STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HERITAGE AT POMPANO HOUSING PARTNERS, LTD,

Petitioner,

vs. Case No. 14-1361BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WISDOM VILLAGE CROSSING, LP, and OAKLAND PRESERVE, LLC,

Intervenors.
_____/

HTG BROWARD 3, LLC,

Petitioner,

vs. Case No. 14-1362BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

WISDOM VILLAGE CROSSING, LP, and OAKLAND PRESERVE, LLC,

Intervenors.
_____/

RECOMMENDED ORDER

Pursuant to notice, an evidentiary hearing was held in the above-styled consolidated cases on May 6 and 7, 2014, in Tallahassee, Florida, before Elizabeth W. McArthur, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner Heritage at Pompano Housing Partners, Ltd.:
M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole
Post Office Box 1110
2060 Delta Way
Tallahassee, Florida 32302-1110

For Petitioner HTG Broward 3, LLC:
Maureen McCarthy Daughton, Esquire
Mark K. Logan, Esquire
Sniffen and Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

For Respondent: Wellington H. Meffert, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

For Intervenor Wisdom Village Crossing, LP:
Michael P. Donaldson, Esquire
Carlton Fields Jorden Burt, P.A.
Suite 500
215 South Monroe Street
Tallahassee, Florida 32301

For Intervenor Oakland Preserve, LLC:
Joseph M. Goldstein, Esquire
Shutts and Bowen LLP
Suite 2100
200 East Broward Boulevard
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent's intended decision to award low-income housing tax credits to Wisdom Village Crossing, LP (Wisdom Village), and Oakland Preserve, LLC (Oakland Preserve), is contrary to governing statutes, Respondent's rules, or the solicitation specifications.

PRELIMINARY STATEMENT

On September 19, 2013, Respondent, Florida Housing Finance Corporation (Respondent or Florida Housing), issued Request for Applications 2013-003 (RFA), by which it solicited applications to compete for tax-credit funding for multifamily affordable housing developments in Miami-Dade, Broward, and Palm Beach Counties. One hundred nineteen applications were filed by the November 12, 2013, deadline in response to the RFA.

On January 31, 2014, Florida Housing electronically posted notice of its intended decision. Insofar as pertinent to this consolidated proceeding, Florida Housing announced the results of its review and scoring of the Broward County applications, and its intent to award tax-credit funding to Wisdom Village and Oakland Preserve, as eligible applicants receiving the maximum number of points and having the lowest lottery numbers.

Heritage at Pompano Housing Partners, Ltd. (Heritage), and HTG Broward 3, LLC (HTG), competing applicants that were deemed eligible and also received the maximum number of points, but were

not selected for funding because of their higher lottery numbers, timely filed notices of intent to protest, followed by timely formal written protests, to contest the Florida Housing intended action for Broward County, pursuant to section 120.57(3), Florida Statutes (2013).[1/]

Following an unsuccessful resolution meeting pursuant to section 120.57(3)(d)1., Florida Housing referred the two protests to the Division of Administrative Hearings, where they were consolidated. Wisdom Village and Oakland Preserve, as the two Broward County applicants whose applications were selected for funding by Florida Housing, intervened. In a scheduling conference, hearing dates were identified to which all parties agreed, and the hearing was set accordingly.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they set forth a number of agreed facts and agreed issues of law. The parties' stipulations have been incorporated below to the extent relevant.

On May 1, 2014, Heritage filed a motion in limine, seeking to prevent HTG from introducing evidence (described as a right-of-way deed, a warranty deed, and a corrective warranty deed) that Heritage asserted would be offered to contest the accuracy of the legal description for the proposed development site submitted by Heritage in its application. Heritage contended in its motion that HTG was in essence seeking an administrative

determination of a real property boundary dispute, a matter within the exclusive jurisdiction of circuit courts.

On May 5, 2014, HTG filed a response in which it represented that it was not seeking to inject a boundary-dispute issue. Instead, the issue HTG wanted to address was whether the "development location point" (DLP) selected by Heritage, for purposes of measuring the proximity of its development to certain services, was beyond the boundaries of the development site according to the legal description in Heritage's application.

At the outset of the hearing, Heritage's motion in limine was addressed. Based on HTG's response clarifying the limited issue that it was seeking to establish, Heritage's motion in limine was denied. The documents to which Heritage's motion in limine was directed were not offered in evidence by HTG.

The parties offered Joint Exhibits 1, 2, and 4 through 9, which were admitted in evidence. In addition, the parties jointly offered the depositions of the following witnesses, in lieu of live testimony: Camille Lachance (Joint Exhibit 11); Jose Martinez (Joint Exhibit 12); and Prangnuan Edie Durand, D.O. (Joint Exhibit 14). These deposition transcripts and attached deposition exhibits were admitted.[2/]

Heritage presented the testimony of the following witnesses: Jean Salmonsen; Robert Hoskins; and John Pulice, accepted as an

expert in surveying and mapping. Heritage's Exhibits 1, 3 through 7, 8a, 8b, 9a, and 9b were admitted in evidence.

HTG presented the testimony of the following witnesses: Kenneth Reecy; Matthew Rieger; Amy Garmon; and Donna West, accepted as an expert in surveying and mapping. HTG's Exhibits 4 through 8, 10 through 21, 25, 26, 29a, 29b, 30, 31, and 40 were admitted in evidence.

Oakland Preserve did not present the testimony of any witnesses, relying on deposition testimony. Oakland Preserve's Exhibits 1, 3, and 8 were admitted in evidence.

Wisdom Village presented the testimony of James Bollinger, Bill Schneider, and Michael Hartman. Wisdom Village's Exhibits 2 through 4, 5a, 5b, 5c, 6, and 7 were admitted in evidence.[3/]

Florida Housing presented the testimony of Kenneth Reecy and offered no additional exhibits beyond the Joint Exhibits.

The four-volume hearing Transcript was filed on May 12, 2014. The parties timely filed their proposed recommended orders (PROs) on May 22, 2014. The PROs have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Overview

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to promote the public welfare by administering the governmental function of

financing affordable housing in Florida. Pursuant to section 420.5099, Florida Statutes, Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits.

2. The low-income housing tax credit program was enacted by Congress in 1986 to incentivize the private market to invest in affordable rental housing. Tax credits are competitively awarded to developers in Florida for qualified rental housing projects.

3. These are tax credits and not tax deductions. For example, a $1,000 deduction in a 15 percent tax bracket reduces taxable income by $1,000 and reduces tax liability by $150. However, a $1,000 tax credit reduces tax liability by $1,000.

4. Developers that are awarded tax credits can use them directly. However, most developers sell the tax credits to raise equity capital for their projects. Developers sell these credits for up-front cash. A developer typically sets up a limited partnership or limited liability company to own the apartment complex. The developer maintains a small interest, but is responsible for building the project and managing (or arranging for the management of) the project. The investors have the largest ownership interest, but are typically passive investors with regard to development and management.

5. Provided the property maintains compliance with the program requirements, investors receive a dollar-for-dollar credit against their federal tax liability each year over a period of ten years. The amount of the annual credit is based on the amount invested in affordable housing.

6. Because the tax credits can be used for ten years by the investors that provide the equity, they are very valuable. When sold to the investors, they provide equity which reduces the debt associated with the project. With lower debt, the affordable housing tax credit property can (and must) offer lower, more affordable rent. The demand for tax credits provided by the federal government far exceeds the supply.

The Competitive Application Process

7. Florida Housing is authorized by law to allocate tax credits and other funding by means of requests for proposal or other forms of competitive solicitation. Pursuant to that authority, Florida Housing has adopted Florida Administrative Code Chapter 67-60 to govern the competitive solicitation process for several different programs, including the tax credit program.

