

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

HTG GRAND EAST, LTD.,

Petitioner,

FHFC Case No. 2023-014BID

DOAH Case No. 23-0670BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

BEACON AT CREATIVE VILLAGE –
PHASE II PARTNERS, LTD.,

Intervenor.

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on June 9, 2023. Petitioner HTG Grand East, LTD (“HTG Grand”) and Intervenor Beacon at Creative Village Phase II Partners, Ltd. (“Beacon”) were applicants under Request for Applications 2022-202: Housing Credit Financing For Affordable Housing Developments Located In Broward, Duval, Hillsborough, Orange, Palm Beach, And Pinellas Counties (the “RFA”). The matter for consideration before this Board is a

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Thomas Blamoy / DATE: 6/12/2023

Recommended Order issued pursuant to §§120.57(1) and 102.57(3), Florida Statute, the Exceptions to the Recommended Order, and the responses to the exceptions.

On January 27, 2023, Florida Housing Finance Corporation (“Florida Housing”) posted notice of its intended decision to award funding to Beacon for Orange County. HTG Grand was found eligible but not selected for funding. HTG Grand timely filed a notice of intent to protest, followed by a formal written protest, and Beacon timely intervened.

Florida Housing referred the matter to the Division of Administrative Hearings (“DOAH”) and Administrative Law Judge (“AJ”) J. Bruce Culpepper was assigned to conduct the final hearing. The hearing was conducted as scheduled on March 10, 2023. The only issue at hearing was whether Beacon met the RFA requirement to demonstrate Availability of Sewer.

After consideration of the oral and documentary evidence presented at hearing, the parties proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 8, 2023. The ALJ found that Beacon’s sewer form did not meet the RFA requirements for the Availability of Sewer. The ALJ recommended that Florida Housing enter a final order finding Beacon’s application was ineligible. A true and correct copy of the Recommended Order is attached as “Exhibit A.”

On May 16, 2023, Beacon filed exceptions to the Recommended Order, a copy of which is attached as “Exhibit B.” On May 19, 2023, Florida Housing and HTG Grand filed a joint response to the exceptions, a copy of which is attached as “Exhibit C.”

Beacon’s Exception No. 1 to Paragraphs 21, 25, 26, 39, and 40-45

1. Beacon filed exceptions to Finding of Fact paragraphs 21, 25, 26, 39, and 40-45 of the Recommended Order.

2. After a review of the record, the Board finds that the Findings of Fact in paragraphs 21, 25, 26, 39, and 40-45 are supported by competent substantial evidence.

3. The Board rejects Beacon’s Exception No. 1 to the Findings of Fact in paragraphs 21, 25, 26, 39, and 40-45.

Beacon’s Exception No. 2 to Paragraphs 47-55 and 57-66

4. Beacon filed an exception to Conclusion of Law paragraphs 47-55 and 57-66 of the Recommended Order.

5. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 47-55 and 57-66 of the Recommended Order.

6. After a review of the record, the Board finds that the Conclusions of Law in paragraphs 47-55 and 57-66 are reasonable and supported by competent substantial evidence.

7. The Board rejects Beacon's Exception No. 2 to the Conclusions of Law in paragraphs 47-55 and 57-66 of the Recommended Order.

Ruling on the Recommended Order

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

9. The Conclusions of Law set out in the Recommended Order are reasonable and supported by competent substantial evidence.

10. The Recommendation of the Recommended Order is reasonable and supported by competent substantial evidence.

ORDER

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

i. 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.

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

iii. The Recommendation of the Recommended Order is adopted as Florida Housing's Recommendation and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Beacon's application is ineligible for funding under the RFA.

DONE and ORDERED this 9th day of June, 2023.



FLORIDA HOUSING FINANCE CORPORATION

By: 
Chair

Copies to:
Betty Zachem, Esq.
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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, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

HTG GRAND EAST, LTD.,

Petitioner,

vs.

Case No. 23-0670BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

BEACON AT CREATIVE VILLAGE –
PHASE II PARTNERS, LTD.,

Intervenor.

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1) and (3), Florida Statutes (2022),¹ on March 10, 2023, in Tallahassee, Florida.

APPEARANCES

For Petitioner HTG Grand East, LTD.:

J. Stephen Menton, Esquire
Tana D. Storey, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

¹ Unless otherwise stated, all citations to the Florida Statutes are to the 2022 version.

For Respondent Florida Housing Finance Corporation:

Betty C. Zachem, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor Beacon At Creative Village-Phase II Partners, LTD.:

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue in this bid protest matter is whether Respondent, Florida Housing Finance Corporation's, intended award of funding under Request for Applications 2022-202 was contrary to its governing statutes, rules, or the solicitation specifications.

PRELIMINARY STATEMENT

This matter involves the protest by Petitioner, HTG Grand East, LTD ("HTG Grand"), to the intended decision of Respondent, Florida Housing Finance Corporation ("Florida Housing"), of an award under Request for Applications 2022-202 ("RFA 2022-202").

On November 14, 2022, Florida Housing issued RFA 2022-202 soliciting applications to allocate competitive tax credits for affordable housing developments to be located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties, Florida.²

² No protests were made to the specifications or terms of RFA 2022-202.

On January 27, 2023, Florida Housing posted notice of its intent to award funding for the development that qualified for the Family Designation in Orange County to Intervenor Beacon At Creative Village – Phase II Partners, LTD ("Beacon").

On February 13, 2023, HTG Grand timely filed a formal written protest challenging the eligibility and selection of Beacon's application.

On February 17, 2023, Florida Housing referred HTG Grand's protest to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge ("ALJ") to conduct a chapter 120 evidentiary hearing.

The final hearing was held on March 10, 2023. Joint Exhibits 1 through 7 were admitted into evidence. Beacon's Exhibits 1 through 3 were also admitted. Florida Housing called Marisa Button as a witness, from whom all parties elicited testimony. HTG Grand offered the testimony of Rodrigo Paredes. Beacon provided testimony from Scott Culp. In addition, the parties stipulated to a number of facts in a Joint Pre-Hearing Statement filed on March 8, 2023, which have been incorporated into this Recommended Order.

A one-volume Transcript of the final hearing was filed with DOAH on April 7, 2023. At the close of the hearing, the parties were advised of a ten-day time frame after receipt of the hearing transcript to file post-hearing submittals. All parties filed Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to provide and promote

public welfare by administering the governmental function of financing affordable housing in the state of Florida. For purposes of this administrative proceeding, Florida Housing is considered an agency of the state of Florida.

2. Beacon applied for competitive housing credits awarded by RFA 2022-202 for a proposed affordable housing development to be located in Orange County, Florida. Florida Housing deemed Beacon's application (Application Number 2023-112C) eligible for funding and preliminarily selected Beacon for an award of housing credits for Orange County.

