STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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

FHFC Case No. 2013-038BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

PARADISE POINT SENIOR HOUSING, LLC,

Intervenor,

ARBOURS AT TUMBLIN CREEK, LLC,

Intervenor,

ARBOURS AT CENTRAL PARKWAY, LLC,

Intervenor,
_____/

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

FHFC Case No. 2013-042BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

KATIE MANOR, LTD.,

Intervenor.
_____/

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

_____ /DATE: 06/13/14

FRENCHTOWN SQUARE, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

_____/

FHFC Case No. 2013-043BP

JPM WESTBROOK I LIMITED PARTNERSHIP,

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent;

and

KATIE MANOR, LTD.,

Intervenor.

_____/

FHFC Case No. 2013-044BP

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

FOREST RIDGE AT BEVERLY HILLS, LTD.,

Intervenor,

_____/

FHFC Case No. 2013-047BP

FINAL ORDER

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

Recommended Order filed in this matter pursuant to Section 120.57(3), *Florida Statutes*, and Rule 28-106.216, *Florida Administrative Code*. on June 13, 2014. The Board has jurisdiction. After a review of the record and being otherwise fully advised in these proceedings, the Board finds:

Petitioners timely filed formal written protests pursuant to Sections 120.569 and 120.57(3), *Florida Statutes*, (the "Petition") challenging Florida Housing's scoring and ranking decisions regarding RFA 2013-001, which provided federal Low Income Housing Tax Credits ("HC," "tax credits," or credits") to fund affordable housing projects in Medium and Small population counties throughout Florida. There are no disputed issues of material fact. Pursuant to Section 120.57(1), *Florida Statutes*, an informal hearing was held in this case on March 5, 2014, in Tallahassee, Florida, before Florida Housing's appointed Hearing Officer, Christopher D. McGuire.

The parties timely filed Proposed Recommended Orders. After reviewing the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order on May 12, 2014. The Recommended Order found that Petitioners had failed to prove that Florida Housing's scoring and ranking decisions were clearly erroneous, arbitrary or capricious, or contrary to competition, and recommended that a Final Order be entered affirming Florida Housing's actions regarding RFA

2013-001, and denying the relief requested in each Petition. A copy of the Recommended Order is attached as Exhibit"A."

On May 28, 2014, Rosedale Holdings, LLC, filed "Rosedale's Exceptions to Recommended Order," taking exception with certain of the Hearing Officer's Recommended Conclusions of Law, challenging such decisions as to each and every development except for the disqualification of OCDC Palm Village (A copy is attached as Exhibit "B,"); JPM Westbrook I Limited Partnership filed a "Notice of Joinder in Exceptions," adopting all exceptions filed by Rosedale (A copy is attached as Exhibit "C,"); and Summerset Apartments Limited Partnership filed its "Objections/Exceptions to the Recommended Order," challenging only the Hearing Officer's determination regarding the Hammock Crossings withdrawal. A copy is attached as Exhibit "D." On June 9, 2014, Florida Housing filed "Florida Housing's Response to Exceptions to Recommended Order." A copy is attached as Exhibit "E."

After a review of the entire record in this proceeding, the Board makes the following findings and rulings:

EXCEPTIONS

1. An agency is permitted to interpret statutes and administrative rules over which it has substantive jurisdiction and to reject or modify erroneous conclusions of law over which it has substantive jurisdiction. See § 120.57(1)(1),

Fla. Stat. (2012). As long as the agency states with particularity the reasons for rejecting an ALJ's conclusion of law and finds that its substituted conclusion is as reasonable, or more reasonable, the agency is not bound by the ALJ's conclusions of law. Sec. 120.57(1)(1), Fla. Stat. (2012). *See also, Harloff v. City of Sarasota,* 575 So.2d 1324, 1328 (Fla. 2d DCA 1991), *review denied*, 583 So.2d 1035 (Fla. 1991).

2. Rosedale's exceptions are grounded mainly on three issues: one, whether the correct standard of review was applied; two, whether mistakes were "clearly evident," and three, whether errors in various attachments to the application were subject to being waived or corrected as "minor irregularities." Rosedale and Summerset take exception to the conclusion that the Board exceeded its discretionary authority in its preliminary award in December 2013.

The "Clearly Erroneous" Standard

3. Petitioner Rosedale's Exception to Conclusion of Law No. 13 of the Recommended Order is not well taken. The issues addressed here involve the agency's interpretation of its own rules, specifically R. 67-60.002(6) and 67-60.006, Fla. Admin. Code, relating to the definition and treatment of "minor irregularities," thus the "clearly erroneous" standard of review is applicable here. *See, State Contracting & Engineering Corp. v. Dep't of Transportation*, 709 So. 2d 607 (Fla. 1st DCA 1998).

"Clearly Evident"

4. Petitioner Rosedale's Exceptions to Findings of Fact Nos. 54 and 55, and Conclusion of Law No. of the Recommended Order, are not well taken. Whether a mistake is "clearly evident is a factual determination. In each case, Ms. Grubbs testimony was that the errors in the equity commitment letters at issue were clearly evident to her. (J-19, pp. 18-27). In reviewing a Recommended Order, an agency is not free to re-weigh the evidence or to reject findings of fact unless there is ***no*** competent, substantial evidence to support them. *See Health Care and Retirement Corporation v. Department of Health and Rehabilitative Services,* 561 So.2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Department of Business Regulation,* 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Findings of Fact 54 and 55 are supported competent substantial evidence.

"Face of the Application"

5. Rosedale takes exception to Florida Housing applying the minor irregularities rules to documents other than the Application form itself, but which are attached and made part of each submission in response to the RFA.

6. Rosedale argues in its second, third, and fourth Exceptions, as to the Paradise Point (at ¶13-17) and Arbours at Tumblin Creek (at ¶32-33) equity commitment letters, and the Summerset site contract closing date(at ¶ 47), that Florida Housing erred in making its scoring decisions because it looked to other

attachments, to the pro forma, or to the application form for information in making its decision. Rosedale is wrong as a matter of law.

7. Rule 67-48.002(10), *Florida Administrative Code*, defines "Application," as "[T]he sealed response submitted to participate in a competitive solicitation for funding pursuant to Rule 67-60, F.A.C." RFA 2013-001, at Section Three A., provides, "A complete application consists of Exhibit A of RFA 2013-001 and all applicable attachments . . .." The "Application," means the application form and all attachments filed along with that form. Once filed, the application and attachments become one document: the "Application." Thus, any argument that attempts to distinguish between or among Exhibit A, the Application form, and any attachments thereto is ill founded and must be rejected.

RULING ON EXCEPTIONS

For the reasons set forth above, and in Florida Housing's Response to Exceptions, Petitioner Rosedale's Exceptions to the Recommended Order are not adopted. For the same reasons, Petitioner Summerset's Exception/Objection to the Recommended Order is not adopted.

RULING ON THE RECOMMENDED ORDER

1. The findings of fact in the Recommended Order are supported by competent substantial evidence.

2. The conclusions of law in the Recommended Order are supported by competent substantial evidence.

ORDER

In accordance with the foregoing:

1. Each and all of Rosedale's Exceptions are rejected. Summerset's Objection/Exception is rejected.

2. 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.

3. 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.

4. The Recommendation of the Recommended Order is adopted.

IT IS HEREBY FOUND AND ORDERED that Florida Housing's scoring and ranking actions regarding RFA 2013-001 are affirmed, and the relief requested in each Petition is hereby DENIED.

DONE and ORDERED this *13th* day of June, 2014.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, 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
FLORIDA HOUSING FINANCE CORPORATION

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

FHFC Case No. 2013-038BP

v. Petitioners,

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PARADISE POINT SENIOR HOUSING, LLC,

Intervenor,

ARBOURS AT TUMBLIN CREEK, LLC,

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OCDC PALM VILLAGE, LP,
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FRENCHTOWN SQUARE, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

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FHFC Case No. 2013-043BP

JPM WESTBROOK I LIMITED PARTNERSHIP,

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FHFC Case No. 2013-044BP

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

FOREST RIDGE AT BEVERLY HILLS, LTD.,

Intervenor,

_____/

FHFC Case No. 2013-047BP

RECOMMENDED ORDER

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

APPEARANCES

For Petitioners:

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

STATEMENT OF THE CASE

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

PRELIMINARY STATEMENT

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

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

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

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

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

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

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

EXHIBITS

The parties offered the following joint exhibits into evidence:

Exhibit 1: Prehearing Stipulation.

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

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

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

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

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

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

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

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

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

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

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

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

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

Exhibit 15: Finance Scoring Template for RFA 2013-001

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

Exhibit 17: Page 4 of RFA 2014-103

Exhibit 18: Deposition transcript of Ken Reecy

Exhibit 19: Deposition transcript of Amy Garmon

Exhibit 20: Deposition transcript of Jade Grubbs

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

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

Petitioner Paradise Point offered the following exhibit:

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

Petitioner Summerset offered the following exhibit:

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

Petitioner Frenchtown Square offered the following exhibit:

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

Petitioner Westbrook offered the following two exhibits:

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

FINDINGS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Frenchtown Square

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

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

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

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

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

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

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

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

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

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

OCDC Palm Village

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

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

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

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

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

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

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

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

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

JPM Westbrook

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

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

Summerset

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

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

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

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

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

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

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

Hammock Crossings

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

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

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

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

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

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

Forest Ridge

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

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

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

Paradise Point

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

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

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

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

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

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

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

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

Arbours at Tumblin Creek

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

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

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

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

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

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

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

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

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

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

Arbours at Central Parkway

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

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

Katie Manor

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

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

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

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

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

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

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

Rosedale

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

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

CONCLUSIONS OF LAW

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

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

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

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

> . . . . Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the [hearing officer] shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Paradise Point

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

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

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

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

Arbours at Tumblin Creek and Arbours at Central Parkway

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

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

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

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

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

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

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

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

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

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

Summerset

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

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

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

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

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

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

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

Frenchtown Square

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

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

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

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

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

Katie Manor

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

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

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

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

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

OCDC Palm Village

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

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

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

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

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

Hammock Crossings

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

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

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

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

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

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

RECOMMENDATION

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

Respectfully submitted this 12th day of May, 2014.

