STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

NATIONAL DEVELOPMENT FOUNDATION, INC.,

Petitioner,

vs. Case No. 16-3099BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for an informal final hearing on June 22, 2016, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this protest are, first, whether Respondent clearly erred in determining that Petitioner's application for funding, which had failed to include all of the required

financial information concerning its "non-corporation" lender, was ineligible for consideration due to a material, nonwaivable deviation from the specifications of the solicitation; if Petitioner's application was not, in fact, materially nonresponsive, then it will be necessary to decide whether Respondent should exercise its discretion to waive the minor irregularity in Petitioner's application.

## PRELIMINARY STATEMENT

On January 22, 2016, Respondent Florida Housing Finance Corporation issued Request for Applications 2016-101, which invited developers to compete for funding being made available through the HOME Investment Partnerships Program, for the purpose of facilitating the construction of low-income rental housing in rural areas.

On May 6, 2015, Respondent announced its intent to select five applicants for funding, while simultaneously rejecting Petitioner's application as nonresponsive and thus ineligible to be approved for an award. Thereafter, Petitioner timely notified Respondent of its intent to challenge the rejection of its application, and on May 23, 2016, Petitioner filed a formal written protest alleging that its application is not materially nonresponsive, but at worst has a minor irregularity which Petitioner can and should waive, as Petitioner waived the same

minor irregularity in at least one other contemporaneous situation.

The case was referred to the Division of Administrative Hearings ("DOAH") for a hearing not involving disputed issues of material fact pursuant to section 120.57(2), Florida Statutes. The protest petition was filed on June 6, 2016, and three days later the undersigned set the final hearing for June 22, 2016.

The final hearing took place as scheduled, with both parties present. The parties stipulated to a number of facts as set forth in their Joint Pre-hearing Stipulation, and to the extent relevant these undisputed facts have been incorporated herein. Joint Exhibits 1 through 10 were admitted into evidence with the consent of all parties, as were Petitioner's Exhibits 1 through 5.

No witnesses testified because, as the parties agreed, no material historical facts are in dispute.

Proposed recommended orders were due on June 30, 2016. Each party timely filed a Proposed Recommended Order, and these were considered during the preparation of this Recommended Order, as was the final hearing transcript filed on June 30, 2016.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2016.

## FINDINGS OF FACT

1. Respondent Florida Housing Finance Corporation ("FHFC") is a statutorily created, public corporation whose mission is to dispense financial assistance intended to create affordable housing opportunities in the state of Florida.

2. On January 22, 2016, FHFC issued Request for Applications 2016-101 (the "RFA"), whose full title——"Home Financing to Be Used for Rental Developments in Rural Areas"—— generally describes the developments for which FHFC expects to lend approximately $15 million available through the HOME Investment Partnerships Program. The loans are to be made on a competitive basis to selected applicants proposing to construct affordable housing in accordance with the specifications of the RFA, FHFC's generally applicable standards, and all other governing laws. Applications were due on February 25, 2016.

3. Applicants were required to submit a completed and executed application, together with all applicable attachments. One part of the application, which is relevant to the instant dispute, comprised a multipage Development Cost Pro Forma ("Pro Forma"). To complete the Pro Forma, applicants needed to itemize their projected development costs and disclose the sources and amounts of their anticipating funding, the total of which was supposed to equal or exceed expected costs.

4. The RFA divided lenders into two mutually exclusive classes: (a) Regulated Mortgage Lenders, a category which consists essentially of standard banks and credit unions whose operations are overseen by state or federal agencies that regulate financial institutions; and (b) all other lenders, referred to in the RFA as "Non-Corporation" sources. If an applicant chose to rely upon Non-Corporation funding for its project, then it was required under the RFA to provide evidence of the lender's ability to fund the loan, including the lender's financial statements. The failure to submit sufficient evidence of a Non-Corporation lender's wherewithal to finance the project constituted grounds for FHFC not to count that lender as a funding source, which might create a funding shortfall that would render the applicant ineligible.

5. FHFC received nine applications in response to the RFA, including that of Petitioner National Development Foundation, Inc. ("NDF"), an Oviedo-based, Florida corporation that builds affordable housing. In accordance with the RFA, FHFC selected a review committee to evaluate, score, and rank the nine applications.

