STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LAKESMART ASSOCIATES, LTD.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4287RU
	)	
FLORIDA HOUSING FINANCE CORPORATION,	)	
	)	
Respondent.	)	
	)	
RPK ASSOCIATES, LTD.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 00-4408RU
	)	
FLORIDA HOUSING FINANCE CORPORATION,	)	
	)	
Respondent.	)	
	)	
MEADOW GLEN, LTD. and CORAL VILLAGE II, LTD.,	)	
	)	
Intervenors.	)	

RECOMMENDED ORDER

The parties having been provided proper notice, Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings convened a formal hearing of this matter on December 11, 2000, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

As the parties have stipulated, the issue in this case is whether Respondent Florida Housing Finance Corporation (the "Corporation") properly interpreted Rule 67-48.032(2), Florida Administrative Code, and the corresponding provisions on the

same subject found in paragraph 2, at page 2, of the Corporation's 2000 Qualified Allocation Plan (collectively, the "Instructions"), when it applied the Instructions to determine the substantial interests of Petitioners and Intervenors.

PRELIMINARY STATEMENT

On October 17, 2000, Petitioner Lakesmart Associates, Ltd. ("Lakesmart") filed a petition seeking an administrative determination that certain statements by the Corporation constituted invalid unadopted rules, initiating Case Number 00-4287RU. Petitioner RPK Associates, Ltd. ("RPK") commenced Case Number 00-4408RU by filing a similar petition on October 26, 2000. On or about November 2, 2000, the Corporation moved to consolidate the two cases. An Order granting consolidation was entered on November 8, 2000. On November 8, 2000, Intervenors Meadow Glen, Ltd. and Coral Village II, Ltd. ("Meadow Glen" and "Coral Village"), filed their petition for joinder, seeking to join the petition of RPK. On November 9, 2000, an order was entered granting Intervenors leave to intervene in the consolidated cases.

A Joint Prehearing Stipulation was filed December 8, 2000. In addition, on the day of the final hearing, the parties entered into and filed a separate Stipulation. In their Stipulation, the parties agreed that this matter should go forward as a proceeding under Section 120.57(1)(e), Florida

Statutes, with the administrative law judge entering a recommended order pursuant to Section 120.57(1), Florida Statutes. The Stipulation further provided that the sole issue to be decided in the proceeding was whether the Corporation's interpretation of the Instructions was proper. The parties agreed that the criteria set forth Section 120.57(1)(e)2, Florida Statutes, were not in dispute, except as necessary to determine the stipulated issue, and would require no proof by the Corporation. The administrative law judge accepted the parties' Stipulation, which is hereby adopted and incorporated by reference, and deemed the pleadings to be amended to conform therewith.

At the final hearing, Lakesmart presented the testimony of Gwen Lightfoot and Lloyd Boggio. Meadow Glen and Coral Village presented the testimony of Bowen Arnold. In addition, Petitioners' Exhibits 1 through 8 were received into evidence. The Corporation presented the testimony of its Executive Director, Mark Kaplan. Respondent's Exhibits 1 through 7 and 9 through 12 were also admitted into evidence. Respondent's Exhibits 13, 14, 15, and 16 were not admitted but were proffered by Respondent.

Respondent's Exhibit 8, as identified, consisted of portions of the deposition of Lloyd Boggio that the Corporation designated after the final hearing. In accordance with the

administrative law judge's instructions, the Corporation filed its designations on December 14, 2000, subject to the other parties' objections. Intervenors timely objected to some of the Corporation's deposition designations. Accordingly, the following rulings are made regarding Respondent's Exhibit 8.

Without objection, the portions of Mr. Boggio's deposition designated by the Corporation that shall be received into evidence are: Page 4, Line 15 through Page 7, Line 13; Page 13, Lines 1 through 25; and Page 39, Line 6 through Page 40, Line 15. Intervenors' objections, on the basis of relevance, to the admission of Page 44, Line 8 through Page 46, Line 10; Page 51, Line 17 through Page 54, Line 1; and Deposition Exhibit 17, are sustained; these portions of Respondent's Exhibit 8 are not admitted into evidence but have been received as a proffer. Finally, Page 20, Line 13 through Page 21, Line 22 of Mr. Boggio's deposition, which Intervenors cross-designated, is received without objection.

The parties submitted proposed recommended orders and post-hearing memorandums that have been carefully considered by the administrative law judge in the preparation of this Recommended Order.

FINDINGS OF FACT

The evidence presented at final hearing established the facts that follow.

The Corporation and Its Duty to Allocate Federal Income Tax Credits

1. The Corporation is a public corporation that administers governmental programs relating to the financing and refinancing of housing and related facilities in Florida. It is governed by a nine-member board composed of eight persons whom the governor appoints plus the Secretary of the Department of Community Affairs, sitting ex-officio.

2. Among other things, the Corporation is the state's designated "housing credit agency" as defined in the Internal Revenue Code. As such, the Corporation has the responsibility and authority to establish procedures necessary for the allocation and distribution of low-income housing federal tax credits, which are created under and governed almost entirely by federal law.

3. These tax credits, which are designed to encourage the development of low-income housing for families, provide a dollar-for-dollar reduction of the holder’s federal income tax liability and can be taken each year, for up to ten years, that the low-income housing project for which the credits were awarded continues to satisfy Internal Revenue Code requirements. Housing tax credits are allotted annually to the states on a per capita basis and then awarded, through state-administered programs, to developers of rental housing for low-income and

very low-income families. Once awarded, there is a market for these tax credits; consequently, a developer may sell them at a discount to obtain immediate cash for its project.

4. As a populous state, Florida receives between $18 million and $18.5 million in federal tax credits each year. The Corporation allocates the state's share of tax credits to eligible recipients pursuant to a Qualified Allocation Plan ("QAP") that federal law requires be prepared. The QAP, which must be approved by the governor, is incorporated by reference in Rule 67-48.025, Florida Administrative Code.

5. In accordance with the QAP, the Corporation employs various set-asides and special targeting goals that play a substantial part in determining which applicants will receive tax credits in a particular year. While targeting goals are "aspirational" in nature, set-asides are relatively inflexible. Thus, special targeting goals may be met if credits are available. In contrast, credits that were reserved (or "set-aside") for specific project types will be awarded to applicants whose developments fall within the defined set-aside.

