RESPONSE TO PETITIONER’S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, Respondent, Florida Housing Finance Corporation “Florida Housing” hereby submits the following Response to the Exceptions filed by Petitioner to the Recommended Order issued in this proceeding, and says:

1. Section 120.57(1)(k), Florida Statutes, sets forth the standards by which an agency shall consider exceptions filed to a recommended Order issued thereunder, stating in pertinent part:

The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.
Rule 28.106.217(1), Florida Administrative Code also provides:

Exceptions shall identify the disputed portion of the recommended order by page number and paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.

**Standard for Exceptions to Findings of Fact**

2. Section 120.57(1)(l), Florida Statutes, provides, in pertinent part:

The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Petitioner makes no allegation in its Exceptions that the proceedings on which the findings were based did not comply with the essential requirements of law. The Board must decide whether the challenged Findings of Fact are based on competent substantial evidence.

3. The role of the Administrative Law Judge ("ALJ") in the administrative adjudication process must be taken into account when considering exceptions to findings of fact:

Factual issues susceptible of ordinary methods of proof that are not infused with policy considerations are the prerogative of the hearing officer\(^1\) as the finder of fact. It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible

\(^1\) DOAH "hearing officers," were reclassified as "administrative law judges," in 1996. Ch. 96-159, s. 31, Laws of Fla.
inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.

Walker v. Board of Professional Engineers, 946 So.2d 604 (Fla. 1st DCA 2006), quoting Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985).

And, where there is conflicting or differing evidence, and reasonable people can differ about the facts, an agency is bound by the hearing officer's reasonable inference based on the conflicting inferences arising from the evidence. Greseth v. Department of Health and Rehabilitative Services, 573 So.2d 1004, 1006–1007 (Fla. 4th DCA 1991).

4. It is the prerogative of the ALJ to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. Rogers v. Department of Health, 920 So.2d 27 (Fla. 1st DCA 2005). This Board is bound to honor the Administrative Law Judge's ("ALJ") Findings of Fact unless they are not supported by competent, substantial evidence. B.J. v. Department of Children and Family Services, 983 So.2d 11 (Fla. 1st DCA 2008("ALJ"). "Competent substantial evidence," is explained as: "[T]he evidence relied upon to sustain the ultimate finding should be
sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” Dept. of Highway Safety and Motor Vehicles v. Wiggins, 151 So.3d 457 (Fla. 1st DCA 2014), quoting DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla.1957)

**Standard for Exceptions to Conclusions of Law**

5. Section 120.57(1)(l), Florida Statutes, further provides:

The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. *(Emphasis added)*

**Petitioner’s “Introduction”**

6. Petitioner has included an “Introduction” section in its Exceptions purporting to provide information for the Board to consider in ruling on its Exceptions. While this section includes a recitation of some of the facts of the case (in a light favorable to Petitioner), along with legal arguments made at hearing and addressed in the Recommended Order, and repeated in its Exceptions. This Board
should only consider the “Introduction,” as legal argument in its consideration of any specific Exceptions made by Petitioner.

7. Petitioner’s exceptions all turn on the ALJ’s finding, as to the only material fact at issue in this case, that the word “not” in the Vacant Land Contract (Joint Exhibits 4, 4-A, and 4-B, line 261) was not struck through, resulting in a contract that read, “Buyer may not assign this Contract without Seller’s written consent.” Had the ALJ found the opposite, all Petitioner’s legal arguments about contract law would be completely unnecessary. This is not a case about the enforceability of contracts; it is a bid protest determining whether Florida Housing acted appropriately in finding Clearlake Village’s application ineligible for funding based on its failure to demonstrate site control as required by RFA 2014-114.

**Responses to Petitioner’s Objections**

8. In **Exception 1** (“Strikethrough of Word ‘Not’”), Petitioner takes exception to the finding of fact in paragraph 31 of the Recommended Order, arguing that it is not based on competent, substantial evidence. Petitioner argues that the ALJ’s finding that the word “not,” “is not sufficiently obvious [or sufficiently observable] so as to alert a reader [or reviewer] of the presence of the strikethrough.” *(Brackets in original.)* Petitioner attempts to draw a legal distinction between “sufficiently obvious [or sufficiently observable]” and “legible,” without providing any legal authority for that proposition.
9. The ALJ’s finding here is based on competent substantial evidence in the record: Ms. Garmon’s testimony (T. at 60-61, 69-71, 78-79) and his own observation of three copies\(^2\) of Petitioner’s Application which were admitted into evidence (Joint Exhibits 4, 4A, and 4B). The ALJ took extra care (as noted by Petitioner) by reviewing and comparing all three copies, rather than basing his finding of fact on a single copy. The documents submitted were of such quality that even an experienced reviewer, Ms. Garmon, was not able to discern the purported strikeout, despite Petitioner’s counsel’s valiant effort aimed at having her say otherwise. (Transcript at 61, 63-65). As directed by the case law noted in paragraphs 3 and 4 above, Petitioner’s Exception to Finding of Fact 31 must be denied because it attacks an ALJ’s factual finding that is supported by competent substantial evidence in the record.

