STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HTG OAK VALLEY, LLC,

Petitioner,

vs. Case No. 19-2275BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HARMONY PINEWOOD, LLC; AND NORTON COMMONS, LTD.,

Intervenors.
_____/

FOUNTAINS AT KINGS POINTE LIMITED PARTNERSHIP,

Petitioner,

vs. Case No. 19-2276BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____/

RECOMMENDED ORDER

These cases came before Administrative Law Judge John G. Van Laningham for final hearing on June 3 and 4, 2019, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this protest are whether either or both of Respondent's intended actions in dispute——namely, (i) deeming one application eligible for funding despite the existence of reasonable grounds for uncertainty as to whether the amount of capital the applicant's equity proposal states will be invested during construction is sufficient to cover development costs; and (ii) awarding another applicant a number of proximity points based on information in its application that was later discovered to be mistaken——are contrary to governing statutes, administrative rules, or the specifications of the solicitation; and, if so, whether the erroneous action or actions are contrary to competition, clearly erroneous, or arbitrary or capricious.

PRELIMINARY STATEMENT

On September 6, 2018, Respondent Florida Housing Finance Corporation ("FHFC") issued Request for Applications 2018-110 for the purpose of awarding low-income housing tax credits. On March 22, 2019, FHFC announced its intent to select ten applicants for funding, including Norton Commons, Ltd. ("Norton Commons"), and Harrison Parc, Ltd. ("Harrison Parc"). Petitioners HTG Oak Valley, LLC ("HTG Oak Valley"), and Fountains at Kings Pointe Limited Partnership ("Fountains") were deemed eligible, but not selected for funding.

HTG Oak Valley; HTG Gulf, LLC ("HTG Gulf"); HTG Spring, LLC ("HTG Spring"); and Fountains timely filed Notices of Protest followed by Petitions for Formal Administrative Hearing. All petitions were referred to the Division of Administrative Hearings ("DOAH"), where the undersigned consolidated the four cases. After a pre-hearing conference on May 6, 2019, the final hearing was scheduled to commence on May 31, 2019, in Tallahassee, Florida. Prior to hearing, HTG Spring and HTG Gulf filed notices of voluntary dismissal. Those cases were severed, and the undersigned relinquished jurisdiction over them to FHFC, leaving the consolidated cases numbered 19-2275BID and 19-2276BID (the "2018-110 Protests") at DOAH.

On May 24, 2019, FHFC filed an unopposed motion to consolidate the 2018-110 Protests with The Vistas at Fountainhead Limited Partnership v. Florida Housing Finance Corp., DOAH Case No. 19-2328BID (the "Vistas Protest"), for hearing only, which was granted. The three consolidated cases were scheduled for final hearing together on June 3 and 4, 2019. On May 29, 2019, Harmony Pinewood, LLC ("Harmony Pinewood"), whose substantial interests are being determined in the 2018-110 Protests, filed a Notice of Appearance/Motion to Intervene, which, despite being untimely, was granted with limitations.

The parties entered into a detailed Joint Pre-hearing Stipulation, which was filed on May 30, 2019. A Supplement to

the Joint Pre-hearing Stipulation was filed on May 31, 2019, outlining the various funding scenarios that might result, depending on the outcome of these proceedings. To the extent relevant, the stipulated facts have been incorporated herein.

The final hearing took place as scheduled, with all parties present. All parties presented the testimony of Marisa Button, FHFC's Director of Multifamily Programs. Norton Commons presented the testimony of James Dyal. Brian Waterfield testified on behalf of Harmony Pinewood. Fountains called as witnesses David Urban of RBC Capital Markets and Scott Deaton, a principal of Fountains. Joint Exhibits 1 through 12 were received into evidence. HTG Oak Valley's Exhibits 1 through 6 and Norton Commons' Exhibits 1 through 3 were admitted as well. FHFC offered no additional exhibits.

On June 6, 2019, Norton Commons and HTG Oak Valley filed a Joint Notice of Voluntary Dismissal of Specific Issues. In the joint notice, Norton Commons voluntarily dismissed its objection to HTG Oak Valley's claimed proximity to a medical facility, and HTG Oak Valley voluntarily dismissed its protest relating to the sufficiency of Norton Commons' disclosure of principals. This Recommended Order will not address those matters.

The three-volume transcript was filed on June 18, 2019. All parties timely filed Proposed Recommended Orders, which were considered in preparing this Recommended Order.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2018.

FINDINGS OF FACT

1. FHFC is the housing credit agency for the state of Florida whose responsibilities include the awarding of low-income housing tax credits, which developers use to finance the construction of affordable housing. Tax credits are distributed pursuant to a competitive process similar to a public procurement that starts with FHFC's issuance of a request for applications.[1/]

2. On September 6, 2018, FHFC issued Request for Applications 2018-110 (the "RFA"). Applications were originally due on October 23, 2018, but this deadline was extended to December 4, 2018.

3. FHFC received 191 applications in response to the RFA, through which FHFC seeks to award housing credits worth up to approximately $14.3 million for developments that will be located in medium counties. A Review Committee was appointed to evaluate the applications and make recommendations to FHFC's Board of Directors (the "Board").

4. Pursuant to the ranking and selection process outlined in the RFA, applicants were evaluated on eligibility items and were awarded points for other items. The eligibility items

included Submission Requirements, Financial Arrearage Requirements, and a Total Development Cost Per Unit Limitation requirement. To be eligible for funding, an application must meet all of the eligibility items. A Funding Test in the RFA provides that "[a]pplications will be selected for funding only if there is enough funding available to fully fund the Eligible Housing Credit Request Amount."

5. The Review Committee found 181 applications eligible (95 percent of the total), deemed ten applications ineligible, and selected ten applications for recommendation to the Board for funding. At a meeting on March 22, 2019, the Board approved the Review Committee's eligibility and funding recommendations. That same day, FHFC notified all applicants that the Board had approved the staff recommendations. The notice, which was posted on FHFC's website, listed the many eligible applicants along with the handful of eligible applicants that had been chosen for an intended award of housing credits. Among the putative successful applicants were Norton Commons and Harrison Parc.[2/] Though deemed eligible, HTG Oak Valley, Harmony Pinewood, and Fountains were not recommended for funding.

6. Harmony Pinewood. Harmony Pinewood timely submitted an application requesting an allocation of housing credits for an 86-unit housing development in Brevard County. FHFC determined that Harmony Pinewood's application was eligible for an award of

housing credits but did not preliminarily select Harmony Pinewood for funding. In evaluating Harmony Pinewood's application, FHFC found that the applicant had earned enough proximity points to qualify for the Proximity Funding Preference, which gives Harmony Pinewood an advantage in the ranking over other applicants who failed to qualify for the preference.

