STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

QUAIL ROOST TRANSIT VILLAGE II, LTD.

Petitioner,

FHFC Case No. 2023-011BP
DOAH Case No. 23-0674BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

COCO PLUM HOUSING PARTNERS, LP, AND THE ENCLAVE AT RIO, LP,

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 June 9, 2023. Petitioner Quail Roost Transit Village II, Ltd. ("Quail Roost") and Intervenors Coco Plum Housing Partners, LP ("Coco Plum") and The Enclave at Rio, LP ("Enclave"), were applicants under Request for Applications 2022-203: Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and 102.57(3), Florida Statutes.

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
DATE: 6/12/2023

On January 27, 2023, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to two applicants, one of which was Coco Plum. Quail Roost and Enclave were found eligible but were not selected for funding. Petitioners timely filed notices of intent to protest, followed by formal written protests, and Intervenors timely intervened.

Florida Housing referred the matters to the Division of Administrative Hearings ("DOAH") and Administrative Law Judge ("ALJ") W. David Watkins was assigned to conduct the final hearing. Before the final hearing, Enclave agreed that while it remained an eligible application, it was not entitled to the 5 points for a Local Government Contribution and, without those 5 points, Enclave is not in line for funding.

The hearing was conducted as scheduled on March 22, 2023. Only one contested issue, Coco Plum's eligibility, proceeded to hearing. After consideration of the oral and documentary evidence presented at hearing, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 10, 2023 recommending that Florida Housing enter a final order 1) finding Coco Plum's application ineligible for funding; and 2) finding Enclave remains eligible but does not receive 5 points for its Local Government Contribution. A true and correct copy of the Recommended Order is attached as "Exhibit A."

No exceptions to the Recommended Order were filed.

Ruling on the Recommended Order

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

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

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

ORDER

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

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

ii. The Conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

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

IT IS HEREBY ORDERED that a) Coco Plum's application is ineligible for funding under the RFA; and b) Enclave remains eligible but is not entitled to 5 points for a Local Government Contribution.

DONE and ORDERED this 9th day of June, 2023.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:
Betty Zachem, Esq.
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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

QUAIL ROOST TRANSIT VILLAGE II, LTD.,

Petitioner,

vs. Case No. 23-0674BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

COCO PLUM HOUSING PARTNERS, LP AND THE ENCLAVE AT RIO, LP,

Intervenors.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 22, 2023, by Zoom conference before W. David Watkins, a designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner Quail Roost Transit Village II, Ltd. ("Quail Roost"):

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Melissa Hedrick, Esquire
Radey Law Firm
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For Respondent Florida Housing Finance Corporation ("Florida Housing"):

Betty Zachem, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor Coco Plum Housing Parners, LP ("Coco Plum"):

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
1400 Village Square Boulevard, Suite 3-231
Tallahassee, Florida 32312

For Intervenor The Enclave at Rio, LP ("Enclave"):

Michael P. Donaldson, Esquire
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Post Office Drawer 190
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

Whether Florida Housing's notice of intent to award funding under Request for Applications 2022-203 Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA") is contrary to governing statutes, Florida Housing rules, or the RFA specifications; and, if so, whether the award is contrary to competition, clearly erroneous, arbitrary, or capricious.

PRELIMINARY STATEMENT

On November 14, 2022, Florida Housing solicited applications for an allocation of housing credits through the RFA. Applications were due December 29, 2022. On January 27, 2023, Florida Housing issued its notice of intended decision to award funding to two applicants, including Coco Plum.

Petitioner, Quail Roost, timely filed a Notice of Protest, followed by a Petition for Formal Administrative Hearing. Intervenors Coco Plum and Enclave timely intervened. The Petition was referred to DOAH on February 20, 2023, and a telephonic status conference was held on February 27, 2023. The final hearing commenced and concluded as scheduled on March 22, 2023, via Zoom conference technology.

During hearing, all parties offered the testimony of Marisa Button. Coco Plum offered the testimony of Robbie Block. The parties offered eight exhibits jointly, all of which were admitted into evidence as Joint Exhibits 1 through 8. Quail Roost offered 15 exhibits, all of which were admitted into evidence as Quail Roost's Exhibits 1 through 15. Coco Plum offered ten exhibits, nine of which were admitted as Coco Plum's Exhibits 1, 2, 6, 9 through 11, and 13 through 15. The undersigned reserved ruling on the admissibility of Coco Plum's Exhibit 3a. In addition, the parties stipulated to a number of facts in a Joint Pre-hearing Stipulation filed on March 20, 2023.

