STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

THE VISTAS AT FOUNTAINHEAD
LIMITED PARTNERSHIP,

Petitioner,

DOAH Case No. 19-2328BID
FHFC Case No. 2019-030BP

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WINCHESTER PLACE, LTD. and
WINCHESTER PLACE DEVELOPER, LLC

Intervenors.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on August 2, 2019. Petitioner The Vistas at Fountainhead Limited Partnership ("Vistas") and Intervenor Winchester Place, Ltd. ("Winchester") were Applicants under Request for Applications 2019-105, Housing Credit Financing for Affordable Multifamily Rental Housing that is a Part of Local Revitalization Initiatives (the "RFA").. Winchester Place Developer, LLC was the developer entity for Winchester. The

matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On March 22, 2019, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to Winchester and Lincoln Village Apartments. No party has challenged the eligibility of either of these applications. The Board found that Vistas was ineligible for funding, and awarded funding based upon the ranking criteria in the RFA. Petitioner timely filed its notice of intent to protest followed by a formal written protest. Intervenor timely filed a Notice of Intervention. The protest was referred to the Division of Administrative Hearings ("DOAH").

Florida Housing had initially determined that the equity proposal letter included with Vistas' application demonstrated a construction funding shortfall. During litigation, however, it was discovered that Florida Housing had also determined that the equity proposal letter submitted by Fountains at Kings Pointe in RFA 2018-110, which was substantially similar to that submitted by Vistas, had been accepted by Florida Housing as not demonstrating a construction funding shortfall. As a result, Florida Housing changed its position at hearing and argued that Vistas' application should also have been found eligible.

This matter was consolidated for purposes of hearing with HTG Oak Valley, LLC, vs. Florida Housing Finance Corporation and Harmony Pinewood, LLC; and

Norton Commons, Ltd, FHFC Case No.: 2019-032BP, DOAH Case No.: 19-2275BID, and with Fountains at Kings Pointe Limited Partnership vs. Florida Housing Finance Corporation, FHFC Case No.: 2019-034BP, DOAH Case No.: 19-2276BID. The hearing was held as scheduled on June 3 and 4, 2019, before Administrative Law Judge (ALJ) John G. Van Laningham. After the hearing, the instant case was severed from the other cases and separate Recommended Orders were issued.

All parties filed Proposed Recommended Orders. After consideration of the Proposed Recommended Orders, the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the Administrative Law Judge issued a Recommended Order on July 16, 2019. The ALJ found that the equity proposal submitted by Vistas was ambiguous on whether certain capital contributions would be paid prior to construction completion and concluded as a matter of law that this ambiguity should result Vistas being found ineligible. The ALJ recommended that Florida Housing enter a final order upholding Florida Housing's initial position and that Lincoln Village Apartments and Winchester Place should be funded. A copy of the Recommended Order is attached as Exhibit A.

On July 23, Vistas filed seven exceptions to the Recommended Order. On July 29, Winchester Place and Florida Housing filed responses to Vistas' exceptions. Copies of the Exceptions and Responses are attached as Exhibits B, C and D.

RULING ON EXCEPTION #1

Petitioner takes exception to portions of Findings of Fact #12, #13, and #20, in which the Administrative Law Judge (ALJ) discussed the relevance of the debt proposal letter from JP Morgan Chase Bank. Petitioner argues that the ALJ "makes an erroneous factual determination that the Chase debt proposal letter could be resorted to [sic] interpret the RBC Capital equity proposal letter." That, however, is not precisely what the ALJ found.

The equity proposal letter that is at the heart of this issue refers to "permanent loan closing" but does not define that term. The ALJ correctly notes that Florida Housing, in attempting to determine the meaning of an undefined term, may look elsewhere within the four corners of the application. It is not inappropriate, therefore, for Florida Housing to look at the Chase letter, which was submitted with the application to see whether it might clear up any uncertainty as to what the term "permanent loan closing" means. The ALJ correctly noted that the Chase letter may have "potential relevance" and "at least sheds some light" on the meaning of the term, but he did not find that the Chase letter could be used to definitively state what "permanent loan closing" means. In Conclusions of Law #60-63, the ALJ explains that the purpose of considering the Chase letter was to determine whether the application as a whole was ambiguous as to the amount of equity to be provided prior to construction completion. He determined that the Chase letter "does not erase

the ambiguity appearing on the face of the Equity Proposal." This is not the same as finding that the Chase letter creates or even confirms the ambiguity in the equity proposal letter.

Petitioner argues that the author of the equity proposal letter testified that he did not see or consider the debt proposal letter. While this may be true, it is irrelevant since the ALJ never found that either letter necessarily influenced the other, or that the intent of the author was relevant to the definition of the terms of the letter.

Petitioner also argues that the ALJ equates "permanent loan closing" with "permanent loan conversion." It is possible to read Finding of Fact #13 as confusing "closing" with "conversion," but even if true, it is ultimately irrelevant to the ultimate conclusion that the Chase letter did not resolve the ambiguity in the equity proposal letter. Petition is correct, however, in noting that there is no record evidence that "physical occupancy" must occur only after receipt of a final certificate of occupancy.

Findings of Fact #12, #13, and #20 are supported by competent substantial evidence, except for the last sentence of Finding of Fact #13. For these reasons, Finding of Fact #13 is amended as follows, and Petitioner's Exception #1 is otherwise rejected.

> 13. 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~~.

RULING ON EXCEPTION #2

Petitioner takes exception to Conclusions of Law #61 and #62, in which the ALJ again discussed the relevance of the debt proposal letter from JP Morgan Chase Bank. These conclusions are consistent with the ALJ's other findings and conclusions and are supported by competent substantial evidence. For these reasons, Petitioner's Exception #2 is rejected.

RULING ON EXCEPTION #3

Petitioner takes exception to Conclusion of Law #58, in which the ALJ concluded that ambiguities in responses to RFAs should be evaluated *de novo* in an administrative hearing without giving deference to an agency's interpretation of any such ambiguities. Petitioner primarily argues that the ALJ should have deferred to the position taken by Florida Housing at the administrative hearing. However, the ALJ did not reach a conclusion as to whether Florida Housing's litigation position or its initial determination should be given deference; he

determined as a matter of law that no determination of Florida Housing should be given deference regarding the interpretation of materially ambiguous responses to an RFA. This interpretation of Section 120.57(3), Fla. Stat., and the relevant case law, is not within the substantive jurisdiction of Florida Housing, and Florida Housing thus has no authority to reject or modify this conclusion. For this reason, Petitioner's Exception #3 is rejected.

RULING ON EXCEPTION #4

Petitioner takes exception to Conclusions of Law #48, 49, and 50, in which the ALJ concludes that an ambiguity in a response to an RFA must be considered nonresponsive by citing to Rule 67-60.008, Fla. Admin. Code. This rule states:

> **67-60.008 Right to Waive Minor Irregularities.**
>
> Minor irregularities are those irregularities in an Application, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

As Petitioner correctly points out, no party has argued that the alleged ambiguity in the response should be considered a minor irregularity, and Florida Housing has not conducted a minor irregularity analysis. Construing this rule as creating a requirement that any ambiguity in a response must necessarily be considered a material deficiency is an incorrect reading of this rule. Instead, the rule

must be read to mean that if an irregularity is discovered in a response, it may be waived only if certain requirements are met.

The ALJ concluded in Conclusions of Law #46 and 47 that Petitioner's response did contain a material ambiguity and should therefore have been considered nonresponsive. Although the subject of minor irregularities was not raised by any party, it is not inappropriate for the ALJ to conduct an analysis as to whether or not this ambiguity should have been waived as a minor irregularity. In this context, Conclusions of Law #48-50 should be read to mean only that a material ambiguity that cannot be resolved by looking elsewhere in the application could not be waived as a minor irregularity.

Interpretation of Rule 67-60.008, Fla. Admin. Code, is within the substantive jurisdiction of Florida Housing, and the ALJ's conclusions regarding this rule may thus be rejected or modified. Petitioner's exception is granted in part, and Conclusions of Law #48-50 are modified as follows:

> 48. ~~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.~~ Rule 67-60.008 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." This rule makes clear that a material ambiguity in a

response cannot be waived as a minor irregularity unless the uncertainty can be reasonably eliminated by looking elsewhere in the application.

~~49. 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.~~

~~50. To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Vistas) 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.~~

RULING ON EXCEPTION #5

Petitioner takes exception to Conclusion of Law #35, in which the ALJ discusses whether the Pay-In Schedule in the equity proposal letter is required by the RFA. The ALJ correctly finds that while the RFA "does not specifically require an equity pay-in schedule," it does require that the equity proposal letter be submitted with the application, and the Vistas equity proposal letter included a Pay-

In Schedule. The last two sentences of Conclusion of Law #35, however, state: "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."

