

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

JPM OUTLOOK ONE LIMITED
PARTNERSHIP and GRANDE PARK
LIMITED PARTNERSHIP,

FHFC Case No.: 2018-031BP
FHFC RFA No. 2018-109

Petitioners,

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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**FORMAL WRITTEN PROTEST AND PETITION FOR FORMAL
ADMINISTRATIVE HEARING AND ADMINISTRATIVE
DETERMINATION OF INVALIDITY OF RFA 2018-109**

Petitioners, JPM OUTLOOK ONE LIMITED PARTNERSHIP and GRANDE PARK LIMITED PARTNERSHIP (“Petitioners”), by and through their undersigned counsel and pursuant to Sections 120.57(1) and 120.57(3), Florida Statutes, Rules 28-100, 28-110, 67-48 and 67-60, Florida Administrative Code, and Section 2(E) of RFA 2018-109, hereby files this *Formal Written Protest and Petition for Formal Administrative Hearing and Determination of Invalidity of RFA 2018-109* (the “Petition”), challenging the terms of the Request for Applications 2018-109, issued March 29, 2018 and Modification of RFA 2018-109 posted on April 6, 2018 (the “RFA 2018-109”).

1. This is a formal written protest file pursuant to Sections 120.57(1) and 120.57(3), Florida Statutes, and Rule 28-110, F.A.C., challenging the terms of RFA 2018-109. A true and correct copy of RFA 2018-109, with modification, is attached as **Composite Exhibit “A”**. Petitioners reserve the right to amend the Petition to address information obtained through public records requests and discovery.

I. The Parties to the Proceeding

2. Petitioners are Florida limited partnerships in the business of providing affordable housing. Petitioners submitted applications in response to Request for Applications 2016-110, Housing Credit Financing for the Affordable Housing Developments Located in Medium and Small Counties (the “RFA 2016-110”). Petitioners’ address is c/o 4110 Southpoint Blvd. Suite 206, Jacksonville, Florida 32216.

3. For purposes of this proceeding, Petitioners’ contact information is that of its counsel:

Kimberly A. Ashby
Foley & Lardner LLP
111 North Orange Avenue, Suite 1800
Orlando, Florida 32801
Telephone: (407) 423-7656
Fax: (407) 648-1743

4. Respondent, Florida Housing Finance Corporation (“FHFC”), is a public corporation, established by Chapter 420.501, et seq., Florida Statutes.

FHFC is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code. FHFC has the responsibility and authority to establish procedures for allocating and distributing low income housing tax credits. The low income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. In this regard, tax credits are to be awarded competitively to housing developers in Florida for rental housing projects which qualify. These tax credits may be sold by developers for cash to raise capital for their projects. The sale of the tax credits has the effect of reducing the amount the developer would have to borrow for the project. FHFC is an agency for purposes of Chapter 120, Florida Statutes. FHFC's business address is 227 North Bronough Street, Suite 500, Tallahassee, Florida 32301-1329; Telephone (850) 488-4197.

II. Background Regarding Petitioners' Applications for RFA 2016- 110

5. FHFC is authorized to allocate housing tax credits in Florida on an annual basis by the US Treasury through the bid protest provisions of Section 120.57(3), Florida Statutes. FHFC utilizes a competitive process which is initiated when FHFC issues a Request for Applications ("RFA") after which interested developers submit applications in response to the RFA. Therefore, RFA is equivalent to a "request for proposal" pursuant to Florida Administrative Code 67-60.009(3).

6. Petitioners are Appellants in the appeal styled *JPM Outlook One Limited Partnership et al v. Florida Housing Finance Corporation*, Case No. 1D-17-3499, pending in the First District Court of Appeal (the “Appeal”). This Background addresses the facts underpinning the appeal for context of the Petition and Protest. On October 7, 2016, FHFC issued RFA 2016-110 which solicited applications to compete for an award of tax credits for the development of affordable housing developments in Medium and Small Counties, as defined in RFA 2016-110. On November 10, 2016, FHFC issued a modification to RFA 2016-110 which extended the deadline for submitting applications from November 17, 2000, until December 2, 2006, and added the following language in section 2(b)(4) to the six-page Applicant Certification and Acknowledgment Form (the “Form”) (the added language is underscored):

Applicant acknowledges and certifies the following information will be provided by the due date outlined below, or as otherwise outlined in the invitation to enter credit underwriting. Failure to provide the required information designated intersection and city (is located within a city), or (ii) the street name, closest designated intersection and County (if located in the unincorporated area of the county) by the stated deadline shall result in the withdrawal of the invitation to enter credit underwriting.

(b) Within 21 Calendar Days of the date of the invitation to enter credit underwriting:

(4) Confirmation that, if the proposed Development meets the definition of Scattered Sites, all Scattered Sites requirements that were not required to be met in the Application will be met, including that all features and amenities committed to and proposed by

Applicant that are not unit-specific shall be located on each of the Scattered Sites, or no more than 1/16 mile from the Scattered Site with the most units, or a combination of both. If the Surveyor Certification form in the Application indicates that the proposed Development does not consist of Scattered Sites, but it is determined during credit underwriting that the proposed Development does meet the definition of Scattered Sites, all of the Scattered Sites requirements must have been met as of Application Deadline and, if all Scattered Sites requirements were not in place as of the Application Deadline, the Applicant's funding award will be rescinded.

7. "Scattered Sites" was a defined term in RFA 2016-110, as part of the Surveyor Certification form. Scattered Sites as defined in Florida Administrative Code 67-21.002(95), and recited in the Surveyor Certification is as follows:

"Scattered Sites," as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a "Scattered Site"). For purposes of this definition "contiguous" means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement provided the easement is not a roadway or street. All of the Scattered Sites must be located in the same county. The location of the Scattered Site means, at a minimum, the address number, street name, and city, and/or provide (i) the street name, closest designated intersection and city (if located within a city), or (ii) the street name, closest designated intersection and county (if located in the unincorporated area of the county).

8. Both versions of the Form contained the following text at the end of the Application, and before the signature line for each Applicant: "Under the penalties of perjury, I declare and certify that I have read the foregoing and that the information is true, correct and complete." RFA 2016-110 contained a

reservation of the right to FHFC to waive minor irregularities.

9. Petitioners submitted applications in response to RFA 2016-110. Petitioners submitted on the original form, not the Form as modified to include the underscored language. The record reflects that Petitioners' Applications did not consist of Scattered Sites. The record also reflects there was no challenge or deficiency in Petitioners' Surveyor Certification form; the failure to submit the Applications on the modified Form with the underscored language was the sole reason that FHFC found Petitioners to be ineligible. But for the use of the original form, Petitioners would have been deemed eligible and each would have been in the funding range based on their assigned lottery numbers and RFA 2016-110 selection criteria.

10. The FHFC designated Review Committee met and considered the Applications responding to RFA 2016-110. The Review Committee determined Petitioners' Applications were ineligible for funding because the October 7 Form was used instead of the November 17 Form. Twenty-six (26) other applications which had the same issue were found to be ineligible. On March 24, 2017, FHFC posted its Notice of Intended Decision to approve the RFA Recommendations ("Notice") naming the ten (10) applicants FHFC intended to award the tax credits under the RFA 2016-110.

11. Petitioners each timely filed its Notice of Intent to Protest, and each

filed a timely Formal Written Protest and Petition for Administrative Hearing, challenging FHFC's decisions in the Notice regarding RFA 2016-110. Petitioners relied in principal part on Rule 67-60.008 which provides:

67-60.008 Right to Waive Minor Irregularities.

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.

Rule 67-60.002(6) defines a "Minor Irregularity" as follows:

"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.

12. On April 25, 2017, FHFC filed a Referral Letter to the Division of Administrative Hearings ("DOAH"). Petitioners demonstrated their interests would be adversely affected by the ruling because FHFC's decision not to award the necessary funding pursuant to RFA 2016-110 resulted in Petitioners' inability to develop their proposed Developments.

13. For review of Petitioners' challenge to RFA 2016-110, DOAH set a final hearing which was held before Administrative Law Judge Lawrence P. Stevenson. Petitioners submitted that FHFC's action was arbitrary and capricious because the form used by Petitioners were essentially the same as the modified

Form, and the Forms submitted did not provide any competitive advantage to Petitioners, nor did they affect the interests of FHFC or the public. Petitioners cited to Rule 67-60.002(6) of the Florida Administrative Code which defines “minor irregularity.” Petitioners argued the use of the earlier iteration of the form was a Minor Irregularity because no points could be gained or lost by use of the earlier form. The Forms submitted by Petitioners referenced the modified RFA 2016-110 and demonstrated Petitioners, as applicants, intended to certifying the modified RFA 2016-110. Petitioners also cited to prior cases in which it was determined that there were Minor Irregularity(ies), arguing that the facts presented were substantially similar and that FHFC’s determination that Petitioners were ineligible was arbitrary and capricious, clearly erroneous, did not create a competitive advantage and which did no harm to either FHFC or the public. *See, Capital Grove Limited Partnership v. FHFC*, FHFC Case No. 2015-012BP (Applicant listed the development as containing 110 units on its application, under penalty for perjury, but represented to the local government that it was actually seeking approval for 120 units which the administrative judge found was a “minor irregularity”, and FHFC approved); *Rosedale Holdings LLC v. FHFC*, FHFC Case No. 2013-038BP, (Final Order entered 6-13-14; FHFC waived as a Minor Irregularity an applicant’s failure to state the approximate dollar amount of the Housing Credit Allocation to be purchased); *Douglas Gardens V Ltd. v. FHFC*,

FHFC Case No.2016-177BS (Administrative judge declared as a Minor Irregularity the submission of the wrong surveyor form because there was no substantive difference in the forms, nor any competitive advantage given, and DOAH concluded it was a “minor irregularity” though FHFC did not accept the recommended order); *Oasis at Renaissance v. FHFC*, FHFC Case No. 2016-0061BP (Applicant submitted the proper modified acknowledgement form in the copies but not the original; DOAH ruled it was a “minor irregularity” but also holding the ability to waive a Minor Irregularity was within the discretion of FHFC). In RFA 2016-110, there was a separate listing of “Mandatory Items” to be included with the Applications, but the Form was not one of them.

14. After the conclusion of the hearing, DOAH filed the Recommended Order. A copy of the Recommended Order (“Recommended Order”), dated June 29, 2017, is attached as **Exhibit “B”**, and referenced to explain the basis of the Appeal.

15. The Recommended Order recommended Petitioners’ petitions be denied. As the Recommended Order noted, had the Applications been deemed eligible, they would have been in the funding range based on the assigned lottery numbers and RFA 2016-110 selection criteria. *Id.* at para. 14. Without the funding, Petitioners will not be able to develop their proposed Developments. *Id.* at para 16.

16. Further, as stated in the Recommended Order, DOAH specifically found: Petitioners' submission of the earlier version of the Form was not a "minor irregularity" because: a) the submission of the long form was not an error that FHFC could correct; and b) FHFC had an interest in maintaining the credibility and integrity of its bidding process. DOAH held that in order to be a "minor irregularity" a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of FHFC or the public. *Id* at para. 52.

17. On July 28, 2017, FHFC's Board of Directors filed a Final Order ("Final Order"). A copy of the Final Order, dated July 28, 2017 is attached as **Exhibit "C"**; and is referenced to explain the basis of the Appeal issues. In the Final Order, FHFC held that the Conclusions of Law in the Recommended Order were reasonable and based on competent, substantial evidence. *Id* at para. 7. At the hearing before the Board, FHFC indicated that the "minor irregularity" rule was not clear and needed to be modified.

18. Petitioners timely filed their Notice of Appeal of the Final Order. *See JPM Outlook v. Florida Housing Finance Corp.*, Case No. 1D17-3499. The appeal has been fully briefed and is pending in the First District Court of Appeal. The appellate briefs of the parties contain the arguments made by Petitioners and Respondent, and are attached as **Composite Exhibit "D"**.

19. RFA 2018-109 Development Viability Loan Funding was issued by

FHFC on March 29, 2018, and modified on April 6, 2018. More particularly, RFA 2018-109 provides as follows:

This Request for Application is open to Applicants that have an Active Award of (a) 9 percent Housing Credits, or (b) State Apartment Incentives Loan (SAIL) funding used in conjunction with (i) Tax-Exempt Bond financing (i.e. Corporation-issued Multifamily Mortgage Revenue Bonds (MMRB) or Non-Corporation-issued Tax Exempt Bonds obtained through a Public Housing Authority (established under Chapter 421, F.S.), a County Housing Finance Authority (established pursuant to Section 159.604, F.S.), or a Local Government and (ii) Non—Competitive Housing Credits, awarded through one of the following Requests for Application: 2014-111, 2014-114, 2015-106, 2015-107, 2015-108, 2015-111, 2016-103, 2016-109, 2016-110, 2016-112, 2016-113, 2016-114, 2016-116, 2017-102, 2017-103, or 2017-107.

To be eligible for funding, as of the Application Deadline the Development must not have closed on their Limited Partnership Agreement, Tax-Exempt Bond financing, or any other Corporation funding (excluding Pre-Development Loan Program funding (PLP) and Elderly Housing Community Loan (EHCL) funding), must not have recorded a Notice of Commencement with the appropriate local jurisdiction, must not have a final credit underwriting report, and must not have returned the allocation for the Active Award to the [FHFC].

This RFA [2018-109] is being offered to assist Applicants experiencing a reduction in equity funding for their Active Award, recognizing a funding need based on changes in market pricing, which have been exacerbated by increased construction costs due to hurricane impact and construction market changes.

[FHFC] expects to have up to an estimated \$13,472,173 in loan funding available in RFA [2018-109].

FHFC reserves the right to 1. Waive Minor Irregularities; and 2. Accept or reject any or all Applications received as a result of this RFA [2018-109].

The Corporation [FHFC] expects to select one (1) or more Applications to award the funding contemplated by this RFA.

Composite Exhibit “A” at pp. 2-6.

20. Further, RFA 2018-109 limits Applicants to only apply for a maximum of two “Related Applications.” A Related Application is defined in RFA 2018-109 as:

“An Application submitted in his RFA that shares one (1) or more Principals of an Applicant or Developer of an Applicant or Developer common to any of the Principals of an Applicant or Developer in another Application submitted in the same RFA, as verified by the list of Principals submitted with the Original Application or any subsequent Board or Corporation approved change in Principals.”

21. If RFA 2018-109 defined “Applicants” to include putative Applicants with Active Awards, Petitioners would file Applications and seek a portion of the loan funding available in RFA 2018-109. Because Petitioners are not included in the definition of “Applicants” in RFA 2018-109, Petitioners are arbitrarily blocked from seeking funding which they would be otherwise eligible to seek if the Final Order is reversed on appeal, even though they will fit the definition of Applicants if Petitioners are successful on appeal.

22. Because FHFC entered the Final Order which prevented Petitioners from receiving an Active Award, Petitioners are not able to provide the “Corporation-issued Application” number for the Active Award, as required by Section 3(c) of RFA 2018-109. Also, Petitioners are not able to provide the

“amount awarded” for the Housing Credit Equity Calculation. For the same reason, Petitioners cannot certify that the credit underwriting fee was received by the Credit Underwriter not later than seven (7) Calendar Days after the notice of preliminary award, as required by Section C(2) of Exhibit “C” of RFA 2018-109.

23. The RFA terms are arbitrary and capricious, clearly erroneous and contrary to competition because the terms are not inclusive of Applicants with inchoate or putative rights to be declared “Applicants” with “Active Awards” and which may result in those Applicants possessing Active Awards.

24. Petitioners timely filed a Notice of Protest pursuant to Section 120.57(3), Florida Statutes, on April 6, 2018, notifying FHFC of its intent to file a Formal Written Protest and Petition for Formal Administrative Hearing challenging the terms of RFA 2018-109. The Notice of Protest is attached as **Exhibit “E”**.

III. Petitioners’ Substantial Interests are Determined in this Proceeding

25. Petitioners’ substantial interest will be determined in this proceeding, which is designed to protect the interest of parties whose substantial interests are determined by the agency’s funding decisions under RFA 2018-109. FHFC’s decision to define “Applicant” in RFA 2018-109 in such a way as to exclude Petitioners, who are putative Applicants by virtue of the rights preserved on appeal, causes Petitioners to suffer an immediate injury in fact that is within the

zone of interest of this proceeding, the purpose of which is to determine whether Petitioners are entitled to the same rights of the Applicants who have an Active Award, because if Petitioners succeed on appeal, they will be Applicants who have an Active Award as is otherwise defined in RFA 2018-109. Therefore, Petitioners have standing to initiate and participate as a party in this proceeding. *Fla. Stat. §120.569(1)*; *See Agrico Chem Co. v. Dept. of Env. Reg.*, 406 So. 2d 478 (Fla. 1st DCA 1981).

IV. FHFC's Exclusion of Petitioners from RFA 2018-109's Definition of "Applicant" and Effective Disqualification from Entitlement to Apply for the Development Viability Loan Funding is Clearly Erroneous, Arbitrary and Capricious and Contrary to Competition

26. FHFC is created and defined by section 420.501, et seq., Florida Statutes, and was formed as a result of the Florida Legislature's findings of the need to create inducements for private and public investment for the construction of housing for low, moderate and middle income persons and families. *Fla. Stat. §420.502*. FHFC is charged with the responsibility to administer the governmental function of financing or refinancing housing and related facilities in the state. *Fla. Stat. §420.504(1)*. The purpose for the formation and existence of FHFC is thwarted if the functions of financing are reduced to form over substance.

27. An RFA is treated as a Request for Proposal for the purposes of a bid protest under section 120.57(3), Florida Statutes. *See Fla. Admin. Code R. 67-60.009(4)*. Administrative conclusions of law are subject to *de novo* review, while

findings of fact are reviewed for competent, substantial evidence. *Brownsville Manor, L.P. v. Redding Dev. Partners, LLC*, 224 So. 3d 891 (Fla. 1st DCA 2017) (citing *AT&T Corp. v. State, Dept of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016)). Additionally, the agency action should be set aside when the agency action is clearly erroneous, contrary to competition, arbitrary or capricious. *Agrico Chem. Co. v. Dept. of Env. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An arbitrary decision is one not supported by facts or logic. *Id.* The test for whether the agency action has been arbitrary is determined whether the agency “has considered all relevant factors, given actual, good faith consideration to those factors, and used reason rather than whim to progress from consideration of these factors to its final decision”. *Adam Smith Enterprises v. Dept. of Env. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). An agency’s action is clearly erroneous if it is contrary to the correct interpretations of law or rule. *Collier County Bd. Of County Comm’rs v. Florida Fish & Wildlife Conserv. Comm.*, 993 So. 2d 69 (Fla. 2d DCA 2008).

28. As Petitioners have argued on the Appeal, Rule 67-60.002(6) states that a “minor irregularity” is a variation “that does not provide a competitive advantage or benefit” to the applicant over other applicants, nor does it adversely affect the public or *FHFC [defined as “Corporation” in the Code]*. *Fla. Admin. Code R. 67-60.002(6)*. Review is sought on appeal of the legal interpretation of

the term “minor irregularity” as defined in Rules 67-60.002(6) and 67-60.008. In the Code of Federal Regulations, a “minor irregularity” is further defined as a defect or variation which is immaterial effect on price, quantity, quality, or delivery is negligible when contrasted with total cost or scope of the supplies or services being acquired. *Id.* 48 C.F.R. §14.405 specifically includes as a Minor Irregularity the failure to sign a bid if it is accompanied by other material indicating the bidder’s intention to be bound by the unsigned bid. *See* 48 C.F.R. §14.405(c)(1).

29. FHFC, through its Board, did not find that there was a competitive advantage given to Petitioners by executing the earlier form; all of the accurate substantive information was given, and there were no typographical or mathematical errors. There was no issue of whether the property defined in the Applications included “Scattered Sites.” There were no Scattered Sites included, and no challenge was given to Petitioners’ submitted Surveyor Certificate whatsoever.

30. On the Appeal, FHFC has argued there can be no finding of a “minor irregularity” if there is an error in an “effects clause.” “Effects clause” is not defined in Chapter 67 of the Florida Administrative Code, and is not mentioned as a term of art in Chapter 67-60 which is applicable to Multifamily Competitive Solicitation Funding Process. From the record, FHFC called “effects clauses” as

those which state outright that the “clause” will not be waived. Notably, Rule 67-60.008 makes no mention of “effects clauses” as those which are not susceptible of being subject to a finding of a “minor irregularity.” There is no definition of “effects clause” anywhere in the Florida Administrative Code, nor was any definition included in the RFA. FHFC did not include in the Rule 67-60.008 that failure to abide by the requirements of the “effects clause” could not constitute a Minor Irregularity, when it could have expressly done so.

31. As Petitioners have argued on the Appeal, the fact that FHFC placed its decision to declare Petitioners’ Applications ineligible due to a violation of an undefined “effects clause” is reason enough to find an abuse of discretion. See *Liberty County v. Baxter’s Asphalt and Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982). As the Florida Supreme Court advises, an agency’s discretion must be exercised based on clearly defined criteria in the bid specifications, rules or statutes. *Id.* Here, there is no definition of an “effects clause” and therefore cannot find its way to a category of “clearly defined” as the Florida Supreme Court requires.

32. Even if “effects clauses” from Rule 67-60.008 and the definition of Minor Irregularities, and even if “effects clauses” were a defined term of art, there would still be no change in the outcome and Petitioners should have been declared recipients of Active Awards. The warning language found in the revised Form in

RFA 2016-110, cautioned that if it were determined that Scattered Sites were included in the property included in the application, the applicant, if successful in obtaining funding, was subject to having that funding rescinded after the award was made. Even if there were an automatic exemption for an “effects clause”, the warning language does not constitute an “effects clause” as independently defined by FHFC, nor does that warning language apply in any way to the Petitioners’ Applications.

33. Petitioners have preserved their objections to the Final Order by timely appealing the Final Order to the First District Court of Appeal, and by so doing, Petitioners have standing to challenge the terms of RFA 2018-109, and the disbursement of funds because Petitioners are prohibited from filing Applications. In the event the First District Court of Appeal reverses the Final Order and determines Petitioners should have be the recipients of an “Active Award” pursuant to RFA 2016-110, Petitioners would be entitled to file Applications for funding available in RFA 2018-109.

34. FHFC’s failure to include Petitioners in the definition of “Applicants”, as putative holders of an “Active Award”, constitutes agency action that is clearly erroneous, contrary to competition, arbitrary and capricious, and seeks to invade the jurisdiction of the First District Court of Appeal.

V. Disputed Issues of Material Fact

35. The disputed issues of material fact in this proceeding include, but are not limited to the following; as noted above, Petitioners reserve the right to amend this Petition to allege additional disputed issues of material fact based on information obtained through public records requests and discovery.

- a. Whether Florida Housing Finance Corporation's definition of "Applicant" in RFA 2018-109 is clearly erroneous, arbitrary or capricious, or contrary to competition because it fails to include putative Applicants who have preserved their rights by appealing, and seeking the reversal of, the Final Order of the agency declaring that they were not entitled to receive an Award under one of the designated RFA's listed in RFA 2018-109.
- b. Whether, under the existing facts and circumstances, Florida Housing Finance Corporation's failure to include in RFA 2018-109 provisions that would apply to putative Applicants, which would include Petitioners, including but not limited to, modifying the provisions of RFA 2018-109 referenced in Paragraph 22 above, to provide for the Application to include exceptions to those RFA provisions available to putative Applicants.

VI. Concise Statement of Ultimate Facts Alleged

36. Petitioners incorporate by reference the facts set forth in paragraphs 1 through 35 above. Petitioners meet the requirements of RFA 2016-110, as expressed more fully in the Initial Brief and Reply Brief, attached in **Composite Exhibit “B”**, and is therefore entitled to an Application for RFA 2018-109, and to apply for part of the Development Viability Loan Funding. Once the Funding has been disbursed, Petitioners will have no other remedy in equity or law to apply for, receive, or recover any of the Funding.

VII. Statutes and Rules Warranting Reversal of the Agencies Proposed Action

37. The statutes and rules warranting declaring invalid FHFC’s RFA 2018-109, and, including but not limited to, the definition of “Applicant” include, but are not limited to, Sections 120.569, 120.57, 420.501, 420.502, 420.504, Florida Statutes, and Rules 67-21.002, 67-60.002, 67-60.006, 67-60.008, 67-60.009, for the reasons discussed above in paragraphs 1 through 36.

VIII. Relief Requested

WHEREFORE, Petitioners JPM OUTLOOK ONE LIMITED PARTNERSHIP and GRANDE PARK LIMITED PARTNERSHIP, hereby request the following relief:

1. For Florida Housing Finance Corporation to schedule a meeting as

required by section 120.57(3), Florida Statutes, to discuss resolution of this Petition by mutual agreement;

2. For Florida Housing Finance Corporation, pursuant to Sections 120.569 and 120.57(1), Florida Statutes, to forward this Formal Written Protest and Petition for Formal Administrative Hearing and Determination of Invalidity of RFA 2018-109 to the Division of Administrative Hearings for assignment of an Administrative Law Judge and conduct of a formal administrative hearing pursuant to Sections 120.56 and 120.569, and 120.57, Florida Statutes, if not resolved by mutual agreement;
3. For the Administrative Law Judge to enter a Recommended Order recommending that the Petitioners are entitled to be defined as Applicants under RFA 2018-109, and to preserve Petitioners' rights to apply for the Development Viability Loan Funding before the funding is awarded and disbursed;
4. For Florida Housing Finance Corporation to enter a Final Order determining that Petitioners are entitled to file Applications as Applicants under RFA 2018-109, and;
5. For the award to Petitioners of any other consistent relief, including but not limited to costs, as may be deemed appropriate in this proceeding.

