developers and co-Developers on the prior experience chart.

23. Finally, on the cover page to its Application, Frenchtown lists Frenchtown Square Developer, LLC as the Developer. Apparently there is no requirement that the cover page list all Developers and co-Developers.

OCDC Palm Village

24. On October 17, 2013, Petitioner Palm Village submitted its Application #2014-011C in response to the RFA that included information concerning a proposed 38-unit apartment complex in Okaloosa County named Palm Village. Through the Application, Palm Village requested $420,421.00 in Tax Credit funding assistance for the project, which has an overall development cost of approximately $6,168,000.

25. The Review Committee determined the Palm Village Application had a perfect score of 27 points, but the Application but was ineligible for funding due to a funding shortfall identified by a Review Committee member responsible for scoring the financing.

26. As disclosed in the notes of the Review Committee and as disclosed orally during the Review Committee meeting held November 21, 2013, the Palm Village Application was specifically found ineligible for the following reason: "Financing shortfall."

27. On December 13, 2013, Florida Housing's Board of Directors adopted the Review Committee's scoring ranking and tentative funding recommendation and in so doing found Palm Village's Application ineligible.

28. The scoring notes indicate that the scoring issue involves the amount of equity to be paid prior to construction completion. Florida Housing decided that an amount listed in the Palm Village equity commitment letter could not be considered as funding thus resulting in a shortfall, as it would not be paid until after construction completion.

29. The RFA at Section Four A.9. requires applicants to provide Information concerning all funding sources. With regard to Non-Corporation Funding Proposals, Section Four A.9.d.(2)(b) requires a Housing Credit equity proposal to, among other things, "state the proposed amount of equity to be paid prior to construction completion."

30. In response to these RFA requirements, Palm Village provided at Attachment 13 a Term Sheet setting forth the proposed equity investment in the proposed Palm Village Project from SunTrust Community Capital, LLC. At page 2 the Term Sheet states: "The proposed amount of equity to be paid prior to construction completion is $2,127,118." This total is to be paid in two separate capital contributions referenced in the Term Sheet.

31. The first capital contribution of an estimated $1,160,246 would be paid when the partnership was entered into. The second capital contribution of an estimated $966,872 would be paid only upon receipt of each of the following: 1) final Certificates of Occupancy on all units by the appropriate authority; 2) certification by the STCC Construction Inspector that the project was completed in accordance with the plans and specifications, and 3) acknowledgements by Lender of completion of the Project in accordance with the Project documents.

32. The Development Cost Pro Forma in the RFA defines "Prior to Completion of Construction" as "Prior to Receipt of Final Certificate of Occupancy or in the case of Rehabilitation, prior to placed-in-service date as determined by the Applicant."

JPM Westbrook

33. On October 17, 2013, Petitioner Westbrook submitted its Application, #2014-082C in Response to the RFA that included information concerning a proposed 72 unit apartment complex in Pasco County named Residences at Fort King. Through the Application, Westbrook requested $1,325,000 in Tax Credit funding assistance for the project, which has an overall development cost of $15,044,346.

34. The Review Committee determined the Westbrook Application had a perfect score of 27 points, but because of its place in the ranking its Application was not recommended for funding. In its Petition, Westbrook challenges the scoring of Applications submitted by Summerset, Katie Manor, and Tumblin Creek, and argues that if those projects had not been awarded funding then Westbrook would have recommended for funding.

Summerset

35. On October 17, 2013, Petitioner Summerset submitted its Application #2014-008C in response to the RFA that included information concerning a proposed 96-unit apartment

complex in Pasco County named Summerset Apartments. Through the Application, Summerset requested $1,501,257.00 in Tax Credit funding assistance for the project.

36. The Review Committee determined the Summerset Application had a perfect score of 27 points, but the Application was not recommended for funding because the Review Committee concluded that full funding was not available to meet the request of Summerset. Summerset argues that if the Board had not selected Hammock Crossings for funding there would have been sufficient funds available to award the requested tax credits to Summerset.

37. The RFA requires the Applicant to demonstrate site control by providing documentation in the form of an eligible contract, a deed or certificate of title or a Lease. For the purposes of the RFA, an eligible contract is one that has a term that does not expire before a date that is six months after the Application Deadline, or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than six months after the Application Deadline.

38. The Application Deadline was October 17, 2013, and the date six months thereafter is April 17, 2014.

39. The Summerset application includes a "Real Estate Purchase Agreement" executed by the buyer and the sellers, dated August 28, 2013. This agreement provides for a 120-day due diligence period, and gives the purchaser the right to extend the closing for three 30-day extension periods, for a total of 90 days. It also requires the purchaser to make non-refundable deposits of $25,000 at the end of the due diligence period and on February 1, 2014. However, the agreement then requires closing to occur "upon site plan approval and all building permits issued to the proposed multifamily project, but no later than April 1, 2013, unless both parties agree to extend the closing date."

