STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FLAGSHIP MANOR, LLC,

Petitioner,

v.

FHFC CASE NO.: 2015-009BP
Application No.: 2015-223S

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SPINAL CORD LIVING ASSISTANCE DEVELOPMENT, INC.,

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 June 19, 2015. Petitioner Flagship Manor, LLC, ("Flagship Manor") timely submitted an Application for funding ("Application") in response to Request for Applications 2015-101: SAIL Financing for Smaller Permanent Supportive Housing Developments for Persons with Special Needs (the "RFA"). The matter for consideration before this Board is a recommended order pursuant to §120.57(2) and (3), Fla. Stat. (2014), and Fla. Admin. Code R. 67-60.009 (Rev. 10-18-14).

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION

Kate [signature] DATE: 6-19-15

Petitioner timely filed its Petition for Formal Administrative Hearing pursuant to §§120.569 and 120.57(2) and (3), Fla. Stat. (2014), (the "Petition") challenging the preliminary agency action of Florida Housing Finance Corporation ("Florida Housing") regarding the scoring of its Application. Intervenor Spinal Cord Living Assistance Development, Inc. ("SCLAD") subsequently intervened in the proceeding. Florida Housing reviewed the Petition pursuant to §120.569(2)(c), Fla. Stat. (2014), and determined that the Petition did not raise disputed issues of material fact. Pursuant to §120.57(2), Fla. Stat. (2014), an informal hearing was held in this case on May 22, 2015, in Tallahassee, Florida, before Florida Housing's designated Hearing Officer, Junious D. Brown III. Petitioner, Florida Housing and SCLAD all timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended that Florida Housing issue a Final Order affirming the scoring of Petitioner's Application and recommending denial of the relief requested in the Petition.

Fla. Admin. Code R. 67-60.009(3)(b) provides a procedure for an Applicant to challenge the findings of a recommended order entered pursuant to an informal hearing. By stipulation of the Parties at hearing, Flagship was provided two days to

file its objections (aka "Exceptions"), with one day provided for Responses. Petitioner timely filed its Exceptions to the Recommended Order on June 17, 2015, a copy of which is attached hereto as "Exhibit B" and made a part hereof by reference. Florida Housing subsequently filed its Response to Petitioners Exceptions ("Response") the following day, June 18, 2015, a copy of which is attached hereto as "Exhibit C." SCLAD did not file a separate Response, but joined in the Response filed by Florida Housing.

RULING ON EXCEPTIONS

1. Based on a review of the record and the arguments presented by the Parties, the Board specifically rejects Flagship Manor's enumerated Exceptions 1-3 for the reasons set forth in the Recommended Order and the Response filed by Florida Housing.

2. Based on a review of the record and the arguments presented by the Parties, the Board specifically rejects Flagship Manor's Miscellaneous Exceptions numbered 1-7 on pp. 14-16 of its Exceptions for the reasons set forth in the Recommended Order and the Response filed by Florida Housing.

3. Based on a review of the record and the arguments presented by the Parties, the Board grants Flagship Manor's Miscellaneous Exception 8 on p. 16 of the Exceptions, regarding the scrivener's error in Conclusion of Law 30 of the Recommended Order.

RULING ON THE RECOMMENDED ORDER

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

5. Conclusions of Law 1-29 and 31-42 in the Recommended Order are supported by competent substantial evidence.

6. Conclusion of Law 30 contains a scrivener's error, and is accordingly amended below.

7. Other than the scrivener's error noted above, the arguments presented in Petitioner's Exceptions are specifically rejected on the grounds set forth in the Recommended Order and Florida Housing's Response 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. Conclusions of Law 1-29 and 31-42 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.

10. In Conclusion of Law 30, the language "further defines" is deleted and replaced with "more particularly described."

11. As amended above, Conclusion of Law 30 is adopted as Florida Housing's Conclusion of Law and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Florida Housing's scoring of Petitioner's Application is **AFFIRMED** and the relief requested in the Petition is **DENIED**.

DONE and ORDERED this 19th day of June, 2015.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

Hugh R. Brown
General Counsel
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227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 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
FLORIDA HOUSING FINANCE CORPORATION

FLAGSHIP MANOR, LLC,

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Respondent,

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SPINAL CORD LIVING ASSISTANCE DEVELOPMENT, INC.

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, Sections 120.569, 120.57(2) and (3), Florida Statutes, and Rule 67-60, Florida Administrative Code, an informal administrative hearing (the "Hearing") was held in this case on May 22, 2015, in Tallahassee, Florida, before Florida Housing Finance Corporation's designated Hearing Officer, Junious D. Brown III.

APPEARANCES

For Petitioner Flagship Manor, LLC ("Flagship Manor"):

William R. Paul
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305 South Boulevard
Tampa, Florida 33606-2150

John L. Wharton
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Tallahassee, Florida 32301

For Respondent Florida Housing Finance Corporation ("Florida Housing"):

Hugh R. Brown
General Counsel
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

For Intervenor Spinal Cord Living Assistance Development, Inc. (“SCLAD”):

Michael P. Donaldson
Carlton Fields Jorden Burt, P.A.
Post Office Drawer 190
215 S. Monroe St., Suite 500
Tallahassee, Florida 32302

STATEMENT OF THE CASE

The issue for determination in this case is whether Florida Housing's rejection of Flagship Manor’s response (the "Application") to Request for Applications 2015-101: SAIL Financing For Smaller Permanent Supportive Housing Developments For Persons with Special Needs (the “RFA”), on the grounds that the Application was ineligible for failing to adequately demonstrate site control due to an incomplete and unresponsive Application, was clearly erroneous, contrary to competition, arbitrary or capricious, or was contrary to Florida Housing’s governing statutes, rules, policies or the RFA specifications.

PRELIMINARY STATEMENT

In the instant proceeding there are no disputed issues of material fact. Accordingly, the proceeding was conducted as an informal hearing pursuant to Section 120.57(2) and (3), Florida Statutes. At Hearing, the parties filed a Prehearing Stipulation. Joint Exhibits J-1 through J-7 were stipulated and admitted into evidence without objection. Prior to Hearing, Flagship Manor moved to amend its Petition to include additional arguments. At Hearing, Flagship Manor sought to introduce Petitioner’s Exhibits 1-5 (the “Proffered Documents”). Florida Housing and SCLAD objected to introduction or consideration of the Proffered Documents based on the evidentiary

limitations on amending or supplementing a bid set forth in Section 120.57(3)(f), Florida Statutes. I reserved ruling on these objections and requested the parties to address the issues in their respective proposed recommended orders ("PROs"). Having considered the parties' arguments and for the reasons explained in the Conclusions of Law section of this Recommended Order, the objections of Florida Housing and SCLAD are sustained and the admission of the Proffered Documents is denied.

The parties stipulated, subject to arguments on the grounds of relevance, to the official recognition of any Final Orders of Florida Housing and to any applicable Rules promulgated by Florida Housing. The Prehearing Stipulation included facts describing the RFA process and the scoring issue raised in this proceeding. The facts have been incorporated into this Recommended Order. The transcript of the Hearing was filed on May 27, 2015. All parties timely submitted their PROs on June 2, 2015. The parties' PROs have been given consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Flagship Manor is a Florida limited liability company in the business of providing affordable housing.

2. Florida Housing is a public corporation organized pursuant to Chapter 420, Part V, Florida Statutes, and for the purposes of these proceedings, an agency of the State of Florida.

3. SCLAD is a Florida not-for-profit corporation in the business of providing affordable housing units.

4. Florida Housing administers the State Apartment Incentive Loan ("SAIL") Program pursuant to Section 420.5087, Florida Statutes.

5. On January 9, 2015, Florida Housing issued the RFA pursuant to Rules 67-48 and 67-60, Florida Administrative Code.

6. On February 12, 2015, Flagship Manor timely submitted its Application #2015-223S, seeking $4,442,675.95 in SAIL funding to assist in the development of a proposed Development for Persons with Special Needs.

7. One February 12, 2015, SCLAD submitted its Application #2015-224S seeking $3,420,000 in SAIL funding to assist in the development of a proposed Development for Persons with Special Needs.

8. The issue raised in this proceeding concerns whether Flagship Manor submitted a complete application including documentation which demonstrate site control. At Section Three, the RFA provides that a complete application consists of, among other things, Exhibit A of the RFA and all other applicable documentation to be provided by the Applicant, as outlined in Section Four of the RFA.

9. Site control requires an applicant to show that it has control of the entire Development site for its proposed development. The demonstration of site control is a mandatory element of the RFA. The RFA allows applicants to demonstrate site control in several ways, including the submittal of an "eligible contract."

10. Specifically, Section Four, Paragraph G of the RFA provides, in pertinent part:

> Site Control (Mandatory):
>
> The Applicant must demonstrate that the Applicant entity as named in question C.2 of Exhibit A has control of the Development site(s). The Applicant must demonstrate site control by providing, as Attachment 8 to Exhibit A, the documentation required in Items a., b., and/or c., as indicated below.
>
> If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites.
>
> ***
>
> a. Eligible Contract – For purposes of the RFA, an eligible contract is one that has a term that does not expire before August 14, 2015, or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies

> which, if exercised, would extend the term to a date that is not earlier than August 14, 2015; specifically states that the buyer's remedy for default on the part of the seller includes or is specific performance; and the buyer MUST be the Applicant unless an assignment of the eligible contract to the Applicant, is provided. If the owner of the subject property is not a party to the eligible contract, all documents evidencing intermediate contracts, agreements, assignments, options, or conveyances of any kind between or among the owner, the Applicant, or other parties, must be provided, and, if a contract, must contain the following elements of an eligible contract: (i) have a term that does not expire before August 14, 2015 or contain extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than August 14, 2015, and (ii) specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance.