8. Chapter 67-60 was newly enacted on August 20, 2013, replacing prior procedures used by Florida Housing for allocating tax credits. The bid protest provisions of section 120.57(3) are adopted as part of the process for allocating tax credits, except that no bond is required. See Fla. Admin Code R. 67-60.009.

9. Tax credits are made available annually. Florida Housing begins the competitive application process through the issuance of Requests for Applications.[4/] The RFA that started the competitive application process being considered here was issued September 19, 2013, with responses/applications due November 12, 2013.

10. According to the RFA, Florida Housing expected to award up to approximately $10,052,825 in tax credits for qualified affordable housing projects in Miami-Dade, Broward, and Palm Beach Counties.

11. Knowing that there would be far more applications than available credits, Florida Housing established an order for funding in the three counties:

> The Applications will be considered for funding in the following funding order: first the highest scoring eligible Application located in Miami-Dade County that can meet the Funding Test, then the highest scoring eligible Application located in Broward County that can meet the Funding Test, then the highest scoring eligible Application located in Palm Beach County that can meet the Funding Test, then the highest scoring eligible unfunded Application located in Miami-Dade County that can meet the Funding Test and then the highest scoring eligible unfunded Application located in Broward County regardless of the Funding Test. If there is not enough funding available to fully fund this last Broward County Application, the Application will be entitled to receive a Binding Commitment for the unfunded balance. No further Applications will be considered for funding and any remaining funding will be distributed as approved by the Board.

12. Applications were scored using a 27-point scale based on criteria in the RFA, as set out in the RFA:

> The highest scoring Applications will be determined by first sorting all eligible Applications from highest score to lowest score, with any scores that are tied separated first by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four A.4.c.(1)(a) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference), then by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.9.e. of the RFA, (with Applications that qualify for the preference listed above Applications that do not qualify for the preference), then by the Application's Leveraging Classification (applying the multipliers outlined in Exhibit C below and having the Classification of A be the top priority, then by the Application's eligibility for the Florida Job Creation Preference which is outlined in Exhibit C below (with Applications that qualify for the preference listed above Applications that do not qualify for the preference), and then by lottery number, resulting in the lowest lottery number receiving preference.

13. The way this process works in reality is that the developers know that they must first submit an application that meets all the eligibility criteria and does not have any significant omissions or errors.[5/] Developers also strive to submit projects structured to receive the maximum of 27 points, with 22 points available for the proposed development's proximity to transit and community services.

14. The tiebreakers are determined strictly by the luck of the draw. At the time each application is filed, it is randomly assigned a lottery number used to break the ties.

15. The role of the lottery numbers is demonstrated by the following facts: 119 applications were filed in response to the RFA; all but six received the maximum score of 27 points. Seventy of the 119 applications were deemed eligible. Of those 70, 69 received the maximum score of 27 points. As such, the lottery numbers are a big factor in deciding the winners and, concomitantly, the challengers here are applicants with lottery numbers outside the funding range that are trying to displace those with lower lottery numbers.

16. All applicant-parties in this case were deemed eligible and received the maximum 27 points as a result of Florida Housing's initial review and scoring. Therefore, the two Broward projects selected for funding were Oakland Preserve and Wisdom Village, based on their lower lottery numbers of 12 and 20, respectively. Heritage drew lottery number 26 and HTG drew lottery number 48.

17. Florida Housing's rules provide that the selection of applicants for funding does not end the competition. Instead, Florida Administrative Code Rule 67-48.0072 provides in part:

> Credit underwriting is a de novo review of all information supplied, received or discovered during or after any competitive solicitation

> scoring and funding preference process, prior to the closing on funding, including the issuance of IRS Forms 8609 for Housing Credits. The success of an Applicant in being selected for funding is not an indication that the Applicant will receive a positive recommendation from the Credit Underwriter or that the Development team's experience, past performance or financial capacity is satisfactory.

18. An applicant might fail in this de novo review in the credit underwriting phase and never receive funding, even though it was "awarded" tax-credit funding as a result of a proceeding such as this one. In that event, the RFA provides:

> Funding that becomes available after the Board takes action on the Committee's recommendation(s), due to an Applicant declining its invitation to enter credit underwriting or the Applicant's inability to satisfy a requirement outlined in this RFA, and/or Rule Chapter 67-48, F.A.C., will be distributed to the highest scoring eligible unfunded Application located in the same county as the Development that returned the funding regardless of the Funding Test. If there is not enough funding available to fully fund the Application, it will be entitled to receive a Binding Commitment for the unfunded balance.

Therefore, if one or more applicants nominally "awarded" funding in the eligibility and scoring phase fail credit underwriting, the next applicant(s) in the queue of eligible applicants may still be granted funding. As such, these applicants are substantially affected by the order established for the queue before credit underwriting, just as they may be substantially affected by decisions resulting from the de novo credit underwriting review.

19. In this consolidated proceeding, the objective of the applicants not selected for funding was to displace any and all applicants in more favorable positions. Thus, Petitioner Heritage sought to challenge the scoring of both the Oakland Preserve and Wisdom Village applications; and Petitioner HTG sought to challenge the scoring of the Oakland Preserve, Wisdom Village, and Heritage applications. The specific issues raised as to the three challenged applications will be discussed in turn below.

I. OAKLAND PRESERVE

20. HTG and Heritage sought to prove that the scoring of Oakland Preserve's application was erroneous in only one respect: they contend that Oakland Preserve was not entitled to any points for the proximity of its proposed development to a "medical facility" because the location used by Oakland Preserve does not meet the RFA's definition of "medical facility." Without those proximity points, Oakland Preserve's application would have fallen below the threshold number of proximity points needed to be deemed eligible for funding.

21. The RFA defined "medical facility" as follows:

> For purposes of proximity points, a Medical Facility means a medically licensed facility that (i) employs or has under contractual obligation at least one physician licensed under Chapter 458 or 459, F.S. available to treat patients by walk-in or by appointment; and (ii) provides general medical treatment to any physically sick or injured person. Facilities that specialize in treating specific

> classes of medical conditions or specific classes of patients, including emergency rooms affiliated with specialty or Class II hospitals and clinics affiliated with specialty or Class II hospitals, will not be accepted.[6/]

22. To qualify for these proximity points, Oakland Preserve's application included the required surveyor certification form (provided as part of the RFA) attesting to the proximity of the development site (measured from Oakland Preserve's DLP) to Dr. Edie Durand's medical office practice.

23. Florida Housing accepted the information and awarded Oakland Preserve points for the proximity of its development to Dr. Durand's office. Florida Housing conducted no independent investigation into whether Dr. Durand's office practice qualified as a "medical facility" within the meaning of the RFA. That is hardly surprising given the fact that Florida Housing personnel were also reviewing 118 other applications in addition to carrying out their other duties unrelated to the RFA.

24. HTG and Heritage contend that Dr. Durand's office practice does not meet the definition of "medical facility," because Dr. Durand restricts her practice to treating only adults and geriatric patients, and does not treat persons under age 18. Neither HTG nor Heritage raised any other issue in their formal written protests regarding whether Dr. Durand's office practice qualifies as a "medical facility."[7/]

25. It is undisputed that Dr. Durand qualifies as a matter of credentials to satisfy the professional provider requirement imposed by the medical facility definition, in that she is a physician licensed to practice osteopathic medicine, pursuant to chapter 459, Florida Statutes.

26. It is also undisputed that, if Dr. Durand's medical office practice otherwise qualifies as a "medical facility," it would meet the RFA's temporal requirement that the service must be in existence and available for use by the general public as of the application filing deadline. Dr. Durand's medical office practice has been open and operational since 2003.