These last two sentences are not supported by competent substantial evidence and are potentially misleading. The RFA includes specific requirements for what must be included in an equity proposal letter, and a pay-in schedule is not among those requirements. For this reason, Petitioner's Exception #5 is granted and Conclusion of Law #35 is modified as follows:

> 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.~~

RULING ON EXCEPTION #6

Petitioner takes exception to the first sentence of Conclusion of Law #38, which reads as follows:

> 38. 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.

Petitioner's argument is essentially that the ALJ's role is not to interpret language in a response to an RFA, but instead to determine whether or not Florida Housing's interpretation of that language is arbitrary, capricious, or clearly erroneous. While it is true that Florida Housing's interpretation of its own rules or the RFA specifications is entitled to deference, the ALJ has concluded elsewhere that Florida Housing's interpretation of language in a response to an RFA is not (and, in fact, may even be prohibited). As noted earlier, Florida Housing has no authority to reject a conclusion over which it has no substantive jurisdiction.

In this case, the "conclusion" regarding the interpretation of the equity proposal letter is actually a finding of fact; the inherent "conclusion" is that the ALJ has the authority to make such a finding. The equity proposal letter was admitted into evidence, and it is entirely appropriate for an ALJ to make findings based upon such evidence. As the ALJ pointed out in a footnote, it was possible to read the equity proposal letter differently, and as a result he did not make a finding that the letter definitively stated that Capital Contribution #3 would be paid after construction completion. Read in context, the disputed sentence provides a basis for the ALJ's conclusion that the equity proposal letter could be reasonably interpreted at least two different ways, and therefore contained a material ambiguity.

For these reasons, Petitioner's Exception #6 is rejected.

RULING ON EXCEPTION #7

Petitioner takes exception to Conclusions of Law #45, 46, and 47, in which the ALJ concluded that the equity proposal letter submitted by Vistas contained a material ambiguity, and that Florida Housing did not have the authority to use its best judgment to ascertain the most reasonable meaning of that letter. Petitioner argues that it was not proper for the ALJ to reject Florida Housing's interpretation, and that the ALJ should have deferred to the position Florida Housing took during the administrative hearing.

Again, while Florida Housing's interpretation of the RFA specifications and its own rules is subject to deference, the ALJ concluded that Florida Housing's interpretation of Vistas' response to the RFA was not. This conclusion was based on the ALJ's understanding of Chapter 120, Fla. Stat., as well as relevant case law, and Florida Housing has no authority to reject this conclusion. The ALJ concluded that for Florida Housing to attempt to interpret a materially ambiguous response not only violated the plain language of the RFA, but was also contrary to competition and clearly erroneous. Whether or not Florida Housing's reading of the equity proposal letter was reasonable, it was not allowed as a matter of law.

For these reasons, Petitioner's Exception #7 is rejected.

RULING ON THE RECOMMENDED ORDER

The Findings of Fact set out in the Recommended Order, as modified herein, are supported by competent substantial evidence.

The Conclusions of Law set out in the Recommended Order, as modified herein, are reasonable and supported by competent substantial evidence.

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

ORDER

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

A. Petitioner's Exceptions #2, #3, #6 and #7 are **REJECTED**;

B. Petitioner's Exception #5 is **GRANTED**;

C. Petitioner's Exceptions #1 and #4 are **GRANTED** in part;

D. The Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order, as modified herein; are adopted as Florida Housing's and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Lincoln Village Apartments and Winchester Place are awarded funding under RFA 2019-105.

DONE and ORDERED this 2nd day of August, 2019.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

THE VISTAS AT FOUNTAINHEAD
LIMITED PARTNERSHIP,

Petitioner,

vs. Case No. 19-2328BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

WINCHESTER PLACE, LTD.; AND
WINCHESTER PLACE DEVELOPER, LLC,

Intervenors.
_____/

RECOMMENDED ORDER

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

APPEARANCES

For The Vistas at Fountainhead Limited Partnership:

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STATEMENT OF THE ISSUES

The issues in this protest are whether Respondent's intended action——i.e., deeming Petitioner's application ineligible for funding on the grounds that the amount of capital the applicant's equity proposal states will be invested during construction is insufficient to cover development costs——is contrary to governing statutes, administrative rules, or the specifications of the solicitation; and, if so, whether this erroneous action is contrary to competition, clearly erroneous, or arbitrary or capricious.

PRELIMINARY STATEMENT

On January 9, 2019, Respondent Florida Housing Finance Corporation ("FHFC") issued Request for Applications 2019-105

for the purpose of awarding low-income housing tax credits. On March 22, 2019, FHFC announced its intent to award funding to Intervenor Winchester Place, Ltd., and Winchester Place Developer, LLC (collectively, "Winchester Place"), and one other applicant.

Petitioner, The Vistas at Fountainhead Limited Partnership ("Vistas"), timely filed a Notice of Protest, and on April 19, 2019, filed its formal written protest of the intended action. FHFC referred Vistas' formal protest to the Division of Administrative Hearings ("DOAH") on March 15, 2019. On May 2, 2019, Winchester Place filed a Notice of Intervention, which was considered a Motion to Intervene and granted on May 6, 2019.

On May 24, 2019, FHFC filed an unopposed motion to consolidate this proceeding with HTG Oak Valley, LLC v. Florida Housing Finance Corp., DOAH Case Nos. 19-2275BID and 19-2276BID (the "2018-110 Protests"), for hearing only, which was granted. The three consolidated cases were scheduled for final hearing together on June 3 and 4, 2019.

The parties entered into a detailed Joint Pre-hearing Stipulation, which was filed on May 30, 2019. To the extent relevant, the stipulated facts have been incorporated herein.

The final hearing took place as scheduled, with all parties present. The parties presented the testimony of Marisa Button, FHFC's Director of Multifamily Programs. Vistas called as

witnesses David Urban of RBC Capital Markets and Scott Deaton, a principal of BCP Development LLC. Joint Exhibits 1 through 6 were received into evidence. Vistas' Exhibits 1 through 4 were admitted as well. FHFC offered no additional exhibits.

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 January 9, 2019, FHFC issued Request for Applications 2019-105 (the "RFA"). Eighteen applications were submitted in response to the RFA on February 6, 2019.

3. A Review Committee was appointed to evaluate the applications and make recommendations to FHFC's Board of Directors (the "Board"). Pursuant to the ranking and selection

process outlined in the RFA, applicants were evaluated on eligibility items and were awarded points for other items.

4. Florida Administrative Code Rule 67-60.006 provides that "[t]he failure of an Applicant to supply required information in connection with any competitive solicitation . . . shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by [FHFC], the Application shall be considered ineligible."

5. The RFA sets forth a list of mandatory Eligibility and Point Items that must be included in a response. The RFA expressly provides that "[o]nly Applications that meet all of the Eligibility Items will be eligible for funding and considered for funding selection."

6. As an Eligibility Item, each applicant was required to 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.

7. 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."

8. 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).

9. The Review Committee found 14 applications eligible and four applications ineligible, including the Vistas application. Two applications were recommended for funding: Lincoln Village Apartments and Winchester Place. At a meeting on March 22, 2019, the Board approved the Review Committee's eligibility and funding recommendations.

10. In its application, Vistas requested an allocation of $1,325,000 in housing credits. In formulating its intended action on the RFA, FHFC determined that Vistas is not eligible for an award of housing credits for failing to state in its application that an amount of equity sufficient to cover the anticipated development costs would be invested in the project prior to construction completion. Vistas protests this determination of ineligibility. Due to the limited availability of credits and Vistas' position in the ranking, Winchester Place, a putatively successful applicant, would end up being deselected if FHFC's final agency action were to find Vistas eligible. Thus, Winchester Place has intervened in this proceeding to defend the intended agency action.

11. As Attachment 14 to its application, Vistas 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:	$12,586,241*
Equity Proceeds Paid Prior to or simultaneous to closing the construction financing:	$2,013,799* (min. 15%)
Equity Proceeds to be Paid Prior to Construction Completion:	$7,048,295
Pay-In Schedule:	Funds available for Capital Contributions #1: $2,013,799* be paid prior to or simultaneously with the closing of the construction financing. Funds available for Capital Contribution #2 $1,887,936* prior to construction completion. Funds available for Capital Contribution #3 $3,146,560* concurrent with permanent loan closing. Equity Proceeds Paid at Lease Up $4,405,184* Equity Proceeds Paid at 8609 $1,132,762*

*All numbers rounded to nearest dollar.

12. 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 15 to Vistas' application.

13. 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.