40. Florida Housing decided that the closing date of April 1, 2013 in the Real Estate Purchase Agreement was a typographical error based on the August 28, 2013 date the Real Estate Purchase Agreement was executed and other provisions in the Agreement, and accepted the "Real Estate Purchase Agreement" as meeting the RFA requirement to demonstrate site control.

Hammock Crossings

41. On October 17, 2013, Petitioner Hammock Crossings submitted its Application #2014-092C in response to the RFA that included information concerning a proposed project in Bay County named Pinnacle at Hammock Crossings. Through the Application, Hammock Crossings requested $1,075,000.00 in Tax Credit funding assistance for the project.

42. Rule 67-60.004(2), Florida Administrative Code, states: "An applicant may request in writing to withdraw its application at any time prior to a vote by the corporation's Board regarding any application received."

43. Hammock Crossings is one of the applicants that Florida Housing recommended to the Board for funding. At 10:53 a.m. on December 12, 2013, Florida Housing received an email message from the vice president of Pinnacle Housing Group stating that it was withdrawing its Application.

44. The Board met to consider all of the applications under RFA 2013-001 on December 13, 2013, and was made aware at that time of Hammock Crossings' withdrawal letter. Rather than accept the withdrawal and proceed to reallocate the funding that had been freed up, or to request that the Review Committee modify its list of recommendations, the Board decided to accept the staff recommendation to fund Hammock Crossing along with the other recommended projects.

45. Section Four B.8. of the RFA, entitled "returned allocation," describes how funding that becomes available after the Board takes action, either because the Applicant declined to enter credit underwriting or because the Applicant was unable to satisfy a requirement of the RFA or the relevant rules, will be distributed. The Board was made aware of this provision while it was considering the Hammock Crossing project, and may have been advised that this process could be used to reallocate any unused funds if it did decide to fund the Hammock Crossing project.

46. Hammock Crossing was not invited to credit underwriting and has not declined to enter credit underwriting. There is no evidence that Hammock Crossings was unable to satisfy any requirement in the RFA or the relevant rules, and the Board did not make any findings regarding such inability.

Forest Ridge

47. In its formal written Protest and Petition for Administrative Hearing, Summerset alleged "Forest Ridge Application No. 3004-038C does not appear to contain an original signature of the applicant on page 10 as required under the [Request for Applications]. The failure to include the original signature results in the application being ineligible for funding. Consequently, Forest Ridge's application should not have been allocated funding. Summerset would be eligible for funding if the Forest Ridge allocation is deemed ineligible."

48. Forest Ridge has filed a Certified Copy of its Application to Florida Housing in this proceeding. The Certified Copy of the Application shows that the Application submitted by Forest Ridge in response to the RFA was, in fact, signed.

49. As a result of the foregoing, Summerset is no longer pursuing a challenge to the Forest Ridge Application or the allocation of funding to Forest Ridge.

Paradise Point

50. On October 17, 2013, Petitioner Paradise Point submitted its Application #2014-080C in response to the RFA that included information concerning a proposed project in Monroe County named Paradise Point Senior Housing. Through the Application, Paradise Point requested $1,175,000.00 in Tax Credit funding assistance for the project. Paradise Point is one of the applicants that Florida Housing recommended to the Board for funding.

51. The RFA at page 36 at Paragraph (2) states that in order to be counted as a source a Housing Credit equity proposal must meet the following criteria listed in Paragraph (2)(b):

- Be executed by all parties, including the Applicant;
- Include specific reference to the Applicant as the beneficiary of the equity proceeds;
- State the proposed amount of equity to be paid prior to construction completion;
- State the anticipated Eligible Housing Credit Request Amount;
- State the anticipated dollar amount of Housing Credit allocation to be purchased; and
- State the anticipated total amount of equity to be provided.

52. The RFA also states that "if the Eligible Housing Credit Request Amount is less than the anticipated amount of credit allocation stated in the equity proposal, the equity proposal will not be considered a source of financing." Without consideration of the equity proposal as a source of financing, the application would fail to show that the sources equal or exceed uses, as required by the RFA.

53. In response to this RFA requirement, Paradise Point provided an equity proposal from RBC Capital Markets. The proposal includes all the listed criteria required by RFA Section Four (A)(9). The proposal shows an eligible housing request amount as $1,175,000 annually; allocated over ten years, this amount should total $11,750,000. The proposal lists the anticipated amount of credit allocation to be purchased as $11,778,825 ($11,775,000 * 99.99%). On its face,

then, the equity proposal states that the total housing credit request amount ($11,750,000) is less than the anticipated amount of credit allocation ($11,778,825).