Respectfully submitted,



Kimberly A. Ashby

Fla. Bar No. 322881

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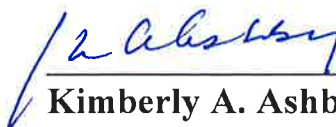
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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** on this 13^h day of April 2018, that the original of the foregoing Formal Written Protest and Petition for Formal Administrative Hearing has been filed by email and hand delivery with the Corporation Clerk (CorporationClerk@floridahousing.org), Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301-1329, and a copy via hand delivery to the following:

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*Attorneys for Florida Housing Finance
Corporation*



Kimberly A. Ashby

Fla. Bar No. 322881

REQUEST FOR APPLICATIONS 2018-109

RFA 2018-109 DEVELOPMENT VIABILITY LOAN FUNDING

Issued By:

FLORIDA HOUSING FINANCE CORPORATION

Issue Date: March 29, 2018

Due Date: April 16, 2018

**SECTION ONE
INTRODUCTION**

This Request for Applications is open to Applicants that have an Active Award of (a) 9 percent Housing Credits, or (b) State Apartment Incentive Loan (SAIL) funding used in conjunction with (i) Tax-Exempt Bond financing (i.e., Corporation-issued Multifamily Mortgage Revenue Bonds (MMRB) or Non-Corporation-issued Tax-Exempt Bonds obtained through a Public Housing Authority (established under Chapter 421, F.S.), a County Housing Finance Authority (established pursuant to Section 159.604, F.S.), or a Local Government and (ii) Non-Competitive Housing Credits, awarded through one of the following Requests for Applications: 2014-111, 2014-114, 2015-106, 2015-107, 2015-108, 2015-111, 2016-103, 2016-109, 2016-110, 2016-112, 2016-113, 2016-114, 2016-116, 2017-102, 2017-103, or 2017-107. To be eligible for funding, as of the Application Deadline the Development must not have closed on their Limited Partnership Agreement, Tax-Exempt Bond financing, or any other Corporation funding (excluding Pre-Development Loan Program funding (PLP) and Elderly Housing Community Loan (EHCL) funding), must not have recorded a Notice of Commencement with the appropriate local jurisdiction, must not have a final credit underwriting report, and must not have returned the allocation for the Active Award to the Corporation.

Developments awarded under RFA 2017-109 Development Viability Loan Funding are not eligible for funding in this RFA. This RFA is being offered to assist Applicants experiencing a reduction in equity funding for their Active Award, recognizing a funding need based on changes in market pricing, which have been exacerbated by increased construction costs due to hurricane impact and construction market changes.

Florida Housing Finance Corporation (the Corporation) expects to have up to an estimated \$13,472,173 in loan funding available in this RFA.

The Corporation is soliciting applications from qualified Applicants that commit to provide housing in accordance with the terms and conditions of this RFA, inclusive of Exhibits A, B, and C, applicable laws, rules and regulations, and the Corporation's generally applicable construction and financial standards. In addition, Applicants will be held to all terms and conditions of the RFA under which the Active Award was made.

**SECTION TWO
DEFINITIONS**

Unless otherwise defined in Exhibit B to this RFA, capitalized terms within this RFA shall have the meaning set forth in Rule Chapters 67-48, 67-21, and 67-60, F.A.C., or in applicable federal regulations.

**SECTION THREE
PROCEDURES AND PROVISIONS**

A. Submission Requirements.

1. The Application Deadline is 11:00 a.m., Eastern Time, on April 16, 2018. To meet the submission requirements, prior to Application Deadline the Applicant must do all of the following for its Application:
 - a. The Applicant must download and complete the Application and Development Cost Pro Forma. These two (2) documents are available on the Corporation's Website at <http://www.floridahousing.org/programs/developers-multifamily-programs/competitive/2018/2018-109> (also available by clicking [here](#)). The download process may take several minutes. Applicants should save this document with a file name that is unique to the specific Application.
 - b. Next, when the Applicant is ready to submit the completed Application and Development Cost Proforma (the "Complete Online Submission Package") to the Corporation, the Applicant must go to the webpage <http://www.floridahousing.org/programs/developers-multifamily-programs/competitive/2018/2018-109> (also available by clicking [here](#)) and click the link to login and upload the Complete Online Submission Package consisting of these two (2) documents. To upload the Complete Online Submission Package, a username and password must be entered.
 - c. After successfully logging in, the Applicant must click "Upload Application." The Applicant must also enter the Development Name, click "Browse" to locate the completed Application and Development Cost Pro Forma that was saved on the Applicant's computer, and then click "Upload Selected File." Hard copies of all attachments are not uploaded. The hard copies must be included with the printed copies of the Application as provided in e. below. The selected Application will then be listed as an Uploaded Application and its assigned Response Number will be visible in the first column.
 - d. Next, to view and print the Uploaded Application (consisting of the complete Online Submission Package), the Applicant must click "Print Application for Submission to Florida Housing." The assigned Response Number will be reflected on each page of the printed Uploaded Application. The Applicant must submit three (3) printed copies of the Uploaded Application to the Corporation, as outlined in item e. below.

Note: If the Applicant clicks "Delete" prior to the Application Deadline, the Application will no longer be considered an Uploaded Application and the Applicant will be required to upload the Complete Online Submission Package again in order for the document to be considered an Uploaded Application. This will generate a new Response Number.

- e. The Applicant must provide to the Corporation by the Application Deadline sealed package(s) containing three (3) printed copies of the final Uploaded Application (Consisting of the Complete Online Submission Package) with all applicable attachments, as outlined in Section Four, with each copy housed in a separate 3-ring binder with numbered divider tabs for each attachment. The final assigned Response Number should be reflected on each page of the printed Application and Development Cost Pro Forma.

(1) One (1) printed copy of the completed Uploaded Application with all applicable attachments must be labeled "Original Hard Copy" and must include the following items:

- (a) The required non-refundable \$500 Application fee, payable to Florida Housing Finance Corporation (check or money order only); and
- (b) The Applicant Certification and Acknowledgement form with an original signature (blue ink preferred).

(2) The remaining two (2) copies of the complete Uploaded Application with all applicable attachments should be labeled "Copy".

f. The Applicant should label the outside of each shipping package with the applicable RFA number. The Corporation will not consider faxed or e-mailed Applications.

2. After 11:00 a.m., Eastern Time, on the Application Deadline, each Application for which hard copies are received by the Application Deadline will be assigned an Application number. In addition, these Applications will be assigned a lottery number by having the Corporation's internal auditors run the total number of Applications received through a random number generator program.

The printed copies of the complete Application must be addressed to:

Marisa Button
Director of Multifamily Allocations
Florida Housing Finance Corporation
227 N. Bronough Street, Suite 5000
Tallahassee, FL 32301

If any of the hard copies of Exhibit A (The Application) or the Development Cost Pro Forma are not identical to the complete Uploaded Application, the Uploaded Application will be utilized for scoring purposes.

Pursuant to subsection 67.60.004(2), F.A.C., any Applicant may request withdrawal of its Application from a competitive solicitation by filing a written notice of withdrawal with the Corporation Clerk. For purposes of the funding selection process, the Corporation shall not accept any Application withdrawal request that is submitted between 5:00 p.m., Eastern Time, on the last business day before the date the scoring committee meets to make its recommendations until after the Board has taken action on the scoring committee's recommendations, and such Application shall be included in the funding selection process as if no withdrawal request had been submitted. Any funding or allocation that becomes available after such withdrawal is accepted shall be treated as returned funds and disposed of according to Section Five of the RFA.

B. This RFA does not commit the Corporation to award any funding to any Applicant or to pay any costs incurred in the preparation or delivery of an Application.

- C. Florida Housing reserves the right to:
1. Waive Minor Irregularities; and
 2. Accept or reject any or all Applications received as a result of this RFA.
- D. Any interested party may submit any inquiry regarding this RFA in writing to the Director of Multifamily Allocations via e-mail at RFA_2018-109_Questions@floridahousing.org (also available by clicking [here](#)) with "Questions Regarding RFA 2018-109" as the subject of the email. All inquiries are due by 5:00 p.m., Eastern Time, on April 5, 2018. Phone calls or written inquiries other than at the above e-mail address will not be accepted. The Corporation expects to respond to all inquiries by 5:00 p.m., Eastern Time, on April 10, 2018, and will post a copy of all inquiries received, and their answers, on the Corporation's Website <http://www.floridahousing.org/programs/developers-multifamily-programs/competitive/2018/2018-109> (also available by clicking [here](#)). The Corporation will also send a copy of those inquiries and answers in writing to any interested party that requests a copy. The Corporation will determine the method of sending its answers, which may include regular United States mail, overnight delivery, fax, e-mail, or any combination of the above. No other means of communications, whether oral or written, shall be construed as an official response or statement from the Corporation.
- E. Any person who wishes to protest the specifications of this RFA must file a protest in compliance with Section 120.57(3), Fla. Stat., and Rule Chapter 28-110, F.A.C. Failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.
- F. By submitting this Application, each Applicant agrees to the terms and conditions outlined in the RFA and certifies that:
1. **Public Records.** Any material submitted in response to this RFA is a public record pursuant to Chapter 119, Fla. Stat. Per Section 119.071(1)9b)2., the sealed Applications received by the Corporation are exempt from disclosure until such time as the Board provides notice on an intended decision or until 30 Calendar Days after the opening of the sealed Applications, whichever is earlier.
 2. **Noninterference.** At no time during the review and evaluation process, commencing with the Application Deadline and continuing until the Board renders a final decision on the RFA, may Applicants or their representatives contact Board members or Corporation staff, except Corporation legal staff, concerning their own or any other Applicant's Application. If an Applicant or its representative does contact a Board or staff member in violation of this section, the Board shall, upon a determination that such contact was made in an attempt to influence the selection process, disqualify the Application.
 3. **Requirements.** All Developments will be subject to the requirements of the RFA, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the credit underwriting and

program requirements outlined in Rule Chapters 67-21 or 67-48, F.A.C., as applicable, and the Compliance requirements of Rule Chapter 67-53, F.A.C. In addition, all Developments will be subject to the requirements set out in the RFA under which the Active Award was made.

4. Modifications. Any modifications that occur to the Request for application will be posted on the website and may result in an extension of the deadline. It is the responsibility of the Applicant to check the website for any modifications prior to the Application Deadline.
- G. The Corporation expects to select one (1) or more Applications to award the funding contemplated by this RFA. Any such Applications will be selected through the Corporation's review of each Application, considering the factors identified in this RFA.

SECTION FOUR INFORMATION TO BE PROVIDED IN APPLICATION

A. Exhibit A Items

1. Applicant Certification and Acknowledgement

The Applicant must include a signed Applicant Certification and Acknowledgement form as **Attachment 1** to Exhibit A to indicate the Applicant's certification and acknowledgement of the provisions and requirements of the RFA. The form included in the copy of the Application labeled "Original Hard Copy" must reflect an original signature (blue ink is preferred). The Applicant Certification and Acknowledgement form is provided on the Corporation's Website <http://www.floridahousing.org/programs/developers-multifamily-programs/competitive/2018/2018-109> (also accessible by clicking [here](#)). Note: If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.

2. Related Applications and Priority Application Designation

The Applicant must name all Developments submitted in this RFA that are Related Applications and label each one as the Priority I Application or Priority II Application. For a non-Related Application, list the name of the Development as a Priority I Application. Priority Application Designations that are included in each Related Application must contain the identical information as included in the other Related Applications. If Priority Application Designation information provided for a Related Application is not identical to the other Related Application, both Related Applications will be deemed a Priority II Application. Under this RFA, Applicants may only apply for a maximum of two (2) Related Applications. If it is determined during scoring, or any time after award, that more than two (2) Related Applications were submitted, the award(s) for those Related Applications will be rescinded.

3. General Development Information

- a. The Applicant must provide the name of the Development that has the qualifying Active Award.

- b. The Applicant must provide the Request for Applications (“RFA”) number through which the Active Award was made.
- c. The Applicant must provide the Corporation-issued Application number for the Active Award.
- d. The Applicant must provide the demographic committed to in the Original Application, which may not change. In the case of a discrepancy between the Original Application and this Application, the Corporation will use the demographic commitment stated in the Original Application for scoring purposes. Developments serving the demographic of Homeless or Persons with a Disabling Condition will receive a funding preference as outlined in Section Five of the RFA.
- e. The Applicant must state the total number of new construction and/or Rehabilitation units, which may not be less than the total number of units committed to in the Original Application.

4. Funding

- a. The Applicant must provide the amount of loan funding it is requesting.

The maximum amount the Applicant is eligible to request is the lesser of (1) or (2), as applicable, or (3), as described below. During the scoring process, if the Applicant states a loan funding request amount that is greater than the amount the Applicant is eligible to request, the Corporation will reduce the amount down to the maximum amount the Applicant is eligible to request and such adjusted amount will be deemed the Applicant’s Eligible Viability Loan Funding Request Amount. The Eligible Viability Loan Funding Request Amount will also be reviewed during the credit underwriting process and when the final cost certification is finalized, which may result in a further reduction of the Eligible Viability Loan Funding Request Amount. At no time will the Eligible Viability Loan Funding Request Amount be increased.

Note: A maximum of \$2.25 million when funding two Related Applications will be eligible to be awarded to any one Principal, as verified by the list of Principals submitted with the Original Application or any subsequent Board or Corporation approved change in Principals. If a Principal submits Related Applications that exceed a total of \$2.25 million, the award from the Related Application deemed Priority II will be reduced until the \$2.25 million maximum is met. This \$2.25 million maximum is increased to \$3,200,000 when at least one Related Application is awarded funding within the limits in 4.a.(2) below.

(1) Per Unit/Development Limitations:

For Developments that do not meet the criteria in (2) below, the following limitations apply:

- (a) Developments serving Homeless or Persons with a Disabling Condition Demographics are limited to the lesser of \$18,000 per set-aside unit or \$1,500,000 per Development.

- (b) Developments serving a demographic other than Homeless or Persons with a Disabling Condition are limited to the lesser of \$15,000 per set-aside unit or \$1,250,000 per Development.

(2) Development Location Limitation:

If the Development is located in a small county, with a Development Category of new construction, the request amount is limited to the lesser of \$43,500 per unit or \$2,250,000 per Development;

or

- (3) The amount of Viability Loan Funding needed to make the Development viable, sized by determining an amount to balance the Total Development Costs as provided in this Application against the Total Permanent Funding Sources, to the extent possible. The Total Permanent Funding Sources shall be determined by adding together the amounts provided in (a) through (c) below:

- (a) Permanent Funding Sources:

The Total Permanent Funding Sources that will be used in this Application for this calculation will be the greater of any permanent funding (Corporation and non-Corporation) disclosed in the Original Application (exclusive of HC equity and deferred Developer fee) and that which is disclosed on the Development Cost Pro Forma provided with this RFA.

However, in the case of the permanent funding disclosed in the Original Application, the amount of the first mortgage will be discounted by 5% prior to making the comparison.

- (b) Housing Credit Equity:

The HC equity that will be used in this Application for this calculation will be the greater of (i) the amount provided in the Letter of Intent provided with this Application when the housing credit pricing is at least \$0.90, or (ii) an amount calculated by utilizing a housing credit price of \$0.90 when the housing credit price as stated in the Letter of Intent in this Application is less than \$0.90. In the case of a 9 percent HC Applicant, the amount of Housing Credits to be incorporated in this process cannot exceed the amount initially awarded;

- (c) Deferred Developer Fee:

The deferred Developer fee that will be used in this Application for this calculation shall equal 50 percent of the total Developer fee, exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee (which will be equal to 5 percent of Development Cost).

If the Applicant's Development Cost Pro Forma has surplus funding at time of Application submission, the scorer will first reduce the deferred Developer fee by the amount of the surplus funding to no less than the 50 percent deferral minimum and then reduce the Applicant's Viability Loan Funding Request Amount, as needed. This adjustment will take place prior to the process of determining the maximum Viability Loan Funding Request Amount.

Note: If other additional funding sources* are acquired prior to finalization of the cost certification, such other funding will be used to first reduce the deferred Developer fee to no less than 50 percent of the total Developer fee and then to reduce the Viability Loan Funding. After the IRS form(s) 8609 are issued, through the end of the Compliance Period, any additional funding sources* acquired will be used to pay down the deferred Developer fee and the Viability Loan Funding on a 50/50 basis. If the deferred Developer fee is paid off prior to the Viability Loan Funding, then 100 percent of any remaining additional funding sources* will be used to reduce or pay off the Viability Loan Funding. Thereafter, a portion of the Development Viability Loan would be reduced in the same manner as prescribed for SAIL in Rule Chapter 67-48.010(15), F.A.C.

*Additional funding sources does not include the Development's net cash flow from operations, after debt service, but it does include Housing Credit equity greater than the amount provided (or calculated) in this RFA as it relates to competitive Housing Credits. Additional Housing Credit equity as it relates to non-competitive Housing Credits shall be used to first pay additional development costs incurred prior to following the waterfall of payment priorities outlined above, but in no instance will the deferred Developer fee be less than 50 percent of the total Developer fee.

Provided below is an example of sizing process:

Applicant A has an Active Award of 9 percent Housing Credits with a Family demographic commitment located in a Large County. There are no Related Applications. The table below summarizes the information the Applicant provided in its Original Application under which the Active Award was made as well as information provided in response to this RFA.

	Original Application	Current Application
General Information		
HC Allocation ¹	\$1,510,000	\$1,510,000
Limited Partner(s) Ownership %	99.99%	99.99%
HC Pricing	\$0.97	\$0.90
Total Units	90	90
TDC Information		
Development Costs	\$13,150,000	\$13,940,000
<i>Maximum Total Developer fee allowed (16% of Development Costs)</i>	<i>\$2,104,000</i>	<i>\$2,230,400</i>
Total Developer fee used in RFA	\$2,100,000	\$2,230,000
Other Costs (land, ODR)	\$2,700,000	\$2,700,000

Total Development Costs	\$17,950,000	\$18,870,000
Permanent Funding Sources		
Deferred Developer fee ²	\$504,465	\$1,446,359
First Mortgage (Bank) Debt	\$2,650,000	\$2,450,000
Local Gov't Funds	\$50,000	\$150,000
Other FHFC Funding	\$0	\$0
HC Equity ³	\$14,645,535	\$13,588,641
Viability Loan Funding Request Amount ⁴	N/A	\$1,235,000
Total Permanent Funding Sources	\$17,950,000	\$18,870,000
HC Equity Calculation for Sizing Purposes		
HC Allocation ¹		\$1,510,000
Greater of Syndicator's LOI HC Price or \$0.90		\$0.9000
Resulting HC Equity for Sizing		\$13,588,641
Minimum Deferred Developer Fee		\$1,115,000
Permanent Sources that are not Deferred Developer Fee or HC Equity ⁵	\$2,662,500	\$2,600,000
Greater amount of permanent sources that are not deferred developer fee or HC equity as presented in the original application or the current application ("other permanent sources")		\$2,662,500
Viability Loan Sizing		
A: Total Development Cost, less minimum developer fee, less Resulting HC Equity for Sizing, less the greater amount of other permanent sources (Viability Loan Amount via gap analysis)		\$1,503,859
B: Maximum Viability Loan Amount relative to the Per Development Limit		\$1,250,000
C: Maximum Viability Loan Amount relative to the Per Unit Limit		\$1,350,000
Least amount of qualifying Viability Loan		\$1,250,000

¹For 9% HCs, use the awarded HC allocation. For 4% HCs, use the HC allocation identified in the syndicator's Letter of intent.

²The current deferred developer fee must be at least 50%, but can go up to 100% if needed to balance total permanent sources and total development costs.

³The HC Equity amount listed is based on the calculations in the "HC Equity Calculation for Sizing Purposes" section.

⁴The Viability Loan Funding Request Amount cannot exceed the RFA limits. If it does, FHFC will reduce it down to the maximum and increase the deferred developer fee to offset, up to 100% of the developer fee.

⁵ The total amount of permanent sources from the Original Application is calculated by taking 95% of the \$2,750,000 first mortgage (\$2,612,500) and adding the \$50,000 from the local government to yield \$2,662,500. This total recognizes the 5% discount of the first mortgage provided by 4.a.(3)(a) above.

The Viability Loan Funding Request Amount listed above from the current Application is \$1,250,000. This will be reviewed using the following methodology during scoring, credit underwriting and final cost certification sizing processes. The Viability Loan Funding Request Amount can only be reduced or remain the same and cannot be increased.

- Sizing limits based on 4.a.(1) (Per Unit Limit): 90 Units x \$15,000 PU = \$1,350,000.
- Sizing limits based on 4.a.(1) (Per Development Limit): \$1,250,000.
- Sizing limits based on 4.a.(2) is not applicable due to the Development's location.

Based on the two limiting factors above, the maximum Viability Loan Funding Request Amount is \$1,250,000 ($\$1,250,000 < \$1,350,000$).

- Sizing limits based on 4.a.(3)

The Total Development Cost must equal all permanent funding sources. The permanent funding sources will assume to include (for sizing purposes), at a minimum, the same amount of permanent sources provided in the Original Application, exclusive of HC equity and deferred Developer fee. The deferred Developer fee must equal at least 50 percent of the total Developer fee (exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee). In addition, the amount of HC equity to be incorporated will assume to have (for sizing purposes) a minimum price of \$0.90 per dollar of Housing Credits.

Total Development Cost (TDC):

- The TDC stated in the current Application is \$18,870,000.

Permanent Sources Calculation:

The greater of the following will be used in calculating the Eligible Viability Loan Funding Request Amount:

- Permanent sources provided in the Original Application, exclusive of HC equity and deferred Developer fee: $\$2,650,000 + \$50,000 = \$2,700,000$.
- Permanent sources provided in the current Application, exclusive of HC equity, deferred Developer fee and the Viability Loan Funding Request Amount: $\$2,450,000 + \$150,000 = \$2,600,000$.
- The greater of the two amounts above is \$2,700,000.

Housing Credit Equity Calculation:

The greater of the following will be used in calculating the Eligible Viability Loan Funding Request Amount:

- The HC equity calculation will use a HC annual allocation based on the lesser of the amount awarded (if it is a 9% HC allocation), the amount stated in the current syndicator Letter of intent (if it is a 4% HC allocation), or the amount calculated by taking the eligible basis, applying a basis boost to the eligible basis that is subject to a basis boost (if the Development qualifies for a basis boost), applying the applicable fraction and taking the resulting qualified basis and multiply by the applicable PV Tax Credit Percentage. This later process is provided in the example in the table above within the "HC Equity Calculation for Sizing Purposes" section and the associated footnotes with a result of \$1,743,183. This amount is greater than the 9% HC allocation award so the amount of HC equity will utilize an allocation of \$1,510,000.
- HC equity provided in current Application: \$13,588,641 as stated in the Letter of Intent where the syndicator provided the following supporting information: $\$1,510,000 \text{ Housing Credit Allocation} \times 10 \times 99.99\% \times \$0.90 = \$13,588,641$ (rounded to nearest dollar).
- HC equity based on a minimum price of \$0.90 per dollar of Housing Credits: $\$1,510,000 \text{ Housing Credit Allocation} \times 10 \times 99.99\% \times \$0.90 = \$13,588,641$ (rounded to nearest dollar).

- The greater of the two amounts above is \$13,588,641.

Deferred Developer Fee Calculation:

The following will be used in calculating the Eligible Viability Loan Funding Request Amount:

- 50 percent of the stated total Developer fee (exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee): $\$2,230,000 \times 50\% = \$1,115,000$.

Calculating the Eligible Viability Loan Funding Request Amount:

- \$18,870,000 (TDC), less \$2,700,000 (the greater of the Permanent Sources Calculation above), less \$13,588,641 (the greater of the Housing Credit Equity Calculation above), less \$1,115,000 (the minimum deferred Developer fee) = \$1,466,359 (Eligible Viability Loan Funding Request Amount via gap analysis).
- The maximum qualified Eligible Viability Loan Funding Request Amount is based on the lesser of all sizing requirements described in 4.a. ($\$1,250,000 < \$1,350,000 < \$1,466,359$), or the Applicant's Viability Loan Request Amount ($\$1,235,000$) which equals \$1,235,000 ($\$1,235,000 < \$1,250,000$).
- As a note, the deferred developer fee was increased above the minimum to balance the sources and uses.
- For Tie-Breaker purposes, the maximum Viability Loan Request Amount is \$1,250,000 and the Applicant's Eligible Viability Loan Request Amount is \$1,235,000, indicating the Applicant's Eligible Viability Loan Request Amount is 98.80% of the maximum Viability Loan Request Amount.

In the case where the Eligible Viability Loan Funding Request Amount is less than the Applicant's Request Amount and a funding shortfall exists, the Applicant must demonstrate that it can meet the requirement of funding sources must equal Total Development Costs in credit underwriting or the award will be rescinded.

Since there are no Related Applications, the sizing limitation of \$2,250,000 being available for up to two (2) Related Applications is not applicable to this example.

- b. The Applicant must provide the following as **Attachment 2** to Exhibit A:

- (1) A Letter of Intent from the Housing Credit Syndicator/Equity Provider

The letter of intent must meet the following criteria:

- Must be dated no earlier than March 1, 2018;
- Be executed by the syndicator/equity provider and 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 of completion;
- State the total 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.
- State the dollar amount of any reserve required by the Housing Credit Syndicator/equity provider. Such reserve must be entered on the Development Cost Pro Forma.