Christopher McGuire
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Gary Cohen, Esq., gcohen@shutts.com, Shutts & Bowen LLP, 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, this *1st* day of April, 2014.

BEFORE THE STATE OF FLORIDA
HOUSING FINANCE CORPORATION

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

Petitioners,

FHFC Case No. 2013-038BP

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PARADISE POINT SENIOR HOUSING, LLC,

Intervenor,

ARBOURS AT TUMBLIN CREEK, LLC,

Intervenor,

ARBOURS AT CENTRAL PARKWAY, LLC,

Intervenor.
_____/

ROSEDALE'S EXCEPTIONS TO RECOMMENDED ORDER

Rosedale Holdings, LLC, H&H Residential Development, LLC, and Brookestone I, L.P. ("Rosedale"), by and through undersigned counsel and pursuant to Section 120.57(3)(e), Florida Statutes, hereby files these exceptions to certain Findings of Fact and Conclusions of Law in the Recommended Order dated May 12, 2014.

Section 120.57(1)(l), Florida Statutes, restricts an agency's authority to reject or modify a findings of fact in a recommended order. That restriction, however, is not absolute. An agency may reject a finding of fact when the agency reviews the entire record and determines that a finding of fact is not based on any competent, substantial evidence. § 120.57(1)(l), Fla. Stat.

(2014). This was an informal proceedings for which the parties agreed there were no disputed issues of material fact. Nonetheless, the Hearing Officer made several factual findings in his Recommended Order that were not stipulated by the parties and are not based on any evidence in the record. As described below, Rosedale takes exception to such findings of fact which should be rejected by the Board as the agency head of Florida Housing Finance Corporation ("Florida Housing" or the "Corporation").

Rosedale also takes exception to certain of the Hearing Officer's Conclusions of Law. Section 120.57(1)(l), Florida Statutes, authorizes the agency head to reject or modify those conclusions of law in a recommended order over which the agency has substantive jurisdiction if the agency head finds that its modified or substituted conclusions are at least a reasonable as those of the hearing officer. § 120.57(1)(l), Fla. Stat. (2014). As the income housing tax credit allocating agency for the State of Florida, Florida Housing has substantive jurisdiction over legal conclusions relating to its process for awarding income housing tax credits including those interpreting Chapters 67-48 and 67-60, Florida Administrative Code. For the reasons described below, Florida Housing should reject the following Findings of Fact and Conclusions of Law in the Recommended Order.

EXCEPTION TO CONCLUSION OF LAW 13—DEFERENCE

1. Rosedale takes exception to Conclusion of Law 13, wherein the Hearing Officer erroneously concluded that "Florida Housing's conclusion that a proposal's departure from the RFA specifications is a minor irregularity, as opposed to a material deviation, being a matter of rule construction, must be accorded deference under the clearly erroneous standard." In his Recommended Order, the Hearing Officer finds that a number of applications that the Review Committee recommended for funding clearly did not comply with the requirements of the RFA.

However, the Review Committee's Recommendations that were presented to and approved by Florida Housing's Board (Exhibit 3) did not even mention these clear departures-- much less explain why these departures were determined to be "minor irregularities." Nor was the Board asked to approve any such determinations. As such, the Hearing Officer erred in concluding that these undisclosed and unexplained determinations should be accorded deference under the clearly erroneous standard as no determination was made by the agency head that any deviations from the RFA specifications were waivable "minor irregularities" under Chapter 67-60, Florida Administrative Code. Thus, Florida Housing has not made any interpretation of Rule 67-60.002(6) or 67-60.008 relating to the applications at issue in this proceeding to which any deference can be afforded.

2. Because the Hearing Officer employed this erroneous standard to "defer" to determinations by Florida Housing staff that were never presented to, let alone explained to the Board, Florida Housing's Board should carefully and critically review each departure from the RFA and make its own independent evaluation of whether such departure is in fact a "minor irregularity" that should be waived under Florida Housing's rules.

EXCEPTIONS TO FINDINGS 54-55 AND CONCLUSIONS 18-19 (PARADISE POINT)

3. Rosedale takes exception to Conclusions of Law 18-19 to the extent the Recommended Order accepts an equity proposal submitted by Paradise Point that clearly does not comply with the requirements of the RFA, but which plain noncompliance was excused by Florida Housing staff based on the erroneous conclusion that it may be waived as a minor irregularity. Rosedale also takes exception to Findings of Fact 54-55 to the extent they erroneously find that the information may be supplied based on calculations

4. The RFA provides that in order for an Application to be funded, the "total amount of monetary funds determined to be in funding proposals must equal or exceed uses." [RFA § 4.A.9., p. 37].

5. The RFA includes the requirements for an Applicant's equity proposal. This language states that in order to be counted as a source, an equity proposal where the Applicant is selling Housing Credits "***must*** . . . meet the requirements outlined in (a). . . ." [RFA § 4.A.9.(2), p. 36 (emphasis added)].

6. Subparagraph (a) states: "If the Eligible Housing Credit Request Amount is less than the anticipated amount of credit allocation to be purchased stated in the equity proposal, the equity proposal will not be considered a source of financing. However, if the Eligible Housing Credit Request Amount is greater than the anticipated amount of credit allocation stated in the equity proposal, the equity proposal will be considered a source of financing . . ." [RFA § 4.A.9.d.(2)(a), p. 36]. In other words, the Applicant may not "sell" more credits than it requested, nor may the syndicator purchase more credits than are available.

7. The equity proposal submitted by Paradise Point states that the anticipated Eligible Housing Credit Request Amount is $1,175,000, which would be $11,750,000 over 10 years. [J-14; J-20 at 21].

8. The equity proposal states that the anticipated Housing Credit allocation to be purchased is "$11,778,825 ($11,775,000 * 99.99%)." [J-14]. [1]

9. The Eligible Housing Credit Request Amount in this equity proposal ($11,750,000) is less than the amount of credit allocation to be purchased stated in the equity

[1] Contrary to the requirements of the RFA, the equity proposal does not expressly state the amount of the allocation; rather, it states the amount of allocation "to be purchased." But the parties stipulated that the equity proposal shows an Eligible Housing Credit Request Amount that is less than the anticipated amount of credit allocation stated in the equity proposal.

proposal ($11,778,825 ($11,775,000*99.99%)). Thus, this equity proposal cannot be considered a source of financing pursuant to the terms of the RFA.

10. The Recommended Order erroneously concludes that the $11,778,825 stated amount of Housing Credit allocation to be purchased is a typographical error and that the correct amount should be $11,748,285,[2] which is less than the Housing Credit Request amount stated in the equity proposal.

11. The Recommended Order erroneously relies on Rule 67-60.008, which states that: "Mistakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors, may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes."

12. This rule, however, does not authorize the Corporation to "correct" the amount of the Housing Credit Allocation to be purchased as stated in the Paradise Point equity proposal -- by changing it from $11,778,825 to $11,748,285 (or even $11,748,825) --for several reasons.

13. First, the "mistake"--if it is one--is not "clearly evident" on the face of the Application. The calculation used in the Recommended Order to arrive at the amount of $11,748,285,[3] ignores the calculation that ***is*** "clearly evident" on the face of the equity proposal: ($11,775,000[4] * 99.99), a calculation which yields the amount of $11,773,823, which also is greater than the Housing Request Amount and results in the equity proposal being not eligible as a source of financing per the terms of the RFA.

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[2] As explained in footnote 3 below, this appears to be a typographical error in the Recommended Order.

[3] This calculation actually produces the number $11,748,825 (not $11,748,285 as stated in the Recommended Order); presumably, the Recommended Order contains a typographical error. The calculation also improperly relies on information obtained from outside of the equity proposal itself, including information in the pro forma as discussed in more detail in Paragraph. 19 below.

[4] At the final hearing, Paradise Point argued that this number is "probably" not correct and that "maybe there are two typographical errors." [Tr. 92, 110-111]. As noted, however, the rule requires that the mistake be "clearly evident," not "maybe" a typographical error or "probably" not correct.

14. Florida Housing cannot be sure if there is a typographical error in the equity proposal and, if so, which number is a typographical error. As such, the mistake is not "clearly evident."

15. Second, Rule 67-08.008 does not authorize the Corporation to "correct" the stated amount of the Housing Credit Allocation to be purchased because it does not appear on the "face of the Application." The alleged typographical error which Florida Housing purports to "correct" is not part of the Application form. It is stated in the equity proposal, which is a letter submitted by a third party, the purpose of which is to confirm information in the Application, not the reverse.

16. The RFA states what must be included in the equity proposal itself and does not authorize Florida Housing (or the Hearing Officer) to look at other aspects of the Application and perform its own calculations to supply different information than is stated on the face of the equity proposal. Here, Florida Housing (and the Hearing Officer) admittedly took information from outside of the equity proposal in order to find the equity proposal met the mandatory requirements of the RFA. Specifically, Florida Housing (and the Hearing Officer) looked to information in the pro forma prepared by Paradise Point and included in its Application. [PP-1]. The purpose of Florida Housing requiring an equity letter from a third party is to substantiate the information in the Application, including the numbers used in the pro forma. As such, it would be improper – and defeat the purpose of requiring an equity proposal from a third party--to rely on information from the pro forma to "correct" information in the equity letter so that it then matches information in the portion of the Application prepared by the Applicant.

17. In fact, Florida Housing's position here—to look at information from outside of the equity proposal to "correct" an alleged error in the equity proposal-- is inconsistent with

Florida Housing's treatment of other applications submitted in response to the RFA, and particularly the application for Janie's Garden. [J-21]. In that case, Florida Housing declined to use information that was "clearly evident" in the equity letter—and not, as here, inconsistent with other information-- to provide missing information in the Application. Instead, Florida Housing disqualified the Application because information was not completed in response to one question where the information clearly was provided elsewhere in the Application package. Florida Housing should have done the same here and looked only to the equity proposal to determine whether the equity proposal meets the mandatory requirements for the equity proposal as set forth in the RFA.