7. Applicants earn proximity points based on the distance between their Development Location Point ("DLP")[3/] and the Transit Service or Community Service they select. The closer the applicant's DLP is to the corresponding Transit or Community Service, the more proximity points the applicant will receive. As an eligible Community Service, an applicant might choose a Grocery Store, Public School, Medical Facility, or Pharmacy.

8. The RFA required applicants to "state[] [their respective DLPs] in decimal degrees, rounded to at least the sixth decimal place." Harmony Pinewood selected latitude 28.041319 and longitude -80.615026 as the coordinates for its DLP.

9. As a Community Service, Harmony Pinewood identified a Grocery Store, Thrifty Specialty Produce, located at 2135 Palm Bay Road Northeast, Palm Bay, Florida 32905, latitude 28.035489, longitude -80.610050. The RFA instructed applicants to round up the distance between the DLP and selected service to the nearest

hundredth of a mile. Harmony Pinewood's application declared the distance between its DLP and Thrifty Specialty Produce to be exactly one-half of a mile.

10. The RFA required applicants to obtain a minimum of 7.0 proximity points to be eligible for funding. Applicants needed to earn 9.0 or more proximity points to be entitled to the Proximity Funding Preference. During the evaluation, FHFC does not independently calculate any distances based on the coordinates provided by applicants, but instead awards points based on the distances stated in the applications, which it accepts as true. The distance of 0.50 miles entitled Harmony Pinewood to an award of 3.5 proximity points for its Grocery Store, which contributed to the applicant's total proximity score of 9.0.

11. Based on the coordinates provided in Harmony Pinewood's application, however, the distance between its DLP and Thrifty Specialty Produce is, in fact, 0.51 miles when rounded up to the nearest hundredth of a mile, as Brian Waterfield, testifying at hearing on behalf of Harmony Pinewood, admitted. According to Mr. Waterfield, Harmony Pinewood had intended to enter "28.041**2**19" rather than "28.041**3**19" as the latitude coordinate for its DLP but made a typographical error. He claimed that if the latitude had been entered correctly

as "28.041219," then the distances shown in Harmony Pinewood's application would be correct.

12. HTG Oak Valley protests the award of 3.5 Grocery Store proximity points to Harmony Pinewood's application, asserting that the score was based on an erroneously reported *distance* of one-half mile. HTG Oak Valley urges that this error be treated as a minor irregularity; that the distance in question be corrected to 0.51 miles in accordance with the RFA's directions concerning rounding; and that Harmony Pinewood's Grocery Store-related proximity points be reduced to 3.0 to conform to the revised DLP-to-service distance. This would bring Harmony Pinewood's total proximity score down to 8.5, rendering Harmony Pinewood ineligible for the Proximity Funding Preference. FHFC agrees with HTG Oak Valley.

13. Harmony Pinewood contends that the error in its application was not in the reported *distance* but rather in the DLP *latitude coordinate*. Harmony Pinewood urges that this error be treated as a minor irregularity; that the latitude in question be corrected to 28.041219 in accordance with the applicant's intent; and that the initial scoring decision to award Harmony Pinewood 3.5 Grocery Store-related proximity points be upheld.

14. The problem with Harmony Pinewood's position is that no one reviewing *the information provided within the application*

could discover the alleged typographical error in the DLP latitude coordinate except Harmony Pinewood itself. In contrast, any party *using the coordinates stated in the application* could attempt to verify the accuracy of the reported distance between Harmony Pinewood's DLP and Thrifty Specialty Produce.

15. Taking this a step further, the longitude and latitude coordinates of a DLP constitute the numerical expression of a subjective decision on the part of the applicant, a value judgment which is not falsifiable, despite the apparent exactitude of the figures. This is because the DLP is, by definition, "a single point selected by the Applicant on the proposed Development site that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development." Fla. Admin. Code R. 67-48.002(34) (emphasis added). There are, in other words, no right or wrong DLPs, only compliant and noncompliant DLPs. Harmony Pinewood's DLP, as described in its application, satisfies rule 67-48.002(34), and thus is a responsive, conforming, compliant DLP; there is nothing facially or inherently irregular about it.

16. The selection of a DLP is, moreover, a *competitive* decision because the chosen location directly affects the number of proximity points to which an application may be entitled. It

is a decision that makes an application more or less competitive relative to the other applications. In this respect, selecting a DLP is analogous to deciding upon a price to bid on a contract. Imagine a second-ranked bidder claiming that it had meant to bid $28,041,219 instead of $28,041,319, where $100 would make the difference between winning and losing. Unless there were clear evidence in the bid that the lower price had been intended, there would be no practical distinction whatsoever between "correcting" the supposed clerical error and "amending" the bid based on extrinsic evidence submitted post decision. The latter is clearly prohibited. See § 120.57(3)(f), Fla. Stat; cf. Fla. Admin. Code R. 67-60.009(4).

17. Because post-deadline amendments to an application based on extrinsic evidence are impermissible, an applicant's subjective competitive decisions must be deemed both *final* as of the application deadline, and *fully expressed* within the four corners of the application. Thus, it should be rare for an alleged error in the expression of a competitive decision to be deemed a minor irregularity. To make such a finding of minor irregularity in an exceptional situation, two necessary (but perhaps not sufficient) conditions would have to be met: (i) the alleged error would need to be reasonably apparent to anyone on the face of the application and (ii) the intended statement, free of error, would need to be unmistakably

expressed somewhere in the application. So, for an example, recall the previous hypothetical but assume, as additional facts, that the bid price of $28,041,319 is necessarily the product of a unit price ("*a*") times a certain number of units ("*b*"), and that both *a* and *b* are clearly stated in the bid. If *a* × *b* = $28,041,219 instead of $28,041,319, then someone other than the applicant would be able to discover the mathematical or clerical error in the bottom-line price quote, and it would be fairly clear from the face of the bid that $28,041,219 was the intended price. Such an error might be correctible in the agency's discretion.[4/]

18. That is not the situation here. The coordinates of Harmony Pinewood's DLP appear only once in its application. Because of the rounding involved, moreover, the "true" coordinates cannot be derived from the stated distance of 0.50 miles. Unlike the product of *a* times *b*, which can be only one number, there are multiple DLP longitude-latitude pairs that correspond to the stated distance of 0.50 miles——or, at a minimum, the evidence fails to rule out such diversity. The only way for anyone besides Harmony Pinewood to know that the DLP latitude "should have been" 28.041219 is to hear it from Harmony Pinewood.