6. The set-asides that have spawned the instant dispute are the Geographic Set-Asides and the Non-Profit Set-Aside. The Geographic Set-Asides require that a pre-determined portion of the available tax credits be awarded to applicants in each of the following county groups: Large County, Medium County, and

Small County. In 2000, the allocation percentages for these groups were 64%, 26%, and 10%, respectively. The Non-Profit Set-Aside, which is a function of federal law, requires that at least 12% of the credits be awarded to non-profit applicants.

7. None of the other set-asides is either at issue here or affects the analysis or outcome. The same is true of the special targeting goals. For simplicity's sake, therefore, special targeting goals will be ignored in the discussion that follows, and it will be assumed, unless otherwise stated, that the Geographic and Non-Profit Set-Asides are the only factors (besides merit) that affect the Corporation's award of tax credits.

The Petitioners and Intervenors
(Collectively, "Petitioners")

8. Lakesmart is a Florida limited partnership which has as one of its general partners a non-profit corporation. In the 2000 application cycle, Lakesmart applied to the Corporation for an award of tax credits from the Medium County allocation. Lakesmart is a "Non-Profit Applicant" for purposes of the Non-Profit Set-Aside.

9. RPK is a Florida limited partnership. In the 2000 application cycle, RPK applied to the Corporation for an award of tax credits from the Large County allocation. For purposes of the Non-Profit Set-Aside, RPK is a "for-profit Applicant."

10. Meadow Glen and Coral Village are Florida limited partnerships. Each has a non-profit corporation as one of its general partners. Both applied to the Corporation in the 2000 application cycle for an award of tax credits from the Medium County allocation. Each is considered a "Non-Profit Applicant" for purposes of the Non-Profit Set-Aside.

Evaluation, Ranking, and the Tentative Funding Range

11. To distribute the finite amount of tax credits available each year, the Corporation has designed a competitive process whereby potential recipients file applications that the Corporation grades according to selection criteria set forth in the QAP. Points are assigned based on compliance with these criteria. At the end of the evaluation process, each applicant that met the threshold requirements will have earned a final score that determines its rank in terms of relative merit, with higher-scored projects being "better" than lower-scored projects.

12. Because of the set-asides, however, credits are not awarded simply on the basis of comparative scores. Instead, the Geographic Set-Asides require that the applicants be sorted and ranked, according to their scores, within the Large County, Medium County, and Small County groups to which they belong and from whose credit allocations the successful applicants will be funded. As a result, therefore, if the several applicants with

the three highest scores in the entire applicant pool were all in the Large County group and the applicant with the fourth highest score were in the Small County group, for example, then the latter applicant would be ranked first in the Small County group. This means, to continue with the example, that if the first- and second-ranked projects in the Large County group were to exhaust the credits allocated to that group, then the applicant with the third highest score overall would not be funded, while the applicant with the fourth highest score in the applicant pool (but ranked first in a county group) would be funded. 16/

13. After the Corporation has sorted the applicants by county group and ranked them, within their respective groups, from highest to lowest based on the applicants' final scores, it draws a tentative funding line within each group. Applicants above these lines are within the tentative funding range and thus apparently successful. Conversely, an applicant below the tentative funding line in its county group will not receive tax credits unless, to satisfy a set-aside or fulfill a special targeting goal, it is moved into the funding range.

14. In the 2000 application cycle, a preliminary outcome which had occurred only once before, in 1997, happened again: the aggregate of credits requested by the non-profit applicants within the tentative funding range did not amount to the Non-

Profit Set-Aside percentage — 12% in 2000 — of total available credits. Therefore, the Corporation needed to elevate as many apparently unsuccessful non-profit applicants into the funding range — and concomitantly to remove as many apparently successful for-profit applicants from the funding range to make room for the favored non-profit applicant(s) — as necessary to fulfill the 12% quota.

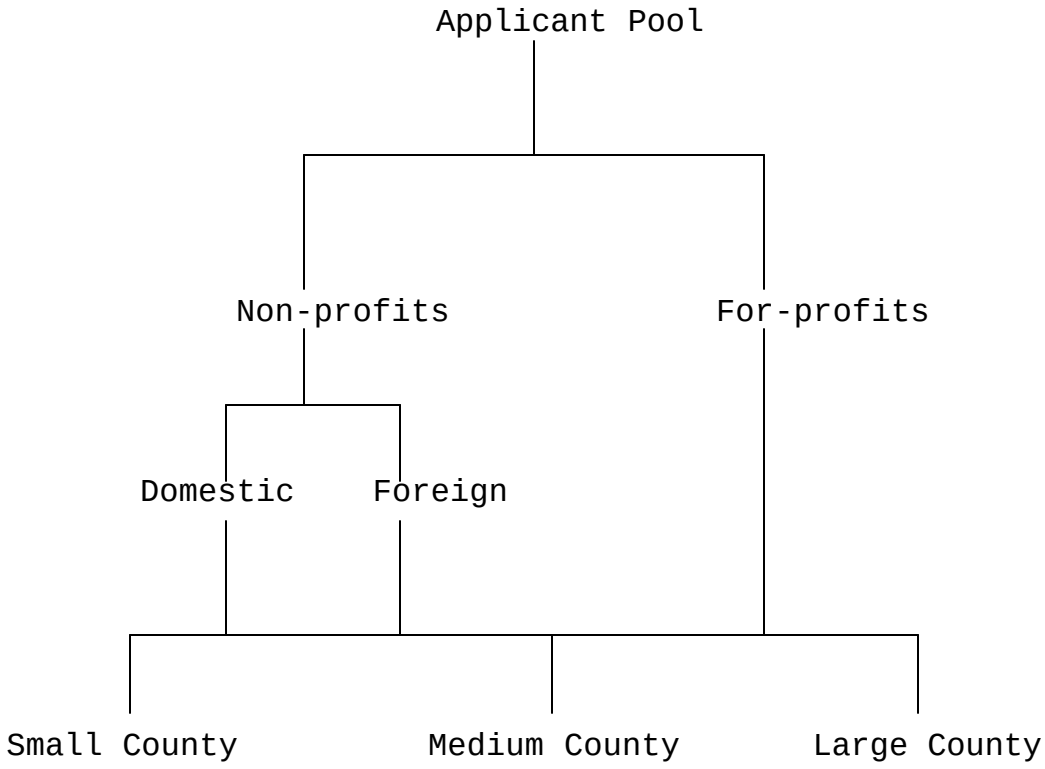
An Aside on Categorical Ranking

15. The separation of applicants into three groups according to the Geographic Set-Asides, and the effect that has on determining which applicants will receive credits, was mentioned above. To better understand the parties' dispute regarding the procedure for satisfying the Non-Profit Set-Aside when, as in 2000, it is necessary to award credits to a putatively unsuccessful non-profit applicant at the expense of a putatively successful for-profit applicant, a second, more detailed look at the implications of categorical ranking will be helpful.

