

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON OAKS, LLC; AND AMERICAN
RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

vs.

Case No. 18-2966BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ARBORS AT HESTER LAKE, LLC;
COLONNADE PARK, LTD; HTG
CREEKSIDE, LLC; HTG SUNSET, LLC;
HARPER'S POINTE, LP; AND BLUE
SUNBELT, LLC,

Intervenors.

_____/

STERLING TERRACE, LTD; AND
STERLING TERRACE DEVELOPER, LLC,

Petitioners,

vs.

Case No. 18-2967BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ARBORS AT HESTER LAKE, LLC;
COLONNADE PARK, LTD; HARPER'S
POINTE, LP; HTG CREEKSIDE, LLC;
HTG SUNSET, LLC; BLUE SUNBELT,
LLC; AND CLERMONT RIDGE, LTD,

Intervenors.

_____/

RECOMMENDED ORDER

A duly-noticed final hearing was conducted in this case on July 11, 2018, in Tallahassee, Florida, by Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

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Florida Housing Finance Corporation
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For Intervenors HTG Sunset, LLC; and HTG Creekside, LLC:

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STATEMENT OF THE ISSUES

Whether Respondent, Florida Housing Finance Corporation's ("Florida Housing"), decision to award funding, pursuant to Request for Applications 2017-111 ("the RFA"), to HTG Sunset,

LLC ("Sunset Lake"); HTG Creekside, LLC ("Oaks at Creekside"); and Harper's Pointe, LP ("Harper's Pointe"), is contrary to its governing statutes, rules, or the RFA specifications; and, if so, whether the decision is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

Florida Housing initially issued the RFA on October 6, 2017, and, after two modifications, established an application deadline of December 20, 2017. Petitioners and Intervenors submitted timely applications in response to the RFA. On May 4, 2018, Florida Housing published "RFA 2017-111 Board Approved Preliminary Awards" ("Corporation's Notice"), tentatively awarding funding to Sunset Lake, Oaks at Creekside, and Harper's Pointe, among others.

On May 9, 2018, Petitioners, Madison Oaks, LLC ("Madison Oaks"); and American Residential Communities, LLC ("American Residential"), filed their notices of protest challenging the selection of the applications set forth in the Corporation's Notice. Petitioners timely filed a Formal Written Protest of Award and Petition for Administrative Hearing, which was forwarded to the Division of Administrative Hearings ("Division") on June 8, 2018,^{1/} for assignment of an Administrative Law Judge ("ALJ") to conduct a final hearing. The Petition was assigned DOAH Case No. 18-2966BID.

On May 9, 2018, Petitioners, Sterling Terrace, LTD; and Sterling Terrace Developer, LLC (collectively, "Sterling Terrace"), filed their Notice of Protest challenging the selection of the applications set forth in the Corporation's Notice. Sterling Terrace timely filed a Formal Written Protest of Award and Petition for Administrative Hearing, which was forwarded to the Division on June 8, 2018, for assignment of an ALJ to conduct a final hearing. The Petition was assigned DOAH Case No. 18-2967BID. The cases were consolidated on June 14, 2018.^{2/}

Intervenors, Harper's Pointe, HTG Creekside, and HTG Sunset gained Intervenor status on June 12 and 14, 2018, respectively.^{3/}

The final hearing was scheduled for July 11 and 12, 2018, in Tallahassee, Florida, and commenced as scheduled.

The parties introduced Joint Exhibits J1 through J8, which were admitted in evidence. The parties jointly offered the testimony of Marisa Button, Florida Housing's Director of Multifamily Allocations.

Madison Oaks introduced Petitioner's Exhibits P1, P2, P5 through P9, P9a, P10, P12 through P15, P19, P26, and P27, which were admitted in evidence. Madison Oaks offered the testimony of Richard Creech.

Intervenor Oaks at Creekside introduced Intervenor's Exhibits IO2 and IO9, which were admitted in evidence.

Intervenor Sunset Lake introduced Exhibit IS6, which was admitted in evidence. Intervenor Oaks at Creekside offered the testimony of Matthew Rieger, CEO of Housing Trust Group, the parent company of HTG Creekside.