With regard to the admissibility of Coco Plum's Exhibit 3a, authentication or identification of evidence is required as a condition precedent to its admissibility. *See* § 90.901, Fla. Stat. Coco Plum failed to authenticate the exhibit and, therefore, it is inadmissible. Coco Plum's Exhibit 3a is not accepted into evidence.

The one-volume Transcript was electronically filed with DOAH on April 10, 2023. Proposed recommended orders were due on or before April 20, 2023. Quail Roost, Florida Housing, and Coco Plum timely filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order. On April 28, 2023, Enclave filed a Notice of Joinder in the Proposed Recommended Order filed by Florida Housing, joining in Florida Housing's proposal "to the extent it finds and concludes that The

Enclave while still eligible is no longer entitled to 5 points for its Local Government Contribution."

References to statutes are to Florida Statutes (2022).

FINDINGS OF FACT

Based upon the credibility of the witnesses and evidence presented at the final hearing, and on the entire record of this proceeding, the following Findings of Fact are made:

The Parties

1. Florida Housing is a public corporation organized pursuant to chapter 420, Part V, Florida Statutes, whose address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, and for the purposes of these proceedings, is an agency of the State of 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), Internal Revenue Code, and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits.

2. Quail Roost is an applicant in the RFA. Quail Roost, assigned number 2023-081C, was deemed eligible for consideration for funding but was not preliminarily selected for funding under the terms of the RFA.

3. Coco Plum is an applicant in the RFA and was assigned number 2023-076C. Coco Plum was initially deemed eligible and was preliminarily selected for funding under the terms of the RFA.

4. Enclave is an applicant in the RFA and was assigned number 2023-080C. Enclave was deemed eligible for consideration for funding but was not preliminarily selected for funding under the terms of the RFA.

The Competitive Application Process

5. The low-income housing tax credit program (commonly referred to as "tax credits" or "housing credits") was enacted to incentivize the private market to invest in affordable rental housing. These housing credits are awarded competitively to housing developers in Florida for qualifying rental housing projects. The credits are then normally sold by developers for cash to raise capital for their projects, effectively reducing the amount that the developer will have to borrow. Because the total debt is lower, a housing 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 housing credits. The demand for housing credits provided by the federal government exceeds the supply.

6. Florida Housing is authorized to allocate housing credits and other funding by means of request for proposal or other competitive solicitation in section 420.507(48), and adopted Florida Administrative Code Chapter 67-60, to govern the competitive solicitation process. Chapter 67-60 provides that Florida Housing allocate its competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes.

7. In their applications, applicants request a specific dollar amount of housing credits to be given to the applicant each year for a period of ten years. The amount that can be received depends upon 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 areas of some counties. This, however, is not an exhaustive list of the factors considered.

8. Housing credits are made available through a competitive application process commenced by Florida Housing issuing an RFA. An RFA is equivalent to a "request for proposal" as indicated in rule 67-60.009(4).

RFA 2022-203

9. The RFA at issue in this proceeding was published on November 14, 2022, and was further modified on November 18, 2022, November 29, 2022, and December 20, 2022. Responses to the RFA were due on December 29, 2022.

10. There were no challenges to the terms or specifications of the RFA.

11. Through the RFA, Florida Housing expects to award up to an estimated $6,855,330 of housing credits to proposed developments in Miami-Dade County.

12. Florida Housing received 29 applications in response to the RFA. A Review Committee was appointed to review the applications and make recommendations to the Board. The RFA contemplates a structure in which the applicant is scored on eligibility items and obtains points for other items. A summary of the eligibility items is available in Section Five A.1, beginning on page 70 of the RFA. Only applications that meet all the eligibility items are eligible for funding and considered for funding selection.

13. The Review Committee preliminarily determined that 27 applications were eligible for funding and two applications were ineligible for funding.

14. Through the ranking and selection process outlined in the RFA, the Review Committee further recommended two applications for preliminary funding. The Review Committee developed spreadsheets listing its eligibility and funding recommendations to be presented to the Board.