18. In addition to the reasons stated above, Florida Housing could not lawfully "correct" what it determined was a mistake in the Paradise Point equity proposal because such intended action ignores the mandatory requirements of the RFA. The RFA states that the equity proposal "must" meet the stated requirement that the Eligible Housing Credit Request amount is greater than the anticipated amount of credit allocation stated in the equity proposal. The use of the word "must" indicates that the requirement is mandatory. *See Florida Dept. of Health and Rehabilitative Servs. v. Career Service Comm'n*, 289 So. 2d 412, 417 (Fla. 4th DCA 1974).

19. In accordance with the second sentence of Section 4.A.9., paragraph (2)(a) on page 36 of the RFA, because the Eligible Housing Credit Request Amount is less than the anticipated amount of credit allocation stated in the Paradise Point equity proposal, the equity proposal cannot be considered a source of financing for the Paradise Point project. This is a requirement that Florida Housing cannot waive since Florida Housing made it a mandatory requirement. *See American Lighting and Signalization v. Dept. of Transp.*, DOAH Case No. 10-7669BID, 2010 WL 4926224 (Fla. Div. Admin. Hearings Dec. 1, 2010).

20. Acceptance of the Paradise Point equity proposal by Florida Housing contravenes the mandatory requirements for an equity proposal as stated on page 36 of the RFA. Failure by Florida Housing to follow its own bid specifications is an arbitrary and capricious act. *See Coin Laundry Equipment co., Inc. v. University of West Fla.*, DOAH Case No. 96-0962BID, 1996 WL 1060244 (Fla. Div. Admin. Hrgs. July 5, 1996).

21. The Paradise Point Application is not eligible for funding because the Housing Credit Request Amount is less than the anticipated amount of credit allocation stated in the equity proposal, and the equity proposal therefore may not be considered a source of funding. Without consideration of the equity proposal as a source of financing, the Paradise Point Application fails to show that the sources equal or exceed uses, as required by the RFA.

22. With respect to Findings of Fact 54 and 55, as indicated in footnote 3, the calculation $11,750,000 x 99.99% does not yield $11,748,285. Thus, there is no evidence in the record to support this finding and it is clearly in error. Finding of Fact 55 is also not supported by any competent substantial evidence to the extent that it finds that "Florida Housing was able to confirm that the errors actually were the result of typographical and mathematical mistakes, and that the anticipated housing credit request amount actually was less than the anticipated credit amount to be purchased." There is no evidence in the record that Florida Housing confirmed with the author of the equity proposal letter that any errors in that letter were the result of typographical errors or mathematical mistakes.

EXCEPTIONS TO CONCLUSIONS OF LAW 20-23 (TUMBLIN CREEK)

23. Rosedale takes exception to Conclusions of Law 20-23 to the extent the Recommended Order accepts an equity proposal submitted by Arbours at Tumblin Creek that clearly does not comply with the requirements of the RFA, but which plain noncompliance was

excused by Florida Housing staff based on the erroneous conclusion that it may be waived as a minor irregularity.

24. As described above with respect to the Paradise Point Application, the RFA requires that the "total amount of monetary funds determined to be in funding proposals must equal or exceed uses" for an Application to be funded. [RFA, p. 37].

25. In addition, in order to be counted as a source of financing, an equity proposal must meet certain requirements. Among other things, the proposal "***must*** . . . [s]tate the anticipated dollar amount of Housing Credit allocation to be purchased." [RFA § 4. A.9.d.(2)(b), p. 36) (emphasis added)]. The RFA makes clear that this is a mandatory requirement. The RFA states that in order to be counted as a source, an equity proposal "***must*** . . . include the information outlined in (b)." Subparagraph (b) states again that the "Housing Credit equity proposal ***must*** meet the following criteria. . . ." [RFA § 4.A.9.d.(2)(b), p. 36 (emphasis added)]. The list of criteria in subparagraph (b) includes the following requirement: "***State*** the anticipated ***dollar amount*** of Housing Credit allocation to be purchased. . . ." [RFA § 4.A.9.d.(2)(b), p. 36 (emphasis added)].

26. The mandatory nature of the equity proposal requirements of the RFA is made clear by the scoring template developed by Florida Housing for use in evaluating the equity commitment as part of the Finance Scoring. [J-15] The template for scoring the equity commitment directs the reviewer not to consider an equity proposal a source of financing if the anticipated dollar amount of Housing Credit allocation to be purchased is not stated. [J-15]

27. Tumblin Creek acknowledges that the amount of housing credit allocation being purchased is required by Florida Housing to be included in an equity proposal so that Florida Housing can determine if the equity proposal is internally consistent such that there are sources

of financing to pay for all development costs reflected on the Applicant's pro forma. [Tr. p. 126]. Equity proposals provide the foundational numbers and third party commitments upon which a tax credit application is built, not the other way around.

28. The Tumblin Creek Application includes an equity proposal from Raymond James. Nowhere does this equity proposal "state the anticipated dollar amount of Housing Credit allocation to be purchased." Thus, the equity proposal included in Tumblin Creek's Application does not satisfy the mandatory requirements of the RFA relating to the equity proposal.

29. The Parties have stipulated that without the Raymond James equity proposal, the Tumblin Creek funding proposal does not equal of exceed uses. [J-1].

30. The Recommended Order erroneously concludes that Florida Housing may waive as a minor irregularity the failure of the Tumblin Creek equity proposal to state the anticipated dollar amount of Housing Credit allocation to be purchased because this amount may be calculated from information found in other places in the Tumblin Creek Application. That conclusion is in error for four reasons.

31. First, Rule 62-60.008, F.A.C., which authorizes Florida Housing to waive minor irregularities, only includes computation and typographical errors as the sorts of minor irregularities that may be waived. The rule does not authorize the waiver of errors based on the absence of information required to be included in an equity proposal, or the absence of even a calculation, rather than on an obvious miscalculation.

32. Second, the Recommended Order concludes that Florida Housing properly calculated the missing amount of Housing Credit allocation to be purchased considering information from outside the equity proposal; specifically, the 99.99% ownership percentage

from the Tumblin Creek application. This conclusion, however, is in direct contradiction of the plain language of the RFA which states what must be included in the equity proposal itself and does not authorize Florida Housing to look at other aspects of the Application. In addition, this would be inconsistent with Florida Housing's treatment of other applications, where Florida Housing refused to look to information in one part of the Application package to fill in missing information elsewhere in the Application. [J-21].

33. Nonetheless, even if this information from the Application is used (which as noted is error), it is clear the calculated amount of Housing Credit Allocation being purchased ($10,421,270 times 99.99% equals $10,420,227.87), produces a number that does not "check." When that calculated number ($10,420,227.87) is multiplied by the stated $0.92 purchase price, it yields an amount ($9,586,609.94) that does not match the amount stated in the equity proposal ($9,586,614). [Tr. at p. 124]. As this amount does not "check," it is clear that Florida Housing could not calculate from information in the equity proposal, or even elsewhere in the Application, the missing dollar amount of Housing Credit allocation to be purchased.[5]

34. Third, Tumblin Creek's failure to submit an equity proposal that states the anticipated dollar amount of Housing Credit allocation to be purchased, is not something that Florida Housing properly may waive since Florida Housing made it a mandatory requirement. *See American Lighting and Signalization v. Dept. of Transp.*, DOAH Case No. 10-7669BID, 2010 WL 4926224 (Fla. Div. Admin. Hearings Dec. 1, 2010). As noted above, the RFA states that the equity proposal "must" state the anticipated dollar amount of Housing Credit allocation to be purchased. The use of the word "must" indicates that the requirement is mandatory. *See Florida Dept. of Health and Rehabilitative Servs. v. Career Service Comm'n*, 289 So. 2d 412,

[5] In summary, for the "math" to "check," Tumblin Creek must either concede that the ownership percentage in its application (99.99%) is incorrect or that the equity amount to be provided ($9,586,614) as stated in the equity proposal is incorrect. Tumblin Creek has done neither.

417 (Fla. 4th DCA 1974). Acceptance of the Tumblin Creek equity proposal by Florida Housing contravenes the mandatory requirements for an equity proposal as stated on page 36 of the RFA. Failure by Florida Housing to follow its own bid specifications is an arbitrary and capricious act. *See Coin Laundry Equipment co., Inc. v. University of West Fla.*, DOAH Case No. 96-0962BID, 1996 WL 1060244 (Fla. Div. Admin. Hrgs. July 5, 1996).

35. Finally, even if Tumblin Creek's failure to include the required information in its equity proposal was something that Florida Housing could waive (which it is not), Florida Housing could only do so if the failure to include this information constitutes a "minor irregularity." Rule 67-60.002 defines a "minor irregularity" as a "variation in a term or condition of an Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other applicants, and does not adversely affect the interests of the Corporation or the public." If Florida Housing is allowed to waive its own mandatory requirement in its RFA, Tumblin Creek will be afforded a benefit not enjoyed by other Applicants who were required to include all of the information required by the RFA in their equity proposal. In addition, accepting an equity proposal that does not state the dollar amount of Housing Credit allocation to be purchased will adversely affect the interests of Florida Housing. As noted, the equity proposal is supposed to be used as the basis for the financial proposal in the Application, not the other way around. Without confirmation that the equity will be provided pursuant to the same terms as in the pro forma, Florida Housing cannot ensure that adequate financing will be available.

36. For all these reasons, the Recommended Order errs in concluding that Florida Housing may waive as a minor irregularity the undisputed failure of the Tumblin Creek equity proposal to state the anticipated dollar amount of Housing Credit allocation to be purchased.

37. The Tumblin Creek equity proposal cannot be considered a source of financing because it fails to "state the anticipated dollar amount of Housing Credit allocation to be purchased," as required by the RFA. Without consideration of the equity proposal as a source of financing, the Tumblin Creek Application fails to show that the sources equal or exceed uses, as required by the RFA.