If the Applicant's previously awarded HC Allocation is less than the anticipated amount of credit allocation stated in the equity proposal, the equity proposal will be considered a source of financing and, for scoring purposes, the amount of HC equity to be permitted in the Development Cost Pro Forma will be adjusted downward from the amount stated in the equity proposal. If the Applicant's previously awarded HC Allocation is greater than the anticipated amount of credit allocation stated in the equity proposal, the equity proposal will be considered a source of financing and the amount of HC equity to be permitted for scoring in the Development Cost Pro Forma will be the amount stated in the equity proposal, adjusted upward. In either case, this adjusted HC equity will be calculated by taking the total amount of equity to be provided to the proposed Development as stated in the equity proposal letter, dividing it by the credit allocation stated in the equity proposal and multiplying that quotient by the Applicant's previously awarded HC Allocation.

Note: Closing the Limited Partnership Agreement prior to Board approval of the credit underwriting report will result in the Viability Loan Funding being rescinded.

- (2) A letter from the Housing Credit Syndicator/equity provider (a) confirming that, as of Application Deadline, the Limited Partnership has not closed; and (b) acknowledging that at least 50 percent of the Developer fee must be deferred.

5. Development Cost Pro Forma:

All Applicants must complete the Development Cost Pro Forma listing the anticipated sources of funding and the Total Development Costs (uses of funds). The sources must equal the uses. If not, the deferred Developer fee will be adjusted to the extent needed or available to balance the sources and uses of funds. If the Developer fee is 100 percent deferred and a shortfall still exists, the Applicant will be deemed ineligible. If the deferred Developer fee needs to be adjusted downward to balance the sources and uses, it will only be adjusted down the minimum of 50 percent of the total Developer fee (exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee). If the sources of funding remain in excess of uses after adjusting the deferred Developer fee, then the Applicant's Viability Loan Request Amount will be adjusted down accordingly.

The Development Cost Pro Forma must include all anticipated costs of the Development construction and, if applicable, acquisition, including the Developer fee and General Contractor fee. Waived or reimbursed fees or charges are not considered costs to the Development and therefore should not be included in the Development Cost Pro Forma. Note: deferred Developer fees are not considered "waived fees". The Developer fee and General Contractor fee provided in this Application will have the same limiting and minimum requirements as indicated in the Original Application under which the Active Award was made.

To be eligible for funding, the Applicant must commit to defer at least 50 percent of the Developer fee, exclusive of any operating deficit reserve portion that is part of a 21 percent Developer fee (which will be equal to 5 percent of the Development Cost). If the Applicant states an amount of deferred Developer fee that is less than 50 percent of the total Developer fee, the deferred Developer fee will be adjusted to the minimum requirement of 50 percent. If the deferred Developer fee is adjusted upward and surplus funding exists, the surplus funding will be used to reduce the Applicant's Viability Loan Request Amount.

6. Total Development Cost Limitations:

The Development will be held to the Total Development Cost (TDC) Per Unit (PU) limitations, inclusive of the escalation factor permitted after the Original Application Deadline, as described in the Original Application under which the Active Award was made. These limits will be tested in credit underwriting as well as final cost certification in accordance with the RFA under which the Active Award was made, but not in this RFA.

The Total Permanent Funding Sources that will be used in this Application for calculating the Eligible Viability Loan Funding Request Amount will be the amount as described in Item 4 of this RFA.

B. Addenda

The Applicant may use the Addenda section of Exhibit A to provide any additional information or explanatory addendum for items in the Application. Please specify the particular item to which the additional information or explanatory addendum applies.

**SECTION FIVE
SCORING AND EVALUATION PROCESS**

A. Determining Eligibility:

Applications that meet all of the following Eligibility Items will be eligible for funding and considered for funding selection:

Eligibility Items
Submission Requirements met*
Related Applications and Priority Application Designations provided
Name of Development provided
RFA number through which the Active Award was made provided
Demographic commitment provided
Total number of New Construction units and/or Rehabilitation units provided
Corporation-issued Application number for the Active Award provided
Amount of Eligible Viability Loan Funding requested provided
Letter of Intent from Housing Credit Syndicator/Equity Provider provided
Letter from Housing Credit Syndicator/Equity Provider confirming the limited partnership has not closed and acknowledging the 50 percent deferred Developer fee requirement provided
Development Cost Pro Forma provided (listing uses) and Permanent Analysis (listing sources) – Sources must equal uses

In addition to the above threshold items, to be eligible for funding, the Applicant must have submitted an Original Application and have an Active Award as defined in Exhibit B to the RFA and must not have withdrawn such Original Application as of the Application Deadline for this RFA.

* To be eligible for funding, the following submission requirements must be met: (i) the Application must be submitted online by the Application deadline (ii) the required number of hard copies must be submitted by the Application Deadline, (iii) the Applicant’s hard copy submission must be contained in a sealed package, (iv) the Applicant Certification and Acknowledgement form, containing an original signature, must be included in the Application labeled “Original Hard Copy” as of the Application Deadline, and (v) the required Application fee must be submitted as of the Application Deadline.

B. Application Sorting Order:

All Applications will be sorted into two (2) groups: Priority I Application Designation and Priority II Application Designation. Then, within each of the two (2) groups, the Applications will be sorted as follows:

1. First, Applications with a demographic of Homeless or Persons with a Disabling Condition will be listed above Applications with a demographic other than Homeless or Persons with a Disabling Condition.

2. Next, Applications located in Monroe County will be listed above Applications located in a county other than Monroe.
3. Next, by the Application Deadline of each Request for Application in which Applicants that have an Active Award are eligible to apply (as set out in Section One of the RFA), sorted by date order with the oldest dates receiving preference. The sorting order is as follows:

RFA	Application Deadline
2014-111	9-18-14
2014-114	1-25-15
2015-106	10-15-15
2015-107	11-5-15
2015-108	11-19-15
2015-111	12-4-15
2016-103	4-6-16
2016-109	10-20-16
2016-110	12-2-16
2016-114	12-15-16
2016-113	12-30-16
2016-112	1-6-17
2016-116	2-3-17
2017-102	3-23-17
2017-103	4-20-17
2017-107	10-23-17

4. Next, by the percentage resulting from the Applicant's Eligible Viability Loan Funding Request Amount divided by the maximum award amount the Applicant is eligible to request (adjusted as outlined in Section Four A.4.a. of this RFA), rounded to two (2) decimal places of the percentage. Applications will be listed in ascending order beginning with the Application with the lowest percentage and ending with the Application that has the highest percentage.
5. Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item B of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the Preference); and
6. Finally, by lottery number, with the lowest lottery number receiving preference.

C. Funding Selection

1. The first Application(s) selected for funding will be the highest ranking eligible Application(s) in the Priority I Application Designation group that can be fully funded.
2. If funding remains, the next Application(s) selected for funding will be the highest ranking eligible Application(s) in the Priority II Application Designation group that can be fully funded.

3. If at least \$250,000 of funding remains and there are no further eligible unfunded Application(s) in the Priority I or Priority II Application Designation group that can be fully funded, the next highest ranking eligible Application will be tentatively selected for funding with the remaining balance.
 4. If funding remains and there are no eligible unfunded Applications remaining, no further Applications will be considered for funding and any remaining funding will be distributed as approved by the Board.
- D. Returned Allocation

Funding that becomes available after the Board takes action on the Committee's recommendation(s), due to an Applicant withdrawing its Application, an Applicant's failure to pay the credit underwriting fee by the deadline outlined in this RFA,, the Applicant's inability to satisfy a requirement outlined in this RFA, as a result of sizing efforts during credit underwriting or final cost certification, or the Applicant's withdrawal or return of the Active Award, will be distributed as approved by the Board.

SECTION SIX AWARD PROCESS

Committee members shall independently evaluate and score their assigned portions of the submitted Applications, consulting with non-committee Corporation staff and legal counsel as necessary and appropriate.

The Committee shall conduct at least one public meeting during which the Committee members may discuss their evaluations, select Applicants to be considered for award, and make any adjustments deemed necessary to best serve the interests of the Corporation's mission. The Committee will list the Applications deemed eligible for funding in order applying the funding selection criteria outlined in Section Five above, and develop a recommendation or series of recommendations to the Board

The Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding. Notwithstanding an award by the Board pursuant to this RFA, funding will be subject to a positive recommendation from the Credit Underwriter based on criteria outlined in the credit underwriting provisions in Rule Chapter 67-48, F.A.C. or Rule Chapter 67-21, F.A.C., as applicable, and the criteria outlined in this RFA.

The Corporation shall provide notice of its decision, or intended decision, for this RFA on the Corporation's Website the day of the applicable Board vote. After posting, an unsuccessful Applicant may file a notice of protest and a formal written protest in accordance with Section 120.57(3), Fla. Stat., et. al. Failure to file a protest within the time prescribed in Section 120.57(3), Fla. Stat., et. al. shall constitute a waiver of proceedings under Chapter 120, Fla. Stat.

After the Board's decision to select Applicants for funding in this RFA has become final action, the Corporation shall offer all Applicants within the funding range a notice of preliminary award.

Exhibit A to RFA 2018-109 – Development Viability Loan Funding

1. Provide the Applicant Certification and Acknowledgement as **Attachment 1**.
2. Related Applications and Priority Designation:

Provide the name of the Development that is designated as the Priority I Application Designation (required):

[Click here to enter text.](#)

Provide the name of the Development that is designated as the Priority II Application Designation (if applicable):

[Click here to enter text.](#)
3. General Development Information
 - a. Name of Development:

[Click here to enter text.](#)
 - b. Original RFA Number: [Choose an item.](#)
 - c. Original Application No. [Click here to enter text.](#)
 - d. Demographic Commitment: [Choose an item.](#)
 - e. Total number of New Construction Units: [Click here to enter text.](#)

Total number of Rehabilitation Units: [Click here to enter text.](#)
4. Funding
 - a. Eligible Viability Loan Funding Request Amount: \$ [Click here to enter text.](#)
 - b. The following must be provided as **Attachment 2**:
 - (1) A Letter of Intent from the Housing Credit Syndicator/equity provider; and
 - (2) A letter from the Housing Credit Syndicator/equity provider confirming the Limited Partnership has not closed and acknowledging that the Developer must defer at least 50 percent of the Developer fee.
5. To meet the submission requirements, the Applicant must upload the Development Cost Pro Forma with the Application, as outlined in Section Three of the RFA.

Addenda

[Click here to enter text.](#)

Applicant Acknowledgement and Certification

The Applicant affirms that the information and commitments made by the Applicant in its Original Application are still in effect, subject to Rule Chapters 67-48 and 67-21, as applicable.

If awarded funding under this RFA, the Applicant understands and agrees that any withdrawal or return of the Applicant's Active Award means the automatic withdrawal and return of any funding awarded under this RFA.

The Applicant certifies that, as of Application Deadline (i) it has not closed on the partnership with the Housing Credit Syndicator/equity provider; and/or (ii) it has not closed on the tax-exempt bond financing; and/or (iii) it has not closed on any other Corporation funding (excluding PLP and EHCL funding).

The Applicant acknowledges that, to be eligible for funding, 50 percent of the Developer fee must be deferred. The amount of deferred Developer fee will be tested during scoring, during credit underwriting, and during review of the final cost certification.

The Applicant certifies and acknowledges that as of Application Deadline, the Notice of Commencement has not been recorded with the appropriate local jurisdiction.

The Applicant certifies that the Development can be completed and operating within the development schedule and budget submitted to Florida Housing and the Credit Underwriter.

The Applicant and all Financial Beneficiaries have read all applicable Florida Housing rules and have read the instructions regarding this RFA, and will abide by the terms and conditions of this RFA, and applicable Florida Statutes and administrative rules, including, but not limited to, Rule Chapters 67-48 or 67-21, F.A.C., as applicable.

The Applicant acknowledges and agrees that all terms and conditions of the RFA under which the Active Award was made remain in effect.

The Applicant understands and agrees to cooperate with any audits conducted in accordance with the provisions set forth in Section 20.055(5), F.S.

The undersigned is authorized to bind all Financial Beneficiaries to this certification and warranty of truthfulness and completeness of the Application.

The Applicant certifies that the complete Limited Partnership Agreement, including any amendments thereto, will be divulged to the Corporation and the Credit Underwriter.

The Applicant certifies that there are no agreements, other than the letter of intent provided with this Application, between the Applicant and the Housing Credit Syndicator/equity provider.

Under the penalties of perjury, I declare and certify that I have read the foregoing and that the information is true, correct and complete. I certify that all information provided in this Proposal is true and correct, that I am authorized to sign this Application as the Applicant, and that I am in compliance with all requirements of the RFA.

Signature of Applicant

Name (typed or printed)

Title (typed or printed)

Note: The Applicant must provide this form as Attachment 1 to the RFA. The Applicant Certification and Acknowledgement form included in the Application labeled "Original Hard Copy" must contain an original signature (blue ink is preferred).

**EXHIBIT B
DEFINITIONS**

- “Active Award” An allocation of (a) 9 percent Housing Credits, or (b) State Apartment Incentive Loan (SAIL) funding used in conjunction with (i) Tax-Exempt Bond financing (i.e., Corporation-issued Multifamily Mortgage Revenue Bonds (MMRB) or Non-Corporation-issued Tax-Exempt Bonds obtained through a Public Housing Authority (established under Chapter 421, F.S.), a County Housing Finance Authority (established pursuant to Section 159.604, F.S., or a Local Government) and (ii) Non-Competitive Housing Credits, awarded through one of the following Request for Applications: 2014-111, 2014-114, 2015-106, 2015-107, 2015-108, 2015-111, 216-103, 2016-109, 2016-110, 2016-112, 2016-113, 2016-114, 2016-116, 2017-102, 2017-103, or 2017-107, that, as of Application Deadline for this RFA, have not yet closed on their Limited Partnership Agreement, Tax-Exempt Bond financing, or other Corporation funding (excluding Pre-Development Loan Program (PLP) or Elderly Community Housing Loan (EHCL) funding), have not recorded a Notice of Commencement with the appropriate local jurisdiction, have not received a final credit underwriting report, and have not returned the allocation to the Corporation.
- “Original Application” The Application for which the Applicant has an Active Award. For HOME Investment Partnerships (HOME) funding used in conjunction with Corporation-issued MMRB and Non-Competitive Housing Credits, Original Application means the related Non-Competitive Application for 4 percent Housing Credits.
- “Related Application” An Application submitted in his RFA that share(s) one (1) or more Principals of an Applicant or Developer common to any or all of the Principals of an Applicant or Developer in another Application submitted in this same RFA, as verified by the list of Principals submitted with the Original Application or any subsequent Board or Corporation approved change in Principals.

EXHIBIT C
PROGRAM REQUIREMENTS, TERMS AND CONDITIONS

A. Fees

In addition to fees set out in the Original Application, the following additional fees apply to any funding awarded under this RFA:

1. Application Fee:

All Applicants requesting funding in this RFA shall submit to the Corporation as part of the Application submission a non-refundable Application fee of \$500.

2. Credit Underwriting Fees:

The following fees are not the fees that will be charged, but are listed below for estimation purposes. The actual fees will be determined based on the current contract, including any addendum, for services between the Corporation and the Credit Underwriter(s) in effect at the time underwriting begins.

(1) Multiple Program Fee: \$4,629

(2) Re-underwriting fee: \$177 per hour

Any Development requiring further analysis by the Credit Underwriter pursuant to Rule Chapters 67-21 or 67-48, F.A.C., as applicable, and this RFA will be subject to a fee based on an hourly rate determined pursuant to the contract between the Corporation and the Credit Underwriter. All credit underwriting fees shall be paid by the Applicant prior to the performance of the analysis by the Credit Underwriter.

(3) Extraordinary Services fee: \$177 per hour.

3. Commitment Fees:

Each Applicant to which a firm commitment is granted shall submit to the Corporation a non-refundable commitment fee of 1 percent of each FHFC loan amount upon acceptance of the firm commitment.

a. Non-Profit sponsors who provide a certification indicating that funds will not be available prior to closing shall be permitted to pay the commitment fee at closing.

b. All Applicants shall remit the commitment fee payable to Florida Housing Finance Corporation.

4. Annual Compliance Monitoring Fee:

The following fees are not the fees that will be charged, but are listed below for estimation purposes. The actual fees will be determined based on the current contract,

including any addendum, for services between the Corporation and the Compliance Monitor(s).

- a. Multiple Program Fee: \$921
- b. Follow-up Review/Extraordinary Services fee: \$177 per hour.

5. Loan Servicing Fees:

These fees are for estimation purposes whereby the actual fees will be determined based on the current contract, including any addendum, for services between the Corporation and the Servicer(s).

- a. Draw Requests:
 - \$177 per hour for an in-house review of a draw request, up to a maximum of \$1,759 per draw.
 - \$177 per hour for extraordinary services.

- b. Permanent Loan Servicing Fees:

Annual fee of 25 bps on the unpaid principal balance of the loan or a minimum monthly fee of \$212 and a maximum monthly fee of \$843, and an hourly fee of \$177 for extraordinary services.

6. Additional Fees:

Applicants will be responsible for all fees associated with the Corporation's legal counsel related to the Viability Loan Funding.

Applicants will be held to all fees stated in the Original Application under which the Active Award was made.

7. Assumption/Renegotiation Fees:

For all loans where the Applicant is requesting a sale and/or transfer and assumption of the loan, the borrower or purchaser shall submit to the Corporation a non-refundable assumption fee of one-tenth of one percent of the loan amount.

For all loans where the Applicant is requesting a renegotiation of the loan, the borrower shall submit to the Corporation a non-refundable renegotiation fee of one-half of one percent of the loan amount.

For all loans where the Applicant is requesting an extension of the loan term, the borrower shall submit to the Corporation a non-refundable extension fee of one-tenth of one percent of the loan amount. If the extension is associated with a renegotiation of the loan, then only the renegotiation fee will be charged.

B. Florida Job Creation Funding Preference:

Each Application will be measured to determine whether it qualifies for the Florida Job Creation Funding Preference. To determine eligibility for the preference, the Corporation will calculate the Application's Florida Job Creation score, which will reflect the number of Florida jobs per \$1 million of implied Eligible Viability Loan Funding. All Applications must earn a Florida Job Creation score equal to or greater than 210 for new construction Developments and 155 for Rehabilitation Developments to qualify for the Florida Job Creation Preference in Section Five of the RFA.

Determination of the Florida Job Creation score will be based on the following information:

- The number of new construction and Rehabilitation units committed to by the Applicant (as stated by the Applicant at question 3.e. of Exhibit A of the RFA);
- The applicable Florida job creation rate for the type of units:
 - Rate of 3.811 Florida Jobs per unit for proposed new construction units;
 - Rate of 1.916 Florida Jobs per unit for proposed Rehabilitation units; and
- The Eligible Viability Loan Funding Request Amount.

The score for the Florida Rate of Job Creation per \$1 million of implied Eligible Viability Loan Funding will be measured using one of the following calculations:

a. Developments consisting of only new construction units:

Number of new construction units x 3.811 Florida Jobs per unit x 1,000,000 / (the Eligible Viability Loan Funding Request Amount) = Florida Jobs per \$1 million of Eligible Viability Loan Funding.

For example:

Application A consists of 80 new construction units and has an Eligible Viability Loan Funding Request Amount of \$1,000,000.

$80 \times 3.811 \times 1,000,000 / (1,000,000) =$ Florida Job Creation score of 304.88.

b. Developments consisting of only Rehabilitation units:

Number of Rehabilitation units x 1.916 Florida Jobs per unit x 1,000,000 / (the Eligible Viability Loan Funding Request Amount) = Florida Jobs per \$1 million of Eligible Viability Loan Funding.

For example:

Application A consists of 140 Rehabilitation units, and has an Eligible Viability Loan Funding Request Amount of \$800,000.

$140 \times 1.916 \times 1,000,000 / (800,000) =$ Florida Job Creation score of 335.3.

- c. Developments consisting of both new construction units and Rehabilitation units:

(Number of new construction units x 3.811 Florida Jobs per unit + number of Rehabilitation units x 1.916 Florida Jobs per unit) x 1,000,000 / (the Eligible Viability Loan Funding Request Amount) = Florida Jobs per \$1 million of Eligible Viability Loan Funding.

For example:

Application B consists of 10 new construction units and 74 Rehabilitation units and has an eligible loan funding request amount of \$900,000.

$[(10 \times 3.811) + (74 \times 1.916)] \times 1,000,000 / (900,000) =$ Florida Job Creation score of 199.8822.

In above examples, all Applications will qualify for the Job Creation Funding Preference because the 100% new construction example has a Florida Job Creation score that is at least 210, the 100% rehabilitation example has a Florida Job Creation score that is at least 155, and the mixed development has a pro rata Florida Job Creation score that is at least 161.5476 ($10/84 \times 210 + 74/84 \times 155$) = 161.5476).

C. Terms and Conditions

1. After the Board's decision to select Applicants for funding as a result of a competitive solicitation process has become final action, the Corporation shall issue such Applicants a notice of preliminary award. For purposes of this section, a decision regarding an Applicant will become final action:
 - a. If none of the Board's selections of Applicants for funding are challenged pursuant to Section 120.57(3), F.S.;
 - b. If some of the Board's selections of other Applicants for funding are challenged pursuant to Section 120.57(3), F.S., but none of the challenges could impact the decision to select the Applicant for funding, or
 - c. When the Board issues a final order as a result of a challenge pursuant to Section 120.57(3), F.S.
2. The credit underwriting fee must be received by the Credit Underwriter not later than seven (7) Calendar Days after the notice of preliminary award. Failure to submit the required credit underwriting fee by the specified deadline shall result in withdrawal of the preliminary award.
3. The Credit Underwriter shall complete its analysis and submit a written draft report and recommendation to the Corporation. Upon receipt, the Corporation shall provide to the Applicant the section of the written draft report consisting of supporting information and schedules. The Applicant shall review and provide written comments to the Corporation and Credit Underwriter within 48 hours of receipt. After the 48 hour period, the Corporation shall provide to the Credit Underwriter comments on the draft report and, as applicable, on the Applicant's comments. Then, the Credit Underwriter shall review and incorporate, if deemed appropriate, the Corporation's and Applicant's comments and release the revised report to the Corporation and the Applicant. Any additional

comments from the Applicant shall be received by the Corporation and the Credit Underwriter within 72 hours of receipt of the revised report. Then, the Credit Underwriter will provide a final report, which will address comments made by the Applicant, to the Corporation.

4. The Credit Underwriter's recommendations will be sent to the Board for approval.
5. The credit underwriting report must be completed within the timeframes stated in the Original Application under which the Active Award was made.
6. The Corporation shall issue a firm loan commitment within seven (7) Calendar Days after approval of the Credit Underwriter's recommendation for funding by the Board.
7. Closing of the Viability Loan Funding will be simultaneous with the closing of other Corporation funding. Applicants with an Active Award of only 9 percent Housing Credits must show evidence of closing the Limited Partnership Agreement before the closing of the Viability Loan Funding.
8. At least five (5) Calendar Days prior to closing:
 - a. The Applicant must provide evidence of all necessary consents or required signatures from first mortgagees or subordinate mortgagees to the Corporation and its counsel, and
 - b. The Credit Underwriter must have received all items necessary to release its letter confirming that all closing contingencies have been met, including the finalized sources and uses of funds and Draw schedule.
9. The Viability Loan Funding shall be revocable if the loan funds were used for any purpose not permitted under the RFA or if the loan funding was awarded or disbursed to the Applicant based upon fraud or misrepresentation committed by the Applicant.
10. The Viability Loan Funding shall be serviced either directly by the Corporation or by the servicer on behalf of the Corporation.
11. The Corporation shall monitor compliance of all terms and conditions of the Viability Loan and shall require that certain terms and conditions be embodied in the Land Use Restriction Agreement and recorded in the public records of the county wherein the Development is located. Violation of any material term or condition of the documents evidencing or securing the loan shall constitute a default during the term of the loan.
12. The documents creating, evidencing or securing the loan financing must provide that any violation of the terms and conditions described in this RFA constitutes a default of the loan financing and allow the Corporation to seek any legally available remedies.
13. If any additional permanent loan and/or equity funding source(s) are obtained after the Application, but before the finalization of the final cost certification and the issuance of IRS form(s) 8609, the additional funding will first be used to reduce the deferred Developer fee to no less than 50 percent of the total Developer fee (exclusive of any operating deficit reserve portion when the maximum Developer fee is 21%) and then to reduce the Viability Loan Funding. After the issuance of the IRS form(s) 8609, if any additional permanent loan and or equity funding sources are obtained through the end of the Compliance Period (inclusive of any upward equity adjusters associated with

marginal corporate tax rates and/or maintenance of internal rates of return associated with determining equity funds), then said resource(s) would be used to reduce or payoff the deferred Developer fee and the Development Viability Loan Funding on a 50/50 basis. Additional funding sources shall consist of any Housing Credit equity upward adjusters, including but not limited to those tied to a change in the assumed tax credit rate or the maintenance of the investors internal rate of return (or any similarly structured adjuster). If the deferred Developer fee is paid off prior to the Viability Loan Funding, then 100 percent of any remaining additional funding sources will be used to reduce or pay off the Viability Loan Funding. Thereafter, a portion of the Development Viability loan would be reduced in the same manner as prescribed for SAIL in Rule Chapter 67-48.010(15), F.A.C.

Additional funding sources does not include the Development's net cash flow from operations, after debt service, but it does include Housing Credit equity greater than the amount provided (or calculated) in this RFA as it relates to competitive Housing Credits. Additional Housing Credit equity as it relates to non-competitive Housing Credits shall be used to first pay additional development costs incurred prior to following the waterfall of payment priorities outlined above, but in no instance will the deferred Developer fee be less than 50 percent of the total Developer fee.