6. NDF proposed to obtain a first mortgage loan from Neighborhood Lending Partners, Inc. ("NLPI"), to provide both construction and permanent financing for a 30-unit apartment complex to be developed in Macclenny, Florida. NLPI is a multi-

bank lending consortium that provides financing to developers of affordable housing. Although NLPI is not a Regulated Mortgage Lender, its member banks are in that category. Nevertheless, it is undisputed that NLPI is a Non-Corporation lender for purposes of the RFA under consideration. Consequently, NDF was required to submit evidence of NLPI's ability to fund the mortgage loan.

7. NDF provided a detailed Term Sheet from NLPI, which described the proposed financing. NDF did not, however, provide NLPI's financial statements with its application. There is no dispute that NDF's application did not strictly conform to the RFA's specifications in this regard. As will be seen, the most hotly contested issue here is whether this deficiency constitutes a nonwaivable material deviation or, rather, a minor irregularity which could be waived at FHFC's discretion.

8. FHFC's review committee determined that, because NLPI did not meet the definition of a Regulated Mortgage Lender, and because NDF had failed to provide the necessary evidence of NLPI's ability to fund, NDF's proposed Non-Corporation funding should not be counted, which effectively removed essential first mortgage financing from NDF's Pro Forma, creating a disqualifying funding shortfall for the applicant. As a result, the committee deemed NDF's application ineligible for lack of financing.

9. At its meeting on May 6, 2016, FHFC's Board of Directors (the "Board"), as urged by its staff, approved the review committee's recommendations with regard to the distribution of funds being allocated under the RFA, including the recommendation to reject NDF's application as ineligible to receive funding. No discussion was had concerning the relative materiality of NDF's failure to provide evidence of NLPI's ability to fund. The Board's action, however, strongly implies that it believed the defect was a nonwaivable material deviation, which is how, in this proceeding, FHFC currently characterizes the deficiency.

10. The question of whether the Board clearly erred in determining that NDF's application was materially nonresponsive is made more complicated by the undisputed fact that, during the meeting on May 6 at which NDF's application was rejected, the Board voted to award funds being made available under a separate program to an applicant (Grove Pointe) whose application had the very same deficiency as NDF's. The material facts of that case, in brief, are that Grove Pointe applied under RFA 2016-104 (the "SAIL RFA") for State Apartment Incentive Loan funding. Grove Pointe was the only applicant. The SAIL RFA required documentation of a Non-Corporation lender's ability to finance, just as did the RFA in this case. Like NDF, Grove Pointe submitted a mortgage loan proposal from NLPI, but failed to

provide the consortium's financial statements. The review committee accordingly declined to count the funds Grove Pointe expected to borrow from NLPI, thereby creating a funding shortfall which, in the committee's view, rendered Grove Pointe ineligible for an award. In short, Grove Pointe and NDF ended up in the same situation, for the same reason, after the respective review committees had completed their assigned tasks.

11. At the Board meeting, however, the two similarly situated applicants' fortunes diverged, as staff recommended that the Board offer funding to Grove Pointe on the condition that, within 21 days after the meeting, Grove Pointe cure the deficiency in its application by submitting acceptable evidence of NLPI's ability to provide financing. The Board adopted this recommendation, tacitly waiving the irregularity in Grove Pointe's application (the "Grove Pointe Decision").

12. The rationale for the Grove Pointe Decision is not entirely clear. When a variance exists between the response to a competitive solicitation and the specifications of the request, the agency must, as a threshold matter, determine whether the variance is a "material deviation" or a "minor irregularity." This is because a material deviation cannot be waived; a response suffering from a material deviation is fatally flawed and must be rejected. If the agency determines, as a matter of ultimate fact, that the deviation is material,

therefore, the inquiry is over. If, however, the agency determines that the deviation is not material, but rather is merely a minor irregularity, then it must make another decision, namely whether to waive the minor irregularity, which requires the exercise of discretion. In making the Grove Pointe Decision, the Board did not explicitly decide the threshold question, and even here, in this proceeding, FHFC has not plainly taken an unequivocal position as to whether, in its view, Grove Pointe's failure to provide NLPI's financial statements was a material deviation or a minor irregularity.