16. Because of the Non-Profit Set-Aside, the set of all qualified applicants ("Applicant Pool") is divided into two classes: non-profit and for-profit corporations. As will be seen, the class of non-profit corporations is further separated, for purposes of the Non-Profit Set-Aside, into two subclasses: domestic non-profits and out-of-state, or foreign, non-profits.

Finally, to repeat for emphasis, all qualified applicants, regardless of class or subclass (if applicable), fall within one of three groups according to the Geographic Set-Asides: Small County, Medium County, and Large County.

17. The following chart depicts the relevant classification of applicants within the Applicant Pool:



Because, as the chart shows, each applicant fits into several categories, applicants may be ranked in order of their comparative scores in a variety of combinations, depending on how they are sorted, e.g. all applicants, all Large County for-profits, all foreign non-profits, etc.

18. Once the Corporation has drawn the tentative funding lines (which, recall, are county group-specific) and determined

preliminarily which applicants will receive funding and which will not, two additional categories exist: applicants within the funding range and applicants below (or outside) the funding range. Owing to the nature of the instant dispute, however, the only non-profits discussed below are those outside the tentative funding range, unless otherwise stated, and the only for-profits considered are those within the tentative funding range, unless otherwise stated. 1/

19. The above makes clear, it is hoped, that a reference to the "highest scored" applicant, without more, may describe many applicants, such as the highest scored domestic non-profit, the highest scored non-profit in the Small County group, the highest scored foreign non-profit in the Large County group, and so on. More information is needed to pinpoint a particular entity.

20. For ease of reference, and to facilitate the discussion and disposition of the present dispute, the following abbreviations will be used in this Recommended Order as shorthand descriptions of applicants' defining characteristics:

Abbreviation	Meaning
NP	Non-profit applicant
FP	For-profit applicant
High-	highest scored
Low-	lowest scored

D	domestic entity (i.e. organized under Florida law)
F	foreign entity (i.e. organized under the law of a state other than Florida)
S, M, and L	Small, Medium and Large County, respectively
!	highest or lowest scored within the indicated category; e.g. High-NP(S!) means highest scored non-profit within the Small County group; Low-FP(S!) means lowest scored for-profit in the Small county group
x, y	variables

Combining these abbreviations provides an increasingly precise description, as more information is added. For example:

Combination	Description
High-NP	Highest scored non-profit in some, unknown category
High-NP[D!]	Highest scored domestic non-profit, unknown group; is not necessarily the highest scored non-profit in the class of non-profits
High-NP[F!]	Highest scored foreign non-profit, unknown group; is not necessarily the highest scored non-profit in the class of non-profits
High-NP[D!](S)	Highest scored domestic non-profit, located in the Small County group; not the highest scored non-profit within the Small County group

High-NP[D](S!)	Highest scored non-profit in the Small County group; is a domestic corporation but is neither the highest scored non-profit nor highest scored domestic non-profit
High-NP[D](S)	Highest scored domestic non-profit in the Small County group; is neither the highest scored non-profit, the highest scored domestic non-profit, nor the highest scored non-profit in the Small County group
Low-FP!	Lowest scored for-profit in the class of for-profits
Low-FP(M!)	Lowest scored for-profit in Medium County group; is not necessarily the lowest scored for-profit in the class of for-profits

The Controversy: Gored Oxen and Leapt-Over Frogs

21. The solution to the problem that arose in the 2000 application cycle when an insufficient number of non-profit applicants wound up initially within the tentative funding range is found in two places: Rule 67-48.032, Florida Administrative Code, and the 2000 QAP. Although the language of the two is not identical, the parties agree that the rule and the pertinent QAP provisions have the same meaning, despite their differences in wording. The undersigned has concluded, however, that the differences, though subtle, substantially affect the outcome of this case. It is necessary, therefore, to read them carefully.

22. Rule 67-48.032(2), Florida Administrative Code, provides in pertinent part:

To ensure that the minimum 10% is set aside, the Corporation has determined that an initial allocation of 12% to qualified Non-Profits will be met. In order to achieve the initial 12% set aside, Applications from Applicants that qualify or whose General Partner qualifies as a Non-Profit entity pursuant to Rule 67.48.002(71), F.A.C., HUD Regulations, Section 42(h)(5)(c), subsection 501(c)(3) or 501(c)(4) of the Code and organized under Chapter 617, Florida Statutes, or organized under similar state law if organized in a jurisdiction other than Florida and meet scoring threshold requirements shall be moved into the funding range, in order of their comparative scores, with Applicants whose Non-Profit entity is organized under Florida law receiving priority over Non-Profit entities of other jurisdictions, until the set-aside is achieved. The last Non-Profit Development that is moved into the funding range in order to achieve the 12% initial set-aside shall be fully funded even though that may result in a higher Non-Profit set-aside. This will be accomplished by removing the lowest scored Application of a for-profit Applicant from the funding range and replacing it with the highest scored Non-Profit Application below the funding range within the applicable Geographic Set-Aside pursuant to the QAP. This procedure will be used again on or after October 1, if necessary, to ensure that the Agency allocates at least 10% of its Allocation Authority to qualified Non-Profit Applicants. Any for-profit Applicant so removed from the funding range will NOT be entitled to any consideration or priority for the receipt of current or future Housing Credits other than placement on the current ranking and scoring list in accordance with its score. Binding Commitments for Housing Credits from a future year will not be issued for Applicants so displaced.