EXCEPTIONS TO FINDING 40 AND CONCLUSIONS 28-32 (SUMMERSET)

38. Rosedale takes exception to Conclusions of Law 28-32 to the extent the Recommended Order concludes that Florida Housing had the authority to consider a contract provision between two private parties a typographical error in the Application and waive such as a minor irregularity under Rule 67-60.008. Rosedale also takes exception to Finding of Fact 40 to the extent it erroneously finds that Florida Housing relied on "other provisions in the Agreement"—and not solely on the execution date of the Agreement-- in determining that the Agreement contains a typographical error in the closing date. Based on these errors, the Recommended Order finds that Florida Housing may substitute a "corrected" closing date not found anywhere in the Agreement or Application, and then using this manufactured closing date, concludes that Summerset satisfied the requirements of the RFA.

39. In order to establish site control, the RFA required that such a contract must have a term that, with available extensions, continued at least six months beyond the Application deadline, or before April 17, 2014

40. It is undisputed that the contract submitted as evidence of site control by Summerset states that closing is to occur no later than "April 1, 2013." April 1, 2013 is not six months or more after the Application Deadline (April 17, 2014). It is prior to April 17, 2014.

41. The contract provides for a maximum of three 30-day extensions. However, even with these three extensions, the contract does not show that it has a term that does not expire

before a date six months after the Application Deadline (April 17, 2014). Likewise, even when taking into consideration the 120-day due diligence period under the Agreement, and three 30-day extensions, one arrives at a date that is prior to April 17, 2014, and therefore is insufficient to establish site control

42. The evidence presented at hearing indicated that Florida Housing's Amy Garmon reviewed the Applications submitted in response to the RFA and evaluated Site Control issues. Ms. Garmon stated that she saw the April 1, 2013 date, but determined based ***solely*** on the execution date of the contract (August 28, 2013) that it was a typographical error and she, therefore, interpreted the closing date to be April 1, 2014. [J-19]. However, the Recommended Order erroneously concludes that Florida Housing based its decision on the fact that the contract provides for an additional deposit to be paid on February 1, 2014, and then, beginning with this error, concluding that "it simply makes no sense to think the parties to the contract intended a closing date before an additional deposit was due, nor does it make any sense to think that the parties intended a closing date sometime after February 2, 2014, but before April 1, 2014, but somehow the contract was drawn up with typographical errors to both the month and the year and that no party to the contract noticed."

43. This conclusion is in error for several reasons. First, there is no indication that Florida Housing staff used such reasoning. Indeed, the record shows that Florida Housing ***only*** considered the execution date of the Agreement in determining the closing date was a typo that should have been April 1, 2014.[6] Second, there is likewise no basis on which the Hearing Officer properly could find that the parties would not have noticed typographical errors to both

[6] See Paragraph 42 above and the deposition of Amy Garmon (J-19) at pp. 10-11. See also Joint Prehearing Stipulation at Para. 47. Accordingly, to the extent that Finding of Fact 40 states that Florida Housing relied on "other provisions in the Agreement," that finding is not based on competent substantial evidence and must be rejected.

the month and the year. And third, no evidence was admitted at hearing regarding the intent of the parties; the Hearing Officer concluded that any such evidence was inadmissible under Section 120.57(3)(f), Florida Statutes, because no evidence of any intent of the parties to the Agreement was included in the Application other than the Agreement itself with a closing date of April 1, 2013.

44. Rule 67-60.008 states that: "Mistakes ***clearly evident*** to the Corporation on the ***face of the Application***, such as computation and typographical errors, may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes." (Emphasis added.)

45. This rule does not authorize the Corporation to "correct" the date in the contract--by changing it from April 1, 2013 to April 1, 2014--for several reasons.

46. First, the "mistake"--if it is one--is not "clearly evident" on the face of the Application. While the April 1, 2013 closing date may appear inconsistent with the date on which the Agreement was signed in August 2013--assuming that signing date is not a typographical error--there is nothing on the face of the Application that "clearly" evidences what the "correct" closing date should be. This is not a case where a closing date of "April 1, 2014"--or any other permissible closing date--is "clearly" stated anywhere in the contract (or elsewhere in the Application, for that matter). In fact, if the date is incorrect, there is nothing to suggest that it is the year that is incorrect; perhaps it is the month and/or day that is incorrectly stated. Accordingly, Rule 67-60.008 does not authorize Florida Housing to "correct" the April 1, 2013 closing date to April 1, 2014 because there is nothing in the Application from which Florida Housing can "clearly" determine that this date is the "correct" date.

47. Second, Rule 67-08.008 does not authorize the Corporation to "correct" the April 1, 2013 closing date because it does not appear on the "face of the Application." The date is not part of the Application form. It is language in a contract with legal effect. Pursuant to the terms of that contract, only the parties to the contract may amend or alter its terms, and then only by a written instrument signed by the seller and Purchaser. [J-11, at ¶ 17(b)].

48. Third, as recognized by the Hearing Officer in the Recommended Order, Florida Housing does not have authority to interpret or amend a contract, as jurisdiction to interpret such contract is, under our system, vested solely in the judiciary. *Lennar Homes, Inc. v. Dep't of Business and Prof'l Reg.*, 888 So. 2d 50, 55 (Fla. 1st DCA 2004) (quoting *Peck Plaza Condominium v. Division of Fla. Land Sales and Condominiums*, 371 So. 2d 152, 153-54 (Fla. 1st DCA 1979)); *see also Ferrari North Am. v. Crown Auto Dealerships, Inc.*, 658 So. 2d 1187, 1189 (Fla. 1st DCA 1995) (recognizing that neither the hearing officer nor the Department of Highway Safety and Motor Vehicles had authority to interpret or enforce a franchise agreement between two private parties).

49. If, in fact, the April 1, 2013 date was incorrect due to a mutual mistake of the parties, the remedy would be for one of the parties to the contract to ask a court to reform the contract. The Restatement (Second) of Contracts at Section 155 states: "A court of equity has the power to reform a written instrument where, due to mutual mistake, the instrument as drawn does not accurately express the true intention or agreement of the parties to the instrument." *See Brandsmart U.S.A. of West Palm Beach, Inc. v. DR Lakes, Inc.*, 901 So. 2d 1004, 1006 (Fla. 4th DCA 2005) (noting that there is a strong presumption that a written agreement accurately expresses the parties' intent); *see also Palmer v. R.S. Evans, Jacksonville, Inc.*, 69 So. 2d 342, 343 (Fla. 1954) (reformation action to fix mutual mistake in date in sales contract).

50. No documentation was included in Summerset's Application showing that the contract had ever been amended or reformed. In fact, the Assignment and Assumption Agreement states that the contract had not been amended as October 15, 2013— a date only a few days before the Application Deadline.

51. Florida Housing is not a court of general jurisdiction and cannot reform a contract. *See Bend v. Shamrock Services*, 59 So. 3d 153,156 (Fla. 1st DCA 2011).

52. Finally, Florida Housing's Mr. Reecy has acknowledged that Site Control is something that Florida Housing cannot waive altogether. [J-18, p. 40].

53. It was Summerset's obligation to demonstrate site control in its Application as submitted prior to the Application deadline. Because the Summerset application does not demonstrate Site Control in accordance with the requirements of the RFA, the Summerset Application cannot be funded and the Hearing Officer's conclusions of law to the contrary should be rejected.

EXCEPTIONS TO CONCLUSIONS OF LAW 45-49 (HAMMOCK CROSSINGS)

54. Rosedale takes exception to Conclusions of Law 45-49, to the extent the Recommended Order concludes that the Board essentially may ignore the timely withdrawal of the Hammock Crossings application and nonetheless award funding to that withdrawn application rather than to other applications in accordance with the applicable Funding Selection Process described in the RFA.

55. Rule 67-60.004 addresses withdrawal of an application. This rule states that: "Any applicant may request in writing to withdraw its Application at any time prior to a vote by the Corporation's Board regarding the application received." This rule does not impose any

limits on when a withdrawal may be submitted other than that it has to be before the Board takes action on any Application.

56. Rule 67-60.004 is the only authority relating to withdrawal of an Application relevant to this RFA. The RFA does not contain any provision that addresses withdrawal of an Application. By comparison, the language in a subsequently-issued RFA, RFA 2014-103, provides:

> Pursuant to paragraph 67-60.004(2), F.A.C., an Applicant may request in writing to withdraw its Application at any time prior to a vote by the Corporation's Board. For funding selection purposes for this RFA, the Corporation shall disregard any Application withdrawal request that is submitted between 5:00 p.m., Eastern Time, the last business day before the date the Committee meets to make its recommendations to the Board and the Board's vote on the Committee's recommendations, and such Application shall be included in the funding selection process as if no withdrawal request had been submitted.

[J-17, p. 4]. No such language is found in the RFA that is the subject of this proceeding.

57. On December 12, 2013, Hammock Crossings submitted a letter dated December 11, 2013 to Florida Housing stating that it was withdrawing its Application submitted in response to the RFA. [J-5]. This request for withdrawal was submitted in accordance with Rule 67-60.004 before the Board took action on any Application received in response to the RFA.

58. The Recommended Order appears to accept Florida Housing's staff's argument that a request for withdrawal should be submitted prior to the Review Committee making its recommendation to the Board. There is no such requirement, however, in Rule 67-60.004. If Florida Housing wanted to adopt a rule that required withdrawal prior to the Review Committee's recommendation it could have done so—as was done in RFA 2014-103-- but it did not.

59. The Recommended Order concludes that, "[w]hether or not it makes good sense" there is "no requirement that the Board accept a request to withdraw an application, nor any prohibition on the Board deciding to fund a project even though the applicant has asked to withdraw the application." Of course, a decision that does not "make good sense" is by definition arbitrary and capricious and therefore in error. Further the Recommended Order acknowledges that there are no parameters whatsoever regarding when or how the Board may or must accept an applicant's withdrawal.