13. Careful examination of the Grove Pointe Decision is necessary to assess the strength of NDF's position, which relies heavily upon that "precedent." That is, NDF argues that considerations of consistency and fairness (sometimes called administrative stare decisis) require FHFC to follow the Grove Pointe Decision, which NDF believes is on all fours, in determining NDF's substantial interests. Simply put, it is NDF's contention that FHFC, having approved Grove Pointe's identically defective application, must likewise approve NDF for funding. For its part, FHFC argues that the Grove Pointe Decision is distinguishable and hence inapposite. (Notably, FHFC does not suggest that the decision to fund Grove Pointe was incorrect and should be disregarded for that reason.) Because the parties disagree as to what the Board "held" in the other

case, it is important to ascertain the reasoning behind the Grove Pointe Decision.

14. The record shows that the Grove Pointe Decision was taken on three grounds——although one was arguably something of an afterthought, and the others are really two sides of the same coin. The interrelated reasons boil down to the fact that because Grove Pointe was the sole applicant, FHFC could fund Grove Pointe, despite its ineligibility, without having to deny any other applicant's request for funding. Grove Pointe's win, in other words, was not someone else's loss——not, at least, someone identifiable. The absence of other applicants led FHFC to conclude that awarding funding to Grove Pointe would not give the developer a "competitive advantage" over other applicants. Thus, one basis for the Grove Pointe Decision was the supposed lack of a competitive advantage.

15. That there was more funding available than could be awarded to all the applicants——or to the one applicant, as it happened——also prompted FHFC to invoke the "Returned Allocation provision" in the SAIL RFA, which stated as follows:

> Funding that becomes available after the Board takes action on the Committee's recommendations, due to an Applicant withdrawing its Application, an Applicant declining its Invitation to enter credit underwriting, or an Applicant's inability to satisfy a requirement outlined in this RFA, will be distributed as approved by the Board.

Putting aside whether this language actually applies under the circumstances facing FHFC at the time, the reasons for the agency's reliance on the Returned Allocation provision focused, again, on the fact that Grove Pointe was the only applicant, which meant that there was lots of leftover money to distribute, and no one to complain if Grove Pointe received funding, so FHFC might as well get the deal done with the applicant it had, notwithstanding Grove Pointe's apparent ineligibility.

16. The no competitive advantage/unallocated balance grounds can be summed up as the "no harm, no foul" rationale, which, ultimately, provided the principal justification for the Grove Pointe Decision. Notice, however, that this rule applies equally to the waiver of *any* variance, whether a material deviation or a minor irregularity, for the determinative factor is not the significance of the variance, but rather on how its waiver actually——i.e., not in theory, but in fact——would affect competitors.[1/] As mentioned, FHFC has never clearly articulated its determination regarding the materiality of the Grove Pointe application's deficiency, leaving open two possibilities: (a) FHFC believes it has the authority to waive a material deviation where doing so results in "no harm"; or (b) FHFC believes that a variance which, if waived, would result in "no harm" is, for that reason, a minor irregularity that, in the exercise of sound discretion, should be waived. Either of

these, therefore, could be considered the rule of the Grove Pointe Decision.

17. The third basis for funding Grove Pointe, which the Board considered but arguably did not view as essential, was FHFC's favorable experience with NLPI, whose ability to provide financing had been proven in past projects, and whose financial statements FHFC had reviewed within the preceding 17 months. FHFC, in other words, was already familiar with the fact of NLPI's fiscal health despite Grove Pointe and NDF's failure to provide evidence thereof. NDF interprets the Grove Pointe Decision as standing for the proposition that the failure to provide financial statements for NLPI is a minor irregularity that should be waived because FHFC knows from experience that NLPI is able to fund mortgage loans.

## CONCLUSIONS OF LAW

18. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(2), and 120.57(3), Florida Statutes. See also Fla. Admin. Code R. 67-60.009. Pursuant to a contract between DOAH and FHFC, administrative law judges serve as informal hearing officers in matters, such as this, not involving disputed issues of material fact.

19. NDF's substantial interests are being determined in this proceeding, and therefore it has standing to maintain a protest.