14. Winchester Place 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" ($7,048,295) will be paid before the final certificate of occupancy is issued. According to

Winchester Place, 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, Winchester Place contends that Vistas' construction financing sources should be reduced by $3,146,560, thereby creating a construction financing shortfall and rendering the Vistas application ineligible for funding.

15. Winchester Place's argument supports FHFC's intended action but is opposed by FHFC in this proceeding. This turnabout on the part of FHFC is the result of FHFC's intended acceptance, as eligible, of the application that Fountains at King's Pointe Limited Partnership ("Fountains") submitted in response to Request for Applications 2018-110 ("RFA 2018-110"). That proposed agency action is relevant because Fountains 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 Vistas.

16. During the evaluation of applications under RFA 2018-110, 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 included in the amount of equity proceeds to be paid to

Fountains prior to construction completion, with the result that Fountains' application, showing a construction funding surplus, was deemed eligible for funding.

17. 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.

18. Once in litigation, FHFC discovered that it had reached opposite scoring conclusions based on the same material facts. In this proceeding and in the 2018-110 Protests, FHFC has stressed its desire to take a consistent approach to the identical Equity Proposals. To that end, FHFC has reversed course here and argued that, contrary to its intended action,

the Equity Proposal provided by Vistas fully satisfies the requirements of RFA; 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, Winchester Place urges that consistency be found the other way around, through the rejection of both applications, or, alternatively, that the inconsistency be tolerated as the price of affording the agency wide discretion in making scoring decisions.

19. In support of its decision to change positions on Vistas' Equity Proposal, FHFC relies upon the following premises: (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 the RFA.

20. 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

21. 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 Vistas and Winchester Place, each of whom therefore has standing to participate in this proceeding.

22. 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).

23. 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.

24. 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, at *41-55 (Fla. DOAH Jan. 2, 2014). It is not necessary to review these principles here.

25. 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.

26. 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.

27. 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.

28. 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.

29. 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*.

30. Rosedale is analogous to this case inasmuch as the intended action in Rosedale was, as it is here, 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 Proposal for Vistas unambiguously conditions 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.

31. 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.[2/]

32. 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.

33. 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.

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

35. The internal inconsistency in the Equity Proposal stems from the Pay-In Schedule. As a preliminary matter, FHFC and Vistas 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.

36. 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.

37. 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).

38. 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.[3/] 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.

39. 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.

40. 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.

41. 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 Equity Proposal 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 proposal.

42. Moreover, if the rights and obligations of the parties to the Equity Proposal were relevant to the question at hand—which, not to forget, is whether FHFC should consider Capital Contribution #3 as part of the 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 Proposal, as between the parties thereto, is irrelevant to the instant dispute.

43. 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.

44. FHFC and Vistas 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.

45. 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.

46. 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.

47. 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 Vistas' 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.

48. 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.[4/]

49. 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.

50. To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Vistas) 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.

51. 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.

52. 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 this case and the 2018-110 Protests 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.

53. 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.

54. 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.

55. 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?

56. 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.

57. Having concluded that material ambiguity in a response is a substantial, nonwaivable deviation, the question as to Vistas' application 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.

58. 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.

59. "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 Vistas prior to the completion of construction. Because of this inconsistency, the proposal can reasonably be interpreted as providing that Vistas would be paid $7,048,295 prior to construction completion, and it also can reasonably be interpreted as calling for the payment of $3,901,735 in pre-completion equity. In and of itself, therefore, the Equity Proposal is ambiguous in this regard.

60. This does not necessarily mean that the application as a whole must be deemed ambiguous as to the amount of pre-completion equity Vistas 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 Vistas would be paid $7,048,295 prior to construction completion.

61. 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 Vistas, 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 Vistas of approximately $7,986,382, which is precisely the amount of first mortgage financing shown in the applicant's Development Cost Pro Forma.

62. FHFC and Vistas argue that the Chase Letter is irrelevant and should not be considered. Their arguments might be persuasive if this were a civil action between Vistas 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.[5/] The Chase Letter might not be part of the Equity Proposal, but it *is* part of the application.

63. 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

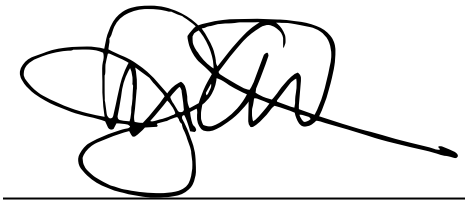
(to say the least) with the notion that permanent loan closing would occur prior to construction completion. Consequently, the Chase Letter does not erase the ambiguity appearing on the face of the Equity Proposal; to the contrary, it underscores the uncertainty arising from the proposal's internal inconsistency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

64. It is concluded that the Vistas 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 $3,146,560 would be available for construction funding. Because uncertainty makes a response nonconforming to the extent thereof, FHFC's evaluator was justified in excluding this portion of the total equity proceeds from the applicant's construction funding and deeming Vistas' application ineligible as a result.[6/]

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 fully implementing its intended action, as no basis for reversal has been established in this proceeding.

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



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Filed with the Clerk of the
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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/] 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.

[3/] 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.

[4/] 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.

[5/] 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.

[6/] The evidence was insufficient to support a finding as to the evaluator's specific rationale for not counting the ambiguously stated portion of the applicant's equity proceeds. This is of no moment, however, because an intended scoring decision that is neither arbitrary nor capricious, even if arrived at using flawed reasoning (which was not shown here), cannot be disturbed.

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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.

BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

THE VISTAS AT FOUNTAINHEAD
LIMITED PARTNERSHIP,

Petitioner,

vs.

Case No. 19-2328BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

WINCHESTER PLACE, LTD., AND
WINCHESTER PLACE DEVELOPER, LLC,

Intervenors.
_____/

PETITIONER VISTAS AT FOUNTAINHEAD LIMITED PARTNERSHIP'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Sections 120.57(3)(e), Fla. Stat. and Rule 28-106.217, Fla. Admin. Code, Petitioner THE VISTAS AT FOUNTAINHEAD LIMITED PARTNERSHIP'S ("Vistas") files its Exceptions to the Recommended Order entered in this matter on July 16, 2019 by Administrative Law Judge John G. Van Laningham of the Division of Administrative Hearings.

Background

1. This case concerns the proposed award of competitive housing credits in RFA 2019-105, for proposed developments that are a part of local revitalization initiatives. Florida Housing had proposed to award the housing credits to two applicants: Lincoln Village Apartments in Manatee County, and Winchester Place in Seminole County. The application submitted by Vistas at Fountainhead (for a proposed development in Volusia County) was deemed ineligible for

consideration for funding. No party disputes the selection of Lincoln Village for funding; and no part disputes that, if Vistas was determined to be eligible for consideration for funding, it would have been selected for funding instead of Winchester Place.

2. Vistas was initially deemed ineligible by the review committee member scoring the finance portions of the applications. The basis for her determination was a perceived shortfall in construction period financing, specifically in the amount of tax credit equity to be paid prior to the completion of construction. Her determination was based on one portion of the equity proposal letter from RBC Capital Markets included in the Vistas' application.

3. The review committee scoring and ranking determinations included this scorer's conclusions, and served as the basis for the review committee's recommendations to the Board of applicant eligibility and funding selection. The Board adopted the review committee's recommendations.

4. An RBC Capital Markets' letter that is substantially the same as the letter in Vistas was submitted with the application for Fountains at Kings Pointe, an application submitted in RFA 2018-110, for the award of competitive Housing Credits in Medium Counties. The finance scorer in the Medium County RFA did not find a construction period financing shortfall to exist with the Fountains application. The review committee and the Board found Fountains at Kings Pointe eligible, although it was not recommended for funding due to the available tax credit funding running out before reaching Fountains at Kings Pointe. However, due to some other preliminarily funded applicants in RFA 2018-110 later acknowledging that they are not entitled to funding, Fountains would now be selected for funding if it remained eligible.

5. As a result of formal protests filed in RFA 2018-110 and 2019-105, Florida Housing senior staff realized that the Corporation had preliminarily reached inconsistent results

on substantially identical facts regarding Vistas' and Fountains' construction period financing. In order to avoid such inconsistent results, Florida Housing senior staff took the position at hearing that the more reasonable view of the RBC Capital letters was that they supported the two applicants' documentation of equity available during the construction period, and that there was no construction financing shortfall in either the Vistas or Fountains at Kings Pointe applications.

6. In his Recommended Orders entered in this case and in the RFA 2018-110 (Medium County) litigation, the Administrative Law Judge determined that both Vistas (in RFA 2019-105 and Fountains at Kinds Points (in RFA 2018-110) should be deemed ineligible due to a construction financing shortfall, based on his view of the RBC Capital equity proposal letters and of debt financing letters from J.P. Morgan Chase Bank (the "Chase letter"). Vistas files these exceptions to that Recommended Order.