3. HTG Grand also submitted an application (Application Number 2023-103C) to Florida Housing for housing credits through RFA 2022-202 for a proposed affordable housing development in Orange County, Florida. Florida Housing deemed eligible, but did not select, HTG Grand's application for funding under RFA 2022-202.

4. As background, Florida Housing is designated as the housing credit agency for the state of Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code. As such, Florida Housing is authorized to establish procedures to distribute low-income housing tax credits (commonly referred to as "housing credits" or "tax credits") and to exercise all powers necessary to administer the allocation of those credits. § 420.5099, Fla. Stat.

5. Florida Housing's low-income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. The affordable housing industry relies heavily on public funding, subsidies, and tax credits to support projects that may not be financially sustainable in light of the sub-market rents they charge. The housing credits provide an "equity infusion" into prospective housing developments. For this reason, housing credits allow developers to reduce the amount necessary to fund housing projects. Concomitantly, applicants who are awarded housing credits can (and must) offer the subject property at lower, more affordable rents.

6. Florida Housing uses a competitive solicitation process to award the housing credits. Florida Housing initiates the solicitation process by issuing a

request for applications ("RFA"). §§ 420.507(48) and 420.5093, Fla. Stat.; and Fla. Admin. Code Chs. 67-48 and 67-60.

7. The RFA competitive solicitation process begins when Florida Housing requests its Board of Directors (the "Board") to approve Florida Housing's plan for allocating resources through various RFAs. If the Board approves the plan, Florida Housing begins work on each individual RFA.

RFA 2022-202:

8. The RFA at issue in this matter is RFA 2022-202, entitled "Housing Credit Financing For Affordable Housing Developments Located In Broward, Duval, Hillsborough, Orange, Palm Beach, And Pinellas Counties." The purpose of RFA 2022-202 is to distribute funding to develop affordable, multifamily housing in the named Florida counties. Through RFA 2022-202, Florida Housing intends to provide an estimated \$16,491,600.00 of housing credit financing.

9. Florida Housing issued RFA 2022-202 on November 14, 2022.³ RFA 2022-202 set forth the information each Applicant was required to provide. This information included a number of submission requirements, as well as a general description of the type of project that would be considered for funding. RFA 2022-202 Section Three A.3 directed Applicants to submit their Application Packages electronically through the Florida Housing RFA Webpage. RFA 2022-202 Section Three A.2.b further instructed Applicants to compile all attachments together into one All Attachments Document, which Applicants would then upload "in a pdf format." Applicants were advised that the All Attachments Document could be created by "merging the documents using a computer program such as Adobe Acrobat Pro or by scanning all of the attachments together."

³ Florida Housing subsequently modified RFA 2022-202 on November 18, 2022, November 29, 2022, and December 20, 2022.

10. All applications for funding under RFA 2022-202 were due to Florida Housing by December 29, 2022. Florida Housing received 15 applications for housing credits, including timely applications from both Beacon and HTG Grand.

11. Florida Housing appointed a Review Committee from amongst its staff to evaluate and score the applications. The Review Committee independently reviewed, deemed eligible or ineligible, scored, and ranked applications pursuant to the terms of RFA 2022-202, as well as Florida Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.

12. Beacon and HTG Grand were the only two Applicants for housing credits in Orange County. Through the scoring and evaluation process outlined in RFA 2022-202, the Review Committee found both HTG Grand and Beacon eligible for funding under RFA 2022-202. Beacon's application, however, received a scoring preference because Beacon qualified for Local Government Areas of Opportunity Designation points. With its application, Beacon produced evidence of a "local government" contribution from the City of Orlando, which demonstrated to Florida Housing that Orlando was committed to Beacon's housing project. HTG Grand's application, on the other hand, did not include a local government contribution. Consequently, Beacon's application received five additional points over HTG Grand's application. (RFA 2022-202 Section Four, A.11.d; Section Five A.2; and Section Five B.1). Beacon, therefore, was the highest-ranking Applicant for an award of the tax credits in Orange County.

13. Following its assessment, the Review Committee recommended six applications to the Board for funding in the designated counties. Included in the Review Committee's recommendations was Beacon's application for the Family Demographic for Orange County.

14. On January 27, 2023, the Board formally approved the Review Committee recommendations. As part of its determinations, the Board

selected Beacon's application for housing credits in Orange County. The Board awarded Beacon \$2,850,000.00 in housing credits.

The HTG Grand Protest:

15. HTG Grand protests the Board's selection of Beacon's development instead of its own. HTG Grand, the second ranked Applicant for Orange County, challenges Florida Housing's determination regarding the eligibility of, and award to, Beacon. If HTG Grand successfully demonstrates that Florida Housing erred in accepting, then scoring, Beacon's application, or the evidence demonstrates that Beacon's application was ineligible or nonresponsive, then HTG Grand will be entitled to an award of housing credits for Orange County through RFA 2022-202 instead of Beacon.⁴

16. In its protest, HTG Grand raises one objection to Beacon's application. HTG Grand contends that Beacon failed to satisfy the "Availability of Sewer" requirement under RFA 2022-202 Section Four A.7.b(3). Specifically, HTG Grand points to an alleged deficiency in Beacon's "Florida Housing Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank Form" (the "Sewer Form"). HTG Grand asserts that the Sewer Form Beacon included with its application was fatally flawed due to the fact that it was not signed by a waste treatment service provider. HTG Grand argues that a "properly completed and executed" (i.e., signed) Sewer Form is a mandatory eligibility requirement per RFA 2022-202 in order to be selected for funding. Consequently, the "incomplete" Sewer Form renders Beacon's application ineligible for funding. Therefore, Florida Housing should have disqualified Beacon from an award under RFA 2022-202.

17. At the final hearing, Florida Housing announced that its initial determination that Beacon's application was eligible for funding was incorrect. Instead, after reviewing HTG Grand's allegations and realizing

⁴ No party alleged that HTG Grand's application failed to satisfy all eligibility requirements or was otherwise ineligible for funding under RFA 2022-202.

that Beacon's Sewer Form was unsigned, Florida Housing took the position that Beacon's application failed to meet mandatory RFA requirements and is ineligible under RFA 2022-202. As a result, Florida Housing sided with HTG Grand and declared that Florida Housing should have selected HTG Grand's application for an award of housing credits.

18. To explain its reasoning, Florida Housing presented the testimony of Marisa Button. Ms. Button is Florida Housing's Managing Director of Multifamily Programs. In her job, Ms. Button oversees the allocation of federal and state resources for the development and rehabilitation of multifamily affordable rental housing throughout the state of Florida. She is also responsible for Florida Housing's competitive solicitation process.