Intervenor Harper's Pointe introduced Intervenor's Exhibits IH1 through IH8 and IH10 through IH12, which were admitted in evidence, and introduced no additional witnesses.

A one-volume Transcript of the proceedings was filed on July 18, 2018. The parties timely filed Proposed Recommended Orders ("PROs"), which the undersigned has considered in preparing this Recommended Order. On August 3, 2018, Intervenor Clermont Ridge and Blue Sunbelt filed a Notice of Joinder in portions of both Petitioners' and Respondent's PROs.

Except as otherwise provided, all references to the Florida Statutes are to the 2017 version.

FINDINGS OF FACT

1. Petitioner Madison Oaks is the Applicant entity for a proposed affordable housing development to be located in Osceola County, Florida.

2. Petitioner Sterling Terrace is the Applicant entity for a proposed affordable housing development to be located in Hernando County, Florida.

3. American Residential and Sterling Terrace are Developer entities as defined by Florida Housing in Florida Administrative Code Rule 67-48.002(28).

4. Sunset Lake, Oaks at Creekside, and Harper's Pointe are all properly registered business entities in Florida in the business of providing affordable housing.

5. Florida Housing is a public corporation organized pursuant to chapter 420, Part V, Florida Statutes, and, for the purposes of these proceedings, an agency of the State of Florida.

6. Through the RFA, Florida Housing proposes to award an estimated \$10,978,942 in Housing Credit Financing for Affordable Housing Developments located in medium and small counties ("affordable housing tax credits").

7. The RFA outlines a process for selecting developments for funding. Section Five B. outlines the Selection Process, and subsection 2. is the Application Sorting Order.

8. On November 5, 2017, Florida Housing received 167 applications in response to the RFA. Madison Oaks, Sterling Terrace, Sunset Lake, Oaks at Creekside, and Harper's Pointe timely submitted applications seeking funding to assist in the development of multi-family housing in medium counties.

9. Florida Housing selected a review committee to score all submitted applications. The review committee issued a recommendation of preliminary rankings and allocations, and the

Board of Directors of Florida Housing approved these recommendations on May 4, 2018. The Board found that the parties to this proceeding all satisfied the mandatory and eligibility requirements for funding, but awarded funding to Intervenor based upon the ranking criteria in the RFA.

10. If Sterling Terrace can demonstrate that any two of the three Intervenor should not have been recommended for funding, it and Blue Sunbelt, LLC, will displace them as applications selected for funding. If Madison Oaks can demonstrate that all three Intervenor should not have been recommended for funding, Sterling Terrace and Blue Sunbelt, LLC, will displace them as applications selected for funding.

Sunset Lake

11. Section Four A.5.e.(3) of the RFA allows applicants to receive up to four points for proximity to certain community services. The RFA provides that applicants in medium counties must receive at least seven points to be eligible for funding, and at least nine points to be eligible for a Proximity Funding Preference.

12. One of those community services is public schools, which are defined as follows:

A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school. This may include a charter school, if the charter school is open to

appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.

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

13. Sunset Lake identified the Jewett School of the Arts ("Jewett School") as a public school, received four points for proximity, and as a result, was eligible for the Proximity Funding Preference.

14. The Jewett School is a magnet school within the Polk County Florida School District. The Jewett School was in existence and available for use by the general public as of the application deadline.

15. Petitioners maintain the Jewett School does not meet the definition of "public school."^{4/} If the Jewett School does not meet the definition of a "public school," Sunset Lake would not be entitled to four points for proximity to community services. As a result, it would have a total of seven points for proximity, and while it would remain eligible, it would lose the Proximity Funding Preference. As a result, Sunset Lake would not have been ranked as highly and would not have been recommended for funding.

16. The Jewett School does not meet the RFA definition of "public school" because geographic proximity to the school is not the principal admission criterion. Although a student must live in Polk County Schools' Magnet Zone B to apply for admission to the Jewett School, the principal admission criteria is a random lottery process. Geographic location within the Polk County magnet school zones is a threshold issue which qualifies a student to apply for admission. However, the magnet school decision-making process entails a subsequent elaborate demographic diversity analysis, sorting based on the outcome of that analysis, and, ultimately, a random lottery drawing which determines final admission.