14. The same minimum first mortgage requirements provided in Rule Chapter 67-48.0072(29)(g) utilized to size Housing Credits during credit underwriting and final cost certification will apply to this Viability Loan Funding.
15. Loan funding documentation shall consist of the standard closing documentation, including, but not limited to, a Promissory Note, Mortgage and Security Agreement, Land Use Restriction Agreement, and Construction Loan Agreement.
16. The Viability Loan Funding shall be non-amortizing and shall have an interest rate of 0 percent, with payment due at maturity.
17. The term of the loan shall be 15 years after construction completion. The term of the loan may exceed 15 years if the lien of the Corporation's encumbrance is subordinate to the lien of another mortgagee, in which case the term may be made coterminous with the term of the superior loan or longer if required by the tax credit syndicator.
18. Any existing SAIL loan award, for which a final credit underwriting report has not been issued, will be in subordinated lien position to this loan funding.
19. After accepting a notice of preliminary award, the Applicant shall not refinance, increase the principal amount, or alter any terms or conditions of any mortgage superior or inferior to the mortgage without prior approval of the Corporation's Board of Directors. However, an Applicant may reduce the interest rate on any superior or inferior mortgage loan without the Board's permission, provided that no other terms of the loan are changed. The Corporation must be notified in writing of any such change.
20. After maturity or acceleration, the note shall bear interest at an interest rate of 1 percent, as provided therein, from the due date until paid. Unless the Corporation has accelerated the loan, the Applicant shall pay the Corporation a late charge of 5 percent of

any required payment that is not received by the Corporation within 15 days of the due date.

21. Failure to pay any principal due under the terms of this section shall constitute a default on the loan.
22. Failure to provide the Corporation and its servicer with any financial reporting required in a competitive solicitation shall constitute a default on the loan.
23. Unless and until a guarantor's obligations for a loan are terminated as approved in writing by the Corporation or its servicer, each guarantor shall furnish to the Corporation or its servicer financial statement as provided in paragraphs a. through c. below as the Corporation or its servicer may reasonable request.

- a. The audited financial statements are to be prepared in accordance with accounting principles generally accepted in the United States of America and audited in accordance with auditing standards generally accepted in the United States of America for the 12-month fiscal year period just ended and shall include:

- (1) Comparative Balance Sheet with prior year and current year balances;
- (2) Statement of revenue and expenses;
- (3) Statement of changes in fund balances or equity;
- (4) Statement of cash flows; and
- (5) Notes to financial statements.

The financial statements referenced above should also be accompanied by a certification of the guarantor(s) as to the accuracy of such financial statements; or

- b. If an audited financial statement as not been prepared, a federal income tax return filed for the most recently completed year; or
- c. For individual guarantors, if an audited financial statement is not available, a financial statement certified as true and complete without qualification by such guarantor and a cop of the most recently filed individual federal income tax return.

D. Sale, Transfer or Refinancing of a Development

1. Any sale, conveyance, assignment, or other transfer of interest or the grant of a security interest in all or any part of the title to the Development other than a superior mortgage shall be subject to the Corporation's prior written approval. The Board shall consider the facts and circumstances of each Applicant's request and any credit underwriting report, if available, prior to determining whether to grant such request, which may include the requirement of partial or full repayment of this loan.
2. The loan shall be assumable upon sale or transfer of the Development if the following conditions are met:
 - a. The proposed transferee meets all specific Applicant identity criteria which were required as conditions of the original loan;

- b. The proposed transferee agrees to maintain all set-asides and other requirements of the loan for the period originally specified or longer; and
- c. The proposed transferee and release of transferor receives a favorable recommendation from the Credit Underwriter and approval by the Board of Directors of the Corporation.

All assumption requests must be submitted in writing to the Director of Special Assets and contain the specific details of the transfer and assumption. In addition to any related professional fees, the Corporation shall charge a non-refundable assumption fee as outlined in Exhibit C to the RFA.

- 3. If the loan is not assumed since the buyer does not meet the criteria for assumption of the loan, the loan (principal and any outstanding interest) shall be repaid from the proceeds of the sale in the following order of priority:
 - a. First mortgage debt service, first mortgage fees;
 - b. Compliance and loan servicing fees;
 - c. An amount equal to the present value of the compliance monitoring fee for the periods for which the Development will have a set-aside commitment beyond the repayment date. Such amount shall be reduced by the amount of any compliance monitoring fees collected by the Corporation for the Development for that period, provided:
 - (1) The compliance monitoring fee covers some or all of the period following the anticipated repayment date; and
 - (2) The Development has substantially equivalent set-aside commitments mandated through another program of the Corporation for which the compliance monitoring fee was collected.
 - d. Unpaid principal balance of the loan;
 - e. Any interest due on the loan;
 - f. Expenses of the sale;
 - g. If there will be insufficient funds available from the proposed sale of the Development to satisfy paragraphs 3.a.- f. above, the loan shall not be satisfied until the Corporation has received:
 - (1) An appraisal prepared by an appraiser selected by the Corporation or the Credit Underwriter indicating that the purchase price for the Development is reasonable and consistent with existing market conditions;
 - (2) A certification from the Applicant that the purchase price reported is the actual price paid for the Development, as supported by a copy of the final executed purchase and sale agreement, and that no other consideration passed between the parties, as supported by a draft and final closing statement;

- (3) A certification from the Applicant that there are no Development funds available to repay the loan, including any interest due, and the Applicant knows of no source from which funds could or would be forthcoming to pay the loan; and
- (4) A certification from the Applicant detailing the information needed to determine the final billing for loan interest. Such certification shall require submission of financial statements and other documents that may be required by the Corporation and its servicer.

4. The Corporation may renegotiate and extend the loan in order to extend or retain the availability of housing for the target population. Such renegotiations shall be based upon:
- a. Performance of the Applicant during the loan term;
 - b. Availability of similar housing stock for the target population in the area;
 - c. Documentation and certification by the Applicant that funds are not available to repay the Note upon maturity;
 - d. A plan for the repayment of the loan at the new maturity date;
 - e. Assurance that the security interest of the Corporation will not be jeopardized by the new term(s); and
 - f. Industry standard terms which may include amortizing loans requiring regularly scheduled payments of principal and interest.

All loan renegotiation requests, including requests for extension, must be submitted in writing to the Director of Special Assets and contain the specific details of the renegotiation. In addition to any related professional fees, the Corporation shall charge a non-refundable renegotiation fee as outlined in Exhibit C to the RFA.

5. The Board shall approve requests for mortgage loan refinancing only if Development Cash Flow is improved, the Development's economic viability is maintained, the security interest of the Corporation is not adversely affected, and the Credit Underwriter provides a positive recommendation.
6. The Board shall deny requests for mortgage loan refinancing which require extension of the loan term or otherwise adversely affect the security interest of the Corporation, unless the criteria outlined in D.5. above, are met, the Credit Underwriter recommends that the approval of such a request is crucial to the economic survival of the Development, or unless the Board determines that public policy will be better served by the extension as a result of the Applicant agreeing to further extend the Compliance Period or provide additional amenities or resident programs suitable for the resident population. Further, the Board shall limit any approved extension to a minimum term which makes the Development feasible and which does not exceed an industry standard term.

The Board shall deny requests to increase the amount of any superior mortgage, unless the criteria outlined in C.19. above, are met, the original combined loan to value ratio for the superior mortgage and the mortgage is maintained or improved, and a proportionate amount of the increase in the superior mortgage is used to reduce the outstanding loan balance.

E. Loan Disbursement

1. Loan proceeds shall not be disbursed until a final cost certification is approved by the Corporation. Completion of the Development shall be evidenced by a certificate of occupancy or, in the event a final certificate of occupancy is not routinely provided by the applicable jurisdiction, such other information evidencing completion of the Development which is deemed acceptable to the Corporation, a final site inspection ordered by the servicer which evidences completion in accordance with the RFA under which the Active Award was made and, for Housing Credits, all requirements of the Corporation for the issuance of the Extended Low-Income Housing Agreement and the IRS form(s) 8609 for all buildings in the Development.
2. Ten (10) business days prior to the Draw, the Applicant shall supply the Corporation's servicer, as agent for the Corporation, with a written request executed by the Applicant for the Draw. The request shall set forth the amount to be paid and shall be accompanied by documentation specified by the Corporation's servicer, including claims for labor and materials to date of the last inspection. In addition, draw requests for non-Corporation funding must be provided. Any amendments to the Use of Proceeds Schedule/Draw Schedule or any reallocation of the line items therein must be approved by the Corporation, the first mortgagee, and the Corporation's servicer.
3. The Corporation and its servicer shall review the request for the Draw, and the servicer shall provide the Corporation with approval of the request or an alternative recommendation.
4. The Corporation shall disburse the Draw through Automated Clearing House (ACH). The Applicant may request disbursement of the Draw via a wire transfer. The Applicant will be charged a fee of \$10 for each wire transfer requested. This charge will be netted against the Draw amount.

- NOTES:
- (1) Developer fee may not exceed the limits established in Rule Chapter 67-48, F.A.C., this RFA or the RFA under which the original funding was awarded. Any portion of the fee that has been deferred must be included in Total Development Cost. When the maximum Developer fee is 21%, the 5% portion available for ODR must be entered on its own separate line and the remaining 16% portion would be the limiting amount on the other Developer fee line(s).
 - (2) General Contractor's fee is limited to 14% of actual construction cost (for Application purposes, this is represented by A1.1. Column 3), rounded down to nearest dollar. The General Contractor's fee must be disclosed. The General Contractor's fee includes General Conditions, Overhead, and Profit.
 - (3) For Application purposes, the maximum hard cost contingency allowed cannot exceed 5% of the amount provided in column 3 for A1.3. TOTAL ACTUAL CONSTRUCTION COSTS for Developments where 50 percent or more of the units are new construction. Otherwise the maximum is 15%. The maximum soft cost contingency allowed cannot exceed 5% of the amount provided in column 3 for A2.1 TOTAL GENERAL DEVELOPMENT COST. Limitations on these contingency line items post-Application are provided in Rule Chapter 67-48, F.A.C.
 - (4) Operating Deficit Reserves (ODR) of any kind are not to be included in C. DEVELOPMENT COST and cannot be used in determining the maximum Developer fee. However, an ODR is permitted in the Application and must only be included in E. OPERATING DEFICIT RESERVES (exclusive of the ODR portion of the 21% Developer fee which is on its own cost line item). The amount permitted in E. OPERATING DEFICIT RESERVES is limited to the amount provided by the syndicator in its Letter of Intent as an attachment to the Application and is considered to be in addition to any ODR portion in the Developer fee.
 - (5) Although the Corporation acknowledges that the costs listed on the Development Cost Pro Forma, Construction or Rehab Analysis and Permanent Analysis are subject to change during credit underwriting, such costs are subject to the Total Development Cost Per Unit Limitation as provided in the RFA under which the original funding was awarded, as well as the other cost limitations provided in Rule Chapter 67-48, F.A.C., as applicable.

What is the Development Category of the Proposed Development: _____ (please select from drop-down menu) **

	1 HC ELIGIBLE COSTS	2 HC INELIGIBLE COSTS	3 TOTAL COSTS
DEVELOPMENT COSTS			
A1.1. Actual Construction Cost	\$ _____	\$ _____	\$ _____
A1.2. General Contractor Fee <small>See Note (2)</small> (Max. 14% of A1.1., column 3)	\$ _____	\$ _____	\$ _____
A1.3. TOTAL ACTUAL CONSTRUCTION COSTS	\$ _____	\$ _____	\$ _____
A1.4. HARD COST CONTINGENCY <small>See Note (3)</small>	\$ _____	\$ _____	\$ _____
A2.1. TOTAL GENERAL DEVELOPMENT COST	\$ _____	\$ _____	\$ _____
A2.2. SOFT COST CONTINGENCY <small>See Note (3)</small>	\$ _____	\$ _____	\$ _____
A3. TOTAL FINANCIAL COSTS	\$ _____	\$ _____	\$ _____
B. TOTAL ACQUISITION COSTS OF EXISTING DEVELOPMENT (excluding land)	\$ _____	\$ _____	\$ _____
C. DEVELOPMENT COST (A1.3+A1.4+A2.1+A2.2+A3+B)	\$ _____	\$ _____	\$ _____
<i>Developer Fee</i> <small>See Note (1)</small>			
Developer Fee on Acquisition Costs	_____	_____	_____
Developer Fee on Non-Acquisition Costs	_____	_____	_____
Additional 5% Developer Fee for Homeless/ Persons with a Disabling Condition Demographic	_____	_____	_____
D. TOTAL DEVELOPER FEE	\$ _____	\$ _____	\$ _____

E. OPERATING DEFICIT RESERVES <small>See Note (4)</small>	\$ 	\$ _____	\$ _____
F. TOTAL LAND COST		\$ _____	\$ _____
G. TOTAL DEVELOPMENT COST <small>See Note (5)</small> (C+D+E+F)	\$ _____	\$ _____	\$ _____

PERMANENT ANALYSIS

	AMOUNT	LOCATION OF DOCUMENTATION
A. Total Development Costs	\$ _____	
B. Permanent Funding Sources:		
1. SAIL Request Amount	\$ _____	(Please enter amount previously awarded by FHFC)
2. ELI Loan Request Amount	\$ _____	(Please enter amount previously awarded by FHFC)
3. MMRB Request Amount	\$ _____	(Please enter amount previously awarded by FHFC)
4. Viability Loan Request Amount	\$ _____	
5. HC Syndication/HC Equity Proceeds	\$ _____	
6. First Mortgage Financing	\$ _____	Lender _____
7. Second Mortgage Financing	\$ _____	Lender _____
8. Third Mortgage Financing	\$ _____	Lender _____
9. Grants	\$ _____	Provider _____
10. Other: _____	\$ _____	Provider _____
11. Other: _____	\$ _____	Provider _____
12. Deferred Developer Fee	\$ _____	(Deferred Developer Fee must be equal to at least 50% of the amount listed for Development Cost Item D, column 3.)
13. Total Permanent Funding Sources	\$ _____	
C. Permanent Funding Surplus		(If there is a surplus (i.e., C. reflects an amount greater than zero), the Viability Loan Request Amount shall be decreased until Total Permanent Funding Sources equals Total Development Costs.)
(B.13. Total Permanent Funding Sources, less A. Total Development Costs):	\$ _____	(A negative number here represents a funding shortfall.)

Each Attachment must be listed behind its own Tab. DO NOT INCLUDE ALL ATTACHMENTS BEHIND ONE TAB.

FLORIDA HOUSING FINANCE CORPORATION
Modification of Request for Applications (RFA) 2018-109
Development Viability Loan Funding

Pursuant to Rule 67-60.005, F.A.C., Modification of Terms of Competitive Solicitations, Florida Housing hereby modifies Section Four A.4. to read as follows:

4. Funding

- a. The Applicant must provide the amount of loan funding it is requesting.

The maximum amount the Applicant is eligible to request is the lesser of (1) or (2), as applicable, or (3), as described below. During the scoring process, if the Applicant states a loan funding request amount that is greater than the amount the Applicant is eligible to request, the Corporation will reduce the amount down to the maximum amount the Applicant is eligible to request and such adjusted amount will be deemed the Applicant's Eligible Viability Loan Funding Request Amount. The Eligible Viability Loan Funding Request Amount will also be reviewed during the credit underwriting process and when the final cost certification is finalized, which may result in a further reduction of the Eligible Viability Loan Funding Request Amount. At no time will the Eligible Viability Loan Funding Request Amount be increased.

Note: A maximum of \$2.25 million when funding two Related Applications will be eligible to be awarded to any one Principal, as verified by the list of Principals submitted with the Original Application or any subsequent Board or Corporation approved change in Principals. If a Principal submits Related Applications that exceed a total of \$2.25 million, the award from the Related Application deemed Priority II will be reduced until the \$2.25 million maximum is met. This \$2.25 million maximum is increased to \$3,200,000 when at least one Related Application is awarded funding within the limits in 4.a.(2) below.

- (1) Per Unit/Development Limitations:

For Developments that do not meet the criteria in (2) below, the following limitations apply:

- (a) Developments serving Homeless or Persons with a Disabling Condition Demographics are limited to the lesser of \$18,000 per set-aside unit or \$1,500,000 per Development.
- (b) Developments serving a demographic other than Homeless or Persons with a Disabling Condition are limited to the lesser of \$15,000 per set-aside unit or \$1,250,000 per Development.

- (2) Development Location Limitation:

If the Development is located in a small county, with a Development Category of new construction, the request amount is limited to the lesser of \$43,500 per unit or \$2,250,000 per Development;

or

- (3) The amount of Viability Loan Funding needed to make the Development viable, sized by determining an amount to balance the Total Development Costs as provided in this Application against the Total Permanent Funding Sources, to the extent possible. The Total Permanent Funding Sources shall be determined by adding together the amounts provided in (a) through (c) below:

(a) Permanent Funding Sources:

The Total Permanent Funding Sources that will be used in this Application for this calculation will be the greater of any permanent funding (Corporation and non-Corporation) disclosed in the Original Application (exclusive of HC equity and deferred Developer fee) and that which is disclosed on the Development Cost Pro Forma provided with this RFA.

However, in the case of the permanent funding disclosed in the Original Application, the amount of the first mortgage will be discounted by 5% prior to making the comparison.

(b) Housing Credit Equity:

The HC equity that will be used in this Application for this calculation will be the greater of (i) the amount provided in the Letter of Intent provided with this Application when the housing credit pricing is at least \$0.90, or (ii) an amount calculated by utilizing a housing credit price of \$0.90 when the housing credit price as stated in the Letter of Intent in this Application is less than \$0.90. In the case of a 9 percent HC Applicant, the amount of Housing Credits to be incorporated in this process cannot exceed the amount initially awarded;

(c) Deferred Developer Fee:

The deferred Developer fee that will be used in this Application for this calculation shall equal 50 percent of the total Developer fee, exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee (which will be equal to 5 percent of Development Cost).

If the Applicant's Development Cost Pro Forma has surplus funding at time of Application submission, the scorer will first reduce the deferred Developer fee by the amount of the surplus funding to no less than the 50 percent deferral minimum and then reduce the Applicant's Viability Loan Funding Request Amount, as needed. This adjustment will take place prior to the process of determining the maximum Viability Loan Funding Request Amount.

Note: If other additional funding sources* are acquired prior to finalization of the cost certification, such other funding will be used to first reduce the deferred Developer fee to no less than 50 percent of the total Developer fee and then to reduce the Viability Loan Funding. After the IRS form(s) 8609 are issued, through the end of the Compliance Period, any additional funding sources* acquired will be used to pay down the deferred Developer fee and the Viability Loan Funding on a 50/50 basis. If the deferred Developer fee is paid off prior to the Viability Loan Funding, then 100 percent of any remaining additional funding sources* will be used to reduce or pay off the Viability Loan Funding. Thereafter, a portion of the Development Viability Loan would be reduced in the same manner as prescribed for SAIL in Rule Chapter 67-48.010(15), F.A.C.

*Additional funding sources does not include the Development's net cash flow from operations, after debt service, but it does include Housing Credit equity greater than the amount provided (or calculated) in this RFA as it relates to competitive Housing Credits. Additional Housing Credit equity as it relates to non-competitive Housing Credits shall be used to first pay additional development costs incurred prior to following the waterfall of payment priorities outlined above, but in no instance will the deferred Developer fee be less than 50 percent of the total Developer fee.

Provided below is an example of sizing process:

Applicant A has an Active Award of 9 percent Housing Credits with a Family demographic commitment located in a Large County. There are no Related Applications. The table below summarizes the information the Applicant provided in its Original Application under which the Active Award was made as well as information provided in response to this RFA.

	Original Application	Current Application
General Information		
HC Allocation ¹	\$1,510,000	\$1,510,000
Limited Partner(s) Ownership %	99.99%	99.99%
HC Pricing	\$0.97	\$0.90
Total Units	90	90
TDC Information		
Development Costs	\$13,150,000	\$13,940,000
<i>Maximum Total Developer fee allowed (16% of Development Costs)</i>	\$2,104,000	\$2,230,400
Total Developer fee used in RFA	\$2,100,000	\$2,230,000
Other Costs (land, ODR)	\$2,700,000	\$2,700,000
Total Development Costs	\$17,950,000	\$18,870,000
Permanent Funding Sources		
Deferred Developer fee ²	\$504,465	\$1,446,359
First Mortgage (Bank) Debt	\$2,650,000 \$2,750,000	\$2,450,000
Local Gov't Funds	\$50,000	\$150,000
Other FHFC Funding	\$0	\$0
HC Equity ³	\$14,645,535	\$13,588,641
<i>Viability Loan Funding Request Amount⁴</i>	N/A	\$1,235,000
Total Permanent Funding Sources	\$17,950,000	\$18,870,000
HC Equity Calculation for Sizing Purposes		
HC Allocation ¹		\$1,510,000
Greater of Syndicator's LOI HC Price or \$0.90		\$0.9000
Resulting HC Equity for Sizing		\$13,588,641
Minimum Deferred Developer Fee		\$1,115,000
Permanent Sources that are not Deferred Developer Fee or HC Equity ⁵	\$2,662,500	\$2,600,000

Greater amount of permanent sources that are not deferred developer fee or HC equity as presented in the original application or the current application (“other permanent sources”)	\$2,662,500
Viability Loan Sizing	
A: Total Development Cost, less minimum developer fee, less Resulting HC Equity for Sizing, less the greater amount of other permanent sources (Viability Loan Amount via gap analysis)	\$1,503,859
B: Maximum Viability Loan Amount relative to the Per Development Limit	\$1,250,000
C: Maximum Viability Loan Amount relative to the Per Unit Limit	\$1,350,000
Least amount of qualifying Viability Loan	\$1,250,000

¹For 9% HCs, use the awarded HC allocation. For 4% HCs, use the HC allocation identified in the syndicator’s Letter of intent.

²The current deferred developer fee must be at least 50%, but can go up to 100% if needed to balance total permanent sources and total development costs.

³The HC Equity amount listed is based on the calculations in the “HC Equity Calculation for Sizing Purposes” section.

⁴The Viability Loan Funding Request Amount cannot exceed the RFA limits. If it does, FHFC will reduce it down to the maximum and increase the deferred developer fee to offset, up to 100% of the developer fee.

⁵ The total amount of permanent sources from the Original Application is calculated by taking 95% of the \$2,750,000 first mortgage (\$2,612,500) and adding the \$50,000 from the local government to yield \$2,662,500. This total recognizes the 5% discount of the first mortgage provided by 4.a.(3)(a) above.

The Viability Loan Funding Request Amount listed above from the current Application is \$1,250,000. This will be reviewed using the following methodology during scoring, credit underwriting and final cost certification sizing processes. The Viability Loan Funding Request Amount can only be reduced or remain the same and cannot be increased.

- Sizing limits based on 4.a.(1) (Per Unit Limit): 90 Units x \$15,000 PU = \$1,350,000.
- Sizing limits based on 4.a.(1) (Per Development Limit): \$1,250,000.
- Sizing limits based on 4.a.(2) is not applicable due to the Development’s location.

Based on the two limiting factors above, the maximum Viability Loan Funding Request Amount is \$1,250,000 (\$1,250,000 < \$1,350,000).

- Sizing limits based on 4.a.(3)

The Total Development Cost must equal all permanent funding sources. The permanent funding sources will assume to include (for sizing purposes), at a minimum, the same amount of permanent sources provided in the Original Application, exclusive of HC equity and deferred Developer fee. The deferred Developer fee must equal at least 50 percent of the total Developer fee (exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee). In addition, the amount of HC equity to be incorporated will assume to have (for sizing purposes) a minimum price of \$0.90 per dollar of Housing Credits.

Total Development Cost (TDC):

- o The TDC stated in the current Application is \$18,870,000.

Permanent Sources Calculation:

The greater of the following will be used in calculating the Eligible Viability Loan Funding Request Amount:

- Permanent sources provided in the Original Application, exclusive of HC equity and deferred Developer fee: $\$2,650,000, 750,000 \times 95\% + \$50,000 = \$2,700,000, 662,500$.
- Permanent sources provided in the current Application, exclusive of HC equity, deferred Developer fee and the Viability Loan Funding Request Amount: $\$2,450,000 + \$150,000 = \$2,600,000$.
- The greater of the two amounts above is $\$2,700,000, 662,500$.

Housing Credit Equity Calculation:

The greater of the following will be used in calculating the Eligible Viability Loan Funding Request Amount:

- The HC equity calculation will use a HC annual allocation based on the lesser of the amount awarded (if it is a 9% HC allocation) or, the amount stated in the current syndicator Letter of Intent ~~Intent~~ (if it is a 4% HC allocation), ~~or the amount calculated by taking the eligible basis, applying a basis boost to the eligible basis that is subject to a basis boost (if the Development qualifies for a basis boost), applying the applicable fraction and taking the resulting qualified basis and multiply by the applicable PV Tax Credit Percentage. This later process is provided in the example in the table above within the "HC Equity Calculation for Sizing Purposes" section and the associated footnotes with a result of \$1,743,183. This amount is greater than the a 9% HC allocation award so the amount of HC equity will utilize an allocation of \$1,510,000 the same as the amount in the syndicator Letter of Intent.~~
- HC equity provided in current Application: \$13,588,641 as stated in the Letter of Intent where the syndicator provided the following supporting information: \$1,510,000 Housing Credit Allocation $\times 10 \times 99.99\% \times \$0.90 = \$13,588,641$ (rounded to nearest dollar).
- HC equity based on a minimum price of \$0.90 per dollar of Housing Credits: \$1,510,000 Housing Credit Allocation $\times 10 \times 99.99\% \times \$0.90 = \$13,588,641$ (rounded to nearest dollar).
- The greater of the two amounts above is \$13,588,641.

