STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BDG PARKWOOD LOFTS, LP,

Petitioner,

vs. Case No. 20-1766BID

CHRISTIAN MANOR RESTORATION, LLC, AND FLORIDA HOUSING FINANCE CORPORATION,

Respondents.
_____/

RECOMMENDED ORDER

On May 5, 2020, Administrative Law Judge Hetal Desai of the Division of Administrative Hearings (DOAH) held a final evidentiary hearing in Tallahassee, Florida, and by a video teleconferencing platform (Zoom). All parties participated by separate web or telephone connections due to the coronavirus pandemic.

APPEARANCES

For Petitioner: Michael J. Glazer, Esquire
Ausley McMullen
123 South Calhoun Street
Post Office Box 391
Tallahassee, Florida 32302

For Respondents: Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

Michael P. Donaldson, Esquire
Carlton Fields
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

The issues presented for determination are whether Florida Housing Finance Corporation's (FHFC) determinations regarding the applications responding to Request for Applications 2019-116 SAIL Financing of Affordable Multifamily Housing Development to Be Used In Conjunction With Tax-Exempt Bond Financing And Non-Competitive Housing Credits (the RFA), were clearly erroneous, contrary to competition, arbitrary, or capricious; and whether the award to Respondent Christian Manor Restoration, LLC (Christian Manor), is contrary to governing statutes, rules, or the solicitation specifications of the RFA.

PRELIMINARY STATEMENT

FHFC issued the final RFA on December 20, 2019. In response, FHFC received 65 applications, including applications from Petitioner, BDG Parkwood Lofts, LP (Parkwood), Christian Manor, and Waterview Preserve, LLC (Waterview).

On March 6, 2020, FHFC posted notice of its intended decision to award funding and the rankings of the applications on its website. Out of the 65 applications submitted, 13 were awarded funding, including Christian Manor. Waterview was not awarded funding, but was ranked above Petitioner, but below Christian Manor.

On March 11, 2020, Parkwood and Waterview filed Notices to Protest. On March 23, 2020, both filed Petitions for Administrative Hearings challenging the award to Christian Manor. Parkwood's Petition also challenged the eligibility and ranking of Waterview because Parkwood needed to prevail against Waterview to move into the funded application range.

On April 9, 2020, FHFC referred all the protests to the RFA awards to DOAH pursuant to section 120.57(3)(d)3., Florida Statutes (2019).[1] These included the challenges by Parkwood and Waterview. The cases were assigned to the undersigned Administrative Law Judge (ALJ) who consolidated them with the current action. Specifically, this case, Case No. 20-1766BID, was consolidated with *Metro Grande Associates I, LTD v. Florida Housing Finance Corporation*, Case No. 20-1767BID (Metro Grande Challenge) and *Waterview Preserve, LLC v. Florida Housing Finance Corporation*, Case No. 20-1768BID (Waterview challenge).[2]

On April 13, 2020, the undersigned held a scheduling conference by telephone with all the parties in the consolidated cases. Due to the ongoing COVID-19 pandemic, the parties agreed that the final hearing would be conducted via Zoom.

At the final hearing, Joint Exhibits 1-7 were admitted into evidence. Petitioner's Exhibits P6, P10 through P16, P19, and P29 were admitted into evidence; other exhibits were offered by Petitioner, but not admitted due to FHFC's objections (see discussion below). Petitioner also presented the testimony of Chris Savino via deposition transcript (Ex. P19). Christian Manor introduced Exhibits R1 through R3 and called no witnesses. FHFC introduced no additional exhibits and presented the testimony of Marisa Button, FHFC's Director of Multifamily Allocation.

The parties entered into and submitted a Joint Prehearing Stipulation that included 30 paragraphs of facts describing the RFA, the scoring and ranking process, the parties' RFA applications, and issues raised in this

[1] All statutory and administrative rule references are to the 2019 versions of the Florida Statutes and Florida Administrative Code unless otherwise stated.

[2] The Metro Grande challenge was severed and dismissed on April 24, 2020; and the Waterview challenge was severed and dismissed on May 4, 2020.

proceeding. The stipulated facts, where appropriate, have been incorporated into this Recommended Order. The Transcript of the hearing was filed on May 19, 2020. All parties timely submitted Proposed Recommended Orders (PROs) on May 29, 2020. The parties' PROs have been duly considered in the preparation of this Recommended Order.

Inadmissibility of Parkwood's Exhibits

At the hearing, Petitioner offered Exhibits P2 through P5, P7, and P8, which are the City of Orlando's (City) zoning ordinances, regulations, and forms; correspondence regarding another proposed project from 2009; and a federal regulation on property standards. Additionally, proposed Exhibit P20 is the deposition transcript of Richard Carr (an expert witness) who testified about the proposed structure in the Waterview application and the feasibility of Waterview's proposal given assumed height and zoning restrictions.