17. The Jewett School admission process is contrary to Florida Housing's primary purpose of awarding proximity points to proposed housing developments--to ensure the intended residents can, in fact, use the services in proximity to the development.

18. Sunset Lake is not entitled to four points for proximity to community services and should not be awarded Proximity Funding Preference. As a result, Sunset Lake should not have been ranked as highly and should not have been recommended for funding.

Oaks at Creekside

19. Oaks at Creekside identified the Manatee Charter School ("Manatee School") as a public school, received three points for proximity, and, as a result, was eligible for funding but not for the Proximity Funding Preference. The Manatee School is a charter school located in Bradenton, Florida.

20. The Manatee School was in existence and available for use by the general public as of the application deadline.

21. Petitioners maintain the Manatee School does not meet the definition of a "public school."^{5/} If the Manatee Charter School does not meet that definition, then Oaks at Creekside is not entitled to three points for proximity. As a result, it would have only six total proximity points, and would not be eligible for funding.

22. Florida Housing maintains that a charter school must meet both parts of the definition of a public school in order for a proposed development to receive proximity points based on proximity to that school. That means a charter school must (1) use geographic proximity as the primary admission criteria, and (2) be "open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations."

23. Geographic proximity is not the primary admission criterion for the Manatee School. On the contrary, the Manatee School is open for admission regardless of geographic proximity thereto.

24. The Manatee School operates pursuant to a contract with the Manatee County School Board, and is "open to any student residing in the Manatee County School District, students covered in an interdistrict agreement and students as provided for in Section 1002.33(10), Florida Statutes (2010)."^{6/}

25. The Manatee School operates a "controlled open enrollment" process. The application period opens in early January and closes at the end of February, and the School accepts students from any school district in the state whose parent or guardian can provide transportation to the school, if the school has not reached capacity. This process is sometimes referred to as "school choice" and is mandatory pursuant to section 1002.31, Florida Statutes.^{7/}

26. The Manatee School has enrolled students throughout Manatee County, as well as from adjoining Sarasota County.

27. Historically, the Manatee School has not reached capacity. Once the School reaches capacity in any one grade level or class, students will be selected by a system-generated, random lottery process.

28. The term "radius area" is not defined in the RFA or in Florida Housing's rules. Florida Housing introduced no evidence regarding the meaning of the term "radius area" within the definition of "public school." When questioned about the meaning, Marisa Button, Florida Housing's Director of Multifamily Allocations, stated she did not know, but "[I] assume it means if the charter school has a radius area. I don't know."^{8/}

29. The term "radius" is defined as "a bounded or circumscribed area." Merriam-Webster Online, www.merriam-webster.com (2018).

30. The bounded or circumscribed area for admission to the Manatee School is the Manatee County School District, pursuant to its contract. The Manatee School is open to appropriately-aged children in the radius area who apply.

31. The Manatee School does not apply additional requirements for admission, such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.^{9/}

32. The Manatee School does provide admissions preferences to students of active duty military personnel, siblings of a student already enrolled, siblings of an accepted applicant, children of an employee of the School, and children

of a charter board member. Each of these preferences is authorized pursuant to section 1002.33(10)(d).

33. The preferences are not additional requirements for admission to the Manatee School.

34. The Manatee School meets the second part of the definition of "public school" for purpose of qualifying Oaks at Creekside to receive proximity points pursuant to the RFA.

Harper's Pointe

35. Madison Oaks argues Harper's Pointe is ineligible for funding pursuant to the RFA because the Harper's Pointe development site is a "scattered site," and Harper's Pointe did not identify the site as such and comply with the RFA requirement to designate latitude and longitude coordinates for both sites.^{10/}

36. Rule 67-48.002(105) defines "scattered sites" as follows:

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

37. Section Four A.5.c. of the RFA states: "The Applicant must state whether the Development consists of Scattered Sites."

38. Section Four A.5.d. of the RFA requires that applicants provide latitude and longitude coordinates for the Development Location Point and any scattered sites.