15. On January 27, 2023, Florida Housing's Board met and considered the recommendations of the Review Committee. On the same day, all applicants in the RFA received notice that the Board had determined which applications were eligible to be considered for funding, and which eligible applicants had been preliminarily selected for a funding award (subject to satisfactory completion of the credit underwriting process). Such notice was provided by the posting of two spreadsheets on Florida Housing's website—one listing the

Board-approved scoring results in the RFA and another identifying the applications that Florida Housing proposed to fund.

16. In that January 27, 2023 posting, Florida Housing announced its preliminary decision to award funding to two applicants, including Coco Plum. Quail Roost timely filed a Notice of Protest and Petition. Coco Plum and the Enclave intervened, and the petition was referred to DOAH, giving rise to the instant proceeding.

17. Notwithstanding Florida Housing's preliminary decision to approve Coco Plum's application, at hearing (and in its Proposed Recommended Order), Florida Housing contends that its decision to award housing credits to Coco Plum is contrary to the RFA specifications, and accordingly, an award of housing credits should be made to Quail Roost under the RFA.

The Quail Roost Protest

18. Quail Roost raised challenges to applications submitted by Enclave and Coco Plum. If successful in both challenges, then according to the funding selection process outlined in the RFA, Quail Roost would be selected for funding, subject to the requirements of credit underwriting.

19. Quail Roost challenges the award of five points to Enclave for a Local Government Contribution. Based on information discovered during this litigation, Enclave, Quail Roost, and Florida Housing now agree that Enclave is not entitled to the five points for a Local Government Contribution. Without those five points, Enclave remains an eligible application, but is not in line for funding.

20. Quail Roost raises one challenge to Coco Plum's application, *to wit*, that Coco Plum failed to attain the minimum transit score and proximity points required for eligibility. If Quail Roost is successful, Coco Plum would be ineligible for funding.

21. The RFA allows applicants to earn proximity points based on the distance between the proposed development's location and the location of a qualifying community service or transit service. According to the RFA,

proximity points are used to determine whether the applicant meets the required minimum proximity eligibility requirements, and whether the applicant meets the Proximity Funding Preference. Proximity points are not applied towards the applicant's total score.

22. In order to meet eligibility requirements, applicants such as Coco Plum must achieve at least 2.0 proximity points for transit and at least 10.5 total proximity points. According to the RFA, to receive proximity points for transit services, such as a Public Bus Rapid Transit Stop, applicants are required to provide latitude and longitude coordinates for the service, and provide the distance between the Development Location Point and the service. The distance between the Development Location Point and the latitude and longitude coordinates for the service are the basis for awarding proximity points.

23. For transit services, the RFA allows applicants to select one – and only one – transit service upon which its transit service score would be based. Applicants may select from the following transit services: Private Transportation (2 points), Public Bus Stop (maximum of 6 points), Public Bus Transfer Stop (maximum of 6 points), Public Bus Rapid Transit Stop (maximum of 6 points), and Public Rail Station (maximum of 6 points).

24. The RFA contains Transit and Community Service Scoring Charts, which provide the point value based on the distance of the service from the proposed development. In its application, Coco Plum provided latitude coordinates 25.876785 and longitude coordinates -80.45639 for a Public Bus Rapid Transit Stop. Coco Plum listed the distance for that transit service as 0.49. Those coordinates correlate to Miami-Dade County Metro Bus Stop 152 ("Bus Stop 152"), which Coco Plum chose as its Public Bus Rapid Transit Stop for the purpose of Proximity Points. Bus Stop 152 is located at the Miami-Dade College North Campus and is serviced by five Miami-Dade County Metro Bus Routes: 19, 27, 32, 107, and 297. Based on the distance, Coco Plum was awarded 5.5 points for its Public Bus Rapid Transit Stop.

25. The RFA defines a Public Bus Rapid Transit Stop as:

> A fixed location at which passengers may access public transportation via bus. The Public Bus Rapid Transit Stop must service at least one bus that travels at some point during the route in either a lane or corridor that is exclusively used by buses, and the Public Bus Rapid Transit Stop must service at least one route that has scheduled stops at the Public Bus Rapid Transit Stop at least every 20 minutes during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis.
>
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

26. Neither the RFA, chapter 420, chapter 67-60, or Florida Administrative Code Chapter 67-48 define the words "lane," "corridor," or "route," as those words are used in the definition of Public Bus Rapid Transit Stop.

27. There is no minimum length of time or distance that a bus must travel in a lane or corridor used exclusively for buses in order to meet the definition of Public Bus Rapid Transit Stop.