Deferred Developer Fee Calculation:

The following will be used in calculating the Eligible Viability Loan Funding Request Amount:

- 50 percent of the stated total Developer fee (exclusive of any operating deficit reserve portion that is a part of a 21 percent Developer fee): $\$2,230,000 \times 50\% = \$1,115,000$.

Calculating the Eligible Viability Loan Funding Request Amount:

- \$18,870,000 (TDC), less $\$2,700,000, 662,500$ (the greater of the Permanent Sources Calculation above), less \$13,588,641 (the greater of the Housing Credit Equity Calculation above), less \$1,115,000 (the minimum deferred Developer fee) = $\$1,466,359, 503, 859$ (Eligible Viability Loan Funding Request Amount via gap analysis).
- The maximum qualified Eligible Viability Loan Funding Request Amount is based on the lesser of all sizing requirements described in 4.a. ($\$1,250,000 < \$1,350,000 < \$1,466,359, 503, 859$), or the Applicant's Viability Loan Request Amount (\$1,235,000) which equals \$1,235,000 ($\$1,235,000 < \$1,250,000$).
- As a note, the deferred developer fee was increased above the minimum to balance the sources and uses.
- For Tie-Breaker purposes, the maximum Viability Loan Request Amount is \$1,250,000 and the Applicant's Eligible Viability Loan Request Amount is \$1,235,000, indicating the

Applicant's Eligible Viability Loan Request Amount is 98.80% of the maximum Viability Loan Request Amount.

In the case where the Eligible Viability Loan Funding Request Amount is less than the Applicant's Request Amount and a funding shortfall exists, the Applicant must demonstrate that it can meet the requirement of funding sources must equal Total Development Costs in credit underwriting or the award will be rescinded.

Since there are no Related Applications, the sizing limitation of \$2,250,000 being available for up to two (2) Related Applications is not applicable to this example.

b. The Applicant must provide the following as **Attachment 2** to Exhibit A:

(1) A Letter of Intent from the Housing Credit Syndicator/Equity Provider

The letter of intent must meet the following criteria:

- Must be dated no earlier than March 1, 2018;
- Be executed by the syndicator/equity provider and 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 of completion;
- State the total 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.
- State the dollar amount of any reserve required by the Housing Credit Syndicator/equity provider. Such reserve must be entered on the Development Cost Pro Forma.

If the Applicant received a 9% allocation and the Applicant's previously awarded HC Allocation is less than the anticipated amount of credit allocation stated in the equity proposal, the equity proposal (that meets the above criteria) will be considered a source of financing and, for scoring purposes, the amount of HC equity to be permitted in the Development Cost Pro Forma will be adjusted downward from the amount stated in the equity proposal. If the Applicant received a 9% HC allocation and the Applicant's previously awarded HC Allocation is greater than the anticipated amount of credit allocation stated in the equity proposal, the equity proposal will be considered a source of financing and the amount of HC equity to be permitted for scoring in the Development Cost Pro Forma will be the amount stated in the equity proposal, ~~adjusted upward. In either case, this adjusted HC equity will be calculated by taking the total amount of equity to be provided to the proposed Development as stated in the equity proposal letter, dividing it by the credit allocation stated in the equity proposal and multiplying that quotient by the Applicant's previously awarded HC Allocation.~~

If the Applicant is to receive a 4% HC allocation, the amount of HC equity to be permitted for scoring in the Development Cost Pro Forma will be the same amount stated in the equity proposal (that meets the above criteria).

Note: Closing the Limited Partnership Agreement prior to Board approval of the credit underwriting report will result in the Viability Loan Funding being rescinded.

(2) A letter from the Housing Credit Syndicator/equity provider (a) confirming that, as of Application Deadline, the Limited Partnership has not closed; and (b) acknowledging that at

least 50 percent of the Developer fee must be deferred. This can be in the HC equity proposal provided above or a separate letter.

Submitted By:

Marisa Button
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JPM OUTLOOK ONE LIMITED
PARTNERSHIP,

Petitioner,

vs.

Case No. 17-2499BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HTG HAMMOCK RIDGE II, LLC,

Intervenor.

GRANDE PARK LIMITED PARTNERSHIP,

Petitioner,

vs.

Case No. 17-2500BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

HTG HAMMOCK RIDGE II, LLC,

Intervenor.

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in these cases on May 15, 2017, before Lawrence P. Stevenson, a duly-designated

EXHIBIT B

Administrative Law Judge, sitting as an informal hearing officer pursuant to sections 120.57(2) & (3), Florida Statutes, in Tallahassee, Florida.

APPEARANCES

For Petitioners: Michael P. Donaldson, Esquire
Carlton Fields Jordan Burt, P.A.
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For Respondent: Christopher McGuire, Esquire
Florida Housing Finance Corporation
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227 North Bronough Street
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For Intervenor: Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
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Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

At issue in this proceeding is whether the actions of the Florida Housing Finance Corporation ("Florida Housing") concerning the review and scoring of the responses to Request for Applications 2016-110, Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA"), was clearly erroneous, contrary to competition, arbitrary or capricious. Specifically, the issue is whether Florida Housing acted contrary to the agency's governing statutes, rules, policies, or the RFA specifications in finding that the applications of Petitioners JPM Outlook One Limited Partnership

("JPM Outlook") and Grande Park Limited Partnership ("Grande Park") were ineligible for funding.

PRELIMINARY STATEMENT

On October 7, 2016, Florida Housing issued the RFA, which solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding for the construction of affordable housing developments. Florida Housing issued a modification to the RFA on November 10, 2016. On December 2, 2016, a number of developers submitted applications in response to the RFA, including Petitioners JPM Outlook and Grande Park, and Intervenor Hammock Ridge II, LLC ("Hammock Ridge"). On March 24, 2017, Florida Housing posted notice of its intended decision to award funding to 10 applicants, including Hammock Ridge. Petitioners JPM Outlook and Grande Park were determined to be ineligible for funding.

JPM Outlook and Grande Park timely filed with Florida Housing their notices of protest, followed by a Formal Written Protest and Petition for Administrative Hearing ("Petition") for each Petitioner, pursuant to section 120.57(3) and Florida Administrative Code Rules 67-60.009 and 28-110.004.

On April 24, 2017, Hammock Ridge filed with Florida Housing its Petition for Leave to Intervene in both cases, pursuant to Florida Administrative Code Rule 28-106.205.

On April 25, 2017, Florida Housing forwarded the cases to the Division of Administrative Hearings ("DOAH"). By Orders dated May 1, 2017, the cases were consolidated for hearing and Hammock Ridge's Petition for Leave to Intervene was granted.

All parties agreed that the issues raised in the Petition were matters of law and that there were no disputed issues of material fact requiring resolution at the hearing. Therefore, this proceeding was conducted as an informal hearing pursuant to sections 120.57(2) and (3). The parties submitted a Prehearing Stipulation setting forth the agreed facts as to the RFA process and the scoring issue raised in this proceeding.

The informal hearing was held on May 15, 2017. At the hearing, Joint Exhibits 1 through 10 were admitted into evidence. Petitioners presented the testimony of Brian Parent, a principal of both companies who was involved in preparing the applications. Florida Housing presented the testimony of Ken Reecy, its Director of Multifamily Programs. Intervenor called no witnesses. All three parties presented oral argument.

The one-volume Transcript of the final hearing was filed at DOAH on June 1, 2017. On June 8, 2017, Petitioners filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders, which was granted orally on June 9, 2017, and memorialized in a written Order Granting Extension of Time on June 12, 2017. All three parties submitted Proposed Recommended

Orders on June 13, 2017, as set forth in the Order Granting Extension of Time. The Proposed Recommended Orders have been given due consideration in the preparation of this Recommended Order.

Unless otherwise stated, all statutory references are to the 2016 edition of the Florida Statutes.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following Findings of Fact are made:

1. JPM Outlook is a Florida limited partnership based in Jacksonville, Florida, that is in the business of providing affordable housing.

2. Grande Park is a Florida limited partnership based in Jacksonville, Florida, that is in the business of providing affordable housing.

3. Hammock Ridge is a Florida limited liability company based in Coconut Grove, Florida, that is in the business of providing affordable housing.

4. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. For the purposes of this proceeding, Florida Housing is an agency of the State of Florida. Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida.

Pursuant to section 420.5099, Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits.

5. The low income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. These tax credits are awarded competitively to housing developers in Florida for rental housing projects that qualify. The credits are then normally sold by developers for cash to raise capital for their projects. The effect of this sale is to reduce the amount that the developer would have to borrow otherwise. Because the total debt is lower, a tax credit property can (and must) offer lower, more affordable rents. Developers also covenant to keep rents at affordable levels for periods of 30 to 50 years as consideration for receipt of the tax credits.

6. Housing tax credits are not tax deductions. For example, a \$1,000 deduction in a 15-percent tax bracket reduces taxable income by \$1,000 and reduces tax liability by \$150, while a \$1,000 tax credit reduces tax liability by \$1,000. The demand for tax credits provided by the federal government exceeds the supply.

7. Florida Housing is authorized to allocate housing tax credits and other funding by means of a request for proposal or other competitive solicitation in section 420.507(48). Florida

Housing has adopted chapter 67-60 to govern the competitive solicitation process for several different programs, including the program for tax credits. Chapter 67-60 provides that Florida Housing allocate its housing tax credits, which are made available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3).

8. In their applications, applicants request a specific dollar amount of housing tax credits to be given to the applicant each year for a period of 10 years. Applicants will normally sell the rights to that future stream of income tax credits (through the sale of almost all of the ownership interest in the applicant entity) to an investor to generate the amount of capital needed to build the development. The amount which can be received depends upon the accomplishment of several factors, such as a certain percentage of the projected Total Development Cost; a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated area of some counties. This, however, is not an exhaustive list of the factors considered.

9. Housing tax credits are made available through a competitive application process commenced by the issuance of a Request for Applications. A Request for Applications is equivalent to a "request for proposal," as indicated in rule 67-60.009(3). The RFA in this case was issued on October 7, 2016.

A modification to the RFA was issued on November 10, 2016, and responses were due December 2, 2016. A challenge was filed to the terms, conditions, or requirements of the RFA by parties not associated with the instant case, but that challenge was dismissed prior to hearing.

10. Through the RFA, Florida Housing seeks to award up to an estimated \$12,312,632 of housing tax credits to qualified applicants to provide affordable housing developments in Medium Counties, as well as up to an estimated \$477,091 of housing tax credits to qualified applicants to provide affordable housing developments in Small Counties other than Monroe County.

11. By the terms of the RFA, a review committee made up of Florida Housing staff reviewed and scored each application. These scores were presented in a public meeting and the committee ultimately made a recommendation as to which projects should be funded. This recommendation was presented to Florida Housing's Board of Directors ("the Board") for final agency action.

12. On March 24, 2017, all applicants received notice that the Board had approved the recommendation of the review committee concerning which applications were eligible or ineligible for funding and which applications were selected for awards of housing tax credits, subject to satisfactory completion of the credit underwriting process. The notice was provided by the posting on Florida Housing's website (www.floridahousing.org) of two

spreadsheets, one listing the "eligible" and "ineligible" applications and one identifying the applications which Florida Housing proposed to fund.

13. Florida Housing announced its intention to award funding to 10 developments, including Intervenor Hammock Ridge. Petitioners JPM Outlook and Grande Park were deemed ineligible.

14. If JPM Outlook and Grande Park had been deemed eligible, each would have been in the funding range based on its assigned lottery number and the RFA selection criteria. If Grande Park had been deemed eligible, Hammock Ridge would not have been recommended for funding.

15. Petitioners JPM Outlook and Grande Park timely filed notices of protest and petitions for administrative proceedings.

16. The scoring decision at issue in this proceeding is based on Florida Housing's decision that Petitioners failed to submit as Attachment 1 to Exhibit A the correct and properly signed version of the Applicant Certification and Acknowledgment Form. Petitioners' admitted failure to submit the correct Applicant Certification and Acknowledgment Form was the sole reason that Florida Housing found Petitioners' applications to be ineligible for funding.

17. Section Four of the RFA was titled, "INFORMATION TO BE PROVIDED IN APPLICATION." Listed there among the Exhibit A

submission requirements was the Applicant Certification and Acknowledgement Form, described as follows:

The Applicant must include a signed Applicant Certification and Acknowledgement form as Attachment 1 to Exhibit A to indicate the Applicant's certification and acknowledgement of the provisions and requirements of the RFA. The form included in the copy of the Application labeled "Original Hard Copy" must reflect an original signature (blue ink is preferred). The Applicant Certification and Acknowledgement form is provided in Exhibit B of this RFA and on the Corporation's Website <http://www.floridahousing.org/Developers/MultiFamilyPrograms/Competitive/2016-110/RelatedForms/> (also accessible by clicking here). Note: If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.

The final sentence of the quoted language is referred to by Florida Housing as the "effects clause."

18. The November 10, 2016, modifications to the RFA were communicated to applicants in three ways. First, Florida Housing provided a Web Board notice. The Florida Housing Web Board is a communication tool that allows interested parties and development partners to stay apprised of modifications to procurement documents. Second, each RFA issued by Florida Housing, including the one at issue in this proceeding, has its own specific page on Florida Housing's website with hyperlinks to all documents related to that RFA. Third, Florida Housing released an Official Modification Notice that delineated every modification, including

a "blackline" version showing the changes with underscoring for emphasis.

19. Brian Parent is a principal for both JPM Outlook and Grande Park. Mr. Parent received the Web Board notification of the RFA modifications via email. Upon receiving the email, Mr. Parent reviewed the modifications on the Florida Housing website.

20. The modification to the RFA, posted on Florida Housing's website on November 10, 2016, included the following modification of the Applicant Certification and Acknowledgement Form, with textual underscoring indicating new language:

Pursuant to Rule 67-60.005, F.A.C., Modification of Terms of Competitive Solicitations, Florida Housing hereby modifies Item 2.b.(4) of the Applicant Certification and Acknowledgement Form to read as follows:

(4) Confirmation that, if the proposed Development meets the definition of Scattered Sites, all Scattered Sites requirements that were not required to be met in the Application will be met, including that all features and amenities committed to and proposed by the Applicant that are not unit-specific shall be located on each of the Scattered Sites, or no more than 1/16 mile from the Scattered Site with the most units, or a combination of both. If the Surveyor Certification form in the Application indicates that the proposed Development does not consist of Scattered Sites, but it is determined during credit underwriting that the proposed Development does meet the definition of Scattered Sites, all of the Scattered Sites requirements must have been

met as of Application Deadline and, if all Scattered Sites requirements were not in place as of the Application Deadline, the Applicant's funding award will be rescinded;

Note: For the Application to be eligible for funding, the version of the Applicant Certification and Acknowledgement Form reflecting the Modification posted 11-10-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA.

21. Rule 67-48.002(105) defines "Scattered Sites" as follows:

"Scattered Sites," as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a "Scattered Site"). For purposes of this definition "contiguous" means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement, provided the easement is not a roadway or street. All of the Scattered Sites must be located in the same county.

22. The RFA modification included other changes concerning Scattered Sites. Those changes either modified the Surveyor Certification Form itself or required applicants to correctly provide information concerning Scattered Sites in the Surveyor Certification Form.

23. Each Petitioner included in its application a Surveyor Certification Form indicating that its proposed development sites did not consist of Scattered Sites. The Surveyor Certification

Forms submitted were the forms required by the modified RFA. There was no allegation that Petitioners incorrectly filled out the Surveyor Certification Forms.

24. However, the Applicant Certification and Acknowledgement Form submitted by each of the Petitioners was the original form, not the form as modified to include the underscored language set forth in Finding of Fact 20 regarding the effect of mislabeling Scattered Sites on the Surveyor Certification Form.

25. The failure of JPM Outlook and Grande Park to submit the correct Applicant Certification and Acknowledgement Form was the sole reason that Florida Housing found them ineligible for funding.

26. In deposition testimony, Ken Reecy, Florida Housing's Director of Multifamily Programs, explained the purpose of the Applicant Certification and Acknowledgement Form:

There's a number of things that we want to be sure that the applicants are absolutely aware of in regard to future actions or requirements by the Corporation. If they win the award, there are certain things that they need to know that they must do or that they are under certain obligations, that there's certain obligations and commitments associated with the application to make it clear what the requirements--what certain requirements are, not only now in the application, but also perhaps in the future if they won awards.

27. At the conclusion of a lengthy exposition on the significance of the modified language relating to Scattered Sites, Mr. Reecy concluded as follows:

[W]e wanted to make sure that if somebody answered the question or did not indicate that they were a scattered site, but then we found out that they were, in fact, a scattered site, we wanted to make it absolutely clear to everyone involved that in the event that your scattered sites did not meet all of those requirements as of the application deadline, that the funding would be rescinded.

28. Petitioners argue that the failure to submit the modified Applicant Certification and Acknowledgement Form should be waived as a minor irregularity. Their simplest argument on that point is that their applications did not in fact include Scattered Sites and therefore the cautionary language added to the Applicant Certification and Acknowledgement Form by the November 10, 2016, modifications did not apply to them and could have no substantive effect on their applications.

29. Petitioners note that their applications included the substantive changes required by the November 10, 2016, modifications, including those related to Scattered Sites. Petitioners submitted the unmodified Applicant Certification and Acknowledgement Form as Attachment 1 to their modified Exhibit A.

30. Petitioners further note that the "Ability to Proceed Forms" they submitted with their applications on December 2, 2016, were the forms as modified on November 10, 2016. They assert that

this submission indicates their clear intent to acknowledge and certify the modified RFA and forms, regardless of their error in submitting the unmodified Applicant Certification and Acknowledgement Form.

31. Petitioners assert that the Scattered Sites language added to the Applicant Certification and Acknowledgement Form by the November 10, 2016, modifications was essentially redundant. Mr. Reecy conceded that the warning regarding Scattered Sites was not tied to any specific substantive modification of the RFA. The language was added to make it "more clear" to the applicant that funding would be rescinded if the Scattered sites requirements were not met as of the application deadline. Petitioners point out that this warning is the same as that applying to underwriting failures generally.

32. Petitioners assert that the new language had no substantive effect on either the Applicant Certification and Acknowledgement Form or on the certifications and acknowledgements required of the applicants. Even in the absence of the modified language, Petitioners would be required to satisfy all applicable requirements for Scattered Sites if it were determined during underwriting that their applications included Scattered Sites.

33. Petitioners conclude that, even though the modified Applicant Certification and Acknowledgement Form was not included with either of their applications, the deviation should be waived

as a minor irregularity. Florida Housing could not have been confused as to what Petitioners were acknowledging and certifying. The unmodified Applicant Certification and Acknowledgement Form was submitted with a modified Attachment 1 that included all substantive changes made by the November 10, 2016, modifications to the RFA. Petitioners gained no advantage by mistakenly submitting an unmodified version of the Applicant Certification and Acknowledgement Form. The submittal of the unmodified version of the form was an obvious mistake and waiving the mistake does not adversely impact Florida Housing or the public.

34. Mr. Reecy testified that he could recall no instance in which Florida Housing had waived the submittal of the wrong form as a minor irregularity. He also observed that the credibility of Florida Housing could be negatively affected if it waived the submission of the correct form in light of the "effects clause" contained in Section Four:

Due to the fact that we did have an effects clause in this RFA and we felt that, in accordance with the rule requirements regarding minor irregularities, that it would be contrary to competition because we wanted everybody to sign and acknowledge the same criteria in the certification; so we felt that if some did--some certified some things and some certified to others, that that would be problematic.

And the fact that we had very specifically instructed that if we did not get the modified version, that we would not consider it, and then if we backed up and considered it, that

that would erode the credibility of the Corporation and the scoring process.

35. Mr. Reecy testified that the modification to the Applicant Certification and Acknowledgement Form was intended not merely to clarify the Scattered Sites requirement but to strengthen Florida Housing's legal position in any litigation that might ensue from a decision to rescind the funding of an applicant that did not comply with the Scattered Sites requirements as of the application deadline. He believed that waiving the "effects clause" would tend to weaken Florida Housing's legal position in such a case.

36. Petitioners had clear notice that they were required to submit the modified Applicant Certification and Acknowledgement Form. They did not avail themselves of the opportunity to protest the RFA modifications. There is no allegation that they were misled by Florida Housing or that they had no way of knowing they were submitting the wrong form. The relative importance of the new acknowledgement in the modified form may be a matter of argument, but the consequences for failure to submit the proper form were plainly set forth in the effects clause. Florida Housing simply applied the terms of the modified RFA to Petitioners' applications and correctly deemed them ineligible for funding.

CONCLUSIONS OF LAW

37. Pursuant to sections 120.569 and 120.57(2) and (3), Florida Statutes, the Division of Administrative Hearings 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.

38. This is a competitive procurement protest proceeding and as such is governed by section 120.57(3) (f), which provides as follows in pertinent 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 administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .

39. Pursuant to section 120.57(3) (f), the burden of proof rests with Petitioners as the parties opposing the proposed agency action. See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioners must prove by a preponderance of the evidence that Florida

Housing's proposed action is arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat.

40. The First District Court of Appeal has interpreted the process set forth in section 120.57(3)(f) as follows:

A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes (Supp. 1996)^(1/) provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

41. The ultimate issue in this proceeding is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal

specifications." In addition to proving that Florida Housing breached this statutory standard of conduct, Petitioners also must establish that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

42. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law will be upheld "if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004) (citations omitted); see also Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985) ("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

43. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

[T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values

for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977) (quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931)).

44. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if it is not supported by facts or logic. See Agrico Chem. Co. v. Dep't of Env'tl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

45. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "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 these factors to its final decision." Adam Smith Enter. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

46. However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632 n.3 (Fla. 2d DCA 1992).

47. Rule 67-60.006 is titled, "Responsibility of Applicants." Subsection (1) of the rule provides as follows:

(1) The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

48. Rule 67-60.008 provides:

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.

49. Rule 67-60.002(6) defines "minor irregularity" to mean "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."

50. In the instant case, Florida Housing provided adequate justification for its determination that the failure of Petitioners to submit the correct Applicant Certification and Acknowledgement Form was not a minor irregularity. The submission of the wrong form was not an error that Florida Housing could correct. More important, the interest of Florida

Housing in maintaining the credibility and integrity of its bidding process requires that it enforce the "effects clause" when no prospective vendor has contested its use via a challenge to the RFA specifications. See Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004) (vendor waived right to challenge agency's weighting of cost proposals by failing to timely file a specifications protest); Optiplan, Inc. v. Sch. Bd. of Broward Cnty., 710 So. 2d 569, 572 (Fla. 4th DCA 1998) (by failing to timely file specifications protest, vendor waived right to challenge evaluation criteria in its award challenge).

51. The effects clause is not ambiguous: "If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered." Florida Housing reasonably points out that waiving such a specific mandatory requirement in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. See St. Elizabeth Gardens v. Fla. Hous. Fin. Corp., Case No. 16-4132BID, RO at 47-48 (Fla. DOAH Oct. 18, 2016; FHFC Nov. 28, 2016). Applicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public

confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.

52. To be a minor irregularity, a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of Florida Housing or the public. Even if it is accepted that Petitioners gained no competitive advantage by submitting the wrong Applicant Certification and Acknowledgement Form, Florida Housing has articulated sufficient reasons why Petitioners' noncompliance does not meet the definition of a minor irregularity because of its adverse effect on the interests of Florida Housing and the public in a fair bidding process conducted on a level playing field according to clear specifications.

53. It is concluded that Petitioners have failed to carry their burden of proving that Florida Housing's proposed decision in these consolidated cases was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that the Florida Housing Finance Corporation enter a final order confirming its initial decision finding JPM Outlook One Limited Partnership and Grande Park Limited

Partnership ineligible for funding, and dismissing each Formal Written Protest and Petition for Administrative Hearing filed by JPM Outlook One Limited Partnership and Grande Park Limited Partnership.

DONE AND ENTERED this 29th day of June, 2017, in Tallahassee, Leon County, Florida.

Lawrence P. Stevenson

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2017.

ENDNOTE

^{1/} The meaning of the operative language has remained the same since its adoption in 1996:

In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. 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, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing

statutes, the agency's rules or policies, or the bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .

§ 120.57(3)(f), Fla. Stat. (1997).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

JPM OUTLOOK ONE LIMITED PARTNERSHIP

Petitioner,
vs.

DOAH Case No. 17-2499BID

FLORIDA HOUSING FINANCE
CORPORATION,

FHFC Case No. 2017-018BP

Respondent,
_____ /

GRANDE PARK LIMITED PARTNERSHIP

Petitioner,
vs.

DOAH Case No. 17-2500BID

FLORIDA HOUSING FINANCE
CORPORATION,

FHFC Case No. 2017-019BP

Respondent,
_____ /

and

HAMMOCK RIDGE II, LLC,

Intervenor.
_____ /

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on July 28, 2017.

All Petitioners in these consolidated cases were Applicants under Request for

Applications 2016-110: Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA"). The matter for consideration before this Board is a Recommended Order pursuant to §§120.57(2) and (3)(e), Fla. Stat., and Rule 67-60.009(3)(b), Fla. Admin. Code, the Exceptions to the Recommended Order, and Responses thereto.

On October 7, 2016, Florida Housing issued the RFA which solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding ("tax credits") for the construction of affordable housing developments. A modification to the RFA was issued on November 10, 2016. On December 2, 2016, Applications were submitted in response to the RFA by a number of Developers including Petitioners and Intervenors. On March 24, 2017, Florida Housing posted notice of its intended decision to award funding to 10 Applicants including Intervenor Hammock Ridge. Petitioners JPM Outlook and Grande Park were determined to be ineligible for funding.

