STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON HOLLOW, LLC, AND
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

v.

FHFC CASE NO.: 2015-023BP
DOAH CASE NO.: 15-3301BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

BRIXTON LANDING, LTD,

Intervenor.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on December 11, 2015. Petitioners Madison Hollow, LLC, ("Madison Hollow") and American Residential Development, LLC ("American Residential") timely submitted Applications for funding ("Applications") in response to Request for Applications 2014-115: Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the "RFA"). The matter for consideration before this Board is a

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
Kate R /DATE: 12-14-15

Recommended Order pursuant to §120.57(3), Fla. Stat. (2015), and Fla. Admin. Code R. 67-60.009 (Rev. 10-18-14).

Petitioners timely filed a Petition for Formal Administrative Hearing pursuant to §§120.569 and 120.57(3), Fla. Stat. (2015), (the "Petition") challenging the preliminary agency action of Florida Housing Finance Corporation ("Florida Housing") regarding the scoring of the Applications. Brixton Landing, LTD, ("Brixton Landing") intervened by filing a Notice of Appearance. Florida Housing referred the Petition to the Division of Administrative Hearings on June 9, 2015.

A formal hearing took place on August 3 and 4, 2015, in Tallahassee, Florida, before the Honorable Administrative Law Judge Suzanne Van Wyk. Respondent and Intervenor timely filed Proposed Recommended Orders on August 31, 2015. Petitioners filed a Proposed Recommended Order on September 1, 2015.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Administrative Law Judge issued a Recommended Order on October 29, 2015. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Administrative Law Judge recommended that Florida Housing issue a Final Order affirming Brixton Landing for funding under RFA 2014-115.

On November 9, 2015, Petitioners filed Petitioners' Exceptions to Recommended Order attached hereto as "Exhibit B." On November 16, 2015,

Brixton Landing filed Brixton Landing, LTD.'s Response to Petitioners' Exceptions to Recommended Order attached hereto as "Exhibit C." On November 17, 2015, Florida Housing submitted Respondent Florida Housing Finance Corporation Response to Petitioners' Exceptions attached hereto as "Exhibit D."

RULING ON EXCEPTIONS

1. The exceptions in Petitioners' Exceptions to Recommended Order were not numbered. In this Final Order, the exceptions will be referred to in numerical order based upon the order presented by Petitioners in Petitioners' Exceptions to Recommended Order (ex. the first exception presented will be exception one, the second exception presented will be exception two and so forth).

2. Based on a review of the record and the arguments presented by the Parties, the Board specifically rejects Petitioner's Exceptions One through Eighteen for the reasons set forth in the Recommended Order and the Responses filed by Respondent and Intervenor.

RULING ON THE RECOMMENDED ORDER

3. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence.

4. The Conclusions of Law in the Recommended Order are accepted without change.

4. The arguments presented in Petitioner's Exceptions are specifically rejected on the grounds set forth in the Recommended Order and Respondent's and Intervenor's Responses to Petitioner's Exceptions.

ORDER

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

8. The findings of fact of the Recommended Order are adopted as Florida Housing's findings of fact and incorporated by reference as though fully set forth in this Order.

9. The conclusions of Law in the Recommended Order are adopted as Florida Housing's Conclusions of Law and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Florida Housing's recommendation to award funding to Brixton Landing is **AFFIRMED** and the relief requested in the Petition is **DENIED**.

DONE and ORDERED this 11th day of December, 2015.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
Post Office Box 551 (32302)
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

Douglas P. Manson, Esquire
Manson Bolves Donaldson, P.A.
1101 West Swann Avenue
Tampa, Florida 33606

Paria Shirzadia, Esquire,
Manson Bolves Donaldson, P.A.
1101 West Swann Avenue
Tampa, Florida 33606

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

James W. Middleton, Esquire
Smith, Gambrell, & Russell, LLP
Suite 2600
50 North Laura Street
Jacksonville, Florida 32202

Kenneth B. Bell, Shareholder
Gunster, Yoakley & Stewart, P.A.
Suite 601
215 South Monroe Street
Tallahassee, Florida 32301

Ken Reecy
Director of Multifamily Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON HOLLOW, LLC, AND
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

vs. Case No. 15-3301BID

BRIXTON LANDING, LTD, AND
FLORIDA HOUSING FINANCE
CORPORATION,

Respondents.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 3 and 4, 2015, at the Division of Administrative Hearings in Tallahassee, Florida, before Suzanne Van Wyk, a duly-appointed Administrative Law Judge.

APPEARANCES

For Petitioners: J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
Post Office Box 551 (32302)
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

For Respondent Florida Housing Finance Corporation:

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street
Tallahassee, Florida 32301

For Respondent Brixton Landing, Ltd.

Douglas Manson Esquire
Paria Shirzadi, Esquire
Manson Bolves Donaldson, P.A.
1101 West Swann Avenue
Tampa, Florida 33606

STATEMENT OF THE ISSUE

Whether Florida Housing Finance Corporation's (Florida Housing) intended decision to award Respondent, Brixton Landing, Ltd., low-income housing tax credits is contrary to Florida Housing's governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

On November 21, 2014, Florida Housing issued Request for Applications 2014-115 (the RFA) for the purpose of awarding tax credits for the development of affordable housing in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. According to the terms of the RFA, only one development in the "Family or Elderly Demographic Commitment" category would be funded in Orange County.

On May 8, 2015, Florida Housing announced its intent to select 10 applicants for funding under the RFA, including Respondent, Brixton Landing. Petitioners, Madison Hollow, LLC, and American Residential Development, LLC (Madison Hollow or Petitioners), timely filed a Notice of Protest, and on May 22,

2015, filed their formal written notice of protest of the intended action. Florida Housing referred Madison Hollow's formal protest to the Division of Administrative Hearings on June 9, 2015. Brixton Landing became a party to the case when counsel for Brixton Landing filed a Notice of Appearance.

The final hearing took place on August 3 and 4, 2015, in Tallahassee, Florida. At the final hearing, Joint Exhibits J1 through J13 were admitted in evidence.

Petitioners presented the testimony of four witnesses: Ken Reecy, Director of Multifamily Programs for Florida Housing; David Evans, a civil engineer; Patrick Law, developer and owner of Madison Hollow; and Edward Williams, a land planner. Petitioners' Exhibits P1, portions of P3, P10 through P18, P23 (pages 2 and 3), P24 through P30, P33, and P34 were admitted in evidence. Petitioner proffered an audio recording of the July 7, 2007, meeting of the Orange County Board of County Commissioners.

Brixton Landing presented the testimony of three witnesses: Scott Culp, principal at Atlantic Housing Partners; Rick Baldocchi, a civil engineer; and Ken Reecy. Brixton Landing's Exhibits R1, R4, R16, R17, and R20 were admitted in evidence. Brixton Landing proffered audio

recordings of portions of the April 22, 2014, and November 11, 2014, meetings of the Orange County Board of County Commissioners.

The undersigned granted Petitioners' and Brixton Landing's requests for official recognition of specified portions of the Orange County Code of Ordinances.

Florida Housing called no witnesses and offered no exhibits in evidence.

A four-volume Transcript of the proceedings was filed on August 21, 2015. Respondents timely filed Proposed Recommended Orders on August 31, 2015. Petitioners filed a Proposed Recommended Order on September 1, 2015, to which no party objected. Unless otherwise stated, all statutory references are to the 2015 edition of the Florida Statutes.

FINDINGS OF FACT

1. Respondent, Florida Housing, is a public corporation created pursuant to section 420.504, Florida Statutes (2015). Its purpose is to promote the public welfare by administering the governmental function of financing affordable housing in Florida.

2. Petitioners, Madison Hollow, LLC, and American Residential Development, LLC (Madison Hollow or Petitioners),

are Florida limited liability corporations engaged in the business of affordable housing development.

3. Brixton Landing, is a Florida limited liability corporation also engaged in the business of affordable housing development.

4. Florida Housing is the housing credit agency for the State of 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, which are made available to the states annually by the United States Department of the Treasury.

5. The State Housing Tax Credit Program is established in Florida under the authority of section 420.5093, Florida Statutes. Florida Housing is the designated entity in Florida responsible for allocating federal tax credits to assist in financing the construction or substantial rehabilitation of affordable housing.

6. Because the demand for tax credits provided by the federal government far exceeds the supply available under the State Housing Tax Credit Program, qualified affordable housing developments must compete for this funding.

7. On November 21, 2015, Florida Housing issued Request for Applications 2014-115, Housing Credit Financing for Affordable Housing Developments in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the RFA). No challenge was filed to the terms, conditions, or requirements of the RFA.

8. According to the RFA, Florida Housing expected to award up to approximately $15,553,993 in tax credits for qualified affordable housing projects in those six large counties.

9. Florida Housing received approximately 58 applications in response to the RFA. Madison Hollow, Brixton Landing, Sheeler Club Apartments, Sheeler Club Apartments-Phase II, Banyan Station, Lauderdale Place, and Lake Sherwood timely submitted applications in response to the RFA requesting financing of their affordable housing projects from the funding proposed to be allocated through the RFA.

10. Petitioners requested an allocation of $2,110,000 in annual tax credits for their development, Madison Hollow, located in Orange County.

11. Brixton Landing requested an allocation of $1,330,000 in annual tax credits for Brixton Landing's proposed development in Orange County.

12. On May 8, 2015, the Board of Directors of Florida Housing approved the preliminary rankings and allocations, and issued its Approved Preliminary Awards/Notice of Intended Decision (Notice of Intended Decision), in which Florida Housing scored both Madison Hollow's and Brixton Landing's projects as eligible for funding and awarded each application 23 points. In addition, Sheeler Club Apartments, Sheeler Club Apartments-Phase II, Banyan Station, Lauderdale Place, and Lake Sherwood were all found to be eligible applications.

13. On that same date, Florida Housing published on its website the Notice of Intended Decision, which included a three-page spreadsheet listing all applications made in response to the RFA and identifying those which were eligible and ineligible.

Ranking and Selection Process

14. Applications were evaluated for eligibility and scoring by a Review Committee appointed by Florida Housing's executive director. Applications were considered for funding only if they were deemed "eligible," based on the terms of the RFA. Of the 58 timely-submitted applications, 52 were deemed eligible and six were deemed ineligible.

15. The highest scoring applications were determined by first sorting all eligible applications from highest score to

lowest score. Pursuant to the RFA, applicants could achieve a maximum score of 23 points. Eighteen (18) of those 23 points were attributable to "proximity" scores based on the distance of the proposed development from services needed by tenants. The remaining five points were attributable to Local Government Contributions.

16. In scoring housing tax credit applications, many applicants achieved tie scores. In anticipation of that occurrence, Florida Housing designed the RFA and rules to incorporate a series of "tie breakers" to separate any scores that tied as follows:

> a. First by the Application's eligibility for the "SAIL RFA 2014-111 Unfunded Preference", which is outlined in Section One of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference).
>
> b. Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four A.5.c.(1)(a)(iii) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);
>
> c. Next by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.12.e. of the RFA, (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

d. Next by the Application's Leveraging Classification (applying the multipliers outlined in Exhibit C below and having the Classification of A be the top priority);

e. Next 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

f. Finally by lottery number, resulting in the lowest lottery number receiving preference.

17. The Leveraging Classification is essentially a ranking of eligible applications based upon the cost per unit (referred to in the RFA as Total Corporation Funding Per Set-Aside Unit), with the most cost-effective project at the top of the list and the least cost-effective at the bottom. The top 90 percent of applications on the list were classified as Group A and the bottom 10 percent of applications classified as Group B. Applicants in Group B are not eligible for funding until all applicants in Group A are funded.

18. Pursuant to Item 9 of Exhibit C to the RFA, Florida Housing classified Brixton Landing and Madison Hollow in the Group A Leveraging Classification, and classified Sheeler Club Apartments, Sheeler Club Apartments-Phase II, Banyan Station, and Lauderdale Place in the Group B Leveraging Classification.

19. Both Brixton Landing and Madison Hollow were scored identically by Florida Housing, and both developments are located in Orange County. Because the RFA provided that only one project will be funded in each county, and because Brixton Landing had a lower lottery number than Madison Hollow, Brixton Landing was selected for funding.

20. A total of 52 applications were found to be eligible for funding. According to the leveraging calculations, the Group B applications were removed from consideration for funding. Brixton Landing was number 45 on the list, thus classified in Group A. Brixton Landing will be moved to Group B classification, if at least two of the five applications in Group B are found to be ineligible. If Brixton Landing is moved into Group B, Madison Hollow will be eligible for funding.

The Challenged Applications

21. Madison Hollow alleges that the applications for Sheeler Club Apartments and Sheeler Club Apartments-Phase II should have each been found ineligible for failure to demonstrate the "ability to proceed" required in the RFA. Madison Hollow also alleges that the applications for Banyan Station and Lauderdale Place should have each been found ineligible for failure to fully disclose the principals of the applicant and developer.[1/]

22. Madison Hollow is thus in the unusual position of challenging four applicants who were not selected for funding and are not parties to this case. Brixton Landing is in the equally unusual position of defending the applications of those four unfunded applicants.

A. Sheeler Club

23. Atlantic Housing Partners (Atlantic) submitted two applications in response to the RFA. Sheeler Club Apartments was an application for development of affordable multifamily units to serve a family demographic. Sheeler Club Apartments-Phase II was an application for development of multi-family garden homes to serve an elderly demographic. The projects were proposed to be located adjacent to each other.