27. To prove that Dr. Durand does not treat "any person," but rather, restricts her practice to only adults and geriatric patients, Petitioners offered the testimony of a private investigator retained by Heritage for the purpose of developing proof that Dr. Durand does not treat patients under age 18. However, the investigator's report offered nothing but hearsay evidence, including the investigator's recounting of what he contends was said during brief discussions with Dr. Durand's receptionist/medical assistant and with Dr. Durand at her office.

28. The private investigator set out to prove a certain point, consistent with his client's objective. Accordingly, his report focused on indicators suggesting that Dr. Durand markets to adults and geriatric patients, and her marketing highlights

certain specialty treatments that might be popular with these age groups, such as anti-aging treatment. Dr. Durand has business cards that focus on these areas.

29. On the other hand, the front of Dr. Durand's office has a large sign with her name printed on the top line, below which are the words "Family Medicine." Dr. Durand's office also has a large sign painted on the side of the building to advertise her medical office practice, indicating in bullet points the type of treatment she offers there. The very first bullet point is "Family Medicine." The investigator ignored these indicators that ran contrary to his objective.

30. The investigator discussed certain information in brochures used by Dr. Durand, but did not mention that these brochures highlight a picture of Dr. Durand in a white physician's coat, on which her name and "Family Medicine" are prominently embroidered. The investigator also did not mention that the brochures display a picture of the front of Dr. Durand's office, with a large sign across the front of the building identifying the office for "Dr. Edie Durand, D.O." (on the top line), "Family Medicine" (immediately below her name).

31. The picture of Dr. Durand in her embroidered "Family Medicine" physician's coat is also portrayed on the home page of Dr. Durand's website. The home page also advertises "Family Doctor," with a picture of a doctor examining a young girl.

32. HTG also sought to collect evidence that Dr. Durand does not treat minors, but like the investigator's report, HTG came up with only hearsay evidence. Matthew Rieger, president and CEO of Housing Trust Group, testified that "we" (i.e., someone from his company) sent an email inquiry to Dr. Durand. The subject reference of this email was: "Children." The body of the email asked Dr. Durand whether she provided general medical treatment to physically sick or injured children (parroting part of the RFA definition, except that the word "person" was changed to "children"). Dr. Durand responded negatively to the question (at 9:30 p.m.), stating that she specializes in adults and geriatrics, and "only treat[s] 18 year old and up." In her deposition testimony, Dr. Durand acknowledged that she sent this email, but explained that at that late hour when she was trying to read and respond quickly to many email inquiries, she understood this inquiry on the subject of "children" to be asking whether she was a pediatrician who only treated children.[8/]

33. Dr. Durand testified that she is available to provide general medical treatment to any physically sick or injured person, and does so, at her office location. Although there is some conflicting evidence, the greater weight of the non-hearsay evidence establishes that Dr. Durand does, in fact, offer general medical treatment to persons under the age of 18; she does not restrict her practice to only patients who are 18 or older.

34. While Dr. Durand acknowledged that she treats many more adults and geriatric patients than minors, Dr. Durand remains available to treat minors, and does in fact treat small numbers of patients under the age of 18. Significantly, Dr. Durand has never turned away a child who was brought to her office for treatment, nor has she ever declined to make an appointment to treat a child upon request of someone calling the office for such an appointment. No evidence to the contrary was offered; Dr. Durand's unrebutted testimony is accepted.[9/]

35. Dr. Durand explained that one reason she does not treat greater numbers of patients under the age of 18 is that parents tend to steer those patients to pediatricians instead of family practitioners. Dr. Durand testified that the pediatrician who trained her in pediatrics when she was a resident at Broward General Hospital has his well-established office practice across the street from Dr. Durand's office. Dr. Durand does not actively compete for this patient population, except to the extent that she advertises her specialty in family medicine.

36. Dr. Durand is well-qualified to treat patients of all ages, having done her residency in family practice at Broward General Hospital, and thereafter attaining board certification in osteopathic family medicine, which she maintains through many hours of continuing medical education in family medicine. Indeed, as plainly as on the signs on both the front and the side

of Dr. Durand's office building, Dr. Durand's dossier collected by the private investigator is replete with references to Dr. Durand's specialty in family practice and family medicine. The investigator's singular objective kept him from asking about Dr. Durand's family medicine practice.

37. HTG and Heritage failed to prove by a preponderance of the evidence that Dr. Durand's medical office location does not qualify as a "medical facility" as defined in the RFA.

II. WISDOM VILLAGE

A. Challenge to Public School Proximity Points

38. HTG and Heritage also joined in challenging the award of proximity points to Wisdom Village for its location near a public school, Northside Elementary School. Petitioners' argument is that the surveyor certification measured the distance from the "wrong" door instead of from the “right” door at Northside. Taking a pass/fail approach, neither HTG nor Heritage address whether the distance discrepancy between the so-called "wrong" and "right" doors is significant or material.

39. Pursuant to the RFA, in expressing the location of community services, such as a public school, the surveyor certification form must identify the latitude and longitude coordinates that "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."

40. There are two doors on the front of the Northside Elementary School building facing Northeast 11th Street, one on the east (east door) and the other to the west (west door). Wisdom Village's surveyor certification form identified the latitude and longitude coordinates of a point on the doorway threshold of the west door.

41. The east door is less prominent than the west door chosen by Wisdom Village. The name of the school is engraved in large letters above the west door. Next to the walkway from the sidewalk to the west door, there is a large marquee sign for school announcements. When photos in evidence were taken, the sign reported an upcoming early release day and the dates when the school would close for spring break. In contrast, the school name does not appear above the east door, nor is there a marquee sign next to the walkway leading to that door.

42. Physically, both doors provide direct access to the school building, in that they open to inner hallways in the main school building where classes are held. As a matter of function and usage, both doors provide restricted access to the school building.

43. There is an outer fence around the entire school building, with gates to the walkways to both east and west doors. Both gates are opened in the mornings before school, and both

gates are closed and locked in the evenings when the custodial staff leaves campus.

44. As of the beginning of the current school year on August 20, 2013, the school district adopted a security restriction, requiring all Broward County public schools to designate a single exterior door as the door to which visitors to the school must enter. Visitors are not allowed free access to the school building. Instead, guards at the door direct the visitors to the office where they must sign in and explain the reason for their visit. Parents are not allowed to enter the school building to walk their children to classes or pick them up from their classes. Thus, in a sense, security measures dictate that there is no such thing as "direct access" to public schools by the general public.

45. The west door used to measure proximity in the Wisdom Village application does not serve as the designated entry point for the school. Instead, as of the current school year, the east door was designated as the single entrance to the school building. The west door is used as an exit.

46. The unrebutted evidence established that the two doorways on the front of the school building are very close together. Both doors are shown in a single picture in evidence, which also shows the street with parallel parking spaces in front of the school. Based on this picture, the distance between the

two doors appears to be the length of approximately four parking spaces. Witnesses who have been to the school site estimated the distance between the two doors to be 50 feet, 100 feet, 120 feet, or 200 feet. It is reasonable to estimate the distance between the two doors as approximately 100 feet.

47. Wisdom Village's surveyor certification form stated that the distance between the public school (measured from the west door) and the Wisdom Village development was .57 miles. Florida Housing accepted the surveyor certification and Wisdom Village received three proximity points, the number of points awarded when the proximity of this service to a development is between one-half mile and one mile. Wisdom Village would have received the same number of proximity points had it used the east door that is now designated as the entrance, instead of the west door that is now designated as an exit. Thus, even if it could be said that Wisdom Village selected the "wrong" door to measure proximity, the choice of door was immaterial to the point award, conferring no competitive advantage on Wisdom Village.