11. In response to the site control requirements of the RFA, Flagship Manor submitted a contract for purchase of the development site dated February 10, 2015 (the "Contract"). The Contract includes the following language on page 1, lines 3-6:

> 3. Street Address: 11721 – 11725 North 12th Street, Tampa, Florida
> 4.
> 5. Legal Description: Hillsborough County Property Appraiser Parcel Folio #s: 036037.000 and 036038.0000, more
> 6. particularly described at Exhibit A attached.

12. On March 9, 2015, a Review Committee comprised of Florida Housing staff met and considered the applications submitted in response to the RFA.

13. The Review Committee found Flagship Manor's Application ineligible for funding for failing to demonstrate site control of the development property (the "Property"), for the reason that Flagship Manor failed to include an "Exhibit A" (*relating to the legal description of the Property*) referenced in the Contract as filed with the Application.

14. On March 20, 2015, Florida Housing's Board of Directors (the "Board") met and approved the Review Committee's recommendations regarding the RFA, including the finding that Flagship Manor was not eligible for funding. Flagship Manor was notified of this preliminary agency action (the "Preliminary Action") via a posting on Florida Housing's website.

15. On March 23, 2015, Flagship Manor timely filed its Notice of Intent to Protest the preliminary decision of the Board to deem its Application ineligible for failure to include an Exhibit A referenced in the Contract as filed with the Application.

16. On April 2, 2015, Flagship Manor timely submitted its Petition challenging the Board's Preliminary Action. The Petition was subsequently amended on April 24, 2015.

17. Intervenor SCLAD was tentatively selected for funding as a result of the Board's Preliminary Action.

18. On April 28, 2015, SCLAD submitted its Notice of Appearance/Motion to Intervene in this proceeding.

CONCLUSIONS OF LAW

1. Pursuant to Section 120.569, Florida Statutes, Sections 120.57(2) and (3), Florida Statutes, and Chapter 67-60, Florida Administrative Code, the Hearing Officer has jurisdiction over the parties and the subject matter of this proceeding.

2. Petitioner Flagship Manor and Intervenor SCLAD have standing to participate in this proceeding.

3. The instant case is a bid protest per Section 120.57(3), Florida Statutes and Rule 28-110, Florida Administrative Code, and is a *de novo* proceeding to determine whether Florida Housing's Proposed Action is contrary to Florida Housing's governing statutes, rules, policies, or the RFP specifications. Section 120.57(3)(f), Florida Statutes.

4. The RFA is a competitive solicitation governed by the provisions of Rule 67-60, Florida Administrative Code, *inter alia*.

5. Rule 67-60.009(4), Florida Administrative Code, provides, in pertinent part:

> For the purposes of Section 120.57(3), F.S., any competitive solicitation issued under this rule chapter shall be considered a "request for proposal."

6. Section 120.57(3)(f), Florida Statutes, provides, in pertinent part:

> In a protest to [a]…request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered … 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....

Standard of Review

7. Although competitive-solicitation protest proceedings are described in Section 120.57(3)(f), Florida Statutes, as *de novo*, courts acknowledge that a different kind of *de novo* is contemplated than for other substantial-interest proceedings under Section 120.57, Florida Statutes. Hearings under Section 120.57(3)(f), Florida Statutes, have been described as a "form of intra-agency review." The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So.2d 607, 609 (Fla. 1st DCA 1998).

8. Accordingly, competitive protest proceedings such as this one remain *de novo* in the sense that the hearing officer is not confined to record review of the information before Florida Housing. Instead, a new evidentiary record is developed in the administrative proceeding for the purpose of evaluating the proposed agency action. *Asphalt Pavers, Inc. v. Dep't of Trans.*, 602 So.2d 558 (Fla. 1st DCA 1992); *Intercontinental Props., Inc. v. Dep't of Health & Rehab. Servs.*, 606 So.2d 380 (Fla. 3d DCA 1992); cf. *J.D. v. Dep't of Children & Families*, 114 So.3d

1127 (Fla. 1st DCA 2013) (describing administrative hearings to review agency action on applications for exemption from disqualification as akin to bid protest proceedings under Section 120.57(3)).

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

Burden of Proof

10. Pursuant to Section 120.57(3)(f), Florida Statutes, the burden of proof rests with Flagship Manor as the party opposing the proposed agency action. See *State Contracting and Eng'g Corp. v. Dep't of Transp*., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Flagship Manor must prove by preponderance of the evidence that Florida Housing's proposed action is arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency. *Dept. of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913-914 (Fla. 1988); *Dep't of Transp. v J.W.C. Co., Inc*., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also Section 120.57(1)(j), Florida Statutes.

11. To find Florida Housing's scoring in this case to be "clearly erroneous", a hearing officer must find that Florida Housing's rejection of the Flagship Manor Application for being incomplete and nonresponsive falls outside the permissible range of interpretations. *Colbert v. Department of Health*, 890 So. 2d. 1165, 1166 (Fla. 1st DCA 2004). This would require that the hearing officer conclude that Florida Housing abused its discretion when declining to accept incomplete or erroneous documents in the context of a competitive solicitation. Such an

interpretation cannot be supported by the findings of fact and conclusions of law in this case. Florida Housing's review of the Contract and interpretation of same to mean that there was an Exhibit A, and such interpretation leading to the rejection of Flagship Manor's Application as incomplete and nonresponsive is well within the permissible range of interpretations.

12. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which have long been held to be:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense, to close all avenues to favoritism and fraud in its various forms; to secure the best values…at the lowest possible expense; and to afford an equal advantage to all desiring to do business [with the State], by providing an opportunity for an exact comparison of bids.

Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931). To the extent such provisions apply at all to a process by which Florida Housing utilizes competitive procurement tools to select applicants for funding, no evidence has been presented in this case to establish that Florida Housing's scoring was contrary to competition.

13. To find that Florida Housing's scoring of the Flagship Manor Application was arbitrary or capricious, requires a finding that the scoring in question was (i) performed without the support of facts or logic (arbitrary), or (ii) taken without thought or reason or irrationally (capricious). *Agrico Chemical Co. v. Department of Environmental Regulation*, 365 So.2d 759, 763 (Fla. 1st DCA 1978), *cert. denied* 376 So.2d 74 (Fla. 1979). The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." A*dam Smith Enter. v. Dep't of*

Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

14. In the instant case, Florida Housing's scoring was based on the facial language of the Contract, which identified an Exhibit A, a legal description, that "more particularly described" the information presented in the main body of the Contract (the folio numbers). If the folio numbers were indeed a sufficient and complete description of the Property, as Flagship Manor argues, then this language should have been deleted from the Contract. Florida Housing's sole reliance on the Contract's facial language, and the resulting conclusions that (i) there was a missing Exhibit A, and (ii) the Contract and Application were incomplete and nonresponsive, cannot be found to be clearly erroneous, contrary to competition, arbitrary or capricious, nor can Florida Housing's actions in reaching such conclusions be found to be contrary to its governing statutes, rules, policies or the RFA specifications.

Evidentiary Disputes

15. At Hearing, Flagship Manor attempted to introduce the Proffered Documents (comprised of affidavits of the Contract parties and a legal opinion containing supplemental documentation) to demonstrate the intent of the parties and the fact that there was no Exhibit A to the Contract. Florida Housing and SCLAD objected to such submission based on Section 120.57(3)(f), Florida Statutes.

16. The Proffered Documents would impermissibly supplement Flagship Manor's Application in violation of Section 120.57(3)(f), Florida Statutes.

17. The purpose of this proceeding is to determine whether Florida Housing's determination to disqualify Flagship Manor's Application was clearly erroneous, contrary to competition, arbitrary or capricious. The application of Section 120.57(3)(f), Florida Statutes, to these proceedings precludes Florida Housing from accepting or considering any supplemental documents from Flagship Manor in connection with its Application for funding in the RFA process after the application deadline. This statute also precludes me from accepting into evidence or even considering any documents from Flagship Manor that would have the effect of amending or supplementing its Application.

18. The scoring and eligibility decisions of Florida Housing must be judged in this proceeding based solely upon the information that was submitted by Flagship Manor at the time of application and subsequently considered by Florida Housing during the scoring process. Documents and other information which were not included in the Application cannot be used as grounds to support the allegation that Florida Housing's decision was clearly erroneous, contrary to competition, arbitrary or capricious. Accordingly, the Contract submitted with the Application, which contained the language "more particularly described at Exhibit A attached" (hereafter referred to as the "Particularity Reference"), is the only evidence of site control that can be considered.

19. Likewise, Flagship Manor is prohibited from presenting argument or testimony in an attempt to amend or supplement its Application. Any such evidence, testimony and argument is irrelevant to the issue of whether Florida Housing's rejection of the Application was clearly erroneous, contrary to competition, arbitrary or capricious or contrary to Florida Housing's governing statutes, rules, policies or the RFA specifications.

20. At Hearing, Flagship Manor argued that the Proffered Documents offered were intended to "clarify" or "further explain" aspects of information already contained in Flagship Manor's Application. Specifically, Flagship Manor argues that the additional submissions

explain that there was no “missing” Exhibit A to the Purchase Contract, notwithstanding the Particularity Reference and that the legal issue to be resolved can be narrowly stated as whether the Particularity Reference is enough, in and of itself, to disqualify an otherwise responsive application. Florida Housing and Intervenors argue that the introduction of such Proffered Documents instead "amend" or "supplement" Flagship Manor’s Application. Flagship Manor’s argument is not persuasive. Since the fact that there was no Exhibit A to the Contract was not available to Florida Housing for scoring purposes, such fact may not be considered in this proceeding to determine whether Florida Housing correctly scored the Application based on the content contained in the Application at the time it was scored.

21. The affidavits of persons purporting to establish that there never was an Exhibit A to the Contract (and thereby admitting that the Contract is facially incorrect), do more than simply “explain” or “clarify” something within the four corners of the submitted Application: they are an attempt to amend or delete the facial language of the Contract to remove or nullify the Particularity Reference. If in fact there never was an Exhibit A, that language should have been amended or deleted prior to the submission of the Contract with the Application.