54. It is apparent from even a casual examination of the equity proposal that there are at least two mathematical errors involved in the calculation of the amount of credit allocation to be purchased. The number $11,775,000 is supposedly arrived at by multiplying the annual request amount by ten years, but of course $1,175,000 x 10 = $11,750,000. In addition, multiplying $11,775,000 by 99.99% yields approximately $11,773,822. Had the correct numbers been used, the amount of credit allocation to be purchased should have been $11,750,000 x 99.99% = $11,748,285.

55. Florida Housing noticed these errors during the review and scoring process. By examining other information found in the Application, including the cost pro forma, Florida Housing was able to confirm that the errors actually were the result of typographical and mathematical mistakes, and that the anticipated housing credit request amount actually was less than the anticipated credit amount to be purchased.

Arbours at Tumblin Creek

56. On October 17, 2013, Intervenor Tumblin Creek submitted its Application #2014-080C in response to the RFA that included information concerning a proposed project in Alachua County named Arbours at Tumblin Creek. Through the Application, Tumblin Creek requested $1,042,127.00 in Tax Credit funding assistance for the project. Tumblin Creek is one of the applicants that Florida Housing recommended to the Board for funding.

57. Similarly to the situation with Paradise Point, the equity proposal submitted with the application did not accurately state the anticipated dollar amount of Housing Credit allocation to be purchased. In this case, the equity proposal consisted of a letter from Raymond James that stated the annual eligible housing request amount, the total investment of Raymond James, and the

syndication rate. The percentage of tax credits being purchased was not stated on this letter, but that information was readily available in other parts of the application. What this letter failed to do was to take all of these numbers and calculate the anticipated amount of credit allocation.

58. Unlike the situation with Paradise Point, there is no obvious typographical or computation error in the equity proposal. Instead, there is a simple failure to document that a particular calculation was or was not made. Florida Housing took it upon itself to perform this particular calculation based on the unambiguous information found in the application.

59. Florida Housing took the Housing Credit request amount ($1,042,127), multiplied that times ten years[1], and multiplied that by the syndicator's interest, (99.99%, which information was found elsewhere in the application), to derive the ten-year anticipated housing credit allocation of $10,420,227.87. This number is less than the ten-year eligible housing request amount of $10,421,270.00 and thus could be considered a source of funding.

60. Florida Housing also multiplied the anticipated housing credit allocation by the syndication rate and compared this number with the total investment proposed by Raymond James and with the "HC Syndication/equity proceeds" line in the Application pro forma. These numbers were essentially identical and served as confirmation of Florida Housing's calculations.

61. It has also been alleged that the application of Tumblin Creek was deficient because it failed to demonstrate site control as required by the RFA. Tumblin Creek submitted, as evidence of site control, a Contract for Purchase and Sale dated November 19, 2012 between Jacqulyn B. Moore and Judyth B. Cox (as seller) and Arbour Valley Development, LLC, or assigns (as purchaser).

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[1] 26 UCS §42 which governs the low income housing tax credit, provides that the allocated amount of tax credits is paid in ten annual installments, each equal to the allocated amount.

62. An addendum to this Contract, included in the application, provides as follows: "This Contract is not assignable by Buyer without Seller's written approval, which approval shall not be unreasonably withheld or denied, however this Contract may be assigned to an entity owned or controlled by the same principals as Buyer."

63. On October 12, 2013, Arbour Valley Development, LLC assigned this contract to Arbours at Tumblin Creek, LLC. The undisputed evidence shows that that Arbour Valley Development, LLC and Arbours at Tumblin Creek, LLC are owned and controlled by the same principals.

Arbours at Central Parkway

64. On October 17, 2013, Intervenor Central Parkway submitted its Application #2014-089C in response to the RFA that included information concerning a proposed 48-unit development in Martin County named Arbours at Central Parkway. Through the Application, Central Parkway requested $766,666.00 in Tax Credit funding assistance for the project. Central Parkway is one of the applicants that Florida Housing recommended to the Corporation's Board for funding.

65. Central Parkway also included an equity proposal from Raymond James, which was virtually identical to the letter submitted for Tumbling Creek although with different numbers in it. This letter also failed to state the anticipated dollar amount of Housing Credit allocation to be purchased. Florida Housing used the information contained in this letter and in other parts of the application to calculate this missing number. As with Tumbling Creek, Florida Housing's calculations showed that the ten-year anticipated housing credit allocation ($7,665,893.33) is less than the ten-year eligible housing request amount ($7,666,660) and thus could be considered a source of funding.

Katie Manor

66. On October 17, 2013, Intervenor Katie Manor submitted its Application #2014-009C in response to the RFA that included information concerning a proposed project in Okaloosa County named Katie Manor. Through the Application, Katie Manor requested $856,802.00 in Tax Credit funding assistance for the project. Katie Manor is one of the applicants that Florida Housing recommended to the Board for funding.