FHFC objected to these exhibits on the basis of relevancy and the undersigned reserved ruling.[3] The objectionable exhibits, including the deposition of Mr. Carr were offered by Petitioner to establish that the proposed Waterview application is incomplete and/or inaccurate because the proposed project would violate height restrictions in the local zoning code; and it would be ineligible for certain funds because the proposed project would violate wetland regulations. FHFC argues Waterview submitted the appropriate certification that the project satisfies the local zoning regulations, and the applicants were not required to show they were eligible for the special funding in order to be found eligible. Therefore evidence regarding these issues is irrelevant.

As explained in the Findings of Fact, as part of its application Waterview submitted an FHFC form titled "Local Government Verification That

[3] Respondent Christian Manor did not join in the objection.

Development Is Consistent with Zoning and Land Use Regulations" (Zoning Form). Waterview's Zoning Form was executed by a Planning Official with the City. That form states in relevant part:

> The undersigned … confirms that, as of the date that this form was signed, the above referenced [Waterview Preserve] Development's proposed units, density, and intended use are consistent with current land use regulations and zoning designations.
>
> * * *
>
> I certify that the City of Orlando has vested in me the authority to verify consistency with local land use regulations and zoning designation.

Neither the undersigned nor FHFC has the authority (or expertise) to make an independent evaluation as to whether a local government has acted in accordance with its own ordinances or procedures, nor is this required. S*ee Brownsville Manor, LP v. Redding Dev. Partners, LLC, and Fla. Hous. Fin. Corp.*, 224 So. 3d 891, 894 (Fla. 1st DCA 2017) (finding Brownsville eligible because it complied with the RFA requirements at the application stage by submitting the required forms and providing assurances it intended to comply with all of the solicitation terms); s*ee also Houston Street Manor LP v. Fla. Hous. Fin. Corp.*, Case No. 15-3302BID, 2015 WL 5008308 (Fla. DOAH Aug. 18, 2015; FHFC Sept. 21, 2015).

In *Houston Manor*, the ALJ allowed FHFC to defer to the local government's verification of a site plan approval submitted as part of a Request for Applications and explained:

> 51. A good place to start in evaluating [the challenger] Pine Grove's position is with a look at the site-plan status form's purpose. It is clear from the language of the form that what FHFC wants, in

> a nutshell, is an authoritative statement from the local government advising that the local government either has approved, or is currently unaware of grounds for disapproving, the proposed development's site plan. The relevance of this statement lies not so much in its being correct, per se, but in the fact that it was made by a person in authority whose word carries the weight of a governmental pronouncement. Put another way, the statement *is* correct *if* made by an official with the authority to utter the statement on behalf of the local government; it is a verbal act, a kind of approval in itself.
>
> 52. FHFC might, of course, deem a fully executed site-plan status form nonresponsive for a number of reasons. If it were determined that the person who signed the form lacked the requisite authority to speak for the government; if the statement were tainted by fraud, illegality, or corruption; or if the signatory withdrew the certification, for example, FHFC likely would reject the certification. No such grounds were established in this case, or anything similar.
>
> 53. Instead, Pine Grove contends that Mr. Huxford simply erred, that he should not have signed the Local Government Verification of Status of Site Plan Approval. Pine Grove makes a reasonable, or at least plausible, case to this effect. The fatal flaw in Pine Grove's argument, however, is that the decision whether to grant or deny this particular form of (preliminary) local governmental approval to Houston Street's site plan must be made by the local government having jurisdiction over the proposed development, i.e, the City of Jacksonville——not by Pine Grove, Houston Street, FHFC, or the undersigned. Mr. Huxford was empowered to make the statement for the city. He made it.

Houston Street Manor LP, 2015 WL 5008308, at *13; *see also Madison Oaks, LLC, and Am. Residential Communities, LLC v. Fla. Hous. Fin. Corp.*, Case No. 18-2966 (July 6, 2018) (order on motion in limine excluding evidence of

zoning and allowable uses of applicant's property); *Warley Park, Ltd. v. Fla. Hous. Fin. Corp.*, Case No. 17-3996BID (Fla. DOAH Oct. 19, 2017) *adopted with modifications* (FHFC Dec. 8, 2017) (allowing FHFC to defer to local government's zoning and land use certifications submitted as part of application); *Madison Hollow, LLC, and Am. Residential Dev.* v. *Brixton Landing, Ltd. and Fla. Hous. Fin. Corp*., Case No. 15-3301BID (Fla. DOAH Oct. 29, 2015; FHFC Dec. 11, 2015) (finding local government had jurisdiction to grant or deny the Zoning Form and FHFC did not erroneously accept local government's certification).

Section 120.569(2)(g) provides that "irrelevant, immaterial, or unduly repetitious evidence shall be excluded" from an administrative proceeding. There is no dispute the Zoning Form was executed by a City Public Official authorized to do so. Absent evidence that the Zoning Form was obtained through fraud, illegality, or corruption, it is irrelevant if Waterview's proposed project would have ultimately violated zoning or other federal regulations. Accordingly, proposed Exhibits P2 through P5, P7, P8, and P20 (the deposition of Mr. Carr) are irrelevant and immaterial to the issues in this proceeding. FHFC's objection is sustained and these exhibits are not entered into evidence.

FINDINGS OF FACT

PARTIES AND PROCESS

1. Petitioner Parkwood is an applicant responding to the RFA. The Parkwood application, assigned number 2020-422BS, was deemed eligible but was not selected for funding under the terms of the RFA.

