

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

AMARYLLIS PARK PLACE III, LLC,

Petitioner,

FHFC Case No. 2023-050BP
DOAH Case No. 23-2526BID

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BLUE IAN, LLC; AND MHP SARASOTA I,
LTD.,

Intervenors.

CORE OAK PARK, LLLP,

Petitioner,

FHFC Case NO. 2023-048BP
DOAH Case No. 23-2527BID

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HERMOSA NFTM 41, II, LTD.,

Intervenor.

ARCHWAY PRINCETON OAKS, LLC,

Petitioner,

FHFC Case No. 2023-047BP
DOAH Case No. 23-2528BID
FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Thomas Blamery DATE: 10/30/23

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ECG TOWN OAKS, LP; AND CARDINAL
POINTE, LLC,

Intervenors.

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on October 27, 2023. Petitioners Amaryllis Park Place III, LLC (“Amaryllis”), CORE Oak Park, LLLP (“Oak Park”), and Archway Princeton Oaks, LLC (“Archway”) (collectively, “Petitioners”) and Intervenors Blue Ian, LLC (“Blue Ian”), MHP Sarasota I, LTD. (“MHP Sarasota”), Hermosa NFTM 41, II, LTD. (“Hermosa”), ECG Town Oaks, LP (“Town Oaks”), and Cardinal Pointe, LLC (“Cardinal Pointe”), (collectively, “Intervenors”) were applicants under RFA 2023-304: Rental Recovery Loan Program (“RRLP”) Financing to be Used for Rental Developments in Hurricane Ian and Hurricane Nicole Impacted Counties (the “RFA”). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and 102.57(3), Florida Statutes.

On June 9, 2023, Florida Housing Finance Corporation (“Florida Housing”) posted notice of its intended decision to award funding to nine applicants, including Hermosa, Blue Ian, MHP Sarasota, Town Oaks, and Cardinal Pointe. Amaryllis, Oak Park, and Archway were deemed eligible for funding but were not selected for funding according to the funding selection process outlined in the RFA. The Petitioners timely filed notices of intent to protest, followed by formal written protests, and the Intervenors timely intervened.

Florida Housing referred the matters to the Division of Administrative Hearings (“DOAH”), where the matters were consolidated into a single hearing. Administrative Law Judge (“ALJ”) Robert L. Kilbride was assigned to conduct the final hearing.

Before the Final Hearing, MHP Sarasota and Hermosa conceded that, while they remained eligible for funding, their applications were not eligible for the proximity funding preference under the terms of the RFA.

The Final Hearing was conducted as scheduled on August 2, 2023. Only one contested issue proceeded to the hearing: Archway’s challenge to Cardinal Pointe’s eligibility for failing to properly complete its Verification of Environmental Safety – Phase I Site Assessment form (“ESA Form”).

After consideration of the oral and documentary evidence presented, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on September 1, 2023 finding:

1) MHP Sarasota and Hermosa validly conceded that they were not eligible for the proximity funding preference under the terms of the RFA but remained eligible for funding.

2) Cardinal Pointe failed to properly complete its ESA form, and the error within Cardinal Pointe's ESA form was not a minor irregularity. Therefore, Cardinal Pointe's application is ineligible for funding under the terms of the RFA.

The ALJ recommended that Florida Housing enter a final order finding: (i) MHP Sarasota and Hermosa were not eligible for the proximity funding preference under the terms of the RFA but remained eligible for funding; (ii) Cardinal Pointe was not eligible for funding. A true and correct copy of the Recommended Order is attached as "Exhibit A."

On September 11, 2023, Cardinal Pointe filed exceptions to the Recommended Order, and on September 21, 2023, Archway and Florida Housing filed a joint response to those exceptions. However, on October 18, 2023, Cardinal Pointe withdrew its Exceptions to the Recommended Order.

RULING ON THE RECOMMENDED ORDER

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

2. The Conclusions of Law set out in the Recommended Order are reasonable and supported by competent substantial evidence.

3. The Recommendations of the Recommended Order are reasonable and supported by competent substantial evidence.

ORDER

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

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

ii. 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.

iii. The Recommendation of the Recommended Order is adopted as Florida Housing's Recommendation and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that:

(a) MHP Sarasota's application is not eligible for the proximity funding preference under the terms of the RFA but remains eligible for funding;

(b) Hermosa's application is not eligible for the proximity funding preference under the terms of the RFA but remains eligible for funding; and

(c) Cardinal Pointe's application is ineligible for funding under the RFA.

DONE and ORDERED this 27th day of October, 2023.



FLORIDA HOUSING FINANCE
CORPORATION

By: _____

Chairman

Copies to:

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Florida Housing Finance Corporation

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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**

MHP LEE II, LLC,

Petitioner,

vs.