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

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

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

22. As for whether NDF's application is fatally nonresponsive, it has long been recognized that "although a bid containing a material variance is unacceptable, not every

deviation from the invitation to bid is material. [A deviation] is material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." Tropabest Foods, Inc. v. Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986). "The test for measuring whether a deviation in a bid is sufficiently material to destroy its competitive character is whether the variation affects the amount of the bid by giving the bidder an advantage or benefit not enjoyed by other bidders." Harry Pepper & Assocs., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1193 (Fla. 2d DCA 1977).

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

> [F]irst, whether the effect of a waiver would be to deprive the municipality of its assurance that the contract will be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.
>
> [S]ometimes it is said that a bid may be rejected or disregarded if there is a material variance between the bid and the advertisement. A minor variance, however, will not invalidate the bid. In this context a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition.

Robinson Elec. Co. v. Dade Cnty., 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982), quoting 10 McQuillan, Municipal Corporations § 29.65 (3d ed. rev. 1981)(footnotes omitted).

24. With these principles in mind, the undersigned rejects as untenable the notion that the Grove Pointe Decision is precedent for waiving a *material deviation*, for FHFC is not legally authorized to do that; such an action would be a clear abuse of discretion.[2/] The undersigned concludes, instead, that FHCF *must* have determined that the deficiency in Grove Pointe's application was a minor irregularity, which could be waived.

25. The question of whether FHFC *correctly* deemed Grove Pointe's deficiency a minor irregularity is a close one. Of course, the undersigned is not reviewing the Grove Pointe Decision, nor is he (or FHFC) bound to follow it, but NDF makes a valid point about administrative stare decisis, which counsels in favor of consistent results is comparable cases. See, e.g., Gessler v. Dep't of Bus. & Prof'l Reg., 627 So. 2d 501, 504 (Fla. 4th DCA 1993)("While it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent the legislature intends there be a principle of administrative stare decisis in Florida."); Bethesda Healthcare Sys. v. Ag. for Health Care Admin., 945 So. 2d 574, 576 (Fla. 4th DCA 2006)("Gessler . . .

applies 'the fundamental principle that like cases should be treated alike.'"). The undersigned would urge FHFC to follow its analogous orders for the sake of consistency, unless and to the extent he finds them to be erroneous. So, it is necessary to consider the soundness of the Grove Pointe Decision.

26. If the undersigned had been called upon to make a de novo determination as to whether Grove Pointe's application should be rejected, he might have reached a different conclusion than FHFC, because specifications that have the capacity to act as a barrier to access into the competition, as the requirement of providing evidence of a Non-Corporation lender's financial strength arguably did, should generally be considered material and nonwaivable. See Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Adm. Hear. LEXIS 161, 35 (Fla. DOAH Mar. 19, 2007; BCSB May 8, 2007). FHFC defends the decision to waive Grove Pointe's failure to submit evidence of ability to fund by invoking the no-harm rule, which though pragmatic overlooks the "forgotten developer" who would have applied but for the requirement to provide financial statements for a Non-Corporation lender.

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

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

28. By focusing on the wrong consequences, the no-harm rule is, ironically, both overinclusive and underinclusive. It is overinclusive because in non-zero-sum situations, such as that which arose from the SAIL RFA, *any* deviation could conceivably be deemed immaterial and then waived, consistent with the agency's risk tolerance. It is underinclusive because in zero-sum situations, the waiver of *any* deficiency, however minor, which allows the beneficiary of the waiver to win (that is, any *meaningful* waiver) necessarily harms the strictly

compliant competitor who would have won the award if the noncompliant party were disqualified. Since zero-sum contests are more common in the procurement context than non-zero-sum situations, consistent application of the no-harm rule likely would (or should) result in more deviations being found material than before, including even relatively trivial irregularities that otherwise would have been considered minor.

29. Consequently, the undersigned rejects the no-harm rule as inconsistent with generally applicable procurement law.

30. That leaves, as a basis for justifying the treatment of the Grove Pointe deficiency as a minor irregularity, FHFC's favorable experience with NLPI, which gave the agency assurance that NLPI——and hence Grove Pointe——would probably be able to perform as promised and develop housing as described in the SAIL RFA. Reliance on matters extrinsic to a competitive response is suboptimal, an expedient to which resort should be sparing, preferably limited to facts which are beyond reasonable dispute and outside of the applicant's or bidder's control. Whether NLPI's fiscal health is beyond genuine dispute is, unfortunately, a question which the undersigned cannot answer independently based on the evidence of record.