2. Respondent Christian Manor is an applicant responding to the RFA. The Christian Manor application, assigned number 2020-405BS, was deemed eligible and was selected for funding under the terms of the RFA.

3. FHFC is a public corporation created pursuant to section 420.504, Florida Statutes. The purpose of FHFC is to promote public welfare by administering the governmental function of financing affordable housing in Florida. FHFC is tasked with allocating a portion of the certain Disaster Recovery funding allocated by the U.S. Department of Housing and Urban Development pursuant to the State of Florida Action Plan for Disaster Recovery.

4. Waterview was an applicant responding to the RFA. The Waterview application, assigned number 2020-424BSN, was deemed eligible but was not selected for funding under the terms of the RFA.

5. FHFC is authorized to allocate housing credits and other funding by means of requests for proposals or other competitive solicitation. *See* § 420.507(48), Fla. Stat.; Fla. Admin. Code Ch. 67-60 (governing the competitive solicitation process). FHFC allocates its competitive funding pursuant to the bid protest provisions of section 120.57(3).

6. Funding is made available through a competitive application process commenced by the issuance of a Request for Applications (RA). An RA is equivalent to a "request for proposal" as indicated in Florida Administrative Code Rule 67-60.009(4).

7. The RFA was issued on November 6, 2019. It was modified several times, and the final RFA was issued on December 20, 2019. The application deadline was December 30, 2019.

8. Sixty-five applications were submitted in response to the RFA.

9. A Review Committee was appointed to review the applications and make recommendations to FHFC's Board of Directors (the Board). The Review Committee found 57 applications eligible, seven applications ineligible, and one application withdrew from the selection process. Through the ranking and selection process outlined in the RFA, 13 applications were preliminarily recommended for funding, including Christian Manor. The

Review Committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

10. On March 6, 2020, the Board met and considered the recommendations of the Review Committee for the RFA. At 9:35 a.m. that same day, all RFA applicants received notice that the Board determined whether applications were eligible or ineligible for funding consideration and that certain eligible applicants were preliminarily selected for funding, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets on the FHFC website, www.floridahousing.org: (1) listing the Board-approved scoring results for the RFA, and (2) identifying the applications which FHFC proposed to fund. There is no dispute that Petitioner and Christian Manor received this notice.

11. In the March 6, 2020, posting, FHFC announced its intention to award funding to 13 applications including Christian Manor.

12. No challenges were made to the terms of the RFA.

RANKING AND SELECTION PROCESS

13. Through the RFA, FHFC seeks to award an estimated total of $71,360,000 in SAIL Financing, as well as tax-exempt bonds, to assist in financing the development of affordable rental housing for tenants who are either low-income or extremely low-income. The available SAIL financing was to be divided so that a certain amount was targeted both geographically, between Large, Medium, and Small Counties, and demographically, between applicants proposing housing for families and those proposing housing for the elderly.

14. Applicants who are awarded tax-exempt bond financing are also entitled to an award of non-competitive federal low-income housing tax credits. FHFC made approximately $5,611,650 in National Housing Trust Fund (NHTF) funding available to applicants committing to build either new construction or rehabilitation of family or elderly housing for "Persons with Special Needs."

15. Applications in this RFA are scored in two categories for a possible total of ten points. Five points each can be awarded for Submission of Pre-Approved Principal Disclosure Form and Local Government Contributions. Because so many applicants achieve a perfect score of ten, the RFA establishes a series of tiebreakers referred to as a "sorting order," designed to rank order applications for funding selection. The RFA set the following sorting order, after listing applications from highest score to lowest score:

> a. By eligibility for Proximity Funding Preference; then
>
> b. By eligibility for the Per Unit Construction Funding Preference; then
>
> c. By Leveraging Level number 1 through 5; then
>
> d. By eligibility for the Florida Job Creation Preference; then
>
> e. By randomly assigned lottery number.

16. The RFA also established a series of funding goals. Those goals were:

> •One New Construction Application in a Large County serving Elderly residents.
>
> •Three New Construction Applications in a Large County serving Family residents, with a preference that at least two of such Applications being from "Self-Sourced" Applicants.
>
> •One New Construction Application in a Medium County serving Elderly residents.
>
> •Two New Construction Applications in a Medium County, with a preference that at least one such Application being from a self-sourced Applicant.

17. The RFA designated each county in Florida as either Large, Medium, or Small. The RFA also allowed an applicant to designate itself as "Self-

Sourced," which requires applicants proposing new construction family projects to provide a portion of their development funding themselves, in an amount of at least half of its SAIL Request Amount (or $1 million, whichever is greater).

18. The RFA provided that eligible applicants be assigned a Leveraging Level 1 through 5, with 1 being the best score, based on the total Corporation SAIL Funding amount relative to all other eligible applicants' total Corporation SAIL Funding amount. The Leveraging Level is a comparative tool to rank applicants based on how much SAIL funding each applicant has requested per affordable housing unit (Set-Aside Unit) it proposes to construct. Calculation of the Leveraging Level includes adjusting the total amount of SAIL funds requested by an applicant based on a variety of factors, including development type, development location, construction method to be employed, and whether a Public Housing Authority is part of the applicant, then dividing that adjusted amount by the applicant's proposed number of Set-Aside Units.