Case No. 23-2523BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG LEGACY II, LTD.; HERMOSA NFTM
41, II, LTD.; AND SP PINELLAS III, LLC,

Intervenors.

MHP LEE I, LLC,

Petitioner,

vs.

Case No. 23-2524BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG LEGACY II, LTD.; HERMOSA NFTM
41, II, LTD.; AND SP PINELLAS III, LLC,

Intervenors.

AMARYLLIS PARK PLACE III, LLC,

Petitioner,

vs.

Case No. 23-2526BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BLUE IAN, LLC; MHP SARASOTA I, LTD.;
AND SP PINELLAS III, LLC,

Intervenors.

CORE OAK PARK, LLLP,

Petitioner,

vs.

Case No. 23-2527BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HERMOSA NFTM 41, II, LTD.; AND
SP PINELLAS III, LLC,

Intervenors.

ARCHWAY PRINCETON OAKS, LLC,

Petitioner,

vs.

Case No. 23-2528BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ECG TOWN OAKS, LP; CARDINAL POINTE,
LLC; AND SP PINELLAS III, LLC,

Intervenors.

RECOMMENDED ORDER

A final hearing was held before Administrative Law Judge (“ALJ”) Robert L. Kilbride of the Division of Administrative Hearings (“DOAH”) on August 2, 2023, by Zoom video conference.

APPEARANCES

For Respondent, Florida Housing Finance Corporation (“Florida Housing”):

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and MHP Sarasota I, Ltd. (“MHP Sarasota”):

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For SP Pinellas III, LLC (“SP Pinellas”):
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For ECG Town Oaks, LP (“Town Oaks”); Hermosa NFTM 41, II, Ltd.
 (“Hermosa”); and Blue Ian, LLC (“Blue Ian”):
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STATEMENT OF THE ISSUE

Whether Florida Housing’s notice of intent to award funding under Request for Applications 2023-304: Rental Recovery Loan Program (RRLP) Financing to be Used for Rental Developments in Hurricane Ian and Hurricane Nicole Impacted Counties (“RFA”) was issued contrary to governing statutes, Florida Housing rules, or the RFA specifications, or was clearly erroneous, contrary to competition, arbitrary or capricious.

PRELIMINARY STATEMENT

On April 12, 2023, Florida Housing issued the RFA to solicit applications for allocations of Rental Recovery Loan Program (“RRLP”) financing to be used for rental developments in Hurricane Ian and Hurricane Nicole impacted counties.

On June 9, 2023, Florida Housing issued its notice of intended decision to award funding to nine applicants, including HTG Legacy, Hermosa, Blue Ian, MHP Sarasota, Town Oaks, and Cardinal Pointe. Petitioners timely filed Notices of Protest followed by Petitions for a Formal Administrative Hearing. Intervenors timely intervened.

The Petitions were referred to DOAH and, upon motion, were consolidated by the undersigned. A telephonic status conference was held on July 12, 2023, with all parties in attendance and a related procedural Order was issued by the undersigned.

Prior to the final hearing, MHP II and MHP I voluntarily dismissed their petitions, Amaryllis voluntarily withdrew the Blue Ian issue, and Archway voluntarily withdrew the Town Oaks issue. MHP Sarasota also filed a concession that it should not have been granted the Proximity Funding

Preference, and Hermosa stipulated before the hearing that it also should not have been granted the Proximity Funding Preference.

The remaining primary issue for the final hearing was whether Florida Housing's decision to award funding to Cardinal Pointe was contrary to governing statutes, Florida Housing rules, or the RFA specifications.

The final hearing commenced on August 2, 2023. During the hearing, Archway offered the testimony of Marisa Button, and Cardinal Pointe offered the testimony of Stephen Auger. The parties offered 13 joint exhibits; eleven were admitted into evidence as Exhibits J-1 through J-11. Amaryllis offered three exhibits; all were admitted into evidence as APP-1 through APP-3. Oak Park offered 17 exhibits; all were admitted into evidence as OP-1 through OP-17. Archway offered seven exhibits; all were admitted into evidence as AR-1 through AR-7. Hermosa offered five exhibits; all were admitted into evidence as H-1 through H-5. Blue Ian offered four exhibits; all were admitted into evidence as BI-1 through BI-4. Cardinal Pointe offered eight exhibits; seven of which were admitted into evidence as CP-1 and CP-3 through CP-8. In addition, the parties stipulated to a number of facts in a Joint Pre-Hearing Stipulation, filed on July 31, 2023.

The final hearing Transcript was filed with DOAH on August 11, 2023. Proposed recommended orders were due on or before August 21, 2023.