23. Paragraph 2, at page 2, of the Corporation's 2000 QAP states:

> [The Corporation] has determined that an initial allocation of 12% to qualified Non-Profits will ensure that the 10% requirement will be met in the event that all Developments included in the initial 12% do not receive an allocation. In order to achieve the initial 12% set-aside a tentative funding line will be drawn. Then, Applications from Non-Profit Applicants that meet scoring threshold requirements shall be moved into the tentative funding range, in order of their scores with Applicants whose Non-Profit entities are organized under Chapter 617, Florida Statutes, having priority, until the 12% set-aside is achieved. This will be accomplished by moving the lowest scored Application of a for-profit Applicant in the funding range down in ranking so it is ranked below the lowest Non-Profit Applicant within the funding range and moving the highest scored Non-Profit Applicant organized under Chapter 617, Florida Statutes below the funding range within the applicable Geographic Set-Aside pursuant to the QAP up in ranking so it is ranked one ranking space above the for-profit Applicant that was moved down in ranking. If no such Applicant exists, the highest Non-Profit Applicant organized under similar statutes from another state which is below the funding range within the applicable Geographic Set-Aside pursuant to the QAP, will be moved into funding range in the same manner as stated in the previous sentence. This procedure will be used again on or after October 1, 2000, if necessary, to ensure that the [Corporation] allocates at least 10% of its Allocation Authority for 2000 to qualified Non-Profit Applicants. Any for-profit Applicant so removed from the funding range will NOT be entitled to any consideration or priority for the receipt of current or future housing credits other than

> placement on the current ranking and scoring list in accordance with its score. Binding Commitments for housing credits from a future year will not be issued for Applicants so displaced. The last Non-Profit Applicant moved into the funding range, in order to meet the initial 12% set-aside or in order to meet the minimum 10% set-aside after October 1, 2000, will be fully funded contingent upon successful credit underwriting even though that may result in a higher Non-Profit set-aside. After the full Non-Profit set-aside amount has been allocated, remaining Applications from Non-Profit organizations shall compete with all other Applications in the HC Program for remaining Allocation Authority.

24. The Corporation's interpretation of Rule 67-48.032, Florida Administrative Code, and paragraph 2 of the 2000 QAP (collectively, the "Instructions") to determine the procedure for satisfying the Non-Profit Set-Aside in connection with the 2000 application cycle has caused considerable controversy — and led to this proceeding. The controversial interpretation was publicly manifested on September 15, 2000, when the Corporation published a preliminary ranking sheet on its web site which reflected adjustments that its staff had made to fulfill the Non-Profit Set-Aside. Within days, adversely affected applicants were complaining that the Corporation's staff had misinterpreted the Instructions.

25. The Corporation's staff had construed the Instructions to mean that when it is necessary to displace a for-profit

within the tentative funding range to satisfy the Non-Profit Set-Aside, the following procedure must be followed:

> Remove Low-FP!(x!) and replace it with High-NP[D](x). 2/ If there is no domestic non-profit in county group x, then replace Low-FP!(x!) with High-NP[F](x!). 3/

This construction permits High-NP[D!], if there is one, High-NP![F!] if not, to remain outside the funding range, because it might not be in county group x.

26. In practice, the process that the Corporation's staff had settled upon operated, in the circumstances presented, to the detriment of Petitioners. Here is how it worked. After the tentative funding range was established, the lowest scored for-profit in the class of for-profits was in the Small County group. 4/ There were no non-profits, domestic or foreign, in that group to elevate, however, and so Low-FP!(S!) could not be removed; the fall-back procedure was followed. See endnote 4.

27. As it happened, RPK was Low-FP(L!) and had a lower score than Low-FP(M!). Thus, under the Corporation's staff's interpretation of the Instructions, as revealed by the rankings posted on September 15, 2000, High-NP[D](L!) was moved into the funding range in the place of RPK, even though High-NP[D](L!)'s final score was lower than that of Lakesmart — which was High-NP![D!](M!). (Coral Village and Meadow Glen were the second- and third-ranked domestic non-profits, respectively, in the

Medium County Group. Sorted by class, Lakesmart, Coral Village, and Meadow Glen would be ranked first, second, and sixth in the class of non-profit applicants.) 5/

28. The second lowest-scored for-profit in the class of for-profits was also in the Large County group. Thus, it became Low-FP!(L!) after RPK was removed. It, too, was replaced by the Large County non-profits that became, in turn, High-NP[D](L!) as the next highest-ranked non-profit in that group was moved up into the funding range to satisfy the 12% Non-Profit Set-Aside. In all, the Corporation's staff proposed to elevate — and hence award tax credits to — four non-profit applicants whose final scores were lower than Lakesmart's and Coral Village's. One of those four putative beneficiaries had a lower final score than Meadow Glen's.

29. Lakesmart and others who disagreed with the Corporation's staff advanced an alternative interpretation of the Instructions. In their view, to ensure that the Non-Profit Set-Aside is met requires the following maneuver:

> Remove Low-FP(x!) and replace it with High-NP[D!](x). 6/ If there is no domestic non-profit outside the funding range, then replace Low-FP(x!) with High-NP![F!](x!). 7/

This interpretation admits the possibility that Low-FP! might remain in the funding range, because it might not be in county group x.

30. Under this interpretation, favored by all Petitioners, Lakesmart and Coral Village would be elevated into the funding range, rather than being "leap-frogged" by lower-scored non-profits, and RPK would not be displaced. (Of course, Petitioners' interpretation would require that some other for-profit ox be gored — one having a higher score than RPK's.)

31. These competing interpretations of the Instructions were presented to the Corporation's board for consideration at its public meeting on September 22, 2000. After a discussion of the issues, in which members of the public participated, the board voted unanimously to accept the interpretation that the staff had acted upon in preparing the September 15, 2000, rankings. Later in the same meeting the board adopted final rankings, which were prepared in accordance with the approved interpretation, that resulted in the denial of Petitioners' applications for tax credits.

The 1997 Awards: Precedent or Peculiarity?

32. Petitioners maintain that their interpretation of the Instructions is supported by a supposed precedent allegedly set in 1997 that, they say, was binding on the Corporation in 2000.

33. In the 1997 cycle, it so happened that after drawing the tentative funding lines, the sum total of credits sought by non-profits within the preliminary funding range failed to reach the then-required threshold of 10%. Thus, for the first time,

the Corporation faced the need to replace higher-scored for-profits (that were apparently in line for funding) with lower-scored non-profits that otherwise would not have received credits.