19. Under these circumstances, the undersigned determines that the DLP coordinates in Harmony Pinewood's application must

be considered the true and correct, full and final expression of the applicant's decision to select that particular location for its DLP. Therefore, the irregularity in Harmony Pinewood's application is not the stated DLP latitude; it is the stated distance between the DLP and the Grocery Store, which should be 0.51 miles instead of 0.50 miles. Because the RFA requires an award of 3.0 proximity points for a distance of 0.51 miles, and because the distance irregularity does not otherwise render Harmony Pinewood's application nonresponsive, the correct, and only nonarbitrary, solution to the problem is for FHFC to reduce the number of Grocery Store proximity points awarded to Harmony Pinewood's application, from 3.5 as intended, to 3.0.

20. Fountains. Fountains submitted an application requesting an allocation of housing credits for a proposed 120-unit housing development in Flagler County. FHFC determined that Fountains was eligible for an award of housing credits but did not preliminarily select the Fountains application for funding. HTG Oak Valley protests FHFC's intended decision to deem Fountains eligible for funding, alleging that Fountains' application is materially nonresponsive——and thus should be rejected as ineligible——for failing clearly to state that an amount of equity sufficient to cover the anticipated development costs would be invested in the project prior to construction completion.

21. The RFA requires that an applicant must submit, as part of its application, a Development Cost Pro Forma detailing both the anticipated costs of the proposed development as well as the anticipated funding sources for the proposed development. In order to demonstrate adequate funding, the Total Construction Sources (including equity proceeds/capital contributions and loans), as shown in the pro forma, must equal or exceed the Total Development Costs reflected therein. During the scoring process, if a funding source is not considered or is adjusted downward, then Total Development Costs might wind up exceeding Total Construction Sources, in which event the applicant is said to suffer from a construction funding shortfall (deficit). If an applicant has a funding shortfall, it is ineligible for funding.

22. The Development Cost Pro Forma does not allow applicants to include in their Total Construction Sources any equity proceeds to be paid after construction completion. Instead, the applicant must state only the amount of "Equity Proceeds Paid Prior to Completion of Construction." The pro forma defines "Prior to Completion of Construction" as "Prior to Receipt of a Final Certificate of Occupancy."

23. The RFA requires, as well, that an equity proposal letter be included as an attachment to the application. For a

housing credit equity proposal to be counted as a source of financing, it must meet the following criteria:

- Be executed by the equity provider;
- Include specific reference to the Applicant as the beneficiary of the equity proceeds;
- State the proposed amount of equity to be paid prior to construction completion;
- State the anticipated Eligible Housing Credit Request Amount;
- State the anticipated dollar amount of Housing Credit allocation to be purchased; and
- State the anticipated total amount of equity to be provided.

(Emphasis added).

24. As Attachment 14 to its application, Fountains submitted an equity proposal letter from RBC Capital Markets ("RBC") executed by David J. Urban (the "Equity Proposal"). In relevant part, the Equity Proposal states:

Anticipated Total Equity to be provided:	$15,510,849*
Equity Proceeds Paid Prior to or simultaneous to closing the construction financing:	$2,481,736* (min. 15%)
Equity Proceeds to be Paid Prior to Construction Completion:	$8,686,075
Pay-In Schedule:	Funds available for Capital Contributions #1: $2,481,736* be paid prior to or simultaneously with the closing of the construction financing.

Funds available for Capital Contribution #2 $2,326,627* prior to construction completion.

Funds available for Capital Contribution #3 $3,877,712* concurrent with permanent loan closing.

Equity Proceeds Paid at Lease Up $5,428,797*

Equity Proceeds Paid at 8609 $1,395,977*

*All numbers rounded to nearest dollar.

25. The Pay-In Schedule in the Equity Proposal refers to "permanent loan closing" as the moment when Capital Contribution #3 will be made "available." The Equity Proposal does not, however, define or discuss permanent loan closing, and, to the point, does not specify when it is expected to occur. Of potential relevance in this regard is a letter from JP Morgan Chase Bank, N.A. (the "Chase Letter"), which is included as Attachment 16 to Fountains' application.

26. Unlike the Equity Proposal, the Chase Letter, if not the last word on the subject, at least sheds some light on the timing of the crucial milestone, i.e., "permanent loan closing." Although the Chase Letter is full of escape clauses and does "not represent a commitment" or "an offer to commit," the document nevertheless outlines the terms for the closing of the proposed construction and permanent loans. The proposed terms

call for the payment of a $10,000 Conversion Fee at permanent loan closing and impose preconditions for the conversion from the construction loan to the permanent loan, which include a requirement that there have been "90% economic and physical occupancy for 90 days." No evidence was presented as to the meaning of this language, but the term "physical occupancy" is clear and unambiguous——and it plainly happens after receipt of a final certificate of occupancy, which, under the RFA, is the end point of the construction phase.

27. HTG Oak Valley argues that the Pay-In Schedule casts doubt on whether the entire amount stated in the Equity Proposal's line-item entry for "Equity Proceeds to be Paid Prior to Construction Completion" ($8,686,075) will be paid before the final certificate of occupancy is issued. According to HTG Oak Valley, the Pay-In Schedule shows that the third capital contribution will be paid *after* construction completion because the second capital contribution, which is the earlier of the two, is due to occur "prior to construction completion." Thus, HTG Oak Valley contends that Fountains' construction financing sources should be reduced by $3,877,712, thereby creating a construction financing shortfall and rendering the Fountains application ineligible for funding.

28. HTG Oak Valley finds support for its position in an unlikely place, namely, FHFC's intended rejection of the

application that The Vistas at Fountainhead Limited Partnership ("Vistas") submitted in response to Request for Applications 2019-105 ("RFA 2019-105"). That proposed agency action is relevant because Vistas had attached to its application an equity proposal letter from RBC whose terms and conditions——other than the dollar amounts and (obviously) the applicant's name——are identical to those of the Equity Proposal for Fountains. During the evaluation of applications under RFA 2019-105, which took place at around the same time as the review of applications pursuant to the RFA at issue here, FHFC's scorer determined that Capital Contribution #3 should be excluded from the amount of equity proceeds to be paid prior to construction completion, with the result that the Vistas application was deemed ineligible for funding due to a funding shortfall.

29. The Vistas and Fountains applications, competing in separate solicitations, were scored by different FHFC staff members. The evaluator who scored the financial section of Vistas' application sought advice concerning her interpretation of the Equity Proposal, discussing the matter with FHFC's Director of Multifamily Programs and legal counsel at a reconciliation meeting that occurred before the Review Committee convened; this evaluator encountered no resistance to her plan of making a downward adjustment to Vistas' equity funding. The

evaluator of the Fountains application did not likewise discuss her scoring rationale and thus received no input or guidance from FHFC's management. Ultimately, however, because each scoring determination belongs to the Review Committee member herself or himself, inconsistent or conflicting results are possible, as these cases demonstrate.