48. Wisdom Village's doorway selection to measure proximity of its proposed development to the public school was reasonable. Physically, the west door does provide direct access to the general public to the building in which the community service is provided. The door certainly has the appearance of being the main entrance to the building, and at times in the past, the door

has functioned as an entrance. The school's current designations of the functions of the east and west doors could change again.

49. The evidence at the hearing, not considered by Florida Housing, confirmed the correctness of Florida Housing's award of three proximity points to Wisdom Village for the proximity of its development to Northside Elementary School, either because the choice of the west door was appropriate to comply with the RFA, or because the choice of the west door instead of the east door was, at worst, a waivable minor irregularity.

B. Challenge to sufficiency of site control documentation

50. HTG, but not Heritage, challenged the sufficiency of Wisdom Village's demonstration of site control.

51. To demonstrate site control, the RFA requires at Section Four A.7. that an applicant must provide a copy of an eligible contract, deed, or lease. The RFA specifications for the first option, an eligible contract, are as follows:

> a. Eligible Contract - For purposes of the RFA, an eligible contract is one that has a term that does not expire before a date that is six (6) months after the Application Deadline or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than six (6) months after the Application Deadline; specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless an assignment of the eligible contract which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant, is provided. If

> the owner of the subject property is not a party to the eligible contract, all documents evidencing intermediate contracts, agreements, assignments, options, or conveyances of any kind between or among the owner, the Applicant, or other parties, must be provided. . . .

52. Wisdom Village's application included the following documents as evidence of site control: a contract for the sale and purchase of the development site; an addendum to that contract; a second addendum to that contract; and an assignment of the contract from the original named buyer to the entity that was the applicant.

53. HTG contends that the contract does not qualify as an "eligible contract" because it was not properly executed on behalf of a seller with an ownership interest in the property.

54. The property in question was owned at one time by Benjamin and Jean Bollinger, as joint tenants. Benjamin and Jean Bollinger were husband and wife. In 1992, Benjamin Bollinger died. In 2010, Jean Bollinger died.

55. Benjamin and Jean Bollinger's two sons are James Bollinger and Bruce Bollinger. The two sons are co-personal representatives of the estates of both Benjamin Bollinger and Jean Bollinger. They are also co-trustees of the Jean Bollinger family trust. HTG does not dispute the authority of James and Bruce Bollinger to act in these representative capacities to enter into a contract to sell real property on behalf of the

estates of either or both of their deceased parents, or on behalf of the trust; instead, HTG questions whether James and Bruce Bollinger properly did so.

56. The land in question twice had been the subject of past contracts for sale to developers applying for tax credit funding for low-income rental property. Bill Schneider was the liaison in dealing with the Bollinger family. Those prior contracts were not consummated because the applications did not obtain tax-credit funding.

57. Mr. Schneider approached James and Bruce Bollinger in preparation for the Wisdom Village application and they expressed their continued interest in selling the property.

58. The Vacant Land Contract for sale and purchase of the property appears to be clear as to all essential terms. However, the contract is messy, and arguably somewhat ambiguous, with respect to naming the seller and having the named seller properly sign the contract in the proper capacity. On the first page, typed into the form contract in the blank for "seller" is the following: "Bruce A. Bollinger and James B. Bollinger, PR's of Benjamin A. Bollinger, deceased and Jean Rupp Bollinger." A line was then drawn through "Jean Rupp Bollinger," next to which the word "DECEASED" was handwritten and initialed by JBB and BAB.

59. At the bottom of the first and all subsequent pages of the contract, space was provided for the "buyer" and "seller" to

place their initials, to acknowledge receipt of a copy of that contract page. Each page is initialed by JBB and BAB in the spaces provided for "seller."

60. On the signature page of the contract, Bill Schneider signed the contract as executive director of Home Start, LLC, the buyer. For the seller, Bruce A. Bollinger's signature appears above the following typed name: "Bruce A. Bollinger Personal Rep. of Benjamin A. Bollinger, Deceased"; then James B. Bollinger's signature appears above the following typed name: "James B. Bollinger Personal Rep. of Benjamin A. Bollinger, Deceased." A third "seller" signature line was provided, above the typed name "Jean Rupp Bollinger." Instead of any full signatures in the line above this typed name, an "X" was drawn through the typed name, next to which the word "DECEASED" was handwritten and initialed by JBB and BAB.

61. The first addendum to the contract was executed at the same time of the original contract, and the manner of identifying the seller and executing on behalf of the seller was the same as in the original contract.

62. Roughly six months later, two additional documents were executed: an assignment of the buyer's interest in the contract from Home Start, LLC, to the applicant, Wisdom Village; and a second addendum to the contract. Both documents clearly refer back to the original contract to sell and purchase the real

property in question. The second addendum to the contract identifies the "seller" in the original contract as follows:

> This is an Addendum to that certain purchase and sale contract by and between BRUCE A. BOLLINGER AND JAMES B. BOLLINGER, AS PERSONAL REPRESENTATIVES OF THE ESTATE OF BENJAMIN A. BOLLINGER, DECEASED AND JEAN RUPP BOLLINGER, DECEASED, "Seller" . . . .

The second addendum was executed by the "seller," with two signature lines provided. On the first signature line for the seller, Bruce A. Bollinger's signature appears above the following typed name: "Bruce A. Bollinger, PR of Benjamin A. Bollinger, Deceased and Jean Rupp Bollinger, Deceased." On the second signature line for the seller, James B. Bollinger's signature appears above the following typed name: "James B. Bollinger, PR of Benjamin A. Bollinger, Deceased and Jean Rupp Bollinger, Deceased." Similarly, the assignment document was "accepted by seller," with the signatures of Bruce and James appearing above the same typed names as in the second addendum.

63. HTG contends that the failure to properly or clearly identify the seller and to sign in the proper representative capacity on behalf of the estate of Jean Rupp Bollinger, instead of or in addition to the estate of Benjamin Bollinger, is fatal to the original contract, and that the clarifying descriptions in the subsequent documents could not cure the fatal flaw in the original contract.

64. Florida Housing, however, considered the documents as a whole, and as such, found that they were sufficiently clear to identify the seller and the capacity in which the documents were executed.

65. James Bollinger testified at the final hearing to confirm that he was the one who drew the lines through his mother's name on the original contract and wrote DECEASED, and that he thought the manner in which he did so, initialed by his brother and himself, was sufficient to express that he and his brother were acting as sellers of the property in their capacity as the personal representatives on behalf of both of their deceased parents. To the extent that was not entirely clear, he testified that they tried to make it clearer in the second addendum and assignment documents.

66. The contract to sell and purchase the Wisdom Village development site has been partially executed, in that two nonrefundable payments totaling $50,000 were made by the buyer to, and accepted by, James and Bruce Bollinger, as personal representatives on behalf of their deceased parents.

67. It is unnecessary, and beyond the scope of the undersigned's jurisdiction, to make a determination as to how the title to the real property in question was held at the time of the original vacant land contract filed with the Wisdom Village application. HTG suggests that the property in question was

owned outright by Jean Bollinger's estate, having passed to her upon Benjamin Bollinger's death as an incident of joint tenancy. HTG also raised the possibility that the property was owned by the trust, but the evidence was to the contrary. For purposes of this proceeding, it is sufficient to observe that James and Bruce Bollinger, as the co-personal representatives of both parents' estates (and as co-trustees of the family trust), were the two persons who were authorized to act on behalf of either or both parents' estates, and that they did so, in entering into and accepting part of the benefits of a contract to sell the property on behalf of either or both of their deceased parents.

68. A preponderance of the evidence does not support HTG's position that the original contract was fatally flawed. Instead, the document itself provided written evidence of the identity of the "seller" and the execution by the two Bollinger sons in their representative capacities on behalf of their deceased parents. Moreover, parol evidence clarifies any arguable ambiguity, as does clarification in the subsequent documents that specifically refer back to the original contract.