60. The Board did not meet until December 13, 2013—two days after Hammock Crossings submitted its withdrawal letter. When the Board met, it knew that Hammock Crossings had submitted, and Florida Housing had received, the withdrawal letter dated December 11, 2013.

61. At the time the Board acted, it knew that the funding that staff recommended be awarded to Hammock Crossings would be available for other projects because Hammock Crossings had stated that it was withdrawing its application.

62. The Board acted as if Hammock Crossings' withdrawal letter never existed and proceeded with adopting staff's recommendation including a recommendation of the award of funding to Hammock Crossings. This was arbitrary and capricious as there is no rational basis upon which the Board could award funding to an applicant that has indicated that it no longer wants funding and there are many other eligible applicants that do desire funding.

63. Hammock Crossings' application was timely withdrawn, and the funding that is available due to Hammock Crossing's withdrawal should be awarded to the applicant (or applicants) that would have received such funds if Hammock Crossings' application had never been considered for funding by the Board.

CONCLUSION

Based on the foregoing Exceptions, Rosedale respectfully requests that a Final Order be entered accepting these Exceptions, rejecting the above-described portions of the Recommended Order, and determining that:

1. The Paradise Point Application (Application 2014-080C) is not eligible for funding;
2. The Tumblin Creek Application (Application 2014-046C) is not eligible for funding;
3. The Frenchtown Application (Application 2014-083C) is not eligible for funding;[7]
4. The Summerset Application (Application 2014-008C) is not eligible for funding;
5. The Hammock Crossing Application (Application 2014-C) was withdrawn and may not receive any allocation; and
6. Based on these determinations, the eligible Applications (excluding Hammock Crossings) should be sorted and ranked in accordance with the Funding Selection Process described in the RFA.

Respectfully submitted this 28th day of May, 2014.

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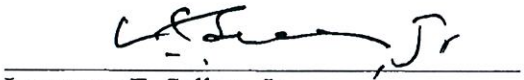
[7] Florida Housing's Intended Decision determined that the Frenchtown application is ineligible. The Recommended Order recommends that this determination be affirmed. See Conclusions of Law Nos.33-36.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of Rosedale's Exceptions to Recommended Order was provided by electronic mail to Ashley Black, Agency Clerk, e-mail: ashley.black@floridahousing.org and by electronic mail to all listed below on this 28th day of May, 2014.



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BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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

Petitioners,

v. FHFC CASE NO. 2013-038BP

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent

and

PARADISE POINT SENIOR HOUSING, LLC

Intervenor,

ARBOURS AT TUMBLIN CREEK, LLC,

Intervenor,

ARBOURS AT CENTRAL PARKWAY, LLC

Intervenor,
_____/

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

Petitioners, FHFC CASE NO. 2013-042BP

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

KATIE MANOR, LTD.,

Intervenor,
_____/

FRENCHTOWN SQUARE, LLC,

Petitioner, FHFC CASE NO. 2013-043BP

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,
_____/

JPM WESTBROOK I LIMITED PARTNERSHIP,

Petitioner, FHFC CASE NO. 2013-044BP

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

KATIE MANOR, LTD.

Intervenor,

_____/

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

Petitioners, FHFC CASE NO. 2013-047BP

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

FOREST RIDGE AT BEVERLY HILLS, LTD. and ARBOURS AT CENTRAL PARKWAY, LLC.,

Intervenors.
_____/

NOTICE OF JOINDER IN EXCEPTIONS

Petitioner, JPM Westbrook I Limited Partnership ("JPM") by and through its undersigned counsel, hereby files this Notice of Joinder in the Exceptions to Recommended Order submitted by Summerset Apartments Limited Partnership (withdrawal issue) and Rosedale Holdings, LLC, H&H Development, LLC and Brookestone I, L.P., (Summerset Site Control and Arbours financing documents issues.) JPM hereby adopts, joins in and incorporates by reference the Exceptions submitted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing been furnished by E-Mail this 28th day of May, 2014, to the following:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

FHFC Case No. 2013-047BP

v. Petitioner,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

FOREST RIDGE AT BEVERLY HILLS, LTD. and
ARBOURS AT CENTRAL PARKWAY, LLC,

Intervenors,
_____/

OBJECTIONS/EXCEPTIONS TO THE RECOMMENDED ORDER

Summerset Apartments Limited Partnership ("Summerset") files its Objections/Exceptions to the Recommended Order issued by Hearing Officer Christopher McGuire on May 12, 2014. Specifically, Summerset objects to paragraphs 5, 6, 7, 8, 45, 46, 47, 48 and 49 of the Conclusions of Law and the ensuing Recommendation set forth in the Recommended Order. As set forth below, the Hearing Officer's Conclusions and Recommendation would result in an award of funding to Hammock Crossings (Application #2014-092C), which has already withdrawn its application. In addition, the Recommended Order does not disturb the funding allocation made to the Arbours at Central Parkway (Application #2014-089C), which was ranked below Summerset due to a higher lottery number. Under the terms of the RFA, Summerset is entitled to funding ahead of Arbours at Central Parkway.

Background

On December 13, 2013, the Board of Directors of Florida Housing Finance Corporation ("Florida Housing"), approved preliminary funding allocations for RFA 2013-001 (the "RFA"). On December 30, 2013, Summerset filed a Formal Written Protest and Petition for Administrative Hearing (the "Petition") challenging the preliminary RFA award decisions. Summerset requested a formal administrative hearing pursuant to section 120.57(1) to challenge the preliminary awards. Florida Housing assigned the case for an informal hearing asserting that there were no disputed issues of material fact.

Summerset's Petition was consolidated for hearing with protests filed by several other applicants denied funding under the RFA. In their petitions, some of the other applicants challenged Summerset's eligibility for funding. More specifically, Rosedale Holdings, LLC, (Application #2014-007) ("Rosedale") and JPM Westbrook I Limited Partnership (Application #2014-082C) ("JPM Westbrook") filed protests that included, among other issues, a claim that Summerset did not demonstrate site control and could not be awarded Tax Credits even though Summerset was ranked higher. The Recommended Order resolves in Summerset's favor the issues raised by the other applicants challenging the Summerset application. Nonetheless, the Recommended Order does not include a recommendation of funding for Summerset. The denial of funding to Summerset is based on the erroneous conclusion that insufficient Tax Credits are available to fully fund Summerset's request. As set forth below, there is adequate funding available for Summerset and the funding selection criteria set forth in the RFA dictate that Summerset is entitled to funding.

Undisputed Facts

1. Summerset timely submitted an application requesting financing for its affordable housing project from the funding that is proposed to be allocated through the RFA. More specifically, Summerset requested an allocation of $1,501,257 in annual tax credits for the development of Summerset Apartments, a 96-unit project located in Pasco County. (FoF 35, pp. 13-14)[1]

2. The RFA provisions establish the basis for the competitive selection process and set forth the criteria to be used in determining which applications are awarded Tax Credits. (FoF 5, p. 8) The RFA directs awards to be made to the highest ranked applicant subject to the County Test and the Funding Test delineated in the RFA. Where, as here, all the parties' applications received a perfect score, the highest ranking is determined by lottery numbers. (FoF 6, p. 8)

3. The Review Committee, comprised of appointed Florida Housing staff members, prepared a "Sorting Chart" which listed the applications listed in order from highest to lowest total score, with lottery numbers applied. (FoF 9, p. 8) The Sorting Chart confirms that Summerset is ranked higher than the Arbours at Central Parkway.

4. The Review Committee prepared for the Board a recommendation list for funding based upon the Sorting Chart and the County and Funding tests set forth in the RFA. Before the Florida Housing Board meeting in December 2013 to adopt preliminary allocations, one of the applicants listed on the Review Committee's suggested funding list, Hammock Crossings

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[1] References to the Findings of Fact in the May 12, 2014 Recommended Order will be made to the paragraph number and the page of the Recommended Order as follows (FoF ___, p. ___). References to the Conclusions of Law in the Recommended Order will be made as follows: (CoL ___, p. ___). References to the RFA will be made to the relevant section and pages as follows (RFA § ___, p. ___).

(Application #2014-092C), submitted a written notice to Florida Housing advising that it was withdrawing its application. (FoF 10, pp. 9-10; FoF 43, p. 15) Hammock Crossings was not invited to credit underwriting. (FoF 46, p. 16)

5. Florida Housing's rules expressly authorize an applicant to "request in writing to withdraw the Application at any time prior to a vote by the Corporation's Board regarding any Applications received." See, Rule 67-60.004(2), Fla. Admin. Code. The rules do not provide or require any action by the Board or Florida Housing after an applicant provides notice of its withdrawal.

6. On December 13, 2013, Florida Housing's Board preliminarily selected 11 applications for funding by approving the recommendations submitted by the Review Committee. The preliminary funding list approved by the Board included the withdrawn Hammock Crossings application as an intended awardee. The Board's preliminary approvals included an allocation of $1,075,000 of annual Tax Credits to Hammock Crossings, even though Hammock Crossings had submitted written notice of its withdrawal of the application prior to the December 13 Board meeting. (FoF 10, pp. 8-9; FoF 43, p. 15)

7. The Review Committee recommendations presented to the Board also included funding for the Arbours of Central Park over the higher ranked Summerset. The Review Committee concluded full funding was not available to meet the request of Summerset. However, as noted above, the Review Committee recommendations included a $1,075,000 annual allocation for the withdrawn Hammock Crossings application. Absent that award to the withdrawn Hammock Crossings application, there are sufficient Tax Credits remaining to fully fund Summerset. In other words, if the Tax Credits allocated to Hammock Crossings are included as part of the funding to be allocated, full funding is available for Summerset.

Objections and Exceptions to the Recommended Order

8. Summerset objects and takes exception to paragraphs 45, 46, 47, 48, 49 and the ultimate Recommendation in the Recommended Order because those paragraphs fail to provide for an allocation to Summerset as directed by the provisions of the RFA.