67. The RFA at Section Four Exhibit A(8) allows an Applicant to obtain points for a Local Government Contribution. Specifically to obtain points the appropriate Contribution Form must be filled out and signed by the appropriate designated local government person.

68. In response to this RFA provision, Katie Manor's Application #2014-009C provided a form entitled "2013 Local Government Verification of Contribution – Fee Waiver Form." The form is signed by Mr. Eric Davis as "Planning Official" for the City of Crestview. The Certification Form provides as follows:

> This certification must be signed by the chief appointed official (staff) responsible for such approvals, Mayor, City Manager, County Manager/Administrator/Coordinator, Chairperson of the City Council/Commission or Chairperson of the Board of County Commissioners. Other signatories are not acceptable.

69. Florida Housing accepted Mr. Davis as the chief appointed official responsible for the approval of the water connection fee waiver.

70. This same form requires that the applicant fill in a blank describing method by which the local government waived the relevant fees. Mr. Davis wrote "Council action approving Annexation Agreement 9/28/13*" and at the bottom of the form added "*and ordinance #1512 10/14/13." Neither the Annexation Agreement nor the ordinance was attached to the form.

71. The form also includes the following statement: "If the Application is not eligible for automatic points, this contribution will not be considered if the certification contains corrections or "white-out" or if the certification is altered or retyped. The certification may be photocopied."

Rosedale

72. On October 17, 2013, Petitioner Rosedale submitted its Application #2014-007C in response to the RFA that included information concerning a proposed project in Leon County named Brookestone I. Through the Application, Rosedale requested $1,280,000.00 in Tax Credit funding assistance for the project.

73. The Review Committee determined the Rosedale Application had a perfect score of 27 points, but the Application was not recommended for funding because of its lottery number. Other applications for development also received the maximum score of 27 points, and qualify for the same preferences as Rosedale, but have lower lottery numbers than Rosedale, including Arbours at Tumblin Creek and Summerset Apartments. Of these applications, Arbours at Tumblin Creek has been recommended for funding. In addition, Paradise Point Senior Housing was recommended for funding to meet the Florida Keys Goal. If some or all of these applications are determined to be ineligible, then Rosedale argues that it would be recommended for funding.

CONCLUSIONS OF LAW

1. Pursuant to Sections 120.569 and 120.57(2) and (3), Florida Statutes, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. Florida Housing's decisions in this case affected the substantial interests of each of the parties, and each has standing to challenge Florida Housing's scoring and review decisions.

2. Rules 67-60 and 67-48, Fla. Admin. Code, govern this matter.

3. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof in this case rests with the parties opposing the proposed agency action to prove "a ground for invalidating the award. *See* State Contracting & Engineering Corp. v. Dep't of Transportation, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Those challenging the proposed agency action must sustain their burden of proof by a preponderance of the evidence. Dep't of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

4. The rules of decision applicable in bid protests are set forth in Section 120.57(3)(f), Florida Statutes, which provides in relevant part:

> . . . . 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 [hearing officer] 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.

5. The nature of a "de novo proceeding" was discussed by the First District Court of Appeal as "a form of intra-agency review, [where] the object of the proceeding is to evaluate the action taken by the agency." State Contracting, 709 So. 2d at 609. As the hearing officer in this case, I do not sit as a substitute for the agency head, but instead act in a review capacity to determine whether the agency action is in accordance with the requirements of law. *See* Intercontinental Properties, Inc. v. State Dep't of Health and Rehabilitative Services, 606 So.2d 380 (Fla. 1st DCA 1992); Sunshine Towing @ Broward, Inc., v. Department of Transportation, DOAH Case No. 10-0134BID (Final Order May 7, 2010).

6. The "clearly erroneous" standard is generally applied in reviewing a lower tribunal's findings of fact and interpretations of the statues and rules it is charged with enforcing. In a de novo proceeding I am not bound by factual determinations made previously by the agency,

but an agency's conclusions and applications of the law to the facts is due some deference according to the clearly erroneous standard of review. An agency's interpretation and application of a rule is clearly erroneous when it "clearly contradicts the unambiguous language of the rule." Woodley v. Dep't of Health and Rehabilitative Services, 505 So.2d 676, 678 (Fla. 1st DCA 1987). An agency's finding is clearly erroneous when it is "without support of any substantial evidence, is clearly against the weight of the evidence or [if the agency] has misapplied the law to the established facts." Holland v. Gross, 89 So.2d 25, 258 (Fla. 1956). "Where a protester objects to a proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the objection turns on the meaning, which is in dispute, of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith)." Sunshine Towing, at ¶ 38. *See also* Level 3 Communications, Inc. v Jacobs, 841 So.2d 447, 450 (Fla. 2003).