All timely filed proposed recommended orders were reviewed and considered in preparing this Recommended Order. The record also reflects that several parties or intervenors joined in the Proposed Recommended Order filed by Florida Housing. Unless otherwise noted, references to Florida Statutes and Florida Administrative Code are to the 2023 versions.

References to Exhibits are denoted as “Ex. J-#,” for Joint Exhibits; “Ex. APP-#,” for Amaryllis’s Exhibits; “Ex. OP-#,” for Oak Park’s Exhibits; “Ex. AR-#,” for Archway’s Exhibits; “Ex. H-#,” for Hermosa’s Exhibits; “Ex. BI-#,” for Blue Ian’s Exhibits; and “Ex. CP-#,” for Cardinal Pointe’s Exhibits. References to the Joint Pre-Hearing Stipulation are denoted as “Stip.”

FINDINGS OF FACT

The Undersigned makes the following findings of material and relevant fact:

1. Florida Housing is a public corporation created under section 420.504, Florida Statutes. Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida under section 420.5099. Stip. at ¶ 1. For the purpose of this proceeding, Florida Housing is an agency of the State of Florida. Stip. at ¶ 5.

2. Florida Housing is authorized to allocate housing credits and other funding, such as the RRLP, by competitive solicitation under section 420.507(48), and Florida Administrative Code Chapter 67-60. Stip. at ¶ 12. Chapter 67-60 provides that Florida Housing allocate its competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes. Stip. at ¶ 12.

3. The issuance of a Request for Applications commences the competitive application process. Stip. at ¶ 13. A request for application is equivalent to a “request for proposal” as indicated in rule 67-60.009(4). Stip. at ¶ 13.

4. The RFA was issued on April 12, 2023, and responses were due May 3, 2023 (“Application Deadline”). Stip. at ¶ 14.

5. Florida Housing received 36 applications in response to the RFA. Stip. at ¶ 16. All 36 applications for the RFA were received, processed, deemed eligible or ineligible, scored, and ranked under the terms of the RFA, chapter 67, and applicable federal regulations. Stip. at ¶ 29.

6. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors ("Board"). The review committee found all applications eligible for consideration for funding. Through the ranking and selection process outlined in the RFA, nine applications were preliminarily recommended for funding. The review committee developed charts listing its eligibility and funding recommendations to be presented to the Board (Ex. J-2 and J-3, respectively). Stip. at ¶ 17.

7. On June 9, 2023, the Board met and considered the recommendations of the review committee for the RFA. Also, on June 9, 2023, Petitioners and all other applicants in the RFA received notice that the Board determined whether applications were eligible or ineligible for consideration for funding and that certain eligible applicants were preliminarily selected for funding (subject to satisfactory completion of the credit underwriting process). Such notice was provided by posting two spreadsheets, one listing the Board-approved scoring results in the RFA and one identifying the applications Florida Housing proposed to fund, on the Florida Housing website, www.floridahousing.org. (Ex. J-4 and J-5, respectively). Stip. at ¶ 18.

8. In the June 9, 2023, posting, Florida Housing announced its intention to award funding to nine applicants, including HTG Legacy, Hermosa, Blue Ian, MHP Sarasota, Town Oaks, and Cardinal Pointe. Stip. at ¶ 19.

9. Petitioners timely filed Notices of Protest and Petitions for Formal Administrative Proceedings. Intervenors timely intervened. The petitions filed were referred to DOAH and consolidated. Stip. at ¶ 20.

10. No challenges were made to the terms or specifications of the RFA. Stip. at ¶ 21.

The RFA

11. The RFA contemplates a structure in which the applicant is scored on eligibility items and obtains points for other items. Only applications that

meet all the eligibility items are eligible for funding and considered for funding selection. Stip. at ¶ 22; Ex. J-1, at 61-64.

12. The RFA awards points for meeting certain requirements outlined in the RFA. Ex. J-1, at 64. There were no challenges to the total points awarded to any application. Stip. at ¶ 23.

13. A Proximity Funding Preference was used to break ties in the funding selection process. Ex. J-1, at 65; Stip. at ¶ 28. Applicants could earn proximity points based on the distance between the Development Location Point and a qualifying transit or community service. *Id.* Proximity points were not applied toward the total application score. Ex. J-1, at 19; Stip. at ¶ 28. There was no minimum eligibility requirement for total proximity score. *Id.* Proximity points were only used to determine whether an Applicant meets the Proximity Funding Preference. *Id.*

MHP Lee II's Petition, DOAH Case No. 23-2523BID

14. On July 27, 2023, MHP Lee II voluntarily dismissed all of its claims upon filing MHP Lee II, LLC's Notice of Voluntary Dismissal. No evidence or testimony was presented in MHP Lee II's case at the August 2, 2023, hearing.