69. HTG also argues that Florida Housing's acceptance of Wisdom Village's site control documents is inconsistent with its rejection of other applicants' site control documentation where the buyer was not the same entity as the applicant. HTG offered no documentation to prove that the circumstances were similar;

the description of these other instances does not sound similar, in that apparently those other applications did not meet the requirement in the RFA's "eligible contract" definition that "the buyer MUST be the Applicant"--the only part of the definition that screams its importance in all caps.

C. Challenge to financing proposal documentation

70. HTG contends that Wisdom Village's financing proposal documentation should have been rejected, because the applicant only "acknowledged" and did not "accept" the financing terms.

71. The RFA in Section Four A.9.d.(1) addresses the requirements for financing proposal documentation, providing in pertinent part:

> Financing proposal documentation, regardless of whether the documentation is in the form of a commitment, proposal, term sheet, or letter of intent, must meet the following criteria. . . .
>
> (a) Each financing proposal shall contain:
>
> * * *
>
> (iv) Signature of all parties, including acceptance by the Applicant. (emphasis added).

72. Wisdom Village submitted a letter from JPMorgan Chase Bank, NA (Chase) as part of its financing proposal documentation. HTG contends that the following portion of the Chase letter, appearing below the signature on behalf of Chase, does not satisfy the RFA requirement for acceptance by the applicant:

> Borrower's "acceptance" of this preliminary outline of terms to satisfy the requirements of Florida Housing Finance Corporation shall not create a binding or enforceable agreement between Borrower and JPMorgan Chase. For the purpose of satisfying the requirements of Florida Housing Finance Corporation, the proposed Borrower has countersigned this preliminary outline of terms to evidence acceptance thereof, this 21st day of October, 2013.
>
> Acknowledged By
>
> Wisdom Village Crossing, LP
>
> By: Wisdom Village Crossing, LLC, General Partner
>
> By: Turnstone Development Corporation, Member/Manager
>
> /S/
> William Schneider, Executive Director

73. HTG contends that the above language shows that Wisdom Village only "acknowledged" the financing terms in the Chase letter, and did not accept them. However, the language in the document is clear that the signature on behalf of Wisdom Village stands to "evidence acceptance thereof."

74. Mr. Schneider testified that he signed the letter, and he hand-wrote the day and month on which he signed the letter "to evidence acceptance" of the terms on behalf of Wisdom Village. The additional typed words "Acknowledged by" appearing below the language specifying that the borrower's signature stands to

evidence acceptance of the financing terms does not change or in any way undermine that acceptance language.

75. Florida Housing reasonably accepted Wisdom Village's financing proposal documentation as meeting the RFA's requirement that the applicant accept the outlined financing terms.

III. HERITAGE

76. Although Heritage was not selected for funding, its application has a priority position over HTG's application. Both applicants will remain in line, even if the Florida Housing initial decision is confirmed, because the applicants selected for funding might fall out during the credit underwriting process. Thus, with the hope of improving its position in line, HTG challenged several aspects of the Heritage application.

A. Challenge to DLP as outside development site

77. HTG sought to prove that Heritage's DLP, identified in its surveyor certification form and used to measure proximity from the development site to various services, is not within the boundaries of the Heritage development site according to the legal description attached to the contract to purchase the site submitted in Heritage's application.

78. The RFA explicitly requires that the DLP selected by the applicant must be on the development site.

79. The instructions for identifying the DLP in the surveyor certification form require the surveyor to provide

coordinates for the applicant's DLP, expressed in degrees, minutes, and seconds. The degrees and minutes must be expressed in whole numbers, and the seconds must be "truncated" after one decimal place.

80. The word "truncated" is not defined in the RFA. John Pulice, the expert surveyor witness for Heritage, testified that "truncated" is not a term of art in the field of surveying. Donna West, HTG's expert surveyor, equivocated on this point; she testified first that the term has a specific connotation in her field. However, she later testified that it is not a term normally used in the surveying field. The evidence was not persuasive that "truncated" is a term of art with a particular meaning in the field of surveying.

81. Ms. West testified that she understood the "truncated" instruction to mean that only the first digit to the right of the decimal point should be put on the form, and any additional digits to the right of that one digit were to be dropped.

82. Both experts agreed that expressing latitude and longitude coordinates to one-tenth of a second does not define a specific point on the ground; instead, a range of possible points is defined, within an area measuring roughly ten feet by nine feet.

83. Ms. West applied her interpretation of the "truncated" instruction to locate the DLP identified by the coordinates in

Heritage's surveyor certification form. She then compared that "point," or area, to the legal description for the development site submitted by Heritage in its application. The result was that she identified an area of roughly ten feet by nine feet that was entirely outside of the Heritage development site. The closest points to the Heritage development site were approximately eight-tenths of one foot--less than ten inches--outside the development site boundaries.

84. However, the Heritage surveyors who located the DLP and completed the surveyor certification form did not apply the same interpretation of "truncated" used by Ms. West. The unrebutted testimony by Mr. Pulice was that the actual point selected as the DLP was the southwest corner of the development site. The full coordinates for that point are: latitude 26 degrees, 14 minutes, 06.66 seconds north; longitude 80 degrees, 7 minutes, 28.100 seconds west.

85. The DLP coordinates in Heritage's surveyor certification form were: latitude 26 degrees, 14 minutes, 06.7 seconds north; longitude 80 degrees, 07 minutes, and 28.1 seconds west. As Mr. Pulice explained, the DLP coordinates in Heritage's surveyor certification form "truncated" the seconds after one decimal place by shortening the number of digits to the right of the decimal place to one digit rounded to the nearest value, instead of just lopping off the additional digits. The truncated

presentation affected the latitude only, for which the seconds were expressed as 06.7 seconds instead of the actual 06.66 seconds. If Heritage's surveyors had interpreted "truncated" the way Ms. West did, the truncated latitude seconds would have been expressed as 06.6 instead of 06.7. By shortening the actual seconds to the required number of digits and rounding the last digit, Heritage's surveyor certification form showed a more accurate number: 06.7 is closer than 06.6 to expressing the actual latitude seconds of 06.66.

86. Mr. Pulice testified that in deciding to shorten the seconds by rounding the first decimal place to the nearest digit, he considered the fact that a surveyor always tries to present information in the most accurate manner possible. Ms. West agreed that surveyors try to present information found in the field in the most accurate way possible.

87. Mr. Pulice also considered an instruction on the surveyor certification form requiring that "horizontal positions shall be collected to meet sub-meter accuracy[.]" He viewed the "sub-meter accuracy" instruction as inconsistent with an interpretation of "truncated" that would result in seconds being shortened by just lopping off the extra digits instead of by rounding.

88. The ordinary meanings of the word "truncated" found in regular dictionaries often favor Ms. West's interpretation;

however, there is room for interpretation among the common dictionary definitions of "truncated." For example, one dictionary defines "truncated" as "made briefer or shorter, usually by removing a part." See American English Dictionary - Cambridge Dictionaries Online, http://www.dictionary.cambridge.org/dictionary/American-english/truncated. A similar definition of "truncated" is provided by the online MacMillan Dictionary: "made shorter, especially by having the end or top removed." See MacMillan Dictionary at http://www.macmillandictionary.com/dictionary/american/truncated. Thus, "truncated" always means "made shorter." While "usually" one would truncate a number by simply lopping off the extra digits, truncated can sometimes mean "made shorter" by means other than simply removing the extra digits. In this particular context, a reasonable interpretation of "truncated" is that seconds should be truncated by shortening the number after one decimal place and rounding the last digit up or down, instead of just by lopping off the extra digits. This would provide the shorter number required by the surveyor certification form, while also improving the accuracy of the shortened coordinates expressed in the form.