7. The "arbitrary or capricious" standard has sometimes been equated with the abuse of discretion standard. An arbitrary decision is one that is not supported by facts or logic, or is despotic. Agrico Chem. Co. v. Dep't of Envtl. Regulation, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). Thus, under the arbitrary or capricious standard, an agency is to be subject only to "the most rudimentary command of rationality." Adam Smith Enterprises, Inc. v. State Dep't of Envtl. Regulation, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The reviewer "must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision." Id, at 1273. "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would

seem that the decision is neither arbitrary nor capricious." Dravo Basic Materials Co., Inc. v. State Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

8. The "contrary to competition" standard, unique to bid protests, is a test that applies to agency actions that do not turn on the interpretation of a statue or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact. This standard is not defined in statute or rule; however, the Legislative intent found in Section 287.001, Florida Statutes, is instructive.[2] Actions that are contrary to competition include those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Sunshine Towing at ¶ 48; *See*, R. N. Expertise, Inc. v. Miami-Dade County School Bd., et al., DOAH Case No. 01- 2663BID, (Feb. 4, 2002); E-Builder v. Miami-Dade County School Bd. et al., DOAH Case No. 03-1581BID (Oct. 10, 2003).

9. Many of the scoring decisions under challenge here turn on Florida Housing's decision to waive some element in the challenged Applications as being a "minor irregularity." Florida Housing points out that this flexibility was a major factor in its change from a rule-driven prescriptive funding process to funding through competitive solicitations.

10. "Minor Irregularity is defined at R. 67-60.002(6), Fla. Admin. Code, as:

> "Minor Irregularity" means a variation in a term or condition of an Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of the Corporation or the public.

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[2] Sec. 287.001. The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process. . .

11. This definition is implemented in Rule 67-60.008, Florida Administrative Code, which includes examples of the kinds of minor irregularities that may be found.

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

12. The rule essentially implements the analysis employed by appellate courts: "Not every deviation from [a competitive solicitation] is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. State Department of General Services, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

13. Rules have the force and effect of a statute, and rules of statutory construction apply. Florida Livestock Board v. Gladden, 76 So.2d 291 (Fla. 1954). Florida Housing's conclusion that a proposal's departure from the RFA specifications is a minor irregularity, as opposed to a material deviation, being a matter of rule construction, must be accorded deference under the clearly erroneous standard. To prevail on an objection to an ultimate finding, therefore, the protester must prove that a defect in the agency's logic led it unequivocally to commit a mistake. Sunshine Towing *at* ¶ 36.

14. Section Three of RFA 2013-001 specifically notes that Florida Housing reserved the right to waive minor irregularities. Arguments that other specific requirements or terms of the RFA somehow supersede or prevent application of the plain language of the rule authorizing waivers are thus misplaced.

15. In addition to the foregoing rules, courts have considered the following criteria in determining whether a variance is material and hence nonwaivable:

> [W]hether the effect of a waiver would be to deprive the [agency] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.
>
> Sunshine Towing at ¶ 58, quoting Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

16. Florida Housing explained that where information was missing or erroneous, it would look to the rest of the Application to determine whether a variation could be resolved—and declared nonmaterial. If such information were contained in the Application and did not create a conflict that a scorer could not reasonably resolve, Florida Housing would, applying R. 67-60.002(6) and 67-60.008, consider the error nonmaterial and waivable.

Paradise Point

17. It is undisputed that Paradise Point's application was deficient in that the Anticipated Housing Credit Request amount stated on the equity proposal from RBC Capital Markets was less than the Anticipated Credit Amount to be Purchased. It is also clear from the evidence that the Anticipated Housing Credit Request amount stated in the equity proposal resulted from at least two typographical or computation errors. Because of this failure, the application would have to be rejected unless Florida Housing determined that the error constituted a minor irregularity that should be waived.

18. Rule 62-60.008, F.A.C., authorizes Florida Housing to waive minor irregularities in an otherwise valid application. The rule specifically includes computation and typographical errors as the sorts of minor irregularities that may be waived. The RFA also specifically stated that Florida Housing retained its authority under its rules to waive minor irregularities. The types

of obvious errors in the equity proposal are exactly the kind of minor, technical irregularities that the rule was intended to address.

19. Florida Housing's decision to waive this irregularity was in accordance with its established rules and was not clearly erroneous. Florida Housing did not simply assume that there was a computation mistake, it examined the entire application in detail to determine what the correct computations should have been. Its decision was entirely reasonable and thus not arbitrary or capricious. In this case there is no evidence that waiving this irregularity in any way gave Paradise Point a competitive advantage over any other applicants; indeed, one might argue that rejecting an application based solely on a minor and obvious typographical or mathematical error is contrary to competition. I conclude, therefore, that Florida Housing's decision to waive this minor irregularity should stand.

