STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG OAK VALLEY, LLC,

Petitioner,

FHFC Case No. 2019-032BP
DOAH Case No. 19-2275BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HARMONY PINEWOOD, LLC; and NORTON COMMONS, LTD.,

Intervenors.

_______________________________________/

FOUNTAINS AT KINGS POINTE LIMITED PARTNERSHIP,

Petitioner,

FHFC Case No. 2019-034BP
DOAH Case No. 19-2276BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_______________________________________/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on August 2, 2019.

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
[signature] / DATE: 8/5/19

Petitioners HTG Oak Valley, LLC ("HTG Oak Valley") and Fountains at Kings Pointe Limited Partnership ("Fountains") and Intervenors Harmony Pinewood, LLC ("Harmony Pinewood") and Norton Commons, Ltd., ("Norton Commons") were Applicants under Request for Applications 2018-110, Housing Credit Financing for Affordable Housing Developments Located in Medium Counties (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On September 6, 2018, Florida Housing Finance Corporation ("Florida Housing") issued the RFA, which solicited applications to compete for an allocation of low-income housing credit funding. On March 22, 2019, Florida Housing posted notice of its intended decision to select ten applicants for funding including Norton Commons, and Harrison Parc, Ltd., ("Harrison Parc"). Petitioners HTG Oak Valley and Fountains, along with Harmony Pinewood and HTG Spring, LLC ("HTG Spring"), were deemed eligible, but not selected for funding.

HTG Gulf, LLC ("HTG Gulf"), HTG Spring, HTG Oak Valley, and Fountains timely filed formal written protests and petitions for administrative proceedings. Several other applicants filed notices of appearances in the challenges. Ultimately, HTG Gulf and HTG Spring voluntarily dismissed their respective petitions.

The ALJ granted an unopposed motion to consolidate this proceeding with The Vistas at Fountainhead Limited Partnership v. Florida Housing Finance Corp.,

DOAH Case No. 19-2328BID (the "Vistas Protest"), for hearing only. The three consolidated cases were scheduled for final hearing on June 3 and 4, 2019. On May 29, 2019, Harmony Pinewood filed a Notice of Appearance/Motion to Intervene, which, despite being untimely, was granted with limitations.

The final hearing took place as scheduled in Tallahassee, Florida, before Administrative Law John G. Van Laningham (the "ALJ") at the Division of Administrative Hearings ("DOAH") with all parties present. After hearing on June 6, 2019, Norton Commons and HTG Oak Valley filed a Joint Notice of Voluntary Dismissal of Specific Issues. In the joint notice, Norton Commons voluntarily dismissed its objection to HTG Oak Valley's proximity to a medical facility, and HTG Oak Valley voluntarily dismissed its protest relating to the sufficiency of Norton Commons' disclosure of principals. Since those issues were voluntarily, neither the Recommended Order nor this Final Order will address those matters.

After consideration of the oral and documentary evidence presented at hearing, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on July 16, 2019. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ determined that Florida Housing's proposed action in determining HTG Spring, Harrison Parc, and Fountains eligible for funding was clearly erroneous and contrary to competition, and that Harmony Pinewood's Proximity Points should be reduced

to 8.5, which results in selecting HTG Oak Valley for funding and deselecting Wildwood Preserve Senior Living, Application Number 2019-335C, for funding.

On July 23, 2019, HTG Oak Valley filed an exception to the Recommended Order and Fountains filed numerous exceptions to the Recommended Order. On July 29, 2019, Florida Housing filed a Response to HTG Oak Valley's exception and Fountains' exceptions. Also, on July 29, 2019, HTG Oak Valley filed a response to Fountains' exceptions. Copies of the Exceptions and Responses are attached as Exhibits B, C, D and E.

HTG Oak Valley's Exception to Finding of Fact 12

1. HTG Oak Valley filed an exception to a portion of Finding of Fact 12 of the Recommended Oder.

2. After a review of the record, the Board finds that portion of Finding of Fact 12 is not supported by competent substantial evidence and should be modified as follows:

> 12. HTG Oak Valley protests the award of 3.5 Grocery Store proximity points to Harmony Pinewood's application, asserting that the score was based on an erroneously reported distanced of one-half mile. HTG Oak valley urges that this error not be treated as a minor irregularity; that the distance in question be corrected to 0.51 miles in accordance with the RFA's directions concerning rounding; and that Harmony Pinewood's Grocery Store-related proximity points be reduced to 3.0 to conform to the revised DLP-to-service distance. This would bring Harmony Pinewood's total proximity score down to 8.5, rendering Harmony Pinewood ineligible for the Proximity Funding Preference. FHFC agrees with HTG Oak Valley.

3. The Board accepts HTG Oak Valley's exception to Finding of Fact 12.

<u>Fountains' Exceptions to Findings of Fact 17, 20, 21, and 25</u>

4. Fountains filed exceptions to Findings of Fact 17, 20, 21, and 25 of the Recommended Order.

5. After a review of the record, the Board finds that Findings of Fact 17, 20, 21, and 25 are supported by competent substantial evidence and the Board rejects the exceptions to the Findings of Fact in those paragraphs.

<u>Fountains' Exception to Finding of Fact 26</u>

6. Fountains filed an exception to Finding of Fact 26 of the Recommended Order.

7. After a review of the record, the Board finds that a portion of Finding of Fact 26 is not supported by competent substantial evidence and should be modified as follows:

> 26. Unlike the Equity Proposal, the Chase Letter, if not the last word on the subject, at least sheds some light on the timing of the crucial milestone, i.e., "permanent loan closing." Although the Chase Letter is full of escape clauses and does "not represent a commitment" or "an offer to commit," the document nevertheless outlines the terms for the closing of the proposed construction and permanent loans. The proposed terms call for the payment of a $10,000 Conversion Fee at permanent loan closing and impose preconditions for the conversion from the construction loan to the permanent loan, which include a requirement that there have been "90% economic and physical occupancy for 90 days." No evidence was presented as to the meaning of this language~~, but the term "physical occupancy" is clear and unambiguous—and it plainly happens after receipt of a final certificate~~

~~of occupancy, which, under the RFA, is the end point of the construction phase~~.

8. The Board accepts Fountains' exception to Finding of Fact 26 as modified herein.

Fountains' Exceptions to Findings of Fact 27, 28, 29, 30, and 31

9. Fountains filed exceptions to Findings of Fact 27-31 of the Recommended Order.

10. After a review of the record, the Board finds that Findings of Fact 27, 28, 29, 30, and 31 are supported by competent substantial evidence and the Board rejects the exceptions to the Findings of Fact in those paragraphs.

Fountains' Exception to Finding of Fact 32

11. Fountains filed exception to Finding of Fact 32 of the Recommended Order.

12. After a review of the record, the Board finds that Finding of Fact 32 is reasonable and is supported by competent substantial evidence and the Board rejects the exception to Finding of Fact 32.

Fountains' Exceptions to Conclusions of Law 38-46

13. Fountains filed exceptions to Conclusions of Law 38-46 of the Recommended Order.

14. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 38 through 46 of the Recommended Order.

15. After a review of the record, the Board finds that Conclusions of Law 38-46 are reasonable and supported by competent substantial evidence.

16. The Board rejects the exceptions to Conclusions of Law 38-46 of the Recommended Order.

<u>Fountains' Exception to Conclusion of Law 47</u>

17. Fountains filed an exception to Conclusion of Law 47 of the Recommended Order.

18. The Board finds that it has substantive jurisdiction over the issues presented in Paragraph 47 of the Recommended Order.

19. After a review of the record, the Board finds that the Conclusion of Law as modified below is as or more reasonable than Conclusion of Law 47 in the Recommended Order and is supported by competent substantial evidence.

20. The Board modifies Conclusion of Law 47 as follows:

> 47. The internal inconsistency in the Equity Proposal stems from the Pay-In Schedule. As a preliminary matter, FHFC and Fountains argue that, because the RFA does not require an equity proposal to include a detailed timetable, the Pay-In Schedule is mere surplusage that can and should be ignored. This is not a persuasive argument. First, the premise is only trivially true. The RFA does not specifically require an equity pay-in schedule, but it *does* instruct that an equity proposal be attached to the application. ~~So, whatever is in the equity proposal must be submitted—that is the important requirement. In that sense, therefore, the RFA *did* require the submission of the Pay-In Schedule, as it was part of the Equity Proposal.~~

21. Accordingly, the Board accepts the exception to Conclusion of Law 47 as modified above.

Fountains' Exceptions to Conclusions of Law 48-51, 54 and 56

22. Fountains filed exceptions to Conclusions of Law 48, 49, 50, 51, 54, and 56 of the Recommended Order.

23. The Board finds that it has substantive jurisdiction over the issues presented in Conclusions of Law 48-51, 54 and 56 of the Recommended Order.

24. After a review of the record, the Board finds that Conclusions of Law 48-51, 54 and 56 are reasonable and supported by competent substantial evidence.

25. The Board rejects the exceptions Conclusions of Law 48-51, 54 and 56 of the Recommended Order.

Fountains' Exception to Conclusion of Law 57

26. Fountains filed an exception to Conclusion of Law 57 of the Recommended Order.

27. The Board finds that it has substantive jurisdiction over the issues presented in Paragraph 57 of the Recommended Order.

28. After a review of the record, the Board finds that the Conclusion of Law as modified below is as or more reasonable than Conclusion of Law 57 in the Recommended Order and is supported by competent substantial evidence.

29. The Board modifies Conclusion of Law 57 as follows:

> 57. Regardless of whether the foregoing reasoning is persuasive, it is neither irrational nor clearly erroneous, provided the premise behind it is correct. The underlying premise is that, in determining conformity, FHFC may use its best judgment to ascertain the most reasonable meaning of ~~an~~ <u>materially</u> uncertain or unclear response. For the reasons that follow, however, it is concluded that this premise is clearly erroneous and contrary to competition.

30. Accordingly, the Board accepts the exception to Conclusion of Law 57 as modified above.

Fountains' Exceptions to Conclusions of Law 58 and 59

31. Fountains filed exceptions to Conclusions of Law 58 and 59 of the Recommended Order.

32. The Board finds that it has substantive jurisdiction over the issues presented in Conclusions of Law 58 and 59 of the Recommended Order.

33. After a review of the record, the Board finds that Conclusions of Law 58 and 59 are reasonable and supported by competent substantial evidence.

34. The Board rejects the exceptions Conclusions of Law 58 and 59 of the Recommended Order.

Fountains' Exceptions to Conclusions of Law 60-62

35. Fountains filed an exception to Conclusions of Law 60, 61, and 62 of the Recommended Order.

36. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 60-62 of the Recommended Order.

37. After a review of the record, the Board finds that the Conclusions of Law as modified below is as or more reasonable than Conclusions of Law 60, 61, and 62 in the Recommended Order and is supported by competent substantial evidence.

38. The Board modifies Conclusions of Law 60-62 as follows:

60. ~~Ambiguity is nonresponsive because Florida Administrative Code Rule 67-60.008 says so. That rule defines the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." An ambiguous response by its very nature creates uncertainty that the response is conforming; absent such uncertainty, the issue of ambiguity would not surface.[17]~~ Rule 67-60.008 defines the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." This rule makes clear that a material ambiguity in a response cannot be waived as a minor irregularity unless the uncertainty can be reasonably eliminated by looking elsewhere in the application.

61. ~~Rule 67-60.008 makes clear that a material ambiguity, that is, one which creates *any* uncertainty that the terms and requirements of the RFA have been met, is an irregularity and *not* a minor one at that. Such an irregularity is otherwise known as a material variance or substantial deviation. By excluding material ambiguities from the subset of errors known as minor irregularities, FHFC's own rule, by necessary implication, classifies an ambiguity involving material information as a substantial deviation from the specifications, for deficiencies in a response or bid are either minor (and waivable) or material (and nonwaivable); there is no middle ground. FHFC does not have the authority, under rule 67-60.008 or procurement law generally, to waive or correct a material variance.~~

62. ~~To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Fountains) urges be done in regard to the Equity Proposal, would be tantamount to "correcting" the irregularity by removing any uncertainty that the terms and requirements of the RFA have been satisfied. In and of itself, the resolution of ambiguity through reasonable interpretation is, of course, neither arbitrary nor illogical; indeed, such an approach is required in some contexts. But this is not a declaratory judgment suit or breach of contract action in circuit court between parties to a written instrument whose meaning is in dispute; it is an administrative competitive-selection protest. In this context, construing an ambiguous response violates rule 67-60.008 and for that reason is plainly and undeniably impermissible. Doing so would be clearly erroneous.~~

39. Accordingly, the Board accepts the exceptions to Conclusions of Law 60-62 as modified above.

Fountains' Exceptions to Conclusions of Law 63, and 70-78

40. Fountains filed exceptions to Conclusions of Law 63, 70, 71, 72, 73, 74, 75, 76, 77, and 78 of the Recommended Order.

41. The Board finds that it has substantive jurisdiction over the issues presented in Conclusions of Law 63 and 70-78 of the Recommended Order.

42. After a review of the record, the Board finds that Conclusions of Law 63 and 70-78 are reasonable and supported by competent substantial evidence.

43. The Board rejects the exceptions Conclusions of Law 63 and 70-78 of the Recommended Order.

Ruling on the Recommended Order

44. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence with the exception of Finding of Fact 26 which is modified as stated herein.

45. The Conclusions of Law set out in the Recommended Order are reasonable and supported by competent substantial evidence with the exception of Conclusions of Law 47, 57, 60, 61, and 62 which are modified as stated herein.

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

ORDER

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

A. 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 with the exception of Finding of Fact 26 which is modified as stated herein.

B. 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 with the exception of Conclusions of Law 47, 57, 60, 61, and 62 which are modified as stated herein.

C. 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) Harrison Parc, HTG Spring, and Fountains are ineligible for funding; b) Harmony Pinewood's proximity points are reduced to 8.5; c) HTG Oak Valley is selected for funding; and d) Wildwood Preserve Senior Living is not selected for funding.

DONE and ORDERED this 2nd day of August, 2019.

FLORIDA HOUSING FINANCE CORPORATION

By:
Chair

Copies to:

Hugh R. Brown, General Counsel
Hugh.Brown@floridahousing.org

Betty Zachem, Assistant General Counsel
Betty.Zachem@floridahousing.org

Marisa Button, Director of Multifamily Allocations
Marisa.Button@floridahousing.org

Jesse Leon, Director of Multifamily Development
Jesse.Leon@floridahousing.org

Maureen M. Daughton, Esq.
mdaughton@mmd-lawfirm.com

J. Stephen Menton, Esq.
smenton@rutledge-ecenia.com

Tana D. Storey, Esq.
tana@rutledge-ecenia.com

Craig D. Varn, Esq.
cvarn@mansonbolves.com

Amy Wells Brennan, Esq.
abrennan@mansonbolves.com

Michael G. Maida, Esq.
mike@maidalawpa.com

M. Christopher Bryant, Esq.
cbryant@ohfc.com

Brian Waterfield
bwaterfield@timsheldevelopment.com

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

HTG OAK VALLEY, LLC,

Petitioner,

vs. Case No. 19-2275BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HARMONY PINEWOOD, LLC; AND
NORTON COMMONS, LTD.,

Intervenors.
_______________________________/
FOUNTAINS AT KINGS POINTE
LIMITED PARTNERSHIP,

Petitioner,

vs. Case No. 19-2276BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_______________________________/

RECOMMENDED ORDER

These cases came before Administrative Law Judge John G. Van Laningham for final hearing on June 3 and 4, 2019, in Tallahassee, Florida.

APPEARANCES

For HTG Oak Valley, LLC:

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
1725 Capital Circle Northeast, Suite 304
Tallahassee, Florida 32308

For Florida Housing Finance Corporation:

Betty Zachem, Esquire
Christopher D. McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

For Fountains at Kings Pointe Limited Partnership:

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32302-0551

For Harmony Pinewood, LLC:

Brian B. Waterfield
Timshel Development Group
310 South Dillard Street, Suite 135
Winter Garden, Florida 34787

For Norton Commons, Ltd.:

Craig D. Varn, Esquire
Manson Bolves Donaldson Varn, P.A.
106 East College Avenue, Suite 820
Tallahassee, Florida 32301

Amy Wells Brennan, Esquire
Manson Bolves Donaldson Varn, P.A.
109 North Brush Street, Suite 300
Tampa, Florida 33602

STATEMENT OF THE ISSUES

The issues in this protest are whether either or both of Respondent's intended actions in dispute——namely, (i) deeming one application eligible for funding despite the existence of reasonable grounds for uncertainty as to whether the amount of capital the applicant's equity proposal states will be invested during construction is sufficient to cover development costs; and (ii) awarding another applicant a number of proximity points based on information in its application that was later discovered to be mistaken——are contrary to governing statutes, administrative rules, or the specifications of the solicitation; and, if so, whether the erroneous action or actions are contrary to competition, clearly erroneous, or arbitrary or capricious.

PRELIMINARY STATEMENT

On September 6, 2018, Respondent Florida Housing Finance Corporation ("FHFC") issued Request for Applications 2018-110 for the purpose of awarding low-income housing tax credits. On March 22, 2019, FHFC announced its intent to select ten applicants for funding, including Norton Commons, Ltd. ("Norton Commons"), and Harrison Parc, Ltd. ("Harrison Parc"). Petitioners HTG Oak Valley, LLC ("HTG Oak Valley"), and Fountains at Kings Pointe Limited Partnership ("Fountains") were deemed eligible, but not selected for funding.

HTG Oak Valley; HTG Gulf, LLC ("HTG Gulf"); HTG Spring, LLC ("HTG Spring"); and Fountains timely filed Notices of Protest followed by Petitions for Formal Administrative Hearing. All petitions were referred to the Division of Administrative Hearings ("DOAH"), where the undersigned consolidated the four cases. After a pre-hearing conference on May 6, 2019, the final hearing was scheduled to commence on May 31, 2019, in Tallahassee, Florida. Prior to hearing, HTG Spring and HTG Gulf filed notices of voluntary dismissal. Those cases were severed, and the undersigned relinquished jurisdiction over them to FHFC, leaving the consolidated cases numbered 19-2275BID and 19-2276BID (the "2018-110 Protests") at DOAH.

On May 24, 2019, FHFC filed an unopposed motion to consolidate the 2018-110 Protests with The Vistas at Fountainhead Limited Partnership v. Florida Housing Finance Corp., DOAH Case No. 19-2328BID (the "Vistas Protest"), for hearing only, which was granted. The three consolidated cases were scheduled for final hearing together on June 3 and 4, 2019. On May 29, 2019, Harmony Pinewood, LLC ("Harmony Pinewood"), whose substantial interests are being determined in the 2018-110 Protests, filed a Notice of Appearance/Motion to Intervene, which, despite being untimely, was granted with limitations.

The parties entered into a detailed Joint Pre-hearing Stipulation, which was filed on May 30, 2019. A Supplement to

the Joint Pre-hearing Stipulation was filed on May 31, 2019, outlining the various funding scenarios that might result, depending on the outcome of these proceedings. To the extent relevant, the stipulated facts have been incorporated herein.

The final hearing took place as scheduled, with all parties present. All parties presented the testimony of Marisa Button, FHFC's Director of Multifamily Programs. Norton Commons presented the testimony of James Dyal. Brian Waterfield testified on behalf of Harmony Pinewood. Fountains called as witnesses David Urban of RBC Capital Markets and Scott Deaton, a principal of Fountains. Joint Exhibits 1 through 12 were received into evidence. HTG Oak Valley's Exhibits 1 through 6 and Norton Commons' Exhibits 1 through 3 were admitted as well. FHFC offered no additional exhibits.

On June 6, 2019, Norton Commons and HTG Oak Valley filed a Joint Notice of Voluntary Dismissal of Specific Issues. In the joint notice, Norton Commons voluntarily dismissed its objection to HTG Oak Valley's claimed proximity to a medical facility, and HTG Oak Valley voluntarily dismissed its protest relating to the sufficiency of Norton Commons' disclosure of principals. This Recommended Order will not address those matters.

The three-volume transcript was filed on June 18, 2019. All parties timely filed Proposed Recommended Orders, which were considered in preparing this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

1. FHFC is the housing credit agency for the state of Florida whose responsibilities include the awarding of low-income housing tax credits, which developers use to finance the construction of affordable housing. Tax credits are distributed pursuant to a competitive process similar to a public procurement that starts with FHFC's issuance of a request for applications.[1/]

2. On September 6, 2018, FHFC issued Request for Applications 2018-110 (the "RFA"). Applications were originally due on October 23, 2018, but this deadline was extended to December 4, 2018.

3. FHFC received 191 applications in response to the RFA, through which FHFC seeks to award housing credits worth up to approximately $14.3 million for developments that will be located in medium counties. A Review Committee was appointed to evaluate the applications and make recommendations to FHFC's Board of Directors (the "Board").

4. Pursuant to the ranking and selection process outlined in the RFA, applicants were evaluated on eligibility items and were awarded points for other items. The eligibility items

included Submission Requirements, Financial Arrearage Requirements, and a Total Development Cost Per Unit Limitation requirement. To be eligible for funding, an application must meet all of the eligibility items. A Funding Test in the RFA provides that "[a]pplications will be selected for funding only if there is enough funding available to fully fund the Eligible Housing Credit Request Amount."

5. The Review Committee found 181 applications eligible (95 percent of the total), deemed ten applications ineligible, and selected ten applications for recommendation to the Board for funding. At a meeting on March 22, 2019, the Board approved the Review Committee's eligibility and funding recommendations. That same day, FHFC notified all applicants that the Board had approved the staff recommendations. The notice, which was posted on FHFC's website, listed the many eligible applicants along with the handful of eligible applicants that had been chosen for an intended award of housing credits. Among the putative successful applicants were Norton Commons and Harrison Parc.[2/] Though deemed eligible, HTG Oak Valley, Harmony Pinewood, and Fountains were not recommended for funding.