9. Under Florida Housing's existing rules and the RFA, the pre-award withdrawal of the Hammock Crossings application must be factored into the final awards.

10. Under the RFA Funding Test, applications are selected for funding when there is enough Medium County funding available to fully fund the Eligible Housing Credit Request Amount. (RFA § 4.B., p. 38). But for the allocation to the withdrawn Hammock Crossings application, there is enough funding for Summerset.

11. In paragraph 46 of the Conclusions of Law on p. 37, the Hearing Officer notes that Rule 67-60.004(2) allows an applicant to "request" to withdraw its application and that the "rule establishes no parameters as to when or how the Board may or must accept a withdrawal." The Hearing Officer suggests in CoL 46 on p. 47 that it is up to the Board to decide whether to accept or grant that request. However, the Board has never previously been asked to formally accept or reject an applicant's "request" to withdraw its application. There is no rule authority or RFA provision that establishes a requirement for the Board to take affirmative action in order for a withdrawal to be effective. Establishing such a requirement would result in a new unpromulgated policy that would require the Board to take affirmative action for any such withdrawal in the future. In any event, the Hearing Officer's conclusion fails to address the more important point. Because Hammock Crossings alerted the Board six months prior to the final award of Tax Credits that it had no intention of proceeding with its project, the approval of a

final award of funding to Hammock Crossings is superfluous and does nothing but circumvent the selection criteria set forth in the ITN.

12. There is no basis in the RFA or the Corporation's rules for the final funding allocation to include a withdrawn application which would result in skipping over a higher ranked applicant to choose a lower ranked applicant based on the Funding Test. To include an award to Hammock Crossings in the final rankings even though Hammock Crossings withdrew its application six months before final Board action is contrary to competition, contrary to the RFA and contrary to the requirements of a competitive bidding process. It would inappropriately elevate a project that is ranked below Summerset to the funding range contrary to the selection criteria delineated in the RFA.

13. The final allocation of Tax Credits under the RFA must be based on applications that are actually pending at the time of award. The Tax Credits preliminarily allocated by the Board to Hammock Crossings should be allocated to the next highest ranked, eligible Medium County application that can be fully funded, which is Summerset. Accordingly, a Final Order should be entered concluding that Summerset is within the funding range in the final rankings.

14. At the December 2013 Board meeting, there was discussion suggesting that the Tax Credits preliminarily allocated to Hammock Crossings could be treated as a "returned allocation" under the RFA. However, the Hearing Officer concluded that the "returned allocation provision is not applicable to the Hammock Crossings situation. (CoL 47, p. 37)

15. Section Four B.8. and B.8.c. of the RFA at pp. 39-40, defines a "returned allocation" as: "[f]unding that becomes available after the Board takes action on the Committee's recommendation(s), due to an Applicant declining its invitation to enter credit underwriting or the Applicant's inability to satisfy a requirement outlined in this RFA and/or

Rule Chapter 67-48." The Hearing Officer concluded that this provision of the RFA on its face only addresses allocations that are returned subsequent to Board action. (CoL 47, p. 37) The "returned allocation" provision of the RFA cannot be applied to the Hammock Crossings withdrawal which occurred before the Board meeting and before Hammock Crossings received an invitation to credit underwriting.

16. In CoL 47 on page 37, the Hearing Officer concludes that, while the returned allocation provision in the RFA is not directly applicable to the Hammock Crossings withdrawal, the Hearing Officer was unable to determine what has or should happen to the funds preliminarily allocated to Hammock Crossings. There has been no final awards issued and no applicants have been invited into credit underwriting. The RFA directs that the funds should be allocated to the next highest ranked applicant which is Summerset. Consequently, the Board should adopt final rankings that include an allocation to Summerset.

17. In adopting Final Rankings, the Board must follow the terms of the RFA which provide for the allocation of Tax Credits to the highest ranked applicant. There is no dispute that if the Tax Credits preliminarily allocated to the withdrawn Hammock Crossings application are included in the credits being allocated, there are adequate Tax Credits available to fully fund the request of Summerset. Consequently, under the terms of the RFA, Summerset is entitled to funding ahead of Arbours at Central Park.

18. Summerset also objects to the Hearing Officer's application of the highly deferential "clearly erroneous," "arbitrary or capricious" or "contrary to competition" standards applied by the Hearing Officer in paragraphs 5, 6, 7, and 8 of the Conclusions of Law. Florida Housing does not have statutory authority to dictate the standard to be applied in an administrative process challenging preliminary decisions by the Board. Such preliminary

decisions are proposed agency action which are subject to the general standards applicable to *de novo* administrative proceedings under section 120.57(1), Fla. Stat.

CONCLUSION

There is no basis in the RFA to include an allocation of tax credits to Hammock Crossings which unequivocally advised Florida Housing six months ago that it has withdrawn and is no longer seeking an award under the RFA. The Tax Credits allocated in the preliminary rankings to Hammock Crossings should be applied to the next eligible application in the sorting and ranking order, Summerset. Summerset is ranked higher and entitled to funding ahead of the Arbours at Central Parkway. There is no basis in the RFA, the Corporation's rules or the governing statutes to skip over Summerset to award funding to Arbours at Central Park. The priority set forth in the RFA for selecting projects for funding should be followed and Summerset should be awarded the Tax Credits it requested.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Objections/Exceptions to Recommended Order has been furnished this 28 day of May, 2014, by electronic mail to:

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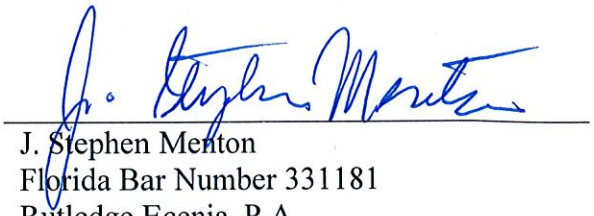

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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

FHFC Case No. 2013-038BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

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PARADISE POINT SENIOR HOUSING, LLC,

Intervenor,

ARBOURS AT TUMBLIN CREEK, LLC,

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OCDC PALM VILLAGE, LP,
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DEVELOPMENT CORPORATION

FHFC Case No. 2013-042BP

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KATIE MANOR, LTD.,

Intervenor.
_____/

FRENCHTOWN SQUARE, LLC,

FHFC Case No. 2013-043BP

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

_____/

JPM WESTBROOK I LIMITED PARTNERSHIP,

FHFC Case No. 2013-044BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent;

and

KATIE MANOR, LTD.,

Intervenor.

_____/

SUMMERSET APARTMENTS LIMITED PARTNERSHIP,

FHFC Case No. 2013-047BP

v. Petitioners,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

FOREST RIDGE AT BEVERLY HILLS, LTD.,

Intervenor,

_____/

FLORIDA HOUSING'S RESPONSE TO EXCEPTIONS TO RECOMMENDED ORDER

The Respondent in these consolidated cases, Florida Housing Finance Corporation ("Florida Housing"), files its Response to Exceptions to the Recommended Order filed in this matter, and says:

1. Petitioners, Rosedale Holdings, LLC, H&H Development, LLC, and Brookestone I, LP, ("Rosedale") filed "Rosedale's Exceptions to Recommended Order;" Summerset Apartments Limited Partnership filed "Objections/Exceptions to the Recommended Order;" and JPM Westbrook I, Limited Partnership filed a "Notice of Joinder in Exceptions," adopting the exceptions filed by both Rosedale and Summerset, all on May 28, 2014,

2. Rosedale took exception to the Recommended Order's Findings of Fact ("FOF") and Conclusions of Law ("COL") in the following respects: first, to the deference accorded Florida Housing's decisions by the Hearing Officer employing the "clearly erroneous" standard of review (COL 13); second, to acceptance of equity commitment letters for Paradise Point Senior Housing, LLC (FOF 54-55 and COL 18-19); third, to acceptance of equity commitment letter for Arbours at Tumblin Creek, LLC[1] (COL 20-23); fourth, to acceptance of documents establishing site control for Summerset Apartments Limited Partnership (FOF 40 and COL 28-32); and fifth, to Florida Housing's decision to include Pinnacle at Hammock Crossings, LLC, in its award, notwithstanding the Applicant's letter requesting withdrawal of its application (COL 45-49). Summerset filed separately, taking exception to FOF 5-8 and COL 45-49, regarding the Board's decision on the Pinnacle at Hammock Crossings' withdrawal.

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

> . . . a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

[1] Rosedale did not take exception to Florida Housing's acceptance of a virtually identical equity commitment letter, also addressed in the Recommended Order filed on behalf of Arbours at Central Parkway, LLC.

STANDARD OF REVIEW APPLICABLE TO EXCEPTIONS

4. In reviewing a Recommended Order, an agency is not free to re-weigh the evidence or to reject findings of fact unless there is ***no*** competent, substantial evidence to support them. *See Health Care and Retirement Corporation v. Department of Health and Rehabilitative Services*, 561 So.2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Department of Business Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). There must be ***some*** competent substantial evidence to support each finding of fact that the Judge recommends that the agency adopt. *See* § 120.57(1)(1), *Florida. Statutes*.

5. An agency is permitted to interpret statutes and administrative rules over which it has substantive jurisdiction and to reject or modify erroneous conclusions of law over which it has substantive jurisdiction. See § 120.57(1)(1), Fla. Stat. (2012). As long as the agency states with particularity the reasons for rejecting an ALJ's conclusion of law and finds that its substituted conclusion is as reasonable, or more reasonable, the agency is not bound by the ALJ's conclusions of law. Sec. 120.57(1)(1), Fla. Stat. (2012). *See also, Harloff v. City of Sarasota*, 575 So.2d 1324, 1328 (Fla. 2d DCA 1991), *review denied*, 583 So.2d 1035 (Fla. 1991).