34. The QAP that governed the 1997 awards provided for the Non-Profit Set-Aside but was silent on the procedure for satisfying it:

> The Agency will allocate not less than 10% of the state's allocation authority to projects involving qualified, non-profit Applicants, provided they are non-profits organized under Chapter 617, Florida Statutes, and as set forth in Section 42(h)(5) of the Internal Revenue Code, as amended, and Rule Chapter 9I-48, Florida Administrative Code.

Respondent's Exhibit 2, page 8.

35. Rule 9I-48.024(3), Florida Administrative Code (1997), did contain directions for carrying out the required substitution. It prescribed the following procedure for elevating non-profits:

> If 10% of the total Allocation Authority is not utilized by Projects with Non-Profit Applicants, Applications from Non-Profit Applicants that meet scoring threshold requirements shall be moved into the funding range, in order of their comparative scores, until the 10% set-aside is achieved. This will be accomplished by removing the lowest scored Application of a for-profit Applicant from the funding range and replacing it with the highest scored Non-Profit Application below the funding range within the

applicable Geographic Set-Aside pursuant to section (2) above.

Petitioners' Exhibit 1. These provisions will be referred to hereafter as the "1997 Directions," to distinguish them from the Instructions.

36. Gwen Lightfoot was the Corporation's Deputy Development Officer in 1997. In that capacity, she was directly responsible for implementing the rules relating to the award of low-income housing tax credits. To satisfy the Non-Profit Set-Aside, Ms. Lightfoot followed the 1997 Directions as she understood them. In so doing, she sorted the eligible non-profits by class (i.e. without regard to their respective county groups) and ranked them in score order, from the highest scoring project to the lowest scoring project. 8/ Then, Ms. Lightfoot moved the highest scoring non-profit in the class of non-profits to a position immediately above the for-profit with the lowest score in the same geographic set-aside as the favored non-profit so that the non-profit project would be fully funded. That is, she replaced Low-FP(x!) with High-NP!(x!). This process was repeated, moving the next highest ranked non-profit to a position immediately above the lowest-ranked for-profit in the same geographic set-aside as the elevated non-profit, until the Non-Profit Set-Aside was met.

37. Although the Corporation presently argues that its board was not fully informed in 1997 as to the procedure that Ms. Lightfoot followed in fulfilling the mandate of the Non-Profit Set-Aside, a preponderance of evidence established that Ms. Lightfoot's actions were within the scope of her authority and taken in furtherance of her official duties; that the board was aware of what she had done; and that the board took no action to change the results that followed from Ms. Lightfoot's interpretation and implementation of the 1997 Directions. Ms. Lightfoot's application of the 1997 Directions, in short, was not the unauthorized act of a rogue employee. Rather, as a matter of fact, her action was the Corporation's action, irrespective of what any individual board member might subjectively have understood at the time.

38. In the years following the 1997 awards, Rule 9I-48.032, Florida Administrative Code, was re-numbered Rule 67-48.032 and amended three times, the most recent amendment becoming effective on February 24, 2000. As a result, the 1997 Directions evolved into the language of Rule 67-48.032(2) which, though not identical, retains the essential meaning of its predecessor.

39. During the same period, the QAP was also amended three times, the version controlling the 2000 application cycle having been approved by the governor on December 16, 1999, and adopted

by reference in the Florida Administrative Code on February 24, 2000. Unlike the revisions to Rule 9I-48.032(3), however, the changes in the QAP that relate to the issue at hand are significant, because the 2000 QAP sets forth a procedure for fulfilling the Non-Profit Set-Aside when the collective amount of credits sought by non-profits in the tentative funding range falls short of the mandated mark, whereas the 1997 QAP did not.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

41. The parties stipulated to the standing of Petitioners (including Intervenors) to maintain this proceeding, and the evidence established that the substantial interests of each of them were affected by the agency action at issue.

42. Petitioners have the burden of going forward with the evidence as well as the ultimate burden of establishing the basis for their claim, The Environmental Trust v. Department of Environmental Protection, 714 So. 2d 493, 497 (Fla. 1st DCA 1998), and therefore must demonstrate the impropriety of the Corporation's interpretation of the Instructions.

43. Florida courts generally defer to an agency's interpretation of its own rules and the statutes that it administers. See D.A.B. Constructors, Inc. v. State of

Transportation, 656 So. 2d 940, 944 (Fla. 1st DCA 1995); Humana Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 388, 392 (Fla. 4th DCA 1986)(agency's interpretation of its own rule is entitled to great weight and persuasive force). This deference is given to the interpretations of, and meanings assigned to, such rules and statutes by the officials charged with their administration. Pan American World Airways, Inc. v. Florida Public Service Commission, 427 So. 2d 716, 719 (Fla. 1983).

44. From the general principle of deference follows the more specific rule that an agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations. State Board of Optometry v. Florida Society of Ophthalmology, 538 So. 2d 878, 885 (Fla. 1st DCA 1988); see also Suddath Van Lines, Inc. v. Department of Environmental Protection, 668 So. 2d 209, 212 (Fla. 1st DCA 1996). However, "[t]he deference granted an agency's interpretation is not absolute." Department of Natural Resources v. Wingfield Development Co., 581 So. 2d 193, 197 (Fla. 1st DCA 1991). Obviously, an agency cannot implement any conceivable construction of a statute or rule no matter how strained, stilted, or fanciful it might be. Id. Rather, "only a permissible construction" will be upheld by the courts. Florida Society of Ophthalmology, 538 So. 2d at 885.

45. Accordingly, "[w]hen the agency's construction clearly contradicts the unambiguous language of the rule, the construction is clearly erroneous and cannot stand." Woodley v. Department of Health and Rehabilitative Services, 505 So. 2d 676, 678 (Fla. 1st DCA 1987); see also Legal Environmental Assistance Foundation v. Board of County Commissioners of Brevard County, 642 So. 2d 1081, 1083-84 (Fla. 1994)("unreasonable interpretation" will not be sustained).

46. In determining which side has advanced the proper interpretation, it is helpful to reduce the language of the rules (both Rule 9I-48.032(3), Florida Administrative Code (1997), and Rule 67-48.032(2), Florida Administrative Code (2000)) and the QAP to the bare essentials. By removing terms that are not in dispute and abbreviating others, the structure of the pertinent provisions becomes much clearer. Thus:

Rule 9I-48.032(3)

> [NPs] shall be moved into the funding range, in order of their comparative scores, . . . by removing the [Low-FP] and replacing it with the [High-NP] within the applicable Geographic Set-Aside[.]