6. Harmony Pinewood. Harmony Pinewood timely submitted an application requesting an allocation of housing credits for an 86-unit housing development in Brevard County. FHFC determined that Harmony Pinewood's application was eligible for an award of

housing credits but did not preliminarily select Harmony Pinewood for funding. In evaluating Harmony Pinewood's application, FHFC found that the applicant had earned enough proximity points to qualify for the Proximity Funding Preference, which gives Harmony Pinewood an advantage in the ranking over other applicants who failed to qualify for the preference.

7. Applicants earn proximity points based on the distance between their Development Location Point ("DLP")[3/] and the Transit Service or Community Service they select. The closer the applicant's DLP is to the corresponding Transit or Community Service, the more proximity points the applicant will receive. As an eligible Community Service, an applicant might choose a Grocery Store, Public School, Medical Facility, or Pharmacy.

8. The RFA required applicants to "state[] [their respective DLPs] in decimal degrees, rounded to at least the sixth decimal place." Harmony Pinewood selected latitude 28.041319 and longitude -80.615026 as the coordinates for its DLP.

9. As a Community Service, Harmony Pinewood identified a Grocery Store, Thrifty Specialty Produce, located at 2135 Palm Bay Road Northeast, Palm Bay, Florida 32905, latitude 28.035489, longitude -80.610050. The RFA instructed applicants to round up the distance between the DLP and selected service to the nearest

hundredth of a mile. Harmony Pinewood's application declared the distance between its DLP and Thrifty Specialty Produce to be exactly one-half of a mile.

10. The RFA required applicants to obtain a minimum of 7.0 proximity points to be eligible for funding. Applicants needed to earn 9.0 or more proximity points to be entitled to the Proximity Funding Preference. During the evaluation, FHFC does not independently calculate any distances based on the coordinates provided by applicants, but instead awards points based on the distances stated in the applications, which it accepts as true. The distance of 0.50 miles entitled Harmony Pinewood to an award of 3.5 proximity points for its Grocery Store, which contributed to the applicant's total proximity score of 9.0.

11. Based on the coordinates provided in Harmony Pinewood's application, however, the distance between its DLP and Thrifty Specialty Produce is, in fact, 0.51 miles when rounded up to the nearest hundredth of a mile, as Brian Waterfield, testifying at hearing on behalf of Harmony Pinewood, admitted. According to Mr. Waterfield, Harmony Pinewood had intended to enter "28.041**2**19" rather than "28.041**3**19" as the latitude coordinate for its DLP but made a typographical error. He claimed that if the latitude had been entered correctly

as "28.041219," then the distances shown in Harmony Pinewood's application would be correct.

12. HTG Oak Valley protests the award of 3.5 Grocery Store proximity points to Harmony Pinewood's application, asserting that the score was based on an erroneously reported *distance* of one-half mile. HTG Oak Valley urges that this error be treated as a minor irregularity; that the distance in question be corrected to 0.51 miles in accordance with the RFA's directions concerning rounding; and that Harmony Pinewood's Grocery Store-related proximity points be reduced to 3.0 to conform to the revised DLP-to-service distance. This would bring Harmony Pinewood's total proximity score down to 8.5, rendering Harmony Pinewood ineligible for the Proximity Funding Preference. FHFC agrees with HTG Oak Valley.

13. Harmony Pinewood contends that the error in its application was not in the reported *distance* but rather in the DLP *latitude coordinate*. Harmony Pinewood urges that this error be treated as a minor irregularity; that the latitude in question be corrected to 28.041219 in accordance with the applicant's intent; and that the initial scoring decision to award Harmony Pinewood 3.5 Grocery Store-related proximity points be upheld.

14. The problem with Harmony Pinewood's position is that no one reviewing *the information provided within the application*

could discover the alleged typographical error in the DLP latitude coordinate except Harmony Pinewood itself. In contrast, any party *using the coordinates stated in the application* could attempt to verify the accuracy of the reported distance between Harmony Pinewood's DLP and Thrifty Specialty Produce.

15. Taking this a step further, the longitude and latitude coordinates of a DLP constitute the numerical expression of a subjective decision on the part of the applicant, a value judgment which is not falsifiable, despite the apparent exactitude of the figures. This is because the DLP is, by definition, "a single point selected by the Applicant on the proposed Development site that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development." Fla. Admin. Code R. 67-48.002(34) (emphasis added). There are, in other words, no right or wrong DLPs, only compliant and noncompliant DLPs. Harmony Pinewood's DLP, as described in its application, satisfies rule 67-48.002(34), and thus is a responsive, conforming, compliant DLP; there is nothing facially or inherently irregular about it.

16. The selection of a DLP is, moreover, a *competitive* decision because the chosen location directly affects the number of proximity points to which an application may be entitled. It

is a decision that makes an application more or less competitive relative to the other applications. In this respect, selecting a DLP is analogous to deciding upon a price to bid on a contract. Imagine a second-ranked bidder claiming that it had meant to bid $28,041,219 instead of $28,041,319, where $100 would make the difference between winning and losing. Unless there were clear evidence in the bid that the lower price had been intended, there would be no practical distinction whatsoever between "correcting" the supposed clerical error and "amending" the bid based on extrinsic evidence submitted post decision. The latter is clearly prohibited. See § 120.57(3)(f), Fla. Stat; cf. Fla. Admin. Code R. 67-60.009(4).

17. Because post-deadline amendments to an application based on extrinsic evidence are impermissible, an applicant's subjective competitive decisions must be deemed both *final* as of the application deadline, and *fully expressed* within the four corners of the application. Thus, it should be rare for an alleged error in the expression of a competitive decision to be deemed a minor irregularity. To make such a finding of minor irregularity in an exceptional situation, two necessary (but perhaps not sufficient) conditions would have to be met: (i) the alleged error would need to be reasonably apparent to anyone on the face of the application and (ii) the intended statement, free of error, would need to be unmistakably

expressed somewhere in the application. So, for an example, recall the previous hypothetical but assume, as additional facts, that the bid price of $28,041,319 is necessarily the product of a unit price ("*a*") times a certain number of units ("*b*"), and that both *a* and *b* are clearly stated in the bid. If $a \times b$ = $28,041,219 instead of $28,041,319, then someone other than the applicant would be able to discover the mathematical or clerical error in the bottom-line price quote, and it would be fairly clear from the face of the bid that $28,041,219 was the intended price. Such an error might be correctible in the agency's discretion.[4/]

18. That is not the situation here. The coordinates of Harmony Pinewood's DLP appear only once in its application. Because of the rounding involved, moreover, the "true" coordinates cannot be derived from the stated distance of 0.50 miles. Unlike the product of *a* times *b*, which can be only one number, there are multiple DLP longitude-latitude pairs that correspond to the stated distance of 0.50 miles——or, at a minimum, the evidence fails to rule out such diversity. The only way for anyone besides Harmony Pinewood to know that the DLP latitude "should have been" 28.041219 is to hear it from Harmony Pinewood.

19. Under these circumstances, the undersigned determines that the DLP coordinates in Harmony Pinewood's application must

be considered the true and correct, full and final expression of the applicant's decision to select that particular location for its DLP. Therefore, the irregularity in Harmony Pinewood's application is not the stated DLP latitude; it is the stated distance between the DLP and the Grocery Store, which should be 0.51 miles instead of 0.50 miles. Because the RFA requires an award of 3.0 proximity points for a distance of 0.51 miles, and because the distance irregularity does not otherwise render Harmony Pinewood's application nonresponsive, the correct, and only nonarbitrary, solution to the problem is for FHFC to reduce the number of Grocery Store proximity points awarded to Harmony Pinewood's application, from 3.5 as intended, to 3.0.

20. Fountains. Fountains submitted an application requesting an allocation of housing credits for a proposed 120-unit housing development in Flagler County. FHFC determined that Fountains was eligible for an award of housing credits but did not preliminarily select the Fountains application for funding. HTG Oak Valley protests FHFC's intended decision to deem Fountains eligible for funding, alleging that Fountains' application is materially nonresponsive——and thus should be rejected as ineligible——for failing clearly to state that an amount of equity sufficient to cover the anticipated development costs would be invested in the project prior to construction completion.

21. The RFA requires that an applicant must submit, as part of its application, a Development Cost Pro Forma detailing both the anticipated costs of the proposed development as well as the anticipated funding sources for the proposed development. In order to demonstrate adequate funding, the Total Construction Sources (including equity proceeds/capital contributions and loans), as shown in the pro forma, must equal or exceed the Total Development Costs reflected therein. During the scoring process, if a funding source is not considered or is adjusted downward, then Total Development Costs might wind up exceeding Total Construction Sources, in which event the applicant is said to suffer from a construction funding shortfall (deficit). If an applicant has a funding shortfall, it is ineligible for funding.

22. The Development Cost Pro Forma does not allow applicants to include in their Total Construction Sources any equity proceeds to be paid after construction completion. Instead, the applicant must state only the amount of "Equity Proceeds Paid Prior to Completion of Construction." The pro forma defines "Prior to Completion of Construction" as "Prior to Receipt of a Final Certificate of Occupancy."

23. The RFA requires, as well, that an equity proposal letter be included as an attachment to the application. For a

housing credit equity proposal to be counted as a source of financing, it must meet the following criteria:

- Be executed by the equity provider;
- 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.

(Emphasis added).

24. As Attachment 14 to its application, Fountains submitted an equity proposal letter from RBC Capital Markets ("RBC") executed by David J. Urban (the "Equity Proposal"). In relevant part, the Equity Proposal states:

Anticipated Total Equity to be provided:	$15,510,849*
Equity Proceeds Paid Prior to or simultaneous to closing the construction financing:	$2,481,736* (min. 15%)
Equity Proceeds to be Paid Prior to Construction Completion:	$8,686,075
Pay-In Schedule:	Funds available for Capital Contributions #1: $2,481,736* be paid prior to or simultaneously with the closing of the construction financing.

Funds available for Capital Contribution #2 $2,326,627* prior to construction completion.

Funds available for Capital Contribution #3 $3,877,712* concurrent with permanent loan closing.

Equity Proceeds Paid at Lease Up $5,428,797*

Equity Proceeds Paid at 8609 $1,395,977*

*All numbers rounded to nearest dollar.

25. The Pay-In Schedule in the Equity Proposal refers to "permanent loan closing" as the moment when Capital Contribution #3 will be made "available." The Equity Proposal does not, however, define or discuss permanent loan closing, and, to the point, does not specify when it is expected to occur. Of potential relevance in this regard is a letter from JP Morgan Chase Bank, N.A. (the "Chase Letter"), which is included as Attachment 16 to Fountains' application.

26. Unlike the Equity Proposal, the Chase Letter, if not the last word on the subject, at least sheds some light on the timing of the crucial milestone, i.e., "permanent loan closing." Although the Chase Letter is full of escape clauses and does "not represent a commitment" or "an offer to commit," the document nevertheless outlines the terms for the closing of the proposed construction and permanent loans. The proposed terms

call for the payment of a $10,000 Conversion Fee at permanent loan closing and impose preconditions for the conversion from the construction loan to the permanent loan, which include a requirement that there have been "90% economic and physical occupancy for 90 days." No evidence was presented as to the meaning of this language, but the term "physical occupancy" is clear and unambiguous——and it plainly happens after receipt of a final certificate of occupancy, which, under the RFA, is the end point of the construction phase.

27. HTG Oak Valley argues that the Pay-In Schedule casts doubt on whether the entire amount stated in the Equity Proposal's line-item entry for "Equity Proceeds to be Paid Prior to Construction Completion" ($8,686,075) will be paid before the final certificate of occupancy is issued. According to HTG Oak Valley, the Pay-In Schedule shows that the third capital contribution will be paid *after* construction completion because the second capital contribution, which is the earlier of the two, is due to occur "prior to construction completion." Thus, HTG Oak Valley contends that Fountains' construction financing sources should be reduced by $3,877,712, thereby creating a construction financing shortfall and rendering the Fountains application ineligible for funding.

28. HTG Oak Valley finds support for its position in an unlikely place, namely, FHFC's intended rejection of the

application that The Vistas at Fountainhead Limited Partnership ("Vistas") submitted in response to Request for Applications 2019-105 ("RFA 2019-105"). That proposed agency action is relevant because Vistas had attached to its application an equity proposal letter from RBC whose terms and conditions——other than the dollar amounts and (obviously) the applicant's name——are identical to those of the Equity Proposal for Fountains. During the evaluation of applications under RFA 2019-105, which took place at around the same time as the review of applications pursuant to the RFA at issue here, FHFC's scorer determined that Capital Contribution #3 should be excluded from the amount of equity proceeds to be paid prior to construction completion, with the result that the Vistas application was deemed ineligible for funding due to a funding shortfall.

29. The Vistas and Fountains applications, competing in separate solicitations, were scored by different FHFC staff members. The evaluator who scored the financial section of Vistas' application sought advice concerning her interpretation of the Equity Proposal, discussing the matter with FHFC's Director of Multifamily Programs and legal counsel at a reconciliation meeting that occurred before the Review Committee convened; this evaluator encountered no resistance to her plan of making a downward adjustment to Vistas' equity funding. The

evaluator of the Fountains application did not likewise discuss her scoring rationale and thus received no input or guidance from FHFC's management. Ultimately, however, because each scoring determination belongs to the Review Committee member herself or himself, inconsistent or conflicting results are possible, as these cases demonstrate.

30. Once in litigation, FHFC discovered that it had reached opposite scoring conclusions based on the same material facts. In these proceedings and in the Vistas Protest, FHFC has stressed its desire to take a consistent approach to the identical Equity Proposals. To that end, in the Vistas Protest, FHFC has reversed course and argued that, contrary to its intended action, the Equity Proposal provided by Vistas fully satisfies the requirements of RFA 2019-105; there is no funding shortfall; and Vistas' application is eligible and should be selected for funding. Deeming Vistas' application eligible would achieve consistency, of course, by giving favorable treatment to the applications of both Fountains and Vistas, which are similarly situated as to the Equity Proposal. Naturally, HTG Oak Valley urges that consistency be found the other way around, through the rejection of both applications.

31. In support of its decision to change positions on Vistas' Equity Proposal, FHFC relies upon the following premises, which are equally applicable to the determination of

Fountains' substantial interests: (i) the Equity Proposal plainly specifies, in the line-item entry for "Equity Proceeds to be Paid Prior to Construction Completion," the amount to be paid prior to construction completion; (ii) permanent loan closing does not necessarily have to occur after construction completion; and (iii) the information contained in the Pay-In Schedule is not information that is required by RFA 2019-105 (or the RFA at issue in this case).

32. The disputes arising from the scoring of the Equity Proposal are solvable as matters of law and therefore will be addressed below.

CONCLUSIONS OF LAW

33. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. See also Fla. Admin. Code R. 67-60.009. FHFC's decisions in this competitive process determine the substantial interests of HTG Oak Valley, Fountains, Harmony Pines, and Norton Commons, each of whom therefore has standing to participate in this proceeding.

34. Pursuant to section 120.57(3)(f), the burden of proof rests with the party opposing the proposed agency action, see State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998), which must establish its allegations by a preponderance of the evidence. Dep't of

Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

35. Section 120.57(3)(f) spells out the rules of decision applicable in bid protests. In pertinent part, the statute provides:

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

36. The undersigned has discussed elsewhere, at length, the meaning of this statutory language, the analytical framework established thereby, and the levels of deference to be afforded to the agency's preliminary findings and conclusions. See, e.g., Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Adm. Hear. LEXIS 3, 41-55 (Fla. DOAH Jan. 2, 2014). It is not necessary to review these principles here.

37. The decision whether to "count" or "exclude" all or part of a funding source is at heart a scoring function. Instead of awarding points, the evaluator in effect assigns a grade of "pass" (count the funds) or "fail" (exclude/reduce the

funds). Scoring decisions are committed to the agency's discretion and thus are accorded the highest deference on review. In a protest governed by section 120.57(3), therefore, the undersigned must be reluctant to upset a scoring decision and even less willing, should it be necessary to invalidate a score, to re-score the improperly rated item.

38. The parties have paid considerable attention to Rosedale Holding v. Florida Housing Finance Corp., FHFC Case No. 2013-038BP (Recommended Order May 12, 2014; FHFC June 13, 2014). They dispute whether that case is distinguishable or precedential as regards the scoring of Capital Contribution #3 as described in the Equity Proposal. There are enough similarities between Rosedale and the cases at hand to warrant a closer look at the earlier decision.

39. In his Recommended Order in Rosedale (the "Rosedale RO"), the hearing officer made the following findings of fact:

> 30. In response to [the requirement in the RFA that an equity proposal "state the proposed amount of equity to be paid prior to construction completion,"] 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."

Rosedale RO at 12-13.

40. Regarding the equity proposal at issue in Rosedale, the hearing officer concluded as follows:

> 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.

Rosedale RO at 35-36.

41. To summarize, in the relevant part of Rosedale, the hearing officer upheld the intended score of "fail" given to the proposed second capital contribution from SunTrust Community

Capital, LLC. ("STCC"), a score which had been based on the Term Sheet's plain disclosure that the payment was not going to occur "prior to construction completion" as that term was defined *in the applicable pro forma*. Whether an intended score of "*pass*" vis-à-vis the second contribution likewise would have survived review is somewhat unclear; applying the deferential standard of review applicable to scoring decisions, the hearing officer in Rosedale seems to have stopped short of concluding that FHFC was *required* not to consider the second capital contribution, although he implied as much. Because the intended decision to treat the Fountains application as eligible for funding raises the unexamined question of whether the agency committed reversible error in counting (rather than excluding) a capital contribution, Rosedale is, if not inapposite, not quite "on all fours" either, at least as to Fountains.

42. Rosedale is more analogous to the Vistas Protest, since the intended action in Rosedale was, as it is in the Vistas Protest, to exclude a proposed capital contribution deemed to be payable after the completion of construction. There is a factual distinction between the cases, however. The Term Sheet at issue in Rosedale unambiguously conditioned the payment of the second capital contribution on events that clearly would take place after "Receipt of Final Certificate of Occupancy," which, according to the Development Cost Pro Forma

in Rosedale, was the milestone that would signal the completion of construction. In contrast, the Equity Proposals for both Vistas and Fountains unambiguously condition the availability of Capital Contribution #3 on the simultaneous occurrence of "permanent loan closing" without clearly stating when that event will take place in relation to Receipt of a Final Certificate of Occupancy, which the applicable pro forma (as in Rosedale) designates as the end point of construction.

43. The Rosedale RO arguably veils this distinction because it concludes that the STCC Term Sheet——by stating "generically" that a total of $2.1 million would be paid prior to construction completion, while also specifying that nearly $1 million of that sum would not be paid until after the receipt of final certificates of occupancy——suffered from "an internal inconsistency." The reasonable inference, however, is that the parties to the Term Sheet (STCC and Palm Village) had reached a private agreement regarding the meaning of the term "prior to completion of construction." The Term Sheet was presumably internally consistent with the parties' intent that $2.1 million would be paid "prior to construction completion" *as they used and mutually understood that term*. In any event, the Term Sheet was not facially or patently ambiguous because the term "construction completion" is not literally or exclusively synonymous with "Receipt of a Final Certificate of Occupancy"

but could be understood and used by the parties to a consensual agreement to mean, e.g., "permanent loan closing," among other possible events, so that, as between the parties, any event occurring prior to permanent loan closing would be deemed by contract to have taken place prior to construction completion.[5/]

44. Palm Village's problem was that it and STCC's definition of "prior to construction completion" differed from the definition of that same term as set forth in the Development Cost Pro Forma, and it was that latter definition, of course, which determined whether a funding source could be considered as part of an applicant's construction financing. The bottom line, therefore, is that although the Term Sheet was *internally consistent*, it nevertheless unambiguously showed that a substantial portion (about $1 million) of the STCC equity investment would *not* be paid "prior to construction completion" under the external, but *controlling*, definition of that term.

45. Once this is recognized, it becomes clear that, in Rosedale, FHFC had *no choice* but to deduct, from the applicant's total construction financing, the second capital contribution, which the equity proposal clearly and unambiguously stated would not be made until after events that could not occur "prior to construction completion" as that term was defined in the request for applications, because the agency's discretion, though broad,

does not authorize it to act in contravention of the solicitation's plain language.

46. In sum, then, a careful reading of Rosedale reveals it to be distinguishable from the Vistas and Fountains matters, because while the Equity Proposals, unlike the STCC Term Sheet, truly *are* internally inconsistent (as will be discussed below), they do *not* (again unlike the Term Sheet) clearly and unambiguously state that Capital Contribution #3 will not be paid "prior to construction completion" as that term is defined in the RFA. But neither, however, do they clearly and unambiguously state that Capital Contribution #3 *will* be paid "prior to construction completion" as that term is defined in the RFA.

47. The internal inconsistency in the Equity Proposal stems from the Pay-In Schedule. As a preliminary matter, FHFC and Fountains argue that, because the RFA does not require an equity proposal to include a detailed timetable, the Pay-In Schedule is mere surplusage that can and should be ignored. This is not a persuasive argument. First, the premise is only trivially true. The RFA does not specifically require an equity pay-in schedule, but it *does* instruct that an equity proposal be attached to the application. So, whatever is in the equity proposal must be submitted——that is the important requirement.

In that sense, therefore, the RFA *did* require the submission of the Pay-In Schedule, as it was part of the Equity Proposal.

48. Second, and more important, whether required or not, the Pay-In Schedule contains language bearing on the timing of certain capital contributions, which is specifically relevant because of the instruction to "[s]tate the proposed amount of equity to be paid prior to construction completion," and is generally relevant, in any event, as part of the application. FHFC cannot pick and choose which language of the application to consider and which to overlook; that would be arbitrary and contrary to competition. The upshot is that the Pay-In Schedule cannot be ignored simply because it creates uncertainty that otherwise would not exist.

49. The Pay-In Schedule prescribes the timetable for RBC's proposed equity contributions in chronological order from the first payment to the fifth (and final) payment. Each installment (or funding window for the second and third contributions, respectively) is tied to——and scheduled to occur *before/at*, *before*, or *at*——a milestone in the life cycle of the project as follows: #1 - (before/at) closing of construction financing; #2 - (before) construction completion; #3 - (at) permanent loan closing; #4 - (at) lease up; and #5 - (at) filing of IRS Form 8609 (after the building is placed in service).