19. Initially, Ms. Button testified regarding RFA 2022-202's provision requiring the Sewer Form. Ms. Button reported that, as an eligibility requirement, RFA 2022-202 Section Four A.7.b(3) charged each Applicant to demonstrate the "Availability of Sewer" to the development site. Specifically, RFA 2022-202 Section Four A.7.b(3) directed the Applicant to:

Demonstrate that as of the Application Deadline sewer capacity, package treatment or septic tank service is available to the entire proposed Development site by providing as **Attachment 9** to Exhibit A:

(a) The properly completed and executed Florida Housing Finance Corporation Verification of Availability of Infrastructure – Sewer Capacity, Package Treatment, or Septic Tank form (Form Rev. 07-2022) [the Sewer Form]; or

(b) Documentation from the waste treatment service provider that contains the Development location, the number of units, and is dated within 12 months of the Application Deadline. The documentation may not be signed by the Applicant, by any related parties of the Applicant, by any Principals or Financial Beneficiaries of the Applicant, or by any local elected officials.

In other words, the RFA instructed each Applicant to demonstrate the "Availability of Sewer" to its proposed development site through one of two ways. The Applicant could provide with its application a "properly completed and executed" Sewer Form ("Option (a)"). The second option ("Option (b)") was for the Applicant to produce documentation from a waste treatment service provider that incorporated certain information including the development location, as well as the number of units in the development, and was signed within 12 months of the application deadline.

20. Regarding Option (a), Ms. Button relayed that the Sewer Form was created by Florida Housing to assist Applicants comply with the RFA's "Availability of Sewer" requirement. RFA 2022-202 included a blank template Sewer Form for Applicants' reference and use. The Sewer Form contained spaces in which the Applicant could insert the development's name, location, and number of units. The Sewer Form further read, in part:

The undersigned service provider confirms that, as of the date that this form was signed, Sewer Capacity or Package Treatment is available to the proposed Development; or there are no known prohibitions to installing a Septic Tank system with adequate capacity for the proposed Development location, or if necessary, upgrading an existing Septic Tank system with adequate capacity for the proposed Development location.

In addition, the Sewer Form contained a "CERTIFICATION" section, which stated, "I certify that the foregoing information is true and correct." This language was followed by spaces the certifying individual was to complete, including: Signature, Print or Type Name, Print or Type Title, Date Signed, Name of Entity Providing Service, Address (street address, city, state), and Telephone Number (including area code).

21. Beacon included the Sewer Form under Option (a) with its application. Beacon's Sewer Form CERTIFICATION displayed the following information:

Signature: [blank]

Print or Type Name: David Breitrack, P.E.

Print or Type Title: Engineering & Mapping Manager

Date Signed: November 11, 2022

Name of Entity Providing Service: City of Orlando Water
Reclamation Division

Address (street address, city, state): 5100 L.B. McLeod Rd
Orlando, FL 32811

Telephone Number (including area code): 407-246-2213

As shown above, the signature line on Beacon's Sewer Form was empty. In other words, Beacon's Sewer Form did not bear the signature of Mr. Breitrack, the person who Beacon represented certified that sewer services were available to its development site.

22. By contrast, the Sewer Form that HTG Grand submitted contained the following CERTIFICATION:

Signature: David Breitrack Digitally signed by David Breitrack

Date: 2022.11.10 10:05:54 -05'00'^[5]

Print or Type Name: David Breitrack, P.E.

Print or Type Title: Engineering & Mapping Manager

Date Signed: November 10, 2022

Name of Entity Providing Service: City of Orlando Water
Reclamation Division

Address (street address, city, state): 5100 L.B. McLeod Rd
Orlando, FL 32811

Telephone Number (including area code): 407-246-2213

⁵ See section 668.004, Florida Statutes, which states that, "Unless otherwise provided by law, an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature."

23. Ms. Button voiced that HTG Grand's Sewer Form was "properly completed and executed."

24. During her testimony, Ms. Button acknowledged that Florida Housing did not discover the blank signature line on Beacon's Sewer Form until after the Review Committee had completed its evaluation and preliminarily deemed Beacon's application eligible for funding under RFA 2022-202. Ms. Button offered that whoever scored Beacon's application simply did not pick up on the missing signature. Consequently, the Board was unaware of the lack of a signature on Beacon's Sewer Form at the time it approved the Review Committee's recommendation for housing credits in Orange County.

25. Ms. Button declared that the Review Committee's initial determination, as well as the Board's selection of Beacon's application, was a mistake. Instead, Florida Housing should have found that Beacon's Sewer Form omitted information that was specifically required by RFA 2022-202 Section Four A.7.b(3)(a), i.e., the signature of the individual who certified that sewer services were available to the development site on behalf of a waste treatment service provider. As a result, Ms. Button asserted that Beacon's Sewer Form materially deviated from the RFA specifications because it was not "properly completed or executed" as mandated by RFA 2022-202 Section Four A.7.b(3)(a). Consequently, Ms. Button maintained that Beacon's Application is not eligible for an award of housing credits.

26. Ms. Button further advised that evidence of the "Availability of Sewer" to the property provides Florida Housing reasonable assurances that the Applicant will be prepared to proceed with its housing development if awarded funding. Conversely, the omission of the signature creates uncertainty regarding whether the Applicant can provide essential services to its housing residents. Ms. Button also commented that an actual signature on the Sewer Form is essential because the individual who signs the form personally certifies to Florida Housing that the Applicant's representation that sewer services are available to the development property is correct and

true. In addition, Ms. Button expressed that if Florida Housing were to accept Beacon's unexecuted Sewer Form, Beacon would receive a competitive advantage over other Applicants who made the effort to coordinate and obtain a signed Sewer Form certification. Finally, Ms. Button imparted that Florida Housing's acceptance of an incomplete Sewer Form would adversely impact Florida Housing's ability to fairly administer its competitive solicitation process.

27. HTG Grand presented the testimony of Rodrigo Paredes, its Vice President of Development. Among his responsibilities, Mr. Paredes prepares and reviews HTG Grand's applications for tax credits from Florida Housing.

28. Mr. Paredes supported Florida Housing's (Ms. Button's) position that Beacon's Sewer Form was not "properly completed and executed" without Mr. Breitrack's signature. Mr. Paredes explained that he understood RFP 2022-202 Section Four A.7.b(3) to give an Applicant two alternatives to use to demonstrate the availability of sewer services to its development. An Applicant could either complete Florida Housing's Sewer Form, or they could obtain a letter from a waste treatment company. Mr. Paredes relayed that HTG Grand elected to use the Sewer Form. In so doing, HTG Grand took steps to contact Mr. Breitrack with the City of Orlando, who signed the Sewer Form for its development site. HTG Grand then uploaded the completed, and digitally signed, Sewer Form with its Application.

29. Mr. Paredes relayed that HTG Grand expended time and effort to ensure that its Sewer Form was "properly completed and executed." Therefore, he maintained that an Applicant who was allowed to submit an unexecuted/unsigned Sewer Form would receive a competitive advantage.