* * *

Rule 67-48.032(2)

> [NPs] shall be moved into the funding range, in order of their comparative scores, with [NP[D]s] receiving priority over [NP[F]s] . . . by removing the [Low-FP] and replacing it with the [High-NP] within the applicable Geographic Set-Aside[.]

The earlier rule differs from the later version in that it does not require domestic non-profits to be favored over foreign non-profits. The QAP in effect in 1997, however, directed that only domestic non-profits would count towards the Non-Profit Set-Aside, so an instruction to give Florida non-profits priority would not have made sense in 1997. At bottom, as far as the present dispute is concerned, these two rules are identical in meaning. The following discussion examines Rule 67-48.032(2), Florida Administrative Code (2000) (the "Rule"), in detail, but the analysis would not be materially different if the earlier rule were its subject.

47. The QAP in 1997 did not dictate a procedure for elevating non-profits when necessary. But the 2000 version applicable to Petitioners' applications did. Boiled down to its operative terms, the 2000 QAP provides:

> [NPs] shall be moved into the tentative funding range, in order of their scores with [NP[D]s] having priority . . . by moving the [Low-FP] down in ranking . . . and moving the [High-NP[D]] within the applicable Geographic Set-Aside . . . up in ranking[.] If no such Applicant exists, the [High-NP[F]] within the applicable Geographic Set-Aside . . . will be moved into funding range in the same manner as stated in the previous sentence.

Interpreting the Rule

48. Two questions naturally arise upon reading the Rule. One is whether the for-profit to be removed is Low-FP! (which

would necessarily be the lowest scored for-profit in its county group: Low-FP!(x!)) or, instead, one of the applicants fitting the description Low-FP(x!) (which would not necessarily be Low-FP!). The other is whether the non-profit to be moved into the funding range is the sole High-NP[D!](x) or, rather, one of the applicants fitting the description High-NP[D](x). The answers must be found in the phrase "within the applicable Geographic Set-Aside," for that is the only language that establishes a parameter. The problem is, the phrase can be understood reasonably in two ways, as explained below. Consequently, the Rule, standing alone, is ambiguous.

The "Anti-For-Profit" Construction

49. The crucial language may fairly be read as an adjective clause, further modifying High-NP. Under this interpretation, which probably comes more naturally to most readers (and makes the sentence more grammatical) given the proximity of the clause to its apparent object, the phrase "within the applicable Geographic Set-Aside" describes the county group from which High-NP must be drawn; namely, the "applicable" one, whose identity can be deduced as follows. 9/

50. Observe first that the non-profit to be elevated is not necessarily High-NP!, but rather High-NP(x!) — the highest scored non-profit in a particular (i.e. the applicable) county group. However, because the Rule also requires that domestic

non-profits be given priority, and because the highest scored domestic non-profit in the applicable group would not necessarily be the highest scored domestic non-profit in the subclass of domestic non-profits, or even the highest scored non-profit in the applicable group, it next becomes clear that the non-profit to be elevated must fit the description High-NP[D](x). But three domestic non-profits might fit that description, 10/ which means that the applicable group simply cannot be ascertained with reference to the non-profits. 11/ Apparently, therefore, the "applicable" group is intended to match the one from which the lowest scored for-profit, however defined, is removed.

51. Turning to the for-profits, we see that as many as three for-profits may fall within the definition Low-FP(x!), but that only one Low-FP!(x!) can exist at a time. Thus, the Rule logically directs that Low-FP!(x!) be removed, or else it would offer no meaningful direction regarding how to proceed. Once the decision is made that the Rule requires the removal and replacement of Low-FP!(x!), it becomes evident at last that the applicable county group from which to select High-NP[D](x) is the county group matching the one in which Low-FP!(x!) is situated. In other words, if the lowest scored for-profit in the class of for-profits is situated in the Medium County group,

then Low-FP!(M!) will be removed and replaced with High-NP[D](M).

52. Because this interpretation effectively places greater emphasis on removing the for-profit with the lowest possible score as opposed to elevating the non-profit with the highest possible score, its approach (relatively speaking) is "anti" for-profit rather than "pro" non-profit. This is the Corporation’s interpretation.

The "Pro-Non-Profit" Construction

53. Alternatively, the phrase “within the applicable Geographic Set-Aside” may be read an as adverbial clause, modifying the verb “replacing.” Assuming this were the intended meaning, the Rule's drafters, to avoid confusion, might have put the phrase immediately after the verb to be modified, so that the sentence would have been structured like this: NPs shall be moved into the funding range, in order of their comparative scores, by removing the Low-FP and replacing it, within the applicable Geographic Set-Aside, with the High-NP. Although the actual language is perhaps a bit less grammatical, it is nevertheless not unreasonable to construe the crucial phrase as an instruction concerning where the replacing is to occur, i.e. in the applicable group. As with the competing construction discussed above, the applicable group can be deduced, as follows.

54. Initially it can be observed that because the replacing occurs in the funding range and adversely selects a for-profit, under this interpretation the applicable group must be the one in which the for-profit to be removed resides. Thus, the for-profit to be displaced must be the lowest scored for profit in the applicable group, or Low-FP(x!), which would not necessarily be the lowest scored for-profit in the class of for-profits. Indeed, as many as three for-profits might fit the description Low-FP(x!). Therefore, the applicable group cannot be determined with reference to the for-profits but instead is apparently intended to match the one in which the highest scored non-profit to be elevated, however defined, is situated.

55. The Rule requires that the "highest scored" non-profit be elevated — a general description that without more might mean, depending on the context, the highest scored non-profit in a particular county group (in which case there might be three non-profits fitting the description), or the single highest scored non-profit in the class of non-profits, among other possibilities. But the Rule also requires that domestic non-profits be given priority, and it does not make the choice group-specific. For those reasons, there is only one eligible beneficiary at a time: the highest scored domestic non-profit, or High-NP[D!](x). Therefore, the Rule logically directs that High-NP[D!](x) be moved into the funding range, or else it would

offer no meaningful guidance. Accordingly, the applicable county group in which to replace Low-FP(x!) must be the county group matching the one in which High-NP[D!](x) is located. In other words, if the highest scored domestic non-profit in the subclass of domestic non-profits is situated in the Small County group, then Low-FP(S!) will be removed and replaced with High-NP[D!](S).