50. Regardless of how "construction completion" is defined, the most natural reading of this schedule is that Capital Contribution #3 is scheduled to be made *after* construction completion, since Capital Contribution #2 covers the entire period during which construction is ongoing.[6/] If Capital Contribution #3 were intended to be made while construction continued; that is, if the second and third contributions were intended to overlap, the Pay-In Schedule clearly fails to express such intention in an ordinary fashion. Rather, this normally would be communicated either by tying Capital Contribution #*2* to permanent loan closing and making Capital Contribution #*3* available prior to construction completion (reversing the order of these two installments), or by combining the two contributions into one installment, with the sum being available prior to construction completion.

51. If the Pay-In Schedule were the only language in the application pertaining to the amounts to be paid prior to construction completion, the undersigned would not hesitate to conclude, based on the schedule's fairly straightforward timetable, that the amount of equity to be paid prior to construction completion is the sum of Capital Contribution #1 and Capital Contribution #2. But the Pay-In Schedule does not stand alone; within just the Equity Proposal, it is attended by the line item stating that an amount equal to the sum of the

first *three* capital contributions will be "Paid Prior to Construction Completion." As used in the line item, the term "Prior to Construction Completion" must be synonymous with "prior to construction completion" as used in the Pay-In Schedule, given the identity of the language. Consequently, the line item can only be understood as meaning that Capital Contribution #3 is payable prior to the completion of construction, even though the Pay-In Schedule states that Capital Contribution #3 is payable after the completion of construction. Hence the internal inconsistency.

52. Ordinarily, when a legal dispute arises from such an inconsistency in the terms of an instrument, resolution requires the judge to engage in a two-step analysis. The first step is to determine "whether the language at issue is either clear or ambiguous." Famiglio v. Famiglio, 44 Fla. L. Weekly D1260, 2019 Fla. App. LEXIS 7204, at *17 n.3 (Fla. 2d DCA May 10, 2019). This is a question of law. Id. If the terms at issue are ambiguous, then, in step two, the judge must apply the canons of construction and interpret the uncertain language, as a matter of law. See, e.g., Holmes v. Fla. A&M Univ., 260 So. 3d 400, 404 (Fla. 1st DCA 2018). In some instances, it is permissible for the judge to receive and consider parol or extrinsic evidence bearing on the parties' intent, to assist in the interpretation. E.g., Famiglio, 2019 Fla. App. LEXIS 7204,

at *7-8. In such cases, the parties' intent becomes a material fact, but the interpretation of the instrument remains a matter of law.

53. It is tempting to travel this familiar path and simply construe the Equity Proposal, reaching a legal conclusion as to its best meaning. But this is not an ordinary legal dispute arising from competing interpretations of a writing. For one thing, the parties to the respective Equity Proposals under consideration are not in doubt about what they meant to say therein, nor is there a dispute between these parties regarding their rights and obligations under the proposals.

54. Moreover, if the rights and obligations of the parties to the Equity Proposals were relevant to the question at hand——which, not to forget, is whether FHFC should consider Capital Contribution #3 as part of each applicant's total construction funding——it is not clear that FHFC would be empowered to determine such rights and obligations, because jurisdiction to interpret a contract for that purpose is vested exclusively in the judiciary. Eden Isles Condo. Ass'n v. Dep't of Bus. & Prof'l Reg., 1 So. 3d 291, 293 (Fla. 3d DCA 2009). Fortunately, the meaning of the Equity Proposals, as between the parties to those proposals, is irrelevant to the instant dispute.

55. What FHFC *does* have the authority (and, indeed, the duty) to determine is whether an application meets the

requirements of the RFA. This includes the power to decide whether an equity proposal states an amount of equity to be paid prior to construction completion that (together with other funding) is sufficient to cover the projected costs of development as set forth in the pro forma. Such an exercise might seem to involve the same analysis as a straightforward contract interpretation. There is a difference, however, between FHFC's setting out to determine the intended meaning of contractual terms to which private parties have given their mutual assent, on the one hand; and, on the other, FHFC's deciding whether the parties' written instrument, as measured against the specifications of the RFA, complies with the *agency's* requirements.

56. FHFC and Fountains advocate an interpretive analysis that blurs this distinction; they would construe the Equity Proposal to show that the letter states an adequate amount of equity to be paid prior to construction completion. Their argument goes something like this. There is no legal or other mandate that prohibits permanent loan closing from occurring prior to construction completion. To be sure, permanent loans typically close after the completion of construction, but that is not necessarily the sequence of events in every instance. Thus, the Pay-In Schedule does not clearly and definitively eliminate the possibility that Capital Contribution #3 might be

paid prior to construction completion. Because the relevant line item clearly states an amount of equity to be paid prior to construction completion that obviously includes the third capital contribution, the parties must have intended that the permanent loan would close prior to construction completion—which, while admittedly uncommon, is not unheard of. The Equity Proposal should be interpreted as reflecting such intent, and, as so construed, be deemed to state a sufficient amount of equity to cover the anticipated development costs, in conformity with the RFA.

57. Regardless of whether the foregoing reasoning is persuasive, it is neither irrational nor clearly erroneous, provided the premise behind it is correct. The underlying premise is that, in determining conformity, FHFC may use its best judgment to ascertain the most reasonable meaning of an uncertain or unclear response. For the reasons that follow, however, it is concluded that this premise is clearly erroneous and contrary to competition and therefore must be rejected.

58. To begin, it will be helpful to recall that the RFA specification at issue here is the requirement that an equity proposal must "[s]tate the amount of equity to be paid prior to construction completion." An equity proposal that failed to state *any* amount of pre-completion equity, even if the number were zero, would be nonresponsive; unless the applicant's other

financing sources were sufficient, its application would have to be deemed ineligible. In contrast, an equity proposal that states *any* amount of pre-completion equity is facially responsive; however, it is responsive in this regard only to the extent the amount of equity to be paid prior to construction completion is *clearly* stated. To the extent the amount of pre-completion equity is unclear, the equity proposal must be considered nonresponsive, because an ambiguously expressed amount is no different, in the context of a competitive evaluation, from an unexpressed amount.

59. Why is this so? For starters, ambiguity is nonresponsive because the relevant RFA provision does not permit uncertain responses. It should go without saying that the RFA plainly requires the proposed amount of pre-completion equity to be *clearly* stated. Presumably no one would seriously suggest that the specification should be read to mean: "State *at least ambiguously* the proposed amount of equity," etc. Yet, a fatal flaw in FHFC and Fountains' position is that it implicitly revises the specification to include an unstated proviso to the effect that *ambiguous or uncertain responses will be given the most reasonable interpretation*. This is a clearly erroneous construction of the plain language of the RFA.

60. Ambiguity is nonresponsive because Florida Administrative Code Rule 67-60.008 says so. That rule defines

the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." An ambiguous response by its very nature creates uncertainty that the response is conforming; absent such uncertainty, the issue of ambiguity would not surface.[7/]

61. Rule 67-60.008 makes clear that a material ambiguity, that is, one which creates *any* uncertainty that the terms and requirements of the RFA have been met, is an irregularity——and *not* a minor one at that. Such an irregularity is otherwise known as a material variance or substantial deviation. By excluding material ambiguities from the subset of errors known as minor irregularities, FHFC's own rule, by necessary implication, classifies an ambiguity involving material information as a substantial deviation from the specifications, for deficiencies in a response or bid are either minor (and waivable) or material (and nonwaivable); there is no middle ground. FHFC does not have the authority, under rule 67-60.008 or procurement law generally, to waive or correct a material variance.

62. To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Fountains) urges be done in regard to the Equity Proposal, would

be tantamount to "correcting" the irregularity by removing any uncertainty that the terms and requirements of the RFA have been satisfied. In and of itself, the resolution of ambiguity through reasonable interpretation is, of course, neither arbitrary nor illogical; indeed, such an approach is required in some contexts. But this is not a declaratory judgment suit or breach of contract action in circuit court between parties to a written instrument whose meaning is in dispute; it is an administrative competitive-selection protest. In this context, construing an ambiguous response violates rule 67-60.008 and for that reason is plainly and undeniably impermissible. Doing so would be clearly erroneous.

63. Finally, even if not otherwise prohibited (which it is), resolution of ambiguity by the agency would be contrary to competition at both ends of the spectrum. At the front end, FHFC's willingness to "correct" uncertainties in an application at a minimum would remove a salutary disincentive to sloppy draftsmanship, and might even encourage applicants to use studied ambiguity on occasion for competitive advantage. Apart from that, rare is the sentence so clearly written as to foreclose a semantic dispute if the stakes are high enough. The suggestion that material ambiguity should be handled as a minor irregularity smells like litigation fuel.

64. The bigger threat to competition, however, comes at the back end. An uncertain response inherently presents wiggle room for interpretation, and if FHFC were able to exercise the power to construe, it would have opportunities to show favoritism and, conversely, to act on bias. To be clear, the undersigned is not suggesting that FHFC has done anything of the sort or otherwise improper here——to the contrary, the agency has handled these cases in a most professional and competent manner, and its conduct has been beyond reproach. Nor does the undersigned mean to imply that FHFC is somehow likely to behave improperly in the future. Prohibiting the interpretation of an ambiguous response should be viewed as a prophylactic measure rather than a remedial or punitive one.

65. To elaborate, there are grounds for genuine confusion about what would constitute the proper purpose of an interpretation in this context. In a civil action where the parties to an agreement dispute its meaning, the court is required to construe ambiguous language so as to bring it in line with the parties' intent. E.g., Charbonier Food Servs., LLC v. 121 Alhambra Tower, LLC, 206 So. 3d 755, 758 (Fla. 3d DCA 2016). In that context, in other words, the goal of the interpretative process is to give the writing the meaning its subscribers intended it to have. The court does not have a free hand in choosing between reasonable interpretations.

66. In a competitive selection, however, similar reliance upon the parties' intent would be problematic. This is because, it may reasonably be presumed that the applicant always intends its response to conform to the RFA and maximize the applicant's chances of being selected for funding. Where the terms of an equity proposal are at issue, as here, the reasonable presumption again would be, in all cases, that the applicant and the potential investor intended the proposal to satisfy fully all applicable provisions of the RFA. Thus, if the parties' intent were to be the determinative factor, as in civil litigation, the rule, as a practical matter, whether explicitly acknowledged or not, would be that an ambiguous response must be construed in favor of the applicant. By *rewarding* ambiguity, however, such a rule, it may be confidently predicted, would have unintended consequences unfavorable to competition.

67. The undersigned believes, therefore, that if ambiguous responses are to be tolerated, they must not be favored, which means that the use of the parties' (or applicant's) intent as the polestar for interpretation should be discouraged. But while this would solve one problem, it would create another. If FHFC were not required to construe an ambiguous response pursuant to the parties' intent, what limiting principle would take its place to assist the agency in choosing which reasonable interpretation to adopt? Where a writing supports two or more

reasonable interpretations (the definition of ambiguity), could it ever be said that the agency's selection of one reasonable interpretation over another was arbitrary, capricious, or clearly erroneous?

68. Without the parties' intent for guidance, the agency would have no choice but to resort to seeking the "most reasonable" interpretation, which is basically what FHFC advocates should be done here. But there is little "limitation," if any, in this principle, for, like beauty, reasonableness is not quantifiable. Allowing FHFC to adopt the "most reasonable" interpretation of an ambiguous response would undermine confidence in the integrity of the competition because, no matter how responsibly and ethically the agency carried out this task, the possibility of favoritism could never be completely eliminated, and suspicions of such impropriety inevitably would arise. For these reasons, the undersigned concludes that, however good the agency's intentions, its exercise of the power of interpretation to shore up an ambiguous application would open a Pandora's Box and hence must be deemed contrary to competition.

69. Having concluded that material ambiguity in a response is a substantial, nonwaivable deviation, the question as to both the Fountains and Vistas applications boils down to whether an amount of equity to be paid prior to construction completion

sufficient to cover projected construction costs was clearly and unambiguously stated. As discussed above, the question of whether a written instrument is ambiguous is a matter of law. Further, although an agency's exercise of interpretive authority over an ambiguous instrument might raise separation-of-powers concerns, there should be no similar objection to a quasi-judicial officer's determination of ambiguity when necessary to the performance of an agency's clear statutory responsibilities. See Eden Isles, 1 So. 3d 291 at 293.

70. Because this proceeding is governed by section 120.57(3), the question arises whether FHFC's preliminary decision regarding the ambiguity of a response, to the extent it has made such a decision, is entitled to deferential review. The undersigned concludes that ambiguity, like historical facts, must be determined de novo in an administrative bid protest. This conclusion is based on the grounds that (i) the identification of ambiguity does not require the application of special rules tailored for competitive selection or procurement processes but, rather, is a function of general law; and, relatedly, (ii) determining whether an instrument is ambiguous does not fall within FHFC's substantive jurisdiction or call upon any agency's special expertise.

71. "An agreement is ambiguous if as a whole or by its terms and conditions it can reasonably be interpreted in more

than one way." Nationstar Mortg. Co. v. Levine, 216 So. 3d 711, 715 (Fla. 4th DCA 2017). For reasons previously discussed, the Equity Proposal is burdened with an internal inconsistency regarding the amount of capital contributions to be paid to Fountains prior to the completion of construction. Because of this inconsistency, the proposal can reasonably be interpreted as providing that Fountains would be paid $8,686,075 prior to construction completion, and it also can reasonably be interpreted as calling for the payment of $4,808,363 in pre-completion equity. In and of itself, therefore, the Equity Proposal is ambiguous in this regard.

72. This does not necessarily mean that the application as a whole must be deemed ambiguous as to the amount of pre-completion equity Fountains would receive. Conceivably, some other part of the application might make clear that the permanent loan likely would close prior to construction completion. Were that the case, the internal inconsistency would disappear, and it might be concluded that the *application* unambiguously states that Fountains would be paid $8,686,075 prior to construction completion.

73. As it happens, there is another part of the application that speaks to the timing of permanent loan closing, namely the Chase Letter. The Chase Letter sets forth the terms on which the bank might make a construction loan to Fountains,

which would be converted to a permanent loan later on. Although the Chase Letter clearly states that it does not constitute a binding commitment, it is nevertheless the only source of information in the application concerning the timing of a potential permanent loan closing. Moreover, notwithstanding the qualifications and caveats contained therein, the Chase Letter offers to make a construction loan to Fountains of approximately $10,941,689, which is precisely the amount of first mortgage financing shown in the applicant's Development Cost Pro Forma.

74. FHFC and Fountains argue that the Chase Letter is irrelevant and should not be considered. Their arguments might be persuasive if this were a civil action between Fountains and RBC in which the terms of the Equity Proposal were in dispute. But, of course, this is not such a case, and the ultimate question here is not whether the Equity Proposal per se is ambiguous/nonresponsive, but whether the application as a whole is ambiguous/nonresponsive. It would be arbitrary and capricious not to consider the entirety of the application in determining this issue.[8/] The Chase Letter might not be part of the Equity Proposal, but it *is* part of the application.

75. The Chase Letter prescribes certain conditions that must occur prior to conversion of the construction loan into a permanent loan. One of these conditions is "physical occupancy for 90 days." Because it is highly unlikely that three months

of physical occupancy would take place prior to the receipt of a final certificate of occupancy, the Chase Letter is inconsistent (to say the least) with the notion that permanent loan closing would occur prior to construction completion. Consequently, the Chase Letter does not erase the ambiguity appearing on the face of the Equity Proposal; to the contrary, it underscores the uncertainty arising from the proposal's internal inconsistency regarding the timing of Capital Contribution #3.

76. It is concluded that the Fountains application is ambiguous on the question of whether Capital Contribution #3 would be paid prior to construction completion. This ambiguity creates uncertainty that the amount of $3,877,712 would be available for construction funding. Because uncertainty makes a response nonconforming to the extent thereof, FHFC erred in "passing" this amount; the evaluator should have excluded this portion of the total equity proceeds from the applicant's construction funding.

77. The decision to count the ambiguously stated portion of the applicant's equity proceeds must have been based either on the premise (i) that the Equity Proposal clearly states that the third, $3,877,712 Capital Contribution would be paid prior to construction completion, which is incorrect as a matter of law; or, alternatively, (ii) that the proposal is best understood as stating that the $3,877,712 Capital Contribution

would be paid prior to construction completion, a conclusion which necessarily would have followed from an interpretive analysis the engaging in of which was clearly erroneous, contrary to competition, or both. A conclusion drawn from a false or faulty premise is irrational, no matter how well reasoned, and thus arbitrary or capricious. Therefore, the intended action of counting the third capital contribution as a construction funding source must be set aside.

78. Since the decision on funding sources is binary and one option has been eliminated, there is no room for discretion in the re-scoring. The third capital contribution must be excluded from the total construction funding available for the project. This results in a funding shortfall, at least on paper, which is all that matters at this juncture.[9/] The nominal funding shortfall, in turn, renders Fountains' application ineligible for selection.

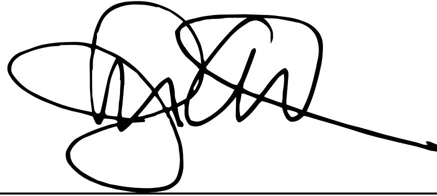
79. Turning to Harmony Pinewood, FHFC's intended decision cannot stand, as the agency itself realizes, because Harmony Pinewood's application, after fixing the factual misstatement regarding the DLP-to-service distance so that it correctly states 0.51 miles instead of one-half mile, fails to earn enough proximity points to be given the Proximity Funding Preference. Harmony Pinewood's argument that the alleged typographical error in the DLP latitude coordinate is the *real* minor irregularity

must be rejected; amending the latitude coordinate to conform to Mr. Waterfield's testimony, as Harmony Pinewood urges, would be in violation of rule 67-60.009(4) and contrary to competition, and such action, therefore, cannot be recommended.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order rescinding the intended award to Harrison Parc due to ineligibility; finding HTG Spring and Fountains ineligible for funding; and reducing Harmony Pinewood's proximity points to 8.5, which requires the cancelation of its Proximity Funding Preference. It is further RECOMMENDED that, as a result of the foregoing final actions, HTG Oak Valley be selected for funding under RFA 2018-110 and Wildwood Preserve Senior Living (not a party to this litigation) be deselected for funding.

DONE AND ENTERED this 16th day of July, 2019, in Tallahassee, Leon County, Florida.



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

Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2019.

ENDNOTES

1/ Much like a request for proposals or an invitation to bid, a request for applications solicits competitive responses from qualified developers. See Fla. Admin. Code R. 67-60.009(4) (A request for applications "shall be considered a 'request for proposal.'").

2/ After being selected for funding, Harrison Parc discovered that, as of the Application Deadline, there was no Transit Service located at the coordinates provided in its application. As a result, Harrison Parc conceded that it was not entitled to receive any Transit Service points, and that, without such points, it had failed to achieve the minimum proximity score of 7.0 points to be considered eligible. On June 3, 2019, at Harrison Parc's request, the undersigned entered an Order Dropping Harrison Parc As a Party. The funding intended for Harrison Parc will need to be reallocated.

3/ The term "development location point" is defined in Florida Administrative Code Rule 67-48.002(34).

[4/] It is always worth mentioning that just because an agency *may*, in its discretion, waive a minor irregularity does not mean that the agency *must* do so.

[5/] To be clear, while the parties to an equity proposal are free to define the term "prior to construction completion" however they choose for purposes of their agreement, even to the point of formulating a definition that others might consider "unreasonable," the parties are not free to define that same term for purposes of the RFA, as the hearing officer in Rosedale correctly concluded. FHFC is free to define "construction completion" as "Receipt of a Final Certificate of Occupancy," as it has done, and that is the definition which must be applied in evaluating equity proposals submitted in an application for funding in response to the RFA.

[6/] It is logically possible to read the schedule as meaning that Capital Contribution #3 will be available *at* construction completion, but this must be regarded as, at best, a strained interpretation.

[7/] An ambiguous writing is one whose meaning is uncertain. Thus, the term "uncertainty," as used in rule 67-60.008, plainly *includes* ambiguity in the legal sense, i.e., language which is susceptible to two or more reasonable interpretations. Whether "uncertainty" is *limited to* such ambiguity need not be decided here. The discussion in this Recommended Order focuses on semantic ambiguity because that is the nature of the case. Nothing herein is intended to imply a conclusion that "uncertainty" for purposes of the rule is indistinguishable from "ambiguity" as the latter term is defined in the common law.

[8/] Strictly speaking, it is the equity proposal that the RFA requires must state the amount of equity to be paid prior to construction completion. The sufficiency of this amount, however, depends upon sum total of construction funding available to the applicant from all sources, including, e.g., financing obtained through construction loans, as shown in the Development Cost Pro Forma. Ultimately, therefore, the responsiveness of the equity proposal cannot be determined without referring to other parts of the application.

[9/] The undersigned does not find, or need to find, that, if selected, Fountains would not, in fact, have enough money to construct the proposed development. In the real-world event,

the applicant most likely would have sufficient funding. In a competitive procurement, however, reality often takes a backseat to the *description* of reality contained in the proposal or application. While this can lead, as here, to regrettable results in individual cases, which is obviously undesirable, the alternative——inevitably, a fact-finding hearing conducted after the agency has announced its intended decision, to clarify or supplement the unartfully drafted application——would be far worse, and at any rate is prohibited under section 120.57(3)(f) and rule 67-60.009(4)("No submissions made after the Application deadline which amend or supplement the Application shall be considered.").

COPIES FURNISHED:

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

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

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Post Office Box 551
Tallahassee, Florida 32302-0551
(eServed)

Brian B. Waterfield
Timshel Development Group
310 South Dillard Street, Suite 135
Winter Garden, Florida 34787
(eServed)

Craig D. Varn, Esquire
Manson Bolves Donaldson Varn, P.A.
106 East College Avenue, Suite 820
Tallahassee, Florida 32301
(eServed)

Amy Wells Brennan, Esquire
Manson Bolves Donaldson Varn, P.A.
109 North Brush Street, Suite 300
Tampa, Florida 33602
(eServed)

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

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG OAK VALLEY, LLC,

Petitioner,   Case No. 19-2275BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_______________________________________/

FOUNTAINS AT KINGS POINTE LIMITED
PARTNERSHIP,

Petitioner,   Case No. 19-2276BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_______________________________________/

PETITIONER HTG OAK VALLEY, LLC'S
EXCEPTION TO RECOMMENDED ORDER

Petitioner, HTG Oak Valley, LLC ("HTG Oak Valley") files this exception to the Recommended Order entered in this proceeding by the Administrative Law Judge on July 16, 2019.