24. The RFA sets forth the following specific requirements for applicants to demonstrate the ability to proceed:

> 5.f. Ability to Proceed:
>
> The Applicant must demonstrate the following Ability to Proceed elements as of Application Deadline, as outlined below.
>
> * * *
>
> (1) Status of Site Plan Approval. The Applicant must demonstrate the status of site plan approval as of the Application Deadline by providing, as **Attachment 7** to Exhibit A, the properly completed and executed Florida Housing Finance Corporation Local Government Verification of Status of

> Site Plan Approval for Multifamily Developments form (Form Rev. 11-14).
>
> (2) Appropriate Zoning. The Applicant must demonstrate that as of the Application Deadline the proposed Development site is appropriately zoned and consistent with local land use regulations regarding density and intended use or that the proposed Development site is legally non-conforming by providing, as **Attachment 8** to Exhibit A, the applicable properly completed and executed verification form:
>
> > (a) The Florida Housing Finance Corporation Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form (Form Rev. 11-14); or
> >
> > (b) The Florida Housing Finance Corporation Local Government Verification that Permits are not Required for this Development form (Form Rev. 11-14).

25. Similarly, the RFA requires applicants to submit forms to demonstrate availability of electricity, water, sewer, and roads to serve the proposed development.

26. The Verification of Status of Site Plan Approval form (Site Plan form) must be completed by the local government official responsible for determination of issues related to site plan approval within the applicable jurisdiction. The official must choose between two optional paragraphs related to proposals for new construction: (1) the proposed development "requires additional site plan approval or similar process" and the "final

site plan . . . was approved on or before the submission deadline for the" RFA; or (2) the proposed development "requires additional site plan approval or similar process" and either (a) the jurisdiction requires preliminary or conceptual site plan approval, "which has been issued," or (b) the jurisdiction provides neither preliminary nor conceptual site plan approval, "nor is any other similar process provided prior to issuing final site plan approval," but the site plan, in the applicable zoning designation, has been reviewed.

27. Orange County provides neither preliminary nor conceptual site plan approval. Thus, the local government official must certify that the site plan for the proposed project has been reviewed.

28. The Local Government Verification that Development is Consistent with Zoning and Land Use Regulations form (Zoning form), requires that the local government official responsible for issues related to comprehensive planning and zoning certify the following: (1) the zoning designation applicable to the property; (2) that the proposed number of units and intended use are consistent with current land use regulations and the zoning designation; (3) that there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density proposed; and (4) that there are no

known conditions that would preclude construction of the proposed development on the site.

29. It is undisputed that Atlantic submitted both verification forms with its application. Olan Hill, Chief Planner for Orange County, reviewed, completed, and signed each of these forms, attesting that in his opinion both of the proposed projects would be in compliance with local zoning and land use regulations. Mr. Hill was fully authorized to sign the forms on behalf of Orange County.

30. The two Atlantic projects are proposed adjacent to one another on a site which has a Planned Development (PD) zoning approval for development of 152 single-family townhome units in the Medium Density Residential Future Land Use category (MDR), which allows a maximum density of 20 units per acre.

31. The County's PD zoning approval was based on review of Atlantic's Land Use Plan (LUP) for the site. According to Mr. Hill, the LUP is a "bubble plan" outlining the general entitlements and development program for the site.

32. In the case at hand, the Atlantic site also has an approved preliminary subdivision plan (PSP), which is the first step to subdivide the property. Under the PSP, the property is

proposed to be subdivided into 152 lots for development of single-family townhomes.

33. For purposes of certifying the Site Plan and Zoning forms, Mr. Hill reviewed the PD LUP, not the PSP.

34. Regarding the Site Plan form, Mr. Hill certified that, although the County requires no preliminary or conceptual site plan approval process and the final site plan approval has not yet been issued, the site plan for the project in the applicable zoning classification, the PD LUP, had been reviewed.

35. With respect to the Zoning form, Mr. Hill first certified that the proposed number of units and intended use are consistent with current land use regulations and the PD zoning designation. The PD LUP limits the total number of units to 152, which would accommodate either of the Sheeler Club applications (Sheeler Club Apartments proposes 88 units, while Sheeler Club-Phase II proposes 64 units). The MDR land use category allows the multi-family uses proposed for the development up to 20 units per acre. Under the MDR category, the 21.4-acre site could be approved for well over 152 units.

36. Mr. Hill next certified that there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density described in that zoning classification. The PD zoning is final and is not dependent

upon whether Atlantic goes forward with subdivision of the property as proposed in the existing PSP. Atlantic could subdivide the property for a different number of lots, or in a different configuration, without changing the zoning of the property.

37. Finally, Mr. Hill certified that there are no known conditions that would preclude construction of the referenced Development on the proposed site, assuming compliance with the applicable land use regulations.

38. There are numerous county approvals needed throughout the development approval process. The Zoning form does not require the local government official to certify that no additional approvals are needed following site plan review, or that the proposed project is ready to begin construction.

39. Petitioners contend that neither of the Sheeler Club applications should have been deemed eligible because, despite Mr. Hill's authorized certifications to the contrary, the projects do not have the ability to proceed.

40. Petitioners do not contend that Mr. Hill was not authorized to execute the forms, or that the certifications were obtained through fraud or other illegality.

41. As to the Site Plan form, Petitioners contend first that Mr. Hill did not review a site plan for either project

proposed by Atlantic: Sheeler Club Apartments, 88 multi-family units; or Sheeler Club Apartments-Phase II, 64 garden apartments. Instead, Mr. Hill reviewed and certified the site plan for Sheeler Avenue Townhomes PD, which provides for development of single-family townhomes in a single phase over the entire site.

42. Petitioners argue that the PD is conditioned upon development of townhomes in single ownership complying with section 38-79(20) of the Orange County Code of Ordinances, which is unrelated to construction of the "garden apartments" proposed by Atlantic in its application to Florida Housing for financing. Thus, Petitioners conclude, Mr. Hill has not reviewed a site plan for either Sheeler Club Apartments or Sheeler Club Apartments-Phase II.

43. Mr. Hill testified that his certification did not depend on whether either or both of the proposed projects was eventually developed, but that the overall site has a PD zoning approval for a total of 152 units.

44. Ken Reecy is the Director of Multi-family Programs for Florida Housing. He testified the purpose of the Site Plan form, and, for that matter, the Zoning form, is to verify "high-level" approval of the site. For example, if the applicant

proposes a 64-unit project, Florida Housing wants verification that the developer will be able to deliver 64 units.

45. As to the Zoning form, Petitioners present a parade of objections. Petitioners argue that the proposed use of the property for multi-family apartments and garden apartments is inconsistent with the zoning approval for single-family townhomes; thus, additional land use regulation approvals are required, contrary to the certified Zoning form.

46. Petitioners point to the PSP approved for the subdivision of the property and argue that neither Sheeler Club project could be built in conformity with the PSP, which proposes to subdivide the property into 152 townhome lots.

47. Relying on the PSP, Petitioners also argue that Sheeler Club Apartments-Phase II has no public road access without the Sheeler Club Apartments development, thus, Mr. Hill's certification as to Phase II was incorrect and the project is not ready to proceed. Moreover, Petitioners argue that Atlantic "gerrymandered" the boundaries of the two projects in order to secure the most advantageous location for the "development location point"; therefore, the lot layout proposed in the PSP cannot be achieved on either of the two projects. Likewise, Petitioners argue the boundary is a change from the

approved PSP, which requires additional land use approvals from the Board of County Commissioners.

48. It is Florida Housing's practice to accept the zoning and land use certifications by local officials, which it followed in this case. Florida Housing does not have the expertise, resources, or authority to evaluate local zoning and land use decisions.

49. Petitioners would have the undersigned perform the analysis that Florida Housing did not and make a determination whether the Atlantic projects, as proposed, meet the requirements for zoning and land use approvals set forth in the certifications signed by Mr. Hill. Petitioners would have this tribunal interpret the Orange County Code of Ordinances and make findings regarding: whether the LUP PD would have to be amended for Atlantic to build the projects proposed in its funding application to Florida Housing; whether said amendments would constitute "substantial changes" to the approved PD, thus requiring additional public hearings; and, ultimately, whether the Site Plan and Zoning forms were executed in error.

50. The undersigned declines to do so, as set forth more fully in the Conclusions of Law.

51. In this particular case, Mr. Reecy testified that Orange County was aware of the issues raised by Madison Hollow

and that he relied on Mr. Hill's knowledge to make the right call on these forms. While there was certainly an abundance of testimony attempting to call into question the decisions of the Orange County authorities, the evidence does not support a finding that Florida Housing's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications, or that it was clearly erroneous, contrary to competition, arbitrary, or capricious.

52. In light of that finding, the audio recordings of Orange County Commission Meetings proffered by both Petitioners and Brixton Landing are not admitted. The recordings are irrelevant in this proceeding and have not been relied upon by the undersigned.

B. Banyan Station and Lauderdale Place

53. Madison Hollow alleges that two other applications, Banyan Station and Lauderdale Place, should have been found ineligible for failure to disclose the principals of the applicant and the developers, as required by RFA section Four.A.3.

54. Both the applicants for, and developers of, Banyan Station and Lauderdale Place are limited liability companies (LLCs). Section Four.A.3.d.(2) requires applicants that are LLCs to provide a list identifying the principals of the

applicant and the principals of each developer as of the application deadline.

55. The RFA also directs applicants to Section 3 of Exhibit C "to assist the [a]pplicant in compiling the listing." Exhibit C provides, "[t]he Corporation is providing the following charts and examples to assist the Applicant in providing the required list[.] The term Principal is defined in Section 67-48.002, F.A.C."

56. Florida Administrative Code Rule 67-48.002(93) reads, in relevant part, as follows:

> (93) 'Principal' means:
>
> (c) With respect to an Applicant or Developer that is a limited liability company, any manager or member of the Applicant or Developer limited liability company, and, with respect to any manager or member of the Applicant or Developer limited liability company that is:
>
> 3. A limited liability company, any manager or member of the limited liability company.

57. Exhibit C provides the following chart applicable to disclosures by LLC applicants:

Identify All Managers	**And**	**Identify all Members**

and

For each Manager that is a Limited Partership:	**For each Manager that is a Limited Liability Company:**	**For each Manager that is a Corporation:**
Identify each General Partner	Identify each Manager	Identify each Officer

and	and	and
Identify each Limited Partner	Identify each Member	Identify each Director
		and
		Identify each Shareholder

and

For each Member that is a Limited Partnership:	**For each Member that is a Limited Liability Company:**	**For each Member that is a Corporation:**
Identify each General Partner	Identify each Manager	Identify each Officer
and	and	and
Identify each Limited Partner	Identify each Member	Identify each Director
		and
		Identify each Shareholder

For any Manager and/or Member that is a natural person (i.e., Samuel S. Smith), no further disclosure is required.

58. Exhibit C further provides examples of fictitious applicants and developers followed by disclosure listings of managers, members, general and limited partners, officers, directors, and shareholders, as applicable.

59. Banyan Station, applicant, HTG Banyan is a limited liability company. HTG Banyan listed its managers as Matthew and Randy Rieger, and its members as Camillus-Banyan, LLC, and Housing Trust Group, LLC. It then listed Camillus House, Inc., and RER Family Partnership, Ltd., as sole members of those LLCs, respectively.

60. Applicant's developer is also a limited liability company, HTG Banyan Developer, LLC. HTG Banyan Developer listed Matthew and Randy Rieger as the developer's managers, and Camillus-Banyan, LLC, HTG Affordable, LLC, and Reiger Holdings, LLC, as its members. It listed Camillus House, Inc., RER Family Partnership, Ltd., and Balogh Family Investments Limited Partnership, as members of those LLCs. HTG Banyan Developer disclosed Matthew Reiger as the sole member of Rieger Holdings.

61. Likewise, Lauderdale Place applicant, HTG Anderson, LLC, identified its managers and members, although some members were identified as LLCs.

62. In each case, the applicant identified the principals of the applicant and the developer down "two levels" of organizational structure, even though in some cases this did not result in the disclosure of natural persons.

63. Petitioners urge an interpretation of the disclosure requirement that would require an LLC to continue to identify members and managers until natural persons are identified. Respondents maintain that the rule and the RFA require disclosure of only "two levels" of organizational structure, as shown on the charts in Exhibit C.

64. Petitioners did not make a showing that Florida Housing's interpretation of the rule and the RFA is

unreasonable. The definition of "principal" of an LLC includes members which are likewise LLCs. The assistive chart includes disclosures at only two levels of organizational structure. Furthermore, in Exhibit C, example 3, the disclosure for ABC, LLC, includes XYZ, LLC, as a member without further disclosure.

65. In support of its argument, Petitioners rely upon the language below the chart which states, "[f]or any Manager and/or Member that is a natural person (i.e., Samuel S. Smith), no further disclosure is required."

66. The plain language of the chart states that when disclosing managers and members of an LLC, for any manager or member who is a natural person, no further disclosure is required. The language does not state, as Petitioners would prefer, when disclosing managers and members of an LLC, disclosure must be made until all natural persons are disclosed.

CONCLUSIONS OF LAW

67. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter of this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes (2015). Florida Housing's decisions in this case affected the substantial interests of each of the parties, and each has standing to challenge Florida Housing's scoring and review decisions.

68. The burden of proof in this case rests with the parties opposing the proposed agency action, see State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998), which must establish their allegations by a preponderance of the evidence. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

69. Section 120.57(3)(f) sets forth the rules of decision applicable in bid protests, 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.

70. Although chapter 120 uses the term "de novo" when describing competitive solicitation protest proceedings, courts have recognized that a different kind of de novo is contemplated than for other substantial interest proceedings under section 120.57. Bid disputes are 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, 709 So. 2d at 609.

71. Accordingly, competitive bid protest proceedings, such as the instant case, remain de novo in the sense that the Administrative Law Judge is not confined to a record review of the information before Florida Housing. Instead, a new evidentiary record is developed in the hearing for the purpose of evaluating the proposed agency action. See Intercontinental Prop., Inc. v. Dep't of HRS, 606 So. 2d 380 (Fla. 1st DCA 1992); Sunshine Towing at Broward, Inc. v. Dep't of Transp., Case No. 10-0134BID (DOAH April 6, 2014; DOT May 7, 2010).

72. After determining the relevant facts based upon evidence presented at hearing, the agency's intended action must be considered in light of those facts, and 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.