89. Given the undisputed evidence regarding the actual location of the DLP before truncation of the coordinates, HTG failed to prove that Heritage's DLP was not within the development site according to the legal description provided in

the Heritage application. At most, HTG proved that the surveyor certification form identified an area as the DLP that would not be within the development site based on how Ms. West would have truncated the coordinates, which was not how Heritage's surveyors truncated the coordinates. Ms. West identified an area outside of the development site by assuming that the range of possibilities for the actual seconds in the latitude coordinates spanned from 06.70 seconds to 06.79 seconds. That was shown not to be an accurate assumption, because the actual seconds in the latitude coordinates were 06.66.

90. In the absence of a clear meaning of "truncated" imposed by statute, rule, or RFA specifications that requires shortening by just lopping off extra digits instead of shortening by rounding, the interpretation used for Heritage's surveyor certification form was reasonable.

91. The evidence offered at hearing, which was not considered by Florida Housing, confirmed the correctness of Florida Housing's initial decision to accept the DLP in Heritage's survey certification form, in that the DLP identified in that form in fact corresponds to a point within the boundaries of the legal description of the development site in Heritage's application, and the coordinates of that DLP were expressed in the certification form in a manner that was reasonable and consistent with the RFA requirements.

B. Challenged proximity points for public bus transfer stop

92. HTG also challenges the award of proximity points to Heritage for proximity to a public bus transfer stop, because the surveyor certification form contained an error in stating the distance between the bus station and the DLP.

93. HTG did not dispute the appropriateness of the public bus transfer stop used by Heritage, nor did HTG dispute the accuracy of the coordinates provided for the bus stop's location. However, in stating the distance between the bus stop and the DLP, the surveyor made an error: the surveyor certification form stated that the distance was 0.04 miles, when, in fact, evidence at hearing established that the distance is actually .15 miles.

94. Under the RFA, an applicant is entitled to six proximity points if its development is less than a quarter-mile (.25 miles) to a public bus transfer stop. A distance of .04 miles would yield six proximity points; a distance of .15 miles would also yield six proximity points.

95. Thus, although there was a plain error in Heritage's surveyor certification form, just as plainly, that error is insignificant and immaterial. Whether the distance was as stated in the surveyor certification form or as corrected by the evidence at hearing, Heritage would have received the same number of proximity points. The slight error conferred no competitive

advantage on Heritage; its application received no more points than it was entitled to by reason of the mistake.

96. The evidence at hearing, not considered by Florida Housing, confirms the correctness of Florida Housing's proximity point award to Heritage with respect to the public bus transfer stop. The slight error in the surveyor certification form is a waivable minor irregularity.

C. Challenge to site control documentation

97. HTG challenged the sufficiency of Heritage's site control documentation, contending that the contract to purchase the development site submitted by Heritage contains an impermissible condition on the exercise of options to extend the contract's term. HTG argues that the contract does not meet the RFA's definition of "eligible contract" (quoted above in paragraph 51), which requires that the extension options must be "exercisable by the purchaser and conditioned solely upon payment of additional monies[.]"

98. The contract at issue established a closing date of March 21, 2014, but allowed the purchaser to extend the closing date by up to two 30-day extensions, by providing prior written notice of the purchaser's election to extend the closing date and payment of extension fees to an escrow agent by wire transfer, in the amount of $25,000 per 30-day extension.

99. HTG argues that the provision specifying that the purchaser will give written notice that it is exercising the extension option, in addition to the requirement to send payment to an escrow agent by wire transfer, is an impermissible additional condition in violation of the RFA.

100. Although the contract provides for the purchaser to give written notice that it is exercising the extension option, HTG did not prove that the extension option is "conditioned" on the notice in the sense that the failure to give timely or proper notice would defeat an extension option if the extension fee were timely and properly paid.

101. Instead, the notice to the seller that the purchaser is exercising the extension option appears to mean nothing more than that the extension options are "exercisable by the purchaser." The notice serves the pragmatic function of informing the seller that the purchaser is exercising the extension option, in that payment of the extension fee itself must be by wire transfer to an escrow agent. In the past, before wire transfers became customary, these two parts would have been collapsed into a single step: a transmittal letter mailed by purchaser to seller explaining what the enclosed check is for.

102. Florida Housing reviewed the extension option terms in Heritage's contract, and reasonably determined that the contract met the requirements in the RFA.

D. Challenge to misnamed general partner

103. HTG's final challenge is based on a typographical error in the Department of State, Division of Corporations' records that misnamed Heritage's general partner as "NDG Heritage Pompany, LLC" instead of "NDG Heritage Pompano, LLC."

104. The Heritage application identifies Heritage's general partner as "NDG Heritage Pompano, LLC." The RFA's Certification and Acknowledgement Form was executed on behalf of Heritage by Robert G. Hoskins, as managing member of NDG Heritage Pompano, LLC, general partner of Heritage.

105. At the time of the application, the Department of State, Division of Corporations' records for Heritage contained a typographical error, identifying the name of Heritage's general partner as NDG Heritage Pompany, LLC.

106. At hearing, although Heritage could not explain how the typographical error found its way into the Division of Corporations' records, Heritage proved that the general partner entity is and always has been NDG Heritage Pompano, LLC. The correct entity name was verifiable and verified by evidence linking up the "document number" uniquely assigned to NDG Heritage Pompano, LLC (L13000119322), as shown on that entity's electronic articles of organization, with the same document number corresponding to the misnamed "NDG Heritage Pompany, LLC"

in the "general partner detail" section of the Division of Corporations' "detail by entity name" screen for Heritage.

107. HTG argues that Heritage's application reflects the "wrong corporate entity" as its general partner, and that because Heritage did not identify its general partner as NDG Heritage Pompany, LLC, Florida Housing should have thrown out the application. However, HTG offered no evidence to prove that there were two entities, one named NDG Heritage Pompany, LLC, and the other named NDG Heritage Pompano, LLC. No evidence was presented to prove there ever was an entity in Florida named NDG Heritage Pompany, LLC. HTG offered no evidence to refute Heritage's compelling proof that the misnamed NDG Heritage Pompany, LLC, entity in the Division of Corporations' records was one and the same as the correctly named NDG Heritage Pompano, LLC, based on the matching document number uniquely assigned to the entity NDG Heritage Pompano, LLC.

108. HTG attempts to make much of the facts that Heritage did not discover the typographical error before it was called to its attention in this proceeding, and that Heritage corrected the typographical error by means of an amendment to the certificate of limited partnership. Mr. Hoskins testified convincingly that when the typographical error was called to his attention, he contacted the Division of Corporations to try to find out how the error came to be and how to correct it. He was unable to

determine the source of the typographical error--whether it was a mistake on his part or on the part of the Division of Corporations. Regardless of how the typographical error occurred, he followed instructions to file an amendment to the certificate of limited partnership as the only way that the Division of Corporations could correct its records. Mr. Hoskins acted reasonably to follow the instructions and correct the typographical error. That he did so does not undermine the proof that regardless of how the typographical error became imbedded in the Division of Corporations' system, the "Pompany" entity was the same entity as the restored "Pompano" entity.

109. HTG failed to prove its contention that Heritage's application reflected the "wrong corporate entity" as its general partner. The evidence proved a typographical error in the Division of Corporations' records. If it could be said that that error somehow is considered an error in Heritage's application, then it is, at worst, a minor, inconsequential error that is surely waivable. HTG failed to prove that this typographical error was a reason to throw out Heritage's application.