Introduction

Following a formal hearing a Recommended Order was issued in this case by Administrative law Judge ("ALJ") Van Laningham on July 16, 2019, recommending that a final order be entered finding that Florida Housing's initial scoring decisions for Harmony Pinewood,

LLC ("Harmony Pinewood") and Fountains at Kings Pointe Limited Partnership ("Fountains at Kings Pointe") were incorrect and that funding should have been awarded to HTG Oak Valley.

Standard of Review

Section 120.57 (1), Florida Statutes, addresses an agency's authority to modify Findings of Fact and Conclusions of Law in a Recommended Order. Concerning findings of fact, an "agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." 120.57(1)(l), Fla. Stat. Agencies have more flexibility to change Conclusions of Law. Section 120.57 (1)(l) provides in pertinent part:

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection of modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

Florida Housing has substantive jurisdiction over the Conclusions of Law relating to the process for awarding tax credits.

Exception 1 to Finding of Fact 12

HTG Oak Valley argues that Intervenor, Harmony Pinewood should only be entitled to 3.0 proximity points as opposed to 3.5. HTG Oak Valley takes exception to a portion of Finding of Fact 12 which provides in its entirety,

> 12. *HTG Oak Valley protests that award of 3.5 Grocery Store proximity points to Harmony Pinewood's application, asserting that the score was based on an erroneously reported distance of one-half mile. HTG Oak Valley urges that this error be treated as a minor irregularity; that the distance in question be corrected*

> *to 0.51 miles in accordance with the RFA's directions concerning rounding; and that Harmony Pinewood's Grocery Store related proximity points be reduced to 3.0 to conform to the revised DLP-to-service distance. This would bring Harmony Pinewood's total proximity score down to 8.5, rendering harmony Pinewood ineligible for the Proximity Funding preference. FHFC agrees with HTG Oak Valley.*

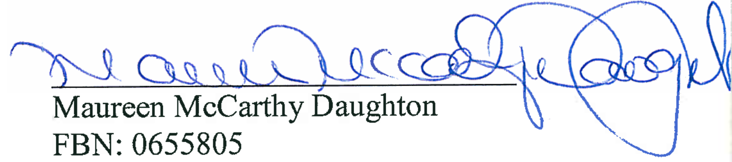
HTG Oak Valley did not argue that the error by Harmony Pinewood should be treated as a minor irregularity and there is no competent substantial evidence to support such a factual finding. A reading of paragraph 12 in its entirety makes it clear that this was merely a scrivener's error because "correcting the distance to 0.51 miles" and reducing Harmony Pinewood's Grocery Store related proximity points to 3.0 would only result if the error was *"not"* treated as a minor irregularity. Finding of Fact 12 should be modified as follows,

> *HTG Oak Valley protests that award of 3.5 Grocery Store proximity points to Harmony Pinewood's application, asserting that the score was based on an erroneously reported distance of one-half mile. HTG Oak Valley urges that this error **not** be treated as a minor irregularity; that the distance in question be corrected to 0.51 miles in accordance with the RFA's directions concerning rounding; and that Harmony Pinewood's Grocery Store related proximity points be reduced to_3.0 to conform to the revised DLP-to-service distance. This would bring Harmony Pinewood's total proximity score down to 8.5, rendering Harmony Pinewood ineligible for the Proximity Funding preference. FHFC agrees with HTG Oak Valley.*

Conclusion

For the reasons expresses, HTG Oak Valley respectfully requests that upon consideration of this exception, Florida Housing enter a Final Order that rejects the identified Finding of Fact and accepts the modification of Paragraph 12 as set forth herein.

FILED AND SERVED this 23rd day of July 2019.



Maureen McCarthy Daughton
FBN: 0655805
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE, Ste 304
Tallahassee, Fl 32308

Counsel for HTG Oak Valley, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail on the following persons this 23rd day of July 2019.

Betty Zachem, Esq.
Florida Housing Finance Corporation
227 N. Bronough Street, Ste 5000
Tallahassee, Florida 32301
Betty.Zachem@floridahousing.org

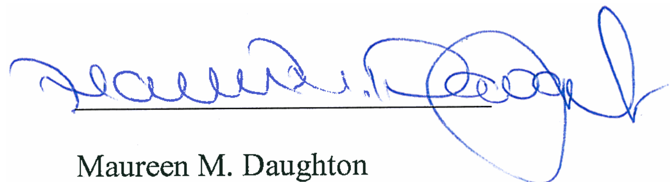
M. Christopher Bryant
Oertel, Fernandez, Bryant & Atkinson
PO Box 1110
Tallahassee, Florida 32302
Cbryant@ohfc.com

Craig D. Varn, Esq.
Manson Bolves Donaldson & Varn, P.A.
109 North Brush Street, Suite 300
Tampa, Florida 33602
Cvarn@MansonBolves.com

J. Stephen Menton, Esq
Rutledge Ecenia, P.A.
119 South Monroe Street, Ste 202
Tallahassee, Florida 32302-0551
Smenton@rutledge-ecenia.com

Tana D. Storey, Esq.
Rutledge Ecenia, P.A
119 South Monroe Street, Ste 202
Tallahassee, Florida 32302-0551
Tana@rutledge-ecenia.com

Brian B. Waterfield
Timshel Development Group
310 South Dillard Street, Suite 135
Winter Garden, Fl 34787
bwaterfield@timsheldevelopment.com



Maureen M. Daughton
Counsel for HTG Oak Valley, LLC

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG OAK VALLEY, LLC,

Petitioner, Case No. 19-2275BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HARMONY PINEWOOD, LLC,

Intervenor.
_______________________________/

FOUNTAINS AT KINGS POINTE LIMITED PARTNERSHIP,

Petitioner, Case No. 19-2276BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_______________________________/

PETITIONER, FOUNTAINS AT KINGS POINTE LIMITED PARTNERSHIP'S EXCEPTIONS TO THE RECOMMENDED ORDER

Petitioner, Fountains at Kings Pointe Limited Partnership ("Fountains"), pursuant to Section 120.57, Florida Statutes, and Rule 28-106.217, Florida Administrative Code, hereby submits its Exceptions to the Recommended Order ("RO") issued in this proceeding by the Administrative Law Judge ("ALJ") on July 16, 2019.

I. Introduction

In the RO, the ALJ has usurped Florida Housing's authority to interpret the provisions of the Request for Applications ("RFA") that it issued. Adoption of the recommendation of the ALJ would create an incentive for applicants in future requests for application to challenge Florida Housing's interpretations of its own RFA requirements, would impose significant additional burdens on the Florida Housing scorers in future funding rounds and will create more cost, uncertainty and litigation for developers who participate in the funding process in good faith. The Board should reject the RO's convoluted analysis and instead adopt the interpretation of the RFA requirements reflected in the preliminary scoring of Fountains' Application and thoughtfully explained by Marisa Button, Florida Housing Multi-Family Allocation Director.

Fountains timely submitted a responsive application to the RFA that was evaluated and scored by Florida Housing staff. Fountains received full points for its application based upon staff's evaluation. Fountains' lottery number would now place it in the funding range as a result of the withdrawal of other applications that were preliminarily funded but have subsequently withdrawn their requests. HTG Oak Valley is a competing applicant with a lottery number that places it behind Fountains based upon the scoring and ranking by the Florida Housing staff. The ALJ's RO would advance HTG Oak Valley in front of Fountains for funding purposes in contravention of the scoring by Florida Housing staff and the legal interpretation of the RFA requirements advanced by Ms. Button at the hearing. HTG Oak Valley presented no witnesses to support its challenge to the Fountains Application. Instead, HTG Oak Valley advanced legal arguments based upon its interpretation of the Equity Proposal Letter in Fountains' Application which contravenes the scoring by Florida Housing staff and the hearing testimony of Ms. Button that the Fountains Application met all of the RFA requirements. The ALJ incorrectly disregards

the interpretation of the RFA requirements advanced by Ms. Button on behalf of Florida Housing at the hearing. Instead, the ALJ embarked on his own interpretation of the RFA and the Equity Proposal Letter. In doing so, the RO contravenes the direct testimony and understanding of the parties to the Equity Proposal. The Board should affirm the preliminary scoring of Fountains Application and adopt the RFA interpretation incorporated in the preliminary scoring and explained by Ms. Button at the hearing.

II. Standard of Review

Section 120.57(1)(l), Florida Statutes, sets forth the standards which Florida Housing must follow in its consideration of the RO:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.
> . . .

§ 120.57(1)(l), Fla. Stat.

The issues before the Board in considering exceptions to the RO are whether the findings of fact are supported by competent substantial evidence and the correctness of the legal conclusions over which the agency has substantive jurisdiction. Florida Department of Transportation v. J.W.C. Company, 396 So. 2d 778 (Fla. 1st DCA 1981). The focus of this proceeding is whether Florida Housing's preliminary scoring and ranking of the Fountains Application was arbitrary,

capricious, clearly erroneous, contrary to statute or contrary to the RFA requirements. The Board's responsibility in this case is unfortunately complicated because many of the Findings of Fact in the RO are actually legal arguments rather than factual findings. In addition, the Conclusions of Law in the RO veer off into extraneous, esoteric legal issues that obscure the real purpose of the hearing.

Agencies have discretion in their treatment of conclusions of law if the conclusions fall within areas of the law or relate to the interpretation of rules over which the agency has substantive jurisdiction. §120.57(1)(l), Fla. Stat.; State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 610 (Fla. 1st DCA 1998). Within those areas, an agency may reject or modify conclusions of law as long as it states its reasons and finds that its substituted conclusions are at least as reasonable as those of the ALJ. §120.57(1)(l), Fla. Stat.

In DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957), the Florida Supreme Court defined competent substantial evidence as follows:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion . . . . In employing the adjective "competent" to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed . . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'

(internal citations omitted); see also Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856, 860 (Fla. 4th DCA 1997)

The Board can and should modify or reject those conclusions of law over which Florida Housing has substantive jurisdiction. See § 120.57(1)(l); State Contracting & Eng'g Corp. v. Dep't

of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998)(affirming final order in which the agency rejected ALJ's interpretation of agency's rule); see also generally Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 2001). The interpretation of the RFA requirements is a matter over which Florida Housing has substantive jurisdiction. When modifying or rejecting a conclusion of law, the Board should state with particularity the reasons for such modification or rejection and must make a finding that its substituted conclusions of law are as or more reasonable than the conclusions modified or rejected. See § 120.57(1)(l), Fla. Stat.

III. Written Exceptions to Findings of Fact in the RO

Petitioner filed the following written exceptions to those paragraphs denominated as Findings of Fact in the Recommended Order. In many instances, the paragraphs labeled as "Findings of Fact" are actually legal conclusions or interpretations which should be reviewed and considered based on the standards of review set forth in Section II above.

As noted in the specific Exception below, the Findings of Fact section of the RO includes extensive extraneous comments that are not based upon evidence in the record, unjustified and unsupported speculation regarding the reading of the Equity Proposal and future events which are not relevant at this stage of the application process. In many instances the paragraphs in the RO reflect an improper usurpation by the ALJ of the responsibility for interpreting the RFA requirements. Specifically, Fountains takes exception to paragraph Nos. 17, 20, 21, 25, 26, 27, 28, 29, 30 and 31 denominated as Findings of Fact in the RO.

Adoption of the RO would invite applicants in future application cycles to file challenges in order to seek an ALJ whose interpretation of the RFA requirements would contravene the Florida Housing scorers and Florida Housing's legal staff. The ALJ improperly substituted his opinion for that of Florida Housing as to what the RFA provisions require. Adoption of the RO

would represent a reversion back to the nit-picking days of the Universal Cycles where applicants were invited to go through competing applications with a fine tooth comb to find any potential issues that could be blown out of proportion to disqualify a competing applicant. Here, the ALJ acknowledges in footnote 9 that, notwithstanding all of the mental gymnastics set forth in the RO to artificially create an ambiguity in the Fountains Application, there really isn't any dispute that Fountains "most likely would have sufficient funding." That is all the RFA requires. Neither the Equity Proposal nor the Permanent Loan Proposal are firm commitment letters. The unrebutted evidence clearly established that, during the credit underwriting process, the details of the equity investment, including the exact terms of the payment schedule, will be finalized. (Tr. 157; 165; 244-245) Thus, the financing proposals in an application are only a confirmation that the development has been reviewed by qualified financial entities that are willing to provide the necessary funding. (T. 110-112) The RO improperly requires more from the Equity Proposal and permanent loan proposal letters than is set forth in the RFA requirements and Florida Housing's rules.

The ALJ unjustifiably dismisses the unrebutted testimony of the only two parties to the Equity Proposal, both of whom agree that, as expressly stated in the Equity Proposal, $8,686,075 of equity proceeds would be paid prior to construction completion. Both the author of the Equity Proposal (David Urban of RBC) and a representative of the developer (Scott Deaton) to whom the proposal was directed testified at the final hearing and unequivocally confirmed that, as expressly stated in the Equity Proposal, all $8,686,075 of equity delineated in the Development Cost Pro Forma would be paid prior to construction, the RO completely disregards this testimony as well as the conclusion of Florida Housing's scorer and its designated representative at the hearing to unnecessarily engage in a contorted analysis that unjustifiably concludes that there is a funding

shortfall in the Fountains Application. There is no shortfall. The RO attempts to defend the disregard of the parties' intent in order to substitute a tortured, protracted analysis of irrelevant details in the Proposals on the grounds that the Equity Proposals were submitted as part of a competitive procurement. However, at no point does the RO explain or describe any competitive advantage that Fountains purportedly gained by including an Equity Proposal that included a non-binding, unnecessary Pay-In Schedule.

The competent substantial evidence in the record does not support a Final Order deeming Fountains to be ineligible. See Gtech Corp. v. Dep't of Lottery, 737 So. 2d 615, 619 (Fla. 1st DCA 1999). Fountains has expended hundreds of thousands of dollars assembling and pursuing this funding. Its Application fully met all of the RFA requirements. The Board should enter a Final Order inviting Fountains into credit underwriting.

Exception to Finding of Fact ¶ 17

Fountain's takes exception to the legal interpretation that is embodied in this specific Finding. This Finding of Fact actually relates to the ALJ's analysis of the Harmony Pinewood Developer Location Point ("DLP"). However, this paragraph sets forth a test for determining when an alleged error in an application can be treated as a minor irregularity. The test set forth by the ALJ in this Finding of Fact is not expressly set forth in Florida Housing's Rule and simply represents the ALJ's interpretation of how it should be applied. Florida Housing should not bind itself to an interpretation that is not expressly delineated in Rule. . While Florida Housing may agree with the ALJ's conclusion that the DLP cannot be modified after an application is submitted, the flawed, additional language in this Finding could, if adopted, unduly restrict the discretion accorded to Florida Housing in evaluating applications in the future.

Exception to Finding of Fact ¶ 20

There is no competent substantial evidence to support the portions of this Finding of Fact which overstates the RFA requirements for an Equity Proposal. While this Finding of Fact is apparently intended to be a summary of the position advanced by HTG Oak Valley, the ALJ appears to be accepting a broad interpretation of the purpose and goal of the Equity Proposal. HTG Oak Valley and the ALJ improperly attempt to elevate the purpose of the Equity Proposal Letter to be more than it is intended to be. There is no requirement in the RFA or in Florida Housing's rules that the Equity Proposal has to "clearly state" that the equity "would be invested" as claimed by HTG Oak Valley. Instead, the Equity Proposal is simply an expression of interest by an established equity provider that it has reviewed the project and is interested in making an equity investment that meets the project needs. (Tr. 110-112) If adopted, this and other findings by the ALJ discussed below would effectively require developers in future application rounds to essentially secure a firm commitment letter which has never before been required, would be an undue burden on applicants and would significantly escalate the cost of submitting applications.

Exception to Finding of Fact ¶ 21

This paragraph purports to summarize the requirements of the RFA and, again, unjustifiably expands and distorts the purpose and intent of the Equity Proposal as well as the Development Cost Pro Forma that must be included with an Application. This Finding of Fact improperly characterizes the Development Cost Pro Forma as detailing the anticipated funding source to the proposed development. The Equity Proposal is not a binding commitment that will necessarily govern the terms of the development if funding is awarded. (Tr. 157; 244-245) The RFA requirements are simply that an equity proposal be included that addresses all of the items delineated expressly in the RFA. See, pp. 53-54 of the RFA. (Tr. 294-296) The RFA does not

require an actual commitment letter nor is there any specification that the developer will be required to use the Proposal and follow the exact terms in the Equity Proposal. Instead, as explained by Florida Housing's Director of Multi-family Allocations in her testimony at hearing, at this stage of the application process, the financing proposals are not binding and are simply intended to confirm an experienced financial institution has reviewed the proposed project and that funding will be available to the project if it is awarded housing credits. (Tr. 110-112) It is understood by Florida Housing as well as the applicants that many terms of the debt and equity financing and, even the identity of the equity and debt providers, will likely change if the development proceeds to credit underwriting. (Tr. 165-166)

The Development Cost Pro Forma in the Fountains Application expressly states that $8,686,075 in equity would be paid prior to construction completion and this exact amount is specifically set forth in the Equity Proposal from RBC. (Tr. 295-297) Thus, the RFA requirements have been met and the attempts by a competing applicant to create an unnecessary ambiguity based upon superfluous language contained in the Pay-In Schedule should be rejected. The Board's Final Order should confirm the preliminary scoring of Fountains' Application and adopt the testimony of Ms. Button that the Fountains Equity Proposal meets all the RFA requirements.

Exception to Finding of Fact ¶ 25

This Finding of Fact includes assumptions and speculation that are not supported by competent, substantial evidence in the record. The first sentence of this Finding indicates that the Pay-In Schedule in the Equity Proposal refers to permanent loan closing "as the moment when Capital Contribution #3 will be made 'available'." The Finding that the Equity Proposal refers to permanent loan closing "as the moment" when Capital Contribution #3 will be made available is not supported by the evidence. There is no limitation or requirement that Contribution #3 would

only be paid at a moment when a specific event, i.e., permanent loan closing, occurs. As Mr. Urban explained, RBC is and always had been ready to make $8,686,075 in equity available prior to construction completion as expressly stated in the proposal. (Tr. 296-297) Moreover, the unrefuted evidence established that there is no particular time when a permanent loan closing would have to occur. (Tr. 120; 166; 253)

The Equity Proposal has a specific line item stating that $8,686,075 in equity proceeds will be paid prior to construction completion." As Ms. Button, Florida Housing's representative at the hearing testified, the RFA does not require a more detailed payment schedule and the Equity Proposal submitted by Fountains meets all of the RFA requirements. It is only by making unwarranted assumptions and groundless speculation regarding the extraneous Pay-In Schedule that the RO claims an ambiguity so as to disregard the clear statement in the Equity Proposal that correlates directly to the Development Cost Pro Forma (which both confirm that $8,686,075 would be paid prior to construction completion).

The Final Order should be based on the unrefuted evidence which established that the Pay-In Schedule was surplus language that was not intended to qualify, modify or alter in any way RBC's express acknowledgement that all of the funds necessary to be paid prior to construction completion would be available. (T. 291; 298-299) There is nothing in the Equity Proposal that limits the funds to only being paid at the moment of a specific event such as permanent loan closing. The unrefuted testimony of Mr. Urban made it clear that funds would be available earlier if necessary. (Tr. 296; 298-299)

There is no factual basis for a competing applicant or the ALJ to impose an unsupported interpretation of the Equity Proposal to alter the intent of the parties to the Agreement. Furthermore, the RO's discussion of the potential relevance of the letter from JP Morgan Chase

Bank, N.A. (the "Chase Letter") is unwarranted and would impose new requirements on applicants and Florida Housing's scorers to ensure complete consistency between an equity proposal and a debt proposal even though the actual terms of those funding sources will not be determined until funding is actually awarded and the project is invited into credit underwriting. There is no basis in the RFA or Florida Housing's rules to impose this type of onerous burden on applicants or Florida Housing's scorers. It was erroneous and improper for the ALJ to revert to the Chase Letter to misconstrue the party's intent with respect to the Equity Proposal. The Equity Proposal from RBC made no reference to the Chase Letter and the undisputed testimony is that, as is typical for all developers, the signatory of the Equity Proposal was not provided with and never saw the Chase Letter. (Tr. 262; 293-294) Adoption of this Finding would create an undue burden on Florida Housing's scorers of future applications and will incentivize competing applicants to seek out irrelevant issues in proposals (which are not intended to be a delineation of final funding terms) to try to disqualify those ranked ahead of them. These sorts of fishing expeditions will be costly and time-consuming. The Board should reject these attempts to base funding decisions on extraneous issues.

Exception to Finding of Fact ¶ 26

This Finding inappropriately and unjustifiably seeks to interpret the Equity Proposal based upon the debt proposal from Chase. As set forth in the Exception to Findings of Fact 25 above, adoption of this finding is not supported by the RFA requirement or Florida Housing's rules and would set a dangerous precedent that would encourage litigation in future funding rounds. Moreover, there is no record evidence to support the statement in the RO that "physical occupancy" . . . "plainly happens after receipt of a final Certificate of Occupancy." There is simply no record evidence to support this assumption and it is irrelevant to the determination of whether the Equity

Proposal in the Fountains Application met the RFA requirements. The unrefuted testimony is that the conditions in the Chase Letter are irrelevant to the Equity Proposal from RBC. (Tr. 262; 293-294; 298-299) There is no reason or basis to consider the Chase Letter in determining whether the RBC Equity Proposal meets the requirements of the RFA and Florida Housing's rules.