22. Likewise, the opinion letter from William R. Paul, Esquire, contains assertions of fact and additional documentation that Flagship Manor cannot now introduce to amend or supplement its Application, including a deed, information regarding the folio numbers from the Public Records of Hillsborough County, Florida, and other information that, if included within the Application, may have obviated the need for this proceeding.

23. Flagship Manor has not successfully distinguished the alleged clarifying character of the documents it offers from documents that "amend" or "supplement" the Application.

Accordingly, neither the RFA nor Section 120.57(3)(f), Florida Statutes, allows an applicant to amend or supplement its application for the purpose of curing a threshold defect, or otherwise.

24. Florida Housing and SCLAD cite several Florida Housing cases (i) applying the prohibition set forth in Section 120.57(3)(f), Florida Statutes, and (ii) supporting the conclusion of preventing an unsuccessful bidder from presenting evidence after the application deadline to support or explain facts not expressed in its Application. See *ARC of Martin County v. Florida Housing Finance Corporation*, Final Order No. 2013-037BP (Fla. HFC March 14, 2013); *City Vista Associates, LLC v. Florida Housing Finance* Corporation, Final Order No. 2014-049BP (June 13, 2014); and *Robert King High Preservation Phase One, LLC v. Florida Housing Finance Corporation, et al.*, Final Order No. 2014-062BP (August 11, 2014).

25. Similar to the holdings in such cases, the Contract is the only evidence of site control that can be considered in this case. Unfortunately for Flagship Manor, that Contract was, as Florida Housing correctly found during the scoring process, incomplete and nonresponsive.

26. The Proffered Documents should have been included in the Flagship Manor Application, or the Particularity Reference deleted, and to allow Petitioner to supplement its Application with this documentation now, or amend it by deleting the Particularity Reference, both in violation of Section 120.57(3)(f), Florida Statutes, and detrimental to the substantial interests of other parties that submitted their documents on or before the application deadline, would be arbitrary and capricious. Moreover, in the context of a competitive solicitation, it would be prejudicial, unfair and directly contrary to competition to permit Flagship Manor to so "cure" their Application when such benefits have not and cannot be enjoyed by other applicants.

Site Control

27. The sole issue in this proceeding is limited to the legal interpretation as to whether Flagship Manor has satisfied the RFA requirements by providing acceptable site control documentation and whether Florida Housing's decision that it did not is clearly erroneous in that it is not consistent with the RFA specifications, controlling law or Florida Housing's policies. Contrary to various arguments presented, and case law cited, by Flagship Manor, the issue in this proceeding is not whether the Contract is valid or enforceable under common law in the context of a civil case. Neither Florida Housing nor SCLAD dispute the legal validity of the Contract in that context. However, such is not the context nor the standard that applies in a competitive solicitation governed by Rule 67-60, Florida Administrative Code and Section 120.57(3), Florida Statutes. Within the applicable context and standard, the Contract fails to demonstrate site control simply by being facially incomplete (as it fails to include Exhibit A which is clearly identified at lines 5-6 of the Contract), and facially incorrect. Florida Housing cannot simply ignore the Particularity Reference or the fact that Exhibit A was not included.

28. As indicated earlier in this Recommended Order, the RFA (i) at Section Three, provides that a complete application consists of, among other things, Exhibit A of the RFA and all other applicable documentation to be provided by the Applicant, as outlined in Section Four of the RFA, and (ii) at Section Four, sets forth the specific requirements for documents submitted to show site control.

29. Additionally, Rule 67-60.006, Florida Administrative Code, entitled "Responsibility of Applicants," provides in pertinent part:

> (1) The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

30. In the instant case, Florida Housing concluded that Flagship Manor failed to provide complete documentation to demonstrate site control. This is evident by a simple review of the Contract which Flagship Manor submitted. The Contract clearly indicates that an Exhibit A which further defines the Development site is attached. The Exhibit was admittedly not attached to the Contract. Flagship Manor argues that in reality there is no Exhibit A. However, Flagship Manor's argument is misguided because there was no way for Florida Housing to know that no Exhibit A existed based on the Application submitted to Florida Housing and the documents provided therein.

31. The Applicant, in this case Flagship Manor, bears the burden of providing complete and accurate information. To the extent there was no Exhibit A it was incumbent on Flagship Manor to review and revise the documentation submitted to Florida Housing accordingly before submitting its Application.

32. Flagship Manor also argues that that since the Contract does not violate any of the specifically enumerated requirements for an eligible contract that Florida Housing erred in rejecting the Contract. This argument is also misguided and fails, due to the more general requirement of completeness and responsiveness set forth in Rule 67-60.006(1), Florida Administrative Code.

33. As Florida Housing correctly argues, in the context of scoring diverse and numerous documents as part of the competitive solicitation process, such a general requirement is logically necessary to address the myriad situations in which a Contract might not be complete or responsive.

34. The scorer responsible for evaluating Flagship Manor's Contract, Liz Thorp, provided uncontroverted testimony that the basis for rejecting the Contract for failing to establish site control was that the Contract itself was "incomplete and nonresponsive." In order for the specific criteria regarding an eligible contract to apply, an Applicant must first provide a

complete and responsive document to review. For purposes of scoring in the context of a competitive solicitation, Flagship Manor effectively failed to provide a Contract that could be reviewed, due to it being facially incomplete and therefore nonresponsive.

35. Florida Housing and SCLAD also cite several cases that demonstrate the issue of site control and support Florida Housing's well-established authority to reject incomplete or erroneous applications, including site control documents. See *Tidewater Revitalization, Ltd. v. Florida Housing Corporation*, FHFC Case No. 2002-0023 (Final Order entered October 10, 2002); *City Vista Associates, LLC v. Florida Housing Finance* Corporation, Final Order No. 2014-049BP (June 13, 2014); and *Robert King High Preservation Phase One, LLC v. Florida Housing Finance Corporation, et al.*, Final Order No. 2014-062BP (August 11, 2014).

36. The parties acknowledge that *Tidewater* contained similar facts to the instant matter. In *Tidewater*, the applicant submitted a purchase contract which at the legal description section included the language: "as more particularly described in Exhibit A attached hereto." There, as here, the Contract submitted by the applicant did not attach Exhibit A (a legal description) and the application was rejected by Florida Housing for failing to provide documentation to demonstrate site control. Additionally, there, as here, the Petitioner argued that the contract was otherwise legally valid. Finally, there, as here, a rule existed that required applications to be complete.

37. In *Tidewater*, as in the instant case, Florida Housing's actions in rejecting the *Tidewater* application for failing to demonstrate site control were upheld by the hearing officer.

38. As Florida Housing and SCLAD acknowledge and Flagship Manor emphasizes, Tidewater is distinguishable from the instant matter because the former was decided under Florida Housing's former Universal Application Cycle and this matter under the current RFA

process. However, as the site control requirements used in the former process are fundamentally the same as those used in Florida Housing's current RFA process, Tidewater retains precedential value and its findings and conclusions are followed in this proceeding.

Minor Irregularities

39. To avoid the impossible task of having a rule or RFA term that covers every possible error or omission, and to temper the effect of the general requirements of responsiveness in Rule 67-60.009(1), Florida Administrative Code, Florida Housing also promulgated Rule 67-60.002(6), Florida Administrative Code, the definition of "Minor Irregularity:"

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

40. Flagship Manor argues that the Particularity Reference in the Contract should have been deemed a Minor Irregularity. However, in order to make a determination that a component of the application constitutes a Minor Irregularity, a scorer would have to know the nature of the irregularity to determine if it meets the requirements of the definition. As Mrs. Thorp testified, this cannot be done in the context of a missing legal description that may or may not present a problem that could be so waived as a Minor Irregularity. In other contexts, such as an obvious calculation or typographical error, or referral to an exhibit the scorer can readily determine is irrelevant, such a determination can be made within the scorer's discretion. That is not the case here, where the Contract in question facially represents that more information regarding the legal description exists than is set forth in its body, and then fails to provide that information.

41. It is without question that the site control requirements of the RFA are mandatory. Moreover, to accept Flagship Manor's argument would in essence allow Flagship Manor an opportunity to "cure" its Application, which it is well-established is not allowed in this RFA process or pursuant to Section 120.57(3)(f), Florida Statutes. Allowing Flagship Manor to cure its Application would provide Flagship Manor with an advantage not enjoyed by its competitors, an action inconsistent with the definition of Minor Irregularity and clearly contrary to competition. Such action would provide an added advantage that serves to penalize Applicants who provided acceptable site control documentation like SCLAD in the instant case, thereby giving Flagship Manor a competitive advantage.

42. Based on the foregoing Flagship Manor has failed to carry its burden of showing that Florida Housing's decision to find its Application ineligible for funding was clearly erroneous, contrary to competition, arbitrary or capricious, or contrary to Florida Housing's governing statutes, rules, policies or the RFA specifications.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be entered affirming Florida Housing's scoring of the Flagship Manor Application and denying all relief requested by Petitioner Flagship Manor.

Respectfully submitted this 15th day of June, 2015.

Junious D. Brown III
Hearing Officer for Florida Housing
Finance Corporation

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FLAGSHIP MANOR LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

SPINAL CORD LIVING ASSISTANCE DEVELOPMENT, INC.

Intervenor

_____/

FHFC Case No.2015-009BP
Application No. 2015-223S

FLAGSHIP MANOR LLC's EXCEPTONS TO RECOMMENDED ORDER

Petitioner, Flagship Manor LLC ***("Flagship")***, pursuant to Section 120.57(1)(k), *Florida Statutes,* and Rule 28-106.217(1) of the *Florida Administrative Code*, hereby submits the following exceptions to the Recommended Order filed on June 15, 2015 (the ***"Recommended Order"***), by Junious D. Brown, III, the hearing officer designated by Florida Housing Finance Corporation (***"Florida Housing"***):

STANDARD OF REVIEW

Section 120.57(1)(l), *Florida Statutes*, sets forth the standards that Florida Housing is required to 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.