39. Section Five A.1. provides that "only items that meet all of the following Eligibility Items will be eligible for funding and consideration for funding selection." Among the items listed are "Question whether a Scattered Sites Development answered" and "Latitude and Longitude Coordinates for any Scattered Site provided, if applicable."

40. Harper's Pointe did not state in its application that the development consists of scattered sites, and did not provide separate latitude and longitude coordinates for scattered sites.

41. Harper's Pointe's proposed development site, as identified in its Site Control Documents, consists of land located within a platted tract of property. The plat recorded in Alachua County indicates that the site is bisected by a platted 50-foot street easement running east/west through the property.

42. The parties stipulated the street has never been constructed.

43. Although portions of the east/west easement area show signs of having been improved at some time in the past, the

easement area has never been paved, and is currently impassible by car or truck due to vegetation in the easement area.

44. Even if the easement area were improved, there is no roadway to the west of the property to which it would connect. A fence runs along the property line and the property beyond the fence is platted residential lots accessed by Northeast 22nd Street.

45. An existing roadway, Northeast 23rd Avenue, terminates at the eastern property line just south of the east/west easement. The City has placed barriers at that property line prohibiting access to the property from Northeast 23rd Avenue.

46. If the platted street is a "roadway or street" as those terms are used in rule 67-48.002(105), the site would meet the definition of a "scattered site."

47. Ms. Button testified on behalf of Florida Housing that the property meets the definition of a scattered site because "there is an easement that is a road or a street" that bisects the property. Ms. Button first testified that Florida Housing's determination did not depend on whether a roadway or street is actually constructed within the easement, but rather, "it goes back to the easement, whether there is an easement that is a roadway or street."

48. Ms. Button's testimony seemed logical enough. If the easement were a street easement, access between the northern and

southern portions of the development site would be constrained. By contrast, if the easement were a conservation or utility easement, there would be no impairment of access between portions of the development site.

49. However, on cross examination, Ms. Button testified that, in making the determination whether an easement for a road or street existed, Florida Housing would consider a number of other factors, including whether a roadway was actually constructed within the easement, whether there were physical obstructions preventing access to the "prospective" roadway or street, and whether the public had a right to use the "prospective" roadway or street.

50. Ms. Button did not testify with specificity what factors she considered in making the determination that the easement, in this case, was "a roadway or street." Ms. Button's direct-examination testimony was conclusory: "Based on the documentation we received, there is an easement that is a road or street." On direct examination, her determination appeared to be based solely on the plat designation of a street easement. On cross-examination, however, Ms. Button testified that "a street designated . . . on a plat could be evidence of the existence of a scattered site." (emphasis added). Moreover, Ms. Button testified that Florida Housing could consider whether a roadway or street was actually constructed, whether there were

obstructions to its use, and whether the public had a right to use the purported roadway.

51. Ms. Button's testimony that the Harper's Point development site was a scattered site was equivocal, and the undersigned does not accept it as either reliable or persuasive.^{11/}

52. There is no physical roadway or street constructed within the easement. While there is some evidence that some portions of the easement area were improved in the past, said improvement was at least 25 years old. The current condition of the property is fairly heavily wooded. To the extent a "path" exists on the property, it is not passable by a standard four-wheeled vehicle. Moreover, there are physical barriers preventing vehicular access to the property from the adjoining street to the east. There is no access to the property from the residential development to the west of the property.

53. There is not an improved area preventing access from the northern to the southern portion of the development site. There is no structure built within the easement which would have to be demolished in order to build the project on the development site as a single parcel.

54. Based on the entirety of the reliable evidence, the Harper's Pointe development site is not a "scattered site" as defined in the RFA.

55. Madison Oaks failed to prove that Florida Housing's initial determination to award tax credits to Harper's Pointe, pursuant to the RFA, was incorrect.

CONCLUSIONS OF LAW

56. The Division has jurisdiction over the subject matter and the parties to this action. §§ 120.569 and 120.57(3), Fla. Stat.

57. Petitioners have the burden to prove, by a preponderance of the evidence, that Florida Housing's intended award of housing tax credits to HTG Sunset, HTG Creekside, and Harper's Pointe is contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications. § 120.57(3)(f), Fla. Stat.