MHP Lee I's Petition, DOAH Case No. 23-2524BID

15. On July 27, 2023, MHP Lee I voluntarily dismissed all of its claims upon filing MHP Lee I, LLC's Notice of Voluntary Dismissal. No evidence or testimony was presented in MHP Lee I's case at the August 2, 2023, hearing.

Issues Raised in Amaryllis's Petition, DOAH Case No. 23-2526BID

16. Petitioner Amaryllis raised two issues within its petition relating to (i) Blue Ian's application; and (ii) MHP Sarasota's application.

(i) Blue Ian

17. On July 28, 2023, Amaryllis notified all parties that it was voluntarily withdrawing its claim that Blue Ian was ineligible for funding upon filing Amaryllis Park Place III, LLC's Notice of Withdrawal of Issue Against

Intervenor Blue Ian, LLC. No evidence or testimony relating to this issue was presented at the August 2, 2023, hearing.

(ii) MHP Sarasota

18. In response to the RFA, MHP Sarasota timely submitted an application for a new development located in Sarasota County, Florida. Stip. at ¶ 30. Florida Housing's review committee deemed MHP Sarasota's application eligible for funding and preliminarily selected the application for funding. Stip. at ¶ 31. MHP Sarasota received a Proximity Funding Preference based on its application responses, including the identification of a grocery store within a certain distance from the Development Location Point. Ex. J-10, at 6-7. Amaryllis contested MHP Sarasota's entitlement to the Proximity Funding Preference.

19. On July 27, 2023, MHP Sarasota served all parties with MHP Sarasota I, Ltd.'s Concession of Issue and docketed the notice on that same date. This tribunal took judicial notice of the filing at the August 2, 2023 hearing. MHP Sarasota I, Ltd.'s Concession of Issue specifically states:

Based on information discovered [in] this proceeding, MHP Sarasota agrees that it is not entitled to 2.5 points for the grocery store identified in Application No. 2023-223BR, and further that MHP Sarasota did not achieve the Minimum Total Proximity Points available in RFA 2023-304, and is therefore not eligible to receive the Proximity Funding Preference.

20. As a result, MHP Sarasota was not entitled to receive the Proximity Funding Preference.

21. A development's proximity to a grocery store is one of several community services listed in the RFA that can earn an applicant proximity points toward the Proximity Funding Preference. Ex. J-1, at 21. The RFA defines the term "Grocery Store," in relevant part, as:

A retail food store consisting of 4,500 square feet or more of contiguous air conditioned space available to the public, that has been issued a food permit,

current and in force as of the dates outlined below, issued by the Florida Department of Agriculture and Consumer Service (FDACS) which designates the store as a Grocery Store or Supermarket within the meaning of those terms for purposes of FDACS-issued food permits.

Ex. J-1, at 99.

22. For the purposes of determining proximity points, Sarasota County, Florida (the location of MHP Sarasota's development), is considered a medium-sized county. Ex. J-1, at 18. To receive the Proximity Funding Preference for a medium county, an applicant must achieve a minimum of nine proximity points. Ex. J-1, at 19.

23. MHP Sarasota claimed a total of nine proximity points in its application. Ex. J-10, at 7. Two and a half of MHP Sarasota's nine points were attained from the development's proximity to Sunflower Market Discount Grocery ("Sunflower Market"). Ex. J-10, at 6.

24. David Marshal of the Florida Department of Agriculture and Consumer Services confirmed during his deposition that Sunflower Market did not hold a grocery store or supermarket permit as of the Application Deadline. Ex. APP-3, at 65.

25. By stipulation, Florida Housing now agrees with Amaryllis that Sunflower Market did not meet the definition of Grocery Store or Supermarket under the terms of the RFA, and MHP Sarasota was not eligible to receive the Proximity Funding Preference under the terms of the RFA. Stip. at ¶ 32.

Issues Raised in Oak Park's Petition, DOAH Case No. 23-2527BID

26. Oak Park raised two issues relating to Hermosa's application in its Petition: (i) Hermosa does not qualify for the Proximity Funding Preference, and (ii) Hermosa failed to properly identify the address of the development site.

27. In response to the RFA, Hermosa timely submitted an application for a new development located in Lee County, Florida. Stip. at ¶ 34. Florida

Housing's review committee deemed Hermosa's application eligible for funding and preliminarily selected the application for funding. Stip. at ¶ 35.

28. Hermosa received a Proximity Funding Preference based on its application responses, including the identification of a bus transfer station within a certain distance from the Development Location Point. Oak Park contests Hermosa's entitlement to the Proximity Funding Preference.