STANDARD OF REVIEW

7. Under § 120.57(1)(1), Fla. Stat., an agency reviewing a recommended order may reject or modify the findings of fact of an ALJ if "the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence." *See*, *Padron v. Dep't of Envtl. Prot.*, 143 So. 3d 1037, 1040-41 (Fla. 3d DCA 2014), reh'g denied; *Stokes v. Bd. of Prof'l Eng'rs*, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007). "Competent, substantial evidence has been defined as such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred . . . ." *G.C. v. Dep't of Children & Families*, 791 So. 2d 17, 19 (Fla. 5th DCA 2001).

8. Section 120.57(1)(l), Fla. Stat., also authorizes an agency to reject or modify an ALJ's conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140, 1143 (Fla. 2d DCA

2001).

9. Controlling case law on appeals of agency final orders requires a party to raise issues by exception, or risk waiving the issue for subsequent judicial review. When a party to an administrative proceeding does not file exceptions to a recommended order, it waives objections and those matters are not preserved for possible subsequent appellate review. *Kantor v. School Board of Monroe County*, 648 So. 2d 1266, 1267 (Fla. 3rd DCA 1995), citing *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

PETITIONER'S EXCEPTIONS

Exception No. 1 – The ALJ's factual findings regarding "permanent loan conversion" are not supported by competent substantial evidence. – Findings of Fact 12, 13, and 20

10. Vistas takes exceptions to the underlined sentences of the following findings of fact.

> 12. 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 15 to Vistas' application.
>
> 13. 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.

* * *

> 19. In support of its decision to change positions on Vistas' Equity Proposal, FHFC relies upon the following premises: (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 the RFA.
>
> 20. The disputes arising from the scoring of the Equity Proposal are solvable as matters of law and therefore will be addressed below.

(Emphasis added. Paragraph 19 is included above to provide context for Paragraph 20.)

11. The ALJ makes an erroneous factual determination that the Chase debt proposal letter could be resorted to interpret the RBC Capital equity proposal letter. This is not supported by any competent substantial evidence, and in fact is contrary to the evidence.

12. First, David Urban, a director of RBC Capital and the signatory on the equity proposal letter, testified at the final hearing, via telephone and under oath, that he did not see the Chase debt proposal letter when he prepared the equity proposal letter, [Tr. 290, 293-294] Mr. Urban sometimes is provided with information or documentation by developers regarding the debt component of financing when he prepares equity proposal letters for tax credit applications, and sometimes he is not provided with that information. [Tr. 290] Either way, Mr. Urban considers the debt proposal letters unnecessary for his task of preparing equity proposals. [Tr. 290, 294]

13. Second, the ALJ's opening for implicating the terms of the Chase debt proposal letter in his interpretation to the RBC equity proposal letter is extraneous language in the RBC letter that links one component of a separately identified total capital contribution to "permanent loan closing." The Chase debt letter does set forth the proposed terms of both the construction loan and the permanent loan. But the ALJ cites to the letter for conditions it attaches to

"Conversion" and equates permanent loan "closing" with permanent loan "conversion." There is no record evidence that those are the same event.

14. Further, the ALJ, presumably in an attempt to shield this false equivalency from review, states, in paragraph 20, that the scoring of the Equity Proposal, which would necessarily include the factual premise that the issue of whether permanent loan closing must necessarily have to occur after construction completion is "solvable as a matter of law." That is not true. Whether permanent loan closing must necessarily occur after construction completion is not at all "solvable as a matter of law;" it is a factual question, solvable by supporting and countervailing evidence.

15. And, in fact, there was evidence presented on this point by Vistas and Fountains. Mr. Scott Deaton, the representative of the developer of Vistas, testified at hearing that there is not a set time as to when permanent loan closing would have to occur. [Tr. 253] This testimony was unrebutted. Winchester Place could have presented evidence in an attempt to counter this testimony (as could the applicant challenging Fountains at Kings Point's eligibility), but they did not.

16. The RFA requires applicants to provide a construction period cost pro forma and a permanent period cost pro forma, in which sufficient amounts of funds are identified to cover projected project costs. See, RFA 2019-105 (Exhibit J-1) at page 118 of 121, and explanation at page 50 of 121. The funding sources typically include tax credit equity paid by the tax credit investor; debt financing (first, second, and third mortgage); grants; other financing; and deferred developer fee. These sources of funding (other than deferred developer fee) must be documented by preliminary funding proposals or other documentation included as attachments to an application.

17. In the case of The Vistas at Fountainhead, Vistas identified in its Construction

Period Pro Forma Housing Credit Equity Proceeds Paid Prior to Completion of Construction of $7,048,295. As Attachment 14 to its Application, Vistas included an equity proposal from RBC Capital that included the line item "Equity Proceeds to be Paid Prior to Construction Completion," followed by the figure $7,048,295 – the same dollar amount shown on the Construction Period Development Cost Pro Forma.

Exception No. 2 – The ALJ erroneously determined that lender debt proposal letters should control the interpretation of equity proposal letters. – Conclusions of Law 61 and 62

18. Vistas takes exception to Conclusions of Law 61 and 62 in their entirety. Paragraphs 61 and 62, although labeled as Conclusions of Law, are at least in part findings of fact. "Erroneously labeling what is essentially a factual determination a 'conclusion of law,' whether by the hearing officer [now ALJ] or the agency does not make it so. . ." *Kinney v. Department of* State, 501 So. 2d 129, 132 (Fla. 5th DCA 1987). Neither a state agency nor a reviewing court is bound by the labels affixed to findings of fact and conclusions of law. *Battaglia Properties v. Fla. Land and Water Adjudicatory Commission*, 629 So. 2d 161, 168 (Fla. 5th DCA 1993). An agency is free to reject findings of fact if there is not competent substantial evidence to support them.

19. These Conclusions discuss using the first mortgage (debt) financing proposal from J.P. Morgan Chase to interpret the terms of the RBC Capital equity proposal letter. As discussed in Exception 1 above, the evidence is unrebutted that the equity proposer for Vistas, RBC Capital, did not review or rely on the Chase debt financing proposal at all in preparing the equity proposal letter, and considered it irrelevant.

> 61. 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 Vistas, 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 Vistas of approximately $7,986,382, which is precisely the amount of first mortgage financing shown in the applicant's Development Cost Pro Forma.
>
> 62. FHFC and Vistas argue that the Chase Letter is irrelevant and should not be considered. Their arguments might be persuasive if this were a civil action between Vistas 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. The Chase Letter might not be part of the Equity Proposal, but it is part of the application.

20. The Chase letter is certainly relevant to determining whether there is a qualified lender with sufficient interest in providing first mortgage financing to support the amount of debt financing claimed in its Development Cost Pro Forma. But the amount of debt financing supported by the documentation was not at issue in this case. The only concern presented by the finance scorer for RFA 2019-105 (which concern was abandoned by senior staff prior to hearing) was over the timing of receipt of tax credit equity proceeds.

21. It adds nothing to the review of the sufficiency of the tax credit equity proposal to say that since both equity financing and debt financing (from different providers) are part of the "entirety of the application," the content of the debt financing proposal affects the content of the equity financing proposal. That statement is mere "ipse dixit;" "it is so because I said it is so," not because it is in fact true or even because it is a logical assumption. It is an illogical assumption and should be rejected as either a factual determination that is not supported by competent substantial evidence, or as conclusions of law erroneously interpreting the RFA, which is within FHFC's substantive jurisdiction to interpret.

Exception No. 3 – The ALJ erroneously deemed that allegedly ambiguously documents that are included in applications submitted to Florida Housing are to be interpreted by an ALJ, and not by Florida Housing. – Conclusion of Law 58

22. Vistas takes exception to Conclusion of Law 58, in which the ALJ parses out those scoring and evaluation decisions of Florida Housing which are "entitled to deferential review" and those that are not. Briefly, he asserts that only those decisions that fall within an agency's "substantive jurisdiction" or are within the "agency's special expertise" are entitled to deference. In filing this exception, Vistas notes that the agency decision under review should be Florida Housing's senior staff's position at hearing: that the more reasonable view of the Vistas' application and attachments was that Vistas' equity proposal letter was sufficient, and not the scorer's preliminary determination that it was not sufficient. There is no law supporting this discretion.

> 58. 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.