73. The "clearly erroneous" standard is generally applied in reviewing a lower tribunal's findings of fact and interpretations of the statutes and rules it is charged with enforcing. In a de novo proceeding, the Administrative Law

Judge is not bound by factual determinations made previously by the agency, but an agency's conclusions and applications of the law to the facts are due some deference according to the clearly erroneous standard of review. An agency's interpretation and application of a rule is clearly erroneous when it "clearly contradicts the unambiguous language of the rule." Woodley v. Dep't of HRS, 505 So. 2d 676, 678 (Fla. 1st DCA 1987). An agency's finding is clearly erroneous when it is "without support of any substantial evidence, is clearly against the weight of the evidence or [if the agency] has misapplied the law to the established facts." Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956). "Where a protester objects to a proposed agency action on the ground that it violates either a governing statute within the agency's substantive jurisdiction or the agency's own rule, and if, further, the validity of the objection turns on the meaning, which is in dispute, of the subject statute or rule, then the agency's interpretation should be accorded deference; the challenged action should stand unless the agency's interpretation is clearly erroneous (assuming the agency acted in accordance therewith)." Sunshine Towing, supra, at 38. See also Level 3 Communications, Inc. v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003).

74. 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 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. See Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

75. The "contrary to competition" standard, unique to bid protests, is a test that applies to agency actions that do not turn on the interpretation of a statute or rule, do not involve the exercise of discretion, and do not depend upon (or amount to) a determination of ultimate fact. This standard is not defined in statute or rule; however, the legislative intent found in section 287.001, Florida Statutes, is instructive.[2/]

76. Actions that are contrary to competition include those which: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. Sunshine Towing, supra, at 48. See R.N. Expertise, Inc. v. Miami-Dade

Cnty. Sch. Bd., Case No. 01-2663BID (DOAH Feb. 4, 2002; Sch. Bd. of Miami-Dade Cnty. March 14, 2002); E-Builder v. Miami-Dade Cnty. Sch. Bd., Case No. 03-1581BID (DOAH Oct. 10, 2003; Sch. Bd. of Miami-Dade Cnty. Nov. 26, 2003).

77. The instant case is not one of first impression. A similar situation was presented in the recent case of Houston Street Manor LP v. Florida Housing Finance Corporation, Case No. 15-3302BID (DOAH Aug. 18, 2015; FHFC Sept. 21, 2015). In that case, Intervenor Pine Grove Senior Apartments asserted that the Houston Street application did not meet the "ability to proceed" requirement, despite the local official's certifications. Pine Grove argued that the project had not undergone conceptual site plan approval, which was available from the local government. Thus, Pine Grove argued, the Site Plan and Zoning forms were invalid because the project did not meet the requirements for certification stated in the forms.

78. In his Recommended Order, Judge Van Laningham made the following findings:

> 51. A good place to start in evaluating Pine Grove's position is with a look at the site-plan status form's purpose. It is clear from the language of the form that what FHFC wants, in a nutshell, is an authoritative statement from the local government advising that the local government either has approved, or is currently unaware of grounds for

disapproving, the proposed development's site plan. The relevance of this statement lies not so much in its being correct, per se, but in the fact that it was made by a person in authority whose word carries the weight of a governmental pronouncement. Put another way, the statement *is* correct *if* made by an official with the authority to utter the statement on behalf of the local government; it is a verbal act, a kind of approval in itself.

52. FHFC might, of course, deem a fully executed site-plan status form nonresponsive for a number of reasons. If it were determined that the person who signed the form lacked the requisite authority to speak for the government; if the statement were tainted by fraud, illegality, or corruption; or if the signatory withdrew his certification, for example, FHFC likely would reject the certification. No such grounds were established in this case, or anything similar.

53. Instead, Pine Grove contends that Mr. Huxford simply erred, that he should not have signed the Local Government Verification of Status of Site Plan Approval. Pine Grove makes a reasonable, or at least plausible, case to this effect. The fatal flaw in Pine Grove's argument, however, is that the decision whether to grant or deny this particular form of (preliminary) local governmental approval to Houston Street's site plan must be made by the local government having jurisdiction over the proposed development, i.e, the City of Jacksonville——not by Pine Grove, Houston Street, FHFC, or the undersigned. Mr. Huxford was empowered to make the statement for the city. He made it. No compelling reason has been shown here to disturb FHFC's acceptance of Mr. Huxford's

> certification as a valid expression of the City of Jacksonville's favorable opinion, as of the application submission deadline, regarding Houston Street's site plan.
>
> * * *
>
> 55. Pine Grove claims that Houston Street's Local Government Verification That Development Is Consistent With Zoning and Land Use Regulations form is incorrect and nonresponsive because Houston Street has not yet obtained all the necessary land use approvals, including the allegedly available conceptual site plan approval mentioned previously. Pine Grove's argument in this regard is identical to its objection to Houston Street's site-plan status form, which was rejected above. For the reasons previously given, therefore, it is found that FHFC did not err in accepting Mr. Huxford's verification of consistency with local zoning and land use regulations as a valid expression of the City of Jacksonville's position on these matters in relation to Houston Street's proposed project.

79. Judge Van Laningham's findings, which were adopted in Florida Housing's Final Order, are persuasive. In this case, Petitioners made numerous plausible arguments as to why the Site Plan and Zoning verification forms may be in error. However, Petitioners offered no compelling reason to disturb Florida Housing's acceptance of Mr. Hill's determinations. As was noted in Houston Street Manor, the decision whether to grant or deny this particular form of (preliminary) local governmental approval to Atlantic's applications must be made by the local

government having jurisdiction over the proposed development. Mr. Hill was the local official with authority to sign both forms. Mr. Hill testified that the verification forms were properly executed and accurate, and there was no evidence to support a conclusion that his determination was tainted by fraud or illegality.

80. Petitioners failed to demonstrate that Florida Housing's reliance on the Site Plan and Zoning forms was clearly erroneous. Having considered the extensive evidence presented at the final hearing, the undersigned was not left with either a definite or firm conviction that a mistake was made when Florida Housing relied upon Mr. Hill's certifications.

81. Petitioners failed to demonstrate that Florida Housing's reliance on the Site Plan and Zoning forms was arbitrary or capricious. It is reasonable for Florida Housing to rely upon the local government official's interpretation of its site plan review process and zoning requirements in processing applications for funding affordable housing project applications.

82. Petitioners failed to demonstrate that Florida Housing's acceptance of the executed Site Plan and Zoning forms was contrary to competition. Every applicant is required to submit properly-executed Site Plan and Zoning forms, and no

evidence was introduced to support a finding that Atlantic's applications were treated differently from other applications.

83. Both Banyan Station and Lauderdale Place disclosed the principals of the applicant and the developer as required by the RFA and by rule 67-48.002(93). Florida Housing's interpretation of the RFA and the rule is entitled to deference. Petitioners failed to establish that Florida Housing's interpretation of the disclosure rule--requiring disclosure of only "two levels" of organizational structure--is unreasonable.

84. Petitioners failed to establish that Florida Housing's decision that Banyan Station and Lauderdale Place met the disclosure requirements of the RFA was contrary to a governing statute, rule, or solicitation specification, or was clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order affirming Brixton Landing for funding under RFA 2014-115.

DONE AND ENTERED this 29th day of October, 2015, in Tallahassee, Leon County, Florida.

SUZANNE VAN WYK
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 29th day of October, 2015.

ENDNOTES

[1/] In their Proposed Recommended Order, Petitioners further allege that the Sheeler Club applications are non-responsive because they: (1) violate Florida Administrative Code Rule 67-48.004, which limits submissions to one project per subject property; and (2) contain an invalid "development location point."

Section 120.57(3)(b), Florida Statutes, pertaining to agency bid protests, requires that the formal written protest "shall state with particularity the facts and law upon which the protest is based." Petitioners did not raise either of these issues in their Formal Written Protest and Petition for Administrative Hearing.

Florida Administrative Code Rule 28-106.202 allows for amendment of the petition at any time prior to designation of the presiding officer, and "thereafter . . . only upon order of the presiding officer." Although amendments should be liberally allowed, an amendment to a bid protest petition offered after the case is referred to the division "should be scrutinized carefully because an agency might have chosen a different forum under those circumstances." Optiplan v. Sch. Bd. of Broward

Cnty., 710 So. 2d 569, 571 (Fla. 4th DCA 1998)(quoting Silver Express Co. v. Dist. Sch. Bd. of Miami-Dade Cmty. College, 691 So. 2d 1099 (Fla. 3d DCA 1997)(Nesbit, J., dissenting)(citations omitted). Nevertheless, Petitioners neither moved to amend their Petition to include the two newly-identified issues at any time prior to the final hearing, nor moved to conform their petition to the evidence presented at the final hearing. Nor was the issue tried by consent of Respondents. Further, despite the undersigned's invitation to do so, Petitioners did not cite in their Proposed Recommended Order any authority for the undersigned to consider those issues during the final hearing. [T4.597:5-7]. For this reason, the undersigned does not include in this Recommended Order any findings related to those two allegations.

[2/] Section 287.001, Florida Statutes, reads as follows:

> The Legislature recognizes that fair and open competition is a basic tenet of public procurement; that such competition reduces the appearance and opportunity for favoritism and inspires public confidence that contracts are awarded equitably and economically; and that documentation of the acts taken and effective monitoring mechanisms are important means of curbing any improprieties and establishing public confidence in the process by which commodities and contractual services are procured. It is essential to the effective and ethical procurement of commodities and contractual services that there be a system of uniform procedures to be utilized by state agencies in managing and procuring commodities and contractual services; that detailed justification of agency decisions in the procurement of commodities and contractual services be maintained; and that adherence by the agency and the vendor to specific ethical considerations be required.

COPIES FURNISHED:

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

J. Stephen Menton, Esquire
Rutledge Ecenia, P.A.
Post Office Box 551 (32302)
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
(eServed)

Douglas P. Manson, Esquire
Manson Bolves Donaldson, P.A.
1101 West Swann Avenue
Tampa, Florida 33606
(eServed)

Paria Shirzadi, Esquire
Mason Bolves Donaldson, P.A.
1101 West Swann Avenue
Tampa, Florida 33606
(eServed)

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

James W. Middleton, Esquire
Smith, Gambrell & Russell, LLP
Suite 2600
50 North Laura Steeet
Jacksonville, Florida 32202
(eServed)

Kenneth B. Bell, Shareholder
Gunster, Yoakley & Stewart, P.A.
Suite 601
215 South Monroe Street
Tallahassee, Florida 32301
(eServed)

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON HOLLOW, LLC and
AMERICAN RESIDENTIAL
DEVELOPMENT, LLC,

Petitioners,

Application No.:
Case No.: 15-003301BID

vs.

FLORIDA HOUSING FINANCE
CORPORATION and BRIXTON
LANDING, LTD.,

Respondents.
_____/

PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Petitioners, MADISON HOLLOW, LLC, and AMERICAN RESIDENTIAL DEVELOPMENT, LLC, ("Madison Hollow" or "Petitioners"), in accordance with Section 120.57, Florida Statutes, and Rule 28-106.217, Florida Administrative Code, submit the following exceptions to the Recommended Order entered in this proceeding on October 29, 2015.

INTRODUCTION

This case involves important interpretations as to the obligations of an applicant to have the ability to proceed at the time of filing an application for funding with Florida Housing Finance Corporation ("Florida Housing") and the rights of developers who submit a response to Florida Housing's Request for Applications to raise issues related to the eligibility of the responses filed by other developers. To ensure that a competitive process is conducted as required by state and federal law, applicants must be allowed a fair opportunity to challenge the applications submitted by other developers. As discussed below, in the 2014-115 RFA process,

a developer ("Atlantic Housing") chose to submit two separate applications (Sheeler Club Apartments and Sheeler Club Apartments-Phase II), (collectively the "Sheeler Applications") to Florida Housing for a parcel of land that Orange County had approved as a single Planned Unit Development (PD) for single family townhomes (the "Sheeler Avenue Townhomes PD"). The two Sheeler Applications were accepted and scored as eligible by Florida Housing during its initial review of the responses to the RFA. Madison Hollow filed an administrative challenge contending that the Sheeler Applications should be deemed ineligible because neither of the two applications had the "ability to proceed" with the proposed development submitted to Florida Housing unless they obtained further local government approvals to modify the PD approvals that had been obtained for the single phase townhome development on the property.

At the administrative hearing, Madison Hollow presented evidence related to the governing land use regulations and approvals for the Sheeler Avenue Townhomes PD as of Florida Housing's February 3, 2015 the application date. Following the hearing, the Administrative Law Judge ("ALJ") entered a Recommended Order which failed to address many of the specific issues raised regarding the status of the local government approvals for the PD as of the Florida Housing application date. Instead, the ALJ concluded that, because the Sheeler Applications included verification forms executed by the appropriate local government officials regarding zoning and site plan verification, Florida Housing's acceptance of the Sheeler Applications as eligible was not arbitrary, capricious, clearly erroneous, contrary to competition or contrary to statute. Madison Hollow contends that, in a *de novo* proceeding as part of a competitive selection process, competing applicants are entitled to bring forth and obtain specific rulings on the underlying facts and the failure of the ALJ to specifically address the ability of the Sheeler Applications to proceed under the land use regulations and approvals in place as of the

time of the Florida Housing application deadline was material error, particularly since the local government land use official never reviewed the land use approvals or a site plan for either application contrary to the statements in the verification forms. The ALJ also recommended dismissal of Madison Hollow's challenge to the disclosure of principals for two other applicants (Banyan Station and Lauderdale Place). The ALJ concluded that disclosure of the actual individuals behind a proposed project is not necessary.

Adoption of the Recommended Order entered by the ALJ would effectively turn the "ability to proceed" requirement of the RFA process into a meaningless factor in determining eligibility. In addition, if the ALJ's findings and conclusions regarding the disclosure of the principles of a proposed development are adopted, applicants will be able to avoid disclosure of the individuals behind a proposed development by simply hiding behind corporate shells. Such a result would render the disclosure requirements essentially meaningless. Madison Hollow respectfully submits that Florida Housing would be abdicating its obligation to the federal government to conduct a true competitive process if the ALJ's Recommended Order is adopted.