30. At the final hearing, Beacon did not dispute that the Sewer Form it submitted with its application did not contain Mr. Breitrack's signature (actual or digital) on the signature line. Beacon insisted, however, that its

Sewer Form complied with the RFA specifications. Therefore, nothing prohibited Florida Housing from awarding Beacon housing credits under RFA 2022-202.

31. To explain its position, Beacon called Scott Culp. Mr. Culp is a principal of Atlantic Housing Partners II, LLC ("Atlantic Housing II"), the Developer of the Beacon development for which housing credits are being sought. Mr. Culp relayed that Atlantic Housing II is in the business of developing affordable housing communities.

32. Mr. Culp offered two arguments to advance that the Sewer Form Beacon presented with its application was "properly completed and executed." First, Mr. Culp pressed that its Sewer Form did bear a signature. Mr. Culp explained that Beacon chose to use Option (a) to establish its "Availability of Sewer" status and downloaded a blank template of the Sewer Form from the Florida Housing website. For the certifying signature, Beacon contacted the City of Orlando Water Reclamation Division (the "Reclamation Division"). Beacon then filled in the pertinent information regarding its development onto the Sewer Form and emailed it to the Reclamation Division. Mr. Culp testified that David Breitrack completed the document on behalf of the Reclamation Division and email it back to Beacon. Mr. Culp claimed that the Sewer Form Mr. Breitrack returned to Beacon bore a clearly visible entry on the signature line that read "David Breitrack," followed by the notation "Digitally signed by David Breitrack Date: 2022.11.11 15:33:47 - 05'00'."

33. Beacon introduced David Breitrack's (deposition) testimony during the final hearing. Mr. Breitrack is the Engineering and Mapping Manager for the Reclamation Division. Mr. Breitrack confirmed that he received and reviewed a Sewer Form from Beacon. Mr. Breitrack further corroborated Mr. Culp's representations that he affixed his digital signature to the CERTIFICATION section of the Sewer Form. He then emailed the signed document back to Beacon.

34. Mr. Culp stated that, upon receiving the signed Sewer Form from Mr. Breitrack, Beacon incorporated it, together with all the other attachments to its application, into one pdf document using Adobe Acrobat Pro as instructed in RFA 2022-202 Section Three A.2.b. Beacon then uploaded the pdf document to the Florida Housing website with its application.

35. Mr. Culp asserted that Beacon did not learn that the signature line on its Sewer Form did not bear Mr. Breitrack's signature until HTG Grand filed its Notice of Intent to Protest, which was after all applications for tax credits were due to Florida Housing.

36. As to why Mr. Breitrack's signature was not included on the pdf document that Florida Housing reviewed and scored, Mr. Culp was only able to offer his best guess based on his investigation into the matter. Mr. Culp surmised that when Beacon used Adobe Acrobat Pro to compile all the attachments together into the single All Attachments Document as RFA 2022-202 suggested, the Adobe program stripped Mr. Breitrack's digital signature off of the Sewer Form. Beacon did not catch the flaw before it unwittingly uploaded the unsigned Sewer Form as part of its application.

37. Despite the missing signature on the signature line, at the final hearing, Mr. Culp contended that Beacon's Sewer Form does, in fact, contained Mr. Breitrack's signature. Mr. Culp declared that the signature is detectable in the form of "metadata" that is embedded in the All Application Document it submitted with its application. Mr. Culp stated that if Florida Housing opens the Sewer Form in Adobe Acrobat Pro certain information about the digital data entered onto the pdf document can be seen in the "comment" sidebar. Mr. Culp represented that "clicking" on the signature line data field reveals an alphanumeric designation that reads "BRE18354," followed by the date "Nov 11, 2022." Mr. Culp asserted that this data is the personal digital identification of Mr. Breitrack and confirms that Mr. Breitrack "properly completed and executed" Beacon's Sewer Form. Therefore, Mr. Culp urged that, despite not possessing a "visible" signature,

its Sewer Form provided Florida Housing acceptable verification of its "Availability of Sewer."

38. Mr. Culp next argued that, even if its Sewer Form was not "properly completed and executed" in accordance with Option (a), the document still qualifies under Section Four A.7.b(3)(b) as "documentation from the waste treatment service provider." In other words, Beacon's Sewer Form includes each piece of information necessary to demonstrate the "Availability of Sewer" to its property. Specifically, Mr. Culp pointed to the fact that its Sewer Form lists the development's waste treatment service provider (the City of Orlando), the development's location (630 W. Amelia Street, Orlando, FL), and the number of units in the development (81). Beacon's Sewer Form is also dated within 12 months of the RFA application deadline (November 11, 2022). As such, Mr. Culp contended that the Sewer Form Beacon submitted with its application contained all the information needed to satisfy Section Four A.7.b(3). Therefore, Florida Housing correctly accepted, deemed eligible, and scored Beacon's application for housing credits.

39. Responding to Beacon/Mr. Culp's arguments, Ms. Button stated that a signature on the Sewer Form is significant in that the signature is a visible confirmation from a third-party representative that substantiates and verifies the accuracy of the information written on the document. Without a physical signature, Ms. Button expressed that Florida Housing cannot adequately discern whether an independent sewer provider has actually reviewed the Applicant's representation that sewer services are available to its development site. Ms. Button explained that accepting a form that did not bear a signature would force the Review Committee to rely upon an Applicant's uncorroborated representations.

40. Ms. Button further maintained that relying on digital metadata would not be either practical, workable, or in Florida Housing's best interests. Ms. Button stated that the Applicant, not Florida Housing, is responsible for

ensuring that all mandatory eligibility items are properly completed, executed, and uploaded to the web portal by the application deadline. Ms. Button, who confessed that she is not an expert in interpreting or understanding the substance of metadata, expressed that even after reviewing the digital notations included with Beacon's Sewer Form, she could not identify any electronic entry or information in the "comment" section that she would consider a "signature." Ms. Button added that the Review Committee does not rely on metadata or other electronic "comments" included in the applications of any RFA Applicants when accepting signatures or scoring submissions.

41. In addition, Ms. Button asserted that Beacon's argument that its Sewer Form meets Option (b) should also fail. Ms. Button conveyed that Option (b) required the Applicant to provide documentation directly from a waste treatment service provider, e.g., on their letterhead and with their signature, attesting to the information they are verifying. Ms. Button stated that Florida Housing, not a sewer provider, drafted the language of the Sewer Form. Therefore, the Sewer Form is not an acceptable substitute for a document that is generated by a provider who independently certifies (with a signature) that sewer services will be available to an Applicant's development site.

42. To conclude her testimony, Ms. Button relayed that Florida Housing has determined that, because Beacon's Sewer Form was not properly "executed" with an actual signature that is visible on the face of the document, Beacon's application did not meet the requirements of RFA 2022-202 Section Four A.7.b(3). Therefore, Beacon's development must be deemed ineligible for funding, and HTG Grand should be selected for funding as the next highest ranking development.