30. Once in litigation, FHFC discovered that it had reached opposite scoring conclusions based on the same material facts. In these proceedings and in the Vistas Protest, FHFC has stressed its desire to take a consistent approach to the identical Equity Proposals. To that end, in the Vistas Protest, FHFC has reversed course and argued that, contrary to its intended action, the Equity Proposal provided by Vistas fully satisfies the requirements of RFA 2019-105; there is no funding shortfall; and Vistas' application is eligible and should be selected for funding. Deeming Vistas' application eligible would achieve consistency, of course, by giving favorable treatment to the applications of both Fountains and Vistas, which are similarly situated as to the Equity Proposal. Naturally, HTG Oak Valley urges that consistency be found the other way around, through the rejection of both applications.

31. In support of its decision to change positions on Vistas' Equity Proposal, FHFC relies upon the following premises, which are equally applicable to the determination of

Fountains' substantial interests: (i) the Equity Proposal plainly specifies, in the line-item entry for "Equity Proceeds to be Paid Prior to Construction Completion," the amount to be paid prior to construction completion; (ii) permanent loan closing does not necessarily have to occur after construction completion; and (iii) the information contained in the Pay-In Schedule is not information that is required by RFA 2019-105 (or the RFA at issue in this case).

32. The disputes arising from the scoring of the Equity Proposal are solvable as matters of law and therefore will be addressed below.

CONCLUSIONS OF LAW

33. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes. See also Fla. Admin. Code R. 67-60.009. FHFC's decisions in this competitive process determine the substantial interests of HTG Oak Valley, Fountains, Harmony Pines, and Norton Commons, each of whom therefore has standing to participate in this proceeding.

34. Pursuant to section 120.57(3)(f), the burden of proof rests with the party opposing the proposed agency action, see State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998), which must establish its allegations by a preponderance of the evidence. Dep't of

Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

35. 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.

36. 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.

37. The decision whether to "count" or "exclude" all or part of a funding source is at heart a scoring function. Instead of awarding points, the evaluator in effect assigns a grade of "pass" (count the funds) or "fail" (exclude/reduce the

funds). Scoring decisions are committed to the agency's discretion and thus are accorded the highest deference on review. In a protest governed by section 120.57(3), therefore, the undersigned must be reluctant to upset a scoring decision and even less willing, should it be necessary to invalidate a score, to re-score the improperly rated item.

38. The parties have paid considerable attention to Rosedale Holding v. Florida Housing Finance Corp., FHFC Case No. 2013-038BP (Recommended Order May 12, 2014; FHFC June 13, 2014). They dispute whether that case is distinguishable or precedential as regards the scoring of Capital Contribution #3 as described in the Equity Proposal. There are enough similarities between Rosedale and the cases at hand to warrant a closer look at the earlier decision.

39. In his Recommended Order in Rosedale (the "Rosedale RO"), the hearing officer made the following findings of fact:

> 30. In response to [the requirement in the RFA that an equity proposal "state the proposed amount of equity to be paid prior to construction completion,"] Palm Village provided at Attachment 13 a Term Sheet setting forth the proposed equity investment in the proposed Palm Village Project from SunTrust Community Capital, LLC. At page 2 the Term Sheet states: "The proposed amount of equity to be paid prior to construction completion is $2,127,118." This total is to be paid in two separate capital contributions referenced in the Term Sheet.

> 31. The first capital contribution of an estimated $1,160,246 would be paid when the partnership was entered into. The second capital contribution of an estimated $966,872 would be paid only upon receipt of each of the following: 1) final Certificates of Occupancy on all units by the appropriate authority; 2) certification by the STCC Construction Inspector that the project was completed in accordance with the plans and specifications, and 3) acknowledgements by Lender of completion of the Project in accordance with the Project documents.
>
> 32. The Development Cost Pro Forma in the RFA defines "Prior to Completion of Construction" as "Prior to Receipt of Final Certificate of Occupancy or in the case of Rehabilitation, prior to placed-in-service date as determined by the Applicant."

Rosedale RO at 12-13.

40. Regarding the equity proposal at issue in Rosedale, the hearing officer concluded as follows:

> 41. The equity proposal from Sun Trust Community Capital included a statement that $2,127,118 would be paid prior to construction completion. On its face this appears to meet the requirements of the RFA and to demonstrate adequate funding levels. However, the equity proposal also stated that almost half of this amount would in fact not be paid until final certificates of occupancy on all units were received, not until the construction inspector certified that the project was completed, and not until the lender agreed that the project was complete.
>
> 42. It is quite clear from the terms of the RFA that equity to be paid "prior to construction completion" means that it must be paid before the final certificates of

> occupancy are obtained. Regardless of the rather generic statement of how much would be paid prior to construction completion, the most reasonable reading of the Term Sheet is that some $966,862 would not be paid prior to construction completion. There is an internal inconsistency in the Term Sheet, but it does not appear to be a typographical or mathematical error and Florida Housing was correct not to consider this a minor irregularity that could be waived. Furthermore, it was at least not unreasonable for Florida Housing to give more weight to the specific and detailed limitations on the second capital contribution than to the general statement about how much would be paid prior to construction completion.
>
> 43. Palm Village argues that because there is no definition of "prior to construction completion" the interpretation of this phrase must be left up to the Applicant. In fact, that term is defined in the Development Cost Pro Forma. Even if it were not, the Applicant would not be free to interpret the phrase however it wished, no matter how illogical. It is simply unreasonable to think that "prior to construction completion" actually means sometime after the construction engineer has certified that the project is complete.
>
> 44. Florida Housing's determination that Palm Village failed to demonstrate adequate funding is not clearly erroneous, nor was it arbitrary or capricious. There is also nothing in the record to suggest that this determination is contrary to competition.

Rosedale RO at 35-36.

41. To summarize, in the relevant part of Rosedale, the hearing officer upheld the intended score of "fail" given to the proposed second capital contribution from SunTrust Community

Capital, LLC. ("STCC"), a score which had been based on the Term Sheet's plain disclosure that the payment was not going to occur "prior to construction completion" as that term was defined *in the applicable pro forma*. Whether an intended score of "*pass*" vis-à-vis the second contribution likewise would have survived review is somewhat unclear; applying the deferential standard of review applicable to scoring decisions, the hearing officer in Rosedale seems to have stopped short of concluding that FHFC was *required* not to consider the second capital contribution, although he implied as much. Because the intended decision to treat the Fountains application as eligible for funding raises the unexamined question of whether the agency committed reversible error in counting (rather than excluding) a capital contribution, Rosedale is, if not inapposite, not quite "on all fours" either, at least as to Fountains.