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, sets forth the standards which Florida Housing must follow in its consideration of the Recommended Order:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with

> particularity in the order, that the findings 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. . . .

§ 120.57(1)(l), Fla. Stat.

The issues before the Board in considering exceptions to the Recommended Order are whether the findings of fact are supported by competent substantial evidence and the correctness of the legal conclusions over which the agency has substantive jurisdiction. *Florida Department of Transportation v. J.W.C. Company*, 396 So. 2d 778 (Fla. 1st DCA 1981).

Agencies have discretion in their treatment of conclusions of law if the conclusions fall within the areas of the law or relate to the interpretation of rules over which the agency has substantive jurisdiction. Within those areas, an agency may reject or modify conclusions of law as long as it states its reasons and finds that its substituted conclusions are at least as reasonable as those of the Administrative Law Judge.

In *DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957), the Florida Supreme Court defined competent substantial evidence as follows:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion . . . . In employing the adjective "competent" to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed . . . . We are of the view, however, that the evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. To this extent the 'substantial' evidence should also be 'competent.'

(internal citations omitted).

WRITTEN EXCEPTIONS

Petitioners file the following written exceptions to the Recommended Order for consideration by Florida Housing prior to the issuance of the Final Order.

Exception

Finding of Fact ¶ 36.

Petitioners take exception to the ALJ's Finding of Fact in ¶ 36.

As evidence of the ability to proceed, the RFA requires, in part, that the applicant "demonstrate that as of the Application Deadline the proposed Development site is appropriately zoned and consistent with local land use regulations regarding the density and intended use. . . ." (emphasis added). It is incumbent on the applicant to demonstrate ability to proceed as of the application date. Only a "properly" completed "Verification that Development is Consistent with Zoning and Land Use Regulations Form" satisfied the applicant's obligation to demonstrate ability to proceed. [T. 1 @ 93].

In ¶ 36, the ALJ finds with respect to Mr. Hill's certification on the Zoning Verification Form:

> . . . that there are no additional land use regulation hearings or approvals required to obtain the zoning classification or density described in that zoning classification. PD zoning is final and is not dependent upon whether Atlantic goes forward with the subdivision of the property as proposed in the existing PSP. Atlantic could subdivide the property for a different number of lots, or in a different configuration, without changing the zoning of the property.

This finding ignores the undisputed fact that there was an approved PSP in place as of the application date which is part of the land use regulations governing development of the land on February 3, 2015. The ability to subdivide the property to develop the separate projects submitted to Florida Housing will require additional local government approvals; thus the project

submitted did not have the ability to proceed under the approvals in place as of the February 2015 application date. To the contrary, the competent substantial evidence in the record supports a finding that, notwithstanding the boilerplate language, the Zoning Verification Forms for the two separate Sheeler Projects proposed by Atlantic Housing are inconsistent with the PSP which are part of the governing land use regulations and neither of the Sheeler projects submitted to Florida Housing has received the discretionary land use approval from the Board of County Commission that would have been necessary for either project to proceed. Therefore, the projects lacked the ability to proceed as of the Florida Housing application date. [T. 3 @ 329, 333-335] Moreover, as of February 3, 2015, the local government approvals for the Sheeler PD limited development to single family attached townhomes. [T. 3 @ 325] Under these circumstances, the Zoning and Site Plan Forms signed by Orange County do not provide a realistic or reasonable basis to determine the "ability to proceed" with either an 88 unit multi-family townhome development or a 64-unit garden apartment (which under the Orange County Code is considered to be multi-family, not single-family) elderly development as of the application date. Table 38-77 of the Orange Code specifically recognizes residential single-family as a different land use than multi-family residential. [T. 2 @ 193] Because the PD approval was specifically for single-family townhome development, a change to a multi-family style development would be a change to the approved land use not previously permitted on the PD zoning under Orange County Code § 38-1207. [T. 2 @ 192-193] Such a change would require approval by the Board of County Commissioners. Neither Atlantic Housing nor the owner of the property has ever sought approval from the Board of County Commissioners to move forward with a multi-family development. [T. 2 @ 196] A PD is site specific zoning for a particular parcel. [PRO @ 66; T. 2 @ 192-193] A change in the conditions of use of any PD

LUP is a change in the zoning. [T. 2 @ 135-136, 189] Neither of the Sheeler applications should have proceeded to development as of the application date without a change in the PD conditions of use and the PSP.

The purpose of the Zoning Verification Form is to demonstrate that the proposed project is consistent with the local land use regulations and there would not be the need for any further local government approvals to proceed with the intended affordable housing project. [T. 1 @ 82-84] While final construction permits, final site plan and design approvals are not necessary to meet Florida Housing's application requirements, applicants are required to demonstrate the ability to proceed which can be shown by properly executed verification forms which, by their terms, are supposed to demonstrate that there are no major impediments to the project proceeded to development as described in the application submitted to Florida Housing. In this regard, the project should not be subject to uncertainty related to local government approval to proceed with development of the project submitted to Florida Housing. [T. 1 @ 109-111, 113] Here, the ALJ refused to address the evidence that demonstrated there were significant additional local government approvals necessary concerning zoning and the PD approvals before either of the two Atlantic projects could proceed.

Exception

Finding of Fact ¶ 41.

Petitioners take exception to the ALJ's Finding of Fact in ¶ 41 in the Recommended Order, regarding the certifications in the Site Plan Form. This finding is in conflict with the Findings of Fact ¶ 33, and conflicts with the competent substantial evidence in the record. Olan Hill, Chief Planner with the Orange County Planning Division, signed Site Plan Approval Forms for both Sheeler project applications. [Pet. Exh. 18, p. 10]. In ¶ 33, the ALJ specifically found

that "[f]or purposes of certifying the Site Plan and Zoning forms, Mr. Hill reviewed the PD LUP [land use plan], not the PSP [preliminary subdivision plan]." This finding is based on Mr. Hill's testimony that he only reviewed the LUP and did not review the PSP. [Pet. Exh. 18, p. 11] A PD is a negotiated or contract zoning with the local government that allows a developer to proceed with a specific use that is proposed. [T. 2 @ 123]. The rules and regulations that govern a PD are typically stated in the form of conditions that are part of the public record developed with the local government. [T. 2 @ 124]. A PSP defines the elements that allow development of the project to move forward. [T. 2 @ 125]. The unrefuted testimony established that the Sheeler Applications related to property for which the zoning was changed from agricultural to PD in order to allow for the construction of single-family type townhomes. [T. 2 @ 126]. The conditions of approval for that zoning change are part of the land use regulations governing the development of the site going forward. [T. 2 @ 127-128]. Those approvals, including the PSP, are part of the governing land use regulations for the property as of the application date submitted to Florida Housing. The ALJ erroneously failed to specifically address the requirements of those approvals. Finding of Fact in ¶ 33 correctly notes that Mr. Hill did not review the PSP, but instead only relied on the LUP. However, the ALJ fails to address the inconsistency between the language in the Zoning Verification Form for each Sheeler Application which indicates that the intended land use is consistent with current land use regulations which must include the existing PSP.

In ¶ 41, the ALJ misconstrues Petitioners' arguments. Petitioners contend not only that Mr. Hill failed to review a separate site plan for the two Atlantic projects, but that Mr. Hill only reviewed a LUP for a unified townhome project that was not part of the Florida Housing applications. As the Administrative Law Judge established in ¶ 33, although Mr. Hill certified

that he reviewed the site plan when he signed the Site Plan Verification Form, Mr. Hill in fact did not review a site plan for either project. [Pet. Exh. 18, p. 11] Moreover, Mr. Hill did not review the existing PSP for the entire PD in which the two Sheeler sites were situated nor did he review any other site plan for either of the two projects submitted to Florida Housing. Thus, the evidence does not support a finding that he correctly certified he reviewed the site plan for the two projects.

Exception

Finding of Fact ¶ 42.

Petitioners take exception to the ALJ's Finding of Fact in ¶ 42 in the Recommended Order, regarding the certifications in the Site Plan Form. This finding is in conflict with the Findings of Fact ¶ 33, and conflicts with the competent substantial evidence in the record. Olan Hill, Chief Planner with the Orange County Planning Division, signed Site Plan Approval Forms for both Sheeler project applications. [Pet. Exh. 18, p. 10]. In ¶ 33, the ALJ specifically found that "[f]or purposes of certifying the Site Plan and Zoning forms, Mr. Hill reviewed the PD LUP [land use plan], not the PSP [preliminary subdivision plan]." This finding is based on Mr. Hill's testimony that he only reviewed the LUP and did not review the PSP. [Pet. Exh. 18, p. 11] A PD is a negotiated or contract zoning with the local government that allows a developer to proceed with a specific use that is proposed. [T. 2 @ 123]. The rules and regulations that govern a PD are typically stated in the form of conditions that are part of the public record developed with the local government. [T. 2 @ 124]. A PSP defines the elements that allow development of the project to move forward. [T. 2 @ 125]. The unrefuted testimony established that the Sheeler Applications related to property for which the zoning was changed from agricultural to PD in order to allow for the construction of single-family type townhomes. [T. 2

@ 126]. The conditions of approval for that zoning change are part of the land use regulations governing the development of the site going forward. [T. 2 @ 127-128]. Those approvals, including the PSP, are part of the governing land use regulations for the property as of the application date submitted to Florida Housing. The ALJ erroneously failed to specifically address the requirements of those approvals. Finding of Fact in ¶ 33 correctly notes that Mr. Hill did not review the PSP, but instead only relied on the LUP. However, the ALJ fails to address the inconsistency between the language in the Zoning Verification Form for each Sheeler Application which indicates that the intended land use is consistent with current land use regulations which might include the entity PSP.

In ¶ 42, the ALJ misconstrues Petitioners' arguments. Petitioners contend not only that Mr. Hill failed to review a separate site plan for the two Atlantic Housing projects, but that Mr. Hill only reviewed a LUP for a unified townhome project that was not part of the Florida Housing applications. As the Administrative Law Judge established in ¶ 33, although Mr. Hill certified he reviewed the site plan for two projects, Mr. Hill in fact did not review any site plan at all. [Pet. Exh. 18, p. 11] Moreover, Mr. Hill did not review the existing PSP for the entire PD in which the two Sheeler sites were situated nor did he review any other site plan for either of the two projects submitted to Florida Housing. Thus, the evidence does not support a finding that he correctly signed the form which certified he reviewed the site plan for the two projects.

Exception

Finding of Fact ¶ 43.

Petitioners take exception to the ALJ's Finding of Fact in ¶ 43. As set forth in ¶ 33, Mr. Hill's certification was not based upon a review of the actual site plan for the two Sheeler Applications. The LUP does not meet the requirement of the Site Plan for either of the proposed Sheeler Club

Apartments-Phase II Applications. The Verification Forms that were submitted to Florida Housing did not demonstrate the ability of either of the Sheeler projects to proceed to development as of the application date as required. [J.Exh. 1 @ 3, 16]. The PSP that was in place as of the February application date was the governing land use regulation for the parcel, and as of the application date, neither of the projects submitted to Florida Housing could proceed under that PSP. [T. 2 @ 124-125]. In addition to the undisputed testimony of Mr. Hill that he did not review the actual site plan of the two applications, the Administrative Law Judge failed to apply the requirement of demonstration of the ability to proceed as of the application date.

Exception

Finding of Fact ¶ 46.

Petitioners take exception to the ALJ's Findings of Fact in ¶ 46. This Finding of Fact incompletely summarizes Petitioners' contentions. Petitioners contend that as of the February application date, neither of the Sheeler projects could be built in conformity with the approved PSP. The ALJ fails to note that the PSP was part of the land use regulations governing the development of the PD as of the February application date. Neither Sheeler project was buildable within the confines of the legal descriptions submitted in the applications based on the PSP.

Exception

Finding of Fact ¶ 47.

Petitioners take exception to the ALJ's Findings of Fact in ¶ 47. Again, this finding mischaracterizes Petitioners' argument. Mr. Hill's certification did not extend to the ability of either of the projects to proceed. He simply verified the zoning density that was allowed. It was up to the applicant to be sure Mr. Hill was presented with sufficient evidence to verify that the

proposed project as submitted to Florida Housing had the ability to proceed under the land use regulations in place as of the application date which included the PSP. Here, the evidence demonstrated that the Sheeler Club applicants did not do this. Because the Sheeler Club Apartments-Phase II Project that was submitted to Florida Housing does not have public road access, it cannot proceed without the Sheeler Club Apartments development also proceeding simultaneously. More importantly, neither project could proceed until the local government approved a different subdivision plan other than the PSP that was in place as of the application date. In this *de novo* proceeding, Florida Housing is obligated to consider the underlying facts developed through the testimony rather than simply observing that the form was executed by the local government. The PSP was part of the land use regulations governing the development of this property as of the application date.

Exception

Finding of Fact ¶ 48.

Petitioners take exception to the ALJ's Findings of Fact in ¶ 48.

Florida Housing's practice to accept at face value verification forms by local government officials does not mean that the applicant has met its obligation to demonstrate the ability to proceed. Florida Housing should consider all the evidence adduced at the *de novo* hearing.

Florida Housing's internal limitations with regard to time or expertise should not be used as a basis to exclude other applicants from demonstrating that the certification on the verification forms was not "proper" or that the verification was false or materially inaccurate because it was not based upon review of the documents identified on the form as the basis for the certification. [T. 1 @ 93] In other words, Florida Housing's lack of expertise in zoning and land use matters should not serve as a basis for meaningful review in a *de novo* proceeding of materials submitted

by an applicant to demonstrate their ability to proceed. Florida Housing is not being asked to determine what is necessary for the Sheeler Applications to proceed. Instead, it is being asked to consider the evidence presented in a *de novo* proceeding that, because the developer of the Sheeler property decided to submit two separate applications for a single PD, it was incumbent on that applicant to ensure that complete and accurate information was reviewed and considered by the local government zoning official so that the verification forms could be properly filled out to demonstrate the ability of the developments to proceed without the need for further governmental approvals to the PD zoning applicable to the property as of the application date. Under the facts developed at the *de novo* proceeding here, it would contrary to competition and contrary to Florida Housing's responsibility to conduct a competitive process to look simply to whether the form was signed by a local government official.