43. Ms. Button's explanation detailing why Beacon's application was not eligible for consideration for housing credits is credible and is credited. Ms. Button persuasively testified that Beacon failed to include with its

application certain material information verifying the availability of sewer services to its development site as required by RFA 2022-202 Section Four A.7.b(3). Specifically, to be "properly completed and executed," Beacon's Sewer Form required a signed CERTIFICATION on the Sewer Form. Failure to include such a signature on the document rendered Beacon's application ineligible under the RFA specifications. Therefore, Florida Housing's selection of Beacon for an award of housing credits was improper.

44. Conversely, Beacon's (Mr. Culp's) argument that its application complied with RFA 2022-202 Section Four A.7.b(3) falls short. Mr. Culp failed to effectively explain how Beacon's Sewer Form complied with either Option (a) or Option (b). On the contrary, the facts found in this matter establish that the Sewer Form was not "properly completed and executed" as required by Option (a). Neither did the Sewer Form provide sufficient "documentation from the waste service provider" to satisfy Option (b).

45. Accordingly, based on the evidence in the record, HTG Grand demonstrated, by a preponderance of the evidence, that Florida Housing's decision to award housing tax credits to Beacon was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, HTG Grand met its burden of proving that Florida Housing's intended award of funding to Beacon under RFA 2022-202 was contrary to its governing statutes, rules, or policies, or the solicitation specifications. Therefore, Florida Housing must rescind the award to Beacon, and select HTG Grand for the award of housing credits under RFA 2022-202.

CONCLUSIONS OF LAW

46. DOAH has jurisdiction over the subject matter and the parties to this competitive procurement protest pursuant to sections 120.569 and 120.57(1) and (3). *See also* Fla. Admin. Code R. 67-60.009(2).

47. HTG Grand challenges Florida Housing's selection of Beacon's application for an award of housing credits under RFA 2022-202. Pursuant to

section 120.57(3)(f), the burden of proof in this matter rests on HTG Grand as the party protesting the proposed agency action. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

Section 120.57(3)(f) further provides that in a bid protest:

[T]he 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.

48. The phrase "de novo proceeding" in section 120.57(3)(f) describes a form of intra-agency review. The purpose of the ALJ's review is to "evaluate the action taken by the agency." *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013); and *State Contracting*, 709 So. 2d at 609. A de novo proceeding "simply means that there was an evidentiary hearing ... for administrative review purposes" and does not mean that the ALJ "sits as a substitute for the [agency] and makes a determination whether to award the bid *de novo*." *J.D.*, 114 So. 3d at 1133; *Intercontinental Props., Inc. v. Dep't of HRS*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992). "The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting*, 709 So. 2d at 609.

49. Accordingly, HTG Grand, as the party protesting the intended award, must prove, by a preponderance of the evidence, that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of RFA 2022-202. The standard of proof that HTG Grand must meet to establish that Florida Housing's intended award violates this statutory standard is that Florida Housing's decision was: (a) clearly erroneous; (b) contrary to competition; or

(c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.; and *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016).

50. The "clearly erroneous" standard has been defined to mean "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations." *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). A factual determination is "clearly erroneous" when the reviewer is "left with a definite and firm conviction that [the fact-finder] has made a mistake." *Tropical Jewelers Inc. v. Bank of Am., N.A.*, 19 So. 3d 424, 426 (Fla. 3d DCA 2009); *see also Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956)(when a finding of fact by the trial court "is without support of any substantial evidence, is clearly against the weight of the evidence or ... the trial court has misapplied the law to the established facts, then the decision is 'clearly erroneous.'").

51. An agency action is "contrary to competition" if it unreasonably interferes with the purpose of competitive procurement. As described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931):

[T]he object and purpose [of the bidding process] ... is to 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 ... , by affording an opportunity for an exact comparison of bids.

In other words, the "contrary to competition" test forbids agency actions that:

(a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or

(d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. See § 287.001, Fla. Stat.; and *Harry Pepper & Assoc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

52. Finally, section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary, or capricious." An "arbitrary" decision is one that is "not supported by facts or logic, or is despotic." *Agrico Chemical Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), *cert. denied*, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." *Id.* See also *Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 40 (Fla. 1st DCA 2006).

53. To determine whether an agency acted in an "arbitrary" or "capricious" manner, consideration must be given to "whether the agency: (1) has considered all relevant factors; (2) given actual, good faith consideration to the factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Enter. v. Dep't of Env'tl. 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, 632 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."

54. Florida Housing's governing statutes, rules, or policies in this matter include chapter 67-60, which Florida Housing implemented pursuant to its rulemaking authority under section 420.507(12). Florida Housing adopted chapter 67-60 to administer the competitive solicitation process. According to rule 67-60.006(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 [Florida Housing], the Application shall be considered ineligible.

55. The solicitation specifications pertinent to this matter include the following:

a. RFA 2022-202 Section Three F.3., which provides that, by applying, each Applicant certifies that:

Proposed Developments funded under this RFA will be subject to the requirements of the RFA, inclusive of all Exhibits, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the requirements outlined in Rule Chapter 67-48, F.A.C. and the Compliance requirements of Rule Chapter 67-53, F.A.C.

b. RFA 2022-202 Section Four A.1. adds that:

During the Review Committee scoring process, the Corporation (i) may rely on the answers submitted by the Applicant in Exhibit A ... and (ii) may, but is not obligated to, review the substance of the documentation that is submitted as Attachments to the Application.

If it is determined that the Attachments do not meet the RFA requirements or the Applicant submitted materially incorrect information in the Application, [Florida Housing] may take any or all of the following actions, even if the Application was not selected for funding, was deemed ineligible, or was withdrawn: deem the Application ineligible, [and] rescind the award

c. RFA 2022-202 Section Five A.1, which provides that:

[O]nly Applications that meet all of the following Eligibility Items will be eligible for funding and considered for funding selection.

Included in the list of Eligibility Items is "Availability of Sewer demonstrated."

56. In order to establish the "Availability of Sewer," RFA 2022-202 Section Four A.7.b(3) provides that the Applicant must:

Demonstrate that as of the Application Deadline sewer capacity, package treatment or septic tank service is available to the entire proposed Development site by providing as **Attachment 9** to Exhibit A:

(a) The properly completed and executed [Sewer Form]; or

(b) Documentation from the waste treatment service provider that contains the Development location, the number of units, and is dated within 12 months of the Application Deadline. The documentation may not be signed by the Applicant, by any related parties of the Applicant, by any Principals or Financial Beneficiaries of the Applicant, or by any local elected officials.

57. Turning to the merits of HTG Grand's protest, based on the competent substantial evidence in the record, Florida Housing's decision to award housing tax credits under RFA 2022-202 to Beacon was clearly erroneous, contrary to competition, arbitrary, and capricious. The evidence and testimony presented at the final hearing demonstrates that Beacon's application did not include certain material information set forth in the RFA (a signed Sewer Form). Therefore, Beacon's application should be considered nonresponsive and ineligible to receive funding. Accordingly, Florida Housing's initial award to Beacon's housing project was contrary to its governing statutes, rules, policies, and the solicitation specifications and must be rescinded.