Arbours at Tumblin Creek and Arbours at Central Parkway

20. The applications for both Arbours at Tumblin Creek and Arbours at Central Parkway were deficient in that they did not specify the anticipated amount of housing credits to be purchased. Because of this failure, each application would have to be rejected unless Florida Housing determined that the error constituted a minor irregularity that should be waived.

21. Rule 62-60.008, F.A.C., authorizes Florida Housing to waive minor irregularities in an otherwise valid application. The rule specifically includes computation and typographical errors as the sorts of minor irregularities that may be waived. The RFA also specifically stated that Florida Housing retained its authority under its rules to waive minor irregularities.

22. The rule does not unambiguously state that Florida Housing has the authority to waive errors based on the absence of a calculation, rather than on an obvious miscalculation. However, Florida Housing's reading of the rule to allow just this sort of waiver, and in fact

applying the rule to grant such a waiver, is not clearly erroneous and is certainly within the permissible range of interpretations.

23. In this case there is no evidence that waiving this irregularity in any way gave either applicant a competitive advantage over any other applicants. Florida Housing examined the entire application in detail to determine what the correct computations should have been; had the Raymond James equity proposal included these computations it would have led to exactly the same conclusion. I conclude, therefore, that Florida Housing's decision to waive these minor irregularities was not clearly erroneous, arbitrary or capricious, or contrary to competition.

24. It is alleged that the assignment of the Contract for Purchase and Sale from Arbour Valley Development, LLC to Arbours at Tumblin Creek, LLC was invalid because the original sellers did not provide written approval of this assignment. This argument turns entirely on a grammatical interpretation of Section 16 of the addendum to the contract, specifically the meaning and use of the term "however." Section 16 reads:

> This Contract is not assignable by Buyer without Seller's written approval, which approval shall not be unreasonably withheld or denied, however this Contract may be assigned to an entity owned or controlled by the same principals as Buyer.

25. Petitioner JPM Westbrook argues that Section 16 should be construed as requiring the seller's written approval for any assignment, regardless of whether or not the assignor and the assignee are commonly controlled. Petitioner also argues that the last clause in Section 16 means that the seller may not refuse to approve an assignment between commonly controlled entities, but does not obviate the need for a written approval anyway. In other words, Petitioner argues that the term "however" should be read as a conjunctive, allowing the clauses before and after the term to be read independently.

26. A more sensible and grammatically correct interpretation is that the word "however" should be read as disjunctive; that is, expressing an alternative or opposition between the phases before and after the word "however." The simple dictionary definition of the term likens it to phrases such as "nevertheless," "on the other hand," and "in spite of that." Read this way, Section 16 would require the seller's written authorization except in those cases where the assignor and assignee are commonly controlled. Such a reading avoids the unreasonable requirement that a seller provide written authorization even though they are prohibited from not authorizing the assignment.

27. While Florida Housing cannot be accorded the same degree of deference when interpreting this contract provision as it would when interpreting a rule or statute it administers, such deference is not required where its interpretation of the contract provision regarding the need for the seller's signature on the assignment was logically and grammatically correct. The decision to accept Arbours at Tumblin Creek's evidence of site control was not clearly erroneous, was neither arbitrary nor capricious, and nothing in the record indicates that this was contrary to competition.

Summerset

28. The sole issue is whether Summerset's evidence of site control was defective, in that the closing date expressed in the contract was April 1, 2013, which was almost five months ***before*** the execution of the contract by the parties on August 26, 2013. In order to establish site control, the RFA required that such a contract must have a term that, with available extensions, continued at least six months beyond the Application deadline, or before April 17, 2014. The April 1, 2013 date was clearly a typographical error, and Florida Housing certainly has the authority to

consider it as such and treat it as a minor irregularity in accordance with Rule 67-60.008, Florida Administrative Code.

29. No one argues that Florida Housing is empowered to interpret or amend the contract itself such that the rights of the parties to the contract are impacted. Instead, the first question is whether Florida Housing has the right to waive the apparent failure to meet the RFA requirement that the contract be valid until at least April 17, 2014 based upon a determination that the contract contained a typographical error. Assuming that it does, the next question is whether Florida Housing could determine from the application itself, including the contract that was included as an attachment, what the correct closing date was intended to be.

30. Petitioner JPM Westbrook makes the valid point that it is one thing to identify a typographical error and another thing entirely to determine how that error should be corrected. Just because the April 1, 2013 date was an error does not necessarily mean that the error was solely one of typing 2013 instead of 2014. Instead, it is possible, however unlikely, that the error was one of typing in the wrong month instead of the wrong year. Florida Housing therefore looked to other provisions of the contract to determine whether or not it was feasible that the typographical error was something other than a mistaken year.