42. Rosedale is more analogous to the Vistas Protest, since the intended action in Rosedale was, as it is in the Vistas Protest, to exclude a proposed capital contribution deemed to be payable after the completion of construction. There is a factual distinction between the cases, however. The Term Sheet at issue in Rosedale unambiguously conditioned the payment of the second capital contribution on events that clearly would take place after "Receipt of Final Certificate of Occupancy," which, according to the Development Cost Pro Forma

in Rosedale, was the milestone that would signal the completion of construction. In contrast, the Equity Proposals for both Vistas and Fountains unambiguously condition the availability of Capital Contribution #3 on the simultaneous occurrence of "permanent loan closing" without clearly stating when that event will take place in relation to Receipt of a Final Certificate of Occupancy, which the applicable pro forma (as in Rosedale) designates as the end point of construction.

43. The Rosedale RO arguably veils this distinction because it concludes that the STCC Term Sheet——by stating "generically" that a total of $2.1 million would be paid prior to construction completion, while also specifying that nearly $1 million of that sum would not be paid until after the receipt of final certificates of occupancy——suffered from "an internal inconsistency." The reasonable inference, however, is that the parties to the Term Sheet (STCC and Palm Village) had reached a private agreement regarding the meaning of the term "prior to completion of construction." The Term Sheet was presumably internally consistent with the parties' intent that $2.1 million would be paid "prior to construction completion" *as they used and mutually understood that term*. In any event, the Term Sheet was not facially or patently ambiguous because the term "construction completion" is not literally or exclusively synonymous with "Receipt of a Final Certificate of Occupancy"

but could be understood and used by the parties to a consensual agreement to mean, e.g., "permanent loan closing," among other possible events, so that, as between the parties, any event occurring prior to permanent loan closing would be deemed by contract to have taken place prior to construction completion.[5/]

44. Palm Village's problem was that it and STCC's definition of "prior to construction completion" differed from the definition of that same term as set forth in the Development Cost Pro Forma, and it was that latter definition, of course, which determined whether a funding source could be considered as part of an applicant's construction financing. The bottom line, therefore, is that although the Term Sheet was *internally consistent*, it nevertheless unambiguously showed that a substantial portion (about $1 million) of the STCC equity investment would *not* be paid "prior to construction completion" under the external, but *controlling*, definition of that term.

45. Once this is recognized, it becomes clear that, in Rosedale, FHFC had *no choice* but to deduct, from the applicant's total construction financing, the second capital contribution, which the equity proposal clearly and unambiguously stated would not be made until after events that could not occur "prior to construction completion" as that term was defined in the request for applications, because the agency's discretion, though broad,

does not authorize it to act in contravention of the solicitation's plain language.

46. In sum, then, a careful reading of Rosedale reveals it to be distinguishable from the Vistas and Fountains matters, because while the Equity Proposals, unlike the STCC Term Sheet, truly *are* internally inconsistent (as will be discussed below), they do *not* (again unlike the Term Sheet) clearly and unambiguously state that Capital Contribution #3 will not be paid "prior to construction completion" as that term is defined in the RFA. But neither, however, do they clearly and unambiguously state that Capital Contribution #3 *will* be paid "prior to construction completion" as that term is defined in the RFA.

47. The internal inconsistency in the Equity Proposal stems from the Pay-In Schedule. As a preliminary matter, FHFC and Fountains argue that, because the RFA does not require an equity proposal to include a detailed timetable, the Pay-In Schedule is mere surplusage that can and should be ignored. This is not a persuasive argument. First, the premise is only trivially true. The RFA does not specifically require an equity pay-in schedule, but it *does* instruct that an equity proposal be attached to the application. So, whatever is in the equity proposal must be submitted——that is the important requirement.

In that sense, therefore, the RFA *did* require the submission of the Pay-In Schedule, as it was part of the Equity Proposal.

48. Second, and more important, whether required or not, the Pay-In Schedule contains language bearing on the timing of certain capital contributions, which is specifically relevant because of the instruction to "[s]tate the proposed amount of equity to be paid prior to construction completion," and is generally relevant, in any event, as part of the application. FHFC cannot pick and choose which language of the application to consider and which to overlook; that would be arbitrary and contrary to competition. The upshot is that the Pay-In Schedule cannot be ignored simply because it creates uncertainty that otherwise would not exist.

49. The Pay-In Schedule prescribes the timetable for RBC's proposed equity contributions in chronological order from the first payment to the fifth (and final) payment. Each installment (or funding window for the second and third contributions, respectively) is tied to——and scheduled to occur *before/at*, *before*, or *at*——a milestone in the life cycle of the project as follows: #1 – (before/at) closing of construction financing; #2 – (before) construction completion; #3 – (at) permanent loan closing; #4 – (at) lease up; and #5 – (at) filing of IRS Form 8609 (after the building is placed in service).

50. Regardless of how "construction completion" is defined, the most natural reading of this schedule is that Capital Contribution #3 is scheduled to be made *after* construction completion, since Capital Contribution #2 covers the entire period during which construction is ongoing.[6/] If Capital Contribution #3 were intended to be made while construction continued; that is, if the second and third contributions were intended to overlap, the Pay-In Schedule clearly fails to express such intention in an ordinary fashion. Rather, this normally would be communicated either by tying Capital Contribution #*2* to permanent loan closing and making Capital Contribution #*3* available prior to construction completion (reversing the order of these two installments), or by combining the two contributions into one installment, with the sum being available prior to construction completion.

51. If the Pay-In Schedule were the only language in the application pertaining to the amounts to be paid prior to construction completion, the undersigned would not hesitate to conclude, based on the schedule's fairly straightforward timetable, that the amount of equity to be paid prior to construction completion is the sum of Capital Contribution #1 and Capital Contribution #2. But the Pay-In Schedule does not stand alone; within just the Equity Proposal, it is attended by the line item stating that an amount equal to the sum of the

first *three* capital contributions will be "Paid Prior to Construction Completion." As used in the line item, the term "Prior to Construction Completion" must be synonymous with "prior to construction completion" as used in the Pay-In Schedule, given the identity of the language. Consequently, the line item can only be understood as meaning that Capital Contribution #3 is payable prior to the completion of construction, even though the Pay-In Schedule states that Capital Contribution #3 is payable after the completion of construction. Hence the internal inconsistency.