Review of a recommended order is analogous to a Florida appellate proceeding. It is not the time or place to retry the case, nor to ask the agency head to reweigh the evidence, resolve conflicts therein or judge the credibility of witnesses. *Heifitz v. Department of Business & Professional Regulation*, 475 So.2d 1277 (Fla. 1st DCA 1985). Rather, the issues before the agency are whether the findings that constitute 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. Co.*, 396 So.2d 778 (Fla. 1st DCA 1981).

INTRODUCTION

This proceeding involves the review of Flagship's Application #2015-223S to Florida Housing (the ***"Flagship Application"***) seeking $4,442,675.95 in State Apartment Incentive Loan (***"SAIL"***) funding to assist in the development of a proposed multi-unit housing complex for "persons with special needs" in response to the Request for Applications 2015-101 ***(the "RFA")*** issued by Florida Housing. In response to the RFA's site control requirements, Flagship submitted with the Flagship Application a copy of a fully executed Commercial Contract dated February 10, 2015 ***(the "Purchase Contract")***, to purchase the property to be developed with the requested SAIL funding ***(the "Property")***.

Consistent with and confirming other information regarding the Property included in the Flagship Application, the Purchase Contract identified the Property by providing the street addresses, city and state of the Property followed by the words: "Legal Description: Hillsborough County Property Appraiser Parcel Folio #s: 036037.0000 and 036038.0000, more particularly described at Exhibit A attached." However, there was no Exhibit A document submitted with the Purchase Contract included in the Flagship Application, and, in fact, no such document exists.

Florida Housing determined that the Flagship Application for SAIL funding was not eligible based solely upon the conclusion by Florida Housing that Flagship failed to demonstrate site control, as required by the RFA, due to the fact that there was no Exhibit A attached to the Purchase Contract. Florida Housing's corporate representative, Elizabeth Thorp, in her May 20, 2015, deposition (the ***"Deposition"***), and Florida Housing's legal counsel, at the May 22, 2015, informal hearing, both

explained that the Purchase Contract would have been sufficient to demonstrate site control of the Property had the reference to the non-existent exhibit not been included in the "Legal Description" section of the Purchase Contract.

In the Recommended Order, the hearing officer agreed with Florida Housing that the Purchase Contract failed to demonstrate site control because it was "facially incomplete" due to its failure to include Exhibit A and that the failure to include that exhibit did not constitute a minor irregularity. It is in this context that Flagship hereby asserts the following exceptions to the Recommended Order's findings of fact and conclusions of law:

Exception 1: Florida Housing Submitted a Complete and Responsive Application Sufficient to Establish Site Control

The Purchase Contract reference *"more particularly described at Exhibit A attached" (the **"particularity reference"**)* and the absence of any such Exhibit A attachment were, together, the sole basis for Florida Housing's conclusion, as affirmed in the Recommended Order *(most explicitly in Paragraph 27 on Page 14)*, that the Purchase Contract did not demonstrate site control, thereby rendering the Flagship Application ineligible for SAIL funding. *(All subsequent references to a **"Paragraph"** are to the numbered Paragraphs of the Recommended Order.)* Flagship takes exception to that conclusion, as well as the similar conclusions addressed in the Recommended Order in Paragraph 11 *(on Page 8)*, Paragraph 14 *(on Page 10)*, Paragraph 25 *(on Page 13)*, Paragraph 26 *(on Page 13)*, Paragraph 30 *(on Page 15)*, Paragraph 31 *(on Page 15)*, Paragraph 32 *(on Page 15)* and Paragraph 34 *(on Page 16)*, for the following reasons:

The dispute that gives rise to this proceeding pertains solely to Section Four of the RFA and the documents to be provided in accordance with Subsection G thereof. There is nothing in the RFA or applicable law which specifically provides or implies that the absence of an exhibit referenced in an otherwise "eligible contract" renders an application incomplete or nonresponsive. Flagship takes exception to each of the following statements in the Recommended Order that offer a conclusion or support for a conclusion that the non-existent exhibit at issue necessarily rendered the Flagship Application incomplete and nonresponsive:

Paragraph 11 *(on Page 8) (which refers to alleged "incomplete or erroneous documents")*, Paragraph 14 *(on Page 10) (which alleges that the Purchase Contract and Flagship Application were "incomplete and nonresponsive")*, Paragraph 25 *(on Page 13) (which concludes that the Purchase Contract was "correctly found during the scoring process, incomplete and nonresponsive")*, Paragraph 26 *(on Page 13) (which concludes that "the Proffered Documents [as described below] should have been included in the Flagship Manor Application, or the Particularity Reference deleted")*, Paragraph 27 *(on Page 14) (which concludes that the Purchase Contract "fails to demonstrate site control simply by being facially incomplete")*, Paragraph 30 *(on Page 15) (which notes that "Florida Housing concluded that Flagship Manor failed to provide complete documentation to demonstrate site control" and then goes on to state that such conclusion "is evident by a simple review of the Contract which Flagship Manor submitted")*, Paragraph 31 *(on Page 15) (which states that Flagship "bears the burden of providing complete and accurate information")*, Paragraph 32 *(on Page 15) (which concludes that "the more general requirement of completeness and responsiveness set forth in Rule 67-60.006(1), Florida Administrative Code" permitted Florida Housing to reject the Purchase Contract)* and Paragraph 34 *(on Page 16) (which concluded that Flagship "failed to provide a Contact that could be reviewed, due to it being facially incomplete and therefore nonresponsive")*.

Subsection G of Section Four of the RFA simply required the applicant to furnish either: **(a)** an eligible contract, **(b)** a deed or certificate of title, or **(c)** a lease with an unexpired term of at least 30 years, in order to demonstrate "site control" of the proposed development site. As correctly stated in Paragraphs 9 and 10 *(at Pages 4 and 5)* of the Recommended Order, the only conditions expressly required by the RFA for a contract to qualify as an "eligible contract" necessary to establish "site control" are that the contract (i) must have *"a term that does not expire before August 14, 2015"*, for which the Purchase Contract qualifies due to the "Closing Date" provision in Section 4 thereof, (ii) must specifically state *"that the buyer's remedy for default on the part of the seller includes or is specific performance"*, which remedy is expressly provided in Section 13(a) thereof; and (iii) must name the "Applicant" as the "buyer," which it does. None of those eligible contract conditions is in dispute. Thus, the Purchase Contract filed by Flagship was - and is - an "eligible contract."

Implicit in the "eligible contract" requirement is the requirement that the Purchase Contract must be an enforceable contract. In other words, an "unenforceable contract" is really not a contract, but rather

a purported contract. Thus, unless a contract is enforceable, the remedy of specific performance would not be available. Under Florida law, a real estate contract is binding and enforceable with respect to a parcel of property if that property can be identified based upon the information set forth in the contract. Thus, in *Lente v. Clarke*, 22 Fla. 515 (Fla. 1886), the Florida Supreme Court held that a real estate contract *"will be held sufficient as to its description of the land to be conveyed, if it so describes a particular piece or tract of land that it can be identified, located or found. A detailed description is not necessary where the description shows that a particular tract is within the minds of the contracting parties and intended to be conveyed."* In that case, the Court considered the sufficiency of the identification of the property described as *"my 40 near the Garrison lands in Hernando County."*

Furthermore, in *Paterson v. Brafman*, 530 So.2d 499 (Fla. 3d DCA 1988), a case cited in *Fund Title Note* 13.01.05, the court stated that *"we find no merit at all in the appellee's claim that the principles of constructive notice provided by the recording statute do not apply because the property was designated by the street address rather than the legal description."* In reaching that conclusion, the court favorably cited *Baker v. Baker*, 271 So.2d 796 (Fla. 3d DCA 1973), which also upheld the use of a street address to describe real estate, and noted that R. Boyer's renowned *Survey of the Law of Property* 444 (3d ed. 1981) provides, in HN6, that *"deeds describing land by street number or 'all my land' are considered valid descriptions provided they are identified as within a particular city, town, county or state."*

The general rule of contract formation was enunciated by the Florida Supreme Court in *St. Joe Corp. v. McIver*, 875 So.2d 375, 381 (Fla. 2004), which confirmed that an *"offer, acceptance, consideration and sufficient specification of essential terms"* are the *"basic requirements of contract law."* The Florida Supreme Court has approved *Standard Jury Instruction 416.3*, which addresses the essential factual elements to the formation of a contract, in *In re Std. Jury Instructions-Contract & Bus. Cases*, 116 So.3d 284, 304-305 (Fla. 2013). That instruction provides as follows: *"When you examine whether the parties agreed to the essential terms of the contract, ask yourself if, under the circumstances, a reasonable person would conclude, from the words and conduct of each party, that there was an agreement."*

In recognition of the foregoing multitude of legal authorities, the identification of the Property by the specific folio numbers and street addresses in the Purchase Contract included with the Flagship Application was clearly legally sufficient to constitute a binding and enforceable contract to purchase the Property. In fact, as noted in Paragraph 27 *(on Page 14)* of the Recommended Order, neither Florida Housing nor the Intervenor disputes the legal validity of the Purchase Contract.

Since the Purchase Contract is an enforceable contract, the remedy of specific performance is available. Such a remedy is typically available to a purchaser in a real estate transaction due to the unique characteristics of real property. This proposition was confirmed in *Henry v. Ecker*, 415 So.2d 137 (Fla. 5th DCA 1982), which held that *"[s]ince all land is considered unique, money damages to a contract purchaser of lands is an inadequate remedy at law. Therefore, specific performance of contracts for the sale and purchase of real property is generally granted as a matter of right where their terms are fair, certain and definite and they have been entered into without misunderstanding or misrepresentation."* Flagship would, therefore, be able to avail itself of the remedy of specific performance in the event of a breach of the Purchase Contract by the seller unless the Purchase Contract provided otherwise.