23. Section 120.57(3), Florida Statutes, defines the role of an ALJ in "protests to contract solicitation or award." (By FHFC Rule 67-60.009(2), Florida Housing's RFA funding selection decisions are subject to Section 120.57(3).) Section 120.57(3)(f) states:

> In a competitive-procurement protest, other than a rejection of all bids . . . [the ALJ] shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be

> whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

(Emphasis added.)

24. As the First District Court of Appeal explained in *State Contracting and Engineering Corp. v. Department of Transportation*, 709 So. 2d 607 (Fla. 1st DCA 1998), the "de novo" hearing under Section 120.57(3) consists of "a form of intra-agency review." The ALJ may receive evidence as in any evidentiary proceeding, "but the object of the proceeding is to evaluate the action taken by the agency." 709 So. 2d at 609. The ALJ is not the same as in other, "non-procurement" type evidentiary administrative proceedings, where the ALJ receives evidence and decides the case in a truly "de novo" fashion. In "non-procurement" cases, the purpose of the hearing process is "to formulate final agency action, not to simply review preliminary agency action." See, Section 120.57(1)(k), Fla. Stat., and *Florida Home Builder's Association, Inc. v. City of Daytona Beach*, DOAH Case No. 03-0131BC (DOAH Rec. Order entered April 29, 2003, at para. 143), citing *Department of Transportation v. JWC Co., Inc.*, 396 so. 2d 778 (Fla. 1st DCA 1981) and *McDonald v. Department of Banking and Finance*, 346 So. 2d 569 (Fla. 1st DCA 1977).

25. It is not the ALJ's role, then, to impose his independent view of whether the RBC letter was ambiguous. Instead, it was his role to determine whether Florida Housing's determination that the letter was sufficient was arbitrary or capricious. "If an administrative determination is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious." *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 634, note 3 (Fla. 2d DCA 1992).

26. The Corporation's senior staff's determination prior to hearing – that the RBC Capital equity proposal letter supported the claimed amount of housing credit equity available

during construction – was justifiable under an analysis that a reasonable person would use to reach a decision of similar importance. Florida Housing's senior staff's determination that the RBC Capital proposal reasonably supported the claimed amount of construction period tax credit equity should have been adopted by the ALJ, and his rejection of it should be overturned by this Board.

Exception No. 4 – The ALJ erred by evaluating (and rejecting) an allegedly ambiguous equity proposal letter based on the inapplicability of Florida Housing's "minor irregularity" rule, when neither the applicant nor Florida Housing invoked the minor irregularity rule. – Conclusions of Law 48, 49, and 50

27. Vistas takes exception to Conclusions of Law 48, 49, and 50, in which the ALJ concludes that alleged ambiguities in applications must be analyzed under Florida Housing's "minor irregularity" rule. The "minor irregularity" rule only applies when Florida Housing has first determined that an application contains a deviation from the RFA's requirements; and Florida Housing then must determine whether to waive the deviation. If Florida Housing determines that a deviation does not exist, then no waiver is necessary.

> 48. 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.
>
> 49. 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.

> 50. To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Vistas) 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.

28. The ALJ erred in even undertaking a "minor irregularity" analysis, and then rejecting a possible waiver of minor irregularity. One would only undertake a minor irregularity analysis if it first determined that an application contained an irregularity – a deviation from the RFA's requirements as to what must be included in an application. Only then would Florida Housing (or an ALJ) undertake to determine if that deviation resulted in the omission of material information; created uncertainty that the terms of the RFA have been met; provided a competitive advantage or benefit not enjoyed by other applicants; and did not adversely impact Florida Housing's interests.

29. The ALJ, in short, "put the cart before the horse." He construed Florida Housing's RFA and its processes as requiring a resort to its minor irregularity rule to determine if an irregularity exists. This is an incorrect reading and a misunderstanding of the RFA process. The ALJ's conclusions of law discussing the minor irregularity rule should be rejected.

Exception No. 5 – Whether the RFA required a Pay-In Schedule. – Conclusion of Law 35

30. In "Conclusion of Law 35," reproduced below, the ALJ includes a finding of fact that the RFA required the submission of a Pay-In Schedule in the equity commitment letters. The last three sentences of Conclusion of Law 35, of which Vistas only excepts to the last one, read:

> 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.

(Emphasis added.)

31. As noted elsewhere in these exceptions, an ALJ's designation of language in a Recommended Order as a Finding of Fact or Conclusion is not binding; "Conclusions of Law" may actually be, or may contain, "Findings of Fact," and vice versa.

32. The evidence was unrebutted that the RFA's instructions for equity proposal letters do require that the letter, "State the proposed amount of equity to be paid prior to construction completion." It is undisputed that the Vistas' letter contained a line item designated "Equity Proceeds to be Paid Prior to Construction Completion," and that the dollar amount accompanying that statement ($7,048,295) matched Vistas' construction period Development Cost Pro Forma. The Vistas' letter then contained other information not required by the RFA, including a three step Capital Contribution Schedule that the parties and the ALJ referred to as a Pay-In Schedule. The ALJ is simply incorrect when he states, in any "sense," that the RFA required a Pay-In Schedule in an equity proposal. The equity proposal would have been complete without it, and it was incorrect for the ALJ to impose a Pay-In Schedule requirement, and then, in turn, deem that Vistas' equity proposal letter somehow violated that requirement.

Exception No. 6 – The reading of the Equity Proposal letter's Pay-In Schedule. – Conclusion of Law 38

33. Vistas takes exception to the first sentence of Conclusion of Law 38, which reads as follows:

> 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.[3/]

(Emphasis added.)

34. The ALJ characterizes his interpretation of the Pay-In Schedule (discussed in the previous exception) as the "most natural" reading of the equity proposal letter. Under Section 120.57(3), it is not the role of the ALJ to decide the case based on what he believes is the "most natural" reading of a bid, proposal, or application. It is his role to determine if the agency's reading is contrary to the RFA, in a manner that is arbitrary, capricious, or clearly erroneous. In short, the state agency's reading must be a patently unreasonable reading.

35. The ALJ makes no such determination as to the Pay-In Schedule. In fact, in his footnote 3 accompanying the above-quoted excerpt, the ALJ states, "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."

36. Strained or not, if it is a possible interpretation, it cannot be overturned by the ALJ in favor of his self-described "more natural" reading. The statement of a "more natural" reading should be reversed.

Exception No. 7 – Whether FHFC could reasonably interpret its own RFA, including the equity proposal requirement, to deem the Vistas' application eligible. – Conclusions of Law 45, 46, and 47

37. Rather than reproducing the entirety of Conclusion of Law paragraphs 45, 46, and 47, Vistas will address some of the general conclusions set forth in them that should result in their rejection.

38. In paragraph 45, the ALJ deems "clearly erroneous" the premise that "FHFC may use its best judgment to ascertain the most reasonable meaning of an unclear or uncertain

response." First, Vistas disputes the characterization of its application – its "response to the RFA" – as unclear or uncertain. But more importantly, Vistas disputes the ALJ's assertion that FHFC may not use its best judgment to determine the most reasonable meaning of a response. Vistas submits that that is a proper role for Florida Housing in interpreting and applying the provisions of its RFA; and it is not a proper role for and ALJ to reject Florida Housing's view simply because the ALJ believes his interpretation is "more reasonable" or "more natural."

39. In the last sentence of paragraph 46, the ALJ states:

> 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.

Again, Vistas disputes that its pre-completion equity amount was unclearly stated in its equity proposal letter. It was clearly stated in the letter, on a line item designated "Equity Proceeds to be Paid Prior to Construction Completion." But even if an ambiguity existed, under the facts of this case and this equity proposal letter, it was not arbitrary, capricious, or clearly erroneous for Florida Housing to interpret the letter as supporting the claimed construction period pro forma amount. The Vistas' application and equity proposal letter did not reflect an "unexpressed amount" of construction period capital.

40. Similar to its exception to paragraph 46, Vistas takes exception to paragraph 47 insofar as it implies that its application and supporting documents were "uncertain" or "ambiguous." But even if there was an ambiguity, Florida Housing is not prohibited from determining whether the application, and specifically the Development Cost Pro Forma and supporting documentation, satisfies the RFA requirements. Florida Housing's eventual conclusion in this case was that Vistas' application did satisfy those requirements. As discussed in Vistas' proposed recommended order in this case, the initial scorer's determination that Vistas did not

satisfy those requirements was arbitrary and capricious, and should have been rejected by the ALJ.