Exception

Finding of Fact ¶ 49.

Petitioners take exception to the ALJ's Findings of Fact in ¶ 49.

Contrary to the ALJ's characterization, Petitioners requested that the ALJ review the PSP that was in place as of the application date which the unrebutted facts demonstrate included a PSP that was not consistent with developments proposed to Florida Housing and, consequently, the applicant did not have the ability to proceed as of the application date.

The ALJ mischaracterizes Petitioners' argument. Petitioners have not requested the ALJ to do anything other than recognize that the local government official did not review a site plan for each of the projects as represented in the verification forms, to recognize that there was a PSP in place for the property as of the Florida Housing application date and that PSP governed the development of the property and could not be a basis for concluding that either of the Sheeler

Applications submitted to Florida Housing could proceed without further governmental zoning and land use hearings. Rather than looking only at the forms, the ALJ should have considered the evidence that the developer did not have the ability to proceed as a matter of right based upon the approvals as of the application date.

Exception

Finding of Fact ¶ 50.

Petitioners take exception to the ALJ's Findings of Fact in ¶ 50.

Florida Housing's practice to accept at face value the Land Use Certification by local government officials does not mean that the applicant has met its obligation to demonstrate the ability to proceed. Florida Housing should consider all the evidence adduced at the *de novo* hearing.

Exception

Finding of Fact ¶ 51.

The Petitioners take exception to the ALJ's Finding of Fact in ¶ 51 of the Recommended Order wherein the ALJ states:

> While there was certainly an abundance of testimony attempting to call into question the decisions of the Orange County authorities, the evidence does not support a finding that Florida Housing's proposed action is contrary to the agency's governing statutes, the agency's rule or policies, or the solicitation specifications, or that it was clearly erroneous, contrary to competition, arbitrary, or capricious.

The ALJ found in Paragraph 24, that the RFA sets forth the specific requirement that the applicant demonstrate the ability to proceed including the requirement to "demonstrate the status of site plan approval as of the Application Deadline by providing, as Attachment 7 to Exhibit A, the properly completed and executed Florida Housing Finance Corporation Local Government

Verification of Status Site Plan Approval for Multifamily Development Form." (emphasis added) [J.Exh. 1 @ 3, 16]. Here, although the ALJ determined, as noted in Exception 1, that Mr. Hill did not review a site plan for either of the two Atlantic Housing projects, she then went on to determine in ¶ 34 "Mr. Hill certified that, although the County requires no preliminary or conceptual site plan approval process and final site plan approval has not yet been issued, the site plan for the project in the applicable zoning classification, the PD LUP, had been reviewed." The ALJ's finding in ¶ 34 that Mr. Hill's certification with respect to each of the Atlantic Housing projects was based on a site plan for that particular project having been reviewed is incorrect.

The submission and proper completion of the Site Plan Verification Form is a mandatory requirement of the RFA and is ultimately the applicant's responsibility. [T. 1 @ 93] To not allow Petitioners to look behind the local government certifications on the face of the form to determine their correctness and validity renders such forms and the entire reason for obtaining the forms a nullity. Essential to the proceedings to be conducted is the directive from the federal government to Florida Housing that it conduct a competitive process. [T. 1 @ 69] A competitive process necessarily means that applicants must have an opportunity to bring forth evidence of the deficiencies in other applicant's proposals. This is particularly important here, where the testimony from Florida Housing established it has limited ability and time to either evaluate substantive aspects of an applicant's proposal, nobody at Florida Housing has expertise in zoning and land use in order to determine whether a local government's approval was erroneous and procured based on flawed, incorrect, or incomplete information. [T. 1 @ 71-72, 89, 92-93] Unless applicants are required to meet their obligation to demonstrate the ability to proceed as of the application date, the RFA process becomes essentially a paper shuffling exercise.

The ALJ's Finding of Fact in ¶ 51, with respect to the Site Plan Verification Form, is not supported by the competent substantial evidence in the record. Allowing the applications for the two Sheeler projects to be eligible when the facts at hearing demonstrated that there was a PSP in place as of the application date for a single phase townhome development that is not the same as either of the applications submitted to Florida Housing is contrary to the requirement that each application must demonstrate the ability to proceed as of the application date. [J.Exh. 1 @ 3, 16]. The Administrative Law Judge's findings in ¶ 51 regarding the Site Plan Verification Forms for each application are inconsistent with the findings in ¶ 34, incorrect, contrary to the solicitation specifications and clearly erroneous, contrary to competition, arbitrary, and capricious.

Whether a certification by Mr. Hill based solely upon the LUP would have been acceptable if Atlantic Housing had submitted a single application to Florida Housing is not the question that was presented to the ALJ. Atlantic Housing made the affirmative determination to separate the approved PD into two separate projects for purposes of submitting two applications to Florida Housing. Under this scenario, it was incumbent upon the applicant to make sure that the local government was presented a site plan for each of the individual projects submitted to Florida Housing and the proposed projects could proceed under the local government land use approvals in place as of the application date without the need for further discretionary zoning approvals. This obligation on the applicant is particularly essential under the facts established in this case where there was an approved PSP in place as of the application date that was for a single phase townhome development. Under these facts, the developer did not have approval from the local government to proceed with either of the two projects submitted to Florida Housing. A site plan is an entitlement obtained by a developer for complying with zoning and

development regulations and paying required fees. Contrary to the ALJ's Finding in ¶ 34, Mr. Hill was not provided a site plan for each of the applications. The developer for the Sheeler applications had not obtained separate approvals for the two projects submitted to Florida Housing as of the application date.

In addition, the submission and "proper" completion of the Zoning Verification Form is a mandatory requirement of the RFA to demonstrate an Applicant's ability to proceed. [T. 1 @ 93] The evidence established Mr. Hill's certification was based on review which did not include the PSP and, thus, was based on less than all of the pertinent information. The purpose of the de novo proceeding is to allow a Petitioner to look behind the local government verifications on the face of the form to determine their correctness and validity. To disregard this evidence would effectively render the forms meaningless and the entire reason for obtaining the forms a nullity. Essential to the proceedings to be conducted is the directive from the federal government to Florida Housing that it conduct a competitive process. [T. 1 @ 69] A competitive process necessarily means that applicants must have a reasonable opportunity to bring forth evidence of the deficiencies in other applicant's proposals. This is particularly important here, where Florida Housing has admitted its limited ability and time to evaluate substantive aspects of an applicant's proposal, including whether a local government's approval was erroneous or procured based on flawed, incorrect, or incomplete information.

The ALJ's Finding of Fact in ¶ 51 with respect to the Zoning Verification Forms is not supported by the competent substantial evidence in the record. Deeming the two Sheeler projects to have satisfied the ability to proceed requirements based upon forms that were executed without review of the PSP in place at the time of the application date and without review of a site

plan for each project is clearly erroneous, contrary to the solicitation specifications and is also contrary to competition, arbitrary and capricious.

The fact that Florida Housing's preliminary rankings and allocations were made in good faith based upon information then available to it does not insulate that preliminary decision from fact-finding by an independent judge in a challenge to a proposed award under § 120.57(3). Indeed, the precise purpose of such a hearing is to provide a formal evidentiary record upon which to base final agency action. Following a challenge to an agency's decision to accept a proposal, the agency's final decision must be supported by the evidence adduced at hearing, including evidence unavailable to the agency when it made the decision. Gtech Corp. v. Dep't of Lottery, 737 So. 2d 615, 618 (Fla. 1st DCA 1999)(parties allowed to present evidence "on the reasoning and other matters, after the first hearing").

Exception

Finding of Fact ¶ 64.

Petitioners take exception to the ALJ's Finding of Fact in ¶ 64. It is unreasonable, arbitrary and capricious to interpret the requirement in a way which allows applicants to not fully identify the principals. Such an interpretation renders the disclosure requirements a meaningless paper exercise.

Exception

Finding of Fact ¶ 66.

Petitioners take exception to the ALJ's Finding of Fact in ¶ 66. It is unreasonable, arbitrary and capricious to interpret the requirement in a way which allows applicants to not fully identify the principals. Such an interpretation renders the disclosure requirements a meaningless paper exercise.

Exception

Conclusion of Law ¶ 79.

Petitioners take exception to the statements in the ALJ's Conclusion of Law in ¶ 79 of the Recommended Order.

Site Plan Form: Even though Mr. Hill did not review a site plan for each of the Sheeler Applications or the PSP that was in place as of the application deadline, but instead relied only on the PD LUP, the ALJ erroneously concludes in Conclusion of Law ¶ 79: the verification forms were properly executed and accurate. This conclusion cannot be reconciled with the Finding of Fact in ¶ 34. Although not rising to the level of fraud or illegality, the evidence clearly established that, contrary to Mr. Hill's certification on the Site Plan Verification Forms, that he reviewed a site plan for each of the applications, he did not review the PSP in place as of the application date and did not review a specific site plan for each of the separate projects. Thus, the certifications on the Site Plan Verification Forms are wrong, were not "proper" and/or were "inappropriately signed."

The ALJ cites to a previous opinion by Judge Van Laningham in the *Houston Street Manors* case issued during the pendency of this matter discussing instances where the Florida Housing may deem a fully executed a Site Plan Verification Form nonresponsive including instances where the certification was tainted by fraud or illegality. The ALJ relies on *Houston Street Manors* to conclude that the jurisdiction to question the local government's certification because she would have to interpret the Orange County Code. The *Houston Street Manors* case is not an appellate decision and the Board's final order should be based on the facts developed in the record. It would be arbitrary, capricious, contrary to competition and contrary to the requirements to conduct a competitive process to extend the *Houston Street Manors* holding to facts not addressed in that case. Acceptance of the verification form signed by a local

government official is not automatically sufficient in a competitive process where the applicant bears the ultimate responsibility to demonstrate the ability to proceed. The ALJ's adoption of the reasoning in *Houston Street Manors* is inconsistent with the requirements for a *de novo* hearing in a competitive process. Chapter 120 expressly uses the term "*de novo*" to describe competitive solicitation protest proceedings. Thus, the ALJ must review Florida Housing's intended award *de novo* to determine whether the agency's proposed action is contrary to statutes, rules, policies, or the solicitation specifications in light of the evidence adduced at hearing. *See, Asphalt Pavers, Inc. v. Dep't. of Transp.*, 602 So. 2d 558 (Fla. 1st DCA 1992). Indeed, the precise purpose of such a hearing is to provide a formal evidentiary record upon which to base final agency action. Following a challenge to an agency's decision to accept a proposal, the agency's final decision must be supported by the evidence adduced at hearing, including evidence unavailable to the agency when it made the decision. *Gtech Corp. v. Dep't of Lottery*, 737 So. 2d 615, 618 (Fla. 1st DCA 1999). Here, especially with respect to the certifications on the Site Plan Form, the Florida Housing must look at the evidence adduced at hearing which clearly establishes Mr. Hill's certifications on the Site Plan Form are wrong and/or based on incomplete information. No interpretations of the local code is necessary. To not look behind the local government verification forms renders the entire process of providing information to show the ability to proceed useless and simply a form requirement with no substance.

Petitioners submit that reliance on incomplete information and/or demonstrated factual misstatements on certification forms in this type of application process, whether such erroneous statements were intentional or not, compels Florida Housing to deem the Sheeler Applications ineligible. To establish a precedent of accepting the applications despite the evidence would encourage applicants to disregard the intent of the ability to proceed requirements and to secure

certifications that are not appropriately signed or in conformity with the language of the forms themselves. To be eligible, applicants must be required to demonstrate they had the ability to proceed with the projects proposed to Florida Housing as of the application date.

Zoning Form: Similarly, the ALJ, irrespective of the evidence presented by the Petitioners that there are significant local government approvals necessary concerning zoning PD and the approvals necessary before either of the projects could proceed irrespective of executed forms, erroneously concluded that there is no reason to disturb Florida Housing's original eligibility decision which was based solely on the forms. A competitive process necessarily means that applicants must have a reasonable opportunity to bring forth evidence of the deficiencies in other applicant's proposals. This is particularly important here, where Florida Housing has an admittedly limited ability and time to either evaluate substantive aspects of an applicant's proposal, or to determine whether a local government's approval was erroneous and procured based on flawed, incorrect, or incomplete information. Petitioners are not asking Florida Housing or the ALJ to interpret the local ordinances. Instead, based on the competent substantial evidence presented at the *de novo* hearing that the certifications in the Zoning Form are in error and were not based on the PSP in place at the time of the application, Petitioners are asking Florida Housing to find that the forms do not support a finding that the Sheeler Applications sufficiently complied with the requirements to show an ability to proceed and thus, were not responsive to the RFA requirements.

The findings of fact developed after the evidentiary hearing must support the final order to be issued by the agency. The competent substantial evidence in the record does not support a Final Order deeming the two Atlantic projects to be eligible. *Gtech Corp. v. Dep't of Lottery*, 737 So. 2d 615, 619 (Fla. 1st DCA 1999).

Exception

Conclusion of Law ¶ 80.

Petitioners take exception to the ALJ's Conclusion of Law in ¶ 80 of the Recommended Order. The unrefuted evidence produced at the hearing established that the Sheeler Applications could not proceed under the PSP in place as of the application date without additional local zoning and land use hearings and approvals. The ALJ erroneously failed to address the implications of the PSP in place as of the application date and failed to address the substantial implications of the failure of the local government zoning official, Olan Hill, to review the PSP or a site plan for each of the applications submitted to Florida Housing. Reliance on the Zoning and Site Plan Verification Forms signed by Mr. Hill under these facts would be clearly erroneous, arbitrary and contrary to competition.