Petitioners timely filed notices of intent to protest followed by formal written protests pursuant to §120.57(3), Fla. Stat. (2016). After a review of the Petitions, Florida Housing determined that no disputes of material fact existed, and referred the cases to the Division of Administrative Hearings (DOAH) for informal proceedings per its contract with Florida Housing to provide informal hearing officers. On May 1, 2017 the Administrative Law Judge acting as informal hearing

officer consolidated the cases into this single action, and granted a motion to intervene from Hammock Ridge II, LLC.

An informal hearing took place on May 15, 2017 in Tallahassee, Florida, before the Honorable Administrative Law Judge Lawrence P. Stevenson ("Hearing Officer"). Petitioners, Respondent and Intervenors timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order on June 29, 2017. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer therein recommended that Florida Housing issue a Final Order affirming Florida Housing's scoring and ranking decisions regarding all issues and parties.

On July 10, 2017 Petitioners filed Exceptions to Recommended Order, attached hereto as Exhibit B ("Exceptions"), objecting to the Conclusions of Law in ¶¶ 50-53, and to the Recommendation of the Recommended Order. On July 13, 2017, Florida Housing and the Intervenors filed a Joint Response to Petitioners' Exceptions, attached hereto as "Exhibit C."

RULING ON EXCEPTIONS

1. Petitioners take exception to the Conclusions of Law set forth in ¶¶ 50-53 of the Recommended Order, in which the Hearing Officer concluded that

Petitioners had failed to carry their burden of showing that the errors in their petitions should have been waived as minor irregularities.

2. The Board finds that it has substantive jurisdiction over the issues presented in ¶¶ 50-53 of the Recommended Order.

3. After a review of the record, the Board finds that the Conclusions of Law set forth in ¶¶ 50-53 of the Recommended Order are reasonable and based upon competent, substantial evidence, and rejects Petitioners' Exception.

RULING ON THE RECOMMENDED ORDER

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

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

6. Petitioners' Exceptions to the Recommended Order are rejected.

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

ORDER

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

8. 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.


9. 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.

IT IS HEREBY ORDERED that Florida Housing's scoring and ranking of RFA 2016-110 is **AFFIRMED** and the relief requested in the Petitions is **DENIED**.

DONE and ORDERED this 28th day of July, 2017.

FLORIDA HOUSING FINANCE
CORPORATION

By: _____


Chair

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA

CASE NO.: 1D17-3499

JPM OUTLOOK ONE LIMITED
PARTNERSHIP and GRANDE PARK
LIMITED PARTNERSHIP,

Appellants,

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Appellee.

APPELLANTS' INITIAL BRIEF

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STATEMENT OF THE CASE AND FACTS

Florida Housing Finance Corporation (“FHFC”) is a public corporation, established by Chapter 420.501, et seq., Florida Statutes. FHFC is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code. (R. 261). FHFC has the responsibility and authority to establish procedures for allocating and distributing low income housing tax credits. (R. 181-96). The parties stipulated that the low income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. (R. 181-96). In this regard, tax credits are to be awarded competitively to housing developers in Florida for rental housing projects which qualify. (R. 186-91). These tax credits may be sold by developers for cash to raise capital for their projects. (R. 181-96). The sale of the tax credits has the effect of reducing the amount the developer would have to borrow for the project. (R. 181-96). The property awarded tax credits must offer lower rents, which must be kept at affordable levels for periods of 30 to 50 years as consideration for receipt of the tax credits. (R. 181-96).

The low income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. (R.263). These tax credits are awarded competitively to housing developers for Florida rental housing projects that qualify. (R. 263). The credits can then be sold by developers for cash which is

used to raise capital for the projects. (R. 263). The effect of the sale is the reduction of the amount a developer needs to otherwise borrow. (R. 263). The achievement of a lower total debt results in a tax credit property that can, and must, offer lower, more affordable rents. (R. 263). Developers covenant to keep rents at affordable levels for stated periods of time as consideration for receipt of the tax credits. (R. 263).

FHFC is authorized to allocate housing tax credits in Florida on an annual basis by the US Treasury through the bid protest provisions of Section 120.57 (3), Florida Statutes. (R. 181-96). FHFC utilizes a competitive process which is initiated when FHFC issues a Request for Applications (“RFA”) after which interested developers submit applications in response to the RFA and RFA is equivalent to a “request for proposal” pursuant to Florida Administrative Code 67-60.009(3). (R. 264).

Appellants JPM Outlook One Limited Partnership and Grande Park Limited Partnership (collectively “Appellants”) are Florida limited partnerships in the business of providing affordable housing. (R. 262). Appellants submitted applications in response to RFA 2016-110, Housing Credit Financing for the Affordable Housing Developments Located in Medium and Small Counties (“the RFA”). (R. 626-727; 728-734; 735-840; 841-47).

On October 7, 2016, FHFC issued the RFA which solicited applications to compete for an award of tax credits for the development of affordable housing developments in Medium and Small Counties, as defined in the RFA. (R. 264-5). On November 10, 2016, FHFC issued a modification to the RFA which extended the deadline for submitting applications from November 17, 2000, until December 2, 2006, and added the following language in section 2(b)(4) to the six-page Applicant Certification and Acknowledgment Form (“Form”) (the added language is underscored):

2. Applicant acknowledges and certifies the following information will be provided by the due date outlined below, or as otherwise outlined in the invitation to enter credit underwriting. Failure to provide the required information designated intersection and city (is located within a city), or (ii) the street name, closest designated intersection and County (if located in the unincorporated area of the county) by the stated deadline shall result in the withdrawal of the invitation to enter credit underwriting.

(b) Within 21 Calendar Days of the date of the invitation to enter credit underwriting:

(4) Confirmation that, if the proposed Development meets the definition of Scattered Sites, all Scattered Sites requirements that were not required to be met in the Application will be met, including that all features and amenities committed to and proposed by Applicant that are not unit-specific shall be located on each of the Scattered Sites, or no more than 1/16 mile from the Scattered Site with the most units, or a combination of both. If the Surveyor Certification form in the Application indicates that the proposed Development does not consist of Scattered Sites, but it is determined during credit underwriting that the proposed Development does meet the definition of Scattered Sites, all of the Scattered Sites requirements must have been met as of Application Deadline and, if all Scattered Sites requirements were not in place as of the Application Deadline, the Applicant’s funding award will be rescinded. (R. 268-9).

“Scattered Sites” was a defined term in the RFA, as part of the Surveyor Certification form. Scattered Sites defined in Florida Administrative Code 67-21.002(95), and recited in the Surveyor Certification as follows:

“Scattered Sites,” as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a “Scattered Site”). For purposes of this definition “contiguous” means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement provided the easement is not a roadway or street. All of the Scattered Sites must be located in the same county. The location of the Scattered Site means, at a minimum, the address number, street name, and city, and/or provide (i) the street name, closest designated intersection and city (if located within a city), or (ii) the street name, closest designated intersection and county (if located in the unincorporated area of the county). (R. 449-52).

Both versions of the Form contained the following text at the end of the Application, and before the signature line for each Applicant: “Under the penalties of perjury, I declare and certify that I have read the foregoing and that the information is true, correct and complete.” (R. 484-607). The RFA contained a reservation of the right to FHFC to waive minor irregularities. (R. 484-607).

Appellants submitted applications in response to the RFA. Appellants submitted on the original form, not the form as modified to include the underscored language (R. 279). The record reflects that Appellants’ Applications did not consist of Scattered Sites. The record also reflects there was no challenge or deficiency in Appellants’ Surveyor Certification form; the failure to submit the Applications on the modified form with the underscored language was the sole

reason that FHFC found Appellants to be ineligible. (R. 270). But for the use of the original form, Appellants would have been deemed eligible and each would have been in the funding range based on their assigned lottery numbers and the RFA selection criteria. (R. 266).

The FHFC designated Review Committee met and considered the Applications responding to RFA. The Review Committee determined Appellants' Applications were ineligible for funding because the October 7 Form was used instead of the November 17 Form. (R. 265). 26 other applications which had the same issue were found to be ineligible. On March 24, 2017, FHFC posted its Notice of Intended Decision to approve the RFA Recommendations ("Notice") naming the 10 applicants FHFC intended to award the tax credits under the RFA. (R. 265-66). HTG Hammock Ridge II, LLC ("Intervenor") was one of the successful applicants named. (R. 266).

Appellants each timely filed its Notice of Intent to Protest, and each filed a timely Formal Written Protest and Petition for Administrative Hearing, challenging FHFC's decisions in the Notice. (R. 260). Appellants relied in principal part on Rule 67-60.008 which provides:

67-60.008 Right to Waive Minor Irregularities.

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.

Rule 67-60.002(6) defines a “minor irregularity” as follows:

“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.

On April 25, 2017, FHFC filed a Referral Letter to the Division of Administrative Hearings (“DOAH”). (R. 171-2; 173-4). FHFC filed an unopposed motion to consolidate cases and DOAH filed an Order of Consolidation. (R.175-7). Appellants demonstrated their interests would be adversely affected by the ruling because FHFC’s decision not to award the necessary funding pursuant to the RFA resulted in Appellants’ inability to develop their proposed Developments. (R. 13; 91). As the Recommended Order noted, had the Applications been deemed eligible, they would have been in the funding range based on the assigned lottery numbers and the RFA selection criteria. *Id.* Without the funding, Appellants will not be able to develop their proposed Developments. *Id.* at para 16.

DOAH set a final hearing which was held before Administrative Law Judge Lawrence P. Stevenson. (T. 4). The parties filed a Joint Pre-Trial Stipulation. (R. 181-96). The parties submitted 10 Joint Exhibits. (T. 5; 305-1069). Prior to the presentation of testimony, each side made an opening statement. (T. 9-30). Appellants submitted that FHFC’s action was arbitrary and capricious because the form used by Appellants were essentially the same as the Modified form, and the Forms submitted did not provide any competitive advantage to Appellants, nor did

they affect the interests of FHFC or the public. (T. 19-20). Appellants cited to Rule 67-60.002(6) of the Florida Administrative Code which defines “minor irregularities.” Appellants argued the use of the earlier iteration of the form was a minor irregularity because no points could be gained or lost by use of the earlier form. (T. 20-21). The Forms submitted by Appellants referenced the Modified RFA and demonstrated Appellants, as applicants, intended to certifying the modified RFA. (T. 16; 728-34). Appellants also cited to prior cases in which it was determined that there were minor irregularities, arguing that the facts presented were substantially similar and that FHFC’s determination that Appellants were ineligible was arbitrary and capricious, clearly erroneous, did not create a competitive advantage and which did not harm to either FHFC or the public. The cases cited were as follows:

1. *Capital Grove Limited Partnership v. FHFC*, FHFC Case No. 2015-012BP (Applicant listed the development as containing 110 units on its application, under penalty for perjury, but represented to the local government that it was actually seeking approval for 120 units which the administrative judge found was a “minor irregularity”, and FHFC approved); Mr. Reecy testified that he did not consider the violation by the applicant of the affirmation to tell the truth “because you could be hyper technical about it in some ways and talk about accurately_describing but then, what is the real effect?” (R. 895). FHFC declared

the inaccurate statement about the number of units was a “minor irregularity” because it did not substantially change what could be done, according to Mr. Reecy. *Id.*;

2. *Rosedale Holdings LLC v. FHFC*, FHFC Case No. 2013-038BP, (Final Order entered 6-13-14; FHFC waived as a minor irregularity an applicant’s failure to state the approximate dollar amount of the Housing Credit Allocation to be purchased);

3. *Douglas Gardens V Ltd. v. FHFC*, FHFC Case No.2016-177BS (Administrative judge declared as a minor irregularity the submission of the wrong surveyor form because there was no substantive difference in the forms, nor any competitive advantage given, and DOAH concluded it was a “minor irregularity” though FHFC did not accept the recommended order);

4. *Oasis at Renaissance v. FHFC*, FHFC Case No. 2016-0061BP (Applicant submitted the proper modified Acknowledgement form in the copies but not the original; DOAH ruled it was a “minor irregularity” but also holding the ability to waive a minor irregularity was within the discretion of FHFC).

Appellants also showed FHFC had previously waived deviations in the Surveyor Certification form. (R. 897).

In its opening statement, FHFC noted that often there are more applicants who are eligible for funding than can be awarded the funding. (T. 44). FHFC

counsel stated: “So we look for small discrepancies; we are very nitpicky about that....We have to—we pick nits, that’s true.” (T. 45).

FHFC called as a witness Ken Reecy, Director of Multifamily Programs for FHFC. Mr. Reecy was asked on behalf of FHFC what would change if an application was submitted, the applicant advises in the application that there are no scattered sites and the language in the modified Acknowledgement form was not included. (T. 65). Mr. Reecy testified:

“I think the only thing that would change is that it's more clear to all parties what will happen in the event that there are scattered sites when they had shown that they weren't, and that in the event that there was litigation arising as a result of that, as -- for instance, we did have the language about the funding award will be rescinded. Applicants don't take kindly to that, so we are kind of clearing the way for any future legal issues that arise from perhaps rescinding funding, making it very clear that that is what we are going to do.” (T. 65).

Mr. Reecy’s deposition was submitted by the parties as a Joint Exhibit. (R. 860-919). In his deposition testimony, Mr. Reecy could not identify a competitive advantage to Appellants for submitting the earlier version of the Form. (Jt. Ex. 8, p. 40). In his deposition, he testified that FHFC developed the “minor irregularity” rule [Rule 67-60.008] to allow the ability to consider responses that would not provide a competitive advantage and “that may not have followed the exact letter or intent of the criterion.” (R. 875). He acknowledged that the Form was not a document or item for which the Applicant scored points. (R. 880).

Mr. Reecy described the “effects clause” as something that “pre-limits” FHFC’s

ability to declare something a minor irregularity. (R.881-2). The effects clause is not a defined term in the Florida Administrative Code. He agreed if FHFC makes a determination of non-responsiveness the application shall not be considered. (R. 883). Mr. Reecy made reference to Rule 67-60.006 which provides:

67-60.006 Responsibility of Applicants.

(1) The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

Mr. Reecy testified that the provisions in Rule 67-60.006 were akin to an “effects clause.” *Id.* He agreed that Rule 67-60.006 to every provision of an RFA, but qualified: “it depends on what non-responsiveness is, what we consider to be non-responsiveness.” *Id.* Mr. Reecy said FHFC could waive an “effects clause”, given the right circumstance because he might run into something that has some mitigating circumstances. (R. 884).

In the RFA, there was a separate listing of “Mandatory Items” to be included with the Applications, but the Form was not one of them. (R. 884-5). Mr. Reecy considered the items in the “Mandatory Items” category to be “super-mandatory, that is, without them the application will not be considered.” (R. 887). Mr. Reecy testified that he was loathe to state that something could never be waived because he did not want to close the door on something he had not considered, and that he might decide to waive. *Id.*

Counsel for the Intervenor made a closing argument, in addition to cross-examining the witnesses. (T. 66-71). Intervenor referenced the administrative review of “Oasis at Renaissance” in which the Administrative Judge held there was a “minor irregularity” as a result of the applicant submitting an incorrect original form, although the copies submitted were on the proper form. (T. 66-67). The Administrative Judge held the submission of the wrong form was a “minor irregularity,” though the holding was that FHFC had the discretion to waive or refuse to waive a “minor irregularity.” (T. 67). Judge Stevenson held in this case that the determination that there was a “minor irregularity” meant there was no further discretion to waive the minor irregularity as a basis for ineligibility. Counsel for Intervenor, as well as FHFC, cited to the administrative review of a “minor irregularity” in *Douglas Gardens*, in which the wrong form was submitted by the applicant. In *Douglas Gardens*, the determination was that the forms were virtually identical and therefore the submission of the wrong form was a minor irregularity and the applicant should not have been declared ineligible for funding. (T. 67-68).

After the conclusion of the hearing the parties submitted Proposed Recommended Orders. (R. 197-215; 216-239; 240-57). DOAH filed a Recommended Order (“Recommended Order”). (R. 258-84). The Recommended Order recommended Appellants’ petitions be denied. *Id.* In the Recommended

Order, DOAH specifically found: Appellants' submission of the earlier version of the Form was not a "minor irregularity" because: a) the submission of the long form was not an error that FHFC could correct; and b) FHFC had an interest in maintaining the credibility and integrity of its bidding process. (R. 279-81). DOAH held that a waiver of the requirement in the RFA would put it on a slippery slope in which any mandatory requirement might be considered waivable. (R. 280). DOAH held that in order to be a "minor irregularity" a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of FHFC or the public. (R. 281). DOAH further held the interests of FHFC and the public were adversely affected giving no other basis than the "slippery slope" reference. *Id.*

On July 28, 2017, FHFC's Board of Directors filed a Final Order ("Final Order"). (R. 299-304). In the Final Order, FHFC held that the Conclusions of Law in the Recommended Order were reasonable and based on competent, substantial evidence. *Id.* At the hearing before the Board, FHFC indicated that the "minor irregularity" rule was not clear and needed to be modified. (R. 1129-30). FHFC counsel announced to the Board that 90 percent of the cases dealt with are trying to interpret what is or what is not a minor irregularity, and therefore FHFC was undertaking internal discussions on amending FHFC's rules on that term so it would be clearer for everyone. (R. 1129-30). This timely appeal ensued. (R. 1998-

1232).

SUMMARY OF ARGUMENT

Appellants submitted applications to FHFC in response to a Request for Applications for housing tax credits. FHFC declared Appellants' applications to be ineligible for funding because Appellants submitted everything completely and accurately except it signed the Application Certification and Acknowledgement Form which did not have the lone modification that advised the applicant that improper information regarding Scattered Sites could result in the rescinding of funding. The Court should reverse the Final Order of FHFC because Appellants' use of the earlier version of the Form was a "minor irregularity" as defined in the Florida Administrative Code because it did not give Appellants a competitive advantage and created no adverse impact to FHFC or to the public. Instead, FHFC admitted that the denial of the Applications' eligibility was due to FHFC "nit-picking" because to do otherwise would create a "slippery slope". FHFC could point to no detriment at all for the use of the earlier form of Application. The only change to the form was to include a warning that failure to accurately disclose Scattered Sites could result in the rescinding of Applicants' funding.

No facts were disputed. Appellants' Forms did not include an additional warning that the failure to accurately report on Scattered Sites could result in a rescission of funding if it was learned that the applicant had provided inaccurate

information on the sites. There is no dispute that Appellants did not submit on Scattered Sites. Nothing in the Applications could lead FHFC to believe that there were, or could be, Scattered Sites referenced in the Applications. Scattered Sites were also accurately referenced in the Surveyor Certificate form submitted by Appellants; there is no dispute about that fact either. There were no challenges to, or questions raised, by FHFC about Appellants' Surveyor's Certificates. Other than the inclusion of language advising Appellants of the possible repercussions to them as applicants which could result from the failure to disclose Scattered Sites, there were no other differences between the form of Application submitted by Appellants and the form amended by FHFC two weeks after the issuance of the RFA which included the warning.

FHFC characterized its own actions as "nit-picking." The dictionary definition of "nit-picking" is the act of giving undue attention to minor irregularities. FHFC and Florida's Administrative Code define "minor irregularities" to include even unsigned bids if accompanied by other submitted material indicating the applicant's intention to be bound by the bid. FHFC did not argue or present evidence that Appellants' Applications provided a competitive advantage to Appellants. FHFC argued that Appellants' Applications could constitute an adverse effect to FHFC because it created a slippery slope with a specter that FHFC would agree in the future to waive the requirements relating to

Scattered Sites. However, Appellants did not seek any entitlement to be exempted from Scattered Sites since the Applications did not have any. There was no slippery slope issue. It is a case of form over substance.

The record reflects that other instances of the wrong form being submitted with the correct information were determined by administrative review to be a “minor irregularity”. Therefore, it is inconsistent and necessarily arbitrary and capricious for the result here to be a declaration that Appellants are ineligible for funding. FHFC conceded the only difference in the form was the addition of a warning regarding Scattered Sites, and there is no factual issue at all that the Appellants did not submit on Scattered Sites. Because there was no challenge to the Surveyor’s Certificate attached to the Forms, there was no dilemma posed to FHFC as to whether there were actually Scattered Sites, or even a question of whether there could be upon further investigation in the underwriting phase.

Nit-picking is, by definition, relying upon a minor irregularity. When that minor irregularity excludes an otherwise valid application from consideration, the legislative purpose for the creation and existence of FHFC is destroyed. If the purpose of the review process is to look for “nits”, not only is the interest of FHFC and the public not served, it results in a public view of an administrative agency which has lost sight of the legislative goals expressed in section 420.501, which is supposed to serve the needs of funding and administering the construction of low

and moderate income housing in Florida.

The Court should reverse because Appellants' applications would have been selected as the winning applications, and been awarded the tax credits. A ruling in favor of Appellants will render the process in accord with the intent of the Legislature and better serve the needs of the public and FHFC.

ARGUMENT

I. FHFC AND DOAH ADMINISTRATIVE JUDGE COMMITTED REVERSIBLE ERROR AS A MATTER OF LAW WHEN EACH CONCLUDED, AS A MATTER OF LAW, APPELLANTS' EXECUTION OF THE APPLICANT CERTIFICATION AND ACKNOWLEDGEMENT FORM, IN ITS EARLIER ITERATION, WAS NOT A "MINOR IRREGULARITY"

FHFC is created and defined by section 420.501, et seq., Florida Statutes, and was formed as a result of the Florida Legislature's findings of the need to create inducements for private and public investment for the construction of housing for low, moderate and middle income persons and families. *Fla. Stat. §420.502*. FHFC is charged with the responsibility to administer the governmental function of financing or refinancing housing and related facilities in the state. *Fla. Stat. §420.504(1)*. The purpose for the formation and existence of FHFC is thwarted if the functions of financing are reduced to form over substance.

An RFA is treated as a Request for Proposal for the purposes of a bid protest under section 120.57(3), Florida Statutes. *See Fla. Admin. Code R. 67-60.009(4)*. Administrative conclusions of law are subject to *de novo* review, while findings of

fact are reviewed for competent, substantial evidence. *Brownsville Manor, L.P. v. Redding Dev. Partners, LLC*, 224 So. 3d 891 (Fla. 1st DCA 2017) (citing *AT&T Corp. v. State, Dept of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016))

FHFC held, as a conclusion of law, that Appellants' use of the earlier version of the Form was not a minor irregularity, as that term is defined by Rule 67-60.002(6). The Rule states that a "minor irregularity" is a variation "that does not provide a competitive advantage or benefit" to the applicant over other applicants, nor does it adversely affect the public or FHFC [defined as "Corporation" in the Code]. *Fla. Admin. Code R. 67-60.008*. The Court's review of an agency's conclusion of law is de novo. *See Parlato v. Secret Oaks Owners Ass'n.*, 793 So. 2d 1158, 1162 (Fla. 1st DCA 2001). Review is sought here of the legal interpretation of the term "minor irregularity" as defined in Rule 67-60.008. An administrative agency's action may be set aside if "[t]he agency has erroneously interpreted a provision of law any correct interpretation compels a particular action." *Fla. Stat. §120.68(7)(d)*; *see also Madison Highlands v. FHFC*, 220 So. 3d 467 (Fla. 5th DCA 2017).

In 2014, FHFC adopted Administrative Rule 67-60.008 (Right to Waive Minor Irregularities) which provides:

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 Corporation; however, Corporation shall have no duty or

obligation to correct any such mistakes.

Other than the examples of “minor irregularities” found in Rule 67-60.008, there is no other definition in the Florida Administrative Code, Chapter 67, applicable to FHFC.

Rule 67-60.008 is similar to provisions for waivers of minor irregularities found in other administrative codes. *See, e.g.*, 48 C.F.R. §14.405 (“A minor informality or irregularity is one that is merely a matter of form and not substance.”). In the Code of Federal Regulations, a “minor irregularity” is further defined as a defect or variation which is immaterial effect on price, quantity, quality, or delivery is negligible when contrasted with total cost or scope of the supplies or services being acquired. *Id.* 48 C.F.R. §14.405 specifically includes as a minor irregularity the failure to sign a bid if it is accompanied by other material indicating the bidder’s intention to be bound by the unsigned bid. *See* 48 C.F.R. §14.405(c)(1).

FHFC, through its Board, did not find that there was a competitive advantage given to Appellants by executing the earlier form; all of the accurate substantive information was given, and there were no typographical or mathematical errors. There was no issue of whether the property defined in the Applications included “Scattered Sites.” There were no Scattered Sites included, and no challenge was given to Appellants’ submitted Surveyor Certificate

whatsoever.

FHFC argued there can be no finding of a “minor irregularity” if there is an error in an “effects clause.” “Effects clause” is not defined in Chapter 67 of the Florida Administrative Code, and is not mentioned as a term of art in Chapter 67-60 which is applicable to Multifamily Competitive Solicitation Funding Process. From the record, FHFC called “effects clauses” as those which state outright that the “clause” will not be waived. Notably, Rule 67-60.008 makes no mention of “effects clauses” as those which are not susceptible of being subject to a finding of a “minor irregularity.” There is no definition of “effects clause” anywhere in the Florida Administrative Code, nor was any definition included in the RFA. FHFC did not include in the Rule 67-60.008 that failure to abide by the requirements of the “effects clause” could not constitute a minor irregularity, when it could have expressly done so.

The fact that FHFC placed its decision to declare the Applications ineligible due to a violation of an undefined “effects clause” is reason enough to find an abuse of discretion. *See Liberty County v. Baxter’s Asphalt and Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982). As the Florida Supreme Court advises, an agency’s discretion must be exercised based on clearly defined criteria in the bid specifications, rules or statutes. *Id.* Here, FHFC concedes there is no definition of an “effects clause” and therefore cannot find its way to a category of “clearly

defined” as the Florida Supreme Court requires.