As noted above, the Purchase Contract, in fact, provides in Subsection 13(a) as follows: *"In the event of a default or failure on the part of Seller ..., [Flagship] may either (1) receive a refund of [Flagship's] deposit(s) or (2) seek specific performance."* Since Florida courts have held that any effort to limit a buyer's recourse solely to a return of its deposit after a default by the seller is an "illusory remedy" (See *Blue Lakes Apartments, Ltd. v. George Gowing, Inc.*, 464 So.2d 705 (Fla. 4th DCA 1985); and *Ocean Dunes of Hutchinson Island Development Corp. v. Colangelo*, 463 So.2d 437 (Fla. 4th DCA 1985)), the inclusion of that remedy, as an alternative remedy, would not be construed as a limitation of Flagship's remedies upon a default by the seller. Thus, if the seller defaults under the Purchase Contract, Flagship would have the right to specifically enforce its rights under the Purchase Contract.

Flagship has and may exercise the remedy of specific performance to enforce the Purchase Contract, notwithstanding the particularity reference and the absence of an Exhibit A. Had the Purchase Contract's legal description of the Property been dependent upon a further description, whereby the

identity of the Property could not be sufficiently established by the provisions of the Purchase Contract, the enforceability of the Purchase Contract might have been at issue. However, as fully discussed above, that was not the case with respect to the included "Legal Description" provisions in the copy of the Purchase Contract included with the Flagship Application, which fully and adequately described the Property and was consistent with all other references to the Property throughout the Flagship Application.

Both Florida Housing's corporate representative and legal counsel emphasized that the absence of ***any*** referenced attachment, apparently regardless of content or lack thereof, to a contract submitted for the purpose of demonstrating site control of the applicable property is fatal to the adequacy of such contract to demonstrate site control. No specific requirements to that effect in any statute, rule, or the RFA were cited by Florida Housing's corporate representative in the Deposition or by Florida Housing's legal counsel during the informal hearing, and, therefore, it should not be surprising that no such citation was set forth by the hearing officer in the Recommended Order.

Implicit in Florida Housing's position is the assertion that ***all*** contract references to attachments are of material significance for purposes of demonstrating site control over applicable property and that there can be no distinction as to the effect of a reference to an attachment to a contract, regardless of **(i)** the purpose of the referenced attachment as expressed in the reference to it, **(ii)** any obvious or evident degree of importance of or lack thereof in what is referenced as an attachment, or **(iii)** whether the parties actually included the referenced attachment in the executed contract. In that respect, the position of Florida Housing was that the materiality of the omission is not based upon whether or not **material information** was missing from a legal description of the site that may have been provided by a missing exhibit *(if available at all)*, or whether or not the indicated purpose of the missing exhibit was **necessary for site identification**, but rather simply upon the fact that an exhibit was referenced in a contract document and not included in such document. This stance is the height of form over substance. It neither promotes sound public policy nor makes any contribution to the objective of finding the best and most worthy applicants.

In contrast Flagship asserts that there can be distinguishing determinative factors. Thus, in

determining whether or not a contract which references an exhibit that is not included with the contract document evidences site control, **(i)** the meaning of the words used in a contract to describe the purpose of the exhibit, and **(ii)** the materiality of the purpose of any such exhibit should be examined and evaluated. Simply stated, sound judgment and a modicum of common sense should be employed to determine the significance of a missing exhibit rather than employing a harsh and arbitrary rule that any missing exhibit automatically renders an application incomplete. And make no mistake about it – that is precisely the position of Florida Housing here, a position now adopted by the hearing officer in the Recommended Order.

Paragraphs 36 – 38 *(at Pages 16 and 17)* of the Recommended Order address the case of *Tidewater Revitalization, LTD v. Florida Housing Finance Corporation*, Florida Housing Case No. 2002-0023, and, at the end of Paragraph 38 *(on Page 17)*, the Recommended Order states "*Tidewater* retains precedential value and its findings and conclusions are followed in this proceeding." Flagship takes exception to the interpretation and application of *Tidewater* in the Recommended Order and the fact that Recommended Order does not undertake the review of the property description in the Flagship Purchase Contract, as was done with the contract in *Tidewater,* to decide whether "location and boundaries" can be determined. In the *Tidewater* case, consistent with the rules in place at the time, the petitioner was afforded an opportunity to cure the absence of documents. The hearing officer in *Tidewater* concluded *(on Pages 8 and 9 of the Final Order)* that there was: **(i)** a failure to provide the legal description of its proposed development site, which was part of the Purchase and Sale Agreement offered by Petitioner to demonstrate site control, and **(ii)** a failure to demonstrate that the contract would not expire before the required date to enable it to be eligible and thus failure to provide evidence of site control.

In reaching her conclusion in *Tidewater*, however, the hearing officer did precisely what Flagship requested the hearing officer to do in connection with the Flagship Application, and which is not reflected in the Recommended Order. The *Tidewater* hearing officer examined the *Tidewater* contract's description of the proposed development site without regard to what may have been added by the missing Exhibit A.

She then pointed out *(at Page 9 of the Final Order)*:

> *Without Exhibit A, it is impossible to determine the location and boundaries of the property over which Petitioner claims site control. The general description, without Exhibit A, contains no information as to the amount of land involved, and there is no reference to sections, townships, ranges or any other landmark to identify the location and boundaries of the development site.*

Based upon the foregoing analysis, *Tidewater* held that the missing Exhibit A was needed to adequately identify the property for site control purposes. The hearing officer in *Tidewater* engaged in precisely the analysis and process with which the hearing officer in this case should have approached with respect to this issue – which would have resulted in a determination in this case that the missing exhibit was not needed to adequately identify the Property for site control purposes.

In light of the foregoing, the copy of the Purchase Contract submitted by Flagship to Florida Housing with the Flagship Application is an enforceable contract which satisfies the three conditions necessary to be considered to be an "eligible contract" pursuant to the RFA. Thus, as an "eligible contract," the Purchase Contract satisfies the RFA's requirement that the applicant demonstrate "site control" of the proposed development site, notwithstanding the absence of an irrelevant, extraneous and immaterial exhibit (which, in fact, does not even exist). The Flagship Application was, therefore, complete and responsive to the RFA.

Exception 2: Florida Housing's Rejection of the Flagship Application was Clearly Erroneous, Contrary to Competition, Arbitrary and Capricious and Contrary to Florida Housing's Governing Statutes, Rules, Policies and the RFA Specifications

The first sentence of Paragraph 11 *(on Page 8)* of the Recommended Order correctly explains that the rejection of the Flagship Application by Florida Housing would be considered to be "clearly erroneous" if the decision fell "outside the permissible range of interpretations." Next, Paragraph 12 *(on Page 9)* correctly notes, in the opening sentence, that an agency action is *"contrary to competition"* if it *"unreasonably interferes with the purposes of competitive procurement" (which are further outlined in that Paragraph)*. Finally, Paragraph 13 *(on Page 9)* correctly notes that Florida Housing's scoring of the

Flagship Application could be considered "arbitrary" if it was "performed without the support of facts or logic" and that its scoring could be considered "capricious" if it was "taken without thought or reason or irrationally."

While the hearing officer's recitation of the applicable standards is accurate, Flagship takes exception to the application of those standards in the following Paragraphs in the Recommended Order: Paragraph 11 *(at Pages 8 and 9) (which concluded that Florida Housing's rejection of the Flagship Application was not clearly erroneous because it was "well within the permissible range of interpretations")*, Paragraph 12 *(on Page 9) (which simply concluded that Florida Housing's rejection of the Flagship Application was not contrary to competition simply because, allegedly, "no evidence has been presented in this case to establish that Florida Housing's scoring was contrary to competition")*, Paragraph 14 *(on Page 10) (which concluded that Florida Housing's determination that the Purchase Contract and Flagship Application were incomplete and nonresponsive due to the missing Exhibit A "cannot be found to be clearly erroneous, contrary to competition, arbitrary, capricious, nor...contrary to its governing statutes, rules, policies or the RFA specifications")* and Paragraph 42 *(on Page 18) (which summarily concluded that Flagship has "failed to carry its burden of showing that Florida Housing's decision to find its Application ineligible for funding was clearly erroneous, contrary to competition, arbitrary or capricious, or contrary to Florida Housing's governing statutes, rules, policies or the RFA specifications")*.

In each of the foregoing Paragraphs, the Recommended Order concluded that Florida Housing's rejection of the Flagship Application was either not clearly erroneous, contrary to competition, arbitrary or capricious or contrary to Florida Housing's governing statutes, rules, policies or the RFA specifications. That conclusion cannot be correct if, as is the case here, Flagship included in the Flagship Application a Purchase Contract which meets all of the requirements in the RFA for an "eligible contract." That issue is fully addressed in the commentary to Exception 1 above, so it is not necessary to repeat that commentary here. Thus, Florida Housing's decision to disqualify the Flagship Application without giving any consideration to the adequacy of the information that was provided (by simply

disregarding what may have been provided by the missing Exhibit A) and despite its determination during review that site control was, in fact, demonstrated without any further information (and which would have been Florida Housing staffs' conclusion but for the omission of any Exhibit A) is clearly erroneous, contrary to competition, arbitrary, capricious and contrary to its governing statutes, rules, policies and the RFA specifications.

In light of these facts, it was arbitrary, capricious and contrary to competition for Florida Housing to determine that the lack of extraneous and unnecessary information caused the Flagship Application to be nonresponsive, especially since there is no indication that acceptance of the Flagship Application would have bestowed upon Flagship a competitive advantage or benefit or that would have adversely impacted the interests of Florida Housing or the public. Furthermore, as more fully addressed in the discussion of Exception 1 above, there is no provision under applicable law or the RFA specifications which permit Florida Housing to disqualify the Flagship Application.