Exception to Finding of Fact ¶ 27

Key aspects of this finding are not supported by competent, substantial evidence in the record. While this Finding seems to just be summarizing the arguments made by HTG Oak Valley, these legal arguments, which in many aspects are not supported by the evidentiary record in this proceeding, are relied upon in the Conclusions of Law in the RO to justify the ultimate recommendation. As set forth in the Exception to Finding of Fact 25, the Pay-In Schedule is not required by the RFA and does not modify or alter in any way the explicit provision that $8,686,075 of equity proceeds will be paid prior to construction completion. There is no record evidence to support the claim that the Pay-In Schedule shows that Capital Contribution #3 would only be paid "after" construction completion. There is also no basis in the record for the ALJ to substitute his interpretation of the RFA requirements for that of Florida Housing's scorer and Ms. Button. The attempt to artificially create a funding shortfall as it relates to the Fountains Application is based upon unsupported speculation as well as unnecessary interpretation of the Pay-In Schedule. Florida Housing's scorer and Ms. Button were correct in their position that the Equity Proposal meets all of the RFA requirements. Their conclusion is consistent with the unequivocal statement in the Development Cost Pro Forma that $8,686,075 in equity proceeds would be paid prior to construction completion.

Exception to Finding of Fact ¶ 28

This Finding is an irrelevant and unjustified attempt to reconcile the scoring of the Fountains Application with the scoring of the application filed by Vistas at Fountainhead ("Vistas"), in an entirely different RFA. Certainly, the desire for Florida Housing to be consistent in scoring between RFAs is understandable. But this desire for consistency cannot serve as a basis for unduly shifting the burden of proof in this particular case. In responding to Florida Housing's Motion to Consolidate this proceeding with the Vistas case, Fountains expressed its position that consolidation for hearing purposes should not impact on the burden of proof in this proceeding. While the ALJ acknowledged that reservation and has entered separate Recommended Orders in the two cases, he has improperly and unjustifiably relied upon the preliminary scoring in the Vistas case in analyzing the issues for Fountains. In doing so, he effectively and erroneously shifted the burden of proof off of HTG Oak Valley.

Neither the scorer of the Fountains Application nor the scorer of the Vistas Application testified at the hearing. Thus, there is no competent substantial evidence in the record as to the basis for the preliminary scores in either case. There is only hearsay testimony from Ms. Button who expressly set forth Florida Housing's interpretation based upon her review of all of the circumstances after the challenges were filed. (Tr. 113-118; 129-130; 165-166)

As explained by Ms. Button at the hearing, Florida Housing concluded that the Fountains' Equity Proposal met the RFA requirements and there is no funding shortfall. (Tr. 116-117; 165-166) This position was reached after review of the overall circumstances and the RFA requirements and was based upon the language in the Equity Proposal. (Tr. 113-118; 130; 165-166) There is no basis in law or fact for the ALJ to substitute his interpretation of the RFA for that of Florida Housing. This conclusion is particularly warranted with respect to Fountains which was

preliminarily deemed to have met all of the RFA requirements. There is no competent substantial evidence in the record to support a determination that the preliminary scoring of Fountains was arbitrary, capricious, clearly erroneous or contrary to the RFA specifications or contrary to statute. The similarity in the language between the Equity Proposals in the Vistas and Fountains Applications does not provide carte blanche to the ALJ to disregard the preliminary scoring of Fountains and impose his own interpretation which is contrary to the scorer of the Fountains Application. There is no basis in law or fact to conclude that the preliminary scoring decision related to Fountains was clearly erroneous, arbitrary, capricious or contrary to the RFA. The Board should reject the recommendation in the RO and adopt Florida Housing's litigation position.

Exception to Finding of Fact ¶ 29

This Finding is irrelevant to the issues to be resolved in this case and should be rejected. Similar to the Exception to Findings of Fact 28 above, the Board should conclude Finding 29 is based upon improper reliance on the preliminary scoring of the Vistas Application. Neither the scorer of the Vistas Application nor the scorer of the Fountains Application testified at the hearing. Nonetheless, the ALJ embarks on his own interpretation of the internal Florida Housing meeting with the Vistas scorer and speculates as to the intent of the Fountains scorer, none of which is supported by the record in this case and is contrary to the unrefuted testimony of Ms. Button. Moreover, there is no record evidence to support the ALJ's description of the meeting that took place with the evaluator of the Vistas Application as being a "reconciliation" meeting. The unrebutted testimony described the meeting as a "resource meeting" that served to provide the scorers with background information on issues they were not familiar with. (Tr. 114-115) As explained by Ms. Button in her testimony during the "resource meeting" with the scorer of the Vistas Application, Ms. Button made the determination to allow the scoring to proceed without

interference. (Tr. 114-115; 165-166) The Finding in the RO unjustifiably elevates that meeting to some sort of "reconciliation" which is then used by the ALJ to support the unwarranted substitution of his interpretation of the RFA for that of Florida Housing. The Board should reject this finding.

Exception to Finding of Fact ¶ 30

This Finding is similar to Finding of Fact 29 and Fountains incorporates its Exception to Findings of Fact 29 set forth above regarding the ALJ's improper disregard of the testimony of Ms. Button and his unwarranted substitution of speculation as to the basis for the preliminary scoring of Vistas which improperly shifted the burden of proof in this case. Without credible jurisdiction, the RO completely disregards the unchallenged testimony of Ms. Button that Florida Housing's attempt to reconcile the scoring between Vistas and Fountains was based upon a reasoned and justifiable analysis that was more detailed than the preliminary scoring of Vistas. This Finding should be rejected because it is not based on competent substantial evidence and it does not fully and accurately describe the process that Florida Housing went through in determining its litigation position. This Finding should also be rejected because it improperly usurps Florida Housing's authority to interpret its own RFA requirements.

Exception to Finding of Fact ¶ 31

This Finding purports to summarize Florida Housing's basis for its litigation position in the Vistas case. It is irrelevant to the Fountains proceeding and has been improperly used to shift the burden of proof in this case. Moreover, the summary does not fully and accurately describe the thoughtful process undertaken by Florida Housing as explained by Ms. Button. (T. 113-118; 129-130) This Finding should be rejected as irrelevant to the Fountains proceeding and not a complete or accurate summary of Florida Housing's position.

Exception to Finding of Fact ¶ 32

This purported Finding is not based upon competent substantial evidence. Instead, it is an erroneous legal interpretation by the ALJ who uses it as a springboard to improperly shift the burden of proof in this proceeding and disregard the unrefuted testimony of Florida Housing as to the reasonable basis for its decision. The Board should reject this Finding.

IV. Exceptions To Conclusions Of Law

As noted in Section II above, there is a different standard of review to be applied by the Board in reviewing the Conclusions of Law set forth in the RO. Florida Housing is not bound by the legal interpretations of the ALJ regarding matters within its substantive jurisdiction. Here, the requirements of the RFA and Florida Housing's rules, particularly as it relates to the Equity Proposal, are matters within Florida Housing's substantive jurisdiction. Adoption of the ALJ's substitute interpretation would create a dangerous precedent that would encourage denied applicants to seek a hearing before an ALJ to avoid a reasonable interpretation by Florida Housing of its own application requirements.

The Conclusions of Law in the RO include extensive, extraneous discussion of academic topics that are irrelevant to the ultimate question presented. A number of fundamental flaws in the legal reasoning in the RO are set forth below. The bottom line is that the ALJ should not have usurped Florida Housing's responsibility to interpret the requirements of the RFA. Furthermore, because Fountains' preliminary scoring was previously accepted by the Board, there is a very high burden that must be met in order to overcome Florida Housing's litigation position that the Equity Proposal in the Fountains Application fully complies with the RFA requirements and there is no funding shortfall. That burden was not met in this case. Florida Housing's proposed action to deem the Fountains Application fully responsive is not contrary to the Corporation's governing

statutes, Florida Housing's Rules or Policies, or the RFA Specifications. HTG Oak Valley failed to meet its burden of proof to demonstrate that Florida Housing's position with respect to the Fountains Application was clearly erroneous, contrary to statute or rules, arbitrary or capricious.

The Rosedale Holding is Irrelevant

Paragraphs 38-46 of the RO include an extensive discussion of the holding in Rosedale Holding v. Florida Housing Finance Corporation, FHFC Case No. 2013-038BP (Recommended Order, May 12, 2014, FHFC Final Order June 13, 2014). This entire discussion is irrelevant and cannot serve as a basis to disregard the testimony of Ms. Button who explained that the Rosedale holding is not binding here because the Equity Proposal for Fountains, unlike in Rosedale, did not expressly condition payment of some of the equity proceeds until specific events after completion of construction. The Pay-In Schedule in the Rosedale case included definitive, unequivocal language in the equity proposal that conditioned payment of a portion of the proceeds until after construction completion. The ALJ appears to recognize this in ¶ 46, but in doing so, he misinterprets the role of an equity proposal in the application process (See Exceptions to Findings of Fact 20 and 21 above which is incorporated herein) and incorrectly shifted the burden of proof in this proceeding. In ¶ 42, the ALJ erroneously claims that it is his role to determine whether there is "reversible error" in Florida Housing's decision to accept the Equity Proposals and determine whether Fountains met the RFA requirements. "Reversible error" is not the appropriate legal standard in an administrative proceeding under Chapter 120, Florida Statutes. It does not accord the appropriate deference to Florida Housing's preliminary scoring decision. The ALJ's apparent decision to apply an appellate standard for purposes of these proceedings is wrong as a matter of law and should be rejected. In addition, the RO improperly embarks on its own unique interpretation of the Equity Proposal which directly conflicts with the unrebutted testimony of the

parties to that Agreement. The RO creates an irrelevant ambiguity that is not supported by any testimony in the record. There is no record evidence to support speculation as to when permanent loan closing would occur. Indeed, the unrebutted testimony from Ms. Button and from Mr. Deaton, the representative of the developer, established that there is no set point in time at which permanent loan closing must occur and that it can occur before construction completion. (Tr. 120; 252-253) The unrefuted testimony is that the Equity Proposal in the Fountains Application met all of the requirements of the RFA. (Tr. 113-117; 129-139) Because there is nothing in the RFA that requires a Pay-In Schedule or allows for reference to third party documents like the Chase Letter, the First District Court of Appeal Decision in Brownsville Manor v. Redding Development Partners, LLC, 224 So. 3d 891, 894-895, compels the conclusion that Fountains has met the RFA requirements.

The Attempt to Create an Ambiguity Based on Extraneous Language Should be Rejected

As indicated above, the Equity Proposal from Fountains states on its face, unequivocally, that $8,686,075 of equity would be paid prior to construction completion and this corresponds directly to the Development Cost Pro Forma which states without qualification that amount would be paid prior to construction completion. Despite these unequivocal statements, the ALJ artificially creates an ambiguity by speculating, making unwarranted assumptions and unjustifiably adding language to the Pay-In Schedule. Unlike in Rosedale, there was no statement in the Equity Proposal for Fountains that qualified or in any way expressly altered the statement that the full amount of Equity Proceeds delineated would be paid prior to construction completion. Instead, the ALJ engages in unnecessary speculation and unjustified assumptions to conclude that Fountains may, although it is unlikely, experience a funding shortfall. This conclusion is expressly contrary to the testimony at the hearing by the only parties to the Agreement. It is based solely

upon an interpretation that is not supported by any competent, substantial evidence. There is no basis other than unsupported speculation for the ALJ to conclude that Capital Contribution #3 referenced in the Equity Proposal would not be paid prior to construction completion. There is no competent substantial evidence in the record to refute the statement in both the Equity Proposal and the Development Cost Pro Forma that the full $8,686,075 would be paid prior to construction completion. Paragraph 47 of the Conclusions of Law includes an "unjustified circular analysis that suggests the RFA did "*require the submission of the Pay-In Schedule, as it was part of the Equity Proposal.*" This conclusion is nonsensical, contrary to the RFA specifications and incorrect as a matter of law. What the RO completely ignores is that no applicant in the RFA was required to include a Pay-In Schedule. Thus, it is contrary to competition to scrutinize Fountains' Application based upon provisions in the Equity Proposal that were not required or set forth in the RFA and which are almost certainly going to change if the development is awarded funding. See, Brownsville Manor, supra.

Paragraph 48 of the Conclusions of Law mischaracterizes Florida Housing's preliminary scoring and litigation position. Florida Housing did not choose to overlook the Pay-In Schedule. Instead, it chose to focus on what the RFA requirements were and determined that the Equity Proposal for Fountains met those requirements. (Tr. 114-115; 165-166) The ALJ has imposed additional requirements beyond the RFA which should be rejected. See, Brownsville Manor, supra. The ALJ improperly elevates the Equity Proposal to be something that it was never intended to be. Other than confirming that there is a potential source for the full amount of equity proceeds to be paid prior to construction completion, the actual Pay-In Schedule is irrelevant. Unlike in Rosedale, there is nothing the Fountains Equity Proposal that expressly conditions or alters the unequivocal statements that the equity proceeds would be paid prior to construction completion.

The Invocation of the Material Irregularity Rule Was Improper

There is no testimony in the record to support the statements in ¶¶ 49 and 50 of the Conclusions of Law that the Pay-In Schedule describes the timetable for RBC's proposed equity contributions in chronological order. Both of the paragraphs should be rejected. The RO unjustifiably inserts the word "at" to interpolate a condition to payment of Capital Contribution #3. There is no record or legal basis to add additional words to the Equity Proposal in order to create an ambiguity. Likewise, there is no substantial evidence in the record to support the RO's reference to the "most natural reading" of the Pay-In Schedule. The groundless reference as to the "most natural reading" of the Schedule and how it would "normally" be communicated is not supported in the record and, indeed, is directly contrary to the unrebutted testimony of Scott Deaton and David Urban. (Tr. 252-253; 294-297) The "most natural reading" and what the ALJ perceives to be "normal" are irrelevant standards in this procurement challenge which is limited to determining if Florida Housing acted arbitrarily, capriciously or contrary to statute or rule. There is simply no record evidence to support the conclusion that Contribution #3 is scheduled to be made "after" construction completion. That is not what the letter says and this Conclusion should be rejected.

Paragraph 51 of the Conclusions of Law erroneously indicates that the Pay-In Schedule states "Capital Contributions #3 is payable after the completion of construction." That is not what the letter states and is not what the parties intended. (Tr. 248-250; 294-296; 298-299) The "internal inconsistency" relied upon in the RO to deem the Equity Proposal ambiguous is based on a faulty and strained reading of the document which is contrary to the unrebutted testimony as to the intent of the parties and not supported by record evidence. The claim that the Equity

Proposal does not meet the RFA requirements should be rejected by the Board as irrelevant and unsupported by the evidence.

Paragraph 54 of the Conclusions of Law correctly recognizes that only a Circuit Court is vested with authority to interpret a contract. Even though the ALJ is not a Circuit Court Judge and does not have authority to interpret contractual language, he nonetheless embarked on an unjustified, convoluted analysis to try to support the ill-conceived and erroneous efforts to apply the Cannons of Construction and Interpretation to the Equity Proposal. The RO improperly rejects the intent of the parties to substitute the ALJ's unique interpretation which, as set forth above, is based upon assumptions and language that does not exist in the actual Proposal. This conclusion should be rejected.

Paragraph 54 erroneously states that the "question at hand" is whether FHFC should consider Capital Contribution #3 as part of each applicant's total construction funding. - . . ." This is a misstatement of the question at hand. The question to be resolved is whether the Equity Proposals met the RFA requirements, which they did. The RO should be revised accordingly

Paragraph 56-59 of the Conclusions of Law should be rejected because they misconstrue and misstate the arguments made by Fountains. As set forth above, the Equity Proposal includes an express statement that $8,686,075 would be paid prior to construction completion and this is consistent with the Development Cost Pro Forma. There is no express language in the Pay-In Schedule or anywhere else in the Application that directly contravenes the unequivocal statement that the full $8,686,075 plus would be paid prior to construction completion. As testified by Ms. Button, these statements in the Equity Proposal are consistent with the Development Cost Pro Forma and satisfy the RFA requirements. The belabored discussion of whether the Pay-In Schedule creates an ambiguity is irrelevant since the Proposal is not a final funding commitment

and there is no express retraction or modification of the unequivocal commitment to make $8,686,075 available prior to construction completion. See, Brownsville Manor, supra.

The discussion in ¶¶ 60-63 of the Conclusions of Law regarding Rule 67-62.008, Fla. Admin. Code (which relates to Florida Housing's right to waive minor irregularities,) must be stricken as irrelevant. The unrebutted testimony is that Florida Housing determined that there was not a need to conduct a minor irregularity analysis as contemplated in this Rule. (Tr. 117) The ALJ's injection of this issue is not supported by competent, substantial evidence in the record. Likewise, the ALJ's discussion of the purported competitive implications of these issues should be stricken as irrelevant and unsupported by the evidence. The RO fails to identify any competitive advantage that was purportedly gained by Fountains as a result of the Pay-In Schedule in the Equity Proposal. As noted above, the Pay-In Schedule is not required by the RFA or binding on the parties. Construing the Pay-In Schedule as having some importance in the competitive process will result in the funding of a lower ranked applicant. Adoption of the analysis would create a precedent for applicants in future RFAs to search for possible ambiguities in competing applications and try to escalate irrelevant matters to be the controlling factor in funding decisions. This approach is exactly what Florida Housing was seeking to avoid by going to the RFA process after the ridiculous nit-picking that occurred during the Universal Cycles. See Douglas Gardens v. Florida Housing Finance Corporation, DOAH Case No.16-0418 (Final Order entered March 18, 2016). Florida Housing should not adopt a Final Order that invites the reintroduction of that litigious process.

The ALJ's assumption of jurisdiction to resolve extraneous ambiguities while disregarding Florida Housing's interpretation of its own RFA requirements is wrong as a matter of law. The role of the ALJ in this challenge is to determine whether Florida Housing's actions were arbitrary,

capricious, clearly erroneous or contrary to the RFA specifications. By assuming for himself alone the authority to interpret the RFA provisions and determine exclusively whether an ambiguity exists, the ALJ has exceeded his authority under Chapter 120, Florida Statutes. The RO's distorted analysis of deference in ¶¶ 70-72 should be rejected because it completely ignores the right of Florida Housing to interpret its own RFA requirements.

For the reasons set forth in the Exceptions to Findings of Fact 25 and 26 above, the RO's analysis of the Chase Letter in ¶¶ 73-75 must be rejected. There is no requirement in the RFA or in Florida Housing's rules that authorize the ALJ to refer to a document from a third party to interpret the requirements of the Equity Proposal. To adopt the approach in the RO would create a precedent that would impose significant additional burdens on Florida Housing's scorers in future RFAs and encourage applicants to pursue litigation to seek an ALJ determination to contravene Florida Housing's interpretation.

Paragraphs 76-78 of the Conclusions of Law should be rejected because they are based on a faulty attempt to create an ambiguity based upon speculation that is not supported by competent substantial evidence. The assumptions in ¶ 77 as to the basis for the scorer's decision to accept the Equity Proposal are not supported by any record testimony or competent substantial evidence. There is no basis in the RFA requirements to resort to the Pay-In Schedule to artificially create an ambiguity in the Equity Proposal, particularly since the Schedule does not expressly refute the unequivocal statements about the amount to be paid prior to construction completion. See, Brownsville Manor, supra.

CONCLUSION

Based on the Exceptions set forth herein, the referenced Findings of Fact in the Recommended Order should be rejected by the Florida Housing Board and the referenced Conclusions of Law from the RO should be rejected and/or modified accordingly. Based on the evidence, Fountains at Kings Pointe Limited Partnership's Application should be deemed eligible and invited into credit underwriting.

The Board should issue a Final Order that recognizes the purpose of the Equity Proposal and does not resort to documents from third parties (such as the Chase Letter) to unnecessarily invent ambiguities to distort the intent of the parties. The Pay-In Schedule offered no competitive advantage to Fountains and the attempt by a competing applicant to manufacture a non-existent funding shortfall should be rejected.

Respectfully submitted this 23rd day of July, 2019.

/s/ J. Stephen Menton
J. Stephen Menton, Esq.
Florida Bar No. 331181
Tana D. Storey, Esq.
Florida Bar No. 0514772
Rutledge Ecenia, P.A.
Tallahassee, Florida 32301-1591
Telephone: (850) 681-6788
Facsimile: (850) 681-6515
smenton@rutledge-ecenia.com
tana@rutledge-ecenia.com
Counsel for Petitioner, Fountains at Kings Pointe Limited Partnership

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was furnished on this 23rd day of July, 2019, by electronic mail to:

Betty Zachem, Esq.
Florida Housing Finance Corporation
227 N. Bronough Street, Ste. 5000
Tallahassee, FL 32301
Betty.zachem@floridahousing.org

Maureen McCarthy Daughton, Esq.
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE, Suite 304
Tallahassee, FL 32308
mdaughton@mmd-lawfirm.com

Michael Donaldson, Esq.
Carlton Fields
215 N. Monroe Street, Ste. 5000
Tallahassee, FL 32301
Mdonaldson@carltonfields.com

Craig D. Varn, Esq.
Manson Bolves Donaldson & Varn, P.A.
109 North Brush Street, Suite 300
Tampa, FL 33602
cvarn@mansonbolves.com

/s/ J. Stephen Menton
Attorney

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG OAK VALLEY, LLC,

Petitioner, Case No. 19-2275BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HARMONY PINEWOOD, LLC,

Intervenor.
_______________________________________/

FOUNTAINS AT KINGS POINTE LIMITED
PARTNERSHIP,

Petitioner, Case No. 19-2276BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_______________________________________/

PETITIONER, HTG OAK VALLEY, LLC'S RESPONSES TO EXCEPTIONS TO RECOMMENDED ORDER FILED BY FOUNTAINS AT KINGS POINTE LIMITED PARTNERSHIP

HTG Oak Valley, LLC, ("HTG Oak Valley"), by and through its undersigned counsel, files its response to the Exceptions to Recommended Order filed by Fountains at Kings Pointe Limited Partnership, as follows:

Introduction

Following a formal hearing a Recommended Order was issued in this case by Administrative Law Judge ("ALJ") Van Laningham on July 16, 2019, recommending rescinding the intended award to Harrison Parc due to ineligibility; finding HTG Spring and Fountains at Kings Pointe Limited Partnership (hereinafter "Fountains") ineligible for funding, reducing Harmony Pinewood, LLC's proximity points to 8.5, selecting HTG Oak Valley for funding and de-selecting Wildwood Preserve Senior Living for funding. On July 23, 2019, Fountains filed exceptions to the ALJ's Recommended Order. The Exceptions filed specifically challenge the ALJ's Findings of Fact ¶'s 17,20, 21, 25, 26, 27, 28, 29, 30 and 31 and Conclusions of Law ¶'s 47-51, 54, 56-63, 70-78. The Exceptions to the Findings of Fact and Conclusions of Law should be modified as described herein or denied by this Board and the Recommended Order adopted subject to the modifications herein and the modification filed by separately by HTG Oak Valley, LLC.