19. For example, the SAIL Request per Set-Aside Unit is reduced by ten percent for applicants proposing a Mid-Rise Four-Story building, while applicants proposing Garden Apartments or Townhouses do not receive this adjustment, and applicants proposing Five-Story or Six-story Mid-Rises or High-Rises get a greater reduction. Applicants whose adjusted SAIL Request per Set-Aside Unit is among the lowest ten percent of all calculated SAIL Request amounts per Set-Aside Unit in this RFA are assigned Leveraging Level 1; the next 20 percent are Leveraging Level 2; the next 20 percent are Leveraging Level 3; the next 20 percent are Leveraging Level 4; and the highest 30 percent are Leveraging Level 5.

20. The RFA employed a "funding test," requiring that the full amount of an applicant's SAIL request be available for award when that applicant is under consideration for funding; partial funding awards are not permitted. Sufficient SAIL funding must be available in both the county size group

(Large, Medium, or Small), and the demographic category (elderly or family) for an applicant to be selected. Within the county size group, the RFA contains a pour-over provision for any unallocated Small County funding to be divided between the Medium and Large County funding availability; and any unallocated Medium County funding would be made available to Large County applicants.

21. Further, in order to promote geographic distribution of funding awards, the RFA included a County Award Tally mechanism. If an applicant was selected in a particular county, a second applicant would not generally be selected from that same county if there was any eligible applicant available (even with a lower total application score) from any other county, from which an applicant had not already been selected for funding.

22. The RFA set forth a very specific funding selection order, taking into consideration two specific counties (Miami-Dade and Broward), county size groups, development category (new construction or rehabilitation), demographic group (elderly or family), and self-sourced status.

CHRISTIAN MANOR'S APPLICATION

23. One of the criteria in the RFA for scoring and ranking applications involves proximity to certain services. The RFA provides in relevant part:

> e. Proximity
>
> The Application may earn proximity points based on the distance between the Development Location Point [(DLP)] and the Bus or Rail Transit Service (if Private Transportation is not selected at question 5.e.(2)(a) of Exhibit A) and the Community Services stated in Exhibit A. Proximity points are awarded according to the Transit and Community Service Scoring Charts outlined in Item 2 of Exhibit C. Proximity points will not be applied towards the total score. Proximity points will only be used to determine whether the Applicant meets the required minimum proximity eligibility requirements and the Proximity Funding Preference, as outlined in the chart below.

Requirements and Funding Preference Qualifications

All Large County Applications must achieve a minimum number of Transit Service Points and achieve a minimum number of total proximity points to be eligible for funding ... All Applications that achieve a higher number of total proximity points may also qualify for the Proximity Funding Preference as outlined below.

(3) Community Services (Maximum 4 Points for each service, up to 3 services) Applicants may provide the location information and distances for three of the following four Community Services on which to base the Application's Community Services Score. The Community Service Scoring Charts, which reflect the methodology for calculating the points awarded based on the distances, are outlined in Exhibit C.

Location of coordinates for Community Services

Coordinates must represent a point that is on the doorway threshold of an exterior entrance that provides direct public access to the building where the service is located.

* * *

Eligible Community Services

(a) Grocery Store - This service is defined in Exhibit B and may be selected by all Applicants.

(b) Public School - This service is defined in Exhibit B and may be selected only if the Applicant selected the Family Demographic Commitment.

(c) Medical Facility - This service is defined in Exhibit B and may be selected by all Applicants.
(d) Pharmacy - This service is defined in Exhibit B and may be selected by all Applicants.

> (4) Scoring Proximity to Services (Transit and Community)
>
> (b) Bus and Rail Transit Services and Community Services
>
> *Applicants that wish to receive proximity points for Transit Services other than Private Transportation or points for any community service must provide latitude and longitude coordinates for that service, stated in decimal degrees, rounded to at least the sixth decimal place, and the distance between the [DLP] and the coordinates for the service. The distances between the DLP and the latitude and longitude coordinates for each service will be the basis for awarding proximity points. Failure to provide the distance for any service will result in zero points for that service.* The Transit and Community Service Scoring Charts reflecting the methodology for calculating the points awarded based on the distances are in Exhibit C. (emphasis added).

24. Applicants from a Large County, including Palm Beach County (where Christian Manor is located), must receive at least 10.5 Proximity Points (including at least 2.0 Transit Service points) to be eligible for consideration for funding, and at least 12.5 Proximity Points to receive the Proximity Funding Preference.

25. In its Application, Christian Manor selected three public bus stops for its Transit Services, at claimed distances of .04 miles, .03 miles, and .51 miles from its proposed DLP. It was awarded 5 points for Transit Services. The validity of Christian Manor's claimed Transit Services is not disputed.