52. Ordinarily, when a legal dispute arises from such an inconsistency in the terms of an instrument, resolution requires the judge to engage in a two-step analysis. The first step is to determine "whether the language at issue is either clear or ambiguous." Famiglio v. Famiglio, 44 Fla. L. Weekly D1260, 2019 Fla. App. LEXIS 7204, at *17 n.3 (Fla. 2d DCA May 10, 2019). This is a question of law. Id. If the terms at issue are ambiguous, then, in step two, the judge must apply the canons of construction and interpret the uncertain language, as a matter of law. See, e.g., Holmes v. Fla. A&M Univ., 260 So. 3d 400, 404 (Fla. 1st DCA 2018). In some instances, it is permissible for the judge to receive and consider parol or extrinsic evidence bearing on the parties' intent, to assist in the interpretation. E.g., Famiglio, 2019 Fla. App. LEXIS 7204,

at *7-8. In such cases, the parties' intent becomes a material fact, but the interpretation of the instrument remains a matter of law.

53. It is tempting to travel this familiar path and simply construe the Equity Proposal, reaching a legal conclusion as to its best meaning. But this is not an ordinary legal dispute arising from competing interpretations of a writing. For one thing, the parties to the respective Equity Proposals under consideration are not in doubt about what they meant to say therein, nor is there a dispute between these parties regarding their rights and obligations under the proposals.

54. Moreover, if the rights and obligations of the parties to the Equity Proposals were relevant to the question at hand—— which, not to forget, is whether FHFC should consider Capital Contribution #3 as part of each applicant's total construction funding——it is not clear that FHFC would be empowered to determine such rights and obligations, because jurisdiction to interpret a contract for that purpose is vested exclusively in the judiciary. Eden Isles Condo. Ass'n v. Dep't of Bus. & Prof'l Reg., 1 So. 3d 291, 293 (Fla. 3d DCA 2009). Fortunately, the meaning of the Equity Proposals, as between the parties to those proposals, is irrelevant to the instant dispute.

55. What FHFC *does* have the authority (and, indeed, the duty) to determine is whether an application meets the

requirements of the RFA. This includes the power to decide whether an equity proposal states an amount of equity to be paid prior to construction completion that (together with other funding) is sufficient to cover the projected costs of development as set forth in the pro forma. Such an exercise might seem to involve the same analysis as a straightforward contract interpretation. There is a difference, however, between FHFC's setting out to determine the intended meaning of contractual terms to which private parties have given their mutual assent, on the one hand; and, on the other, FHFC's deciding whether the parties' written instrument, as measured against the specifications of the RFA, complies with the *agency's* requirements.

56. FHFC and Fountains advocate an interpretive analysis that blurs this distinction; they would construe the Equity Proposal to show that the letter states an adequate amount of equity to be paid prior to construction completion. Their argument goes something like this. There is no legal or other mandate that prohibits permanent loan closing from occurring prior to construction completion. To be sure, permanent loans typically close after the completion of construction, but that is not necessarily the sequence of events in every instance. Thus, the Pay-In Schedule does not clearly and definitively eliminate the possibility that Capital Contribution #3 might be

paid prior to construction completion. Because the relevant line item clearly states an amount of equity to be paid prior to construction completion that obviously includes the third capital contribution, the parties must have intended that the permanent loan would close prior to construction completion—— which, while admittedly uncommon, is not unheard of. The Equity Proposal should be interpreted as reflecting such intent, and, as so construed, be deemed to state a sufficient amount of equity to cover the anticipated development costs, in conformity with the RFA.

57. Regardless of whether the foregoing reasoning is persuasive, it is neither irrational nor clearly erroneous, provided the premise behind it is correct. The underlying premise is that, in determining conformity, FHFC may use its best judgment to ascertain the most reasonable meaning of an uncertain or unclear response. For the reasons that follow, however, it is concluded that this premise is clearly erroneous and contrary to competition and therefore must be rejected.

58. To begin, it will be helpful to recall that the RFA specification at issue here is the requirement that an equity proposal must "[s]tate the amount of equity to be paid prior to construction completion." An equity proposal that failed to state *any* amount of pre-completion equity, even if the number were zero, would be nonresponsive; unless the applicant's other

financing sources were sufficient, its application would have to be deemed ineligible. In contrast, an equity proposal that states *any* amount of pre-completion equity is facially responsive; however, it is responsive in this regard only to the extent the amount of equity to be paid prior to construction completion is *clearly* stated. To the extent the amount of pre-completion equity is unclear, the equity proposal must be considered nonresponsive, because an ambiguously expressed amount is no different, in the context of a competitive evaluation, from an unexpressed amount.

59. Why is this so? For starters, ambiguity is nonresponsive because the relevant RFA provision does not permit uncertain responses. It should go without saying that the RFA plainly requires the proposed amount of pre-completion equity to be *clearly* stated. Presumably no one would seriously suggest that the specification should be read to mean: "State *at least ambiguously* the proposed amount of equity," etc. Yet, a fatal flaw in FHFC and Fountains' position is that it implicitly revises the specification to include an unstated proviso to the effect that *ambiguous or uncertain responses will be given the most reasonable interpretation*. This is a clearly erroneous construction of the plain language of the RFA.

60. Ambiguity is nonresponsive because Florida Administrative Code Rule 67-60.008 says so. That rule defines

the term "minor irregularities," which FHFC in its discretion may waive or correct, as errors that, among other things, "do not create any uncertainty that the terms and requirements of the competitive selection have been met." An ambiguous response by its very nature creates uncertainty that the response is conforming; absent such uncertainty, the issue of ambiguity would not surface.[7/]

61. Rule 67-60.008 makes clear that a material ambiguity, that is, one which creates *any* uncertainty that the terms and requirements of the RFA have been met, is an irregularity——and *not* a minor one at that. Such an irregularity is otherwise known as a material variance or substantial deviation. By excluding material ambiguities from the subset of errors known as minor irregularities, FHFC's own rule, by necessary implication, classifies an ambiguity involving material information as a substantial deviation from the specifications, for deficiencies in a response or bid are either minor (and waivable) or material (and nonwaivable); there is no middle ground. FHFC does not have the authority, under rule 67-60.008 or procurement law generally, to waive or correct a material variance.

62. To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Fountains) urges be done in regard to the Equity Proposal, would

be tantamount to "correcting" the irregularity by removing any uncertainty that the terms and requirements of the RFA have been satisfied. In and of itself, the resolution of ambiguity through reasonable interpretation is, of course, neither arbitrary nor illogical; indeed, such an approach is required in some contexts. But this is not a declaratory judgment suit or breach of contract action in circuit court between parties to a written instrument whose meaning is in dispute; it is an administrative competitive-selection protest. In this context, construing an ambiguous response violates rule 67-60.008 and for that reason is plainly and undeniably impermissible. Doing so would be clearly erroneous.

63. Finally, even if not otherwise prohibited (which it is), resolution of ambiguity by the agency would be contrary to competition at both ends of the spectrum. At the front end, FHFC's willingness to "correct" uncertainties in an application at a minimum would remove a salutary disincentive to sloppy draftsmanship, and might even encourage applicants to use studied ambiguity on occasion for competitive advantage. Apart from that, rare is the sentence so clearly written as to foreclose a semantic dispute if the stakes are high enough. The suggestion that material ambiguity should be handled as a minor irregularity smells like litigation fuel.