28. Coco Plum contends that the buses that travel route 27, and are serviced by Bus Stop 152, "travel at some point during the route in either a lane or corridor that is exclusively used by buses" and thus meet the definition of Public Bus Rapid Transit Stop. Bus route 27 follows Northwest 27th Avenue to Southwest 27th Avenue, stretching from the north end of Miami-Dade County to Coral Gables.

29. Bus Route 27, at various locations, has the words "BUS ONLY" in large white lettering prominently spelled out on the pavement in travel lanes that are closest to the curb on both sides of the roadway.

30. Quail Roost argues that Bus Stop 152 fails to satisfy this definition because it does not "service at least one bus that travels at some point during the route in either a lane or corridor that is exclusively used by buses." As a result, Coco Plum is not entitled to the 5.5 transit service points claimed for a Public Bus Rapid Transit Stop.

31. Thus, whether Bus Stop 152 may be considered a Public Bus Rapid Transit Stop turns upon whether Bus Stop 152 travels through a "lane or corridor that is exclusively used by buses."

32. Marisa Button, Florida Housing's Director of Multifamily Allocations, testified that Florida Housing has historically considered information provided by local governments when construing RFA terms related to transit services within their jurisdictions.

33. In this case, the parties deposed Eric Zahn, the Transit Planning Section Supervisor of the Department of Transportation and Public Works ("DTPW"). DTPW is the local government department responsible for managing public transportation in Miami-Dade County. By deposition, Mr. Zahn testified that there is only one lane or corridor used exclusively by buses in Miami-Dade County—the South Dade Transitway ("Transitway").

34. According to Mr. Zahn, the Transitway is a former railroad that has been converted into a "right-of-way" used solely by buses. The Transitway excludes mixed-use traffic and services fewer bus stops to ensure faster bus travel. The Transitway further implements a "Traffic Signal Priority" system that helps buses pass through intersections efficiently. As a result, buses "travel at a higher average speed" on the Transitway. This increased speed provides for rapid transit, allowing passengers to experience a "quicker commute."

35. Mr. Zahn stated that none of the bus routes that service Bus Stop 152 travel at any point on the Transitway. Consequently, not one of the five routes that service Bus Stop 152 travels through a "lane or corridor that is exclusively used by buses."

36. Coco Plum does not contend that any route serving Bus Stop 152 overlaps with the Transitway. Instead, Coco Plum disputes that the Transitway is the only lane or corridor exclusively used by buses in Miami-Dade County.

37. As support for its argument, Coco Plum introduced images of bus stops along Bus Route 27 where text on the pavement surrounding the bus stop reads "bus only." These same images, however, were presented to Mr. Zahn in his deposition. Mr. Zahn credibly testified that the "bus only" areas depicted in the images are not exclusive bus lanes or corridors. Mr. Zahn explained that the photographs instead represent "bus bays," which allow buses to merge out of traffic lanes in order to "serve a bus stop." When approaching a stop, Mr. Zahn testified, a bus pulls into the bus bay to allow passengers to enter and exit the bus. Once it has serviced all passengers, the bus then merges back into traffic.

38. Bus bays are not "travel lane[s]." Rather, their purpose is simply to prevent a bus from obstructing mixed-use traffic while unloading and reloading passengers—or, if large enough, to provide both a recovery area for bus drivers and a space for a bus to turn around at the end of its route. Unlike the Transitway, there is no indication that bus bays allow for rapid transit that reduces travel times for bus passengers.

39. Coco Plum further produced images of "bus only" signs at the Miami Intermodal Station, located at the Miami International Airport. These photographs similarly failed to prove the existence of another lane or corridor used exclusively by buses. Mr. Zahn explained that the Miami Intermodal Station simply excludes mixed-use traffic from a one-way loop leading to a conglomeration of bus stops. There is a lack of any evidence proving that this arrangement allows for rapid bus travel. To the contrary, Mr. Zahn acknowledged that the "routes that serve the airport bus station have a slower average speed" than the buses "operating along the Transitway."

40. As Ms. Button explained, the purpose of allowing applicants to get a higher level of points for submitting one bus stop as a Public Bus Rapid Transit Stop was that the travel was rapid. An area designed for buses to pull over out of the way of traffic does not constitute "rapid transit." Therefore, the existence of bus bays on the routes served by Bus Stop 152 do not demonstrate that a bus "travels at some point during the route in either a lane or corridor that is exclusively used by buses," as that phrase is used in the Public Bus Rapid Transit Stop definition.