CONCLUSION

41. FHFC's finance scorer for RFA 2019-105 took the position that the Vistas' application contained a construction funding shortfall based on the RBC Capital equity proposal letter, even though Vistas' Development Cost Pro Forma reflected no shortfall. That scorer's opinion resulted in Vistas being deemed ineligible, a result that was approved by the Board, without the reason for the ineligibility being disclosed to the Board. FHFC senior staff was subsequently made aware that the scorer's opinion directly conflicted with the action taken by a different finance scorer in RFA 2018-110, where a virtually identical equity proposal letter was not viewed as creating a construction funding shortfall, and that application was deemed eligible. Senior staff sought a consistent outcome, and took the position at hearing that the more reasonable outcome was that the RBC equity letter was sufficient.

42. The ALJ should have upheld the Corporation's position at hearing as being consistent with the RFA, and not arbitrary, capricious, contrary to competition, or clearly erroneous; and rejected the scorer's finding of ineligibility of the Vistas' application based on an arbitrary and capricious misreading of Vistas' application and the RFA requirements. The Recommendation in the recommended order to implement the initial "intended action" of deeming Vistas ineligible should be reversed, and a Final Order should be entered deeming Vistas eligible and selecting it for funding.

FILED AND SERVED this 23rd day of July, 2019.

/s/ M. Christopher Bryant
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing has been filed by e-mail with the Corporation Clerk, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329 (CorporationClerk@floridahousing.org), and copies have been furnished to the following by e-mail this 23rd day of July, 2019:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

THE VISTAS AT FOUNTAINHEAD
LIMITED PARTNERSHIP,

Petitioner,

vs.

FHFC Case No. 2019-0030BP
DOAH Case No. 19-2328BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

WINCHESTER PLACE, LTD. and
WINCHESTER PLACE DEVELOPER, LLC,

Intervenors.
_____/

WINCHESTER PLACE, LTD. AND WINCHESTER PLACE DEVELOPER, LLC'S RESPONSE TO EXCEPTIONS

By and through the undersigned counsel and pursuant to Section 120.57, Florida Statutes ("F.S."), and Rule 28-106.217, Florida Administrative Code ("F.A.C."), Intervenors Winchester Place, Ltd. and Winchester Place Developer, LLC hereby submit the following Response to the Exceptions filed by Petitioner, The Vistas at Fountainhead Limited Partnership ("Vistas"), to the Recommended Order issued in this proceeding, and state as follows:

STANDARD OF REVIEW

Section 120.57(1)(l), F.S., provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or

> interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings were not based upon competent, substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

Fla. Stat. § 120.57(1)(k) (2018).

The agency may not reweigh evidence and may reject the Administrative Law Judge's ("ALJ") findings of fact in the recommended order only if the findings are not supported by competent, substantial evidence in the record. Fla. Stat. § 120.57(1)(k) (2018); Charlotte Cty. v. IMC Phosphates Co., 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (citing Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996); Wills v. Fla. Elections Comm'n,, 955 So. 2d 61 (Fla. 1st DCA 2007); see also Walker v. Bd. of Prof'l Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006) (an agency cannot modify or substitute new findings of fact if competent substantial evidence exists to support the ALJ's findings of fact). If the findings are supported by competent, substantial evidence in the record, the agency is bound by those findings. Id.; see also Dep't of Corrections v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" is explained as: "the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Dept. of Highway Safety and Motor Vehicles v. Wiggins, 151 So. 3d 457 (Fla. 1st DCA 2014) (quoting DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)).

Section 120.57(1), F.S., expressly precludes the Board of Florida Housing Finance Corporation ("Florida Housing") from rejecting findings of fact that are based upon competent substantial evidence. Stokes v. Bd. of Prof'l Eng'rs, 952 So. 2d 1224 (Fla. 2007). Furthermore, a reviewing agency may not reweigh the evidence presented at a Division of Administrative Hearings ("DOAH") final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. See, e.g., Rogers v. Dep't of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); Belleau v. Dep't of Envtl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands Cty. Sch. Bd., 652 So. 2d 894 (Fla. 2d DCA 1995). As explained in Walker v. of Prof'l Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006) (quoting Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985)):

> Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer as the finder of fact. It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. **If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.** The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

(emphasis added). Where there is conflicting or differing evidence, and reasonable people can differ about the facts, an agency is bound by the ALJ's reasonable inference based on the conflicting inferences arising from the evidence. Greseth v. Dep't of Health and Rehab. Servs., 573 So. 2d 1004, 1006 -1007 (Fla. 4th DCA 1991). Furthermore, if there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. See, e.g., Arand Constr. Co. v.

Dyer, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); Conshor, Inc. v. Roberts, 498 So. 2d 622 (Fla. 1st DCA 1986). In addition, an agency has no authority to make independent or supplemental findings of fact. See, e.g., North Port, Fla. v. Consol. Minerals, 645 So. 2d 485, 487 (Fla. 2d DCA 1994). Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing the Final Order. See, e.g., Walker v. Bd. of Prof. Eng'rs, 946 So. 2d 604 (Fla. 1st DCA 2006); Dep't of Corr. v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

With respect to conclusions of law, an agency may reject or modify an ALJ's conclusions of law and application of agency policy; however, when doing so, the agency must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Charlotte County, 18 So. 3d at 1092; see also Goin v. Comm'n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

RESPONSES TO EXCEPTIONS

Response to Exception No. 1

Vistas takes exception with certain portions of Findings of Fact 12, 13 and 20, arguing that the ALJ made "an erroneous factual determination that the Chase debt proposal letter could be resorted to interpret the RBC Capital equity proposal letter." Despite Vistas' attempt to obfuscate the ALJ's actual findings, the ALJ does not go to the extreme suggested by Vistas. Instead, he simply notes that the RBC letter does not state when "permanent loan closing" will occur. This finding is undisputed and is supported by competent, substantial evidence. J. Ex. 6. On the issue of when permanent loan closing will occur, in Findings of Fact 12 and 13 the ALJ notes that the Chase letter is "[o]f potential relevance" and "at least sheds some light on the timing of [this] crucial milestone," which findings were not rebutted by any testimony from

Chase or any other person. Id.[1] The ALJ then reviewed the clear language in the RBC and Chase letters to find that "permanent loan closing" would occur at the time of conversion of the construction loan to a permanent loan.[2] Vistas' Exception No. 1 attempts to persuade Florida Housing to reweigh evidence presented at the final hearing; however, the DOAH record contains competent, substantial evidence supporting Findings of Fact 12, 13, and 20.

Also in Exception No. 1, Vistas continues to advance its argument that because the RBC letter satisfied the conditions of the RFA, the Chase letter it voluntarily included in its application must be ignored. This argument was argued in depth at the final hearing and correctly rejected by the ALJ. Ignoring information an applicant voluntarily includes in its application is contrary to applicable case law and Florida Housing's consistent position that it will consider all information an applicant includes in its application, which can impact an application's scoring or determination of eligibility. See St. Elizabeth Gardens v. Fla. Hous. Fin. Corp., DOAH Case No. 16-4132, ¶¶ 60-62 (R.O. Oct. 18, 2016) adopted in relevant part (F.O. Oct. 28, 2016) (Florida Housing's decision was not clearly erroneous as information that was not explicitly required by RFA created "a degree of uncertainty"); see also Rosedale Holding v. Fla. Hous. Fin. Corp., FHFC Case No. 2013-038BP (R.O. May 12, 2014) adopted in toto (F.O. June 13, 2014). Thus, the ALJ correctly rejected Vistas' suggestion to ignore the additional language.

Florida Housing may only reject the ALJ's findings of fact if they are not supported by competent, substantial evidence in the record. Charlotte Cty., 18 So. 3d at 1092. Competent,

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[1] While these facts do support the ALJ's final determination, the ALJ chose not to rely upon these facts in reaching his ultimate conclusion, which he resolved as a matter of law.

[2] To the extent Vistas did not agree with the way the Chase letter equated permanent loan closing and conversion, it could have called a Chase representative to explain that not to be the case. For whatever reason, Vistas chose not to do so. It cannot now attempt to argue a point it choose not to address during the final hearing.

substantial evidence exists in the record to support Findings of Fact 12, 13, and 20. Therefore, Exception No. 1 should be rejected.

Response to Exception No. 2

In Exception No. 2, Vistas takes exception with Conclusions of Law 61 and 62 in their entirety, arguing that the ALJ erroneously considered the Chase letter in his determination. However, in Conclusions of Law 61 and 62, the ALJ is determining what, if any, effect to give information that an applicant voluntarily includes in its application to satisfy a mandatory eligibility item. As noted in the response to Exception No. 1 above, Vistas is again attempting to obfuscate the issues by re-litigating evidence regarding the Chase letter, and suggesting that Florida Housing should ignore information Vistas included in its application.