64. The bigger threat to competition, however, comes at the back end. An uncertain response inherently presents wiggle room for interpretation, and if FHFC were able to exercise the power to construe, it would have opportunities to show favoritism and, conversely, to act on bias. To be clear, the undersigned is not suggesting that FHFC has done anything of the sort or otherwise improper here——to the contrary, the agency has handled these cases in a most professional and competent manner, and its conduct has been beyond reproach. Nor does the undersigned mean to imply that FHFC is somehow likely to behave improperly in the future. Prohibiting the interpretation of an ambiguous response should be viewed as a prophylactic measure rather than a remedial or punitive one.

65. To elaborate, there are grounds for genuine confusion about what would constitute the proper purpose of an interpretation in this context. In a civil action where the parties to an agreement dispute its meaning, the court is required to construe ambiguous language so as to bring it in line with the parties' intent. E.g., Charbonier Food Servs., LLC v. 121 Alhambra Tower, LLC, 206 So. 3d 755, 758 (Fla. 3d DCA 2016). In that context, in other words, the goal of the interpretative process is to give the writing the meaning its subscribers intended it to have. The court does not have a free hand in choosing between reasonable interpretations.

66. In a competitive selection, however, similar reliance upon the parties' intent would be problematic. This is because, it may reasonably be presumed that the applicant always intends its response to conform to the RFA and maximize the applicant's chances of being selected for funding. Where the terms of an equity proposal are at issue, as here, the reasonable presumption again would be, in all cases, that the applicant and the potential investor intended the proposal to satisfy fully all applicable provisions of the RFA. Thus, if the parties' intent were to be the determinative factor, as in civil litigation, the rule, as a practical matter, whether explicitly acknowledged or not, would be that an ambiguous response must be construed in favor of the applicant. By *rewarding* ambiguity, however, such a rule, it may be confidently predicted, would have unintended consequences unfavorable to competition.

67. The undersigned believes, therefore, that if ambiguous responses are to be tolerated, they must not be favored, which means that the use of the parties' (or applicant's) intent as the polestar for interpretation should be discouraged. But while this would solve one problem, it would create another. If FHFC were not required to construe an ambiguous response pursuant to the parties' intent, what limiting principle would take its place to assist the agency in choosing which reasonable interpretation to adopt? Where a writing supports two or more

reasonable interpretations (the definition of ambiguity), could it ever be said that the agency's selection of one reasonable interpretation over another was arbitrary, capricious, or clearly erroneous?

68. Without the parties' intent for guidance, the agency would have no choice but to resort to seeking the "most reasonable" interpretation, which is basically what FHFC advocates should be done here. But there is little "limitation," if any, in this principle, for, like beauty, reasonableness is not quantifiable. Allowing FHFC to adopt the "most reasonable" interpretation of an ambiguous response would undermine confidence in the integrity of the competition because, no matter how responsibly and ethically the agency carried out this task, the possibility of favoritism could never be completely eliminated, and suspicions of such impropriety inevitably would arise. For these reasons, the undersigned concludes that, however good the agency's intentions, its exercise of the power of interpretation to shore up an ambiguous application would open a Pandora's Box and hence must be deemed contrary to competition.

69. Having concluded that material ambiguity in a response is a substantial, nonwaivable deviation, the question as to both the Fountains and Vistas applications boils down to whether an amount of equity to be paid prior to construction completion

sufficient to cover projected construction costs was clearly and unambiguously stated. As discussed above, the question of whether a written instrument is ambiguous is a matter of law. Further, although an agency's exercise of interpretive authority over an ambiguous instrument might raise separation-of-powers concerns, there should be no similar objection to a quasi-judicial officer's determination of ambiguity when necessary to the performance of an agency's clear statutory responsibilities. See Eden Isles, 1 So. 3d 291 at 293.

70. Because this proceeding is governed by section 120.57(3), the question arises whether FHFC's preliminary decision regarding the ambiguity of a response, to the extent it has made such a decision, is entitled to deferential review. The undersigned concludes that ambiguity, like historical facts, must be determined de novo in an administrative bid protest. This conclusion is based on the grounds that (i) the identification of ambiguity does not require the application of special rules tailored for competitive selection or procurement processes but, rather, is a function of general law; and, relatedly, (ii) determining whether an instrument is ambiguous does not fall within FHFC's substantive jurisdiction or call upon any agency's special expertise.

71. "An agreement is ambiguous if as a whole or by its terms and conditions it can reasonably be interpreted in more

than one way." Nationstar Mortg. Co. v. Levine, 216 So. 3d 711, 715 (Fla. 4th DCA 2017). For reasons previously discussed, the Equity Proposal is burdened with an internal inconsistency regarding the amount of capital contributions to be paid to Fountains prior to the completion of construction. Because of this inconsistency, the proposal can reasonably be interpreted as providing that Fountains would be paid $8,686,075 prior to construction completion, and it also can reasonably be interpreted as calling for the payment of $4,808,363 in pre-completion equity. In and of itself, therefore, the Equity Proposal is ambiguous in this regard.

72. This does not necessarily mean that the application as a whole must be deemed ambiguous as to the amount of pre-completion equity Fountains would receive. Conceivably, some other part of the application might make clear that the permanent loan likely would close prior to construction completion. Were that the case, the internal inconsistency would disappear, and it might be concluded that the *application* unambiguously states that Fountains would be paid $8,686,075 prior to construction completion.

73. As it happens, there is another part of the application that speaks to the timing of permanent loan closing, namely the Chase Letter. The Chase Letter sets forth the terms on which the bank might make a construction loan to Fountains,

which would be converted to a permanent loan later on. Although the Chase Letter clearly states that it does not constitute a binding commitment, it is nevertheless the only source of information in the application concerning the timing of a potential permanent loan closing. Moreover, notwithstanding the qualifications and caveats contained therein, the Chase Letter offers to make a construction loan to Fountains of approximately $10,941,689, which is precisely the amount of first mortgage financing shown in the applicant's Development Cost Pro Forma.

74. FHFC and Fountains argue that the Chase Letter is irrelevant and should not be considered. Their arguments might be persuasive if this were a civil action between Fountains and RBC in which the terms of the Equity Proposal were in dispute. But, of course, this is not such a case, and the ultimate question here is not whether the Equity Proposal per se is ambiguous/nonresponsive, but whether the application as a whole is ambiguous/nonresponsive. It would be arbitrary and capricious not to consider the entirety of the application in determining this issue.[8/] The Chase Letter might not be part of the Equity Proposal, but it *is* part of the application.