29. Hermosa's proposed development is located in Lee County, Florida, a "Medium" county under the terms of the RFA. Ex. J-9, at 5. To receive the proximity funding preference for a medium county, an applicant must achieve a minimum of nine proximity points. Ex. J-1, at 19. In its application, Hermosa claimed 13 proximity points, including four and a half points for the development's proximity to a Public Bus Transfer Stop. Ex. J-9, at 6.

30. By stipulation, all parties now agree that the Public Bus Transfer Stop identified in Hermosa's Application did not meet the definition of a Public Bus Transfer Stop as identified in the RFA. Without those points, Hermosa is not eligible to receive the Proximity Funding Preference under the terms of the RFA. Stip. at ¶ 39.

Issues Raised in Archway's Petition, DOAH Case No. 23-2528BID

31. Petitioner Archway raised two issues in its petition relating to (i) Town Oaks' application; and (ii) Cardinal Pointe's application.

(i) Town Oaks

32. On July 26, 2023, Archway notified all parties that it was voluntarily withdrawing the issue relating to Town Oaks upon filing Archway Princeton Oaks, LLC's Notice of Withdrawal of Issue. As a result, no testimony regarding the issue was necessary or presented at the August 2, 2023, hearing.

(ii) Cardinal Pointe

33. In response to the RFA, Cardinal Pointe timely submitted an application for a new development located in Orange County, Florida. Stip. at ¶ 42. Florida Housing's review committee deemed Cardinal Pointe's

application eligible for funding and preliminarily selected the application for funding under the terms of the RFA. Stip. at ¶ 43.

34. The RFA contains several threshold requirements or conditions that an applicant must demonstrate or meet in order to be eligible for funding consideration. Ex. J-1, at 61.

35. One such condition requires applicants to demonstrate an Environmental Site Assessment. Stip. at ¶ 44. That requirement is achieved by “providing the applicable *properly completed* and executed Florida Housing Finance Corporation Verification of Environmental Safety – Phase I Site Assessment form (Form Rev. 07-2022)” as an attachment to the application. Ex. J-1, at 35 (emphasis added); Stip. at ¶ 44.

36. It was undisputed that an applicant was responsible to accurately complete, execute, and submit the completed form with its application. Applicants were not permitted to amend their applications after the application deadline.

37. There was no dispute that Cardinal Pointe submitted a Florida Housing Finance Corporation Verification of Environmental Safety Phase I Environmental Site Assessment form (“ESA Form”) as attachment 11 to its application. Ex. J-16, at 105.

38. Likewise, Cardinal Pointe self-reported in its application that its proposed development required the demolition of three occupied, existing residential structures. Ex. J-16, at 4 and 26; Stip. at ¶ 46.

39. This is relevant because, for developments with existing buildings, the ESA Form requires applicants to verify that the presence or absence of asbestos or asbestos containing materials and lead based paint has been addressed either as a part of the Phase I Environmental Site Assessment (“ESA”) or as a separate report by checking either box “a” or box “b” under Item 2 of the ESA Form. Ex. J-16, at 106; Stip. at ¶ 47.

40. Significantly, in the ESA Form Cardinal Pointe submitted with its application, neither box “a” nor “b” was checked under Item 2, as was

required for developments with existing buildings. *See* Ex. J-16, at 106; Stip. at ¶ 48.

41. At the final hearing, Cardinal Pointe did not dispute that the ESA Form submitted to Florida Housing did not contain the required certification or checked boxes under Item 2. Instead, Cardinal Pointe explained that the omission was an error possibly caused by the electronic compilation and “compression” process followed during the submission of its application. It also asserted that the omission was not material information needed to evaluate applications for funding.

42. Notably, an Applicant is not required to submit the ESA report itself, or any testing reports as part of the RFA. Ex. J-1.

43. Instead, Marisa Button of Florida Housing testified that Florida Housing relies solely on the ESA Form to confirm that all the requirements of the form have been completed. Of particular significance in this case is that there is nowhere else in the application where Florida Housing can verify whether the requirements of the form have been completed.¹

44. Button further testified that the properly completed and executed ESA Form is an eligibility item that all applicants must provide in order to be considered eligible for funding.

45. Florida Housing initially scored the application eligible for funding. However, Button acknowledged that, after reviewing all the evidence presented and revealed during this proceeding, Florida Housing has now determined that its decision to deem Cardinal Pointe’s application eligible was erroneous, and Cardinal Pointe’s application should have been deemed ineligible during the application review process.