Deference – the "Clearly Erroneous" Standard

6. Rosedale's first exception takes issue with the Hearing Officer's COL 13,which states that the standard of review applicable to Florida Housing's decisions here will be the "clearly erroneous" standard. Conclusion of Law 13 reads:

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

Sunshine Towing @ Broward, Inc., v. Department of Transportation, DOAH Case No. 10-0134BID (Final Order May 7, 2010) *at* ¶ 36.

7. The agency's interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. *Colbert v. Department of Health,* 890 So.2d 1165 (Fla. 1st DCA 2004). Even if somehow problematic, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference. *Morris v. Division of Retirement,* 696 So.2d 830 (Fla. 1st DCA 1997). And, a reviewing court must defer to any statutory interpretation by an administrative agency which is within the range of the possible and reasonable. *Natelson v. Department of Insurance,* 454 So.2d 31 (Fla. 1st DCA 1984). In deference to the agency's expertise, such interpretations will not be overturned unless such interpretations are proven to be clearly erroneous. *State Contracting & Engineering Corp. v. Dep't of Transportation*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

8. The Hearing Officer correctly employed the "clearly erroneous" standard in reviewing Florida Housing's scoring and ranking decisions.

Minor Irregularity

9. Other than the deference issue discussed above, and the Hammock Crossings withdrawal issue, each of Rosedale's Exceptions (second, third, and fourth exceptions) turn on the Corporation's decision to waive some element in the challenged Applications as being a "Minor Irregularity." Florida Housing points out that this flexibility was a major factor in its change from a rule-driven prescriptive funding process to funding through competitive solicitations[2].

[2] The inflexibility of the Universal Application process produced decisions such as: *Twin Lakes v. Florida Housing*, FHFC Case No. 2012-005UC (Final Order entered June 8, 2012). (Typographical error in equity commitment letter as to the number of proposed units caused threshold failure), and *Renaissance Preserve v. Florida Housing,* FHFC Case No. 2012-028UC (Final Order entered June 8, 2012) (percentage of ownership expressed in syndication letter inconsistent leading to threshold failure)

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

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

11. In its Exceptions, Rosedale argues that the only minor irregularities Florida Housing may waive are computation and typographical errors on the face of the application.

12. Rule. 67-60.008, Fla. Admin. Code[3], recites that the corporation may waive "Minor Irregularities," then provides examples of the sorts of Irregularities that it has authority to ***waive*** and may ***correct***:"

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

13. The plain language of the rule states that the Corporation may simply "waive," or ignore errors; it may also go farther and "correct," computation and typographical errors.

14. Where information was missing or erroneous, Florida housing looked to the rest of the Application to determine whether a variation or mistake could be resolved as nonmaterial. If such information were contained in the Application and did not create a conflict that a scorer could not reasonably resolve, the error was considered nonmaterial and waivable, as provided in R. 67-60.002(6) and 67-60.008.

15. As noted above, rules have the force and effect of a statute, and rules of statutory construction apply. *Florida Livestock Board v. Gladden*, 76 So.2d 291 (Fla. 1954). Florida Housing's conclusion, that a proposal's undisputed departure from the RFA specifications was a

[3]1. Rules 67-60.002(6) and 67-60.008, Fla. Admin. Code, were promulgated upon approval of the Board, and are unchallenged. Section Three of RFA 2013-001 provides: "C. Florida Housing waives the right to: 1. Waive minor irregularities . . .." There was no challenge to the terms of the RFA.

minor irregularity as opposed to a material deviation, are matters of rule construction, thus must be accorded deference under the clearly erroneous standard. To prevail on an objection to an ultimate finding, therefore, the protester must prove that a defect in the agency's logic led it unequivocally to commit a mistake. *Sunshine Towing at Broward, Inc., v. Dep't of Transportation*, DOAH Case No. 10-0134BID, ¶36 (Final Order May 7, 2010).

16. Rosedale argued at hearing and in its Exceptions that Florida Housing erred by waiving mandatory terms of the RFA when it accepted the equity commitment letters and site control contract by waiving minor irregularities. If Rules 67-60.002(6) and 67-60.008 did not exist, Rosedale would be correct. However, if Florida Housing were not able to waive or correct evident mistakes in the Applications that appear contrary to the stated terms of the RFA, the plain language of the two rule provisions referenced above would be rendered meaningless. Arguments that the terms of the RFA somehow supersede or prevent application of the plain language of the rules are the tail wagging the dog, so those arguments must be rejected.

17. In addition to the foregoing rules, other criteria have been provided by the courts in determining whether a variance is material, thus nonwaivable:

> [W]hether the effect of a waiver would be to deprive the [agency] of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.

Robinson Electrical Co. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982).

18. As to each minor irregularity at issue here, each is nonmaterial and waivable under either the definition in R. 67-60.002(6) or the test articulated by the court in *Robinson Electrical*.

19. Rosedale further argues that waiver of minor irregularities by Florida Housing staff is unlawful, because the Board did not specifically address and dispose of each irregularity separately. Rosedale has cited no governing law or precedent case that requires such specific and detailed action by an agency head. The Board is addressing each challenged decision regarding a minor irregularity as it considers these exceptions.

The "Application"

20. Rosedale argues in its second, third, and fourth Exceptions, as to the Paradise Point (at ¶13-17) and Arbours at Tumblin Creek (at ¶32-33) equity commitment letters, and the Summerset contract date(at ¶ 47), that Florida Housing erred when it looked at other parts of the Application submitted in making its scoring decisions. Rosedale is wrong as a matter of law.

21. Rule 67-48.002(10), Fla Admin Code, defines "Application," as "[T]he sealed response submitted to participate in a competitive solicitation for funding pursuant to Rule 67-60, F.A.C." RFA 20136-001, at Section Three A., provides, "A complete application consists of Exhibit A of RFA-2013-001 and all applicable attachments . . .." The "Application," means the application form and all attachments filed along with that form. Once filed, the application and attachments become one document: the "Application." Thus, any argument that attempts to distinguish between or among Exhibit A, the Application form, and any attachments thereto is ill founded and must be rejected.

22. There are no impediments to Florida Housing's consideration of any part of the Application in making its determination as regards any other part of the Application. In fact, it would be error for Florida Housing to fail to consider all parts of the Application in its decision-making. *See, American Lighting and Signalization v. Dept. of Transportation*, DOAH Case No.

10-7669BID (Final Order Dec. 30, 2010) at ¶ 77: "[The agency] could read the proposal as a whole to find that it was responsive."

Arbitrary or Capricious

23. The arbitrary or capricious standard is a test of rationality and reason: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." *Dravo Basic Materials Co., Inc. v. State Dep't of Transp.*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992). The "arbitrary or capricious" analysis of agency decisions is almost indistinguishable from the "abuse of discretion," test for review of court decisions:

> . . . discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion.

Canakaris v. Canakaris, 382 So. 2d 1197, 1203 (Fla. 1980); *Sunshine Towing*, DOAH Case No. 10-0134BID ¶ 43.

Contrary to Competition

24. The third standard of review stated in section 120.57(3)(f), Florida Statutes, is unique to bid protests. The "contrary to competition" test is a catch-all which applies to agency actions that do not turn on the interpretation of a statue or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact. The legislature chose not to define the standard; however, an articulable standard can be derived from section 287.001, Florida Statutes[4]: Actions that are contrary to competition include those which: (a) create

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

the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. *See, e.g., Sunshine Towing @ Broward, Inc., v. Department of Transportation*, DOAH Case No. 10-0134BID (Final Order May 7, 2010).

25. The rules essentially implement the analysis employed by appellate courts: "Not every deviation from [a competitive solicitation] is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. State Department of General Services*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986); and see, *Robinson Electric Co. v. Dade County*, 417 So.2d 1032, (Fla. 3rd DCA 1982); and *Harry Pepper & Assocs., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

Housing Credit Commitment

Paradise Point

26. Rosedale's second exception takes issue with FOF 54-55 and COL 18-19, which find Florida Housing's acceptance of Paradise Point's equity proposal an appropriate use of the "minor irregularity," rule. Rule 67-60.008 provides in pertinent part, "Mistakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors, may be corrected by the Corporation . . .."

27. The challenge to Paradise Point's application involved the anticipated amount of housing credits to be purchased by the syndicator as stated on Paradise Point's equity letter (Exh. J- 14). That amount, $ 11,778,825[5], is greater than the yield of the HC request amount,

[5] The Recommended Order has an apparent typographical error: at FOF 54: it recites the product of the multiplication as "$11,748,285," even though the correct number, $11,748,825, appears twice in FOF 53.

($1,175,000) multiplied by the ten annual payments of the credit, which equals $11,750,000, and is typographical or computational error, evident on its face. The correct result ($ 11,748,825) of using the mathematical formula described in the discussion of the Arbours Applications above, meshes with the amount shown in the Application pro forma. (PP. Exh. 1) Paradise Point had other typographical errors in the parenthetical "($11,775,000 *9999)" following the $ 11,778,825 amount should have read "(ll,750,000 * .9999)."

28. Florida Housing (Ms. Grubbs) began with the HC request amount, and simply worked the math to arrive at a solution using only information available within the four corners of the Application. (Rosedale's argument at ¶15 of Exceptions that the equity commitment letter is not part of the Application is addressed above.)

29. The treatment of Paradise Point's equity commitment letter was a reasonable application of R. 67-60.002(6) and 67-60.008, and was thus not clearly erroneous; and as Ms. Grubbs again employed an "analysis that a reasonable person would use to reach a decision of similar importance," was neither arbitrary nor capricious; and as this decision did not supplement facts not in the Application, it gave no "substantial advantage" to Paradise Point, so was not contrary to competition.

Housing Credit Commitment

Arbours at Tumblin Creek

30. Rosedale's third exception disputes COL 20-23 regarding acceptance of Arbours at Tumblin Creek's equity proposal.

31. The issue here is similar to Paradise Point, above, except that the Housing Credit commitment letters for Arbours at Tumblin Creek did not state on its face the anticipated amount of housing credits to be purchased by the syndicator, Raymond James, the letter omitted that

amount. Florida Housing derived the missing number by multiplying the housing credit request amount times 10 (number of years in which request amount would be awarded), times the ownership interest of the limited partner (.9999), times the syndication rate (.92), to arrive at the HC purchase amount.