CONCLUSIONS OF LAW

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

111. Section 420.507 provides the statutory authority for Florida Housing to award low-income housing tax credits by requests for proposals or other competitive solicitation. The statute provides in pertinent part:

> The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:
>
> * * *
>
> (48) To award its annual allocation of low-income housing tax credits, nontaxable revenue bonds, and State Apartment Incentive Loan Program funds appropriated by the Legislature and available to allocate by request for proposals or other competitive solicitation.

112. These consolidated competitive solicitation protests are governed by section 120.57(3)(f), which provides 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.

113. As the parties protesting Florida Housing's proposed action, Petitioners bear the burden of proof by a preponderance of the evidence. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.

114. All applicant-parties have standing; no one contended otherwise. Petitioners have standing to protest Florida Housing's proposed decisions to fund Oakland Preserve and Wisdom Village, and Petitioner HTG has standing to challenge the determinations that Heritage's application is eligible for funding and entitled to the maximum of 27 points. As explained in the Findings of Fact above, in this unique two-phase process, the priority established for applicants not selected for funding in the first phase remains significant for the credit underwriting phase.

115. Although competitive-solicitation protest proceedings are described in section 120.57(3)(f) as de novo, courts acknowledge that a different kind of de novo is contemplated than for other substantial-interest proceedings under section 120.57. Hearings under section 120.57(3)(f) have been described as a "form of intra-agency review. The judge 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).

116. Thus, competitive protest proceedings such as this one remain de novo in the sense that they are not confined to record review of the information before the agency. Instead, a new evidentiary record is developed in the administrative proceeding for the purpose of evaluating the proposed action taken by the agency. See, e.g., Asphalt Pavers, Inc. v. Dep't of Transp., 602 So. 2d 558 (Fla. 1st DCA 1992); Intercontinental Props., Inc. v. Dep't of Health & Rehab. Servs., 606 So. 2d 380 (Fla. 3d DCA 1992); cf. J. D. v. Dep't of Children & Families, 114 So. 3d 1127 (Fla. 1st DCA 2013) (describing administrative hearings to review agency action on applications for exemption from disqualification as akin to bid protest proceedings under section 120.57(3)).

117. New evidence cannot be offered to amend or supplement a party's response/application. § 120.57(3)(f), Fla. Stat. However, new evidence may be offered in a competitive protest proceeding to prove that there was an error in another party's application. Intercontinental Props., supra. And a related reason for new evidence is to prove that an error in a party's application is a minor irregularity that should be waived. Id.

118. 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 [Florida Housing] or the public.

Fla. Admin. Code R. 67-60.002(6). Pursuant to rule 67-60.008 and the RFA, Florida Housing may waive minor irregularities. These rules codify the concept of waivable minor irregularities developed in bid protest cases, wherein appellate courts have recognized that not every deviation from the terms of a competitive solicitation is material, and that 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); accord Intercontinental Props., supra.

119. After determining the relevant facts based upon evidence presented at hearing, the administrative law judge'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.

120. 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).

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." (citations omitted).

121. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has been described in Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931), as protecting the public against collusive contracts and securing fair competition upon equal terms to all bidders.

122. 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 irrational." Hadi v. Lib. Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006); Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). 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. Dravo Basic Materials Co. v. Dep’t of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

Oakland Preserve's application

123. Florida Housing awarded Oakland Preserve proximity points, accepting Dr. Edie Durand's medical office practice as a "medical facility." Based on the Findings of Fact in part I above, the evidence at hearing did not demonstrate that this decision was clearly erroneous, contrary to competition, arbitrary, or capricious.

124. Florida Housing's proposed action to award tax-credit funding to Oakland Preserve was not shown to be contrary to statute, Florida Housing rules or policies, or the RFA specifications.

Wisdom Village's application

125. The award of points for proximity to a public school was not shown to be clearly erroneous, contrary to competition, arbitrary, or capricious. Measuring proximity from the apparent main entrance was not unreasonable under the facts found above. Even if the application deviated from the RFA specifications by measuring from a door whose use was recently changed, the evidence proved that the deviation was immaterial, providing no competitive advantage to Wisdom Village, in that Wisdom Village would have received the same proximity points had it submitted its measurements from the recently-designated entrance 100 feet away. At worst, then, Wisdom Village's use of the west door was a minor irregularity that should be waived.

126. With regard to the site control challenge, Florida Housing determined that the documents submitted by Wisdom Village, taken as a whole, were sufficient to establish an "eligible contract" within the meaning of the RFA specifications. The evidence adduced at hearing did not demonstrate that Florida Housing's determination was clearly erroneous, contrary to competition, arbitrary, or capricious. While HTG argued that the original contract was fatally flawed and could not be cured by subsequent clarifying agreements, the subsequent actions of the parties and the acceptance of benefits under the contract serve as ratification. See, e.g., New Testament Baptist Church, Inc. v. Dep't of Transp., 993 So. 2d 112 (Fla. 4th DCA 2008). HTG offered no authority to the contrary, nor did HTG offer authority to refute the suggestion that any arguable ambiguities in the original contract are appropriately resolved through the clarifications in the subsequent documents, and/or through parol evidence, as they were convincingly answered by the testimony of James Bollinger at the final hearing.

127. With regard to HTG's challenge to the sufficiency of Wisdom Village's financing proposal documentation, the evidence failed to demonstrate that Florida Housing's determination that the Chase letter met the RFA requirements for acceptance by the applicant was clearly erroneous, contrary to competition,

arbitrary, or capricious. Instead, the evidence confirmed the correctness of Florida Housing's determination.

128. Petitioners failed to meet their burden, when the three challenge issues raised against Wisdom Village's application are judged by the foregoing standards, to prove that Florida Housing's decision to award tax-credit funding to Wisdom Village was contrary to statutes, rules, or the RFA specifications.

Heritage's application

129. With regard to HTG's challenge to the Heritage DLP, the evidence did not demonstrate that Florida Housing's acceptance of the Heritage DLP was clearly erroneous, contrary to competition, arbitrary, or capricious. Instead, as found above, the evidence adduced at hearing established that the DLP met the RFA specifications by being located within the boundaries of the development site according to the legal description provided in Heritage's application. In addition, Heritage's manner of identifying the DLP in its surveyor certification form was shown to be a reasonable interpretation of the undefined "truncated" instruction.

130. Even if it had been shown that Heritage had deviated from the RFA instructions by not truncating the DLP coordinates in the manner it was supposed to, such a deviation would not have been material, in that the evidence proved that the actual DLP

before truncation was properly located on the development site. As such, any deviation in how Heritage expressed its truncated DLP coordinates in the application afforded no competitive advantage. Thus, if a deviation had been established, it would be a minor irregularity that should be waived.

131. As to HTG's challenge to the Heritage site control documentation, the evidence did not demonstrate that Florida Housing's acceptance of the Heritage contract as an "eligible contract," within the meaning of the RFA, was clearly erroneous, contrary to competition, arbitrary, or capricious. Florida Housing's interpretation of the RFA's requirements for extension options was shown to be reasonable as applied to the Heritage contract.

132. As to HTG's challenge to Florida Housing's award of proximity points to Heritage based on the location of a public bus transfer stop, the evidence did not demonstrate that Florida Housing's award of proximity points was clearly erroneous, contrary to competition, arbitrary, or capricious. Although the evidence established that Heritage's application contained a slight error in stating the distance between the DLP and the bus stop, that error was shown to be minor and not material to the points awarded, affording no competitive advantage to Heritage. As such, the error was a minor irregularity that should be waived by Florida Housing.