The ALJ erroneously refused to address specific evidence presented regarding the inability of either of the Sheeler applications to proceed as proposed through Florida Housing under the PSP in place as of the application date. These problems included the inability to construct the 64-unit elderly development submitted as Sheeler Club Apartments-Phase II as single story units as contemplated by the developer and the failure to meet the minimum living space requirement for the Sheeler Club Apartments application within the setback requirements. The evidence at hearing demonstrated that the Sheeler Club Apartments-Phase II application did not have access to a public road. Thus, reliance on the road certification letter in that application would be clearly erroneous. The evidence at hearing also demonstrated that the Sheeler Club Apartments application could not provide sufficient units to meet the set aside commitment under the PSP that was in place as of the Florida Housing application date.

The evidence at hearing also established that the legal descriptions for the separate Sheeler Applications submitted to Florida Housing impermissibly utilized part of the other Sheeler application's land in order to meet the RFA requirements. The same land cannot be used in two applications in the same RFA. *See*, Rule 67-48.004, Fla. Admin. Code. Thus, both applications should be deemed ineligible for violating the rule against using the same land in two applications. Neither project had demonstrated site control of the land necessary to construct the projects proposed in their Florida Housing applications, nor did they have sufficient sources of funds to cover all of the financial costs for the two developments to proceed simultaneously.

The fact that Florida Housing's preliminary rankings and allocations were made in good faith based upon information available to it during Florida Housing's evaluation of the RFA responses does not insulate that preliminary decision from fact-finding in a challenge to an award decision under Section 120.57(3), Florida Statutes. Based on the new facts established in the record, it would be clearly erroneous, contrary to the requirements of the RFA and contrary to Florida Housing's rules to consider the Sheeler Applications to be eligible for funding..

It should be noted that throughout the Recommended Order the ALJ discusses the Site Plan Form and the Zoning Verification Form together. Failure to comply with the requirements relative to either one of those forms is sufficient to render the application nonresponsive to the RFA.

Exception

Conclusion of Law ¶ 81.

Petitioners take exception to the ALJ's Conclusion of Law in ¶ 81 wherein the ALJ concludes that Florida Housing's reliance on the Site Plan and Zoning Forms was reasonable. Now that there is evidence in the record that demonstrates that both certifications in the Site

Plan and Zoning Verification Forms were not based on review of the PSP in place as of the application date and were founded on incomplete and/or inaccurate information, it would be arbitrary and capricious and erroneous for Florida Housing to rely on such forms.

Exception

Conclusion of Law ¶ 83.

Petitioners take exception to the ALJ's Conclusion of Law in ¶ 84. The Department's interpretation is arbitrary and capricious because it renders the disclosure requirement meaningless.

Exception

Conclusion of Law ¶ 84.

Petitioners take exception to the ALJ's Conclusion of Law in ¶ 84. The Department's interpretation is arbitrary and capricious because it renders the disclosure requirement meaningless.

Exception

Conclusion of Law in EndNote 1.

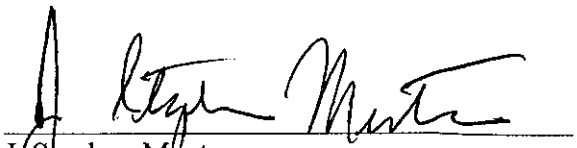
In EndNote 1, the ALJ sites to two issues raised by the Petitioners but does not provide any specific findings regarding those issues asserting that the issues were not raised in the Petition and that the Petitioners neither moved to amend their Petition to include these issues nor moved to conform the petition to the evidence presented by the final hearing. The ALJ's attempt to impose strict pleadings requirements in this expedited proceeding was incorrect as a matter of law and incorrect based upon the facts of this case. The ALJ essentially avoided addressing a very real and significant deficiency related to the Sheeler Club applications. The Petition in this case alleged that the Sheeler Applications should be deemed ineligible because they failed to

comply with the Florida Housing's Rule Requirements. Among the Rule Requirements is that a site can only be used for a single application in each RFA. Because the Sheeler applicants did not provide a specific site plan to the local government for each application and there was no reference to the PSP in any of the materials submitted to Florida Housing, the details of the land use approvals for the applications were not available at the time the Petition was filed. Moreover, it was less than a week before the final hearing that the Intervenor, Brixton Landing, LLC, identified the developer for the Sheeler Applications as a witness in this proceeding and he was not available for deposition until the Friday before the scheduled hearing date. Under these circumstances, it was clearly erroneous for the ALJ to not address the facts developed at the *de novo* proceeding regarding the necessity to utilize property from the legal descriptions in both applications to meet the ability to proceed requirements of the RFA. At hearing, Petitioner requested the ALJ to consider the evidence and arguments based on the holding in *Opti-Plan v. Sch Bd of Broward County*, 710 So. 2d 969 (Fla. 4th DCA 1998). A specific ruling on compliance of the Sheeler Applications with Rule 67-48.004, Fla. Admin. Code, is required.

CONCLUSION

Based on the exceptions set forth herein, the referenced Findings of Fact in the Recommended Order should be rejected by the Florida Housing, and the referenced Conclusions of Law in the Recommended Order should be rejected and/or modified accordingly. Based on the evidence of the *de novo* hearing, the Sheeler Applications should be deemed ineligible

RESPECTFULLY SUBMITTED this 9th day of November, 2015.



J. Stephen Menton
Florida Bar No. 331181
Rutledge Ecenia, P.A.
Post Office Box 551 (32302-0551)
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301
(850) 681-6788 (telephone)
(850) 681-6515 (facsimile)
smenton@rutledge-ecenia.com (primary)
ruthie@rutledge-ecenia.com (secondary)

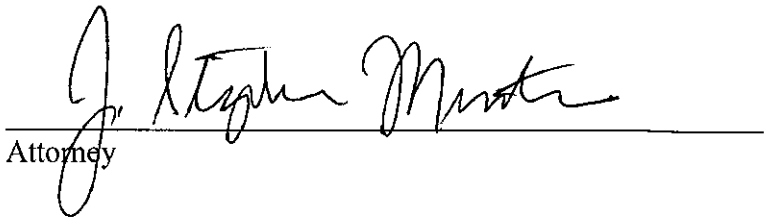
James W. Middleton
Smith, Gambrell & Russell, LLP
50 N. Laura Street, Suite 2600
Jacksonville, Florida 32202
(904) 598-6108 (telephone)
(904) 598-6208 (facsimile)
jmiddleton@sgrlaw.com

Kenneth Bell, Esq.
Gunster Law Firm
215 S Monroe Street, Ste 601
850-521-1980 (telephone)
Tallahassee, FL 32301-1804
kbell@gunster.com

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 9, 2015, a copy of the foregoing was furnished by electronic mail to: Douglas Manson; Paria Shirzadi, Manson Bolves Donaldson, P.A., 1101 W. Swann Avenue, Tampa, Florida 33606, dmanson@mansonbolves.com pshirzadi@mansonbolves.com; Hugh Brown and Chris McGuire, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301 chris.mcguire@floridahousing.org; hugh.brown@floridahousing.org.



Attorney

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON HOLLOW, LLC and AMERICAN RESIDENTIAL DEVELOPMENT, LLC,

Petitioners,

vs.

DOAH Case No. 15-003301BID
FHFC CASE NO.: 2015-023BP

FLORIDA HOUSING FINANCE CORPORATION and BRIXTON LANDING, LTD.,

Respondents,
_____/

BRIXTON LANDING, LTD.'S RESPONSE TO PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Respondent, BRIXTON LANDING, LTD., pursuant to Section 120.57, Florida Statutes, and Rule 28-106.217, Florida Administrative Code ("F.A.C."), hereby submits the following Response to the Exceptions filed by Petitioners to the Recommended Order issued in this proceeding, and says:

STANDARD OF REVIEW

Section 120.57(1)(l), Florida Statutes, sets forth the standard for exceptions to conclusions of law and provides that:

> 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.

Section 120.57(1)(l), Florida Statutes, also sets forth the standard for exceptions to findings of fact and prescribes that an agency reviewing a recommended order may not reject or modify the findings of fact of an ALJ, "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 on competent substantial evidence" or that the proceedings on which the findings were based did not comply with essential requirements of law. § 120.57(1)(l), Fla. Stat (2012); *Charlotte Cty. v. IMC Phosphates Co.*, 18 So.3d 1089 (Fla. 2d DCA 2009); *Wills v. Fla. Elections Comm'n*, 955 So.2d 61 (Fla. 1st DCA 2007). The term "competent substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" is explained as: "[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).

This statute expressly precludes the Board from rejecting findings of fact that are based upon competent substantial evidence. *Stokes v. State, Bd. of Professional Engineers*, 952 So.2d 1224 (2007). Furthermore, a reviewing agency may not reweigh the evidence presented at a DOAH final hearing, attempt to resolve conflicts therein, or judge the credibility of witnesses. *See, e.g., Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot.*, 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd.*, 652 So.2d 894 (Fla. 2d DCA 1995). "Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence. The judge is entitled to rely on the testimony of a single witness even if that testimony contradicts the

testimony of a number of other witnesses." *Stinson v. Winn*, 938 So.2d 554, 555 (Fla. 1st DCA 2006).

As explained in *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):

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

Additionally, 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). Thus, if there is competent substantial evidence to support an administrative law judge's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer*, 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So.2d 622 (Fla. 1st DCA 1986). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So.2d 485, 487 (Fla. 2d DCA 1994).

Therefore, if the DOAH record discloses any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing

the Final Order. *See, e.g., Walker v. Bd. of Prof'l Eng'rs*, 946 So.2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So.2d 1122, 1123 (Fla. 1st DCA 1987).

RESPONSES TO EXCEPTIONS

Respondents file the following responses to each of Petitioners' written exceptions to the Recommended Order for consideration by Florida Housing prior to issuance of the Final Order in this matter:

Exception to Findings of Fact 36, 41, 42, 43, 46, 47, 48, 49, 50 & 51

Findings of Fact 41, 42, 46, 47 and 49 merely summarize the arguments presented by Petitioners at the hearing. Finding of Fact 36 is supported by competent substantial record evidence and is a reasonable inference from the evidence, (T. at p. 224-226; P. Ex. 18 at p. 5, 10, 13, 14-15, 21-22, 29, 36, 38 & 41; J. Ex. 7 at p.40-43; J. Ex. 8 at p.40-43)[1] as are Finding of Fact 43 (P. Ex. 18 at p.13, 21-22, 29, 36), Finding of Fact 48 (T. at p. 109, 110, 565, 575-576, & 577-578), and Finding of Fact 51 (T. at p. 110, 568, 577-578). Petitioners do not assert that the findings of fact referenced in their Exceptions are not supported by competent substantial evidence, but rather attempt to substitute judgment for that of the Administrative Law Judge ("ALJ") as to the weight, credibility or inferences to be drawn from evidence within the record. That function exclusively belongs to the ALJ and may not be supplanted by the judgment of either Petitioners or the Board. *Strickland v. Florida A&M University*, 799 So.2d 276, 278-279 (Fla. 1st DCA 2001).

All of Petitioners' Exceptions to these Findings of Fact essentially challenge Florida Housing's practice and policy of accepting the site plan approval status and zoning and land use certifications which are properly completed and executed by local officials so long as they are

[1] For this Response, citations shall be as follows: "T." for hearing transcript cites; "J. Ex.__" for Joint Exhibits; "BL Ex.__" for Brixton Landing Exhibits; and "P. Ex.__" for Petitioners' Exhibits.

signed by someone with the authority to do so and are not tainted by fraud or illegality. Petitioners argue that Florida Housing and the ALJ "should have considered all the evidence adduced at the de novo hearing." However, the ALJ did allow and considered an abundance of testimony and exhibits from Petitioners at the hearing contesting the site plan approval status and zoning and land use certifications, but simply weighed the evidence and concluded that the weight of the evidence supported a finding that Florida Housing's acceptance of and reliance on the site plan approval status and zoning and land use certifications as satisfying the ability to proceed requirements of RFA 2014-115 was not contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications, nor was it clearly erroneous, contrary to competition, arbitrary, or capricious. These factual findings made by the ALJ reflect judgments regarding the weight of the evidence and the credibility of expert witnesses, and "[w]here the hearing officer's findings of fact and reasonable inferences drawn therefrom are based upon competent and substantial evidence, it is a gross abuse of discretion for the agency to disregard those findings." *See e.g., Peace River/Manasota Regional Water Supply Authority v. IMC Phosphates Co.*, 18 So.3d 1079, 1088 (Fla. 2d DCA 2009); *Southpointe Pharmacy v. Dep't of Health and Rehab. Services*, 596 So.2d 106, 109 (Fla. 1st DCA 1992); *see also Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985).

Petitioners do not allege in their Exceptions that the proceedings on which the findings were based did not comply with essential requirements of law nor do Petitioners allege in their Exceptions that there was no competent substantial evidence in the record to support these Findings of Fact. Rather, Petitioners point to conflicting evidence to argue that "the evidence does not support a finding that.." or to argue that the finding "conflicts with the competent substantial evidence in the record." However, a reviewing agency, here Florida Housing, may

not reweigh the evidence presented at the final hearing or attempt to resolve conflicts therein. *See, e.g., Rogers v. Dep't of Health*, 920 So.2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Envtl. Prot*., 695 So.2d 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cty. Sch. Bd*., 652 So.2d 894 (Fla. 2d DCA 1995). The ALJ "is entitled to rely on the testimony of a single witness even if that testimony contradicts the testimony of a number of other witnesses," 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. *Stinson v. Winn*, 938 So.2d 554, 555 (Fla. 1st DCA 2006); *Greseth v. Department of Health and Rehabilitative Services*, 573 So.2d 1004, 1006–1007 (Fla. 4th DCA 1991).