26. For its Community Services, Christian Manor identified the following services:

> a. Grocery Store - Aldi Food Market, 2481 Okeechobee Blvd., West Palm Beach, Florida 33409, at a distance of 0.73 miles

> b. Medical Facility - MD Now Urgent Care, 2007 Palm Beach Lakes Blvd., West Palm Beach, Florida 33409, at a distance of 0.82 miles
>
> c. Pharmacy - Target (CVS Pharmacy), 1760 Palm Beach Lakes Blvd., West Palm Beach, Florida 33401, at a distance of 0.70 miles.

27. The Aldi Food Market meets the definition of a Grocery Store in the RFA.

28. The MD Now Urgent Care meets the definition of a Medical Facility in the RFA.

29. Christian Manor identified each service by latitude and longitude coordinates and by distance. These coordinates, however, did not accurately reflect the doorway threshold of either the Aldi Food Market or the MD Now Urgent Care Center.

30. The latitude and longitude coordinates provided for the Grocery Store were erroneous. The listed coordinates identify a point over 0.9 miles away from the doorway threshold of the Aldi Food Market. The latitude and longitude coordinates provided for the Medical Facility identify a point over 0.8 miles away from the doorway threshold of the MD Now Urgent Care Center.

31. The actual distance between the Aldi Food Market and the DLP is .73 miles.

32. The actual distance between the street address of the MD Now Urgent Care Center and the DLP is .82 miles.

33. Based on these identified services, Christian Manor was awarded 3 points for the Grocery Store, 3 points for the Pharmacy, and 2.5 points for the Medical Facility. The points awarded for the Pharmacy are not disputed.

34. Parkwood argues that Christian Manor should be awarded no proximity points for its identified Grocery Store or Medical Facility. Parkwood does not argue that the Aldi Food Market is not a Grocery Store as defined by the RFA, nor does it argue that the MD Now Urgent Care is not a

Medical Facility as defined by the RFA. Parkwood does not question the identified addresses for the Community Services or contest that the distances between the identified Aldi Food Market and the MD Now Urgent Care and the DLP are .73 miles and .82 miles respectively.

35. Rather, Parkwood's argument is narrowly focused on the fact the erroneous longitude and latitude coordinates for the grocery and medical services are not at the doorway threshold. Parkwood would have FHFC ignore the actual addresses and distances because of the error in coordinates. Respondents argue the mistake in coordinates was a minor irregularity.

36 The RFA specifically gives FHFC the right to waive minor irregularities.

37 Rule 67-60.008 provides the criteria that FHFC is to consider when evaluating whether an error should be waived as a minor irregularity.

> 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.

38. Ms. Button testified that an evaluating FHFC Review Committee member does not use the latitude or longitude coordinates to confirm the accuracy of the distances provided. Rather, the inclusion of the requirement for such coordinates dates back to when measurements were done by surveyors, who would certify the distances on a special form. FHFC no longer requires the surveyor certification form. FHFC now requires an applicant to self-designate the community services and proximity requirements. FHFC

considers the actual distances as the most relevant factors when evaluating points awarded for proximity from the DLP to a selected Community Service.

39. Ms. Button also testified that listing the incorrect latitude and longitude coordinates could, in this particular case, be waived as a minor irregularity. She explained that because the proximity points are based on the distance between the DLP and the identified services, and because the distances claimed in Christian Manor's application were correct, the proximity points awarded were also correct.

40. Ms. Button opined that Christian Manor did not garner a competitive advantage from the coordinate errors in the application. The coordinates did not create any uncertainty in the application as to what Community Services were identified or how far they were from the DLP. Petitioner pointed to no evidence of any such advantage.

41. Ms. Button also testified that the error in coordinates did not result in any harm to the public or to FHFC. Again, Petitioner provided no evidence of such harm.

42. Rather, Petitioner relies on a different application in a different RA, where the scorer for FHFC had determined that an applicant should be found ineligible because that applicant had failed to list the proper coordinates for one of its listed Community Services. That applicant, however, never challenged FHFC's finding, and therefore never presented evidence or argument contesting this finding of ineligibility. It is unclear whether the applicant in the other case was found ineligible for other reasons as well, where that applicant was ranked, and whether there were other circumstances that would have affected the scoring and ranking in that particular RA. Ms. Button testified that if the error in coordinates had been challenged, FHFC would then have examined the particular circumstances of the situation to determine whether or not the error should have been waived as a minor irregularity.

43. There is no dispute that the Christian Manor application contained a similar error, and that if Christian Manor had not been able to demonstrate that the claimed distances to the grocery store and medical facility were accurate, that error would have resulted in the application being found ineligible. But there is insufficient evidence to determine whether Petitioner is comparing "apples to apples" when relying on this other situation. Any reference to this other applicant in the other RA is unreliable and unconvincing.

44. Regardless, in this case, the undersigned examined the circumstances of Christian Manor's application and finds based on the preponderance of the evidence (made up of the stipulated facts and Ms. Button's unrefuted testimony) any inaccuracies in the longitude and latitude coordinates provided by Christian Manor constitute a minor irregularity that may be waived by FHFC.

45. Based on the facts established, the award to Christian Manor is reasonable and neither erroneous, arbitrary, nor capricious.