56. Because this interpretation effectively places greater emphasis on elevating the non-profit with the highest possible score as opposed to removing the for-profit with the lowest possible score, its approach (relatively speaking) is "pro" non-profit rather than "anti" for-profit. This is Petitioners' interpretation.

Interpreting the QAP

57. The QAP is similar but not identical to the Rule. The differences in terminology are subtle – but the subtle differences materially affect the interpretation.

58. The most striking distinction between the QAP and the Rule is that the QAP substitutes a "moving down – moving up" formula in place of the Rule's "removing – replacing" formula. The action being described is clearly the same. But the QAP's terminology leads to an important difference in the sentence structure. The verb ("moving") is separated from the adverbs ("up" and "down") by the object to be acted upon: moving-

object-up, moving-object-down. This creates two "sandwiches", the insides of which are: (1) the Low-FP, which shall be moved down; and (2) the High-NP[D] within the applicable Geographic Set-Aside, which shall be moved up.

59. As with the Rule, the parameter for determining which for-profit to move down and which non-profit to move up is ultimately the phrase "within the applicable Geographic Set-Aside." But unlike the Rule, the crucial phrase in the QAP can only be read, reasonably, as an adjective clause, further modifying High-NP[D] (or the term “funding range,” see endnote 10). The QAP rendered untenable the construction of "within the applicable Geographic Set-Aside" as an adverbial clause by tying the determinative phrase together with High-NP[D] in the middle of the "moving-object-up" sandwich. To interpret the phrase as an instruction regarding where to do the moving would be contrived and unnatural, divorcing the language from its common meaning; ordinary people attempting to communicate that thought would not have written the sentence as it stands in the QAP. 12/ Rather, as placed, the phrase "within the applicable Geographic Set-Aside" is plainly part of the description of the object to be moved; it informs the reader from which group the non-profit to be elevated must be drawn. Cf. Wright & Seaton, Inc. v. Prescott, 420 So. 2d 623, 629 (Fla. 4th DCA 1982) ("[G]rammatical construction of contracts generally requires

that a relative or qualifying phrase be construed as referring to its nearest antecedent.").

60. This plain-language understanding of the QAP is underscored and confirmed by the next sentence, which says: "If no such Applicant exists" — meaning, plainly, that if there is no domestic non-profit within the applicable county group to move up in ranking — then the High-NP[F] "within the applicable Geographic Set-Aside . . . will be moved into the funding range as stated in the previous sentence." Even if it were possible (and it is not) reasonably to construe the words "such applicant" to mean, simply, "domestic non-profit," rather than High-NP[D](x), there is no way to read the phrase "within the applicable Geographic Set-Aside," when it appears for the second time in back-to-back sentences, as anything but an adjective clause further modifying High-NP[F]; it is not susceptible to interpretation as an adverbial clause. 13/

61. Once accepted that the phrase "within the applicable Geographic Set-Aside" is an adjective clause further describing the object to be acted upon, it becomes clear that the non-profit to be moved up must be the highest scored domestic non-profit in the applicable group; that is, it must fit the description High-NP[D](x). From that point, the analysis is identical to that which informs the "anti-for-profit" construction discussed above in connection with the

interpretation of the Rule. The end result, as we have seen already, is that the applicable county group "x" from which to select High-NP[D](x) is the county group matching the one in which Low-FP!(x!) is situated. Under the QAP, the identity of the non-profit beneficiary is determined with reference to the for-profit victim, not the other way around. The mindset of the QAP, in other words, is "anti" for-profit, as opposed to "pro" non-profit.

Conflating the Rule and QAP

62. The Rule and paragraph 2, at page 2, of the QAP, which comprise the Instructions, are plainly in pari materia; that is, they pertain to the same subject and have a common goal. Accordingly, to the extent reasonably possible, the Rule and the QAP must be construed together as a cohesive, internally consistent whole. See, e.g., Mehl v. State, 632 So. 2d 593, 595 (Fla. 1993); Lincoln v. Florida Parole Commission, 643 So. 2d 668, 671 (Fla. 1st DCA 1994).

63. The two components of the Instructions, as should be evident, are not in conflict. Although the Rule is ambiguous, in that it reasonably may be interpreted in more than one way, one of the two permissible constructions thereof that the parties have advanced matches precisely the unambiguous meaning of the QAP. Under a unified construction, therefore, the QAP resolves the Rule's ambiguity in favor of their common ground.

Taken together, the Instructions plainly provide that, when elevating a non-profit into the funding range to satisfy the Non-Profit Set-Aside, the fortunate non-profit must be selected from the county group corresponding with that of the unfortunate for-profit with the lowest score in the class of for-profits, which will be displaced. The Corporation correctly interpreted the Instructions in the 2000 application cycle.

64. The Corporation's interpretation of the 1997 Directions, with which Petitioners' present position is in enthusiastic accord, does not demand a different result. True, in satisfying the Non-Profit Set-Aside in 1997, the Corporation followed a permissible interpretation of the ambiguous Rule 9I-48.032(3), Florida Administrative Code (1997). 14/ And from that premise, a plausible argument can be made that the Corporation's interpretation and application of the 1997 Directions revealed the intent behind Rule 9I-48.032(3), and therefore that proof of the methodology used in 1997 should be received and considered as extrinsic evidence of the intended meaning of Rule 67-48.032(2). Cf. Mayflower Corp. v. Davis, 655 So. 2d 1134, 1137 (Fla. 1st DCA 1994), rev. dismissed, 652 So. 2d 817 (1995)(interpretation parties give to contract may be best indication of their intentions); Vienneau v. Metropolitan Life Ins. Co., 548 So. 2d 856, 859 (Fla. 4th DCA 1989)(where terms of contract are doubtful, court may consider

interpretation placed on contract by the parties, provided such interpretation is not completely at variance with legal principles of contract interpretation).