133. Lastly, as to HTG's challenge to the Heritage application because of a typographical error in the Division of Corporations' records misnaming Heritage's general partner, the evidence did not demonstrate that Florida Housing's acceptance of the Heritage application was clearly erroneous, contrary to competition, arbitrary, or capricious. Instead, Heritage proved in convincing fashion that the typographical error was just that, and contrary to HTG's claim, Heritage's application did not name the "wrong corporate entity" as general partner. If the typographical error in the Division of Corporations' records were somehow attributable to Heritage's application, then that error would have to be considered a minor irregularity, at worst, that should be waived by Florida Housing.

134. HTG failed to meet its burden, when the four challenge issues raised against the Heritage application are judged by the foregoing standards, to prove that Florida Housing's determinations that Heritage's application is eligible for funding and is entitled to the maximum of 27 points are contrary to statutes, Florida Housing rules and policies, or the RFA specifications.

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) to award funding for the Oakland Preserve and Wisdom Village proposed developments; (2) to award the maximum 27 points to Heritage's application, maintaining that application's priority position based on its lottery number of 26, over HTG's application, with the maximum 27 points and a lottery number of 48; and (3) dismissing the formal written protests of Heritage at Pompano Housing Partners, Ltd., and HTG Broward 3, LLC.

DONE AND ENTERED this 10th day of June, 2014, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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 10th day of June, 2014.

ENDNOTES

[1/] All statutory references are to the Florida Statutes (2013).

[2/] Oakland Preserve objected to deposition exhibit 5 to Joint Exhibit 14--a string of emails between the deponent and someone else--as hearsay. The objection was noted for the record; in accordance with section 120.57(1)(c), Florida Statutes, and Florida Administrative Code Rule 28-106.213(3), hearsay evidence, even if admitted, cannot be used as the sole basis for a finding of fact unless the evidence would be admissible under an exception to the hearsay rule as found in sections 90.801-90.805, Florida Statutes.

[3/] Wisdom Village's Exhibits 2 through 4 and 6 were placed under seal and are subject to a Protective Order issued on June 4, 2014.

[4/] For purposes of section 120.57(3), the request for applications is equivalent to a "request for proposal." Fla. Admin. Code R. 67-60.009(3).

[5/] Both the RFA and chapter 67-60 allow Florida Housing to waive "minor irregularities."

[6/] Under Florida law, a "specialty hospital" is generally defined as a facility that provides either a range of medical services "restricted to a defined age or gender group," or a "restricted range of services" to "patients with specific categories of medical or psychiatric illnesses or disorders." § 395.002(28), Fla. Stat. "Class II specialty hospitals" are defined by rule as the former, i.e., facilities that provide a range of medical services restricted to a defined age or gender group of the population, including specialty hospitals for children or for women. Fla. Admin. Code R. 59A-3.252(1)(b).

[7/] In its PRO, HTG attempts to raise a new challenge issue, by suggesting that Dr. Durand's office practice only marginally satisfies the requirement that she be "available to treat patients by walk-in or by appointment," and that Florida Housing "certainly could . . . require that the term 'available to treat patients by walk-in or by appointment' mean during normal business hours and during a normal business week." (HTG PRO at 35-36). HTG did not raise this issue in its formal written protest. Moreover, while perhaps Florida Housing could add new requirements in subsequent RFAs, what HTG suggests plainly was not required in this RFA. The definition of "medical facility"

only requires that the doctor be "available to treat patients by walk-in or by appointment." There is no requirement that the doctor be "physically present," nor is any minimum requirement imposed for the doctor's in-office hours.

Even if HTG had timely challenged whether Dr. Durand is "available to treat patients by walk-in or by appointment," the evidence established that Dr. Durand's office is generally open during business hours during the week. Dr. Durand is not always on site, as she has an active practice with affiliations at various health care facilities, and she spends time out in the field seeing patients at these facilities. Dr. Durand sometimes makes house calls, as well. However, Dr. Durand's unrebutted testimony was that she remains "available" to see patients by appointment or to see walk-in patients, as she is only a phone call away from coming into the office when needed, even if the need arises outside of her regularly scheduled in-office hours. Accordingly, the evidence establishes the Dr. Durand is "available to treat patients by walk-in or by appointment" as required by the RFA.

[8/] Dr. Durand's email, exhibit 5 to her deposition (Joint Exhibit 14), is hearsay that does not supplement or explain non-hearsay evidence. Instead, the reverse is true; Dr. Durand's non-hearsay deposition testimony explains the hearsay in a way that casts doubt on the reliability of the hearsay statement. As hearsay evidence, the email cannot be the sole basis for a finding of fact unless it would be admissible over objection under the Florida Evidence Code. The requisite showing of admissibility was not made.

HTG, in its PRO, contends that Dr. Durand's email should be deemed admissible under the hearsay exception for former testimony by an unavailable witness in section 90.804(2)(a), Florida Statutes. However, the former testimony hearsay exception applies only to the deposition testimony of this unavailable witness. HTG argues that hearsay exhibits were treated as former testimony under similar former testimony hearsay exceptions in one Idaho case and in one federal district court case, which HTG contends should be followed. HTG does not fairly characterize these cases. Neither case offered by HTG stands for the proposition that exhibits to depositions are admissible under the former testimony hearsay exception.

In the Idaho case, Bahnmiller v. Bahnmiller, 145 Idaho 517, 181 P.3d 443, 446 (2008), the court actually acknowledged that the former testimony rule provides for admission of testimony

only, and not exhibits. However, the court found that the former testimony established the foundation for admission of the exhibit under a different rule, as a data summary. Here, HTG does not contend that Dr. Durand's testimony provided the foundation for admitting the email exhibit under a different rule.

The other case relied on by HTG, Airlie Foundation v. United States, 826 F. Supp. 537 (D.D.C. 1993), was a declaratory judgment action brought by Airlie to challenge the administrative revocation of its tax-exempt status, in which the federal government moved for summary judgment. The court determined that the record in a prior criminal trial, including testimony and exhibits, were properly considered as support for the summary judgment motion (as would be other material, such as affidavits, despite their hearsay nature). The Airlie court also ruled, in the alternative, that the record of the prior proceeding was part of the administrative record, and was admissible as non-hearsay evidence to show what material was considered to reach the decision challenged by Airlie.

Indeed, the illogic of HTG's argument that a witness' testimony about a document imbues the document with the same qualities as the testimony itself leads to the clearly erroneous conclusion that written statements in documentary evidence always can be transformed from hearsay to non-hearsay simply by eliciting testimony about the documents from witnesses at the final hearing, because the hearing testimony is excluded from the definition of hearsay under section 90.801(1)(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing[.]").

[9/] The undersigned does not find persuasive Petitioners' suggestions or implications of bias, interest, or lack of credibility on the part of Dr. Durand. Indeed, in its PRO, HTG backed off from the extreme view offered by Heritage's investigator that Dr. Durand restricts her practice to only adults and geriatrics. HTG's softened stance was that the "primary service" provided by Dr. Durand's medical facility is "towards" specific classes of patients. HTG PRO at 36. Such a practice meets the definition of "medical facility" in the RFA, which does not require that sizeable numbers of each different class of patients be treated, so long as a practice is not restricted to only certain classes of patients.

COPIES FURNISHED:

M. Christopher Bryant, Esquire
Oertel, Fernandez, Cole
Post Office Box 1110
2060 Delta Way
Tallahassee, Florida 32302-1110

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

Wellington H. Meffert, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

Mark Knowles Logan, Esquire
Sniffen and Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

Joseph M. Goldstein, Esquire
Shutts and Bowen LLP
Suite 2100
200 East Broward Boulevard
Fort Lauderdale, Florida 33301

Hugh R. Brown, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

Maureen McCarthy Daughton, Esquire
Sniffen and Spellman, P.A.
123 North Monroe Street
Tallahassee, Florida 32301

Della Harrell, Corporation Clerk
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

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.