58. Regarding the specific objection, HTG Grand proved that the Sewer Form Beacon submitted with its application did not comply with RFA 2022-202 Section Four A.7.b(3). In particular, RFA 2022-202 Section Four A.7.b(3)(a) (Option (a)) required the Sewer Form to be "properly completed

and executed." The evidence is undisputed that Beacon's Sewer Form did not bear the signature (digital or manual) of a certifying individual. Therefore, Beacon's Sewer Form, on its face, was not "completed" or "executed" as needed to fulfill the conditions of Option (a). Consequently, Beacon's application failed to demonstrate the "Availability of Sewer" to its development site, which was a mandatory eligibility item per RFA 2022-202 Section Five A.1. As a result, as Florida Housing now acknowledges, Beacon's application was not eligible for funding. Accordingly, Florida Housing's preliminary decision to award tax credits to Beacon was clearly erroneous, contrary to competition, arbitrary, or capricious.

59. Beacon's argument that its Sewer Form did bear the certifying individual's signature in the form of metadata embedded in the pdf document is not persuasive. HTG Grand's Sewer Form establishes that Mr. Breitrick signs his name as "David Breitrick." No evidence shows that Mr. Breitrick adopted the electronic notation "BRE18354" as his certifying signature.

60. Additionally, Ms. Button rationally testified that it would be impractical, as well as confer a competitive advantage, for Florida Housing's Review Committee to examine the metadata in an Applicant's application to determine whether an unsigned attachment was "properly completed and executed." Moreover, there is no requirement in the governing statutes or rules or the RFA specifications that instruct Florida Housing to consider metadata as a substitute for a visible signature. Ms. Button and Mr. Paredes also effectively articulated how accepting a document that failed to include a signature would create an unfair benefit over competing Applicants who did produce "properly completed and executed" forms.

61. Further, Beacon's argument that Florida Housing should accept its (unsigned) Sewer Form under RFA 2022-202 Section Four A.7.b.(3)(b) (Option (b)) is not convincing. To satisfy Option (b), a party must demonstrate "Availability of Sewer" to its proposed development through documentation from a waste treatment service provider. Florida Housing, through

Ms. Button, capably explained that an Applicant cannot satisfy RFA 2022-202 Section Four A.7.b.(3)(b) by submitting the Florida Housing Sewer Form. Instead, the documentation necessary to meet Option (b) must be generated by a third-party service provider in lieu of the Sewer Form certification.

62. Finally, Beacon presses for Florida Housing to waive the missing signature on the Sewer Form as a "minor irregularity." To Beacon's point, through RFA 2022-202 Section Three C.1, Florida Housing reserved the right to treat errors in applications as "minor irregularities." Rule 67-60.008 further provides:

Minor irregularities are those irregularities in an Application, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

See also Flagship Manor, LLC v. Fla. Hous. Fin. Corp., 199 So. 3d 1090, 1094 (Fla. 1st DCA 2016)("Florida Housing's regulations give it discretion to ignore 'minor irregularities' in an application."); *Heritage Oaks, LLP v. Madison Pointe, LLC*, 277 So. 3d 215, 218–19 (Fla. 1st DCA 2019)(A "minor irregularity" refers to variation "that does not provide a competitive advantage or benefit" to the applicant over other applicants. ... 'Minor irregularities' are errors 'that do not result in the omission of any material information.'"); and *Tropabest Foods, Inc. v. Fla. Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986)(A deviation in a response to an invitation to bid is "material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition.").

63. Based on credible testimony from Florida Housing (Ms. Button), the undersigned concludes that the lack of Mr. Breitrick's signature on the Sewer Form certifying the statements therein is not a "minor irregularity." Instead, Florida Housing makes the more sound argument that an unsigned, hence incomplete and uncertified, Sewer Form omits material information that is specifically required by the RFA. This omission should not be treated like a typographical error, or a responsive document that contains a signature on the wrong line or uses initials instead of a full name. A signature provides Florida Housing with direct evidence on the face of the document of the signer's intentions. In this case, the signature of Mr. Breitrick (either digitally or manually) on Beacon's Sewer Form would have presented apparent and clear evidence of his intent to certify that sewer services were available to Beacon's development site. Without this visible proof, Florida Housing did not have plain and unambiguous confirmation of Beacon's representations. On the contrary, the unsigned CERTIFICATION constituted a material deviation from the RFA requirements and should not be waived as a "minor irregularity."

64. Furthermore, RFA 2022-202 Section Four A.1 and rule 67-60.006(1) clearly establish that each Applicant is responsible for providing the required information when responding to a competitive solicitation. In this case, Mr. Culp credibly relayed the steps Beacon took to secure a certification from a service provider verifying the "Availability of Sewer" to its development property. Unfortunately, the Sewer Form Beacon ultimately uploaded with its application did not bear the signature of the certifying individual. The onus for this omission must fall on Beacon as the Applicant, not Florida Housing. And, the consequences for a nonresponsive application is ineligibility under the provisions of the RFA.

65. In sum, based on the competent substantial evidence introduced during the final hearing, HTG Grand (and Florida Housing) presented the more persuasive argument that the Sewer Form Beacon submitted with its

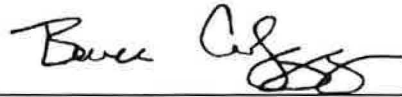
application did not satisfied the "Availability of Sewer" requirement set forth in RFA 2022-202 Section Four A.7.b(3). Ms. Button effectively explained how Beacon's Sewer Form was not "properly completed and executed" without including the actual signature of the certifying individual (Option (a)). She further cogently articulated how Beacon's Sewer Form did not meet the conditions of RFA 2022-202 Section Four A.7.b(3)(b) (Option (b)). Therefore, Beacon's Application was not eligible for an award of tax credits under RFA 2022-202.

66. Accordingly, based on the facts in the record, HTG Grand demonstrated, by a preponderance of the evidence, that Florida Housing's decision finding Beacon's application eligible for funding under RFA 2022-202 was clearly erroneous, contrary to competition, arbitrary, or capricious. Therefore, HTG Grand met its burden of proving that Florida Housing's preliminary intent to award housing tax credits to Beacon's proposed development is contrary to Florida Housing's governing statutes, rules, or policies, or the solicitation specifications. As a result, as a matter of law, Florida Housing is not entitled to proceed with the award of housing credits to Beacon under RFA 2022-202. Instead (subject to meeting the requirements of credit underwriting), the award of tax credits in Orange County should go to HTG Grand who did include a "properly completed and executed" Sewer Form with its application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order deeming Beacon's application ineligible for funding under RFA 2022-202 and rescinding its initial award of housing tax credits to Beacon. It is further recommended that the Florida Housing Finance Corporation select HTG Grand's application as a recipient of housing credit funding in Orange County, Florida, under RFA 2022-202.