Even if “effects clauses” were excluded from Rule 67-60.008 and the definition of minor irregularities, and even if “effects clauses” were a defined term of art, there would still be no change in the outcome here. The warning language found in the revised Form, cautioned that if it were determined that Scattered Sites were included in the property included in the application, the applicant, if successful in obtaining funding, was subject to having that funding rescinded after the award was made. Even if there were an automatic exemption for an “effects clause”, the warning language does not constitute an “effects clause” as independently defined by FHFC, nor does that warning language apply in any way to the Appellants’ Applications.

Additionally, this warning was superfluous in any event because the entire Application was certified by Appellants as “true, correct and complete” under the penalties of perjury. If an application was submitted that inaccurately stated there were no Scattered Sites when in fact there were would subject the applicant to the penalties of perjury. In addition, Rule 67-60.006 provides that the failure of the Applicant to supply the required information in connection with any competitive solicitation shall be grounds for a determination of non-responsiveness and the Application will not be considered.

The Court has consistently ruled that agency action must be overturned

when it is capricious, defined as taking action without thought or reason or irrationally. *See Agrico Chem. Co. v. Dept. of Env. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978) (An agency’s action is arbitrary if it is not supported by facts or logic.). The Court has also consistently supported the conclusion that not every deviation from an Invitation to Bid “ITB” (here an RFA), renders the bid or application unacceptable. *Tropabest Foods, Inc. v. Fla. Dept. of Gen. Serv.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986). In *Tropabest*, the facts were that the beverage mix was submitted on a yield of 3.5 gallons instead of the 1 gallon requested in the ITB. *Id.* Although the mix criteria varied for the ITB, the competitor who challenged the award to the selected bidder, the Court found there was no competitive advantage given to the winning bidder and therefore was sustainable as a minor irregularity. *Id.* In so ruling, the Court recognized: “[T]he purpose of competitive bidding is to secure the lowest responsible offer and minor irregularities can be waived in effectuating that purpose.” *Id.* In contrast, when the application is incomplete and the agency cannot evaluate the impact of the missing exhibit or attachment, there may be more than a minor irregularity, which was not the case here. *See Flagship Manor LLC v. Fla. Housing Fin. Corp.*, 199 So. 3d 1090 (Fla. 1st DCA 2016).

Additionally, the Court reversed FHFC’s order refusing to find eligible an application due to the failure to designate a development location point (“DLP”)

that was a mandatory requirement of the Surveyor's Certificate required by the RFA. *Brownsville Manor, LP v. Redding Dev., Partners, LLC*, 224 So. 3d 891 (Fla. 1st DCA 2017). In *Brownsville*, the applicant designated its DLP on property which was not part of the parcel with the most proposed residential units. *Id.* This arguably affected the other proximity to services calculations and the total point scoring for this applicant. The ALJ agreed and held the application was ineligible because it did not adhere to the strict requirements of the RFA. FHFC entered a final order adopting the ALJ's findings. *Id.* The applicant argued that its selection of the DLP was necessarily incomplete because it had not yet finalized site plan, and that the determination of the DLP would be made at final site approval which occurs during the credit underwriting phase, after the selection of the eligible and winning applicant. *Id.* Even though the RFA required the DLP to be included on the Surveyor's Certificate, the Court held that the RFA did not require a finalized site plan and therefore, the RFA did not require a finalized DLP. *Id.*

The cases which have addressed the issue of minor irregularities support a reversal in favor of Appellants. Other Florida courts have upheld as "minor irregularities" variances which were more than just submission of the unmodified form. For example, in *Robinson Electrical Co. v. Dade County*, 417 So. 2d 1032 (Fla. 3d DCA 1982), the court reversed the finding that the bid submitted with a cashier's check as security instead of a bid bond because the cashier's check was

not a “material” variance and therefore was a waivable irregularity. *Id. at 1034*. Similarly, in *Intercontinental Properties, Inc. v. Dept. of HRS*, 606 So. 2d 380 (Fla. 3d DCA 1992), the court considered whether it was a “minor irregularity” when there was a complete failure to attach to a bid proposal the required proof of agency of the person executing the application. The court held the low bidder’s failure to attach the required form was appropriately waived as a minor irregularity. *Id. at 386*. The 3d DCA opined: “There is no public interest, much less a substantial public interest, in disqualifying low bidders for technical deficiencies in form, where the low bidder did not derive any unfair competitive advantage by reason of the technical omission.” *Id.* The court reasoned, the technical deficiency was easily remedied, and did not mislead the Department in its consideration of the qualifications. *Id.*

The United States Supreme Court has ruled on the issue of an administrative agency’s action when the wrong form is submitted and there is no actual harm as a result. *Germantown Trust Co. v. C.I.R.*, 309 U.S. 304, 60 S.Ct. 566, 568; 84 L.Ed. 770, 773 (1940) (submission of a tax return on the wrong form in good faith will trigger the statute of limitations against the IRS because it contained all of the data from which tax could be computed and assessed). Also, the 11th Circuit noted the Supreme Court’s holding in *Germantown* is precedent that when reviewing an instance of the “wrong form” being submitted to an administrative agency,

“substance should prevail over form in this area.” *Atlantic Land & Improvement Co. v. United States*, 790 F. 2d 853, 858 (11th Cir. 1986).

Florida law provides that the determination of whether an agency acted in an arbitrary or capricious manner is tested by whether the agency has: 1) considered all relevant factors; 2) given actual, good faith consideration to those factors, and 3) *used reason rather than whim to progress from consideration of these factors to its final decision.* See *Adam Smith Enter. v. Dept. of Env. Reg.*, 553 So. 2d 1260 (Fla. 1st DCA 1989). “Whim” has a dictionary definition of: “a sudden wish, desire, or change of mind.” Merriam-Webster Dictionary (2009 Ed.), p. 601. An examination of the process used by FHFC at the time to determine what was, and was not, a minor irregularity, shows that the process was imbued with whim. All decisions regarding whether to characterize something as a minor irregularity were funneled to Mr. Reecy, who made the decision on a case by case basis because he was loathe to state in advance what he might consider as a minor irregularity. Though he did testify that he could never recall agreeing to waive the submission of an improper form, he could not express a reason why, other than the concern about potential future litigation if he chose to waive it.

A policy of deciding all issues except the submission of the wrong form on a whim does not elevate the strict compliance with the form when there is no substantive reason for that strict compliance other than to say it is what we always

do. That rationale is the definition of form over substance and cannot be based in “reason” which is another requirement of the agency decision.

Comparison of the types of errors which have been ruled minor irregularities by FHFC to the submission of the wrong form, results in a necessary finding that whim has triumphed over reason. Misrepresentations regarding the number of units subject to the application constitute minor irregularities but submission of the Form with language that FHFC admits has no application to Appellants, who did not submit on Scattered Sites. There was nothing for FHFC staff to fill in or surmise because nothing was missing. Therefore, it is illogical and without “reason” for Appellants Applications to have been declared ineligible.

Examination of the goals established at the time FHFC was formed is in order. In section 420.502, Florida Statutes, the Florida Legislature rendered detailed findings regarding the purposes underlying the creation and sustaining of FHFC, and the goals set forth for this corporation which is a creature of this statute. Among the reasons for the existence of FHFC are the need “to create inducements and opportunities for public and private investment” to provide funding for the development of decent, safe and sanitary housing in the state to persons and families of low, moderate and middle income. *Fla. Stat. §420.502(4)-(5)*. Specifically, the Legislature described the purpose of FHFC in this way:

It is necessary to create a state housing finance corporation to encourage the investment of private capital in residential housing through the use of public financing to deal with the problem of disintermediation, to stimulate the construction and rehabilitation of residential housing, to facilitate the purchase and sale of existing residential housing, to provide construction and mortgage loans for projects and to make loans to and purchase mortgage loans from private lending institutions, each on a quantifiable, measurable basis providing sufficient clear evidence of the corporation's goals and its success in achieving the goals.

Fla. Stat. §420.502(7).

Indeed, the development of affordable housing is the focus of immediate concern as the nationwide supply has dropped to historic lows. *See Tax Plan Threatens Affordable Housing*, Wall Street Journal, B6 (November 29, 2017).

The stated goals in Florida of encouraging investment and development will be thwarted if the process itself is the goal, instead of the “measurable” outcome, as the Legislature has mandated. This Court has the role of evaluating whether the goals for which FHFC was formed, and continues to exist, are being met by declaring applications ineligible when there is no actual harm, no potential advantage given to anyone, and the supplanting as a goal form over substance. Applicants such as Appellants invest time and money into the development of potential sites and projects which are designed to serve those in the lower, moderate and middle income sectors. Declaring ineligible an application which otherwise has a perfect score, because it serves all of the purposes for which FHFC was created, is to deny the public the fair use and outcome of the Florida Housing Corporation Act.

CONCLUSION

Appellants respectfully request the Court to reverse the final order and to instruct FHFC to find Appellants eligible for funding, and for entry of a final order declaring same.

Respectfully submitted,

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CERTIFICATE OF COMPLAINE WITH FONT REQUIREMENT

I HEREBY CERTIFY that this brief complies with the font requirements (Times New Roman, 14-point) of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** on this 4th day of December, 2017, that a true and correct copy was electronically filed with the Clerk of Court for the 1st District Court of Appeal, Florida and that a true and correct copy of the foregoing was served via electronic mail to:

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IN THE FIRST DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA

JPM OUTLOOK ONE LIMITED
PARTNERSHIP and GRANDE PARK
LIMITED PARTNERSHIP,

Appellants,
v.

Case No.: 1D17-3499
FHFC Case No. 2017-018BP

FLORIDA HOUSING FINANCE
CORPORATION,

Appellee.

ANSWER BRIEF OF APPELLEE
FLORIDA HOUSING FINANCE CORPORATION

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INTRODUCTION

The issue in this case is whether, in making the decision to award low-income housing tax credits pursuant to Request for Applications 2016-110, Housing Credit Financing for the Affordable Housing Developments Located in Medium and Small Counties (the “RFA”), Florida Housing acted contrary to a governing statute, rule, or solicitation specification; and, if so, whether such action was clearly erroneous, contrary to competition, arbitrary, or capricious.

Citations to the record are denoted by “R:” followed by the page number. Citations to the transcript of the administrative hearing are denoted by “T:” followed by the page number.

This case is an appeal from a proceeding conducted in accordance with §§120.57(2) and (3), Fla. Stat. There were no disputed issues of material fact.

STATEMENT OF THE CASE AND OF THE FACTS

Appellee agrees that the first six pages of Appellants’ Statement of the Case and Facts is adequate, up until the point that Appellants begin to summarize or describe the legal arguments made by counsel and to reiterate select portions of the evidence presented at hearing. Appellants cite to several portions of the RFA, but fail to cite to Section Four of the RFA was titled, “Information To Be Provided In Application.” Listed there among the Exhibit A submission requirements was the Applicant Certification and Acknowledgement Form, described as follows:

The Applicant must include a signed Applicant Certification and Acknowledgement form as Attachment 1 to Exhibit A to indicate the Applicant's certification and acknowledgement of the provisions and requirements of the RFA. The form included in the copy of the Application labeled "Original Hard Copy" must reflect an original signature (blue ink is preferred). The Applicant Certification and Acknowledgement form is provided in Exhibit B of this RFA and on the Corporation's Website <http://www.floridahousing.org/Developers/MultiFamilyPrograms/Competitive/2016-110/RelatedForms/> (also accessible by clicking here). *Note: If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.* [Italics added] (R: 371)

As the Administrative Law Judge ("ALJ") found, the final sentence of the quoted language is referred to by Florida Housing as the "effects clause." (R: 267)

Additionally, when Appellants cite to the modified Applicant Certification and Acknowledgment Form, they conveniently omit the following language that immediately followed the new language in section 2(b)(4) of the Form:

Note: For the Application to be eligible for funding, the version of the Applicant Certification and Acknowledgement Form reflecting the Modification posted 11-10-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA. (R: 625)

Ultimately, the ALJ made the following Finding of Fact:

36. Petitioners had clear notice that they were required to submit the modified Applicant Certification and Acknowledgement Form. They did not avail themselves of the opportunity to protest the RFA modifications. There is no allegation that they were misled by Florida Housing or that they had no way of knowing they were submitting the wrong form. The relative importance of the new acknowledgement in the modified form may be a matter of argument, but the consequences for failure to submit the proper form were plainly set forth in the effects clause. Florida Housing simply applied the terms of the modified RFA

to Petitioners' applications and correctly deemed them ineligible for funding. (R: 274)

After hearing all of the evidence, weighing the credibility of the witnesses at hearing, and considering the Proposed Recommended Orders filed by all parties, the ALJ made the following Conclusions of Law:

50. In the instant case, Florida Housing provided adequate justification for its determination that the failure of Petitioners to submit the correct Applicant Certification and Acknowledgement Form was not a minor irregularity. The submission of the wrong form was not an error that Florida Housing could correct. More important, the interest of Florida Housing in maintaining the credibility and integrity of its bidding process requires that it enforce the "effects clause" when no prospective vendor has contested its use via a challenge to the RFA specifications. [citations omitted]

51. The effects clause is not ambiguous: "If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered." Florida Housing reasonably points out that waiving such a specific mandatory requirement in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. See *St. Elizabeth Gardens v. Fla. Hous. Fin. Corp.*, Case No. 16-4132BID, RO at 47-48 (Fla. DOAH Oct. 18, 2016; FHFC Nov. 28, 2016). Applicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.

52. To be a minor irregularity, a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of Florida Housing or the public. Even if it is accepted that Petitioners gained no competitive advantage by submitting the wrong Applicant Certification and Acknowledgement Form, Florida Housing has articulated sufficient reasons why Petitioners' noncompliance does not meet the definition of a minor irregularity because of its adverse

effect on the interests of Florida Housing and the public in a fair bidding process conducted on a level playing field according to clear specifications.

53. It is concluded that Petitioners have failed to carry their burden of proving that Florida Housing's proposed decision in these consolidated cases was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition. (R: 279-281)

Appellants timely filed Exceptions to the Recommended Order, and Appellee filed Responses thereto. On July 28, 2017, Appellee's Board of Directors considered these Exceptions, heard argument from all parties, and ultimately issued a Final Order adopting the Recommended Order *in toto*. (R: 299-304)

STANDARD OF REVIEW

Section 120.68(7), Fla. Stat., requires this court to "remand a case to the agency for further proceedings consistent with the court's decision or set aside agency action, as appropriate, when it finds that . . . [t]he agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action." To the extent that the interpretation involves the application of general principles of administrative law, the court is not required to give deference to Florida Housing's legal analysis. South Broward Hospital District v. State, Agency for Health Care Admin., 141 So.3d 678, 680 (Fla. 1st DCA 2014); Ft. Myers Real Estate Holdings, LLC v. Dep't of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering, 53 So.3d 1158, 1160 (Fla. 1st DCA 2011).

To the extent, however, any of the issues in this case involve an interpretation

of statutes or rules within Florida Housing's regulatory jurisdiction, or an interpretation of the provisions of the RFA, the court's standard of review is that of "clearly erroneous," meaning the 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, 1166 (Fla. 1st DCA 2004); *see also* Natelson v. Department of Insurance, 454 So.2d 31, 32 (Fla. 1st DCA 1984); Bain v. Agency for Persons With Disabilities, 98 So.3d 642, 644 (Fla. 1st DCA 2012); Florida Farm Bureau Casualty Insurance Company v. Office of Insurance Regulation, 109 So.3d 860, 861 (Fla. 1st DCA 2013). An agency's interpretation of statutes and rules within its regulatory jurisdiction does not have to be the only reasonable interpretation - only a permissible one - and should not be overturned unless clearly erroneous. Duke's Steakhouse Ft. Myers, Inc. v. G5 Properties, LLC, 106 So.3d 12 (Fla. 2d DCA 2013); *see also* Collier County Bd. of County Comm'rs v. Fish & Wildlife Conservation Comm'n, 993 So.2d 69, 72 (Fla. 2d DCA 2008).

SUMMARY OF THE ARGUMENT

There is no dispute that Appellants failed to submit the correct form, even though there were at least two warnings in the RFA that submission of the wrong form would cause the application to be ineligible. The only issue, then, is whether Appellee's determination that this error should not be waived as a minor irregularity was clearly erroneous.

Appellee demonstrated at hearing that this determination was consistent with past agency practices. Appellee also demonstrated, and the ALJ found, that it articulated “adequate justification” and “sufficient reasons” for its determination. Appellants’ only arguments to the contrary seem to be that Appellee was being too picky. They cite to no other cases where Appellee found that submittal of the incorrect form was considered a minor irregularity. They suggest that Appellee is shirking its statutory responsibility to fund affordable housing by awarding funding to one applicant instead of another. As the ALJ concluded, however, Appellants failed to carry their burden of proving that Florida Housing’s proposed decision was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

ARGUMENT

I. APPELLEE AND THE ADMINISTRATIVE LAW JUDGE CORRECTLY DETERMINED THAT APPELLANTS’ SUBMITTAL OF THE WRONG CERTIFICATION AND ACKNOWLEDGEMENT FORM WAS NOT A MINOR IRREGULARITY, AND THAT ITS APPLICATION WAS THEREFORE INELIGIBLE.

1. As is explained more fully above, Applicants for RFA 2016-110 were required to submit a modified Certification and Acknowledgment Form with their Applications. Neither JPM Outlook nor Grande Point submitted a version of the Applicant Certification and Acknowledgment Form reflecting the Modification posted November 10, 2016, with its application. Instead, each included an

unmodified Certification and Acknowledgement Form with its application. (R: 188)
Neither of these unmodified forms included the required acknowledgement regarding proposed Developments that do not consist of Scattered Sites. (R: 730, 843)

2. Brian Parent, a principal for both Appellants, testified he had received notice of the modifications to the RFA and that he had read those modifications. (T: 40-41)

3. The modification to the Applicant Certification and Acknowledgement Form was specifically addressed to Applications in which the Surveyor Certification Form indicated that the proposed Development did not consist of Scattered Sites. The Applications of Appellants each included a Surveyor Certification form indicating that the proposed Developments did not consist of Scattered Sites. (R: 188; T: 37-38)

4. The RFA contained two separate notices identifying what would happen to Applicants that submitted the incorrect form. The posted modification to the Applicant Certification and Acknowledgement Form included the following:

Note: For the Application to be eligible for funding, the version of the Applicant Certification and Acknowledgement Form reflecting the Modification posted 11-10-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA.
(R: 187, 623)

5. In addition, the Modified RFA, published on Florida Housing's website on November 10, 2016, also included the following requirement, referred to by the ALJ as the "effects clause:"

Note: If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.

(R: 188, 492)

6. In their initial brief, Appellants have apparently misunderstood what an "effects clause" is and how it applies in this case. They note in several instances that Appellee found their Application to be ineligible because of a violation of an undefined "effects clause," and that such a finding constituted an abuse of discretion because "effects clause" was not defined in Florida Housing rules. They also argue that modified language in the Form that references Scattered Sites does not constitute an "effects clause," which of course no one ever claimed that it did.

7. In fact, however, Appellee did not find the Application ineligible because of a violation of the "effects clause." The sole reason that Appellants' Application was found ineligible was because of the failure to submit the proper Certification and Acknowledgment Form. (R: 188, 270) The "effects clause" constituted nothing more than a clear and unambiguous warning to all Applicants that failure to submit the proper form would result in a finding of ineligibility. The term is not defined in Florida Housing rules because it is not used in Florida Housing rules, any more than it was used in this RFA. It is nothing more than a shorthand

way of referring to the note that if the Applicant provides the wrong form, that form will not be considered.

8. Appellants also argue that the modified language in the Applicant Certification and Acknowledgement Form was irrelevant because the Surveyor Certification form in the Application clearly stated that the Development did not consist of Scattered Sites, and that the entire Application was certified by the Appellants as being correct. This argument, however, tends to prove exactly the opposite. The modified language in the Form was relevant only in those cases where “the Surveyor Certification form in the Application indicates that the proposed Development does not consist of Scattered Sites.” (R: 436) Whether or not this modified language was considered important or not by Appellants, it clearly applied to their Application.

9. In RFA 2016-110, Florida Housing specifically reserved the right to waive minor irregularities. (R: 370) Fla. Admin. Code R. 67-60.008 addresses when minor irregularities may be waived as follows:

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.

10. Fla. Admin. Code R. 67-60.002(6) defines “minor irregularity” to mean “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. Appellants have suggested that their failure to submit the correct Certification and Acknowledgement form should have been waived by Florida Housing as a minor irregularity. However, Mr. Ken Reecy, Director of Multifamily Programs for Florida Housing, testified that the failure of the Applicants to submit the proper form could not be considered a minor irregularity because it was contrary to competition, it would erode the credibility of the Corporation, and that it avoided a substantive requirement of the RFA. (T: 55-56)

12. Mr. Reecy testified that he was not aware of any times Florida Housing waived the submittal of the wrong form as a minor irregularity. (T: 56) He also testified that there had never been a case where Florida Housing had allowed an Applicant to ignore the instructions just because the Applicant did not think that they were important. (T: 66)

13. Appellants have alleged that Florida Housing has acted inconsistently when determining whether errors in an application can be waived as minor irregularities, and has cited to several cases to support this argument. Appellants have cited to no cases, however, in which Florida Housing has waived the submittal of the wrong form in an application. In fact, in the only two reported cases involving submittal of the wrong form, Florida Housing consistently found that the Applicants

were ineligible for funding and that the errors could not be waived as minor irregularities.

14. In Oasis at Renaissance Preserve I, LP v. Florida Housing Finance Corporation, DOAH Case No., 17-00486BID (Final Order dated March 24, 2017), the applicant submitted an outdated form in its original binder, but submitted the correct form in three other binders that were required as part of the application. The ALJ in that case determined that submitting the wrong form in the original binder was a minor irregularity, but that the petitioner failed to show Florida Housing's determination that Petitioner was ineligible was an action contrary to a governing statute, rule, or solicitation specification. In its Final Order, Florida Housing upheld this conclusion.

15. In Douglas Gardens V, Ltd. v. Florida Housing Finance Corporation, DOAH Case No., 16-00418BID (Final Order dated March 18, 2016), the Applicant submitted an outdated Surveyor Certification form. The ALJ found that, under the specific facts of the case, the submittal of the wrong form constituted a minor irregularity. Central to this decision, apparently, was the finding that “The difference was of no matter to the RFA under discussion. For the substantive purposes of this RFA, the forms were identical.” In its Final Order, Florida Housing accepted the findings of fact but concluded that submittal of the outdated form could not be waived as a minor irregularity.

16. In each of these cases, the applicants actually may have had a stronger case to support a waiver of the error than in the present case. (T: pg. 57) In the Oasis case, the Applicants had submitted an unmodified form in the original binder, but had submitted the modified form in three other copies. Mr. Reecy contrasted that with the instant case, where only the unmodified form was submitted. (T: 57) In the Douglas Gardens case, the Applicant had submitted an outdated form, although there was no substantive difference between the outdated form and the current form. Mr. Reecy contrasted that with the instant case, where there was a substantive difference in the forms that directly applied to the Applicants. (T: 58)

17. Appellants have also cited to or referenced several other cases in which Florida Housing did waive certain errors as minor irregularities. In none of those cases, however, did the Applicant's error involve the submittal of an incorrect form, nor did they involve the applicability of any provision in the RFA warning that if an Applicant provided an incorrect version of a form, the form would not be considered (sometimes referred to as an "effects" clause).

18. In Capital Grove v. Florida Housing Finance Corporation, DOAH Case No., 15-2386BID (Final Order dated August 7, 2015), the Applicant had submitted different information to the local government than it did to Florida Housing. The petitioner argued that this discrepancy rendered the Certification and Acknowledgement form, in which the Applicant certifies that all information in the

application is correct, invalid and that the application should therefore have been found ineligible. There was no allegation that the wrong Certification form was used, or that an “effects” clause required Florida Housing to reject the form. Florida Housing determined that it was appropriate to waive this particular error in the information provided in the application, and the ALJ upheld that determination.

19. In Pinnacle Rio, LLC v. Florida Housing Finance Corporation, DOAH Case. No. 14-1398BID, Final Order dated June 13, 2014), an Applicant’s equity commitment letter was missing a page. Florida Housing determined that all required information could be found elsewhere in the application and waived this error as a minor irregularity. The ALJ found that this decision was not clearly erroneous, and cited to Mr. Reecy’s testimony that “if information request by the RFA is reasonably available within the Application, even if it was not provided exactly in the place where it was requested, the failure to have it in the particular place it was requested is a minor irregularity.” (Id. At 26) Again, this case did not involve the submittal of an incorrect form, and there was no allegation that there was a relevant “effects” clause that required a finding of ineligibility.

20. Appellants also cite to the recent case of Brownsville Manor, LP v. Redding Dev. Partners, LLC, 224 So.3d 891 (Fla. 1st DCA 2017), in which the Court reversed a Florida Housing decision regarding the selection of a Development Location Point. The case did not involve, nor did the Court address, the question of

whether or not an error in an Application could be considered a minor irregularity. It did not involve submittal of an incorrect form. It did not involve an “effects clause.” What the Court did conclude was that “Florida Housing was required to interpret the RFA consistently with its plain and unambiguous language.” Id. At 894.