Because Conclusion of Law 62 correctly reflects the applicable law on the topic, it is not as or more reasonable for Florida Housing to reach a different conclusion. With regard to the information contained in Conclusion of Law 61, the information contained therein is simply a reiteration of the information contained in the Chase letter. J. Ex. 6. Thus, whether or not it is appropriately labeled as a conclusion of law, the finding contained therein is supported by competent, substantial evidence. For these reasons and those stated in response to Exception No. 1, Exception No. 2 should be rejected.

Response to Exception No. 3

In Exception No. 3, Vistas takes exception with Conclusion of Law 58, attacking the ALJ's conclusion that the ambiguity of a response must be determined de novo in an administrative bid protest. Vistas' entire argument is based on the incorrect premise that "the agency decision under review should be Florida Housing's senior staff's position at hearing: that the more reasonable view of the Vistas' application and attachments was that Vista's equity proposal letter was sufficient, and not the scorer's preliminary determination that it was not

sufficient." This statement disregards the fact Florida Housing's actual agency action occurred on March 22, 2019, when its Board ratified the scorer's preliminary determination and found Vistas' application ineligible for funding. SFF #16. While the ALJ was correct in his interpretation, as Florida Housing does not have an expertise in determining ambiguities, the argument is irrelevant given the burden that Vistas carried in this case, which burden Vistas has consistently ignored.[3] As noted by Vistas, Section 120.57(3)(f), F.S., states that the ALJ "shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious." See 120.57(3), Florida Statutes; see also Blue Broadway v. Fla. Hous. Fin. Corp., DOAH Case No. 17-3273BID (R.O. Aug. 29, 2017) adopted in toto (F.O. Sept. 22, 2017); see also Pinnacle Heights, LLC v. Fla. Hous. Fin. Corp., DOAH Case No. 15-3304 (R.O. Aug. 31, 2015) adopted in toto (F.O. Sept. 18, 2015).

The proposed agency action in this case is the rejection of Vistas' application due to the insufficiency of its equity funding letter from RBC. It is not, as Vistas suggests, Florida Housing's litigation position taken at final hearing. In its proposed agency action, Florida Housing had already determined that there was an inconsistency. Vistas failed to meet its burden

[3] In paragraph 25 of its Exceptions, Vistas incorrectly states that it was the ALJ's "role to determine whether Florida Housing's determination that the letter was sufficient was arbitrary or capricious." This error extends throughout Vistas' Exceptions. As Florida Housing's preliminary agency action was that the letter is insufficient, the ALJ's role was to determine whether that determination was arbitrary or capricious. To determine whether Florida Housing acted in an arbitrary or capricious manner, it must be determined "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." Adam Smith Enter. v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Vistas failed to provide any facts to allow the ALJ to reach such a determination.

to demonstrate that the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious. As such, it is not as or more reasonable to conclude that Florida Housing should instead ratify its staff's change in litigation position taken at final hearing.[4]

For these reasons, Exception No. 3 should be rejected.

Response to Exception No. 4

In Exception No. 4, Vistas takes exception with Conclusions of Law 48, 49, and 50; however, yet again, Vistas misstates the conclusions contained therein. Vistas correctly points out that Florida Housing has not determined, and no argument has been made, that the rejection of Vistas' application should be considered a "minor irregularity." However, this is not a basis to reject Conclusions of Law 48 through 50 as Vistas suggests. While no party requested that ALJ to consider such a possibility, the ALJ's analysis points out why the issues with Vistas' application would not meet the definition of "minor irregularity." And, although the ALJ's analysis might be considered "putting the cart before the horse," it saves the parties the time and effort of a remand should Vistas now attempt to suggest that its error should be considered a minor irregularity. As such, Conclusions of Law 48 through 50 are, at worst, harmless.

For these reasons, Exception No. 4 should be rejected.

Response to Exception No. 5

In Exception No. 5, Vistas takes exception with Conclusion of Law 35, in which the ALJ determines – and articulates the reasons why – Vistas' suggestion that the Pay-In Schedule should be ignored "is not a persuasive argument." Vistas correctly notes that the RFA does not require the submission of a Pay-In Schedule. However, the ALJ explains his position by

[4] It is important to note that Florida Housing's litigation position was NOT that its prior decision was incorrect. In fact, the litigation position was that the decision was reasonable, but for consistency purposes the alternative interpretation was "more reasonable."

pointing out that because the RFA required an equity proposal, and because the Pay-In Schedule was part of the equity proposal, that information was required to be submitted. In other words, because RBC included the Pay-In Schedule, Vistas could not take it upon itself to remove that language from the letter and submit, in effect, a "partial" equity letter. The ALJ's point simply goes back to Vistas' voluntary inclusion of the additional information and the requirement that the information not be ignored. It is unreasonable for Vistas to suggest, yet again, that Florida Housing should ignore information it voluntarily included in its application, in contravention of applicable case law. See, St. Elizabeth Gardens v. Fla. Hous. Fin. Corp., DOAH Case No. 16-4132, ¶¶ 60-62 (R.O. Oct. 18, 2016) adopted in relevant part (F.O. Oct. 28, 2016) (Florida Housing's decision was not clearly erroneous as information that was not explicitly required by RFA created "a degree of uncertainty"); see also Rosedale Holding v. Fla. Hous. Fin. Corp., FHFC Case No. 2013-038BP (R.O. May 12, 2014) adopted in toto (F.O. June 13, 2014).

For these reasons, Exception No. 5 should be rejected.

Response to Exception No. 6

In Exception No. 6, Vistas takes exception with the first sentence of Conclusion of Law 38, wherein the ALJ concludes that the "most natural reading" of the Pay-In Schedule is that Capital Contribution #3 will be made after construction completion. Ignoring the fact that Vistas position at the final hearing was that despite the language, it was possible that the payment could be made prior to construction completion, Vistas once again fails to recognize the burden it carries in this challenge. As noted above, the proposed agency action in this case is the rejection of Vistas' application. Given Vistas' failure to put on any testimony as to when "permanent loan closing" would occur, the ALJ's determination on the issue cannot be overturned. More importantly, even if the ALJ had determined that the "more natural" reading was that "permanent

loan closing" would occur earlier, such a determination would not demonstrate that Florida Housing's proposed agency action to reject Vistas' application was clearly erroneous, arbitrary, capricious or contrary to competition.

For these reasons, Exception No. 6 should be rejected.

Response to Exception No. 7

In Exception No. 7, Vistas takes exception with Conclusions of Law 45, 46, and 47, in which the ALJ rejects Vistas' and Florida Housing's litigation position that an ambiguous or uncertain response will be given the most reasonable interpretation. It is important to note that at the final hearing, Florida Housing acknowledged that both possible interpretations were reasonable; but felt one was "more reasonable" than the other. Therefore, regardless of the interpretation with which the ALJ agreed, that decision would be insufficient to determine the proposed agency action to reject Vistas' application was clearly erroneous, arbitrary, capricious or contrary to competition.

For these reasons, Exception No. 7 should be rejected.

CONCLUSION

In sum, Vistas' arguments that the Recommended Order's Findings of Fact are not based on competent substantial evidence are inaccurate; instead, Vistas is attempting to have the agency improperly reweigh evidence and overturn facts that are supported by a simple review of Vistas' own application. Likewise, Vistas' arguments that the Conclusions of Law should be rejected or overturned are incorrect as it would not be as or more reasonable for Florida Housing to substitute its own conclusions for those of the ALJ.

WHEREFORE, Winchester Place, Ltd. and Winchester Place Developer, LLC respectfully request, for the reasons set forth above, that the Board of Directors reject each and

all of Vistas' Exceptions, and adopt the Findings of Fact, Conclusions of Law and Recommendation set forth in the Recommended Order as its own and issue a Final Order consistent with same in this matter.

FILED AND SERVED this 29th day of July, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been e-mailed to the Florida Housing's Clerk and counsel of record on the service list below this 29th day of July, 2019.

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

THE VISTAS AT FOUNTAINHEAD
LIMITED PARTNERSHIP,

Petitioner, DOAH Case No. 19-2328BID

v. FHFC Case No. 2019-030BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WINCHESTER PLACE, LTD. and
WINCHESTER PLACE DEVELOPER, LLC

Intervenors.
_____/

RESPONDENT'S RESPONSE TO PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Florida Housing Finance Corporation, hereby submits its Response to Petitioner Vistas at Fountainhead Limited Partnership's Exceptions, pursuant to Rule 28-106.217, Fla. Admin. Code.

The Findings of Fact in the Recommended Order will be referenced as (FOF #). The Conclusions of Law in the Recommended Order will be referenced as (COL #).

Response to Exception 1.