DONE AND ENTERED this 8th day of May, 2023, in Tallahassee, Leon
County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2023.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

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HTG GRAND EAST, LTD.,

FLORIDA HOUSING
FINANCE CORPORATION

Petitioner,

Case No. 23-0067BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

BEACON AT CREATIVE VILLAGE –
PHASE II PARTNERS, LTD.

Intervenor.

**PETITIONER HTG GRAND EAST LTD. AND RESPONDENT FLORIDA HOUSING
FINANCE CORPORATION'S JOINT RESPONSE TO
INTERVENOR'S EXCEPTIONS TO THE RECOMMENDED ORDER**

Petitioner HTG Grand East, Ltd. (“HTG”) and Respondent Florida Housing Finance Corporation (“Florida Housing”), pursuant to Section 120.57, Florida Statutes, and Rule 28-106.217, Florida Administrative Code, hereby submits this Joint Response to the Exceptions filed by Intervenor Beacon At Creative Village – Phase II Partners, Ltd. (“Beacon”) to the Recommended Order issued in this proceeding, by Administrative Law Judge Bruce Culpepper (the “ALJ”) on May 8, 2023. In opposition to the Exception, HTG and Florida Housing state:¹

¹ The Recommended Order is referred to as “RO” followed by the appropriate paragraph and/or page number. The transcript of the hearing is referred to as “T.” followed by the appropriate page number. Reference to hearing exhibits are referred to by the name of the party that introduced the exhibits followed by exhibit number and Bates page numbers.

I. Introduction

The RO was entered by the ALJ after the consideration of the evidence and arguments presented at the formal administrative hearing and review of proposed findings and conclusions submitted by all parties. Beacon's Exceptions are nothing more than an attempt to reargue its position asserted at the final hearing. Based on the competent substantial evidence in the record, the ALJ rejected Beacon's arguments and determined that Beacon's application failed to meet the mandatory submitted requirements set forth in the Request for Applications ("RFA"). Consequently, the ALJ concluded Beacon was ineligible for funding. The ALJ's findings of fact are supported by competent substantial record evidence and his conclusions of law are reasonable and consistent with Florida law and prior Florida Housing precedent. Beacon's Exceptions must be denied.

II. Standard of Review

Section 120.57, Florida Statutes, sets forth the standards the Board must apply in reviewing the recommended order and issuing a final order. The Board may adopt the recommended order in its entirety or, with certain specific requirements, it may modify or reject the findings of fact and conclusions of law as explained below. See §120.57(1)(I), Fla. Stat. A final order must include an explicit ruling on each exception. Id.

The Board may not modify or reject the ALJ's findings of fact unless the agency first determines from a review of the entire record – and states with particularity in the final order – that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law. Id.; Kanter Real Estate, LLC v. Dep't of Env'tl. Pro., 267 So. 3d 483, 487-88 (Fla. 1st DCA 2019); Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA

1986) (“It is well settled that an agency may not reject a hearing officer’s factual findings on the conclusory ground that they are not supported by competent substantial evidence, without offering specific reasons for such rejection.”). “Competent” evidence is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856, 860 (Fla. 4th DCA 1997) (citing DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957)). “Substantial” evidence is that which will establish a substantial basis of fact from which the fact at issue can be reasonably inferred and which a reasonable mind would accept as adequate to support a conclusion. Id.

In other words, the Board may not reweigh the evidence, judge witnesses’ credibility, or otherwise interpret the evidence to fit a particular outcome. Id. In the same vein, the Board may not substitute its findings simply because it reached a different conclusion or would have resolved factual questions differently. Kanter, supra; F.U.S.A., FTP-NEA v. Hillsborough Cmty. Coll., 440 So.2d 593, 595-96 (Fla. 1st DCA 1983); see also Resnick v. Flagler Cnty. Sch. Bd., 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010) (noting that an agency may not reject findings of fact supported by competent substantial evidence even if the agency’s alternate findings also are supported by competent substantial evidence); Heifetz v. Dep’t of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (“If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer’s role to decide the issue one way or the other.”).

The Board may modify or reject only those conclusions of law over which it has substantive jurisdiction. See §120.57(1)(l), Fla. Stat.; State Contracting & Eng’g Corp. v. Dep’t of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998)(affirming final order in which the agency rejected ALJ’s interpretation of agency’s rule); see also generally Barfield v. Dep’t of Health, 805 So. 2d 1008

(Fla. 2001). If the Board decides to modify or reject a conclusion of law, it must state with particularity the reasons for such modification or rejection and must make a finding that its substituted conclusion of laws is as or more reasonable than the conclusion modified or rejected. See § 120.57(1)(l).

Labeling a legal conclusion as a “finding of fact” does not convert the conclusion into a factual finding. See Kanter, supra, at 487-88; Pillsbury v. Dep’t of Health & Rehab. Servs., 744 So 2d 1040,1041-42 (Fla. 2d DCA 1999); see Baptist Hosp., 500 So. 2d at 623; Holmes v. Turlington, 480 So. 2d 150,153 (Fla. 1st DCA 1985). Matters that are susceptible to ordinary methods of proof – such as determining a witness’s credibility or weighing the evidence – are factual matters to be determined by the ALJ. See Baptist Hosp., 500 So. 2d at 623; Holmes, 480 So. 2d at 153.

III. Responses to Intervenor’s Exceptions

Exception No. 1 (Findings of Fact # 21, 25, 26, 39 and 40-45)

Beacon’s Exception 1 erroneously attacks several factual findings by the ALJ and amounts to nothing more than a request for the Board to reweigh the evidence to reach a contrary result. As the reviewing agency, however, the Board may not reweigh the evidence presented or attempt to resolve any conflicts therein. See, e.g., Rogers v. Dep’t of Health, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); Belleau v. Dep’t of Env’tl. Prot., 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997); Dunham v. Highlands Cty. Sch. Bd., 652 So. 2d 894 (Fla. 2d DCA 1995); Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d 856, 860 (Fla. 4th DCA 1997).

Findings of Fact # 21, 25, 26, 39 and 40-45 contain ultimate conclusions which may not be rejected as they are supported by the ALJ’s rational and reasonable weighing of all the evidence presented at final hearing. See Goin v. Comm’n on Ethics, 658 So. 2d 1131, 1138 (Fla. 1st DCA

1995). In Exception No. 1, Beacon quotes several findings of fact in the RO out of context but does not specifically identify any inaccuracy or unsupported finding made by the ALJ.

Findings of fact 21, 25, 26, 39, 40, 41 and 42 are simply recitations of the evidence presented at the hearing. Beacon does not contend that any of these specific findings are incorrect. There is no basis for the Board to overturn or disregard these findings.