21. The question, then, is whether Florida Housing’s decision not to waive submittal of the wrong form as a “minor irregularity” was clearly erroneous. Flagship Manor LLC v. FHFC, 199 So.3d 1090 (Fla. 1st DCA 2016) As the Administrative Law Judge stated at Paragraph 58 of Phil’s Expert Tree Service v. Broward County School Board, DOAH Case No. 06-4499BID (March 19, 2007):

If . . . the challenged agency action involves an ultimate factual determination – for example, an agency’s conclusion that a proposal’s departure from the project specifications was a minor irregularity as opposed to a material deviation – then some deference is in order, according to the clearly erroneous standard of review.

22. As the ALJ pointed out in his Recommended Order in National Development Foundation v. FHFC, DOAH Case No. 16-3099BID (July 18, 2016), the requirement that a waiver not provide a competitive advantage to the recipient would apply not only to other Applicants of that same solicitation, but also to the “forgotten developer” who would have applied but for the requirement that was waived.

The problem with the no-harm rule is that it unduly emphasizes the visible effects on known competitors, when the primary concern should be with whether waiving a deviation would adversely affect the integrity of the competition— the latter being a concept or value that

exits apart from the competitors themselves. The competition starts when the solicitation is published, not when the responses are received, so the number of responses, even if only one, should have no effect on the competitive character of the selection process, whose integrity depends on the uniform and consistent application of previously established, neutral criteria for determining the outcome. The specifications of the solicitation, announced at the outset, are effectively rules of the competition, forming the “common standard” to which all would-be participants must conform, and a rule should not be waived if doing so would fundamentally change the contest under way, even when no competitor would have cause to complain about such waiver, whether because there are no other competitors or because the number of available awards equals or exceeds the number of competitors.

National Development at Paragraphs 26-27.

23. In St Elizabeth Gardens v. Florida Housing Finance Corporation, DOAH Case No. 16-4133BID (Final Order dated October 28, 2016), *per curiam affirmed* 2017 WL 5777479, (Fla. 1st DCA 2017), the Appellants alleged that while certain letters submitted with their applications were outdated, these errors should be waived as minor irregularities. Administrative Law Judge Chisenhall rejected this argument and discussed the effect that accepting this argument could have on the integrity of Florida Housing programs:

47. Furthermore, Mr. Reecy testified that excusing Woodcliff, Colonial, and St. Johns’ noncompliance could lead to FHFC excusing all deviations from all other date requirements in future RFAs. In other words, applicants could essentially rewrite those portions of the RFA, and that would be an unreasonable result.

48. Excusing the noncompliance of Woodcliff, Colonial, and St. Johns could lead to a “slippery slope” in which any shelf-life requirement has no meaning. The letters utilized by Woodcliff, Colonial, and St. Johns

were slightly more than six months old. But, exactly when would a letter become too old to satisfy the “shelf life” requirement? If three weeks can be excused today, will four weeks be excused next year? (Recommended Order at pp. 19-20)

24. The same considerations as articulated by Judge Chisenhall are relevant in this case. Excusing the noncompliance of Appellants, especially when the RFA specifically provided that such noncompliance would render the application ineligible, would put Florida Housing squarely on that slippery slope in which any mandatory requirement in the RFA would have no meaning. Applicants for future RFAs would have no idea whether or not they actually had to comply with each of the requirements in the RFA, or whether the failure of their competitors to comply would lead to their ineligibility. Waiving the errors of Appellants in this case would quite clearly “adversely impact the interests of the Corporation or the public.” Fla. Admin. Code R. 67-60.002(6). It would also be entirely inconsistent with Florida Housing’s past practice of declining to waive the submittal of an incorrect form as a minor irregularity.

25. Appellee has consistently rejected Applications where the wrong form was submitted in an Application, and where the RFA contained a clear warning that submittal of the wrong form would result in a finding on ineligibility. As explained in The Lodging Association of the Florida Keys and Key West, Inc. v. Islamorada et. al, Case No. 07-4364GM (DOAH October 22, 2008):

The principle of stare decisis operates in administrative law. Gessler v. Dept. of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993). [(“While it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent the legislature intends there be a principle of administrative stare decisis in Florida.”)] An agency must follow its own precedents unless it adequately explains on the record its reasons for not doing so. See Bethesda Healthcare System, Inc. v. Agency for Health Care Admin., 945 So. 2d 574 (Fla. 4th DCA 2006); Nordheim v. Dept. of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998). *Quotation from Gessler added.*

26. The principle that agencies should follow precedent is not only well established in case law, it is also reflected in statute. Section 120.68(7)(e)3., Fla. Stat., includes, as a ground for overturning an agency’s decision, that the agency has been “inconsistent with . . . a prior agency practice, if deviation therefrom is not explained by the agency.” Section 120.53(2)(b), Fla. Stat., requires agencies to electronically transmit a copy of each final order “which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value.”

27. Appellants suggest in their Initial Brief that such consistency is somehow unreasonable, perhaps even whimsical. They also suggest that making decisions about what sort of errors might be waived as minor irregularities on a case-by-case basis was a process imbued with whim. The evidence showed, though, that Appellee determined that waiving this particular error would be contrary to

competition, that it would erode the credibility of Florida Housing and the scoring process, that it could weaken Florida Housing's legal position in future litigation, and that it would be consistent with past practices of Florida Housing. (R: 279-281)

28. The ALJ agreed with this reasoning, and offered the following Conclusions of Law in his Recommended Order:

51. The effects clause is not ambiguous: "If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered." Florida Housing reasonably points out that waiving such a specific mandatory requirement in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. See *St. Elizabeth Gardens v. Fla. Hous. Fin. Corp.*, Case No. 16-4132BID, RO at 47-48 (Fla. DOAH Oct. 18, 2016; FHFC Nov. 28, 2016). Applicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.

52. To be a minor irregularity, a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of Florida Housing or the public. Even if it is accepted that Petitioners gained no competitive advantage by submitting the wrong Applicant Certification and Acknowledgement Form, Florida Housing has articulated sufficient reasons why Petitioners' noncompliance does not meet the definition of a minor irregularity because of its adverse effect on the interests of Florida Housing and the public in a fair bidding process conducted on a level playing field according to clear specifications. (R: 279-281)

29. Appellants' final argument is that declaring their Application ineligible will somehow be contrary to Florida Housing's mission of financing affordable

housing, and will “deny the public the fair use and outcome of the Florida Housing Corporation Act.” Were it the case that Appellants were the sole Applicants for funding under this RFA, or that they had applied for funding under a different, non-competitive scenario, this argument might have some merit. In this case, however, there were 137 Applicants competing for the limited funding available. (R: 305-309) Finding Appellants ineligible did not result in any reduction in the amount of funding awarded, it simply resulted in Hammock Ridge being awarded funding instead of Appellants. The mission of encouraging the development of affordable housing is in no way threatened. Declaring an Application ineligible for failure to comply with the requirements of the RFA is the only way to assure fairness and confidence in the solicitation process.

30. Appellants in this case clearly had notice that they were required to submit the modified Certification and Acknowledgement form. There is no allegation that they were misled by Florida Housing or that they had no way to know that they were submitting the wrong form. The acknowledgement that was included in the modified form but not included in the form submitted by Appellants is not available elsewhere in the Application. Whether or not Appellants believe that the new acknowledgement in the modified form is important or not is irrelevant; they were required to comply with the requirements of the RFA, and they chose not to do so.

31. In addressing the scoring issues in this proceeding the RFA provides specific submission requirements applicable to all Applicants as follows:

A complete Application for this RFA consists of the Application and Development Cost Pro Forma found at Exhibit A of the RFA and the Applicant Certification and Acknowledgement form and other applicable verification forms found at Exhibit B of the RFA, as well as all other applicable documentation to be provided by the Applicant, as outlined in Section Four of the RFA. (R: 365)

32. Additionally Fla. Admin. Code R. 67-60.006 specifically puts the responsibility on applicants to supply acceptable information consistent with the requirements of the RFA. That section provides as follows:

67-60.006 Responsibility of Applicants.

1) The failure of an Applicant to supply required information in connection with a competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

33. There is no dispute that the applications of Appellants did not comply with the terms of the RFA because each included the wrong certification form. There is also no dispute that the RFA requirement that all Applicants must submit the modified certification form is a valid requirement, since no party filed a challenge to the terms, conditions or specifications of the RFA. Appellants have waived their right to question this requirement by their failure to timely file a challenge pursuant to Section 120.57(3)(b). Peavy & Son Construction Co., Inc., v. State Of Florida, Dep't of Mgmt. Services, DOAH Case No.: 16-2054BID (F.O. DMS May 12, 2016)

see also Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004) (holding vendor waived right to challenge agency's weighting of cost proposals as vendor failed to timely file specifications protest); Optiplan, Inc. v. Sch. Bd. of Broward County, 710 So. 2d 569, 572 (Fla. 4th DCA 1998) (holding vendor waived right to challenge evaluation criteria as being biased and unreliable as vendor failed to timely file specifications protest).

34. Florida Housing articulated several cogent reasons why the noncompliance of Appellants should not be waived as a minor irregularity. The ALJ concluded that Florida Housing “provided adequate justification for its determination that the failure of Petitioners to submit the correct Applicant Certification and Acknowledgement Form was not a minor irregularity (R: 279). Appellants have failed to demonstrate that this proposed action was contrary to statute, rule, policy, or the specifications of the RFA. Appellants have also failed to demonstrate that the proposed action was clearly erroneous, contrary to competition, arbitrary, or capricious.

CONCLUSION

Appellants have failed to demonstrate that Florida Housing’s decision to dismiss Appellant’s Petition with prejudice was based on an erroneous interpretation of law or the solicitation terms, was outside the range of discretion delegated to the agency by law, was inconsistent with agency rule, officially stated agency policy, or

a prior agency practice or was otherwise in violation of a constitutional or statutory provision. For these reasons, the Final Order in this case must be affirmed.

Respectfully submitted,

A handwritten signature in blue ink that reads "Chris McGuire". The signature is written in a cursive style with a horizontal line underneath the name.

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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that this brief is computer generated in 14-point Times
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by e-mail this 26th day of December, 2017, to the following:

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IN THE DISTRICT COURT OF APPEAL
FOR THE FIRST DISTRICT, STATE OF FLORIDA
CASE NO.: 1D17-3499

JPM OUTLOOK ONE LIMITED
PARTNERSHIP and GRANDE PARK
LIMITED PARTNERSHIP,

Appellants,

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Appellee.

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STATEMENT OF THE CASE AND FACTS

Florida Housing Finance Corporation (“FHFC”) has included in its Answer Brief facts which are either not supported by the record, or which are not clarified and may create confusion as to the actual record and facts. Initially, FHFC suggests that Appellants “omitted” language “that immediately followed the new language in section 2(b)(4) of the Form.” *Answer Brief at 2*. The language FHFC contends was missing is:

Note: For the Application to be eligible for funding, the version of the Applicant Certification and Acknowledgement Form reflecting the Modification posted 11-10-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA.

In support of the statement that this missing section was in the Form, FHFC cites to “(R. 625)” The Record citation is a single page excerpt from a separately posted Modification analysis, and not part of the Form. (R. 608-24; 625; 559). In the Answer Brief, FHFC does not state, or clarify, that this “Note” is not found in the RFA or on the Form itself but instead in a free-standing document not incorporated by reference in the RFA or the Form (R. 623; 608-624).

When FHFC modified the RFA on November 10, 2016, it provided a blackline version that showed the changes (R. 484-607). Though the Revised RFA contained other sections which contained modifications that were emphasized by the entry “Note” followed by an admonition, the “Note” FHFC refers to in its brief was *not* included in the blackline version of the RFA, nor is it found in the final

clean version (R. 504; 505; 623). In the RFA and the Modified RFA, FHFC included the following language: “*Note*: If the Applicant provides any Surveyor Certification form other than Form Rev. 08-16, the form will not be considered.” (emphasis added to clarify use of the word “*Note*”)(R. 504)

In its Answer Brief, FHFC cites to paragraph 51 of the Administrative Law Judge’s Conclusions of Law that the “effects clause” was not ambiguous in the language used: “If the Applicant provides any version of the Applicant Certification and Acknowledgment Form *other than the version included in this RFA, the form will not be considered.*”(emphasis added); *Answer Brief at 3.*

The Revised RFA did not reflect that the Certification and Acknowledgement Form was modified by including language “as modified” or inserting a revision date (R. 435-40). FHFC did make reference to the other forms attached to the modified RFA which were modified with the notation “as modified”, or with the revision date for the form included: Florida Housing Ability to Proceed Verification forms (R. 502); Florida Housing Finance Corporation Local Government Verification of Status of Site Plan Approval for Multifamily Developments form (R.502); Florida Housing Finance Corporation Local Government Verification of Status of Play Approval for Residential Rental Developments (R.502); Florida Housing Finance Corporation Local Government Verification that Development is Consistent with Zoning and Land Use

Regulations form (R.502); Florida Housing Finance Corporation Local Government Verification of Availability of Infrastructure ((Electricity, Water, Sewer and Roads) forms (R.502-3).

In the Argument section of the Answer Brief, FHFC contends that the acknowledgement included in the modified Form is not available elsewhere in the Application. *Answer Brief at 19*. However, Ken Reecy, FHFC Director of Multifamily Programs, testified in his deposition that he expected the same result to occur to an application if FHFC had *not* included the modified language in the revised RFA, and Scattered Sites were found in underwriting that had not been disclosed by the applicant; funding would be rescinded. (R.872). Mr. Reecy was surprised when it was determined that 27 of 137 applicants did not provide the Applicant Certification and Acknowledgement form as modified, and were therefore all disqualified. (R. 873-4)

Finally, FHFC states in its Argument section of the Answer Brief that Appellants have misunderstood what an “effects clause” is and how it applies in this case. *Answer Brief at 8*. FHFC further states it did not find Appellants ineligible because of a violation of the effects clause because “effects clause” is neither defined nor used in Florida Housing rules. *Id.* However, Mr. Reecy testified as follows at the Final Hearing:

Q. When an application is reviewed by your staff, who gets to decide whether it is determined to be a minor irregularity or not?

A. Ultimately, that lies with me in consultation with staff and legal counsel.

Q. And did you make that determination in this case?

A. Yes.

Q. Can you tell me why you did not—you decided not to waive this application as a minor irregularity?

A. Due to the fact that we did have an effects clause in this RFA and we felt that, in accordance with the rule requirements regarding minor irregularities, that it would be contrary to competition because we wanted everybody to sign and acknowledge the same criteria in the certification; so we felt if some did--- some certified some things and some certified to others, that that would be problematic (T. 55)

In deposition, Mr. Reecy testified that the institution of the “effects clause” by FHFC predated him and the “effects clause” “prelimits” FHFC’s ability to waive a minor irregularity. (R.881). He testified that the purpose of the creation of the minor irregularity rule was to allow FHFC the ability to consider responses that would not provide a competitive advantage for applicants who may not have followed the exact letter or intent of the criterion. (R.875). In deposition, Mr.

Reecy labeled the language which was added to the Acknowledgement form as “effect clause language.” (R.881) He testified that using a form other than what was requested in the modified RFA was not a minor irregularity because it was an had “effect clause language” which also meant it had different criteria. (R. 881-2) Notwithstanding Mr. Reecy’s declaration that submitting the proper form was “super-mandatory”, he did not insert a provision in the FHFC rules that a “super-mandatory” provision cannot be waived because he did not want to close the door to allow him to consider some extenuating circumstance that he had not previously considered that he might later determine to waive. (R. 887-8)

ARGUMENT

I. FHFC AND DOAH ADMINISTRATIVE JUDGE COMMITTED REVERSIBLE ERROR AS A MATTER OF LAW WHEN EACH CONCLUDED, AS A MATTER OF LAW, APPELLANTS’ EXECUTION OF THE APPLICANT CERTIFICATION AND ACKNOWLEDGEMENT FORM, IN ITS EARLIER ITERATION, WAS NOT A “MINOR IRREGULARITY”

FHFC argues the Court should affirm because FHFC never finds there is a “minor irregularity” when the wrong version of the form is used, relying, as it must, on the principles that the wrong form will always give special advantage to an applicant using it, and that to accept any sort of wrong form creates a “slippery slope” which will inevitably lead to more litigation and uncertainty in the process of awarding credits for the development of low and middle income housing. Yet, the record belies every part of that premise.

To begin with, FHFC *did* recognize a “minor irregularity” in *Oasis* when it adopted the ALJ’s Recommended Order. So the tenet that uniformity must carry the day is not supportive of its argument. *See Oasis at Renaissance Preserve I, LP v. FHFC*, DOAH Case No. 17-00486BID (Final Order dated March 24, 2017) (FHFC accepted applicant’s submitting the wrong form as a minor irregularity). As most of FHFC’s Argument acknowledges, there were no facts in dispute, and indeed, FHFC stipulated that there were no facts for the ALJ to decide. (R. 181-96) In addition, the other cases FHFC cited involved the ALJ making the recommendation that there was a “minor irregularity” from a similar mistake that did not affect the information conveyed and attested to in the application, leaving FHFC with the necessary information and not advantaging the applicants at all. *See Oasis; Douglas Gardens v. FHFC*, DOAH Case No. 16-0418 (Final Order entered 3-18-16) (ALJ found that using the incorrect form led to no competitive advantage and was a minor irregularity that must be waived).

In *Douglas Gardens*, FHFC argues that notwithstanding the ALJ’s findings of a minor irregularity, FHFC properly elected to overrule that finding, and potentially impugning the reason for having an administrative hearing. As Judge Garnett Chisenhall reflected in his most recent Florida Bar Review article, the DOAH process ensures an effective part of Florida’s checks and balances only so long as the agency respects the DOAH role in the findings of fact and conclusions

of law. See G. Chisenhall, *DOAH: Bringing Impartiality and Fairness to Administrative Litigation Since 1975*, 91 Fla. B. J. 41 (Dec. 2017) (hereinafter “DOAH”). There is no meaning to the conclusion that uniformity of rulings at the agency level must be upheld because “it is the way it has always been done,” when to so hold is at the expense of the administrative process.

As Judge Chisenhall noted:

Although the agency appearing as a party before the ALJ has the ability to make the ultimate determination, F.S. s.120.57(1)(l) prohibits an agency from rejecting or modifying an ALJ’s findings of fact “unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were no based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Id. at 43.

The ALJ’s Recommended Order, adopted by FHFC, reflects the reliance ALJ’s reliance on FHFC’s history of overruling findings of other ALJ’s who found there was a minor irregularity. To the extent this is true, the Final Order is based upon flawed precedent because FHFC was not in a position to overrule those other ALJ findings of fact without specific findings that the ALJ’s Recommended orders did not comply with the “essential requirements of law”. This is a difficult standard for FHFC to overcome, and the same standard used to confer jurisdiction by virtue of a certiorari petition. See *Byrd v. Southern Prestressed Concrete, Inc.*, 928 So. 2d 455 (Fla. 1st DCA 2006). In the other cases relied upon in the Recommended and

Final Orders, FHFC would not have been authorized to reweigh the evidence received by the ALJ in order to make its own findings of fact that support FHFC's preferred outcome. *See Heifetz v. Dep't. of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1281-82 (Fla. 1st DCA 1985); *compare Douglas Gardens V, Ltd. v. FHFC*, DOAH Case No., 16-00418BID (Final Order dated March 18, 2016).

Paradoxically, FHFC relies on *Capital Grove v. FHFC*, DOAH Case No. 15-2386BID (Final Order dated August 7, 2015), to demonstrate its uniformity in waiving the applicant's error in the substantive information contained in the application relating to the site because it was not a matter of using the wrong form. *Answer Brief at 12*. In *Capital Grove*, apparently the correct forms were used but the information contained on them was in error; the applicant certified information to FHFC that was different from the information certified to the local government regarding the number of units. So, the applicant was caught making an untrue statement to one or both of the agency and local government yet this was deemed to be a "minor irregularity" according to the definition in Rule 67-60.008. The only logical conclusion is an illogical one: form matters more than substance. *See Answer Brief at 12*.

FHFC distinguishes its actions in *Pinnacle Rio, LLC v. FHFC*, DOAH Case No. 14-1398BID Final Order dated June 13, 2014). In *Pinnacle Rio*, FHFC argues

that it waived as a minor irregularity an applicant's submission of an incomplete equity commitment letter even though it was missing a page. FHFC posits that the missing page was a minor irregularity because all the "required information" could be found elsewhere in the application. *Answer Brief at 13*. However, even a cursory examination of this argument exposes the fundamental flaw. FHFC could not have known what was on the missing page at the time of submission of the application. The equity commitment could have included a material reservation or limitation that would have affected the ability to develop. FHFC could only know what was on the missing page once it received it. Also, notwithstanding FHFC's contention that the "effects clause" was not a catalyst to its ruling in the present case, FHFC distinguishes *Pinnacle Rio* as an instance with no relevant "effects" clause. *Id.*

In the present case, FHFC knew precisely what was missing from the Applications here, only the language that improper submissions that did not properly disclose Scattered Sites might render the Applications ineligible during underwriting. Mr. Reecy admitted in his testimony that the same result, declaring the Applications ineligible, would occur to an applicant if the new language added to the modified Form was not there at all. (R. 871-2).

FHFC references *National Development Foundation v. FHFC*, DOAH Case No. 16-3099BID (July 18, 2016) for the proposition that the waiver of Appellants'

minor irregularity would somehow have disadvantaged the “forgotten developer,” third parties that would have submitted applications if the language on the revised Certification and Acknowledgement form had been omitted for everyone. *Answer Brief at 14*. FHFC does not explain what difference there would have been that would have invited other applicants if the language had been missing in the final draft of the Application Form. To attempt to apply this rationale, one must assume there was an applicant planning to submit on Scattered Sites, and further planning to represent that there were no Scattered Sites, and reasonably believing that the misrepresentation would, and should, survive a review in the underwriting process without penalty of being declared ineligible for funding. This argument is illogical and not supported by any record evidence that the modification to the form affected third parties in any way.

In *St. Elizabeth Gardens v. FHFC*, DOAH Case No. 16-4133BID(Final Order dated October 28, 2016), FHFC relies on the finding of a “slippery slope” portion of the ALJ ruling to the extent that certain outdated letters could not be considered minor irregularities. The letters submitted in *St. Elizabeth Gardens* were at least six months’ out of date and there are other findings that this would have a material impact on the information contained in the application. *See Answer Brief at 15-6*. However, to the extent FHFC argues that any waiver would potentially lead to the requirement of other waivers, creating the “slippery slope”,

Rule 67-60.002(6) can have no meaning. If everything in the RFA is mandatory, there could be no such thing as a minor irregularity. Instead, the application of *stare decisis*, comparing the consistent and logical applications of the plain meaning of the Rule to the applications, prevents the creation of a slippery slope, just as in every other instance of review using *stare decisis*. To imply otherwise is to infer this Court must affirm with a rubber stamp to prevent all manner of slippery slopes in the law.

Finally, FHFC's inconsistency of the use of the term "effects clause" and its incorporation of arguments to the ALJ, as well as the testimony of the Director of Multi-family programs, is itself a basis for reversal. Notwithstanding the argument and testimony to the ALJ that the "effects clause" in the RFA shunted the application of Rule 67-60-002(6) and a finding of a minor irregularity, FHFC now contends the sole reason for rejection of the application was the failure to submit the proper form. *Answer Brief at 8*. Although the argument at the Final Hearing was the addition of an "effects clause" prevented application of the test of a minor irregularity, FHFC now argues an applicant's submission of the wrong form will always result in the application being declared ineligible without further examination. However, the litany of cases in which FHFC *has waived* wrong forms belies this simple formulaic conclusion. To affirm in this case will only serve to approve of the subjective treatment of applications by FHFC which Florida

administrative law cautions against. Applicants to FHFC must know the applications submitted will be treated and considered objectively with a set of recognizable standards of review that dispel the notion of favoritism or subjective influence.

For all of the reasons expressed herein, and in Appellants' Initial Brief, Appellants respectfully seek the reversal of the Final Order in the interest of upholding a high standard of justice for parties to Florida administrative proceedings.

CONCLUSION

Appellants respectfully request the Court to reverse the final order and to instruct FHFC to find Appellants eligible for funding, and for entry of a final order declaring same. Appellants also request the Court grant their Motion for Attorney's Fees and Costs filed in this appeal for the reasons stated therein.

Respectfully submitted,

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CERTIFICATE OF COMPLAINE WITH FONT REQUIREMENT

I HEREBY CERTIFY that this brief complies with the font requirements (Times New Roman, 14-point) of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

/s/Kimberly A. Ashby
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY on this 22nd day of January, 2018, that a true and correct copy was electronically filed with the Clerk of Court for the 1st District Court of Appeal, Florida and that a true and correct copy of the foregoing was served via electronic mail to:

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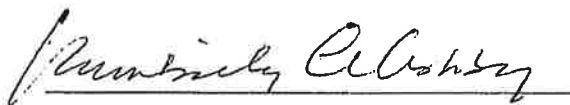
BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

RE: RFA2018-109

NOTICE OF INTENT TO PROTEST BY JPM OUTLOOK AND GRANDE PARK LIMITED PARTNERSHIP

NOTICE OF PROTEST

Pursuant to Section 120.57(3), Fla. Stat., Rule 28-110.003, Fla. Admin. Code; and RFA 2018-109 Development Viability Loan Funding, JPM Outlook One Limited Partnership and Grande Park Limited Partnership (collectively "JPM") give notice of their intent to protest the terms of RFA 2018-109 ("the RFP"). A copy of the RFP is posted on Florida Housing Finance Corporation's website. JPM will file a Formal Written Protest and Petition for Administrative Hearing within 10 days of the filing of this Notice, as calculated pursuant to Section 120.57, Fla. Stat., and Rule 28-106.103, Fla. Admin. Code.



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