41. Ms. Button further testified that—after reviewing Mr. Zahn's testimony—Florida Housing has determined that the Transitway is the only "lane or corridor that is exclusively used by buses" in Miami-Dade County. Because the parties agree that no bus route that services Bus Stop 152 travels at any point on the Transitway, Bus Stop 152 cannot be considered a Public Bus Rapid Transit Stop.

42. As a secondary argument, Coco Plum asserts that its selection of the improper transit category should be considered a minor irregularity. Robby Block, who testified on behalf of Coco Plum, stated that Bus Stop 152 additionally satisfies the RFA's requirements for a Public Bus Transfer Stop.

43. In relevant part, the RFA defines a Public Bus Transfer Stop as:

> For purposes of proximity points, a Public Bus Transfer Stop means a fixed location at which passengers may access at least three routes of public transportation via buses. Each qualifying route must either (i) have a scheduled stop at the Public Bus Transfer Stop at least hourly during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis; or (ii) ... Bus routes must be established or approved by a Local Government department that manages public transportation. Buses that travel between states will not be considered.

> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

44. Coco Plum argues that Routes 19, 27, and 297 meet the RFA definition of a Public Bus Transfer Stop because those three routes stop at least hourly during the times of 7 a.m. to 9 a.m. and 4 p.m. to 6 p.m. To support its contention, Coco Plum provided printouts purported to be from Miami-Dade County, of Metrobus Routes 19, 27, and 297. It is unknown what those printouts mean or how those printouts should be interpreted to demonstrate that those three routes stop at least hourly during the relevant times.

45. Mr. Block acknowledged that, to qualify under the Public Bus Transfer Stop definition, the routes must meet the timing requirements as of the application deadline of December 29, 2022. The printouts relied upon by Coco Plum were downloaded sometime after the petition was filed in this case on February 13, 2023. Mr. Block admitted that he did not have evidence regarding the arrival times of buses as of December 29, 2022. For these reasons, the unauthenticated printouts provided by Coco Plum cannot be reasonably relied upon to demonstrate that, as of the application deadline, each route had "a scheduled stop at the Public Bus Transfer Stop at least hourly during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday...."

46. Mr. Block further claimed that a Public Bus Transfer Stop is worth the same number of transit service points as a Public Bus Rapid Transit Stop. Through this testimony, Coco Plum suggested that its misclassification of Bus Stop 152 is immaterial, since Bus Stop 152 should remain eligible for 5.5 transit service points even if it is not a Public Bus Rapid Transit Stop.

47. Coco Plum's attempt to now attain transit points for a Public Bus Transfer Stop fails for three reasons. One, it is an impermissible attempt to supplement or amend the Coco Plum application. *See* § 120.57(3)(f), Fla. Stat. Two, as explained above, there is no factual basis to support that Bus Stop

152 meets the RFA definition of a Public Bus Transfer Stop. Finally, there is no indication in the application that Coco Plum intended the selected bus stop to qualify as a Public Bus Transfer Stop. After application submission, applicants are statutorily prohibited from amending or supplementing applications. § 120.57(3)(f), Fla. Stat. Coco Plum's effort to insert new information into its previously submitted application must fail.

48. Coco Plum's failure to meet the definition of Public Bus Rapid Transit Stop is a material deviation from the RFA's requirements. Florida Housing will not waive a material deviation as a minor irregularity. As a result, Coco Plum is not entitled to any transit service points for Bus Stop 152.

49. When the 5.5 transit service points erroneously claimed for Bus Stop 152 are eliminated, Coco Plum is left with zero transit service points. Coco Plum therefore failed to achieve the minimum 2 transit service points necessary for eligibility. The removal of the transit service points claimed for a Public Bus Rapid Transit Stop leaves Coco Plum with only 8 total proximity points. This number falls below the minimum of 10.5 proximity points required by the RFA. For both reasons, Coco Plum is ineligible for funding.

The Enclave Application

50. Florida Housing deemed Enclave's application eligible pursuant to the terms of the RFA, but did not select Enclave for funding.

51. The RFA allows Applicants to earn 5 points for a qualifying Local Government Contribution.

52. As evidence of its Local Government Contribution, Enclave submitted the Local Government Verification of Contribution—Fee Waiver Form ("Fee Waiver Form").