Therefore, despite the conflicting evidence presented by Petitioners, it is within the ALJ's province to reject Petitioners' expert's opinion and to accept the Respondents' experts' opinions. *Padron v. State, Dept. of Environmental Protection*, 143 So.3d 1037 (2014); *See Stinson v. Winn*, 938 So.2d 554, 555 (Fla. 1st DCA 2006). Additionally, as explained above, if there is competent substantial evidence to support an ALJ's findings of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *See, e.g., Arand Construction Co. v. Dyer*, 592 So.2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So.2d 622 (Fla. 1st DCA 1986). Therefore, Petitioners' arguments that these findings of fact, supported by competent substantial evidence in the record, conflict with other evidence in the record are irrelevant.

Petitioners also argue in these Exceptions that the ALJ "misconstrues Petitioners' arguments." However, findings of fact are made not on argument of counsel, but on the evidence and testimony in the record. The portions of these Exceptions explaining how the ALJ

"misconstrues Petitioners' arguments" are entirely comprised of legal argument rather than the relevant issue of whether or not there is competent substantial evidence in the record to support the findings of fact.

Therefore, based on the foregoing reasons and the case law noted in the Standard of Review section above, Petitioners' Exceptions to Findings of Fact No. 36, 41, 42, 43, 46, 47, 48, 49, 50 and 51 must be denied because they attack an ALJ's factual findings that are supported by competent substantial evidence in the record.

Exceptions to Finding of Fact 64 & 66

The Petitioners' challenge to Findings of Fact 64 and 66 is unfounded. The Petitioners do not even allege that there was no competent substantial evidence to support these Findings of Fact. Nor do Petitioners point to any evidence in the record supporting their Exceptions to Findings of Fact 64 and 66. Rather, the only reason or support provided for these Exceptions is Petitioners' unsupported legal argument that "it is unreasonable, arbitrary and capricious to interpret the requirement in a way which allows applicants to not fully identify the principals."

However, the plain language of the RFA itself only requires the following for disclosure of principals of the applicant and its developer (since they are both LLCs for Banyan Station and Lauderdale Place): (1) to identify each manager and member of the applicant and developer; and (2) for each manager and member of the applicant and developer that is also an LLC, to identify each of their respective managers and members. (T. at p. 112, 568-570 & 574; J. Ex. 1 at p.101-104; J. Ex. 9 at p.39; J. Ex. 10 at p.30). There is no ambiguity in this principal disclosure requirements set forth in RFA 2014-115, which also provides a chart, as Item 3 in Exhibit C of the RFA, to further clarify and demonstrate what is required for principal disclosure. (J. Ex. 1 at p.101-104; T. at p. 574). Additionally, the examples provided in the RFA itself to demonstrate

the principal disclosure requirements include an example where the disclosure ends at corporate entities, "XYZ, Inc." and "XYZ, LLC," without going any further to reach a natural person. (J. Ex. 1 at p. 104).

Petitioners' allegations regarding the principal disclosure requirements are in essence a challenge to the RFA specifications themselves, arguing that the RFA should require disclosure beyond the two levels of disclosure, until a natural person is reached. However, this is not what the RFA specifications require. (T. at p. 112, 568-570 & 574; J. Ex. 1 at p. 101-104). If Petitioners felt that the specifications were poorly drafted or ambiguous regarding the level of principal disclosure required, they could have challenged the RFA specifications within 72 hours of the posting of the specifications, pursuant to Section 120.57(3)(b), Florida Statutes. However, Petitioners' failure to file a timely protest to the RFA specifications constituted a waiver of the right to challenge the RFA specifications. Care Access PSN, DOAH Case No.13-4113BID at p.37-38.

Petitioners' Exceptions to Findings of Fact 64 and 66 must be denied because they challenge the ALJ's factual findings, which are supported by competent substantial evidence in the record.

Exceptions to Conclusion of Law 79, 80 & 81

"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). However, Petitioners' Exceptions to Conclusions of Law 79, 80 and 81 would require the Board to interpret the Orange County Code of Ordinances and make findings regarding consistency with local zoning and land use regulations and the proposed projects' site plan(s),

which are not areas over which Florida Housing Finance Corporation has substantive jurisdiction. The decision whether to grant or deny these particular forms of (preliminary) local governmental approval must be made by the local government having jurisdiction over the proposed development, i.e, Orange County, not Florida Housing Finance Corporation. This same issue was recently ruled upon in the DOAH Recommended Order issued in *Houston Street Manor Limited Partnership v. Florida Housing Finance Corporation,* FHFC Case No. 2015-024BP, which was adopted by Florida Housing in its Final Order on September 18, 2015, which held that:

> 51. A good place to start in evaluating Pine Grove's position is with a look at the site-plan status form's purpose. It is clear from the language of the form that what FHFC wants, in a nutshell, is an authoritative statement from the local government advising that the local government either has approved, or is currently unaware of grounds for disapproving, the proposed development's site plan. The relevance of this statement lies not so much in its being correct, per se, but in the fact that it was made by a person in authority whose word carries the weight of a governmental pronouncement. Put another way, the statement *is* correct *if* made by an official with the authority to utter the statement on behalf of the local government; it is a verbal act, a kind of approval in itself.
> 52. FHFC might, of course, deem a fully executed site-plan status form nonresponsive for a number of reasons. If it were determined that the person who signed the form lacked the requisite authority to speak for the government; if the statement were tainted by fraud, illegality, or corruption; or if the signatory withdrew his certification, for example, FHFC likely would reject the certification. No such grounds were established in this case, or anything similar.
> 53. Instead, Pine Grove contends that Mr. Huxford simply erred, that he should not have signed the Local Government Verification of Status of Site Plan Approval. Pine Grove makes a reasonable, or at least plausible, case to this effect. The fatal flaw in Pine Grove's argument, however, is that the decision whether to grant or deny this particular form of (preliminary) local governmental approval to Houston Street's site plan must be made by the local government having jurisdiction over the proposed development, i.e, the City of Jacksonville——not by Pine Grove, Houston Street, FHFC, or the undersigned. Mr. Huxford was empowered to make the statement for the city. He made it. No compelling reason has been shown here to disturb FHFC's acceptance of Mr. Huxford's certification as a valid expression of the City of Jacksonville's favorable opinion, as of the application submission deadline, regarding Houston Street's site plan.

Furthermore, it is the ALJ's role to determine the issues in a bid protest one way or the other based upon the evidence and applicable law. Neither Petitioners nor Florida Housing may substitute their judgment for that of the ALJ in the performance of this function. *Strickland v. Florida A&M University*, 799 So.2d 276, 278-279 (Fla. 1st DCA 2001). Petitioners do not contend in their Exceptions that any finding of fact lacks the support of competent substantial evidence. Rather, Petitioners contend that the trier of fact should have come to different conclusions of law from those facts within the record. Florida Housing lacks the authority to reweigh the evidence or substitute its judgment for that of the ALJ upon such matters. *Id.*

Therefore, Petitioners' Exceptions to Conclusions of Law 79, 80 and 81 must be denied.

Exceptions to Conclusion of Law 83 & 84

The only reason or support set forth by Petitioners' for their Exceptions to Conclusions of Law 83 and 84 is the mere conclusory statement that "the Department's interpretation is arbitrary and capricious because it renders the disclosure requirement meaningless." Petitioners' provide no support from the record or elsewhere for this bare assertion. Rather, the plain language of the RFA itself only requires the following for disclosure of principals of the applicant and its developer (since they are both LLCs for Banyan Station and Lauderdale Place): (1) to identify each manager and member of the applicant and developer; and (2) for each manager and member of the applicant and developer that is also an LLC, to identify each of their respective managers and members. (T. at p.112, 568-570 & 574; J. Ex. 1 at p. 101-104; J. Ex. 9 at p.39; J. Ex. 10 at p.30). There is no ambiguity in this principal disclosure requirements set forth in RFA 2014-115, which also provides a chart, as Item 3 in Exhibit C of the RFA, and examples to further clarify and demonstrate what is required for principal disclosure. (J. Ex. 1 at p. 101-104). Even if there were any ambiguity in the principal disclosure requirements of the RFA which required

interpretation, Florida Housing's interpretation of its own rules and RFA specifications regarding principal disclosures as not requiring any disclosure beyond the two level of disclosure set forth in the RFA is a permissible interpretation (i.e. one that is not clearly erroneous) and is accorded great deference. (T. at p.112, 568-570 & 574); *Miles v. Florida A & M Univ.*, 813 So. 2d 242, 245 (Fla. Dist. Ct. App. 2002); *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 610 (Fla. Dist. Ct. App. 1998).

Petitioners' allegations regarding the principal disclosure requirements are in essence a challenge to the RFA specifications themselves, arguing that the RFA should require disclosure beyond the two levels of disclosure, until a natural person is reached. However, this is not what the RFA specifications require. (J. Ex. 1 at p.101-104; T. at p.112, 568-570 & 574). If Petitioners felt that the specifications were poorly drafted or ambiguous regarding the level of principal disclosure required, they could have challenged the RFA specifications within 72 hours of the posting of the specifications, pursuant to Section 120.57(3)(b), Florida Statutes. However, Petitioners' failure to file a timely protest to the RFA specifications constituted a waiver of the right to challenge the RFA specifications. *Care Access PSN, LLC v. Agency for Health Care Administration*, DOAH Case No.13-4113BID at p.37-38.

For the reasons stated above, Petitioners' Exceptions to Conclusions of Law 83 and 84 must be denied.

Exception to Conclusion of Law in EndNote 1

Petitioners' Exception to Conclusion of Law in EndNote 1 argues that the ALJ should have made specific findings addressing the two issues that were not raised in Petitioners' Petition. Section 120.57(3)(b), Florida Statutes, requires an unsuccessful bidder challenging the award of a contract to file a written notice of its intent to protest within 72 hours after receipt of

the notice of the agency's decision, and a formal written protest within 10 days of the filing of the notice of protest. The formal written protest must state ***with particularity the facts and law upon which the protest is based***. See § 120.57(3)(b), Florida Statutes (emphasis added). A petition or request for hearing may be amended prior to the designation of the presiding officer by filing and serving an amended petition or amended request for hearing in the manner prescribed for filing and serving an original petition or request for hearing. Rule 28-106.202, DOAH Uniform Rules of Procedure. Thereafter, the petitioner may amend the petition or request for hearing ***only*** upon order of the presiding officer. *Id.* (emphasis added).

In the case at hand, Petitioner neither raised these two issues in its formal written protest nor did Petitioner ever file a motion or move to amend its Petition to include these two issues. Had Petitioner filed a motion to amend its Petition prior to the hearing, or even at the hearing, then the ALJ could have determined whether or not to grant the motion to amend based on whether it would result in prejudice to the Respondents. *Wackenhut Protective Sys., Inc. v. Key Biscayne Commodore Club Condo. I, Inc*., 350 So. 2d 1150, 1151 (Fla. Dist. Ct. App. 1977) (Florida case law applies a test of prejudice to the defendant as the primary consideration in determining whether the plaintiff's motion to amend should be granted or denied).

However, Petitioner never moved to amend its Petition to include these two new issues which were not previously raised and which were objected to by Respondents at the hearing. (T. at p. 603). Therefore, the ALJ declined to include any specific findings in the Recommended Order regarding the two issues. *Fearing v. De Lugar Neuvo*, 106 So.2d 873, 875 (Fla. 2d DCA 1958) (Claim for the commission was not put in issue and tried by the expressed or implied consent of the parties; the trial court was correct in denying the motion to include this claim in the final decree and in denying the motion for an order amending the pleadings). This was a

procedural ruling by the ALJ regarding the scope of the proceeding and amendment of pleadings. These are legal issues outside the particular expertise of the agency and may not be changed in deciding whether to accept the proposed order. Section 120.57(1)(l), Florida Statutes provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law **over which it has substantive jurisdiction** and interpretation of administrative rules over which it has substantive jurisdiction.

(emphasis added).

Agencies do not have jurisdiction, however, to modify or reject rulings on the admissibility of evidence. Evidentiary rulings of the ALJ that deal with "factual issues susceptible to ordinary methods of proof that are not infused with [agency] policy considerations," are not matters over which the agency has "substantive jurisdiction." *See Martuccio v. Dep't of Prof/ Regulation*, 622 So.2d 607, 609 (Fla. 1st DCA 1993); *Heifetz v. Dep't of Bus. Regulation*, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); *Fla. Power & Light Co. v. Fla. Siting Bd.*, 693 So.2d 1025, 1 028 (Fla. 1st DCA 1997). Evidentiary rulings are matters within the ALJ's sound "prerogative ... as the finder of fact and may not be reversed on agency review. *See Martuccio*, 622 So.2d at 609.

The procedural and evidentiary matters contained in EndNote 1 of the Recommended Order are not matters over which Florida Housing has substantive jurisdiction nor do they call for the interpretation of administrative rules over which Florida Housing has substantive jurisdiction. Therefore, Florida Housing lacks the ability to reject or modify the ALJ's conclusion of law in EndNote 1. *Id*.; *Department of Environmental Protection v. Franklin County*, DOAH Case No. 12-3276EF (Final Order April 18, 2013); *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

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"). Furthermore, it is not proper for the agency to make supplemental findings of fact on an issue about which the ALJ made no findings. *Florida Power & Light Co. v. State of Florida*, 693 So.2d 1025, 1026-1027 (Fla. 1st DCA 1997).

However, even if the issue had been timely raised in the Petition or had a motion to amend been filed, Petitioners' allegation on the issue is without merit and would have had no bearing on the outcome of the proceeding. The Sheeler Club and Sheeler Club II applications submitted to Florida Housing each contained a separate and different legal description of the parcel each proposed project would be located on, and these legal descriptions do not overlap. (J. Ex. 7 at p.61; J. Ex. 8 at p.61). Although, both Sheeler Club and Sheeler Club II's applications submitted to Orange County included a contract with a full legal description for the overall parcel, both applications also indicated to Orange County that they were going to be separating that overall parcel into two parcels, using one for Sheeler Club, and one for Sheeler Club II, but they did not have the exact metes and bounds legal descriptions for each portion at the time the Orange County applications were submitted. (BL Ex. 16 at p.3, 16 & 42-50; BL Ex. 17 at p.17 & 39-46; T. at p.393-394).