31. The undersigned strongly prefers not to conclude that the Grove Pointe Decision was incorrect, however, given that neither party takes such a position. Therefore, because the

Grove Pointe Decision, as it relates to the nonmaterial nature of the Grove Pointe application's deficiency, can be regarded as correct if FHFC's knowledge of NLPI's ability to fund is deemed a sufficient substitute for the evidence that Grove Pointe (and NDF) failed to provide with their respective applications, the undersigned concludes that FHFC properly deemed the Grove Pointe application's nonconformity a waivable minor irregularity.

32. On this point, the Grove Pointe Decision is indistinguishable from the instant case, as NDF's application is identically nonconforming. Logically, NLPI cannot simultaneously be both financially sound (Grove Pointe) and financially suspect (NDF). Thus, what was a minor irregularity in the other case must be the same here. FHFC's determination to the contrary——namely that the NDF is ineligible due to a material deviation in its application (i.e., the omission of proof of NLPI's ability to fund)——was clearly erroneous.

33. It is concluded, on the authority of the Grove Pointe Decision, that the NDF application's nonconformity is an immaterial, waivable defect.

34. The posture of this matter before FHFC was such that the agency never exercised its discretion to waive, or not to waive, the minor irregularity in NDF's application. The undersigned is not prepared to say that the Grove Pointe Decision compels FHFC to waive the minor irregularity in this

case, for there are distinguishing factors, the main one being that the situation here is, apparently, a zero-sum game, where NDF's win would be another applicant's loss.

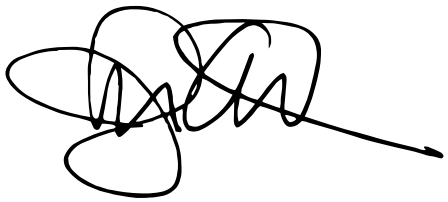
35. The undersigned does not believe that, as a general principle, minor irregularities should be waived only in non-zero-sum situations. It must be conceded, however, that following such a rule probably would not be arbitrary or capricious. As well, the undersigned recognizes that FHFC is in a better position than he to determine whether minor irregularities generally should *not* be waived if doing so would negatively affect competitors whose applications are fully responsive. Thus, while the undersigned concludes that, as FHFC dealt with Grove Pointe, so too should it deal with NDF, his recommendation to accept NDF as an eligible applicant must be qualified to account for FHFC's discretionary authority as it relates to this issue.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order (i) determining that NDF's failure to include with its application evidence of NLPI's ability to lend funds to NDF constitutes a minor irregularity and (ii) waiving the minor irregularity on the condition that NDF supply the missing information within 21 days after the

entry of the final order; or, alternatively, stating the facts and circumstances upon which its discretionary decision *not* to waive the minor irregularity has been based, so that the outcome will not appear to be arbitrary or capricious, and also to enable a reviewing court to determine whether or not the agency's discretion was abused.

DONE AND ENTERED this 18th day of July, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of July, 2016.

ENDNOTES

[1/] Grove Pointe, as said, was the only applicant for the funding offered under the SAIL RFA, but the no-harm rule works just as well whenever the number of applicants is less than or equal to the number of possible awards, because in such non-zero-sum situations making a winner out of a nonresponsive applicant does not make any other competitor a loser. So, for example, if two eligible applicants had been in competition with Grove Pointe and there were sufficient monies available to fund all three,

then waiving the deficiency in Grove Pointe's application would not take anything from the other applicants and therefore, presumably, would be justified under the no-harm rule.

[2/] While the undersigned has doubts about the applicability of the Returned Allocation provision to the Grove Pointe situation, he is certain that the provision——which says nothing about waiving deficiencies——cannot be relied upon as authority for waiving a material deviation.

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NOTICE OF RIGHT TO FILE OBJECTIONS

All parties have the right to submit written objections within 5 days from the date of this Recommended Order. Any objections to this Recommended Order should be filed with the agency that will issue the final order in this case and shall be filed and served exclusively by email.