32. The omission of the anticipated housing credit amount to be purchased in each instance was a mistake clearly evident to the scorer and was treated accordingly. Nothing in the record indicates in any way that omitting the anticipated purchase amount from both Raymond James letters was anything but a mistake evident on the face of the Application.

33. Florida Housing's scorer, Jade Grubbs, recognized that the HC purchase amount was calculable by straightforward mathematical operations, and worked the math to provide an HC purchase number for Arbours at Tumblin Creek. Ms. Grubbs began with the Housing Credit request amount, multiplied that times ten years[6], multiplied that by the syndicator's interest, (.9999), and multiplied that by the syndication rate (0.92), which yielded the total anticipated equity from HC. The result of that exercise yielded a number that corresponded to the "HC Syndication/equity proceeds" line in the Application pro forma. Ms. Grubbs also worked the math beginning with the syndication rate to yield the HC purchase amount.

34. Ms. Grubbs testified that he Finance Scoring Template is simply a tool for use by the corporation's scorers. It is not an agency position statement or rule, and does not dictate the outcome.

35. As with Paradise Point, the decision to accept the Arbours at Tumblin Creek HC equity commitment letter was a reasonable application of R. 67-60.002(6) and 67-60.008, and was thus not clearly erroneous; and as Ms. Grubbs employed an "analysis that a reasonable person

[6] 26 USC §42 which governs the low income housing tax credit, provides that the allocated amount of tax credits is paid in ten annual installments, each equal to the allocated amount.

would use to reach a decision of similar importance," was neither arbitrary nor capricious; nothing in the record indicates that it was contrary to competition.

Summerset Site Control

36. Rosedale's fourth exception addresses the Hearing Officer's FOF 40 and COL 28-32, which accept Florida housing's determination that the closing date on Summerset's contract, April 1, 2013, was a typographical error, and that the correct closing date reasonably was April 1, 2014.

37. At hearing and in its exceptions, Rosedale propounded theories that even if the year date was a typo, Florida Housing had no way to determine what the intended year might have been. Rosedale also made much of the fact that Florida Housing (Ms. Garmon) " . . .determined based ***solely*** on the execution date of the contract (August 26, 2013) and she therefore interpreted the closing date to be April 1, 2014." (*Emphasis in original*) The premise is incorrect—Ms. Garmon also relied on the Assignment executed on October 15, 2013. (J-19, p. 17, lines 12-15). It would have been reasonable to conclude that April 1, 2014, was the intended closing date. On its face, the contract provided for a 120 day due diligence period after the contract was signed, and required a $25,000 extension fee payment by February 1, 2014, as the Hearing Officer noted in affirming Florida Housing's conclusion that April 1, 2014 was appropriate.

38. Rosedale urges that Florida Housing cannot reform a contract, that as a matter of law it cannot "correct" a date in a contract. This is unarguably correct. However, Florida Housing has not reformed, corrected, or changed the contract in any way. Florida Housing only decided that, due to an apparent typographical error, of precisely the sort the minor irregularity rules were intended to address, the contract satisfied its requirement for site control. Florida Housing did not alter, amend, or reform the contract; Florida Housing reasonably applied its rules to the contract,

giving effect to the principles reasonableness as noted in the Recommended Order in determining whether the contract satisfied its own RFA criteria for demonstration of site control.

39. The sole issue is whether Summerset's evidence of site control was defective, in that the closing date expressed in the contract was April 1, 201**3**, which was almost five months ***before*** the execution of the contract by the parties on August 26, 2013. (Exh. J- 11) In order to establish site control, the RFA required that such a contract must have a term that, with available extensions, continued at least six months beyond the Application deadline, or before April 17, 2014. Florida Housing correctly considered the year given for the closing date to be an obvious typographical error, of precisely the sort Rules 67-60.002(6) and 67-60.008 were intended to capture.

40. In determining the intended closing date for its purposes, Florida Housing determined that the most reasonable closing date would be April 1, 2014, given that the contract by its terms provided a due diligence period that did not end until late December, 2013, that an additional $ 25,000 cash deposit was due on February 1, 2014, and that three 30-day extensions beyond the closing date were available—which would extend the contract beyond the mandatory term ending April 17, 2014. All these make clear that the most reasonable date for the contract closing was April 1, 2014.

41. Florida Housing's interpretation of its rules allowing waiver of a minor irregularity is not clearly erroneous. The decision to accept Summerset's contract for sale and purchase as satisfying its requirement for demonstrating site control was the result of an "analysis that a reasonable person would use to reach a decision of similar importance," thus was neither arbitrary nor capricious; nothing in the record indicates that this were contrary to competition.

42. Rosedale/Brookestone I has not proved that Florida Housing erred when it found the closing date was a minor irregularity and accepted the contract as evidence of site control.

Hammock Crossings Withdrawal

43. Hammock Crossings communicated its wish to withdraw its application via email to several Florida Housing personnel at 10:53 am on Thursday, December 12, 2014[7].

44. Florida Housing provides for withdrawal of applications in R. 67-60.004(2), Fla. Admin. Code:

> Any Applicant may **request** in writing **to withdraw its Application** at any time prior to a vote by the Corporation's Board regarding any Applications received. (*Emphasis added)*

45. It is undeniably clear that the December 12, 2013, email was a request to withdraw, so the Board, not the Applicant, had control over that issue.

46. RFA 2013-001 s silent as regards disposition of funds made available after the board votes, but prior to credit underwriting. It. provides for disposition of returned allocation after board action at p. 39, that is aimed at the post-award credit underwriting phase of the funding process. The Board acted with knowledge of Hammock Crossings' withdrawal and adopted the staff recommendation as explained by the executive director, effectively approving the rankings as recommended, then implicitly accepted hammock Crossings' withdrawal and redistributed the allocation based on post-action withdrawal. Nothing in the rule or the RFA limited or prohibited the Board's adopted course of action.

47. Absent any provision of rule or RFA directly addressing the facts here, the Board's

[7] A letter dated December 11, 2013, was attached to the email. Rosedale asserts in its Exceptions at ¶60 that the letter was ***received*** by Florida Housing on December 11th, but in ¶57 alleges it was on December 12th.

interpretation and application of its own rule, R. 67-60.004(2), is a reasonable interpretation. While there were other allocation options available, the Board's application of its rule to the facts before it was not unreasonable. The Board's interpretation of its rule need only be reasonable, not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. *Golfcrest Nursing Home v. Agency for Health care Administration*, 662 So.2d 1330 (Fla. 1st DCA 1995). While others may disagree with this interpretation, it cannot be said to be clearly erroneous.

48. The Board's decision was made cognizant of all material facts, was reasoned, and employed an "analysis that a reasonable person would use to reach a decision of similar importance," thus was neither arbitrary nor capricious. *Dravo Basic Materials Co., Inc. v. State Dep't of Transp.*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

49. The Florida Supreme Court has described the deference due to an agency in a bid protest: [An agency] has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree. *Dept. of Transportation v. Groves-Watkins Constructors, Inc*., 530 So.2d 912 (Fla. 1988).

Conclusion

In each instance discussed above, Petitioners failed to demonstrate that the Board should reject the Recommended Order affirming Florida Housing's actions with respect to the application of the "clearly erroneous standard of review, the acceptance of equity commitment letters for Paradise Point and Arbours at Tumblin Creek, the acceptance of documents establishing site control for Summerset; and Florida Housing's decision to distribute funding for the withdrawn Hammock Crossings application according to the "returned funds" provision in RFA 2013-001.

PROPOSED DISPOSITION

Based upon the Findings of Fact and Conclusions of Law set forth above, Florida Housing requests that the Board:

(1) Find that Neither Rosedale nor Summerset has demonstrated that the Findings of Fact to which they take exception is supported by no competent substantial evidence;

(2) Find that Rosedale's and Summerset's reasons for striking the Hearing Officer's Conclusion of Law to which they take exception are not reasonable;

(3) Reject each and every exception filed by Rosedale and Summerset; and

(4) enter a Recommended Order upholding Florida Housing's scoring of each and every Petitioner's Application to RFA 2013-001, and denying the relief requested in the each and every Petition.

Respectfully submitted this 9^{TH} day of June, 2014.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by by electronic mail, to: Michael P. Donaldson, Esq., mdonaldson@carltonfields.com, Carlton Fields, P.A., P.O. Drawer 190, Tallahassee, Florida 32302; to J. Stephen Menton, Esquire, Rutlege Ecenia & Purnell P.A., smenton@reuphlaw.com, 119 South Monroe Street, Suite 202, Tallahassee, Florida 32301; Lawrence E. Sellers, Esq., larry.sellers@hklaw.com, and Karen D. Walker, Esq., karen.walker@hklaw.com, Holland and Knight LLP., 315 S. Calhoun St., Suite 600, Tallahassee, FL 32301., Michael G. Maida, Esq., mike@maidalawpa.com, Michael G. Maida, P.A., 1709 Hermitage Blvd., Suite 201, Tallahassee, Florida 32308., and to Douglas Manson, Esq., dmanson@mansonbolves.com, and Craig Varn, Esq., cvarn@mansonbolves.com , Manson & Bolves P.A., 1101 West Swan Avenue, Tampa, Florida 33606., Derek Bruce, Esq., dbruce@gunster.com, Gunster, 200 North Orange Ave., Suite 1400, Orlando, Florida 32801, Joseph Goldstein, Esq., jgoldstein@shutts.com Shutts & Bowen LLP, 200 East Broward Boulevard, Suite 2100, Fort Lauderdale, Florida 33301, and to Gary Cohen, Esq., gcohen@shutts.com, Shutts & Bowen LLP, 201 S. Biscayne Blvd., 1500 Miami Center, Miami, FL 33131, this ***9th*** day of June, 2014.

Wellington H. Meffert II

Counsel for Respondent