10. In Exception 2 (“Handwritten or Typewritten Modification”) Petitioner objects to Finding of Fact 32 of the Recommended Order, stating that the ALJ “misunderstood Petitioner’s argument, and misunderstood the applicability of the ‘typewritten terms prevail’ clause of the contract.” Findings of fact are made not on argument of counsel, but on the evidence and testimony in the record. This exception is entirely comprised of legal argument: it contains nothing to address whether Finding of Fact 32 is or is not based on competent substantial

\(^2\) Petitioner notes that the ALJ took the “rare (but correct) step of receiving in evidence the ‘original (Joint Exhibit 4-A’) . . . and one of three copies submitted by Clearlake Village in hard copy (Joint Exhibit 4-B),” along with another copy submitted as Joint Exhibit 4. (Transcript at p. 125)
evidence in the record. Petitioner’s Exception to Finding of Fact 32 must be
denied because it challenges the ALJ’s factual finding, which is supported by
competent substantial evidence in the record.

11. In Exception 3 (“Assignment Deficient”) Petitioner objects to Finding
of Fact 34 of the Recommended Order, arguing that the ALJ incorrectly found that
“the assignment and assumption agreement is deficient . . . ,” because it did not
include any provision to recognize that the Seller consented to the assignment.
Petitioner correctly notes that RFA 2014-114 does not expressly require such a
provision in an assignment, and that his witness was never asked whether the
assignment was deficient. Neither affects the ALJ’s finding of fact. Again, this is
only meaningful in light of the earlier finding that “not” was not struck through,
thus requiring a demonstration that the Seller consented to the assignment of the
contract. Ms. Garmon testified that it is the lack of any demonstration of Seller’s
consent that makes the assignment, as the ALJ found, deficient for purposes of
establishing site control. (Transcript at 85) Again, Petitioner fails to show that
this finding is not based on competent, substantial evidence, so the Exception must
be denied.

12. In Exception 4 (“Assigns in Identification of Buyer”), Petitioner takes
exception to the finding of fact in paragraph 36 of the Recommended Order, which
found that merely identifying the Buyer as “DPKY Development Company, LLC,
or assigns” did not of itself function as consent to the assignment to the applicant, so as to render any other consent unnecessary. Petitioner refers to “unrebutted testimony,” “that the Contract’s paragraph 12 assignability provision was modified . . . .” This seems to refer to Mr. Young’s testimony regarding negotiations of the terms of the contract (Transcript at 93-96), about which the ALJ said:

[W]hat this is sounding a lot like to me is a discussion of those exhibits that were identified in the motion in limine that you essentially said that you were not going to offer3. (Transcript at 97)

I don’t think that really matters unless you are going to have some testimony that Florida Housing was somehow or another privy to part of those negotiations, which I don’t think they were.” (Transcript at 98)

Clearly, the ALJ assigned little or no weight to the “unrebutted testimony,” as he considered it irrelevant. As noted above, the Board “is not allowed to weigh the evidence, judge credibility of witnesses, or interpret the evidence . . . .” Petitioner argued that the use of “or assigns” describing the Buyer operates without more as a blanket consent to assignment of the contract to any party. The ALJ notes that alone cannot be considered a specific consent to assign it to the Applicant, in light of Finding of Fact 31 regarding the word, “not,” in section 12 of the Vacant Land Contract—which requires written approval of the Seller.

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3 Florida Housing filed a motion in limine to exclude evidence and testimony intended to supplement the site control documents in the application, per sec. 120.57(3)(f), Fla. Stat. Petitioner agreed not to offer documents that were the subject of the motion into evidence, so the ALJ did not rule on the motion in limine.
13. The rest of the Exception consists primarily of legal argument regarding application of contract law which is addressed in the response to Exception 6, at paragraph 16 below. The Exception must be denied.

14. Petitioner’s **Exception 5** is to Finding of Fact 37 of the Recommended Order (“Absence of Seller’s Written Consent”). The ALJ found two facts, based on Ms. Garmon’ testimony: (1), that she determined that the required consent was not included in the original copy (Transcript at __), and (2) that she confirmed that it was not in any of the copies of Petitioner’s application (Transcript at 85). Again, these findings are based on competent substantial evidence in the record. The remainder of the Exception consists, as did Exception 4, of argument regarding contract law. The Exception must be denied.

15. In its **Exception 6**, Petitioner attacks Conclusion of Law 48 of the Recommended Order, arguing that its conclusory statement is not supported by competent, substantial evidence. As discussed in the response to Exception 1, the ALJ based his finding regarding the strikeout on Ms. Garmon’s testimony and his own review of the copies, Joint Exhibits 4, 4-A, and 4-B, which are competent substantial evidence. Conclusion of Law 48 essentially determines that the use of the general term “or assigns,” without more, does not clearly express the Seller’s consent to the specific assignment to the Applicant entity. Nothing in the record
demonstrates that Seller consented to, or was even aware of, the assignment. This creates a missing element in the demonstration of site control.