¹ This fact distinguishes this case from the undersigned’s reasoning in *HTF Management, Inc. v. Broward County*, Case No. 22-1650BID (Fla. DOAH Oct. 13, 2022). Unlike the *HTF Management* case, the information related to box “a” and “b” was not located, stated or covered in any other area(s) of the application. Further, Cardinal Pointe had a full and fair opportunity to review its application before submission and could have discovered its error. To the extent Cardinal Pointe believes *HTF Management* compels a different conclusion, its argument is not persuasive.

46. Button admitted at the hearing that Florida Housing has the ability to assess irregularities in the application and the discretion to waive irregularities that are deemed minor under its Minor Irregularity Rule.

47. Florida Housing's right to waive minor irregularities is expressly outlined in rule 67-60.008, and states:

Minor irregularities are those irregularities in an Application, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

Ex. CP-7.

48. Button noted that Florida Housing's scorers did not originally identify the application and ESA Form problem. Presumably then, Florida Housing did not perform a minor irregularity analysis at that time.

49. However, during the pendency of this proceeding, and as a result of the objections raised by other parties or Intervenors, Florida Housing has reviewed and evaluated the issue and determined that Florida Housing's minor irregularity rule does not cover, permit or allow Cardinal Pointe's particular omission related to the ESA Form it submitted.

50. Button credibly and persuasively explained why Cardinal Pointe's failure to properly complete the ESA Form by checking the appropriate boxes could not be considered a minor irregularity under Florida Housing's rules.

51. More specifically, she explained that the error was material because the error itself renders the application ineligible and correcting the error would require information not otherwise found or located within the four

corners of the application.² Also, to allow a correction now would amount to an improper amendment of the application after the Application Deadline.

52. Button correctly pointed out that rule 67-60.008, precludes an irregularity from being waived if any one of the four factors outlined in rule 67-60.008 is met. Therefore, she correctly points out, the analysis by Florida Housing stopped there.

53. However, Button went on to explain that the error also created uncertainty within the application as to whether other requirements had been met. Without the omitted information, Florida Housing could not otherwise verify that the ESA provider had actually performed the testing required by the form.

54. Furthermore, she explained that allowing material omissions of this nature would negatively affect competition and adversely impact the interest of Florida Housing and the public.

55. Button's explanation detailing why Cardinal Pointe's application should not have been eligible for funding is credible and persuasive. Button persuasively testified that Cardinal Pointe failed to include with its application material information required by the terms of the RFA.

56. Therefore, the undersigned finds that Florida Housing's initial selection of Cardinal Pointe for a funding award was improper.

CONCLUSIONS OF LAW

57. DOAH has jurisdiction over the parties and subject matter of this proceeding. *See* § 120.569, 120.57(1), and 120.57(3), Fla. Stat.; *Dep't of Lottery v. Gtech Corp.*, 816 So. 2d 648, 651 (Fla. 1st DCA 2001); *see also* Fla. Admin. Code R. 67-60.009(2).

58. Petitioners challenge Florida Housing's ranking and scoring of several applications in the RFA. Under section 120.57(3)(f), the burden of proof in

² As noted previously, the fact that the omitted information cannot be found elsewhere in the application is significant.

this matter rests on Petitioners as the parties protesting the proposed agency action. See *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

59. Section 120.57(3)(f) further provides that in a bid protest:

[T]he administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

60. The ALJ's objective at the hearing is to "evaluate the action taken by the agency." *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and *State Contracting*, 709 So. 2d at 609.

61. The ALJ may receive evidence, as with any hearing involving disputed issues of material fact under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. *State Contracting*, 709 So. 2d at 609.

62. Accordingly, Petitioners, as the party protesting the intended award, must prove by a preponderance of the evidence that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of the RFA.

63. In doing so, the standard of proof that Petitioners must meet to establish that Florida Housing's ranking and selection process violates this statutory standard is that Florida Housing's decision was: (a) clearly erroneous; (b) contrary to competition; or (c) arbitrary or capricious. § 120.57(3)(f) and 120.57(1)(j), Fla. Stat.; and *AT & T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

64. The "clearly erroneous" standard has been defined to mean "the interpretation will be upheld if the agency's construction falls within the

permissible range of interpretations.” *Colbert v. Dep’t of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004).

65. A factual determination may be found to be “clearly erroneous” when the reviewer or ALJ is “left with a definite and firm conviction that [the fact-finder] has made a mistake.” *Tropical Jewelers Inc. v. Bank of Am., N.A.*, 19 So. 3d 424, 426 (Fla. 3d DCA 2009); *see also Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956) (when a finding of fact by the trial court “is without support of any substantial evidence, is clearly against the weight of the evidence or ... the trial court has misapplied the law to the established facts, then the decision is ‘clearly erroneous.’”).