Exception 3: The Reference to Exhibit A Was, at Most, a Minor Irregularity

The Recommended Order gave short shrift to the minor irregularity issue, purporting to devote only Paragraphs 39 – 42 *(at Pages 17 and 18)* to that issue. Paragraph 39 merely cites the applicable Rule defining a "minor irregularity" *(which Flagship agrees is correct)* and purports to apply that Rule to the facts, in a very cursory manner, in Paragraph 40 and 41 *(to which Flagship takes exception)*. Paragraph 42 does not, in fact, address the minor irregularity issue but, as noted in the discussion of Exception 2 above, simply concludes that Flagship has failed to carry its burden of showing that Florida Housing's decision to find the Flagship Application ineligible was clearly erroneous, contrary to completion, arbitrary or capricious or contrary to Florida Housing's governing statutes, rules, policies or the RFA specifications.

Setting aside the fact that there actually was no Exhibit A to the Purchase Contract, should the particularity reference, coupled with the absence of an Exhibit A referenced in the Purchase Contract, qualify as a minor irregularity, as defined in Rule 67-60.002 *Fla. Admin. Code?* If the irrelevant, extraneous and immaterial exhibit *(which, in fact, does not even exist)* does not qualify as a "minor

irregularity," it is difficult to imagine what would qualify.

As correctly noted in Paragraph 39 *(on Page 17)* of the Recommended Order, a "minor irregularity" is defined in Rule 67-60.002 as follows:

> *"Minor Irregularity" means a variation in a term or condition of an application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other applicants, and does not adversely impact the interests of the Corporation [i.e. Florida Housing] or the public.*

That Florida Housing has seen fit to codify the long accepted definition of a minor irregularity in a *Florida Administrative Code* Rule only strengthens the proposition that the Rule should be applied as and when appropriate, and not arbitrarily, capriciously or at the whim of Florida Housing's staff. That rule is a statement of general applicability and cannot be applied by Florida Housing in an ad hoc fashion or only if and when Florida Housing sees fit. In the case of an applicant who has sufficiently demonstrated site control as required by the RFA, without the provision of additional information, the question would be as follows. Does treating as a minor irregularity the lack of an Exhibit A referenced in the phrase *"more particularly described at Exhibit A attached,"* that is recited a contract following a legally sufficient description of the applicable real property, provide a competitive advantage or benefit to the applicant in a manner not enjoyed by other applicants? Although it is obvious that, in the typical case of a "missing" attachment which causes a failure on the part of an applicant to provide the information minimally necessary in order to be deemed responsive, a waiver of the requirement would provide a competitive advantage or benefit to the applicant not enjoyed by others, that is not the situation in this case. Flagship demonstrated the requisite site control, as did the other applicants whose applications were deemed responsive. A determination that the seven-word misnomer is, therefore, a minor irregularity is consistent with the interests of Florida Housing and the public. Flagship, as a qualified applicant, should not be disqualified over a perceived lack of superfluous and unnecessary additional information *(which, in this case, was not actually included in the contract)* that would have been merely a convenient reference to what was designated as, and accessible, in the public records. This is particularly true in the case of an application which contains sufficient information to be determined complete without whatever information that may or may not have been contained in Exhibit A, as is the case here based upon the

deposition testimony of Florida Housing.

In this case, the words *"more particularly described"* in Flagship's Purchase Contract are, at most, a mere preface for the inclusion of redundant additional information about the property that would be conveniently presented with the contract without the need to view the public records. Thus, at best, the "variation" in what was included in the Flagship Application is an inconsequential "variation' within the text of the Purchase Contract. The specificity of the legal description of the Property stated in the Purchase Contract rendered the intended exhibit irrelevant. That exhibit would have, at most, contained information that is readily retrievable from the public records from the information already provided in the legal description text of the Purchase Contract.

If Florida Housing had properly determined that the Purchase Contract was not an "eligible contract," as defined in the RFA, a minor variance should not have invalidated the Flagship Application. A variance must be material to invalidate an application. As noted in *Robinson Electrical Co. v. Dade County*, 417 So.2d 1032 (Fla. 3rd DCA 1982), *"a variance is material if it gives the bidder a substantial advantage over the other bidders, and thereby restricts or stifles competition."*

There has been no assertion nor evidence that the failure to include the referenced Exhibit A, or a more particular description of the Property, or that the mere reference to such a more particular description in the Purchase Contract, would result in a competitive advantage or benefit to Flagship or would have adversely impacted the interests of Florida Housing or the public.

The failure to delete the superfluous words *"more particularly described at Exhibit A attached"* obviously was an oversight. The originally expected Exhibit A was not included in the document executed by the parties, who, obviously, did not realize that the above superfluous words had not been deleted. Neither the absence of a document designated as Exhibit A, nor the mere reference to an exhibit that did not exist, nor a more particular description of the Property, which would have been redundant and unnecessary, enhanced or would have enhanced the scoring of the Flagship Application.

Further, disregarding the apparent absence of an unnecesary exhibit provides no advantage or benefit to Flagship or causes any adverse impact upon the interest of Florida Housing or the public. In

fact, the Purchase Contract submitted with the Flagship Application did not include an attachment designated as Exhibit A, because the fully executed Purchase Contract actually delivered to Flagship by the seller did not include any such exhibit.

The omission of unnecessary information in the Flagship Purchase Contract, where such unnecessary information inadvertently is indicated as existing, should be an excusable irregularity, simply as a matter of fairness. If the applicable Purchase Contract provision had been carefully analyzed, the unnecessary missing information would have been recognized as being unnecessary. As such, it certainly would have been considered an irregularity that does not invalidate the Purchase Contract. If it would not invalidate the Purchase Contract, then what would be the reason or justification to treat it as more than a "minor irregularity"? We assert that there is no good reason or justification for denying such "minor irregularity" status.

Certainly, if it had been acknowledged as an irregularity, it would be a minor irregularity which should have been waived by Florida Housing, since it would not have adversely affected Flagship's intended acquisition the specified property. If Florida Housing had determined this harmless omission was a minor irregularity, that decision would undoubtedly be defensible on appeal and consistent with the language of the rule. To decline to apply the rule in such a situation is arbitrary and capricious, at a minimum. The fairness and reasonableness of excusing legally inconsequential inadvertence is implicitly the reason why the ignoring of "minor irregularities" is an express Florida administrative rule. Thus, the absence of the Exhibit A document referenced in the Flagship Purchase Contract should clearly qualify as a minor irregularity, as defined in Florida Administrative Code 67-60.002.

Additional Miscellaneous Exceptions

In addition, Flagship takes exception to the following findings of fact, conclusions of law or other statements set forth in the Recommended Order:

(1) The italicized parenthetical language included in Paragraph 13 *(on Page 5)* of the Recommended Order should be deleted. The parenthetical language implies that Exhibit A actually exists when, in fact, no such exhibit exists. Furthermore, a legal description was actually included in the body

of the Purchase Contract *(which Florida Housing's corporate representative, Elizabeth Thorp, and its legal counsel both confirmed would have been sufficient to demonstrate site control of the Property)*, and the parenthetical language implies that the legal description was to be set forth in the non-existent exhibit.

(2) All sentences following the citation to the *Colbert* case in Paragraph 11 *(on Page 8)* of the portion of the Recommended Order dealing with the Burden of Proof should be deleted. The first such sentence implies that Flagship's documents were "incomplete or erroneous." The remaining sentences do not address burden of proof standards. Instead, those sentences set forth the hearing officer's conclusions of fact or law which are not appropriately addressed in a paragraph purporting to describe burden of proof standards. Flagship's exceptions with respect to such conclusions are fully discussed in Exceptions 1 and 2 above.

(3) Likewise, the last sentences in Paragraphs 12 *(on Page 9)* and 14 *(on Page 10)* of the portion of the Recommended Order dealing with the Burden of Proof set forth in the should be deleted since those sentences set forth the hearing officer's conclusions of fact or law which are not appropriately addressed in paragraphs purporting to describe burden of proof standards. Flagship's exceptions with respect to such conclusions are fully discussed in Exception 2 above.

(4) Flagship takes exception to the second sentence in Paragraph 14 *(on Page 10)* of the portion of the Recommended Order dealing with the Burden of Proof to the extent such sentence implies that the folio numbers did not constitute *"a sufficient and complete description of the Property."* In fact, as noted in the Introduction above, both Florida Housing's corporate representative and legal counsel have confirmed that the references to the folio numbers would have been sufficient, standing alone, had there been no reference to the non-existent exhibit.

(5) Flagship takes exception to the conclusions that the affidavits of parties to the Purchase Contract, the printouts from the Hillsborough County Property Appraiser's and Clerk's websites and the legal opinion of William Paul (the ***"Proffered Documents"***) would impermissibly supplement the Flagship Application, as set forth in Paragraph 16 *(on Page 10)* of the portion of the Recommended Order dealing with the Evidentiary Disputes. The Proffered Documents merely explain aspects of information

which was already included within the Flagship Application rather than amend or supplement it.

(6) As to the affidavits, each were proffered for the sole purpose of explaining what was already in the Flagship Application and that neither party to the Purchase Contract disputed, which was that the Purchase Contract document submitted as part of the Flagship Application was the complete contract and that there was no "missing" Exhibit A to the Purchase Contract, notwithstanding the reference to such an exhibit. Each of the affidavits verifies that the Purchase Contract, as executed and delivered by the parties, did not include an Exhibit A. Although it appears to be the position of Florida Housing that it did not matter to its review of the Flagship's Application whether or not an Exhibit A was missing or simply not included at all, the record should reflect that there was, in fact, no Exhibit A.

(7) The website printouts were proffered as relevant to the issue of further information which Florida Housing could have readily accessed based upon the information supplied in Paragraph 5 of the Purchase Contract. The legal opinion was proffered as a correct statement of the law. For the same reasons, in the Conclusions of Law portion of the Recommended Order, Flagship takes exception to the last two sentences of Paragraph 17 *(on Page 11)*, Paragraph 18 *(on Page 11)*, the last sentence of Paragraph 20 *(on Page 12)*, Paragraphs 21, 22 and 23 *(all at Page 12)*, and Paragraphs 25 and 26 *(both at Page 13)*.

(8) The words *"further defines"* in Paragraph 30 *(on Page 15)* of the Conclusions of Law Order are inaccurate and should be replaced with the words "more particularly described."