53. Enclave's Fee Waiver Form was executed by Morris Copeland, CPM, Chief Community Services Officer on behalf of Miami-Dade County. The Enclave's Fee Waiver Form listed Miami-Dade County Ordinances as the authority to waive the following fees: "Roads, Fire, Police, Parks—Impact fees."

54. Clarence Brown, Interim Director for the Public Housing and Community Development Department of Miami-Dade County, testified that Miami-Dade County was withdrawing Enclave's Fee Waiver Form. Mr. Brown stated that the Development proposed by Enclave is within the Miami city limits, and Miami-Dade County does not have authority to waive fees that are instead due to the City of Miami. According to Mr. Brown, the County should have never executed Enclave's Fee Waiver Form.

55. While Enclave remains an eligible application, Enclave, Quail Roost, and Florida Housing agree that Enclave is not entitled to the 5 points for its Local Government Contribution. Without the 5 points for its Local Government Contribution, Enclave would not be in line for funding.

The Quail Roost Application

56. Florida Housing deemed the Quail Roost application eligible pursuant to the terms of the RFA, but did not select Quail Roost for funding.

57. There are no challenges to the eligibility of, or to the points awarded to, the Quail Roost Application.

58. If Coco Plum is ineligible and the Enclave loses 5 points as stipulated, then Quail Roost must be selected for funds, subject to the requirements of credit underwriting.

CONCLUSIONS OF LAW

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

60. Quail Roost challenges Florida Housing's ranking and scoring of Coco Plum's application and Enclave's application under the RFA. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests on Quail Roost as the party protesting the proposed agency action. *See State Contracting &*

Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Section 120.57(3)(f) further provides that in a bid protest:

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

61. The phrase "de novo proceeding" in section 120.57(3)(f) describes a form of intra-agency review. The purpose of the ALJ's review is to "evaluate the action taken by the agency." *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and *State Contracting*, 709 So. 2d at 609. A de novo proceeding "simply means that there was an evidentiary hearing ... for administrative review purposes" and does not mean that the ALJ "sits as a substitute for the [agency] and makes a determination whether to award the bid de novo." *J.D.*, 114 So. 3d at 1133; *Intercontinental Props., Inc. v. Dep't of HRS*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992). "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." *State Contracting*, 709 So. 2d at 609.

62. Accordingly, Quail Roost, as the party protesting the intended award, must prove, by a preponderance of the evidence, that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of the RFA. The standard of proof that Quail Roost must meet to establish that Florida Housing's ranking and selection process violates this statutory standard of conduct is that Florida Housing's decision was: (a) clearly erroneous; (b) contrary to competition; or (c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.; and *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

63. The "clearly erroneous" standard has been defined to mean "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations." *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). A factual determination is "clearly erroneous" when the reviewer is "left with a definite and firm conviction that [the fact-finder] has made a mistake." *Tropical Jewelers Inc. v. Bank of Am., N.A.*, 19 So. 3d 424, 426 (Fla. 3d DCA 2009); *see also Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956)(when a finding of fact by the trial court "is without support of any substantial evidence, is clearly against the weight of the evidence or ... the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous.'").

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

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

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

66. Finally, section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary or capricious." An "arbitrary" decision is one that is "not supported by facts or logic, or is despotic." *Agrico Chemical Co. v. Dep't of Env't Regul.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." *Id. See also Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 40 (Fla. 1st DCA 2006).

67. To determine whether an agency acted in an "arbitrary" or "capricious" manner, consideration must be given to "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Enter. v. Dep't of Env't Regul.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 632 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

68. Facts are determined based upon the evidence presented at hearing. However, applicants are not permitted to submit information that should have been, but was not, included in the application submitted in response to the RFA. Section 120.57(3) expressly prohibits this type of evidence, stating, "no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered." The application must stand on its own, as originally submitted, in light of determined facts. § 120.57(3), Fla. Stat.

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

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

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

70. While an application containing a material deviation is unacceptable, not every deviation from a competitive solicitation is fatal. A deviation is only fatal if it is material. The deviation is "only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. Fla. Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

71. Rule 67-60.008 further provides:

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

72. Turning to the merits of Quail Roost's protest, based on the competent substantial evidence in the record, Florida Housing's proposed action in the RFA finding Coco Plum eligible is contrary to its solicitation specifications and clearly erroneous. The evidence and testimony presented at the final hearing demonstrates that Coco Plum's selected transit service, Bus Stop 152, did not meet the RFA definition for a Public Bus Rapid Transit Stop.