Petitioner takes exception to portions of Findings of Fact #12, #13, and #20, in which the Administrative Law Judge (ALJ) discussed the relevance of the debt proposal letter from JP Morgan Chase Bank. Petitioner argues that the ALJ "makes an erroneous factual determination that the Chase debt proposal letter could be resorted to [sic] interpret the RBC Capital equity proposal letter." That, however, is not precisely what the ALJ found.

The equity proposal letter that is at the heart of this issue refers to "permanent loan closing" but does not define that term. The ALJ correctly notes that Florida Housing, in attempting to determine the meaning of an undefined term, may look elsewhere within the four corners of the application. It is not inappropriate, therefore, for Florida Housing to look at the Chase letter, which was submitted with the application to see whether it might clear up any uncertainty as to what the term "permanent loan closing" means. The ALJ correctly noted that the Chase letter may have "potential relevance" and "at least sheds some light" on the meaning of the term, but he did not find that the Chase letter could be used to definitively state what "permanent loan closing" means. In COLs #60-63, the ALJ explains that the purpose of considering the Chase letter was to determine whether the application as a whole was ambiguous as to the amount of equity to be provided prior to construction completion. He determined that the Chase letter "does not erase the ambiguity appearing on the face of the Equity Proposal." This is not the same as

finding that the Chase letter creates or even confirms the ambiguity in the equity proposal letter.

Petitioner argues that the author of the equity proposal letter testified that he did not see or consider the debt proposal letter. While this may be true, it is irrelevant since the ALJ never found that either letter necessarily influenced the other, or that the intent of the author was relevant to the definition of the terms of the letter.

Petitioner also argues that the ALJ equates "permanent loan closing" with "permanent loan conversion." It is possible to read FOF #13 as confusing "closing" with "conversion," but even if true, it is ultimately irrelevant to the ultimate conclusion that the Chase letter did not resolve the ambiguity in the equity proposal letter. Petition is correct, however, in noting that there is no record evidence that "physical occupancy" must occur only after receipt of a final certificate of occupancy.

Findings of Fact #12, #13, and #20 are supported by competent substantial evidence, except for the last sentence of FOF #13. For these reasons, FOF #13 should be amended as follows, and Petitioner's Exception #1 should otherwise be rejected.

> 13. 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~~.

Response to Exception #2.

Petitioner takes exception to Conclusions of Law #61 and #62, in which the ALJ again discussed the relevance of the debt proposal letter from JP Morgan Chase Bank. These conclusions are consistent with the ALJ's other findings and conclusions and are supported by competent substantial evidence. For these reasons, Petitioner's Exception #2 should be rejected.

Response to Exception #3

Petitioner takes exception to Conclusion of Law #58, in which the ALJ concluded that ambiguities in responses to RFAs should be evaluated *de novo* in an administrative hearing without giving deference to an agency's interpretation of any such ambiguities. Petitioner primarily argues that the ALJ should have deferred to the position taken by Florida Housing at the administrative hearing. However, the ALJ did not reach a conclusion as to whether Florida Housing's litigation position or its initial determination should be given deference; he determined as a matter of law that no determination of Florida Housing should be given deference regarding

the interpretation of materially ambiguous responses to an RFA. This interpretation of Section 120.57(3), Fla. Stat., and the relevant case law, is not within the substantive jurisdiction of Florida Housing, and Florida Housing thus has no authority to reject or modify this conclusion. For this reason, Petitioner's Exception #3 should be rejected.

Response to Exception #4.

Petitioner takes exception to COLs #48, 49, and 50, in which the ALJ concludes that an ambiguity in a response to an RFA must be considered nonresponsive by citing to Rule 67-60.008, Fla. Admin. Code. This rule states:

> **67-60.008 Right to Waive Minor Irregularities.**
>
> Minor irregularities are those irregularities in an Application, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

As Petitioner correctly points out, no party has argued that the alleged ambiguity in the response should be considered a minor irregularity, and Florida Housing has not conducted a minor irregularity analysis. Construing this rule as creating a requirement that any ambiguity in a response must necessarily be considered a material deficiency is an incorrect reading of this rule. Instead, the rule

must be read to mean that if an irregularity is discovered in a response, it may be waived only if certain requirements are met.

The ALJ concluded in COLs #46 and 47 that Petitioner's response did contain a material ambiguity and should therefore have been considered nonresponsive. Although the subject of minor irregularities was not raised by any party, it is not inappropriate for the ALJ to conduct an analysis as to whether or not this ambiguity should have been waived as a minor irregularity. In this context, COLs #48-50 should be read to mean only that a material ambiguity that cannot be resolved by looking elsewhere in the application could not be waived as a minor irregularity.

Interpretation of Rule 67-60.008, Fla. Admin. Code, is within the substantive jurisdiction of Florida Housing, and the ALJ's conclusions regarding this rule may thus be rejected or modified. Petitioner's exception should be granted in part, and COLs 48-50 should be modified as follows:

> 48. ~~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.~~ Rule 67-60.008 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." This rule makes clear that a material ambiguity in a response cannot be waived as a minor irregularity unless the uncertainty can be reasonably eliminated by looking elsewhere in the application.

~~49. 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.~~

~~50. To give an unclear provision its most reasonable interpretation, as FHFC (with the support and encouragement of Vistas) 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.~~

Response to Exception #5

Petitioner takes exception to COL #35, in which the ALJ discusses whether the Pay-In Schedule in the equity proposal letter is required by the RFA. The ALJ correctly finds that while the RFA "does not specifically require an equity pay-in schedule," it does require that the equity proposal letter be submitted with the application, and the Vistas equity proposal letter included a Pay-In Schedule. The last two sentences of COL #35, however, state: "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."

These last two sentences are not supported by competent substantial evidence and are potentially misleading. The RFA includes specific requirements for what must be included in an equity proposal letter, and a pay-in schedule is not among those requirements. For this reason, Petitioner's Exception #5 should be granted and COL #35 should be modified as follows:

> 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.~~

Response to Exception #6

Petitioner takes exception to the first sentence of COL #38, which reads as follows:

> 38. 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.

Petitioner's argument is essentially that the ALJ's role is not to interpret language in a response to an RFA, but instead to determine whether or not Florida Housing's interpretation of that language is arbitrary, capricious, or clearly erroneous. While it is true that Florida Housing's interpretation of its own rules or the RFA specifications is entitled to deference, the ALJ has concluded elsewhere that Florida Housing's interpretation of language in a response to an RFA is not (and, in fact, may even be prohibited). As noted earlier, Florida Housing has no authority to reject a conclusion over which it has no substantive jurisdiction.

In this case, the "conclusion" regarding the interpretation of the equity proposal letter is actually a finding of fact; the inherent "conclusion" is that the ALJ has the authority to make such a finding. The equity proposal letter was admitted into evidence, and it is entirely appropriate for an ALJ to make findings based upon such evidence. As the ALJ pointed out in a footnote, it was possible to read the equity proposal letter differently, and as a result he did not make a finding that the letter definitively stated that Capital Contribution #3 would be paid after construction completion. Read in context, the disputed sentence provides a basis for the ALJ's conclusion that the equity proposal letter could be reasonably interpreted at least two different ways, and therefore contained a material ambiguity.

For these reasons, Petitioner's Exception #6 should be rejected.

Response to Exception #7

Petitioner takes exception to COLs #45, 46, and 47, in which the ALJ concluded that the equity proposal letter submitted by Vistas contained a material ambiguity, and that Florida Housing did not have the authority to use its best judgment to ascertain the most reasonable meaning of that letter. Petitioner argues that it was not proper for the ALJ to reject Florida Housing's interpretation, and that the ALJ should have deferred to the position Florida Housing took during the administrative hearing.

Again, while Florida Housing's interpretation of the RFA specifications and its own rules is subject to deference, the ALJ concluded that Florida Housing's interpretation of Vistas' response to the RFA was not. This conclusion was based on the ALJ's understanding of Chapter 120, Fla. Stat., as well as relevant case law, and Florida Housing has no authority to reject this conclusion. The ALJ concluded that for Florida Housing to attempt to interpret a materially ambiguous response not only violated the plain language of the RFA, but was also contrary to competition and clearly erroneous. Whether or not Florida Housing's reading of the equity proposal letter was reasonable, it was not allowed as a matter of law.

For these reasons, Petitioner's Exception #7 should be rejected.

WHEREFORE, Florida Housing respectfully request that the Board of Directors reject Petitioner's Exceptions #2, #3, #6 and #7, grant Petitioner's Exception #5, and grant in part Petitioner's Exceptions #1 and #4; adopt the Findings

of Fact, Conclusions of Law, and Recommendation of the Recommended Order, as modified herein; and issue a Final Order consistent with same in this matter.

Respectfully submitted on this 29th day of July, 2019.

/s/ Chris McGuire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 29th day of July, 2019 to:

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