CONCLUSION

The Recommended Order incorrectly applies the law at issue. Florida Housing, in its role as the agency, is not required to accept the Recommended Order and should reject unsupported findings of fact and reject erroneous and incorrect interpretations of law.

WHEREFORE, Flagship Manor LLC respectfully submits the foregoing exceptions to Florida Housing to be considered and incorporated into the Final Order.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail to the following on this 17th day of June 2015:

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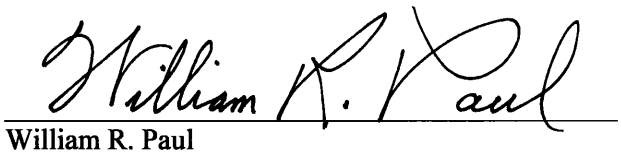

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FLAGSHIP MANOR, LLC,

Petitioner,

v. **FHFC CASE NO.: 2015-009BP**
Application No.: 2015-223S

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RESPONSE TO PETITIONER'S EXCEPTIONS

Respondent, Florida Housing Finance Corporation ("Florida Housing") hereby submits its Response to Petitioner Flagship Manor LLC's Exceptions to Recommended Order (hereinafter, "Exceptions") and states:

1. The majority of the arguments presented in the Exceptions are identical to those presented in its Proposed Recommended Order submitted to the Hearing Officer in this matter. In the interest of brevity, Florida Housing will not fully reiterate the arguments presented in its Proposed Recommended Order here.

2. Petitioner ("Flagship Manor") presents three enumerated Exceptions and a list of "Additional Miscellaneous Exceptions" as well. For the purposes of this Response, these will be addressed separately below.

Response to Exception 1

3. In its first Exception, Flagship Manor argues that the documentation it submitted to demonstrate site control (the "Purchase Contract") was complete, responsive and sufficient to establish site control. The record in this case, the testimony of Florida Housing's witness and the applicable law all demonstrate this to be false.

4. Flagship Manor takes exception to paragraphs 11, 12, 14, 25, 26, 30, 31, 32 and 34 of the Recommended Order in this Exception, which all relate in some fashion to the Hearing Officer's conclusion that the Purchase Contract was nonresponsive, incomplete and insufficient to demonstrate site control. Flagship Manor then launches into a lengthy legal argument regarding the enforceability and general legal validity of the Purchase Contract, asserting that the Purchase Contract could be enforced, could provide for specific performance, etc., and should accordingly be accepted by Florida Housing as complete, responsive and demonstrating site control. This is the same argument made during hearing and subsequently rejected by the Hearing Officer.

5. Neither Florida Housing nor the Intervenor Spinal Cord Living Assistance Development, Inc. ("SCLAD") disputed the validity or enforceability of the Purchase Contract in some context other than a competitive solicitation conducted under §120.57(3), Fla. Stat. Unfortunately, Flagship Manor again argues

to a standard not applicable in this case, and one in which only the parties to the contract may have their substantial interests affected. That is not the case here, where SCLAD's substantial interests are directly affected by the outcome of this case.

6. Conspicuously absent from Flagship Manor's Exception to the paragraphs set forth above, and indeed from all its Exceptions, is any mention of the true standard[1] to be met in this case in Fla. Admin. Code R. 67-60.006, which states:

> (1) The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

7. Contrary to the arguments presented by Flagship Manor that this case pertains only to Section 4 of the Request for Applications (RFA), the rejection of its Application was not merely for failing to demonstrate site control but also for failing to comply with the Rule above, which imposes a more general requirement of responsiveness and completeness above and beyond any specifically enumerated requirement in any specific Request for Application ("RFA"). As stated by Liz Thorp, the site control scorer and Florida Housing's representative in this case:

> Q: Okay. Did you determine that – did you determine that this particular contract was not an eligible contract under the RFA?

[1] *See also* paragraph 14, *infra*.

A: I determined that [the Purchase Contract] did not meet any requirement because it – or it was unresponsive and incomplete.

***

A: We only go by what we receive, and if it says there's something more particularly described elsewhere, then we expect to see it.

Q: But the determination was made in that regard because it was incomplete?

A: It was incomplete and nonresponsive.

(Joint Exhibit 4, pp. 15-16).

8. As the Hearing Officer observed (*see* paragraph 39 of the Recommended Order), it is an impossible task to draft an RFA that specifically enumerates every potential circumstance of nonresponsiveness. For example, the RFA does not specify that site control documents be in any particular language or format. If documentation submitted in an Application cannot be rejected, as argued by Flagship Manor, then Florida Housing would have no choice but to accept incomplete contracts, or ones written in a foreign language, or that presented any of an infinite number of possible ways of being nonresponsive. Hence the existence and applicability of Fla. Admin. Code Rule 67-60.006, which imposes a duty on the Applicant to submit a complete, responsive bid (Application). Flagship Manor failed to do so here, and has presented no argument or evidence at hearing or in its Exceptions to show that they are not subject to the above Rule or that the Rule was misapplied.

9. Moreover, Flagship Manor disingenuously represents Florida Housing's argument and position on page 7 of the Exceptions, stating:

> Implicit in Florida Housing's position is the assertion that ***all*** contract references to attachments are of material significance for purposes of demonstrating site control over applicable property and that there can be no distinction as to the effect of a reference to an attachment to a contract, regardless of (i) the purpose of the referenced attachment as expressed in the reference to it, (ii) any obvious or evident degree of importance or of lack thereof in what is referenced as an attachment, or (iii) whether the parties actually included the referenced attachment in the executed contract. (*Emphasis original).*

10. Flagship Manor cites to no evidence, testimony or argument in the record of this case that supports the assertions above. Moreover, Florida Housing and its representatives have stated precisely the opposite: if a missing exhibit, by its very description in the main document, could be determined to be irrelevant, then its omission could constitute a minor irregularity.[2] Again, as stated by Ms. Thorp, in giving an example of what may constitute a "minor irregularity:"

> A. I know there's been several. None are coming to mind, but, yes, there have been several that we deemed as minor irregularities. Maybe if we – okay, we had – we used to request the percentage of ownership of principals, for instance. And we can – you know, there might have been a typo there, but we could do the math and figure it out, that kind of thing. But there was information there that we could use to make our determination. If the information's not there, we can't make a determination. (Joint Exhibit 4, p. 27).

[2] To paraphrase the example used by Florida Housing at the informal hearing: "Exhibit D, a picture of the Owner's dog, Fluffy."

> A: If there were maybe a typo that we could deem was a typo in many the address and we could find the address elsewhere, that might be a minor irregularity.
> (*Id*., p. 21).

Moreover, when directly asked about the language "more particularly described as Exhibit A attached" as a minor irregularity, Ms. Thorp responded:

> A: If we had known there was no Exhibit A, if they had maybe amended the contract or let us know in the application that it didn't exist, even if it was crossed through and initialed then, yes, but --
> (Joint Exhibit 4, p. 28).

11. Clearly, Florida Housing's position is not that any missing attachment, no matter its relevance or materiality, disqualifies site control documentation. If it did, there would be no need for a Rule providing for minor irregularities and Florida Housing would have no choice but to reject Applications for even the most trivial of omissions. In the instant case there was simply not enough information provided to "do the math" and determine that the missing exhibit was irrelevant, immaterial, or thereby a minor irregularity. In any case, it is not Florida Housing's practice or position to reject every Application that has a missing document or attachment. That is in fact one of the primary reasons for permitting the waiver of minor irregularities.

12. Flagship Manor also argues that the language in the Purchase Contract "as more particularly described in Exhibit A attached hereto…" somehow establishes that the referenced attachment was immaterial. This argument irrationally ignores the plain language of the Purchase Contract itself, which refers

to an exhibit which is not attached, and which exhibit purportedly gives more information than that provided in the Purchase Contract. Florida Housing cannot be held to have been clearly erroneous for simply taking the Purchase Contract language at face value, and by declining to make assumptions about documents not in the Application.

13. Flagship manor further argues that the instant case is distinguishable from *Tidewater Revitalization, LTD. v. Florida Housing Finance Corporation,* FHFC Case No. 2002-0023, despite the fact that *Tidewater* involved the exact same contract language, the same missing referenced exhibit, and in which the Hearing Officer came to the same result as in the instant case. The only true distinguishing factor between these cases is that in 2002, "cures" were permitted, whereas in the current process they are barred by §120.57(3)(f), Fla. Stat. Flagship Manor argues that the current Hearing Officer failed to "undertake the review of the property description in the Flagship Purchase Contract, as was done in *Tidewater*, to decide whether "location and boundaries" can be determined." What Flagship Manor ignores in this argument is that under the current Rules, the Hearing Officer is statutorily barred from considering the proffered evidence that was not part of the Application by §120.57(3)(f), Fla. Stat. This argument only serves to underscore the validity of the Recommended Order's conclusions, in that Flagship admits that it's additional evidence not included in the Application is necessary to establish site

control and complete the Application, and that the only real difference between this case and *Tidewater* is that cures are no longer allowed. Florida Housing readily agrees with this part of the analysis.

14. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Exception 1 should be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

Response to Exception 2

15. Unlike its first Exception, wherein Flagship Manor argues to a standard not applicable in this case, its second Exception does address the correct standards under §120.57(3): whether the rejection of its Application was clearly erroneous, contrary to competition, arbitrary, capricious or contrary to Florida Housing's governing statutes, rules and policies. Specifically, Flagship Manor takes exception to the paragraphs of the Recommended Order addressing these standards and how they apply to the instant case: 11, 12, 14 and 42 from the Conclusions of Law.

16. Flagship argues that Florida Housing's rejection of its Application should be overturned under the above standards because it was made "without giving any consideration to the adequacy of the information that was provided by simply disregarding what may have been provided by the missing Exhibit A." This argument fails for two reasons: no such information was provided by Flagship

Manor in its Application, and Florida Housing is barred by statute from considering the supplemental documentation Flagship attempts to introduce now. Florida Housing did no more and no less than simply take the Purchase Contract language at face value, and without assuming facts not in evidence, as Flagship Manor evidently expects it to do in violation of the law. Florida Housing cannot be found to be clearly erroneous, arbitrary, capricious or contrary to its governing statutes, rules and policies for simply taking the Purchase Contract language at face value, refraining from making assumptions on evidence not provided, and disregarding evidence that §120.57(3)(f), Fla. Stat. clearly states should not be considered either in scoring or in this proceeding.