66. An agency action is “contrary to competition” if it unreasonably interferes with the purpose of competitive procurement. As described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931):

[T]he object and purpose [of the bidding process] ... is to protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in its various forms; to secure the best values ... at the lowest possible expense; and to afford an equal advantage to all desiring to do business ..., by affording an opportunity for an exact comparison of bids.

67. In other words, the “contrary to competition” test forbids agency actions that: (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. *See* § 287.001, Fla. Stat.; and *Harry Pepper & Assoc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

68. Finally, section 120.57(3)(f) requires an agency action be set aside if it is “arbitrary, or capricious.” An “arbitrary” decision is one that is “not

supported by facts or logic, or is despotic.” *Agrico Chemical Co. v. Dep’t of Env’t Regul.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979). A “capricious” action is one which is “taken without thought or reason or irrationally.” *Id.* See also *Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 40 (Fla. 1st DCA 2006).

69. To determine whether an agency acted in an “arbitrary” or “capricious” manner, consideration must be given to “whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision.” *Adam Smith Enter. v. Dep’t of Env’t Regul.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

70. Likewise, the standard has also been stated by the court in *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: “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.”

71. It is axiomatic that Applicants are not permitted to submit information that should have been, but was not, included in the application submitted in response to the RFA. Notably, section 120.57(3) expressly states that “no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered.”

72. It is clear then that, under the law, the application must stand on its own as originally submitted. § 120.57(3), Fla. Stat.

73. Florida Housing’s governing statutes, rules, or policies in this matter include chapter 67-60, which Florida Housing implemented according to its rulemaking authority under section 420.507(12).

74. Florida Housing adopted chapter 67-60 to administer the competitive solicitation process. According to rule 67-60.006(1):

The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by [Florida Housing], the Application shall be considered ineligible.

75. Florida Housing is required to interpret the RFA consistent with its plain and unambiguous language. *Brownsville Manor, L.P. v. Redding Dev. Partners, LLC, and Fla. Hous. Fin. Corp.*, 224 So. 3d 891, 894 (Fla. 1st DCA 2017).

MHP Sarasota's Proximity Points

76. MHP Sarasota has conceded that it was not entitled to the proximity points for Sunflower Market, Florida Housing has stipulated that MHP Sarasota is not eligible to receive the Proximity Funding Preference, and the record evidence shows that issuing MHP Sarasota's proximity points for Sunflower Market was clearly erroneous.

77. Therefore, Amaryllis has met its burden to demonstrate that Florida Housing's decision to grant MHP Sarasota the Proximity Funding Preference was contrary to Florida Housing's RFA specifications, rules, and/or its governing statutes.

Hermosa's Proximity Points

78. The parties agree that Hermosa was not entitled to the proximity points for its bus transfer stop and that issuing Hermosa proximity points for the bus transfer stop was clearly erroneous.

79. As a result, Oak Park has met its burden to demonstrate that Florida Housing's decision to grant Hermosa the Proximity Funding Preference was contrary to Florida Housing's RFA specifications, rules, and/or its governing statutes.

Cardinal Pointe's Eligibility

80. Section 4(A)(1) of the RFA and rule 67-60.006(1) clearly establish that it is the applicant's responsibility to submit an application that complies with

the requirements of the RFA. *See also Clear Lake Vill., L.P. v. Fla. Hous. Fin. Corp, et al.* Case No 15-2394BID, ¶ 49 (Fla. DOAH June 25, 2015; Fla. Hous. Fin. Corp. Aug. 7, 2015); *HTG Grand East, LTD. v. Fla. Hous. Fin. Corp, et al.* Case No 23-0670BID, ¶ 64 (Fla. DOAH May 8, 2023; Fla. Hous. Fin. Corp. June 9, 2023).

81. It is incumbent upon and the sole responsibility of the Applicant, to review the documentation submitted to Florida Housing *before* the application deadline to ensure that all documents convey and include what the applicant intended them to convey or include. *Clear Lake Village, L.P.*, Case No. 15-2394BID, RO at ¶ 49.

82. Ultimately, the responsibility for an omission or error in its application falls on the applicant, not Florida Housing. *HTG Grand East, LTD.*, Case No. 23-0670BID, RO at ¶ 64; The burden is not on Florida Housing to guess the applicant's intent, and to do so would be improper. *Clear Lake Village, L.P.*, Case No. 15-2394BID, RO at ¶ 50; *Vistas at Fountainhead L.P. v. Fla. Hous. Fin. Corp.*, Case No. 19-2328BID, RO at ¶ 52-57 (Fla. DOAH July 16, 2019), *adopted in part*,³ Case No. 2019-030BP (Fla. Hous. Fin. Corp. Aug. 2, 2019).