31. The contract by its terms provided for a due diligence period that did not end until late December, 2013, and allowed for up to three 30-day extensions. The contract also required an additional $ 25,000 cash deposit due on February 1, 2014. Florida Housing concluded that the only logical explanation for these potentially conflicting dates was that the closing date was actually intended to be April 1, 2014, which conclusion I agree with. It simply makes no sense to think that parties to the contract intended a closing date before an additional deposit was due, nor does it make any sense to think that the parties intended a closing date sometime after February 2,

2014 but before April 1, 2014, but that somehow the contract was drawn up with typographical errors to both the month and the year and that no party to the contract noticed.

32. I conclude therefore that Florida Housing had the authority to waive as a minor irregularity the typographical error in the contract, and that its determination that the only reasonable interpretation of the contract was that the closing date was intended to be April 1, 2014 was not clearly erroneous and was neither arbitrary nor capricious. I would note, in fact, that rejecting an application based solely on a single incorrectly typed number that led to no competitive advantage for other applicants is exactly the kind of super-technical result that the rules addressing minor irregularities were designed to avoid.

Frenchtown Square

33. It is undisputed that the Application did not identify all of the principals of RUDG, LLC, nor that such failure would have been grounds for rejecting the Application if RUDG, LLC was a Developer (or a co-Developer) of the project. Frenchtown argues that RUDG, LLC is not actually a Developer and that it was therefore not necessary to include a complete list of its principals. That may very well be true, but it misses the point. Florida Housing must make decisions based upon the Application it has received, and if that Application indicates, correctly or not, that the project has multiple Developers then Florida Housing must reject the Application if all Principals are not identified. For better or worse, Section 120.57(3)(f), Florida Statutes, prohibits Frenchtown from presenting additional evidence after the submittal of the Application to demonstrate the true nature of the relationship with RUDG, LLC.

34. There is only one place in the RFA where the Applicant is specifically required to list all Developers and co-Developers, and that is in response to question 3.a. of Exhibit A. Frenchtown listed three Developers. Further, Frenchtown provided documentation regarding the

legal status of those same three entities, which is only required for each Developer. It was entirely reasonable for Florida Housing to presume that the Application was filled out correctly and that the project had three Developer entities, the Principals for each of which were required to be identified.

35. Frenchtown argues that there are other places in the Application where only one Developer is listed, including the cover page, the prior experience chart, and, ironically, Attachment 3. It then suggests that listing of RUGD,LLC as a Developer should be considered a minor irregularity and that Florida Housing should waive it as such. The difficulty with this argument is that such apparent inconsistencies do not compel the conclusion that listing RUGD, LLC as a Developer and providing documentation of its legal status was some kind of clerical error that must be waived as a minor irregularity. There is no requirement that the cover page include all co-Developers. There is no requirement that each co-Developer be listed on the prior experience chart. And that fact that RUDG, LLC was not listed as a co-Developer on Attachment 3, and that all of its Principals were not identified, is actually the reason that the Application was rejected. That is, while there may have been some apparently conflicting information in the Application, Florida Housing had no way to know for certain which information was correct and which was not.

36. Florida Housing's determination that Frenchtown failed to completely identify the Principals of all listed Developers and co-Developers, based solely upon the Application it received, is not clearly erroneous, nor was it arbitrary or capricious. There is also nothing in the record to suggest that this determination is contrary to competition.

Katie Manor

37. Petitioner JPM Westbrook I challenges Florida Housing's acceptance of 2013 Local Government Verification of Contribution – Fee Waiver Form submitted with Katie Manor's Application on several grounds. Petitioner argues that the signature on the form was invalid; that the form was unacceptable due to handwritten conditions on the form; and that documents referenced on the form were not attached to the form.

38. Westbrook's argument is essentially that the certification form requires a signature by "the chief appointed official (staff) responsible for such approvals" and then goes on to list the only acceptable appointed officials as being the "Mayor, City Manager, County Manager/Administrator/Coordinator, Chairperson of the City Council/Commission or Chairperson of the Board of County Commissioners." This rather strained reading seems to ignore both the words "appointed" and "staff" as there are few cases where mayors and commissioners are appointed or are considered staff. Also, there would be no need at all to use the initial phrase about chief appointed officials if what the form actually meant was that it had to be signed by the Mayor, City Manager, etc. The most reasonable reading of this requirement, and the one used by Florida Housing, is that either an appointed official or staff, or one of the other listed occupations, must sign the form. There is no evidence that Eric Davis, as the Planning Official for the City of Crestview, was not the chief appointed official responsible for such approvals.

39. The argument that filling out the form with the required information, and using an asterisk because there wasn't room in the main body of the form for a complete answer, somehow constitutes an alteration or correction to the form is without merit. The argument that the form should be rejected because the ordinance and agreement which formed the basis for the fee waiver were not attached is also without merit. There is no indication on the form or anywhere else in the

RFA that a copy of every document mentioned in this form needs to be attached to the form. And there is no reason that Florida Housing would need to see or review such documents since Mr. Davis has certified that the City of Crestview did in fact waive the $20,000 fee for water connection.