WATERVIEW'S APPLICATION

46. One of the requirements of the RFA is that applicants demonstrate certain Ability to Proceed elements. One of those elements is as follows:

> Appropriate Zoning. Demonstrate that as of the Application Deadline the entire proposed Development site is appropriately zoned and consistent with local land use regulations regarding density and intended use or that the proposed Development site is legally non-conforming by providing, as Attachment 9 to Exhibit A, the applicable properly completed and executed verification form:
>
> (a) The Florida Housing Finance Corporation Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form (Form Rev. 08-18) [(Zoning Form)].

47. As part of its application, Waterview submitted a Zoning Form executed by Elisabeth Dang, a City Public Official. The Zoning Form states, among other requirements:

> The undersigned service provider confirms that, as of the date that this form was signed, the above referenced Development's proposed number of units, density, and intended use are consistent with current land use regulations and zoning designation or, if the Development consists of rehabilitation, the intended use is allowed as a legally non-conforming use. To the best of my knowledge, there are no hearings or approvals required to obtain the appropriate zoning classification. Assuming compliance with the applicable land use regulations, there are no known conditions that would preclude construction or rehabilitation of the referenced Development on the proposed site.

48. Once it receives the Zoning Form, FHFC does not require that an applicant demonstrate in its application that it will be capable of constructing the proposed development, nor does FHFC attempt to independently verify that an applicant will be capable of constructing the proposed development during the application process. FHFC does not require an applicant to submit engineering drawings or final site plans during the application process, nor does the RFA contain any restrictions or requirements concerning the height of any proposed buildings. All of the details and verifications concerning the actual construction of the proposed project are evaluated during the credit underwriting process.

49. Based partially on its identification of Development Type in its application to FHFC as "Mid-rise 4 stories," Waterview's adjusted SAIL request per affordable unit resulted in it being assigned Leveraging Level 4. If it had instead identified a Development Type of "Garden Apartments," it would have received Leveraging Level 5.

50. Petitioner argues that Waterview will be unable to construct the four-story mid-rise building identified in its application while also meeting a 40-foot height limitation in the local zoning code. As explained above, for the same reasons the undersigned sustained the objections to Petitioner's exhibits relating to zoning issues and feasibility of constructing the proposed development, the undersigned finds at this stage (eligibility, scoring, and ranking), FHFC was not required to independently verify that the proposed development would comply with all building and zoning regulations.[4]

51. The evidence established that Waterview submitted the required Zoning Form executed by a person with authority from the City to execute such a form. There was no evidence presented that Waterview's Zoning Form was improperly completed, or that it was obtained through fraud or illegality.

52. Moreover, there was no convincing evidence that the Zoning Form was improperly completed. FHFC did not make an independent determination as to whether a proposed project would comply with all local zoning requirements, but instead relied on the representation of the local official who executed the Zoning Form.

53. Petitioner also argues Waterview should be deemed ineligible because it presented different information to the City than it presented to FHFC in its application. Specifically, Petitioner challenges use of the term "garden apartment" by Waterview in materials it submitted to the City, but not submitted to FHFC; and the impact of Waterview's proposed development on wetlands. The undersigned rejects these arguments for multiple reasons.

[4] Had Waterview been awarded funds, but its proposed development could not be built due to zoning restrictions, that would be addressed during the credit underwriting process.

54. First, Petitioner alleges that the presentation of additional information to the City somehow conflicts with the Applicant Certification and Acknowledgement Form that applicants are required to sign which provides in relevant part: "In eliciting information from third parties required by and/or included in this Application, the Applicant has provided such parties information that accurately describes the Development as proposed in this Application." Ms. Button, however, testified that providing more information to the local government than is presented to FHFC would not in itself conflict with this statement in this form.

55. Second, Mr. Savino's deposition testimony established he had a number of communications with the City regarding the proposed project and submitted numerous documents for the City to review. Mr. Savino testified he used the term "garden apartments" when discussing the project with the City to refer to apartment complexes, not to the FHFC definition of "garden apartments" as being three stories or less. There is no evidence rebutting Mr. Savino's version of events, nor is there any indication what the City understood the term to mean.

56. Third, Petitioner argues that Waterview's proposed project might have impacted wetlands on the property, contrary to relevant regulations. However, Mr. Savino testified that Waterview could build the project without impacting wetlands. Waterview also included among the documents submitted to the City a Revised Preliminary Site Plan which indicated that the Waterview development would not impact wetlands.

57. Regardless, even if it had been shown that the Waterview project would impact wetlands, this would only impact its ability to receive NHTF funds; it would not have any impact on whether FHFC deems an applicant eligible for funding under this RFA. Ms. Button testified that each applicant is required to check a box on the application indicating whether it is seeking this special funding, but none are required to take it. This special funding is not considered by FHFC when evaluating an applicant's funding sources

during the application review process, and FHFC does not even evaluate an applicant's eligibility for the NHTF during the scoring process. Even if Petitioner could prove Waterview would not be able to qualify for the special funding, there would be no impact on the scoring of its application.

58. Ultimately, Petitioner presented no evidence that the City had somehow been misled into signing the Zoning Form required by the RFA, or that it had not understood that the proposed project involved a four-story building. The fact that the Ms. Dang did sign the Zoning Form indicates that she believed the City had all the information it needed to do so.