75. The Chase Letter prescribes certain conditions that must occur prior to conversion of the construction loan into a permanent loan. One of these conditions is "physical occupancy for 90 days." Because it is highly unlikely that three months

of physical occupancy would take place prior to the receipt of a final certificate of occupancy, the Chase Letter is inconsistent (to say the least) with the notion that permanent loan closing would occur prior to construction completion. Consequently, the Chase Letter does not erase the ambiguity appearing on the face of the Equity Proposal; to the contrary, it underscores the uncertainty arising from the proposal's internal inconsistency regarding the timing of Capital Contribution #3.

76. It is concluded that the Fountains application is ambiguous on the question of whether Capital Contribution #3 would be paid prior to construction completion. This ambiguity creates uncertainty that the amount of $3,877,712 would be available for construction funding. Because uncertainty makes a response nonconforming to the extent thereof, FHFC erred in "passing" this amount; the evaluator should have excluded this portion of the total equity proceeds from the applicant's construction funding.

77. The decision to count the ambiguously stated portion of the applicant's equity proceeds must have been based either on the premise (i) that the Equity Proposal clearly states that the third, $3,877,712 Capital Contribution would be paid prior to construction completion, which is incorrect as a matter of law; or, alternatively, (ii) that the proposal is best understood as stating that the $3,877,712 Capital Contribution

would be paid prior to construction completion, a conclusion which necessarily would have followed from an interpretive analysis the engaging in of which was clearly erroneous, contrary to competition, or both. A conclusion drawn from a false or faulty premise is irrational, no matter how well reasoned, and thus arbitrary or capricious. Therefore, the intended action of counting the third capital contribution as a construction funding source must be set aside.

78. Since the decision on funding sources is binary and one option has been eliminated, there is no room for discretion in the re-scoring. The third capital contribution must be excluded from the total construction funding available for the project. This results in a funding shortfall, at least on paper, which is all that matters at this juncture.[9/] The nominal funding shortfall, in turn, renders Fountains' application ineligible for selection.

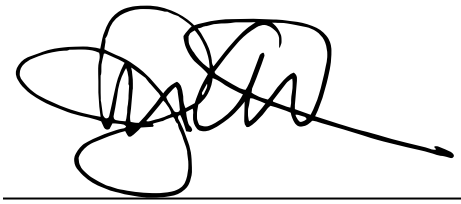
79. Turning to Harmony Pinewood, FHFC's intended decision cannot stand, as the agency itself realizes, because Harmony Pinewood's application, after fixing the factual misstatement regarding the DLP-to-service distance so that it correctly states 0.51 miles instead of one-half mile, fails to earn enough proximity points to be given the Proximity Funding Preference. Harmony Pinewood's argument that the alleged typographical error in the DLP latitude coordinate is the *real* minor irregularity

must be rejected; amending the latitude coordinate to conform to Mr. Waterfield's testimony, as Harmony Pinewood urges, would be in violation of rule 67-60.009(4) and contrary to competition, and such action, therefore, cannot be recommended.

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 rescinding the intended award to Harrison Parc due to ineligibility; finding HTG Spring and Fountains ineligible for funding; and reducing Harmony Pinewood's proximity points to 8.5, which requires the cancelation of its Proximity Funding Preference. It is further RECOMMENDED that, as a result of the foregoing final actions, HTG Oak Valley be selected for funding under RFA 2018-110 and Wildwood Preserve Senior Living (not a party to this litigation) be deselected for funding.

DONE AND ENTERED this 16th day of July, 2019, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of July, 2019.

ENDNOTES

[1/] Much like a request for proposals or an invitation to bid, a request for applications solicits competitive responses from qualified developers. See Fla. Admin. Code R. 67-60.009(4) (A request for applications "shall be considered a 'request for proposal.'").

[2/] After being selected for funding, Harrison Parc discovered that, as of the Application Deadline, there was no Transit Service located at the coordinates provided in its application. As a result, Harrison Parc conceded that it was not entitled to receive any Transit Service points, and that, without such points, it had failed to achieve the minimum proximity score of 7.0 points to be considered eligible. On June 3, 2019, at Harrison Parc's request, the undersigned entered an Order Dropping Harrison Parc As a Party. The funding intended for Harrison Parc will need to be reallocated.

[3/] The term "development location point" is defined in Florida Administrative Code Rule 67-48.002(34).

[4/] It is always worth mentioning that just because an agency *may*, in its discretion, waive a minor irregularity does not mean that the agency *must* do so.

[5/] To be clear, while the parties to an equity proposal are free to define the term "prior to construction completion" however they choose for purposes of their agreement, even to the point of formulating a definition that others might consider "unreasonable," the parties are not free to define that same term for purposes of the RFA, as the hearing officer in Rosedale correctly concluded. FHFC is free to define "construction completion" as "Receipt of a Final Certificate of Occupancy," as it has done, and that is the definition which must be applied in evaluating equity proposals submitted in an application for funding in response to the RFA.

[6/] It is logically possible to read the schedule as meaning that Capital Contribution #3 will be available *at* construction completion, but this must be regarded as, at best, a strained interpretation.

[7/] An ambiguous writing is one whose meaning is uncertain. Thus, the term "uncertainty," as used in rule 67-60.008, plainly *includes* ambiguity in the legal sense, i.e., language which is susceptible to two or more reasonable interpretations. Whether "uncertainty" is *limited to* such ambiguity need not be decided here. The discussion in this Recommended Order focuses on semantic ambiguity because that is the nature of the case. Nothing herein is intended to imply a conclusion that "uncertainty" for purposes of the rule is indistinguishable from "ambiguity" as the latter term is defined in the common law.

[8/] Strictly speaking, it is the equity proposal that the RFA requires must state the amount of equity to be paid prior to construction completion. The sufficiency of this amount, however, depends upon sum total of construction funding available to the applicant from all sources, including, e.g., financing obtained through construction loans, as shown in the Development Cost Pro Forma. Ultimately, therefore, the responsiveness of the equity proposal cannot be determined without referring to other parts of the application.

[9/] The undersigned does not find, or need to find, that, if selected, Fountains would not, in fact, have enough money to construct the proposed development. In the real-world event,

the applicant most likely would have sufficient funding. In a competitive procurement, however, reality often takes a backseat to the *description* of reality contained in the proposal or application. While this can lead, as here, to regrettable results in individual cases, which is obviously undesirable, the alternative——inevitably, a fact-finding hearing conducted after the agency has announced its intended decision, to clarify or supplement the unartfully drafted application——would be far worse, and at any rate is prohibited under section 120.57(3)(f) and rule 67-60.009(4)("No submissions made after the Application deadline which amend or supplement the Application shall be considered.").

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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.