40. Florida Housing's interpretation of the Local Government Verification of Contribution Fee Waiver Form signature and other requirements is not clearly erroneous. The decision to accept Katie Manor's Local Government Verification Form with Mr. Davis's signature and with the extraneous notes on the face of the form was the result of an "analysis that a reasonable person would use to reach a decision of similar importance," thus was neither arbitrary nor capricious. There is also nothing in the record to suggest that this determination is contrary to competition.

OCDC Palm Village

41. The equity proposal from Sun Trust Community Capital included a statement that $2,127, 118 would be paid prior to construction completion. On its face this appears to meet the requirements of the RFA and to demonstrate adequate funding levels. However, the equity proposal also stated that almost half of this amount would in fact not be paid until final certificates of occupancy on all units were received, not until the construction inspector certified that the project was completed, and not until the lender agreed that the project was complete.

42. It is quite clear from the terms of the RFA that equity to be paid "prior to construction completion" means that it must be paid before the final certificates of occupancy are obtained. Regardless of the rather generic statement of how much would be paid prior to construction completion, the most reasonable reading of the Term Sheet is that some $966,862 would not be paid prior to construction completion. There is an internal inconsistency in the Term

Sheet, but it does not appear to be a typographical or mathematical error and Florida Housing was correct not to consider this a minor irregularity that could be waived. Furthermore, it was at least not unreasonable for Florida Housing to give more weight to the specific and detailed limitations on the second capital contribution than to the general statement about how much would be paid prior to construction completion.

43. Palm Village argues that because there is no definition of "prior to construction completion" the interpretation of this phrase must be left up to the Applicant. In fact, that term is defined in the Development Cost Pro Forma. Even if it were not, the Applicant would not be free to interpret the phrase however it wished, no matter how illogical. It is simply unreasonable to think that "prior to construction completion" actually means sometime after the construction engineer has certified that the project is complete.

44. Florida Housing's determination that Palm Village failed to demonstrate adequate funding is not clearly erroneous, nor was it arbitrary or capricious. There is also nothing in the record to suggest that this determination is contrary to competition.

Hammock Crossings

45. Rule 67-60.004(2), F.A.C., allows an Applicant to "request in writing to withdraw its Application at any time prior to a vote by the Corporation's Board regarding any Applications received." There is no other relevant rule that addresses withdrawals, and the RFA does not contain any criteria or guidance for how to handle a request to withdraw an application. There is evidence that the Board has never addressed a situation where an applicant has withdrawn its application between the time Florida Housing staff makes its recommendations for funding and the time that the Board acts on those recommendations.

46. While the letter from Hammock Crossings was not styled as a request, it was appropriate for Florida Housing to treat it as such in accordance with its rules. The rule establishes no parameters as to when or how the Board may or must accept an applicant's withdrawal. Whether or not it makes good sense, I am aware of no requirement that the Board accept a request to withdraw an application, nor any prohibition on the Board deciding to fund a project even though the applicant asked to withdraw the application.

47. The rule is also silent as to what disposition Florida Housing may make of any funding that is unused because of an applicant's withdrawal of its application prior to Board action. The provision in the RFA referring to returned allocations does not seem to be applicable in this case since the Applicant did not decline an invitation to enter credit underwriting and there was no finding and no evidence that the Applicant became unable to satisfy a requirement after the Board took action. It is not clear to me from the evidence whether the Board actually took any action to reallocate funds, but if it did that reallocation is not specifically challenged by any of the Petitioners. The challenges are to the Board's proposed decision to award funding to Hammock Crossings rather than to accept the withdrawal and readdress some of the other funding recommendations brought before it.

48. It is thus not necessary for me to determine whether or not the funds allocated to Hammock Crossings may or may not be reallocated in accordance with Section Four B.8. of the RFA, or indeed in accordance with any other criteria. In order to prevail, the Petitioners must demonstrate that the Board's decision to fund the Hammock Crossings project was contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications.

49. As noted above, there is no statute, rule, or term of the RFA that prohibits the Board from taking the action it did. The Board was made aware of all relevant facts, apparently

considered the delay and administrative inconvenience that would result from accepting the withdrawal request, and made a reasoned decision that, while certainly subject to debate, cannot be said to be clearly erroneous. The Board employed an "analysis that a reasonable person would use to reach a decision of similar importance," thus was neither arbitrary nor capricious. Nor can the Board's interpretation be, under the standards articulated above, considered contrary to competition.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law set forth above, it is RECOMMENDED that a Final Order be entered affirming Florida Housing's actions regarding each Petitioner's Application to RFA 2013-001, and denying the relief requested in each Petition.

Respectfully submitted this 12th day of May, 2014.

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