83. The RFA required a properly and fully completed ESA Form for an applicant to be eligible for funding. Cardinal Pointe's application clearly and unambiguously states that Cardinal Pointe had existing buildings on its proposed development site.

84. The express language of the ESA Form states that Item 2 must be completed if the proposed development site contains existing buildings. The evidence presented shows that Cardinal Pointe failed to check two separate boxes which would have provided material information to Florida Housing. Therefore, it is clear from the evidence that Cardinal Pointe failed to submit a properly completed ESA Form as part of its application.

³ The modifications in Florida Housing's Final Order do not alter the analysis applicable in this case.

85. Based on the competent substantial evidence in the record, Florida Housing's decision to award funding to Cardinal Pointe under the RFA was contrary to the RFA specifications, Florida Housing's rules, and/or its governing statutes.

86. Similarly, the evidence and testimony presented at the final hearing clearly demonstrate that Cardinal Pointe's application did not comply with the criteria set forth in the RFA. Therefore, it was not eligible to receive funding under the RFA.

87. Cardinal Pointe naturally takes the position that Florida Housing should waive the missing checked boxes as a "minor irregularity," claiming that the error was not material. No one disputes that Florida Housing reserved the right to treat errors in applications as "minor irregularities" as outlined in rule 67-60.008, which provides:

Minor irregularities are those irregularities in an Application, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

See also Flagship Manor, LLC v. Fla. Hous. Fin. Corp, 199 So. 3d 1090, 1094 (Fla. 1st DCA 2016) ("Florida Housing's regulations give it discretion to ignore 'minor irregularities' in an application."); *Heritage Oaks, LLP v. Madison Pointe, LLC*, 277 So. 3d 215, 218-19 (Fla. 1st DCA 2019) (a "minor irregularity" refers to variation "that does not provide a competitive advantage or benefit to the applicant over other applicants ... Minor irregularities are errors that do not result in the omission of any material information."); *Tropabest Foods, Inc. v. Fla. Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986) (a deviation in a response to an invitation to bid is

“material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition.”).

88. As noted, the failure to fully and properly complete and submit the ESA Form with the proper boxes checked is not a minor irregularity. Other recent cases at DOAH support this conclusion. *HTG Grand East, Ltd. v. Fla. Hous. Fin. Corp. and Beacon at Creative Vill. Phase II Partners, Ltd.*, Case No. 23-0670BID (Fla. DOAH May 8, 2023; Fla. Hous. Fin. Corp. June 12, 2023) (failure to attach a signed Sewer Form was not a minor irregularity that could be waived, even when the metadata embedded in the pdf document submitted to the agency did bear the individual’s signature.).

89. The undersigned concludes that the error here by Cardinal Pointe—the omission of a required and material disclosure—is not the type of error that should be considered a minor irregularity. *See* Fla. Admin Code. R. 67-60.008.

90. As Button credibly testified, this error resulted in the omission of material information required by the RFA and created uncertainty regarding whether the terms of the RFA had been met.

91. Also, if Florida Housing accepted this type of error, Cardinal Pointe would enjoy a competitive benefit not enjoyed by other applicants that complied with the RFA terms. It also adversely impacts the interests and goals of Florida Housing to fairly and consistently administer its programs.

92. As alluded to by Button in her testimony, excusing Cardinal Pointe’s omission could start Florida Housing down the slippery slope in which mandatory requirements in RFAs cease to be mandatory, and applicants would lose confidence that the terms of the RFA are being fairly and consistently applied.

93. In the above scenario, applicants for future RFAs would be left wondering whether eligibility items are actually material requirements demanding compliance or whether the failure of their competitors to comply with such requirements would lead to their ineligibility.

94. Accordingly, based on the facts in the record, Archway has demonstrated by a preponderance of the evidence that Florida Housing's decision finding Cardinal Pointe's application eligible for funding was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, Archway has met its burden of proving that Florida Housing's decision to award funding to Cardinal Pointe is contrary to Florida Housing's RFA specifications, rules or policies, or its governing statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order finding that:

- (a) MHP Sarasota I, Ltd.'s application remains eligible for funding under the RFA, but has not attained the Proximity Funding Preference;
- (b) Hermosa NFTM 41, III, Ltd.'s application remains eligible for funding under the RFA but has not attained the Proximity Funding Preference; and
- (c) Cardinal Pointe, LLC's application is deemed ineligible for funding under the RFA.

DONE AND ENTERED this 1st day of September, 2023, in Tallahassee, Leon County, Florida.



ROBERT L. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 2023.

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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.