65. But even if it were assumed for argument's sake that an agency's one-time interpretation of an ambiguous rule on the first occasion calling for its application establishes a meaning from which the agency cannot thereafter depart except by validly adopting a subsequent rule change, 15/ see Cleveland Clinic Florida Hospital v. Agency for Health Care Administration, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996), rev. denied, 695 So. 2d 701 (1997), the Corporation did in fact validly adopt a subsequent rule when it promulgated paragraph 2, at page 2, of the QAP after the 1997 awards and before the 2000 application cycle. In other words, the Corporation did that which the Cleveland Clinic case instructs an agency to do when it changes its mind about an earlier established policy, practice, or procedure. Consequently, the Corporation's interpretation of the 1997 Directions, reasonable though it was at the time, lost whatever precedential value it might have had upon the adoption of the unambiguous language contained in paragraph 2 of the 2000 QAP.

66. In sum, even if it were decided that the 1997 awards had fixed the meaning Rule 9I-48.032(3) — and hence Rule 67-48.032(2), Florida Administrative Code — the more recently

adopted language of the QAP unambiguously expresses the Corporation's intent and thus must prevail as against a prior inconsistent interpretation. See McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994)(when two statutes are in conflict, later promulgated statute should prevail as last expression of legislative intent).

Conclusion

67. Both sides' interpretations can produce a result that seems unfair, unjust, or unreasonable. But set-asides, by their nature, are not fair to the applicant that is displaced in favor of another which is preferred in the service of a perceived greater public good. Ultimately, therefore, whether it is more desirable to discriminate against the lowest scored for-profit in the class of for-profits, as the Corporation has decided, or to give preferential treatment to the highest scored (domestic if possible, foreign if necessary) non-profit, as Petitioners would have liked, is simply a policy decision. The Instructions, construed together as a whole, clearly convey the Corporation's policy choice, the wisdom of which is not at issue here. The Corporation properly followed its Instructions in the 2000 Application cycle.

RECOMMENDATION

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

dismissing the petitions of Petitioner Lakesmart, Petitioner RPK, and Intervenors Meadow Glen and Coral Village.

DONE AND ENTERED this 7th day of February, 2001, in Tallahassee, Leon County, Florida.

JOHN G. VAN LANINGHAM
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2001.

ENDNOTES

1. To make the point without the distraction of unnecessary details, the example in the text ignores the potential effects of other set-asides and the special targeting goals.

2. Ignoring non-profits within the funding range and for-profits below the tentative funding lines is appropriate because none of them is affected by the disputed procedure for moving non-profits into the funding range to satisfy the Non-Profit Set-Aside. Under both of the competing methods for doing that, the former are never displaced and the latter are never elevated.

3. There is only one lowest scored for-profit in the class of for-profits. In contrast, there may be as many as three domestic non-profits that can be described as the highest scored domestic non-profit in a particular county group, i.e. that fit the description High-NP[D](x). Because High-NP[D](x) must be drawn from the same county group as Low-FP!(x!) — no matter what x is, x must equal x — the county group placement of Low-FP!(x!) determines which High-NP will be moved into the funding range.

4. If there were no non-profits in the county group in which Low-FP! was located — i.e. a Low-FP!(y!) where there was no High-NP(y!) — then the Corporation would remove the Low-FP(x!) having the lowest score (there might be two from which to choose). This happened in 2000, where Low-FP! was in the Small County group, and there were no Small County non-profits to elevate into the funding range. The Low-FP(x!) with the lowest score happened to be in the Large County group.

5. There were lower scored for-profits in the class of for-profits that were below the tentative funding line, but these are not being considered. See paragraph 18, supra.

6. There was a Large County non-profit with a higher final score than Lakesmart's, but it was within the tentative funding range and hence has been disregarded in the discussion. See paragraph 18, supra.

7. There is only one highest scored domestic non-profit (if there are any non-profits outside the funding range). In contrast, there may be as many as three for-profits that can be described as the lowest scored for-profit in a particular county group, i.e. that fit the description Low-FP(x!). Because Low-FP(x!) must be drawn from the same county group as High-NP[D!](x), the county group placement of High-NP[D!](x) determines which Low-FP will be taken out of the funding range.

8. If there were no for-profits in the county group in which High-NP[D!] (or, alternatively, High-NP![F!]) was located — e.g. a High-NP[D!](y) where there was no Low-FP(y!) — then presumably Petitioners would have the Corporation remove Low-FP(x!) and replace it with either the High-NP[D](x) having the highest score (there might be two from which to choose) or with the High-NP[F](x!) having the highest score (again, there might be two from which to choose).

9. Under the QAP in effect at the time, only domestic non-profits could be elevated into the funding range to satisfy the Non-Profit Set-Aside, so presumably only applicants organized under Florida law were ranked. For that reason, the discussion of the 1997 process disregards the “domestic-foreign” distinction.

10. Because the discussion considers only non-profits outside the funding range, see paragraph 18, supra, the words “below the funding range” were omitted from the abstracts of the rules and QAP that preceded this analysis. It might be noted, however,

that as an adjective clause the phrase “within the applicable Geographic Set-Aside” could be interpreted (and perhaps makes better sense) as a modifier of the term “funding range,” so that in practice one would first identify the applicable funding range (for example, the funding range for the Small County group) and then elevate the highest scored domestic (or foreign) non-profit below that funding line. But, having identified this nuance, it will be recognized that whether the phrase “within the applicable Geographic Set-Aside” modifies “funding range” or “highest scored Non-Profit Application,” the end result is exactly the same; either way, the phrase describes the county group from which High-NP must be drawn. Therefore, this particular technicality will not be pointed out in the text.

11. One of these, of course, would be High-NP[D!], which might also (but would not necessarily) be High-NP![D!]. If a domestic non-profit were the highest scored non-profit in the class of non-profits, then it would also be the highest scored non-profit in its county group.

12. It cannot be assumed that the Rule requires the elevation of the highest scored domestic non-profit in the subclass of non-profits, making the county set-aside in which High-NP[D!] resides the applicable group from which to draw the domestic non-profit to be elevated, because that would be beg the question.

13. If "moving" and "up" were not separated, i.e. if the QAP instructed the reader to move up in ranking the High-NP[D] within the applicable group, then the QAP might be ambiguous in the way the Rule is ambiguous.

14. To reach a contrary conclusion, the QAP would have needed to say, in effect: If there is no domestic non-profit outside the funding range, then the High-NP![F!] will be moved into the funding range, within the applicable Geographic Set-Aside. The actual language of the QAP does not express this thought.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.