16. To the extent that this Exception requires asks the Board to interpret the legal effect of the term “or assigns,” or any other term of the Vacant Land contract, the Board may not reject or modify the ALJ’s Conclusion of Law:

The conclusions of law challenged by Respondent in this exception relate to principles of contractual interpretation and the status of business entities which are not areas over which the Department has substantive jurisdiction. The Department does not have authority to disrupt this conclusion of law.

Schiller Investments d/b/a Shell Creek Groves v. Gulf Citrus Marketing and SunTrust Bank, DOAH Case No. 12-0161 (Dept. of Agriculture and Consumer Services Amended Final Order Sept. 28, 2012). “The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction.” Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001). The Exception must be denied.

17. Petitioner’s Exception 7 argues that Conclusion of Law 51 is not supported by competent, substantial evidence because “there is no provision in the Vacant Land Contract that requires that seller consent to assignment . . ..” This assertion completely disregards Finding of Fact 31, which as noted in the response to Exception 1, is supported by competent substantial evidence. As noted in the
response to Exception 4, above, the ALJ disregarded the “unrebutted evidence” testimony regarding the bargaining between the parties for the contract because it was addressing matters that are outside the scope of the bid protest hearing. To the extent that this Exception requires the Board to interpret the legal effect of the contract term “or assigns,” the Board may not reject or modify the ALJ’s Conclusion of Law. The Exception must be denied.

18. Petitioner’s Exception 8 to Conclusion of Law 55, as did the previous Exception argues that the use of “or assigns,” serves as consent to assign the contract to the Applicant. Petitioner also argues that the underscored lines in the Exception are a Finding of Fact unsupported by competent substantial evidence, again ignoring the competent substantial evidence supporting Finding of Fact 31. To the extent that this Exception requires asks the Board to interpret the legal effect of the contract term “or assigns,” the Board may not reject or modify the ALJ’s Conclusion of Law. For the reasons given in response to Exception 7, the Board must deny the exception.

19. Petitioner’s Exception 9 to Conclusion of Law 56, argues that Finding of Fact 31 is not supported by competent, substantial evidence. As noted in the response to Exception 1, above, the testimony of Ms. Garmon and the copies of site control documents provided by Petitioner in its Application, and reviewed by the ALJ’s do constitute competent substantial evidence. It is not reasonable to
assert that a typewritten term, such as the purported strikethrough here, controls the preprinted term. It is reasonable to insist that for a modification to control, it should at the very minimum be evident to a reviewer with a decade’s experience, who has reviewed hundreds of the form contract used here. The purported strikeout was not. To the extent that this Exception requires the Board to interpret the legal effect of the contract provision regarding typewritten or handwritten modifications, the Board may not reject or modify the ALJ’s Conclusion of Law. The Board must deny the Exception.

20. In Exception 10, Petitioner argues that the Conclusion of Law 57 and the Recommendation of the Recommended Order are incorrect for the reasons set forth in its other Exceptions, and adds that the Florida Housing’s decision “seeks to impose an additional requirement to demonstrating site control – separate written seller consent to assignment of the contract – that was not set forth in the RFA.” This is incorrect, as the only requirement imposed by the RFA is that the Applicant clearly demonstrate that it has site control. This is not a surprise; demonstration of site control has been determined based on the documents submitted in each application since the beginning of the Universal Cycle Application process in 2002, where the corporation rejected an application because the property description for the project site was missing. Tidewater Revitalization LLC v. Florida Housing Finance Corporation, FHFC Case No. 2002-0023 (Final Order
Oct. 10, 2002). This evaluation of site control documents is conducted in the same manner in the RFA process. In a circumstance similar to this, an application was rejected because no evidence of approval of a lease was included in the site control documents. Robert King High Preservation Phase I. LLC v. Florida Housing Finance Corporation, FHFC case No. 2014-062BP (Final Order Aug. 11, 2014).

More recently, a missing property description resulted in an application being found nonresponsive and ineligible for funding. Flagship Manor, LLC, v. Florida Housing Finance Corporation, FHFC Case No. 2015-009BP (Final Order June 9, 2015). Rule 67-60.006(1), Fla. Admin. Code, provides in pertinent part:

The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

There is no new requirement being imposed. Petitioner simply failed to provide all required information. This Board must deny this Exception.

21. To the extent that any of the Exceptions require the Board to interpret the legal effect of a contract term, the Board is without substantive jurisdiction to reject or modify the ALJ’s Conclusion of Law. Barfield, supra; Schiller Investments, supra.
WHEREFORE, Florida Housing respectfully requests, for the reasons set forth above, that the Board of Directors reject the arguments presented in each and all of Petitioner’s Exceptions, and adopt the Findings of Fact, Conclusions of Law and Recommendation of Recommended Order as its own and issue a Final Order consistent with same in this matter.

Respectfully submitted this 27th day of July, 2015.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Exceptions has been furnished this 27th day of July, 2015 by electronic mail to:

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