Additionally, only one Orange County application could be awarded funding in this RFA. If one of the two Sheeler Club applications got funded, and Atlantic decided to build some development on the unfunded property, what happened on the unfunded property would be of no concern to Florida Housing, and Florida Housing would not consider that to be a violation of the rule limiting applications to one submission per property. (T. at p.578-579). Furthermore, Rule

67-48.004(1), F.A.C., Florida Housing's rule regarding multiple submissions for the same Development site, refers to two or more applications submitted in the same competitive process that have the same demographic commitment, and states in relevant part:

> "SAIL, HOME and Housing Credit Applications shall be limited to one submission per subject property. Two or more Applications, submitted in the same competitive solicitation process, that have the same demographic commitment and one or more of the same Financial Beneficiaries, will be considered submissions for the same Development site if any of the following is true…"

Rule 67-48.004(1), F.A.C. Florida Housing interprets this rule to only apply to applications submitted in the same RFA cycle that have the same demographic commitment. In this case, Sheeler Club and Sheeler Club II do not have the same demographic commitment; one is family and the other is elderly. Therefore, since Sheeler Club and Sheeler Club II have different demographics, rule 67-48.004(1), F.A.C., does not apply. (T. at p.593). Mr. Reecy testified similarly that the Sheeler Club and Sheeler Club II applications do not violate the provisions of this rule regarding multiple submissions for the same development site. (T. p. 578-579). This is Florida Housing's interpretation of its own rules and RFA specifications and is therefore accorded great deference. (T. at p. 578- 579 & 593). *Miles v. Florida A & M Univ.,* 813 So. 2d 242, 245 (Fla. Dist. Ct. App. 2002); *State Contracting & Eng'g Corp. v. Dep't of Transp.,* 709 So. 2d 607, 610 (Fla. Dist. Ct. App. 1998).

For the reasons stated above, Petitioners' Exception to the Conclusions of Law in EndNote 1 must be denied.

CONCLUSION

WHEREFORE, Brixton Landing, Ltd. respectfully requests, for the reasons set forth above, that the Board of Directors reject each and all of Petitioners' Exceptions, and adopt the

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

RESPECTFULLY SUBMITTED this 16th day of November, 2015.

Manson Bolves Donaldson, P.A.
1101 W. Swann Avenue
Tampa, Florida 33606
Telephone: (813) 514-4700; Fax: (813) 514-4701
Attorneys for Brixton Landing, Ltd.

By: s/Douglas Manson
Douglas Manson, Esq.
Florida Bar No. 542687
dmanson@mansonbolves.com
Paria Shirzadi, Esq.
Florida Bar No. 99158
pshirzadi@mansonbolves.com

CERTIFICATE OF SERVICE

I hereby certify this 16th day of November, 2015, that a true and correct copy of the foregoing has been served by electronic mail upon the following:

Hugh Brown, Assistant General Counsel Florida Housing and Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, Florida 32301 hugh.brown@floridahousing.org	J. Stephen Menton, Esquire Rutledge Ecenia, P.A. 119 South Monroe Street, Suite 202 Post Office Box 551 (32302) Tallahassee, Florida 32301 smenton@rurledge-ecenia.com
Christopher Dale McGuire, Esquire Florida Housing Finance Corporation 227 North Bronough Street Tallahassee, Florida 32301 chris.mcguire@floridahousing.org	Kenneth Bell 215 South Monroe Street, Suite 601 Tallahassee FL, 32301 kbell@gunster.com
James Middleton 50 N. Laura Street, Suite 2600 Jacksonville FL, 32202 jmiddleton@sgrlaw.com	

s/Douglas Manson
Attorney

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON HOLLOW, LLC and AMERICAN RESIDENTIAL DEVELOPMENT, LLC,

Petitioners,

vs.

DOAH CASE NO.: 15-003301BID
FHFC CASE NO.: 2015-023BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RESPONDENT FLORIDA HOUSING FINANCE CORPORATION
RESPONSE TO PETITIONERS' EXCEPTIONS

Respondent, Florida Housing Finance Corporation, hereby submits its Response to Petitioners Madison Hollow LLC and American Residential Development, LLC's Exceptions to Recommended Order. The Exceptions are not numbered. They will be referred to in this response as the First Exception, Second Exception, etc. based upon the order presented.

Section 120.57(1)(k), Fla. Stat., requires Florida Housing to include an explicit ruling on each exception. It also requires each exception to clearly identify the disputed portion of the recommended order by page number or paragraph, to identify the legal basis for the exception, and to include appropriate and specific citations to the record.

Response to First Exception

Petitioners take Exception to Finding of Fact #36, in which the Administrative Law Judge (ALJ) made several findings concerning local zoning and land use issues. Petitioners actually do not object to any specific part of this Finding, but instead suggest that the ALJ should have made additional findings regarding the PSP. Petitioners do not identify the legal basis for the

exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Second and Third Exceptions

Petitioners takes Exception to Findings of Fact #41 and 42. Those Findings essentially reiterate the ALJ's understanding of Petitioners' arguments concerning whether or not Orange County properly reviewed a site plan for Sheeler Club Apartments or Sheeler Club Apartments Phase II. While Petitioners may wish that the ALJ had included a more thorough or accurate summation of their position, they have not demonstrated that there is no competent substantial evidence to support these findings. Even if these findings are in some ways inaccurate, this would have no bearing on the ultimate outcome of the case. These exceptions should therefore be rejected.

Response to Fourth Exception

Petitioners take exception to Finding of Fact #43, in which the ALJ reiterates certain testimony of Orange County's representative, Mr. Olan Hill. Petitioners actually enunciate no specific objections to this finding, but instead argue that Mr. Hill's ultimate conclusions were faulty. Petitioners do not identify the legal basis for the exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Fifth Exception

Petitioners take exception to Finding of Fact #46, in which the ALJ again summarizes one aspect of Petitioners' arguments concerning the PSP. Petitioners again raise no specific

objection to this finding, but instead argue that the ALJ should have made other additional findings. Petitioners do not identify the legal basis for the exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Sixth Exception

Petitioners takes exception to Finding of Fact #47, in which the ALJ again summarizes one aspect of Petitioners' arguments concerning the PSP. Petitioners again raise no specific objection to this finding, but instead argue that the ALJ should have made other additional findings. While there are some suggestions that the finding of fact contains inaccurate statements, Petitioners do not identify the legal basis for the exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Seventh Exception

Petitioners take exception to Finding of Fact #48, in which the ALJ made findings concerning Florida Housing's practices and abilities. Petitioners again raise no specific objection to these findings, but instead argue that these findings are not relevant to the ultimate conclusions. Petitioners do not identify the legal basis for the exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Eighth Exception

Petitioners take exception to Finding of Fact #49, in which the ALJ again summarizes several of Petitioners' arguments concerning local zoning and land use approvals. Petitioners again raise no specific objection to this finding, but instead argue that the ALJ mischaracterized their arguments. Petitioners do not identify the legal basis for the exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. Even if the ALJ's characterization were flawed, there is no explanation of how a different characterization would affect the ultimate outcome of this case. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Ninth Exception

Petitioners take exception to Finding of Fact #50, in which the ALJ simply notes that she declines to perform an analysis as suggested by Petitioners. Petitioners disagree with this position, but do not identify the legal basis for the exception and do not include appropriate and specific citations to the record to demonstrate that the finding is somehow flawed. There is competent substantial evidence in the record to support this finding and the exception should therefore be rejected.

Response to Tenth Exception

Petitioners take exception to Finding of Fact #51, in which the ALJ found that the evidence does not support a finding that Florida Housing's proposed action was improper and should be overturned. Petitioners argue that the ALJ's implied findings regarding the Site Plan and Zoning Verification Forms were not supported by competent substantial evidence in the record. This is not the case. As the ALJ found in Finding of Fact #34 (a finding to which no

exception has been filed), the local government did review a site plan for the project and otherwise met the requirements for the Site Plan Verification Form. The ALJ found in Finding of Fact #35 (to which no exception was filed) that the local government testified that the proposed project was consistent with current land use regulations and zoning designation. There was competent substantial evidence in the record to support these findings, primarily from the testimony of Olan Hill and Ken Reesy. Petitioners are simply asking Florida Housing to reweigh the evidence, to essentially find that the testimony of its witnesses was more compelling than the testimony of witnesses for Florida Housing and Brixton Landing. This, of course, is impermissible.1 For this reason, this exception should be rejected.

Response to Eleventh and Twelfth Exceptions

Petitioners take exception to Findings of Fact #64 and 66, in which the ALJ found that Petitioners' challenges to the applications of Banyan Station and Lauderdale Place were contrary to a correct interpretation of Florida Housing's rules. Petitioners do not identify the legal basis for the exceptions and do not include appropriate and specific citations to the record to demonstrate that the findings are somehow flawed. There is competent substantial evidence in the record to support these findings and the exceptions should therefore be rejected.

Response to Thirteenth, Fourteenth and Fifteenth Exceptions

Petitioners takes exception to Conclusions of Law #79, #80, and #81, in which the ALJ concluded that Petitioners had offered no compelling reason to disturb Florida Housing's acceptance of Orange County's determinations concerning the Site Plan and Zoning verification forms. The ALJ also cited to the case of Houston Street Manor LP v. Florida Housing Finance

1 See an extensive discussion of this point in Brixton Landings' Response to Exceptions

Corporation, Case No. 15-3302BID (DOAH Aug. 18, 2015; FHFC Sept. 21, 2015) and found the conclusions therein "persuasive."

Petitioners seemingly make the argument that prior DOAH decisions should have no precedential value, and that because cases are to be decided *de novo* that means that they should be decided independently of any prior agency policies or positions. However, as Judge Canter explained in The Lodging Association of the Florida Keys and Key West, Inc. v. Islamorada et. al, Case No. 07-4364GM (DOAH October 22, 2008):

> The principle of stare decisis operates in administrative law. Gessler v. Dept. of Business and Professional Regulation, 627 So. 2d 501, 504 (Fla. 4th DCA 1993). [("While it is apparent that agencies, with their significant policy-making roles, may not be bound to follow prior decisions to the extent that the courts are bound by precedent, it is nevertheless apparent the legislature intends there be a principle of administrative stare decisis in Florida.")] An agency must follow its own precedents unless it adequately explains on the record its reasons for not doing so. See Bethesda Healthcare System, Inc. v. Agency for Health Care Admin., 945 So. 2d 574 (Fla. 4th DCA 2006); Nordheim v. Dept. of Environmental Protection, 719 So. 2d 1212, 1214 (Fla. 3d DCA 1998). *Quotation from Gessler added.*

The principle that agencies should follow precedent is not only well established in case law, it is also reflected in statute. Section 120.68(7)(e)3., Fla. Stat., includes, as a ground for overturning an agency's decision, that the agency has been "inconsistent with . . . a prior agency practice, if deviation therefrom is not explained by the agency." Section 120.53(2)(b), Fla. Stat., requires agencies to electronically transmit a copy of each final order "which contains a statement of agency policy that may be the basis of future agency decisions or that may otherwise contain a statement of precedential value."

As the ALJ concluded, the situation presented in Houston Street was similar to that presented in this case. The Petitioners in Houston Street, like the Petitioners in the present case, alleged that the Intervenor had not demonstrated the "ability to proceed" because the Site Plan

and Zoning forms certified by local government officials should have been found invalid. In each case the Petitioners made plausible arguments as to why the Site Plan and Zoning forms may have contained errors, and in each case Florida Housing accepted the local government official's determination as to whether the Intervenor had met the requirements for preliminary local government approval. The ALJ in the present case thus concluded that there was no compelling reason to deviate from prior agency practice, and that the properly executed forms certified by Orange County were sufficient to demonstrate the "ability to proceed." This conclusion was based on factual findings that are supported by competent substantial evidence. This exception should therefore be rejected.

Response to Sixteenth and Seventeenth Exceptions

Petitioners take exception to Conclusions of Law #83 and #84, in which the ALJ concludes that Banyan Station and Lauderdale Place had met the requirements in relevant rules and RFA requirements for disclosure of the principals of the applicant and the developer. Petitioners disagree with these conclusions, but do not identify the legal basis for the exceptions and do not include appropriate and specific citations to the record to demonstrate that the conclusions are somehow flawed. These exceptions should therefore be rejected.

Response to Eighteenth Exception

Petitioners take exception to Endnote #1, in which the ALJ explains her procedural ruling that certain arguments made by Petitioners at the hearing, but not in the Petition, would not be considered in this Recommended Order. This ruling was based upon the ALJ's interpretation of Section 120.57(3)(b), Fla. Stat., and Rule 28-106.202, Fla. Admin. Code. Section 120.57(1)(l), Fla. Stat., allows an agency to reject or modify only those conclusions of law and interpretations of administrative rules "over which it has substantive jurisdiction." As Florida Housing has no

substantive jurisdiction over Chapter 120, Fla. Stat., or Chapter 28-106, Fla. Admin. Code, it is without authority to reject the ruling made by the ALJ. This exception should therefore be rejected.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors reject the arguments presented in Petitioners' 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 17th day of November, 2015.

/s Chris McGuire_____
Chris McGuire
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Fax: (850) 414-6548
Chris.mcguire@floridahousing.org

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Proposed Recommended Order has been furnished by e-mail to J. Stephen Menton, Rutledge Ecenia, P.A., 119 South Monroe Street, Suite 202, Tallahassee, Florida 32301, and to Douglas Manson, Manson Bolves Donaldson, P.A., 1101 West Swan Avenue, Tampa, Florida 33606 this 17th day of November, 2015.

s/ Chris McGuire_____
Chris McGuire
Assistant General Counsel