Standard of Review

In determining how to rule on Fountains Exceptions, Florida Housing must follow section 120.57 (1)(l), Florida Statutes (2018,)which provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify findings of fact unless the agency first determines from a review of the entire record , and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Additionally,

> ...an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

Section 120.57(1)(k), Fla. Stat. (2018)

At this point of the review, Florida Housing is not free to re-weigh the evidence or reject findings of fact absent a showing that the finding was not based on competent, substantial evidence. *Rogers v. Department of Health*, 920 So. 2d. 27 (Fla. 1st DCA 2005). If the findings are supported by competent, substantial evidence in the record, the agency is bound by those findings. *B.J. v. Department of Children and Family Services*, 983 So. 2d 11 (Fla. 1st DCA 2008)

Rather, "it is the hearing officer's function to consider all the evidence, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." *Belleau v. State, Dep't of Envtl. Protection*, 695 So.2d. 1305, 1307 (Fla. 1st DCA 1997). Therefore, an ALJ's decision to accept testimony of one witness over another is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent, substantial evidence supporting the decision. *See Collier Med. Ctr., Inc. v. State Dep't of Health & Rehab. Servs.*, 462 So. 2d. 83,85 (Fla. 1st DCA 1985)

Florida Housing in its review of the Exceptions may not substitute its findings simply because it would have determined factual questions differently *F.U.S.A., FTP-NEA v. Hillsborough Cnty. Coli.*, 440 So. 2d. 593, 595-96 (Fla. 1st DCA 1983); see also *Resnick v. Flagler Cnty. Sch. Bd.*, 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010) (agency may not reject findings of fact supported by competent substantial evidence even if alternative findings were also supported

by competent substantial evidence); *Heifetz v. Dep't of Bus. Regulation Div. of Alcoholic Bevs. & Tobacco,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.") "Factual inferences are to be drawn by the [ALJ] as a trier of fact." Id. at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of facts. § 120.57(1)(l), Fla. Stat. Thus, if the record contains any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual findings in preparing its Final Order. (*Walker v. Bd. of Prof. Eng'rs* 946 So. 2d 604 (Fla. 1st. DCA 2006)

With respect to conclusions of law, an agency may reject or modify erroneous conclusions of law only if it has substantive jurisdiction over the subject of the conclusion and only if its substituted conclusion of law is as or more reasonable than the one rejected. §120.57 (1)(l), Fla. Stat .

Response to Exception to Finding of Fact 17

Fountains[1] takes exception to finding of fact 17 which provides as follows,

> 17. *Because post-deadline amendments to an application based on extrinsic evidence are impermissible, an applicant's subjective competitive decisions must be deemed both final as of the application deadline, and fully expressed within the four corners of the application. Thus, it should be rare for an alleged error in the expression of a competitive decision to be deemed a minor irregularity. To make such a finding of minor irregularity in an exceptional situation, two necessary (but perhaps sufficient) conditions would have to be met: (i) the alleged error would need to be reasonably apparent to anyone on the face of the application and (ii) the intended statement, free of error, would need to be unmistakably expressed somewhere in the application. So, for an example, recall the previous hypothetical but assume, as additional facts, that the bid price of $28,041,319 is necessarily the product of a unit price ("a") times a certain number of units ("b"), and*

[1] Fountains has included an Introduction section and a section entitled, *Written Exceptions to Findings of Facts in the RO*, while these sections do include some facts of the case it is mostly argument regarding the alleged future perils of adoption of the Recommended Order that is being considered. We respectfully request that the Board only consider these sections as legal argument in its consideration of any specific Exceptions filed by Fountains.

> *that both a and b are clearly stated in the bid. If a x b= $28,041,219 instead of $28,041,319, then someone other than the applicant would be able to discover the mathematical or clerical error in the bottom-line price quote, and it would be fairly clear from the face of the bid that $28,041,219 was the intended price. Such an error might be correctible in the agency's discretion.*

In taking exception to this finding of fact, Fountains does not suggest that it is not supported by competent, substantial evidence. Rather, Fountains alleges that the ALJ's restatement of the minor irregularity rule is a "test for determining when an alleged error in an application can be treated as a minor irregularity" which is "not expressly set forth in Florida Housing's Rule and simply represents the ALJ's interpretation of how it should be applied."

Initially, the finding expressly states that the ALJ is referring to those situations in which the error is made in the "expression of a competitive decision".[2]

Rule 67-60.008, F.A.C., defines Minor Irregularities, as follows,

> 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.

In discussing the minor irregularity rule and the amendment of applications to correct a minor irregularity, Marisa Button testified as follows,

> A… so, an error that does not create any uncertainty that the terms and requirements of the competitive solicitation are met, I think an example of that would be generally a –
> Its sort of in line with that omission of information.
>
> If we could find that information otherwise in the four corners of the application, then we may say, okay, that doesn't create any uncertainty that the requirements of the RFA are met; we may be able to consider that a minor irregularity.

(HTG Exhibit 1 at 41:14-25)

---

[2] As stated by the ALJ, the selection of a DLP is, " a competitive decision because the chosen location directly affects the number of proximity points to which an application may be entitled. It is a decision that makes an application more or less competitive relative to the other applications. (See Recommended Order, finding of fact 16)

Because the finding of fact in Paragraph 17 is supported by competent, substantial evidence it cannot be disturbed.[3] Accordingly, Fountains Exception No.17 must be denied.

Response to Exception to Finding of Fact 20

Fountains takes exception to finding of fact # 20 which provides as follows,

> 20. *Fountains. Fountains submitted an application requesting an allocation of housing credits for a proposed 120- unit housing development in Flagler County. FHFC determined that Fountains was eligible for an award of housing credits but did not preliminarily select the Fountains application for funding. HTG Oak Valley protests FHFC's intended decision to deem Fountains eligible for funding, alleging that Fountains application is materially nonresponsive-and thus should be rejected as ineligible-for failing clearly to state that an amount of equity sufficient to cover the anticipated development costs would be invested in the project prior to construction completion.*

The first two sentences of finding of fact 20 are supported by competent substantial evidence.(Jt. Exhibit 4; Jt. Exhibit 11 at p.4,5) The remaining portion of finding of fact 20 is the ALJ's interpretation of the position of HTG Oak Valley regarding the deficiencies of Fountains application resulting in a funding shortfall.

The RFA, requires each applicant to complete the Development Cost Pro Forma listing the anticipated expenses or uses and the anticipated sources. The sources must equal or exceed the uses and if an Applicant has a funding shortfall, it will be deemed ineligible for funding. (Jt. Exhibit 1 at 59) In addition, the RFA provides, the Housing Credit equity proposal must also meet several criteria including, stating "... the proposed amount of equity to be *paid prior to construction completion.*" (Jt. Exhibit 1 at 54) The equity proposal letter submitted by Fountains is internally inconsistent, stating on the one hand that $8,686,075 in equity proceeds is to be paid prior to construction completion and then on the same page, in the Pay-In Schedule, indicates that only

[3] To the extent that this is considered a conclusion of law rather than a finding of fact, the ALJ's determination is based on competent substantial evidence and is reasonable. The Exception to paragraph 17, whether considered a finding of fact or conclusion of law should be denied.

$4,808,363.00 would be paid or "available" prior to construction completion (Jt. Exhibit 11 at p.76)

Because the findings of fact in Paragraph 20 are supported by competent, substantial evidence, they cannot be disturbed. Fountains Exception to the findings of fact in Paragraph 20 should be denied.

Response to Exception to Finding of Fact 21

Fountains takes exception to finding of fact 21 which provides as follows,

> 21. *The RFA requires that an applicant must submit, as part of its application, a Development Cost Pro Forma detailing both the anticipated costs of the proposed development as well as the anticipated funding sources for the proposed development. In order to demonstrate adequate funding, the Total Construction Sources (including equity proceeds/capital contributions and loans), as shown in the pro forma, must equal or exceed the Total Development Costs reflected therein. During the scoring process, if a funding source is not considered or is adjusted downward, then Total Development Costs might wind up exceeding Total Construction Sources, in which event the applicant is said to suffer from a construction funding shortfall (deficit). If an applicant has a funding shortfall, it is ineligible for funding.*

This finding is supported by the plain terms of RFA 2018-110 which provide,

> *All Applicants must complete the Development Cost Pro Forma listing the anticipated expenses or uses, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation Funding). The sources must equal or exceed the uses. During the scoring process, if a funding source is not considered and/or if the Applicants funding Request Amount if adjusted downward, this may result in a funding shortfall. If the Applicant has a funding shortfall, it will be ineligible for funding.*

Jt. Exhibit 1 at 59.

Because the findings of fact in Paragraph 21 are supported by competent, substantial evidence, they cannot be disturbed. Fountains Exception to the findings of fact in Paragraph 21 should be denied.

Response to Exception to Finding of Fact 25

Fountains takes exception to finding of fact 25 which provides as follows,

> 25. *The Pay-In Schedule in the Equity proposal refers to "permanent loan closing" as the moment when Capital Contribution #3 will be made "available." The Equity Proposal does not, however, define or discuss permanent loan closing, and, to the point, does not specify when it is expected to occur. Of potential relevance in this regard is a letter from JP Morgan Chase bank, N.A. (the "Chase Letter"), which is included as Attachment 16 to Fountains' application.*

Fountains asserts a lack of evidence to support the finding that the Equity Proposal letter refers to permanent loan closing "as the moment" when Capital Contribution #3 will be made available.

The Equity Proposal letter submitted by Fountains within its application provides as follows,

Equity Proceeds to be Paid Prior to Construction Completion:	$8,686,075
Pay-In Schedule:[4]	Funds available for Capital Contributions #1: $2,481,736 be paid prior To or simultaneously with the Closing of the construction financing.
	Funds available for Capital Contribution #2 $2,326,627 prior to construction completion.
	Funds available for Capital Contribution # 3 $3,877,712 concurrent with permanent loan closing.
	Equity Proceeds Paid at Lease Up $5,428,797
	Equity Proceeds paid at 8609 $1,395,977

(Jt. Exhibit 11 at p. 76)

[4] Fountains continues to argue that the Pay-In-Schedule was merely "surplus language that was not intended to qualify, modify or alter in anyway" the statement above it. This argument was rejected by the ALJ. The testimony of Mr. Urban is respectfully irrelevant to whether or not Florida Housings ultimate scoring of Fountains application was clearly erroneous based on what Fountains included within its application.

There is competent substantial evidence in the record to support this portion of finding of fact 25. Even if Florida Housing does not agree with the ALJ's choice of words as urged by Fountains, it is bound by these findings because they are supported by competent, substantial evidence. See *Gross v. Dep't of Health,* 819 So. 2d. 997.

Fountains further argues that the "discussion of the potential relevance" of the Chase Letter is unwarranted and would impose new requirements on scorers to ensure "consistency between the equity letter and debt proposal". Fountains does not argue that there is a lack of competent substantial evidence to support this statement nor could they, since the relevance of the Chase letter is a direct result of the equity proposal letter submitted by Fountains which is internally inconsistent on its face. (Jt. Exhibit 11 at p.76)

The Equity Proposal Letter submitted by Fountains provides evidentiary support for finding of fact 25. The Exception to finding of fact 25 should be denied.

Response to Exception to Finding of Fact 26

Fountains files an exception to finding of fact 26 which provides as follows,

> 26. *Unlike the Equity Proposal, the Chase letter, if not the last word on the subject, at least sheds some light on the timing of the crucial milestone, i.e., "permanent loan closing." Although the Chase letter is full of escape clauses and does "not represent a commitment" or "an offer to commit," the document nevertheless outlines the terms for the closing of the proposed construction and permanent loans. The proposed terms call for the payment of a $10,000 Conversion Fee at permanent loan closing and impose preconditions for the conversion from the construction loan to the permanent loan, which include a requirement that there have been "90% economic and physical occupancy for 90 days" No evidence was presented as to the meaning of this language, but the term "physical occupancy" is clear and unambiguous—and it plainly happens after receipt of a final certificate of occupancy, which, under the RFA, is the end point of the construction phase.*

Fountains argues that the ALJ unjustifiably interpreted the Equity proposal letter based upon the debt proposal from Chase. Furthermore, contends that there is no record evidence to support the

ALJ's interpretation of "physical occupancy" as "happening after receipt of a final Certificate of Occupancy."

As to this issue, HTG Oak Valley agrees to the modification proposed by Florida Housing in their Response to the Exceptions filed by Fountains.[5] This modification does not impact the ultimate findings or conclusion of the Recommended Order.

The RFA requires that Housing Credit Equity Proposals must meet certain criteria, including a statement as to the proposed amount of equity to be paid prior to construction completion. (Jt. Exhibit 1 at 54) As stated herein the Equity Proposal letter submitted is internally inconsistent on its face in terms of the proposed amount of equity to be paid prior to construction completion. Included within the Fountains application at Exhibit 16 is the financing proposal from JPMorgan Bank, NA (hereinafter referred to as the "Chase letter"), which is signed and accepted by the representative of Fountains (Jt. Exhibit 11 at 80-85).

This remaining portion of Finding of Fact 26 is supported by competent substantial evidence in the record. Florida Housing is not free to reject or modify findings of fact that are supported by competent substantial evidence. Because the remaining portion of the finding of fact in Paragraph 26 is supported by competent substantial evidence it cannot be disturbed. Fountains Exception to finding of fact 26 must be denied.

Response to Exception to Finding of Fact 27

Fountains takes exception to finding of fact 27 which provides as follows,

> *27. HTG Oak Valley argues that the Pay-In Schedule casts doubt on whether the entire amount stated in the Equity proposal's line-item entry for "Equity Proceeds to be Paid Prior to Construction Completion" ($8,686,075) will be paid before the final certificate of occupancy is issued. According to HTG Oak Valley, the Pay-In Schedule shows that the*

---

[5] Florida Housing suggests the last sentence of finding of fact 26 is modified as follows," *No evidence was presented as to the meaning of this language*~~*, but the term "physical occupancy" is clear and unambiguous and it plainly happens after receipt of a final certificate of occupancy, which, under the RFA, is the end point of the construction phase.*~~

> *third capital contribution will be paid after construction completion because the second capital contribution, which is the earlier of the two, is due to occur "prior to construction completion" Thus, HTG Oak Valley contends that Fountains' construction financing sources should be reduced by $3,877,712, thereby creating a construction financing shortfall and rendering the Fountains application ineligible for funding.*

Fountain alleges that there is no record evidence to support the claim that the Pay-In Schedule shows that Capital Contribution #3 would only be paid "after" construction completion.

Ms. Button testified that her understanding is that permanent loan closing, "… generally it does occur after construction completion. (HTG Ex. 1 at 76:4-12). Additionally, as set forth in the response to Exception 26 the Chase letter demonstrates that as of the Application Deadline the permanent loan closing would not occur before 90% occupancy for 90 days was achieved. (Jt. Exhibit 11 at p. 83)

Florida Housing is not free to reject or modify findings of fact that are supported by competent, substantial evidence. An agency commits reversible error when it rejects or modifies findings of fact that are supported by competent, substantial evidence. *See Gross v. Dep't of Health,* 819 So. 2d 997, 1001 (Fla. 5th DCA 2002); *Belleau v. State, Dep't of Envtl Protection*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997) Thus, even if Florida Housing were inclined to agree with Fountains statement it is bound by these findings because they are supported by competent, substantial evidence. Florida Housing lacks discretion to grant this exception.

The findings of fact in Paragraph 27 are supported by competent, substantial evidence addressed in the preceding paragraphs and cannot be disturbed. Fountains Exception to the findings of fact in Paragraph 27 should be denied.

Response to Exception to Finding of Fact 28

Fountains take exception to finding of fact 28 which provides as follows,

> *28. HTG Oak Valley finds support for its position in an unlikely place, namely, FHFC's intended rejection of the application that The Vistas at Fountainhead Limited Partnership ("Vistas") submitted in response to Request for Applications 2019-105 ("RFA 2019-105") That proposed agency action is relevant because Vistas had attached to its application an equity proposal letter from RBC whose terms and conditions-other than the dollar amounts and (obviously) the applicants name- are identical to those of the Equity Proposal for Fountains. During the evaluation of applications under RFA 2019-105, which took place at around the same time as the review of applications pursuant to the RFA at issue here, FHFC's scorer determined that capital Contribution #3 should be excluded from the amount of equity proceeds to be paid prior to construction completion, with the result that the Vistas application was deemed ineligible for funding due to a funding shortfall.*

While it is true that neither the scorer for Fountains or for the Vistas application testified the corresponding scoresheets are in evidence as HTG Exhibits 7 and 8 respectively. The Vistas scoresheet with the subheading, *Ineligible for Funding*, clearly demonstrates the basis for the determination of a funding shortfall, *The Applicant has a construction financing shortfall in the amount of $2,638,694.*[6] It is obvious that the scorer of the Vistas application did not include the third payment on the Equity Proposal letter thus resulting in a construction shortfall. Additionally, the language in the Equity Proposal letters are not just similar, as explained by Ms. Button, they are the same letters except for the dollar amounts and the applicant themselves. (T.113:11-25;114:1-5) It is not however the similarity of the letters that is the basis for the determination of funding shortfall as to Fountains, it is the Equity Proposal letter itself which is internally inconsistent.(Jt. Exhibit 11 at p.76)

The findings of fact in paragraph 28 are supported by competent substantial evidence and thus should not be disturbed. Fountains Exception to Finding of Fact 28 must be denied.

Response to Exception to Finding of Fact 29

Fountains takes exception to finding of fact 29 which provides as follows,

---

[6] The Financing Notes provide as follows,

> *The equity commitment shows a pay-in schedule that states $2,013,799 and $1,887,936 are paid during construction, which totals $3,901,735.*

(HTG Exh 8 at p. 11)

> 29. *The Vistas and Fountains applications, competing in separate solicitations, were scored by different FHFC staff members. The evaluator who scored the financial section of Vistas' application sought advice concerning her interpretation of the Equity Proposal, discussing the matter with FHFC's Director of Multifamily programs and legal counsel at a reconciliation meeting that occurred before the Review Committee convened; this evaluator encounters no resistance to her plan of making a downward adjustment to Vistas' equity funding. The evaluator of the Fountains application did not likewise discuss her scoring rationale and thus received no input or guidance from FHFC's management. Ultimately, however, because each scoring determination belongs to the Review Committee member herself or himself, inconsistent or conflicting results are possible, as these cases demonstrate.*

Fountains complains initially that there is no competent substantial evidence in the record as to the preliminary scores of both its application and that of Vistas at Fountainview (hereinafter "Vistas"). The Florida Housing score sheet for Vistas is Oak Valley Exhibit 8. As set forth in the response to Exception 28 above, the scorer of the Vistas application, plainly indicates that basis for this finding was, *The Applicant has a construction financing shortfall in the amount of $2,638,694.*[7] Fountains further complains about the ALJ's characterization of a meeting between Ms. Button and the scorer of the Vistas application.

> Q. What happens if the scorer sees an error in an application?
> A. Well, scorers, if they recognize—part of the process I didn't mention earlier, if the scorer is going through their independent review and analysis of an application and they notice an error, we have a – we always have a **reconciliation meeting with myself and legal staff, we serve as a resource to scorers prior to the review committee. And they can bring that to our attention, and we may discuss those.**
> The scoring determination ultimately is that of the review committee members, but **we serve as that resource for them.**
> Q. Do all errors in applications render the application ineligible?
> A. No. We have—a part of that analysis, when we have our resource meeting, can include talking about our rule regarding minor irregularities,....

(T. at 94:4-21) Later in the transcript, Ms. Button refers to the meeting again,

> Q. And then for RFA 2018-105, the Vistas letter, the scorer in that case did determine that there was a funding shortfall. When they reviewed the equity letter, they brought the

---

[7] The Financing Notes provide as follows,

> *The equity commitment shows a pay-in schedule that states $2,013,799 and $1,887,936 are paid during construction, which totals $3,901,735.*

(HTG Exh 8 at p. 11)

> letter **to my attention and counsel at our resource meeting prior to the review committee meeting and we discussed the letter.**

(T at p.114:18-23) The record reveals that Ms. Button has referred to the meeting as both a reconciliation meeting and a resource meeting.

The findings of fact in paragraph 28 are supported by competent substantial evidence and thus should not be disturbed. Fountains Exception to Finding of Fact 29 must be denied.

Response to Exception to Finding of Fact 30

Fountains files exception to Finding of Fact 30 which provides as follows,

> *30. Once in litigation, FHFC discovered that it had reached opposite scoring conclusions based on the same material facts. In these proceedings and in the Vistas protest, FHFC has stressed its desire to take a consistent approach to the identical Equity Proposals. To that end, in the Vistas protest, FHFC has reversed course and argued that, contrary to its intended action, the Equity Proposal provided by Vistas fully satisfies the requirements of RFA 2019-105; there is no funding shortfall; and Vistas' application is eligible and should be selected for funding. Deeming Vistas' application eligible would achieve consistency, of course, by giving favorable treatment to the applications of both Fountains and Vistas, which are similarly situated as to the Equity Proposal. Naturally, HTG Oak Valley urges that consistency be found the other way around, through the rejection of both applications.*

Fountains incorporates its Exception to Finding of Fact # 29 thus HTG Oak Valley reasserts its response to Exception to Finding of Fact 29.