58. Although section 120.57(3) provides that this is a de novo proceeding, it is not a "de novo" proceeding in the traditional sense. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). That is, this is not a forward-looking proceeding to formulate agency action, and the Division may not substitute its judgment for that of Florida Housing. See Intercontinental Props., Inc. v. State Dep't of HRS, 606 So. 2d 380, 386 (Fla. 3d DCA 1992); R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; MDCSB Mar. 13, 2002) (explaining the Division's role in procurement-protest

proceedings). Instead, the Division engages in a form of "inter-agency review" in which the ALJ makes findings of fact about the action already taken by the Department. See State Contracting, 709 So. 2d at 609. The Division does not evaluate the Department's decision anew; instead the Division looks to see if the Department followed its governing statutes, its rules, and the RFA specifications during the procurement process. See R.N. Expertise, Case No. 01-2663BID, RO at 71.

59. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt & Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Bros., Inc. v. State Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof: whether the proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

60. A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). An agency action is

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

An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 138 So. 721, 723-24 (1931).

Sunset Lake

61. Florida Housing's initial determination to award four proximity points to Sunset Lake for its proximity to the Jewett School was clearly erroneous.^{12/} The Jewett School does not meet the RFA definition of a public school and is not a community service for which Sunset Lake should have received proximity points.

62. Petitioner Madison Oaks proved that Florida Housing's initial decision to award affordable housing tax credits to Sunset Lake was contrary to the RFA, and contrary to competition. Sunset Lake should have received a total of seven proximity points, and should not have been recommended for funding.

Oaks at Creekside

63. Florida Housing's initial determination to award four proximity points to Oaks at Creekside for its proximity to the Manatee School was neither clearly erroneous, contrary to

competition, arbitrary, nor capricious. The Manatee School is a public school as defined in the RFA.

64. As noted in Florida Housing's Notice of Change of Position, filed July 6, 2018, Florida Housing determined after discovery depositions that the Manatee School was not a public school for purposes of awarding proximity points to Oaks at Creekside. However, it is Florida Housing's initial decision to award funding to Oaks at Creekside, not its subsequent litigation position, that is at issue in this proceeding.^{13/} See Blue Broadway, LLC v. Fla. Hous. Fin. Corp., Case No. 17-3273 (Fla. DOAH Aug. 29, 2017; FHFC Sept. 22, 2017) ("In this proceeding, the undersigned continues to review the correctness of Respondent's initial decision which was to find Intervenor's application to be eligible.").

65. Petitioner Sterling Terrace failed to prove that Florida Housing's initial determination to award affordable housing tax credits to Oaks at Creekside was contrary to the RFA. Harper's Pointe

66. Florida Housing initially determined Harper's Pointe was eligible for an award of affordable housing tax credits pursuant to the RFA.

67. Petitioner Madison Oaks failed to prove Florida Housing's intended award of housing tax credits to Harper's Pointe was contrary to Florida Housing's statutes, rules, or the

terms of the RFA, clearly erroneous, contrary to competition, or arbitrary or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing issue a final order finding (1) that its initial scoring decision regarding Sunset Lake was erroneous, and awarding funding to the applicant with the next highest lottery number; and (2) awarding funding to Oaks at Creekside and Harper's Pointe, pursuant to its initial scoring decision.

DONE AND ENTERED this 23rd day of August, 2018, in Tallahassee, Leon County, Florida.



SUZANNE VAN WYK
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2018.

ENDNOTES

^{1/} Madison Oaks filed a First and Second Amended Formal Written Protest of Award and Petition for Administrative Hearing on June 11, 2018.

2/ The cases were initially consolidated with a third challenge filed by Clermont Ridge, LTD (DOAH Case No. 18-2968BID), which was resolved and voluntarily dismissed on June 21, 2018.

3/ Arbours at Hester Lake, LLC; Collonade Park, LTD; Blue Sunbelt, LLC; and Clermont Ridge, LLC, initially gained Intervenor status in these proceedings as well. However, the issues initiating intervention by those parties were resolved prior to the final hearing and those parties did not appear at the final hearing.