Rather than pointing out a misstatement or unsupported factual finding by the ALJ, Beacon, on page 7 of the Exceptions, makes a blanket, erroneous claim that: "In reaching his findings the ALJ ignores this competent and substantial evidence." The evidence that Beacon claims the ALJ purportedly ignored relates to the electronic "meta data" that is discussed at length in the RO. Contrary to Beacon's assertion, the ALJ did not "ignore" any evidence presented by Beacon. Findings of Fact 30 through 33 of the RO specifically address the evidence that Beacon tried to rely upon to cure the obvious defect in its Application. In Findings of Fact 37 and 38, the ALJ accurately summarizes Beacon's contentions and in Findings of Fact 43 and 44, the ALJ explains why the positions advanced by Beacon were not persuasive. There is competent substantial evidence in the record supporting these Findings of Fact.

These detailed findings make it abundantly clear that the ALJ did not "ignore" any evidence presented by Beacon. The ALJ thoughtfully and reasonably evaluated the evidence presented in the context of the relevant RFA requirements and determined that the Beacon application did not satisfy the mandatory submittal requirements. In other words, the ALJ did not ignore any evidence, he simply did not accord that evidence the weight that Beacon advocated. Disagreement with the weight ascribed by the fact finder is not a basis to overturn a finding of fact. There is no basis for this Board to overturn the well-reasoned findings of the ALJ which are based upon competent substantial evidence.

Beacon also erroneously claims that “in essence” the ALJ found there was “uncertainty” as to whether sewer service was available to the proposed development site as of the Application Deadline. See Exceptions, p. 6. What the ALJ actually found was that Beacon failed to submit an application that complied with the RFA requirements. See RO ¶¶ 43-45. Compliance with the mandatory requirements is essential in a competitive process. This Board should reject the invitation to create an unwieldy precedent that applicants can cure defects in their application after submittal and after the evaluation process has been completed.

Beacon’s Exception No. 1 fails to address or refute the ALJ’s clear delineation of what the RFA required an applicant to include in its submittal in order to be eligible. See RO ¶¶ 43-45. The RFA explicitly required the Sewer Form to be “properly completed and executed.” See (T. 43; Jt. Stip. @ 8, ¶19; Jt. Ex. 1, p. 41). Beacon does not explain how an unsigned form can be deemed “properly completed and executed.” Beacon cites the deposition testimony of David Breitrack (which was not part of the application submitted in response to the RFA) to support its claim that sewer service was available to the site. It is improper for this Board to allow extraneous evidence presented after submission of applications in a competitive cycle to rectify failures that are undeniably attributable to the applicant. Also, it is an impermissible attempt by Beacon to amend or supplement its application after submission in violation of Section 120.57(3)(f), Florida Statutes.

Beacon also fails to address the testimony from Marisa Button of Florida Housing, which the ALJ found to be credible and a basis for his findings, that the Beacon application did not include the required “certification” from the sewer provider which the RFA required. See RO ¶¶ 43-45; (T. 31-32, 70-71, 73-74, 86, 91-92, 96-97, 130; Jt. Ex. 7 @ p. 125)

Paragraphs 44 and 45 are the ALJ's summary of his weighing of the evidence that was presented. There is no basis for the Board to reweigh the evidence. Indeed, such an effort would be contrary to well established legal principles applicable in issuing a final order. The Board is bound by the ALJ's reasonable inferences based on the competent substantial evidence in the record. See Stinson v. Winn, 938 So. 2d 554, 555 (Fla. 1st DCA 2006). The Findings of Fact in paragraphs 21, 25, 26, 39, and 40-45 are supported by the competent substantial record evidence and may not be rejected by the Board. (T. 27, 31-34, 41-43, 54, 57-58, 60, 67-68, 70, 71, 73, 74, 86, 96, 97, 130; Jt. Ex. 7 @ 125); Kanter, supra.

Beacon's Exception 1 must be denied.

Exception No. 2 (RO ¶¶47-55, and 57-66)

In Exception 2, Beacon argues that in Conclusions of Law 47-55, and 57-66, that "the ALJ ignores or minimizes the fact that the availability of sewer documentation was signed electronically." The RO, however, explains in great detail that there was no visible signature apparent on the Sewer Form and consequently it was not "properly completed and executed" as required by the RFA. (T. 27, 33-34, 41-42, 70, 71, 73, 74, 86, 96, 97)

As testified by Marisa Button, Florida Housing had no basis from the application submitted by Beacon to determine what the electronic markings within the document meant or who authored them. (T. 30-31, 77) There is nothing in Beacon's submitted application to indicate Mr. Breitrick signed the Sewer Form. (T. 31-32, 77, 91-92)

Whether the electronic data that Beacon seeks to rely upon is visible, depends on the particular viewer that is being utilized. (T. 76-79) The "metadata" is just properties on the PDF version of the document. (T. 95) Florida Housing has not previously allowed any applicant to use "metadata" to cure a defect with respect to a mandatory eligibility item. (T. 9, 30-31, 99). Creating

such a precedent would significantly complicate and prolong the scoring, ranking and award process. Moreover, such action would be in conflict with the Boards' prior practice. For example, in RFA 2020-205 Florida Housing determined during the scoring and ranking process that an application by the name of Hermosa North Fort Myers (2021-275BSN) was not eligible because the applicant submitted an unexecuted Sewer Form. (T. 38-39) There is no basis to deviate from that practice here.

Additionally, Beacon's stated exceptions to Conclusions of Law 47-55, and 57-66, essentially requests the Board to disregard the ALJ's factual finding that Beacon did not meet the requirements of the RFA to demonstrate sewer availability because the Sewer Form was not properly completed and executed and that the submitted Sewer Form did not meet the alternative means set forth in the RFA for demonstrating sewer availability. RO ¶¶43-45. The Board is not at liberty to disregard the ALJ's findings of fact as a basis for overturning a conclusion of law.

The conclusions cited by Beacon are not matters within the substantive jurisdiction of the Board. Thus, there is no basis to disregard or replace the ALJ's conclusions. Moreover, the Board should not consider extraneous material that was not in the Beacon application to correct the deficiencies in the application that was submitted after the application deadline. Beacon's request for the Board to rely on the post-submittal depositions of David Breitrack is an impermissible attempt to use material not in the application to cure a defect in the application after the application deadline. See §120.57(3)(f), Fla. Stat. (“[N]o submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered.”).

The Board does not have the authority and is not at liberty to reopen the record and/or to reweigh the evidence presented or attempt to resolve any conflicts therein. See, e.g., Rogers v. Dep't of Health, 920 So. 2d at 30; Schrimsher v. Sch. Bd. of Palm Beach Cnty., 694 So. 2d at 860.

Beacon's Exception 2 must be denied.

Respectfully submitted this 19th day of May 2023.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served electronically on the following parties this 19th day of May 2023.

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