Additionally, Fountains argues that this finding should be rejected because it "usurps Florida Housing's authority to interpret its own RFA requirements" . Again, under the standard of review if Florida Housing determines that there is competent substantial evidence to support the findings of fact in paragraph 30, Florida Housing will commit reversible error if it rejects or modifies those findings. There is competent substantial evidence to support finding of fact 30 and the exception should be denied.

Response to Exception to Finding of Fact 31

Fountains files exception to finding of fact 31 which provides as follows,

> *31. In support of its decision to change positions on Vistas' Equity Proposal, FHFC relies upon the following premises, which are equally applicable to the determination of Fountains' substantial interests: (i) the Equity Proposal plainly specifies, in the line-item entry for "Equity Proceeds to be Paid Prior to Construction Completion," the amount to be paid prior to Construction Completion, " the amount to be paid prior to construction completion; (ii) permanent loan closing does not necessarily have to occur after construction completion; and (iii) the information contained in the Pay-In Schedule is not information that is required by RFA 2019-105 (or the RFA at issue in this case).*

Fountains contends that this summary does not "fully and accurately describe the thoughtful process undertaken by Florida Housing as explained by Ms. Button"[8] and is also irrelevant to this proceeding. To the contrary this finding is supported and consistent with Ms. Button's testimony regarding Florida Housing's position at the final hearing. (T. 117 :19-23;119:20-25;120;1-11)

The findings of fact in Paragraph 31 are supported by competent, substantial evidence addressed and cannot be disturbed. Fountains Exception to the findings of fact in Paragraph 31 should be denied.

Response to Exception to Finding of Fact 32

Fountains files exception to finding of fact 32 which provides as follows,

> *32. The disputes arising from the scoring of the Equity Proposal are solvable as matters of law and therefore will be addressed below.*

Fountains contends, this is, not based upon competent substantial evidence and is an erroneous legal interpretation by the ALJ. This finding is more accurately described as a conclusion of law, as such it is supported by competent substantial evidence and is reasonable. The Exception to paragraph 32, be it construed a finding of fact or conclusion of law should nonetheless be denied.

Response to Exception to Conclusions of Law # 38-46

[8] In response to the implication raised by Fountains in this Exception it is notable that the ALJ stated the following, "To be clear the undersigned is not suggesting that FHFC has done anything of the sort or otherwise improper here-to the contrary, the agency has handled these cases in a most professional and competent manner, and its conduct has been beyond reproach. (See Conclusion of Law 64)

These paragraphs involve analysis of *Rosedale Holding v. Florida Housing Finance Corp.*, FHFC Case No. 2013-038BP (Recommended Order May 12, 2014, FHFC Final Order June 13, 2014) which is factually similar but distinguishable to this case.

In paragraph 41 of the Conclusions of Law the ALJ states,

> *To summarize, in the relevant part of Rosedale, the hearing officer upheld the intended score of "fail" given to the proposed second capital contribution from SunTrust Community Capital, LLC (STCC), a score which had been based on the Term Sheet's plain disclosure that the payment was not going to occur "prior to construction completion" as that term was defined in the applicable pro forma. Whether an intended score of "pass" vis-à-vis the second contribution likewise would have survived review is somewhat unclear; applying the deferential standard of review applicable to scoring decisions, the hearing officer in Rosedale seems to have stopped short of concluding that FHFC was required not to consider the second capital contribution, although he implied as much. Because the intended decision to treat Fountains application as eligible for funding raises the unexamined question of whether the agency committed reversible error in counting (rather than excluding) a capital contribution, Rosedale is, if not inapposite, not quite "on all fours" either, at least as to Fountains.*

Fountains relies upon *Brownsville Manor v. Redding Development Partners, LLC,* 224 So. 3d. 891, to support its position that because the RFA doesn't require a Pay-In Schedule or expressly "allow" for reference to third party documents, like the "Chase letter" those things should be ignored and a determination made that the Fountains application meets the RFA requirements. This reliance is misplaced. Beyond *Brownsville* being factually distinguishable, Fountains argument ignores the fact that the Pay-In Schedule and the Chase letter were documents which were submitted by Fountains in support of its application. Fountains made the decision to submit an Equity Proposal letter with an internal inconsistency.

The ALJ's Conclusions of Law 38-46 are reasonable and supported by competent substantial evidence and the Exceptions to Conclusions of Law 38-46 must be denied.

<u>Response to Exception to Conclusion of Law 47</u>

Conclusion of Law 47 provides as follows,

47. The internal inconsistency in the Equity Proposal stems from the Pay-In Schedule. As a preliminary matter, FHFC and Fountains argue that, because the RFA does not require an equity proposal to include a detailed timetable, the Pay-In Schedule is mere surplusage that can and should be ignored. This is not a persuasive argument. First, the premise is only trivially true. The RFA does not specifically require an equity pay-in schedule, but it does instruct that an equity proposal be attached to the application. ***So, whatever is in the equity proposal must be submitted- that is the important requirement. In that sense, therefore, the RFA did require the submission of the Pay-In Schedule, as it was part of the Equity proposal.***

Fountains takes exception to the arguably inconsistent statement in this conclusion as to whether or not a "Pay-In Schedule" is required.

To be clear, there is substantial competent evidence that the Pay-In Schedule is not required by the RFA (T.117:19-23) HTG Oak Valley agrees with the position of Florida Housing that this conclusion be modified to delete the last two sentences from Conclusion of Law 47, in bold above, which does not impact the ultimate findings or conclusions in the Recommended Order. The remaining Exceptions should be denied.

<u>Response to Exception to Conclusion of Law 48</u>

Conclusion of Law 48 provides as follows,

48. *Second, and more important, whether required or not, the Pay-In-Schedule contains language bearing on the timing of certain capital contributions, which is specifically relevant because of the instruction to "state the proposed amount of equity to be paid prior to construction competition," and is generally relevant, in any event, as part of the application. FHFC cannot pick and choose which language of the application to consider and which to overlook; that would be arbitrary and contrary to competition. The upshot is that the Pay-In Schedule cannot be ignored simply because it creates uncertainty that otherwise would not exist.*

Fountains argues that the ALJ has imposed additional requirements beyond that the RFA requires and that the Recommended Order has created an ambiguity. Fountains submitted the Equity Proposal letter, which includes the Pay-In-Schedule, to satisfy the RFA requirements. The Equity Proposal on its face is internally inconsistent in terms of the amount of money which will be paid prior to construction competition.

The ALJ's Conclusion of Law in 48 is reasonable and supported by competent substantial evidence. The Exception to Conclusion of Law 48 must be denied.

Response to Exception to Conclusion of Law 49-50

Conclusion of Law 49 and 50 provides as follows.

> 49. *The Pay-In Schedule prescribes the timetable for RBC's proposed equity contributions in chronological order from the first payment to the fifth (and final) payment. Each installment (or funding window for the second and third contributions, respectively) is tied to – and scheduled to occur before/at, before, or at- a milestone in the life cycle of the project as follows: #1- (before/at) closing of construction financing; #2- (before) construction competition;#3-(at) permanent loan closing;#4- (at) lease up; and #5- (at) filing of IRS Form 8609 (after the building is placed in service)*
>
> *50. Regardless of how "construction completion" is defined, the most natural reading of this schedule is that Capital Contribution #3 is scheduled to be made after construction competition, since Capital Contribution #2 covers the entire period during which construction is ongoing. If Capital Contribution #3 were intended to be made while construction continued; that is, if the second and third contributions were intended to overlap, the Pay-In Schedule clearly fails to express such intention in an ordinary fashion. Rather, this normally would be communicated either by tying Capital Contribution #2 to permanent loan closing and making Capital Contribution #3 available prior to construction completion (reversing the order of these two installments), or by combining the two contributions into one installment, with the sum being available prior to construction completion.*

These are more properly labeled as findings of fact since no legal analysis is needed to make these determinations. These are reasonable and supported by competent substantial evidence. (Jt. Exh. 11 at 76) Exceptions to Conclusions of Law 49 and 50 must be denied.

Response to Exceptions to Conclusion of Law 51

Conclusion of Law 51 provides as follows,

> *51. If the Pay-In Schedule were the only language in the application pertaining to the amounts to be paid prior to construction completion, the undersigned would not hesitate to conclude, based on the schedule's fairly straightforward timetable, that the amount of equity to be paid prior to construction completion is the sum of Capital Contribution #1 and Capital Contribution #2. But the Pay-In Schedule does not stand alone, within just the Equity Proposal, it is attended by the line item stating that an amount equal to the sum of the first three capital contributions will be "paid Prior to Construction Completion" As used in the line item, the term"*

> *prior to Construction Completion" must be synonymous with "prior to construction completion" as used in the Pay-In Schedule, given the identity of the language. Consequently, the line item can only be understood as meaning that Capital Contribution #3 is payable prior to the completion of construction, even though the Pay-In Schedule states that Capital Construction #3 is payable after the completion of construction. Hence the internal inconsistency.*

Again, this paragraph should have been deemed a finding of fact and it is supported by reasonable and substantial competent evidence. (Jt. Exhibit 11 at 76) The Exception to the finding in paragraph 51 must be denied.

<u>Response to Exceptions to Conclusion of Law 54</u>

Fountains take exception to Conclusion of Law 54 which provides as follows,

> 54. *Moreover, if the rights and obligations of the parties to the Equity Proposals were relevant to the question at hand-which, not to forget , is whether FHFC should consider Capital Contribution #3 as part of each applicant's total construction funding- it is not clear that FHFC would be empowered to determine such rights and obligations, because jurisdiction to interpret a contract for that purpose is vested exclusively in the judiciary. Eden Isles Condo. Ass'n v. Dep't of Bus. & Prof'l Reg., 1 So. 3d. 291,293 (Fla. 3d DCA 2009) Fortunately, the meaning of the Equity Proposals, as between the parties to those proposals, is irrelevant to the instant dispute.*

Fountains complains that the question at hand is rather, "Whether the Equity Proposals met the RFA requirements.....". The question in this case has *never been* whether the Equity Proposal meets the RFA requirements, the question correctly set forth is whether the Fountains application demonstrates a funding shortfall and is therefore ineligible pursuant to the terms of the RFA.

The ALJ's Conclusion of Law in paragraph 54 is reasonable and supported by competent reasonable evidence. The Exceptions to Conclusion of Law 54 must be denied.

<u>Response to Exception to Conclusion of Law 56-59</u>

The undersigned will not state in its entirety the above referenced Conclusions of Law in their entirety for brevity' sake. Fountains alleges that Conclusions of Law 56-59, misconstrue and misstate their position and those of Florida Housing.

HTG Oak Valley concurs with the suggestion of Florida Housing that paragraph 57 should be modified as follows,

> *Regardless of whether the foregoing reasoning is persuasive, it is neither irrational nor clearly erroneous, provided the premise behind it is correct. The underlying premise is that, in determining conformity, FHFC may use its best judgment to ascertain the most reasonable meaning of* ~~*an*~~ **a *materially*** *uncertain response. For the reasons that follow, however, it is concluded that this premise is clearly erroneous and contrary to competition and therefore must be rejected.*

This will ensure consistency with Conclusions of Law 63 and 69 and will not impact the ultimate findings or conclusions of the Recommended Order.

For the reasons described herein Conclusions of Law56, 58 and 59 are reasonable and supported by competent reasonable evidence. The Exceptions to Conclusions of Law 56-59 must be denied.

Response to Exception to Conclusions of Law 60-63

Fountains takes exception to Conclusions of Law 60-63 in which the ALJ analyzes the material ambiguity in the Equity Proposal letter under the minor irregularity rule.

Florida Housing advocates modifying Conclusion of Law paragraph 60-62 as follows,

> *60.* ~~*Ambiguity is nonresponsive because Florida Administrative Code Rule 67-60.008 says so. That rule defines the term "minor irregularities" which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." An ambiguous response by its very nature creates uncertainty that the response is conforming ;absent such uncertainty, the issue of ambiguity would not surface.*~~ ***Rule 67-60.008 defines the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." This rule makes clear that a material ambiguity in a response cannot be waived as a minor irregularity unless the uncertainty can be reasonably eliminated by looking elsewhere in the application.***

> *61.* ~~*Rule 67-60.008 makes clear that a material ambiguity, that is, one which creates any uncertainty that the terms and requirements of the RFA have been met, is an irregularity and not a minor one at that. Such an irregularity is otherwise known as a material variance or substantial deviation. By excluding material ambiguities from the subset of errors known*~~

~~*as minor irregularities, FHFC;s own rule, by necessary implication, classifies an ambiguity involving material information as a substantial deviation from the specifications, for deficiencies in a response or bid are either minor (and waivable) or material (and nonwaivable); there is no middle ground, FHFC does not have the authority, under rule 67-60.008 or procurement law generally, to waive or correct a material variance.*~~

62. ~~*To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Fountains) urges be done in regard to the Equity Proposal, would be tantamount to "correcting" the irregularity by removing any uncertainty that the terms and requirements of the RFA have been satisfied. In and of itself, the resolution of ambiguity through reasonable interpretation is, of course, neither arbitrary or illogical; indeed, such an approach is required in some contexts. But this is not a declaratory judgment suit or breach of contract action in circuit court between parties to a written instrument whose meaning is in dispute; it is an administrative competitive selection protest. In this context, construing an ambiguous response violates rule 67-60.008 and for that reason is plainly and undeniably impermissible. Doing so would be clearly erroneous.*~~

63. Finally, even if not otherwise prohibited (which it is), resolution of ambiguity by the agency would be contrary to competition at both ends of the spectrum. At the front end, FHFC's willingness to "correct" uncertainties in an application at a minimum would remove a salutary disincentive to sloppy draftsmanship, and might even encourage applicants to use studies ambiguity on occasion for competitive advantage. Apart from that, rare is the sentence so clearly written as to foreclose a semantic dispute if the stakes are high enough. The suggestion that material ambiguity should be handled as a minor irregularity smells like litigation fuel"

Florida Housing has substantive jurisdiction over Conclusions of Law 60-62 and its modification is as or more reasonable that the rejected Conclusion of Law. HTG Oak Valley agrees with this suggested modification to paragraphs 60-62. The modification does not impact the ultimate findings or conclusions of the Recommended order

Conclusion of Law 63 is reasonable and consistent with the ALJ's other findings and conclusions. The Exception to Conclusion of law 63 should be denied.

<u>Response to Exception to Conclusions of Law 70-72</u>

Fountains alleges that the ALJ has exceeded his authority in Conclusions of Law 70-72.

Paragraph 70 involves the identification of an ambiguity in a written instrument and because this does not fall within the substantive jurisdiction of Florida Housing Finance Corporation the Exception to Paragraph 70 must be denied.

Conclusions of Law 71 and 72 provide that the Equity Proposal letter is subject to two reasonable interpretations and thus are ambiguous. These Conclusion of Law are reasonable and supported by competent reasonable evidence. The Exceptions to Conclusions of Law 71 and72 must be denied.

Response to Exception to Conclusions of Law 73-75

Fountains takes Exception to Conclusions of Law 73-75 which concludes that the application is to be reviewed as a cohesive document to determine if the RFA requirements have been met. To address the timing ambiguity in the Equity Proposal letter it was appropriate to review the "Chase Letter" which was submitted by Fountains as part of its application.

These Conclusion of Law are reasonable and supported by competent reasonable evidence. The Exceptions to Conclusions of Law 73-75 must be denied.

Response to Exceptions to Conclusions of Law 76-78

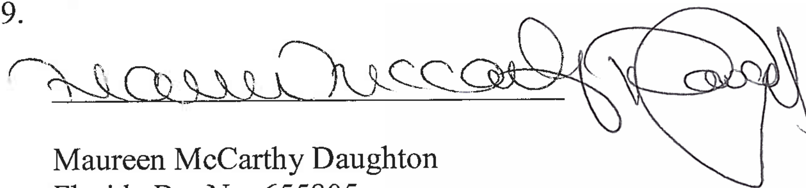
Fountains takes exception to Conclusions of Law 76-78 which is a summary of the prior analysis by the ALJ in coming to his ultimate conclusions regarding Fountains Equity Proposal Letter. These Conclusions of Law are reasonable and supported by competent evidence. The Exceptions to Conclusions of Law 76-78 should be denied

Conclusion

Each of Fountain's exceptions should be denied subject to the modifications addressed herein to Finding of Fact 12 and Conclusions of Law 47,57,60,61 and 62. Competent, substantial

evidence supports each finding of fact and/or modified finding of fact made by the ALJ, and no further fact finding is necessary. The Conclusions of Law are reasonable.

Respectfully submitted, this 29th day of July 2019.



Maureen McCarthy Daughton
Florida Bar No. 655805
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE
Tallahassee, Florida 32308
Counsel for HTG Oak Valley, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail on the following persons this 29th day of July 2019.

Betty Zachem, Esq.
Florida Housing Finance Corporation
227 N. Bronough Street, Ste 5000
Tallahassee, Florida 32301
Betty.Zachem@floridahousing.org

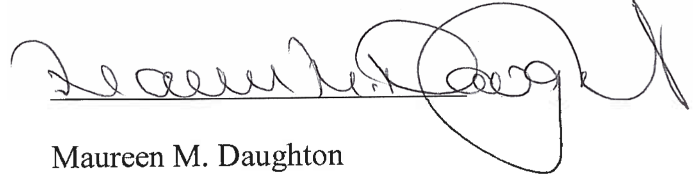
M. Christopher Bryant
Oertel, Fernandez, Bryant & Atkinson
PO Box 1110
Tallahassee, Florida 32302
Cbryant@ohfc.com

Craig D. Varn, Esq.
Manson Bolves Donaldson & Varn, P.A.
109 North Brush Street, Suite 300
Tampa, Florida 33602
Cvarn@MansonBolves.com

J. Stephen Menton, Esq
Rutledge Ecenia, P.A.
119 South Monroe Street, Ste 202
Tallahassee, Florida 32302-0551
Smenton@rutledge-ecenia.com

Tana D. Storey, Esq.
Rutledge Ecenia, P.A
119 South Monroe Street, Ste 202
Tallahassee, Florida 32302-0551
Tana@rutledge-ecenia.com

Brian B. Waterfield
Timshel Development Group
310 South Dillard Street, Suite 135
Winter Garden, Fl 34787
bwaterfield@timsheldevelopment.com



Maureen M. Daughton
Counsel for HTG Oak Valley, LLC

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG OAK VALLEY, LLC,

Petitioner, Case No. 19-2275BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HARMONY PINEWOOD, LLC,

Intervenor.
______________________________________/

FOUNTAINS AT KINGS POINTE LIMITED
PARTNERSHIP,

Petitioner, Case No. 19-2276BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
______________________________________/

FLORIDA HOUSING FINANCE CORPORATION'S RESPONSE TO FOUNTAINS AT KINGS POINTE LIMITED PARTNERSHIP EXCEPTIONS TO RECOMMENDED ORDER AND HTG OAK VALLEY, LLC'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to section 120.57(3)(e), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, Respondent Florida Housing Finance Corporation ("Florida Housing" or "Respondent"), hereby files its response to Petitioner Fountains at Kings Point Limited

Partnership's ("Fountains") Exceptions and Petitioner HTG Oak Valley, LLC's ("HTG Oak Valley") Exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") on July 16, 2019, as follows:

Introduction

Through this response, Florida Housing does not seek to overturn or disturb the ultimate conclusions and eligibility decisions reached by the ALJ. Rather, Florida Housing seeks to remove additional findings of fact and conclusions of law that are not reasonable, nor based on competent substantial evidence and not necessary to the ultimate findings.

Standard of Review

Section 120.57(1)(k), Florida Statutes, sets forth the standards by which an agency must consider exceptions filed to a Recommended Order, and in relevant part provides:

> The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

Section 120.57(1)(l), Florida Statutes, provides, in pertinent part:

> The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

It is the job of the ALJ to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. Rogers v. Department of Health, 920 So.2d 27 9Fla. 1st DCA 2005). B.J. v. Department of Children and Family Services, 983 So.2d 11 (Fla. 1st DCA 2008). "Competent substantial evidence," is defined as: "[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and

material that a reasonable mind would accept it as adequate to support the conclusion reached." Dept. of Highway Safety and Motor Vehicles v. Wiggins, 151 So.3d 457 (Fla. 1st DCA 2014), quoting DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla.1957).

Section 120.57(1)(l), Florida Statutes, further provides:

> The agency in its final order may reject or modify the *conclusions of law over which it has substantive jurisdiction* and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

(Emphasis added).

A reviewing agency has no authority "to reevaluate the quantity and quality of the evidence beyond a determination of whether the evidence is competent and substantial." *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Thus, findings of fact that are supported by competent substantial evidence are "binding" on an agency. *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). With respect to conclusions of law, an agency may reject or modify erroneous conclusions of law only if it has substantive jurisdiction over the subject of the conclusion and if its substituted conclusion is as or more reasonable than the one rejected. *See* § 120.57(1)(l).

Response to HTG Oak Valley's Exception to Finding of Fact 12

HTG takes exception to Finding of Fact 12 in which the ALJ summarized HTG Oak Valley's argument regarding the Harmony Pinewood application. Florida Housing agrees that Finding of Fact 12 contained a scrivener's error and that this finding is not based on competent, substantial evidence. At hearing, HTG Oak Valley argued that the error in the distance of Harmony

Pinewood's selected grocery store was not a minor irregularity. Finding of Fact 12 should be modified as follows:

> 12. HTG Oak Valley protests the award of 3.5 Grocery Store proximity points to Harmony Pinewood's application, asserting that the score was based on an erroneously reported distanced of one-half mile. HTG Oak valley urges that this error not be treated as a minor irregularity; that the distance in question be corrected to 0.51 miles in accordance with the RFA's directions concerning rounding; and that Harmony Pinewood's Grocery Store-related proximity points be reduced to 3.0 to conform to the revised DLP-to-service distance. This would bring Harmony Pinewood's total proximity score down to 8.5, rendering Harmony Pinewood ineligible for the Proximity Funding Preference. FHFC agrees with HTG Oak Valley.