59. Based on the preponderance of the evidence, Waterview's application is eligible for funding.

CONCLUSIONS OF LAW

60. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat.

61. All of the applicant-parties have standing. Specifically, decisions in this case affect the substantial interests of each of the parties, and each has standing to challenge FHFC's scoring and review decisions. *See Madison Highlands, LLC v. Fla. Hous. Fin. Corp.*, 220 So. 3d 467, 474 (Fla. 5th DCA 2017)(finding standing where "Madison Highlands ... alleges that the applications of the four higher-ranked applicants had deficiencies and that if the FHFC had properly scored or considered the higher-ranked applicants, it would have been awarded the housing tax credits for the Hillsborough County development.").

62. Section 420.507 provides the statutory authority for FHFC to award low-income housing tax credits by requests for proposals or other competitive solicitation.

63. Section 120.57(3)(f) provides the burden of proof as follows:

> Unless otherwise provided by statute, the *burden of proof shall rest with the party protesting the proposed agency action*. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, 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 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).

64. As the party protesting FHFC's proposed action, Petitioner bears the burden of proof by a preponderance of the evidence. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.

65. Although competitive-solicitation protest proceedings are described in section 120.57(3)(f) as de novo, courts have held these hearings are a "form of intra-agency review. The ALJ may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

66. After determining the relevant facts based upon evidence presented at hearing, the ALJ's role is to evaluate the agency's intended action in light of those facts. The agency's determinations must remain undisturbed unless clearly erroneous, contrary to competition, arbitrary, or capricious. A proposed award will be upheld unless it is contrary to governing statutes, the agency's rules, or the solicitation specifications.

67. The "clearly erroneous" standard has been applied to both factual determinations and interpretations of statute, rule, or specification. A factual determination is "clearly erroneous" when the reviewer is "left with a definite and firm conviction that [the fact-finder] has made a mistake." *Tropical Jewelers, Inc. v. Bank of Am., N.A.,* 19 So. 3d 424, 426 (Fla. 3d DCA 2009).

68. As applied to legal interpretations, the "clearly erroneous" standard was defined by the court in *Colbert v. Department of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." *Id.* (citations omitted).[5]

69. Whether an agency action is "contrary to competition" must be determined on a case-by-case basis. *See R.N. Expertise, Inc. v. Miami-Dade Cty. Sch. Bd.,* Case No. 01-2663BID, 2002 WL 185217 (Fla. DOAH Feb. 4, 2002; Miami-Dade Cty. Sch. Bd. Mar. 13, 2002). Examples of such actions include those which:

> (a) create the appearance of and opportunity for favoritism;
>
> (b) erode public confidence that contracts are awarded equitably and economically;
>
> (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or
>
> (d) are unethical, dishonest, illegal, or fraudulent.

Id. at *22.

70. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is

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[5] Although FHFC argues deference should be given to its interpretation of its own rules (FHFC's PRO at ¶61), the cases cited therein predate the adoption of Article V, section 21 of the Florida Constitution, which provides:

> In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule, and must instead interpret such statute or rule de novo.

As such, to the extent necessary, the undersigned has interpreted any administrative rules de novo. *See A.W. v. Ag. for Pers. with Disab.*, 288 So. 3d 91, 94 (Fla. 1st DCA 2019).

irrational." *Hadi v. Lib. Behav. Health Corp.,* 927 So. 2d 34, 38 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the action is neither arbitrary nor capricious. *See Dravo Basic Materials Co. v. Dep't of Transp.,* 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992). Thus, under the arbitrary or capricious standard, an agency is to be subject only to "the most rudimentary command of rationality." *Adam Smith Enterprises, Inc. v. State Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The reviewer "must consider 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 each of these factors to its final decision." *Id.* at *1273.

MINOR IRREGULARITY

71. The issue regarding Christian Manor's application is whether the errors in longitude and latitude coordinates were minor irregularities that could be waived by FHFC. *See Flagship Manor LLC v. Fla. Hous. Fin. Corp.*, 199 So. 3d 1090 (Fla. 1st DCA 2016). A "minor irregularity" is defined by rule as follows:

> "Minor Irregularity" means a variation in a term or condition of an Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of [FHFC] or the public.

Fla. Admin. Code R. 67-60.002(6).

72. Rule 67-60.008 and the RFA allow FHFC to waive errors that are not material or that are "minor irregularities." *See Pinnacle Rio, LLC v. Fla. Hous. Fin. Corp.*, Case No. 14-1398BID (Fla. DOAH June 4, 2014; FHFC June 13, 2014) (where information omitted from one part of an application but found in other parts of application, FHFC had discretion to consider omission a minor irregularity). A deviation "is only material if it gives the

bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

73. As it relates to minor irregularities, FHFC has waived deviations in the process of awarding proximity points that did not provide a competitive advantage to the applicant, and that did not adversely impact the interest of FHFC or the public. Several ALJs have addressed the same issue. *See*, *e.g.*, *HTG Hammock Ridge, LLC, and Redding Dev. Partners, LLC v. Fla. Hous. Fin. Corp.* Case No. 16-1137BID, 2016 WL 1627040 (Fla. DOAH April 19, 2016; FHFC May 12, 2016) (errors in coordinates for community services did not affect the distance from the service to the DLP or the points awarded, and were therefore waivable minor irregularities); *Heritage at Pompano Hous. Partners, Ltd. v. Fla. Hous. Fin. Corp.*, Case No. 14-1361BID, 2014 WL 2624255 (Fla. DOAH June 10, 2014; FHFC June 13, 2014) (errors in distance between bus stop and DLP, and between public school and DLP, that did not affect the proximity points awarded were waivable minor irregularities).