73. In *Berkeley Landing, Ltd. v. Florida Housing Finance Corporation*, No. 20-0140BID (Fla. DOAH Apr. 6, 2020), *adopted in part*, No. 2019-102BP (Fla. Hous. Fin. Corp. Apr. 17, 2020), the Beacon Place application was challenged for failing to meet the RFA definition of a Public Bus Rapid Transit Stop. *Id.* at ¶¶95-112. Specifically, the challenge related to the bus stop selected by Beacon Place failing to meet the requirement that one route have "scheduled stops at the Public Bus Rapid Transit Stop at least every 20 minutes during the times of 7am to 9am...Monday through Friday..." *Id.* at ¶¶101-103. The evidence demonstrated that there was a thirty-five (35) minute gap between the scheduled stops at 7:01 and 7:36. *Id.* at ¶107.

74. In *Berkeley Landing*, Florida Housing "rejected the idea that the failure of the identified stop to meet the definition of a Public Bus Transit Stop in the RFA should be waived as a minor irregularity." *Id.* at ¶111. Florida Housing's position was that "allowing one applicant to get points for a stop that did not meet the definition would give it a competitive advantage over other applicants, including some potential applicants who did not apply because they could not satisfy the terms of the definition." *Id.* The ALJ held that "[b]ecause the bus stop listed by Beacon Place does not meet the definition of a Public Bus Rapid Transit Stop, Beacon Place is not entitled to any Transit Service Proximity Points and is thus ineligible for funding." *Id.* at ¶112.

75. The same rationale applies to the instant case as in *Berkeley Landing*. Here, Coco Plum's selected bus stop failed to meet the RFA definition for a Public Bus Rapid Transit Stop. Thus, Coco Plum is not entitled to any transit service proximity points and is ineligible for funding.

76. In forming its litigation position, Florida Housing relied on the testimony of the local government regarding transit. This reliance is consistent with Florida Housing's past practice of deferring to local government in determining whether a selected bus stop qualifies within the meaning of the RFA. *See Pinnacle Heights, LLC v. Fla. Hous. Fin. Corp.*,

No. 15-3304BID, ¶13 (Fla. DOAH Aug. 31, 2015), adopted, No. 2015-025BP (Fla. Hous. Fin. Corp. Sept. 18, 2015) ("Florida Housing defers to the local government in determining whether a selected bus route is a qualifying route within the meaning of the RFA.").

77. It is the applicant's responsibility to comply with the requirements of the RFA and Coco Plum's selected bus stop failed to meet the RFA definition of a Public Bus Rapid Transit Stop. *See* Fla. Admin. Code R. 67-60.006(1). Coco Plum should not receive the 5.5 transit points. Without those points, Coco Plum has zero transit points and 8 total proximity points. Those values are below the minimum required transit points and the minimum total proximity points that must be achieved to be eligible for funding in the RFA. Thus, Coco Plum is ineligible.

78. The error here, failing to meet the RFA definition of a Public Bus Rapid Transit Stop, is a material deviation and not the type of error that can be considered a Minor Irregularity because the error is the omission of material information required by the RFA. *See* Fla. Admin. Code R. 67-60.008.

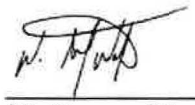
79. Turning to Quail Roost's protest of the Enclave application, based on the competent substantial evidence in the record and, as Enclave and Florida Housing now agree, Florida Housing's scoring of Enclave under the RFA is contrary to its solicitation specifications. Enclave does not receive the 5 points for its Local Government Contribution but remains an eligible application.

80. Accordingly, as Florida Housing now agrees, Florida Housing's scoring and ranking of Enclave and Coco Plum's applications are clearly erroneous, contrary to competition, arbitrary, or capricious and should be overturned. Quail Roost met its burden to demonstrate that Florida Housing's decision to award housing credits to Coco Plum is contrary to Florida Housing's RFA specifications. Accordingly, as a matter of law, Florida Housing should proceed with an award of housing credits to Quail Roost under the RFA.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing enter a final order deeming Coco Plum ineligible and finding that Enclave is not entitled to 5 points for a Local Government Contribution. It is further recommended that Florida Housing select Quail Roost's application as a recipient of housing credit funding in the RFA, subject to the requirements of credit underwriting.

DONE AND ENTERED this 10th day of May, 2023, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of May, 2023.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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