The portion of Finding of Fact 12, as discussed above, is not based on competent substantial evidence and should be modified as noted. HTG Oak Valley's exception to Finding of Fact 12 should be accepted.

Response to Fountains' Exception to Finding of Fact 17

Fountains takes exception to Finding of Fact 17 in which the ALJ interprets and applies Florida Housing's Minor Irregularity Rule 67-60.008 Fla. Admin. Code, in "exceptional situations." The ALJ expresses a two-prong test for finding a minor irregularity within the expression of an applicant's competitive decision, such as the coordinates for the development location point. While termed a Finding of Fact, this is a Conclusion of Law because it regards the analysis of a Rule.

While Florida Housing agrees that the ALJ announces a new two-prong test that is not stated in rule or prior case precedent, regarding how the minor irregularity rule should be applied in "exceptional situations," given the factual context of the analysis, it is not unreasonable. The exception to paragraph labeled as Finding of Fact 17 should be rejected.

Response to Fountains' Exception to Finding of Fact 20

Fountains takes exception to Finding of Fact 20 in which the ALJ summarizes the facts and parties' positions in the matter. Finding of Fact 20 is merely a summary of the ALJ's understanding of HTG Oak Valley's argument. The finding is supported by competent, substantial evidence because HTG Oak Valley's position and argument is clearly articulated in the Joint Pre-Hearing Stipulation, Statement of HTG Oak Valley's Position, and HTG Oak Valley's Proposed Recommended Order. The exception to Finding of Fact 20 should be rejected.

Response to Fountains' Exception to Finding of Fact 21

Fountains takes exception to Finding of Fact 21 in which the ALJ summarizes portions of the equity financing requirements in the RFA. The ALJ does not characterize the summary as a direct quote from the RFA. Rather, support for Finding of Fact 21 comes directly from the RFA itself which states:

> All Applicants must complete the Development Cost Pro Forma listing the anticipated expenses or uses, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation Funding). The sources must equal or exceed the uses. During the scoring process, if a funding source is not considered and/or if the Applicants funding Request Amount if adjusted downward, this may result in a funding shortfall. If the Applicant has a funding shortfall, it will be ineligible for funding.

(Joint Exhibit 1, page 59).

Because the Finding of Fact 21 is supported by competent, substantial evidence, it should not be disturbed. Accordingly, the exception should be rejected.

Response to Fountains' Exception to Finding of Fact 25

Fountains takes exception to Finding of Fact 25 in which the ALJ summarizes capital contribution #3 from the Fountains' equity proposal. However, the equity proposal itself states "Funds available for Capital Contribution #3 $3,877,712* concurrent with permanent loan closing." (Joint Exhibit 11, page 76). Additionally, the ALJ correctly found that the equity

proposal itself did not define when permanent loan closing would occur. (Joint Exhibit 11, page 76-78).

Because Finding of Fact 25 is supported by competent, substantial evidence, it should not be disturbed. Accordingly, the exception should be rejected.

Response to Fountains' Exception to Finding of Fact 26

Fountains takes exception to Finding of Fact 26 in which the ALJ summarizes Fountains' debt letter from JP Morgan Chase Bank (the "Chase Letter") then draws conclusions, without any supporting evidence, as to the meaning of physical occupancy. While at the outset agreeing that there was no evidence as to the meaning of "physical occupancy," the ALJ then stated that "it plainly happens after receipt of a final certificate of occupancy, which, under the RFA, is the end point of the construction phase." Florida Housing agrees with Fountains that there is no record evidence to support this finding and it is irrelevant to the determination of whether Fountains' equity proposal met the requirements of the RFA.

Since Finding of Fact 26 is not supported by competent substantial evidence, it should be modified as follows:

> 26. Unlike the Equity Proposal, the Chase Letter, if not the last word on the subject, at least sheds some light on the timing of the crucial milestone, i.e., "permanent loan closing." Although the Chase Letter is full of escape clauses and does "not represent a commitment" or "an offer to commit," the document nevertheless outlines the terms for the closing of the proposed construction and permanent loans. The proposed terms call for the payment of a $10,000 Conversion Fee at permanent loan closing and impose preconditions for the conversion from the construction loan to the permanent loan, which include a requirement that there have been "90% economic and physical occupancy for 90 days." No evidence was presented as to the meaning of this language~~, but the term "physical occupancy" is clear and unambiguous – and it plainly happens after receipt of a final certificate of occupancy, which, under the RFA, is the end point of the construction phase~~.

The modification of Finding of Fact 26 does not impact the ultimate findings or conclusion of the Recommended Order.

Response to Fountains' Exception to Finding of Fact 27

Fountains takes exception to Finding of Fact 27 in which the ALJ summarizes HTG Oak Valley's argument on Fountains' equity proposal. As stated in the response to Fountains' Exception to Finding of Fact 20, Finding of Fact 27 is supported by competent, substantial evidence because HTG Oak Valley's position and argument is articulated in the Joint Pre-Hearing Stipulation, Statement of HTG Oak Valley's Position, and HTG Oak Valley's Proposed Recommended Order. The Exception to Finding of Fact 27 should be rejected because it is supported by competent substantial evidence.

Response to Fountains' Exception to Finding of Fact 28

Fountains takes exception to Finding of Fact 28 in which the ALJ set forth the factually analogous issue in RFA 2019-105. In fact, the hearing for this matter was combined with the hearing in RFA 2019-105 due to the recognized similarity of issues. Contrary to Fountains' assertions, there is competent substantial evidence in the record as to the basis for the preliminary scores for both RFAs. Marisa Button, Director of Multifamily Allocations, testified that in RFA 2019-105, the scorer excluded capital contribution #3 as a funding source. (Transcript page 113-114). Additionally, the scoresheet from the scoring of the Vistas application in RFA 2019-105 was admitted into evidence as HTG Oak Valley's Exhibit 8. The scorer wrote on the scoresheet that Vistas "has a construction financing shortfall…" Finding of Fact 28 is supported by competent, substantial evidence, and should not be disturbed. Accordingly, the exception should be rejected.

Response to Fountains' Exception to Finding of Fact 29

Fountains takes exception to Finding of Fact 29 in which the ALJ makes findings regarding what occurred during Florida Housing's scoring meetings. Among other issues, Fountains takes

exception to the ALJ characterizing the meetings as "reconciliation" meetings. However, a review of the transcript demonstrates that Ms. Button used the term "reconciliation" interchangeably with "resource" to describe the meetings between the scorers, herself, and Florida Housing legal staff prior to the review committee meetings. (Hearing Transcript, pages 94, 111).

Additionally, as the ALJ himself concludes at the end of Finding of Fact 29, the details of that meeting are irrelevant because "the scoring determination belongs to the review committee member herself or himself." Because Finding of Fact 28 is supported by competent, substantial evidence, it should not be disturbed. Accordingly, the exception should be rejected.

Response to Fountains' Exception to Finding of Fact 30

Fountains takes exception to Finding of Fact 30 in which the ALJ makes findings regarding how Florida Housing discovered its inconsistent scoring results in RFAs 2018-110 and 2019-105. Fountains incorporates its arguments regarding Finding of Fact 29 into this exception and Florida Housing incorporates its response to the exception to Finding of Fact 29. Finding of Fact 30 is a recitation of the procedural history of the scoring for RFAs 2019-105 and 2018-110 and the parties litigation positions on those scoring results. It is supported by competent substantial evidence and the exception should be rejected.

Response to Fountains' Exception to Finding of Fact 31

Fountains takes exception to Finding of Fact 31 in which the ALJ summarizes Florida Housing's argument. The entire paragraph is taken almost entirely from the Proposed Recommended Order filed by Florida Housing in this matter. (Florida Housing's Proposed Recommended Order, ¶59). Additionally, it is supported by Ms. Button's testimony at hearing in which she outlined Florida Housing's position and the reasons behind the litigation position.

(Transcript pages 117-120, 165-166). Finding of Fact 31 is supported by competent substantial evidence and the exception should be rejected.

Response to Fountains' Exception to Finding of Fact 32

Fountains takes exception to Finding of Fact 32 in which the ALJ concludes that the dispute is solvable as a matter of law. Finding of Fact 32 is more accurately construed as a conclusion of law. Regardless, Finding of Fact 32 does not address new factual information and is irrelevant to the ultimate conclusion reached. Given the context of the order, Finding of Fact 32 is reasonable, and the exception should be rejected.

Response to Fountains' Exception to Conclusions of Law 38-46

Fountains takes exception to Conclusions of Law 38-46 in which the ALJ discusses Rosedale Holding v. Florida Housing Finance Corp, FHFC Case No. 2013-038BP (Recommended Order May 12, 2014, FHFC Final Order June 13, 2014). Rosedale involved a similar payment schedule in an equity proposal that the ALJ found is distinguishable from the case at hand. Conclusion of Law 46 distinguishes Rosedale from Fountains because Rosedale's equity proposal clearly and unambiguously did not meet the requirements of the RFA while Fountains' equity proposals was internally inconsistent. Conclusions of Law 38-46 are reasonable and supported by competent substantial evidence. The exception to Conclusions of Law 38-46 should be rejected.

Response to Fountains' Exception to Conclusion of Law 47

Fountains takes exception to Conclusion of Law 47 in which the ALJ discusses the internal inconsistency in the Fountains equity proposal. In a circular analysis, the ALJ concludes that even though the pay-in schedule is not specifically required by the RFA, the RFA requires the pay-in schedule because the pay in schedule is part of the equity proposal. The conclusion is not reasonable based on the plain and unambiguous language of the RFA. Additionally, the conclusion

is not necessary to reach the ultimate outcome in this proceeding and easily subject to erroneous interpretations in future litigation.

Conclusion of Law 47 should be modified as follows:

> 47. The internal inconsistency in the Equity Proposal stems from the Pay-In Schedule. As a preliminary matter, FHFC and Fountains argue that, because the RFA does not require an equity proposal to include a detailed timetable, the Pay-In Schedule is mere surplusage that can and should be ignored. This is not a persuasive argument. First, the premise is only trivially true. The RFA does not specifically require an equity pay-in schedule, but it *does* instruct that an equity proposal be attached to the application. ~~So, whatever is in the equity proposal must be submitted – that is the important requirement. In that sense, therefore, the RFA *did* require the submission of the Pay-In Schedule, as it was part of the Equity Proposal.~~

Florida Housing has substantive jurisdiction over Conclusion of Law 47 and its modification is as or more reasonable than the rejected conclusion. The modification does not impact the ultimate findings or conclusion of the Recommended Order.

Response to Fountains' Exception to Conclusion of Law 48

Fountains takes exception to Conclusion of Law 48 in which the ALJ concludes that the pay-in schedule in the Fountains equity proposal is relevant to the RFA requirement to "[s]tate the proposed amount of equity to be paid prior to construction completion." The equity proposal in its entirety was submitted to satisfy that RFA requirement, along with other requirements. Therefore, it is reasonable to conclude that that the document, as a whole, is relevant in determining if the RFA requirements were met. Conclusion of Law 48 is reasonable and supported by competent substantial evidence. The exception to Conclusion of Law 48 should be rejected.

Response to Fountains' Exceptions to Conclusions of Law 49-51

Fountains takes exception to Conclusions of Law 49-51 in which the ALJ concludes that the Pay-In Schedule is a timetable for the equity contributions and analyzes the impact of the pay in schedule on the RFA requirements. While the ALJ labeled 49-51 Conclusions of Law, in reality,

they are Findings of Fact because no legal analysis is necessary to make the findings. The ALJ uses the pay-in schedule itself and using no other evidence, concludes that the pay-in schedule is a timetable. The pay-in schedule is evidence as it was part of Fountains' application. (Joint Exhibit 11, page 76-78). These findings, albeit mislabeled as conclusions of law, are reasonable, and supported by competent, substantial evidence. The exceptions to the paragraphs labeled as Conclusions of Law 49-51 should be rejected.

Response to Fountains' Exception to Conclusion of Law 54

Fountains takes exception to Conclusion of Law 54 in which the ALJ concludes that the meaning of the equity proposal between the parties to the proposal, Fountains and RBC Capital, is irrelevant. Fountains takes exception to the portion of the conclusion that states that the question to be decided here "is whether FHFC should consider Capital Contribution #3 as part of each applicant's total construction funding." Fountains argues that the question is whether the equity proposal met the requirements of the RFA. While Florida Housing agrees with Fountains, as that is the ultimate question to be decided in this proceeding, the more narrowed question is accurate as stated in Conclusion of Law 54 because in determining whether the equity proposal met the requirements of the RFA, Florida Housing must consider whether Capital Contribution #3 is responsive to the requirements of the RFA. Conclusion of Law 54 is reasonable and supported by competent substantial evidence.

Response to Fountains' Exceptions to Conclusions of Law 56-59

Fountains takes exception to Conclusions of Law 56-59 in which the ALJ summarizes Fountains' and Florida Housing's litigation positions and then makes conclusions regarding those positions.

Conclusion of Law 56 is a recitation of Florida Housing's rational behind its litigation position. Even though the ALJ labeled 56 as a Conclusion of Law, in reality, it is a Finding of Fact because no legal analysis is necessary to recite Florida Housing's litigation position. This finding, albeit mislabeled as a conclusion of law, is reasonable, and supported by competent, substantial evidence. The exception to the paragraph labeled as Conclusion of Law 56 should be rejected.

Conclusion of Law 57 should be modified to be in conformity with other findings and conclusions of the Recommended Order. Specifically, in Conclusion of Law 63, the ALJ concludes that the "suggestion that **material** ambiguity should be handled as a minor irregularity smells like litigation fuel." (emphasis added). Conclusion of Law 69 states that "**material** ambiguity in a response is a substantial, nonwaivable deviation…" (emphasis added). Materiality is a critical factor in determining that the ambiguity in the Fountains equity proposal failed to meet the requirements of the RFA and it should be so noted throughout the order.

Here, Conclusion of Law 57 should be modified as follows to ensure consistency in the holding and prevent future misapplication:

> 57. Regardless of whether the foregoing reasoning is persuasive, it is neither irrational nor clearly erroneous, provided the premise behind it is correct. The underlying premise is that, in determining conformity, FHFC may use its best judgment to ascertain the most reasonable meaning of a~~n~~ materially uncertain or unclear response. For the reasons that follow, however, it is concluded that this premise is clearly erroneous and contrary to competition.

Florida Housing has substantive jurisdiction over Conclusion of Law 57 and its modification is as or more reasonable than the rejected conclusion. The modification does not impact the ultimate findings or conclusion of the Recommended Order.

Conclusions of Law 58-59 include the ALJ's analysis that responses to the RFA should be clearly stated. The language of the RFA was not challenged at hearing, is plain and unambiguous,

and, thus, should require no interpretation. However, the ALJ, in supporting his ultimate conclusion that Fountains' equity letter was materially ambiguous, uses Conclusions of Law 58-59 to provide analysis for the reason why ambiguous responses are not permitted in competitive solicitations. Fountains has not suggested an alternative that is as or more reasonable than Conclusions of Law 58-59. Conclusions of Law 58-59 are reasonable, and the exception should be rejected.

Response to Fountains' Exceptions to Conclusions of Law 60-63

Fountains takes exception to Conclusions of Law 60-63 in which the ALJ endeavors to apply Florida Housing's rule regarding minor irregularities to the Fountains' equity proposal. The ALJ ultimately concludes that the irregularity in the Fountains equity proposal is not a minor irregularity and is a material deviation from the requirements of the RFA. While Florida Housing does not seek to disturb this ultimate conclusion, Florida Housing has never approached the minor irregularity analysis from the standpoint advocated by the ALJ. The ALJ's approach is unprecedented and may have the unintended result of inviting future litigation.

Here, Conclusions of Law 60-62 should be modified as follows to ensure consistency with precedent and prevent future misapplication:

> 60. ~~Ambiguity is nonresponsive because Florida Administrative Code Rule 67-60.008 says so. That rule defines the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." An ambiguous response by its very nature creates uncertainty that the response is conforming; absent such uncertainty, the issue of ambiguity would not surface.[7]~~ Rule 67-60.008 defines the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." This rule makes clear that a material ambiguity in a response cannot be waived as a minor irregularity unless the uncertainty can be reasonably eliminated by looking elsewhere in the application.

> 61. ~~Rule 67-60.008 makes clear that a material ambiguity, that is, one which creates *any* uncertainty that the terms and requirements of the RFA have been met, is an irregularity — and *not* a minor one at that. Such an irregularity is otherwise known as a material variance or substantial deviation. By excluding material ambiguities from the subset of errors known as minor irregularities, FHFC's own rule, by necessary implication, classifies an ambiguity involving material information as a substantial deviation from the specifications, for deficiencies in a response or bid are either minor (and waivable) or material (and nonwaivable); there is no middle ground. FHFC does not have the authority, under rule 67-60.008 or procurement law generally, to waive or correct a material variance.~~
>
> 62. ~~To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Fountains) urges be done in regard to the Equity Proposal, would be tantamount to "correcting" the irregularity by removing any uncertainty that the terms and requirements of the RFA have been satisfied. In and of itself, the resolution of ambiguity through reasonable interpretation is, of course, neither arbitrary nor illogical; indeed, such an approach is required in some contexts. But this is not a declaratory judgment suit or breach of contract action in circuit court between parties to a written instrument whose meaning is in dispute; it is an administrative competitive-selection protest. In this context, construing an ambiguous response violates rule 67-60.008 and for that reason is plainly and undeniably impermissible. Doing so would be clearly erroneous.~~

(internal citations omitted).

Florida Housing has substantive jurisdiction over Conclusions of Law 60-62 and its modification is as or more reasonable than the rejected conclusion. The modification does not impact the ultimate findings or conclusion of the Recommended Order.

Conclusion of Law 63 is consistent with the ALJ's other findings and conclusions and are supported by competent substantial evidence. For these reasons, the exception to Conclusion of Law 63 should be rejected.

Response to Fountains' Exceptions to Conclusions of Law 70-72

Fountains takes exception to Conclusions of Law 70-72 in which the ALJ concludes that ambiguity must be determined de novo in an administrative bid protest and then applies that determination to the facts at hand. In Conclusion of Law 70, the ALJ determined that Florida

Housing should not be given deference in the interpretation of materially ambiguous responses to its own RFAs. This interpretation of Section 120.57(3), Fla. Stat., and the relevant case law, is not within the substantive jurisdiction of Florida Housing, and Florida Housing has no authority to reject or modify this conclusion. The exception to Conclusion of Law 70 should be rejected.

In Conclusions of Law 71-72, the ALJ explains that since the equity letter is subject to two reasonable interpretations, it is ambiguous. However, the ALJ also reasons that there may be some other part of the application that clarifies the ambiguity. This is consistent with how Florida Housing has approached irregularities: when information can be located elsewhere in the application that clarifies the irregularity, Florida Housing may waive or correct the minor irregularity. Conclusions of Law 71-72 are reasonable and supported by competent, substantial evidence. The exception to Conclusions of Law 71-72 should be rejected.

Response to Fountains' Exceptions to Conclusions of Law 73-75

Fountains takes exception to Conclusions of Law 73-75 in which the ALJ concludes that the entirety of the application should be reviewed to determine if it meet the requirements of the RFA. Specifically, that the debt proposal, since it was the only source of information regarding the timing of permanent loan closing, should be reviewed to determine whether the ambiguity in the equity proposal is clarified. Conclusions of Law 73-75 are consistent with the ALJ's other findings and conclusions, are reasonable, and are supported by competent substantial evidence. The exception to Conclusions of Law 73-75 should be rejected.

Response to Fountains' Exceptions to Conclusions of Law 76-78

Fountains takes exception to Conclusions of Law 76-78 in which the ALJ applies his prior analysis and summarizes the ultimate conclusions regarding Fountains equity proposal. Conclusions of Law 76-78 conclusions are consistent with the ALJ's other findings and

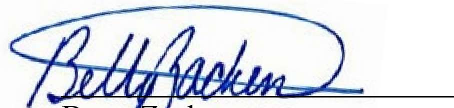
conclusions, are reasonable, and are supported by competent substantial evidence. The exception to Conclusions of Law 76-78 should be rejected for the reasons previously articulated in this Response.

Conclusion

Florida Housing respectfully requests that the Board:

1) Grant HTG Oak Valley's Exception to Finding of Fact 12,
2) Grant, in part, Fountains' Exceptions to Findings of Fact 26, Conclusions of Law 47, 57, 60, 61, and 62 as discussed herein,
3) Reject all other exceptions filed by Fountains, and
4) Adopt the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order, as modified herein, and issue a Final Order consistent with same.

Respectfully submitted, this 29th day of July, 2019.



Betty Zachem
Fla. Bar No.: 25821
Attorney for Respondent Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
Betty.Zachem@floridahousing.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by service through electronic mail this 29th day of July, 2019 to the following:

Maureen M. Daughton
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE
Tallahassee, Florida 32308
mdaughton@mmd-lawfirm.com

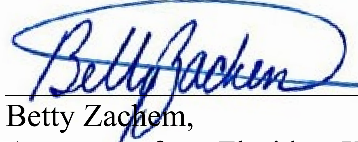
M. Christopher Bryant
Oertel, Fernandez, Bryant & Atkinson, P.A.
P.O. Box 1110
Tallahassee, Florida 32302
cbryant@ohfc.com

J. Stephen Menton
Tana D. Storey
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
smenton@rutledge-ecenia.com
tana@rutledge-ecenia.com

Brian B. Waterfield
Timshel Development Group
310 S. Dillard Street, Suite 135
Winter Garden, Florida 34787
bwaterfield@timsheldevelopment.com

Craig D. Varn
Amy Wells Brennan
Manson Bolves Donaldson & Varn
106 East College Avenue, Suite 820
Tallahassee, Florida 32301
cvarn@mansonbolves.com
abrennan@mansonbolves.com

Michael G. Maida
Michael G. Maida, P.A.
1709 Hermitage Blvd., Suite 201
Tallahassee, Florida 32308
mike@maidalawpa.com



Betty Zachem,
Attorney for Florida Housing Finance Corporation