74. The orders in *HTG Hammock* and *Heritage at Pompano* address the exact argument made by Petitioner in this case. There, the challengers alleged that the identified longitude and latitude coordinates for transit and public school services were not at the doorway threshold of the identified services. The deviation resulted in a change in the distance provided between the DLP and the identified service. Despite the discrepancies, both the ALJ and FHFC concluded the errors in proximity distances did not result in a competitive advantage and the errors were waived as minor irregularities.

75. Coordinate mistakes that were far more off the mark have been deemed minor irregularities that were waivable. For example, in *HTG Osprey Pointe, LLC v. Fla. Hous. Fin. Corp.*, Case Nos. 18-0479BID, 18-0484BID, and 18-04855BID, 2018 WL 3019500 (Fla. DOAH March 21, 2018; FHFC May 4, 2018), an applicant failed to include a negative sign in the coordinates for its selected DLP, resulting in the identified DLP being located in India

rather than in the desired location of Miami-Dade County. *Id.* at *5. If the DLP actually identified in the application had been used, the application would not have been eligible because the project would not be in Miami-Dade County and it would not have achieved the necessary proximity points. In fact the application would have been awarded 0 proximity points. As here, *HTG Osprey* involved an incorrectly identified location point. In that case, FHFC relied on the address of the DLP to confirm Miami Dade County as the correct location. The ALJ concurred with FHFC's determination that this was a minor irregularity because the application noted in numerous places that the DLP was in Miami-Dade County. *Id.* at *11 ("In the instant case, Florida Housing provided adequate, reasonable justification for its determination that the missing negative sign in the longitude coordinates in Woodland Grove's application constituted a minor irregularity.").

76. As in *HTG Osprey*, any error in the longitude and latitude coordinates made by Christian Manor was reasonably waived by FHFC as a minor irregularity.

CHRISTIAN MANOR

77. The evidence shows that the Grocery Store and the Medical Facility identified by Christian Manor met the requisite definitions in the RFA, and that the stated distances from the DLP to these services were correct. Because proximity points are awarded based entirely on these stated distances, the failure to state accurate latitude and longitude coordinates did not, in this case, have any impact on scoring.

78. Accordingly, FHFC's scoring and award decision with regard to Christian Manor's application was not contrary to statute, rule, or the terms of the RFA, nor was the decision clearly erroneous, contrary to competition, arbitrary, or capricious.

WATERVIEW

79. As explained above, Petitioner's allegation that Waterview's proposed building would violate local zoning requirements is not relevant because

Waterview submitted a properly executed Zoning Form. Moreover, Petitioner's argument that Waterview will not be able to obtain NHTF special funding because of potential wetland impact is equally irrelevant since the funding was not a requirement for the RFA.

80. Petitioner also has suggested that because Waterview voluntarily dismissed its challenge to Christian Manor, the allegations against Waterview should be deemed admitted. There is no legal basis for this proposal and there could be a variety of reasons why Waterview no longer wished to proceed with its challenge.

81. In an administrative proceeding under chapter 120, a petitioner does not challenge the actions of a competitor, it challenges the proposed action of an agency. *See* § 120.57(3)(f), Fla. Stat. ("In a competitive-procurement protest … 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 solicitation specifications.").

82. In this case, Petitioner bears the burden of demonstrating that FHFC's finding that Waterview was eligible was contrary to law or the terms of the RFA. Whether Waterview appears in the case or not, that burden does not change.

83. Petitioner has failed to demonstrate that FHFC's proposed action finding Waterview eligible is contrary to statute, rule, policy, or the specifications of the RFA. Petitioner has also failed to demonstrate that FHFC's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent, Florida Housing Finance Corporation, enter a final order consistent with its initial decisions: (1) finding the

applications of Waterview Preserve, LLC, and Christian Manor Restoration, LLC, eligible for funding; (2) awarding the RFA funding to Christian Manor Restoration, LLC; and (3) dismissing the formal written protest of BDG Parkwood Lofts, LP.

DONE AND ENTERED this 19th day of June, 2020, in Tallahassee, Leon County, Florida.

HETAL DESAI
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2020.

COPIES FURNISHED:

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

Michael P. Donaldson, Esquire
Carlton Fields
Suite 500
215 South Monroe Street
Tallahassee, Florida 32302
(eServed)

Michael J. Glazer, Esquire
Ausley McMullen
123 South Calhoun Street
Post Office Box 391
Tallahassee, Florida 32302
(eServed)

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

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.