4/ Petitioners withdrew from consideration all other issues against the application of Sunset Lake in their Third Amended Formal Written Protest of Award and Petition for Administrative Hearing.

5/ Petitioners withdrew from consideration all other issues against the application of Oaks at Creekside in their Third Amended Formal Written Protest of Award and Petition for Administrative Hearing.

6/ The 2010 version of the statute required "a charter school [to be] open to any student covered in an interdistrict agreement or residing in the school district in which the charter school is located[.]"

7/ Section 1002.31(2) (a) provides, in pertinent part:

[E]ach district school board or charter school shall allow a parent from any school district in the state whose child is not subject to a current expulsion or suspension to enroll his or her child in and transport his or her child to any public school, including charter schools, that has not reached capacity in the district, subject to the maximum class size pursuant to s. 1003.03 and se. 1, Art. IX of the State Constitution. The school district or charter school shall accept the student, pursuant to that school district's or charter school's controlled open enrollment process, and report the student for purposes of the school district's or charter school's funding pursuant to the Florida Education Finance Program.

^{8/} The parties also introduced the deposition testimony of Marisol Quinones, the Manatee School Enrollment Administrator. No party asked Ms. Quinones to identify the radius area of the school.

^{9/} The Charter Schools USA policy provides, "the School will endeavor to achieve racial/ethnic balance," but does not award any admission preference based on race or ethnicity. According to the policy, the School "endeavors" to achieve the balance through a marketing plan directed at "underrepresented populations."

^{10/} Madison Oaks initially asserted a challenge to the qualification of the Medical Facility identified in the Harper's Pointe application. Madison Oaks is no longer pursuing its challenge to the qualification of the Medical Facility identified in the Harper's Pointe application.

^{11/} As of the date of the prehearing stipulation, Florida Housing's initial position--that Harper's Pointe was eligible for funding--had not changed. During opening statements, counsel for Florida Housing stated its position as "[I] guess our position at the moment is it looks like a street, it must be a street. . . . I am sure we are going to hear argument on all sides . . . and when we do, we'll just have to come up with our ultimate position on that[.]"

^{12/} Florida Housing conceded this point when it filed a Notice of Change of Position on July 6, 2018.

^{13/} However, the undersigned is compelled to comment on Florida Housing's position, taken at final hearing, that the Manatee School does not meet the RFA definition of "public school" because geographic proximity is not the primary admission criteria. That position is untenable. Florida Housing is required to interpret the RFA consistent with its plain and unambiguous language. See Brownville Manor, LP v. Redding Dev. Partners, LLC, 224 So. 3d 891 (Fla. 1st DCA 2017) (citing Creative Choice XXV, Ltd. v. Fla. Hous. Fin. Corp., 991 So. 2d 899, 901 (Fla. 1st DCA 2008)). Florida Housing's interpretation of the definition to require compliance with both the first and second sentences of the definition is contrary to the plain language of the RFA.

The first sentence clearly and unequivocally refers to the admission criteria of traditional public schools, where admission is mandatory for all children within a defined

geographic proximity to the school, i.e., the school attendance zone. The second sentence applies specifically to charter schools, which are non-traditional public schools in Florida. § 1002.33(1), Fla. Stat. As it pertains to charter schools, the definition requires only that the school be "open to appropriately aged children in the radius area who apply" and not impose additional admission criteria. Requiring a charter school to meet both parts of the definition of public school is contrary to the plain language of the RFA. While the undersigned is cognizant of the principle of deference to agency interpretations, "judicial adherence to the agency's view is not demanded when it is contrary to the [RFA's] plain meaning." Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997). Within the RFA definition of public school, the second sentence is specific to charter schools and should be applied to Oaks at Creekside's application.

Further, Florida Housing's interpretation would effectively prohibit any charter school from qualifying as a public school under the RFA. Through 2016, charter schools were required to be open to any student residing in the school district in which the charter school is located. § 1002.33(10), Fla. Stat. (2016). Under current law, a charter school "may be exempt from [Public School Parental Choice] as long as it is open to any student residing in the school district in which the charter school is located." § 1002.33(10)(2018). A charter school cannot be both open to any student within the school district and use geographic proximity as the primary admission criteria.

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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.