17. In its Exceptions (p. 11) Flagship Manor also argues that Florida Housing violated the standards set forth above by determining that the "lack of extraneous and unnecessary information caused the Flagship Application to be nonresponsive…" Given what was provided by Flagship Manor, as well as the statutory prohibition on amending or supplementing these Applications, there is no way Florida Housing could determine during scoring that the language at issue in the Purchase Contract was extraneous or unnecessary.

18. Also argued in the Exceptions is the notion that if Florida Housing had ignored the Purchase Contract language (as well as its own Rule regarding nonresponsive Applications), that it would provide no competitive advantage to

Flagship Manor. Both Florida Housing and SCLAD disagree with this notion, considering that SCLAD – who did provide a complete and eligible Application – would not receive funding where Flagship Manor would instead.

19. Finally, Flagship Manor again argues in its second Exception that there is no provision under applicable law or the RFA specifications which permit Florida Housing to disqualify the Flagship Application. The conspicuous absence of any mention of Fla. Admin. Code R. 67-60.006(1), which directly addresses nonresponsive and incomplete Applications, might be excused as mere ignorance under other circumstances, but this Rule was cited and discussed during the informal hearing, cited in Proposed Recommended Orders filed in this case, and is explicitly relied on by the Hearing Officer in the Recommended Order. One can only assume Flagship Manor has no argument against the applicability of this Rule to this case. The statement that "no provision under applicable law" permits Florida Housing to disqualify the Application is patently false.

20. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Exception 2 should be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

Response to Exception 3

21. In its third Exception Flagship Manor argues that the reference to Exhibit A in the Purchase Contract was, at most, a minor irregularity. Specifically it takes exception to paragraphs 40-41 of the Conclusions of Law of the Recommended Order.

22. Claiming that the Hearing Officer gave "short shrift" to its minor irregularity arguments, Flagship Manor argues that the Purchase Contract language referring to an Exhibit A should have been deemed a minor irregularity because it referred to an extraneous and immaterial exhibit. Based on the information provided in the Application, there is no way to determine whether this language is or is not extraneous or immaterial.[3] As simply put by Ms. Thorp in her deposition:

> A: I can't deem something a minor irregularity if I don't know what it is.
> (Joint Exhibit 4, p. 20).
>
> A: We don't know what Exhibit A said, so there was no way to even think about waiving that.
> (*Id*., p. 21)

Again, Flagship Manor would have Florida Housing ignore the plain language of the contract and assume facts not in evidence, at the detriment of another Application who did not make such mistakes.

[3] Flagship goes on to state that if this does not qualify as a minor irregularity, that "it is difficult to imagine what would qualify." *See* paragraph 7 and footnote 2, *supra*, for examples of minor irregularities.

23. Flagship argues that the "as more particularly described in Exhibit A" language should have been deemed a minor irregularity since the language is a "mere preface for the inclusion of redundant additional information about the property…," something neither Florida Housing, nor anyone else, can determine from the documents provided in the Application. The Exceptions further state that "The specificity of the legal description of the Property stated in the Purchase Contract rendered the intended exhibit irrelevant." Again, this is not something Florida Housing could know during scoring without itself amending or supplementing the Flagship Manor Application, actions that would clearly be contrary to competition as it would constitute assisting Flagship Manor to the detriment of other Applicants, and specifically SCLAD.

24. Florida Housing agrees with Flagship Manor that the failure to delete the words "more particularly described at Exhibit A attached" was an oversight (p. 13 of Exceptions), and was one committed by Flagship Manor, not Florida Housing. If the Purchase Contract did not include an Exhibit A, then it was the duty of Flagship Manor to delete or clarify this in its Application. It failed to do so, and recognizing that failure does not constitute any error on the part of Florida Housing. Florida Housing strongly disagrees with Flagship Manor's assessment that had it ignored this oversight as a minor irregularity "would be undoubtedly defensible on appeal",

in fact Florida Housing believes that had it done so, SCLAD would have prevailed at any resulting hearing.

25. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Exception 3 should be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

Response to Additional Miscellaneous Exceptions

26. Flagship Manor takes exception to several paragraphs in the Recommended Order it describes as "miscellaneous." For the sake of clarity, Florida Housing will respond to the Exceptions in the order presented by Flagship Manor.

27. Flagship Manor takes exception to the italicized language from paragraph 13 of the Findings of Fact of the Recommended Order, stating that it implies that Exhibit A actually exists. The language reads:

> The Review Committee found Flagship Manor's Application ineligible for funding for failing to demonstrate site control of the development property (the "Property"), for the reason that Flagship Manor failed to include an "Exhibit A" (*relating to the legal description of the Property*) referenced in the Contract as filed with the Application.

28. The findings of fact established by this paragraph are supported by competent, substantial evidence: the Purchase Contract itself which refers to a legal description attached as Exhibit A. This is also apparent throughout the deposition

of Liz Thorp, who scored the Application for site control. It is also clear from the Recommended Order that the Hearing Officer was in no way confused as to whether such an Exhibit A ever existed or not outside the Application – because the Purchase Contract asserted that it did exist. That record is the proper basis for this Finding of Fact, and not the irrelevant and excluded testimony and exhibits that were not part of the Application. The Hearing Officer properly refused to admit those exhibits or consider that testimony pursuant to the aforementioned statutory prohibition on amending or supplementing the Application.

29. This Exception further argues that Ms. Thorp and the undersigned both confirmed that the legal description contained within the text of the Purchase Contract (folio numbers) would have been sufficient to demonstrate site control of the Property. This is a mischaracterization, in that the folio numbers *would have* been sufficient *but for* the language that represented there was additional information in an attached exhibit, which was not found attached to the Purchase Contract.

30. Neither Florida Housing nor SCLAD nor the Hearing Officer contested that the "missing" Exhibit A actually existed or not. Flagship Manor contends that no such exhibit ever existed, but for that fact to be relevant in this case it should have been expressed in the materials submitted with the Application. It was not.

31. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Miscellaneous Exception 1 should be

rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

32. The second Miscellaneous Exception takes issue with "all the sentences following the citation to the *Colbert* case in Paragraph 11 (p. 8) of the portion of the Recommended Order dealing with the Burden of Proof, stating that the first sentence implies that Flagship Manor's documents were "incomplete and erroneous" (which Flagship Manor has admitted, *see* paragraph 24 above). This is a conclusion of law by the Hearing Officer that simply appears elsewhere in the Recommended Order, making Flagship Manor's exceptions too trivial to consider granting in this proceeding.

33. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Miscellaneous Exception 2 should be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

34. The third Miscellaneous Exception makes a similar argument that the Hearing Officer included findings of fact or conclusions of law in the same section labeled Burden of Proof. As above, there is no rule or law that prohibits a Hearing Officer from discussing the particularities of a case in an analysis of the burden of proof that applies to a case. Again, these findings and conclusions are repeated elsewhere in the Recommended Order.

35. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Miscellaneous Exception 3 should be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

36. The fourth Miscellaneous Exception regards the second sentence of Paragraph 14, again within the section titled Burden of Proof. As with Miscellaneous Exceptions 2 and 3 above, the appearance of this language in this section violates no rule or law, and it appears elsewhere in the Recommended Order.

37. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Miscellaneous Exception 4 should be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

38. Flagship Manor's fifth Miscellaneous Exception regards the exclusion of exhibits proffered by Flagship Manor (the "Proffered Exhibits") which are not part of the record in this case. Moreover, this Board does not have the authority to overrule an evidentiary ruling by the Hearing Officer unless it can be shown that the issue is one within the Board's "substantive jurisdiction." The provisions of §120.57(3)(f), Fla. Stat. are not within that substantive jurisdiction, and therefore cannot be disturbed by this Board.

39. It is likewise without question that the Proffered Exhibits are, in fact, an attempt to "amend or supplement" the Application in violation of statute. Flagship Manor itself admits, in its Proposed Recommended Order (p. 5):

> It is Flagship's position that the foregoing exhibits further explain aspects of information which was already contained within the Flagship Application rather than amend or supplement it. Florida Housing and the Intervenor take the position that the explanations are not relevant and cannot be considered because they are an amendment or supplementation to the Flagship Application in violation of the statute. **The issue with regard to these exhibits is not one of amendment, but rather *supplementation***. (Emphasis added).

Florida Housing agrees that the Proffered Documents supplement the Application, and are therefore not to be considered in this proceeding.

40. Flagship Manor repeats this argument in its Miscellaneous Exception 6, and for the sake of brevity, would adopt its same response thereto for this Exception. The same is true for Miscellaneous Exception 7.

41. Flagship Manor's Miscellaneous Exceptions are improper and should not be considered by this Board as the Proffered Exhibits are not part of the record of this case – they were not admitted into evidence and specifically excluded therefrom by the Conclusions of Law of the Recommended Order, a decision not within the purview of this Board to disturb.

42. For these reasons and those further reasons set forth in the Recommended Order, Flagship Manor's Miscellaneous Exceptions 5, 6 and 7 should

be rejected, and the Board should adopt the pertinent Findings of Fact and Conclusions of Law of the Recommended Order as its Final Order.

43. Florida Housing concedes that the language "further defines" differs from the language of the Purchase Contract, which states "…as more particularly described." Accordingly, Florida Housing agrees with this Exception and with the issuance of a Final Order replacing that language with the language found in the Purchase Contract.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors reject the arguments presented in Flagship Manor's Exceptions, other than as noted above in paragraph 43, 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 18th day of June, 2015.

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C.ERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Exceptions has been furnished this 18th day of June, 2015 by electronic mail to:

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