STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MJHS FL SOUTH PARCEL, LTD.,

Petitioner,

FHFC Case No.: 23-007BP
DOAH Case No. 23-0903BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

KISSIMMEE LEASED HOUSING ASSOCIATES III, LLLP, and LDG MULTIFAMILY, LLC,

Intervenors.

DM REDEVELOPMENT, LTD.,

Petitioner,

FHFC Case No.: 23-009BP
DOAH Case No. 23-0904BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE BREEZE REDEVELOPMENT, LLLP, SP FIELD, LLC and KISSIMMEE LEASED HOUSING ASSOCIATES II, LLLP,

Intervenor.

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Ann McNamara DATE: 7/21/2023

HERITAGE VILLAGE SOUTH, LTD.,

Petitioner,

FHFC Case No.: 23-010BP
DOAH Case No. 23-0905BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

And

MHP FL IX LLLP,

Intervenor.

SP FIELD LLC,

Petitioner,

FHFC Case No.: 23-017BP
DOAH Case No. 23-0906BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

AUTUMN PALMS NFTM, LLC,

Petitioner,

FHFC Case No.: 23-018BP
DOAH Case No. 23-0907BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

BAYSIDE BREEZE REDEVELOPMENT, LLLP

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 July 21, 2023. Petitioners MJHS South Parcel, Ltd. ("MJHS"), DM Redevelopment, LTD. ("DM Redevelopment"), Heritage Village South, LTD. ("Heritage"), SP Field LLC ("SP Field"), and Autumn Palms MFTM, LLC ("Autumn Palms") (collectively, "Petitioners") and Intervenors Kissimmee Leased Housing Development II, LLLP ("Kissimmee"), LDG Multifamily, LLC ("LDG"), Bayside Breeze Redevelopment, LLLP ("Bayside Breeze"), SP Field, MHP FL IX LLLP ("MHP"), Autumn Palms, and Bayside Development of Fort Walton, LLC ("Bayside Gardens") (collectively, "Intervenors") were applicants under Request for Applications 2022-205: SAIL Financing of Affordable Multifamily Housing Developments to be used in conjunction with Tax Exempt Bonds and Non-Competitive Housing Credits (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and 102.57(3), Florida Statutes, the exceptions to the Recommended Order, and the responses thereto.

On January 27, 2023, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to 10 applicants,

including Pinnacle 441 Phase 2, LLC ("Pinnacle"), Kissimmee, SP Field, MHP, and Bayside Breeze. LDG, MJHS, and Bayside Gardens were deemed eligible for funding but were not selected for funding according to the funding selection process outlined in the RFA. The Petitioners timely filed notices of intent to protest, followed by formal written protests, and the Intervenors timely intervened.

Florida Housing referred the matters to the Division of Administrative Hearings ("DOAH"), where the matters were consolidated into a single hearing. Administrative Law Judge ("ALJ") Jodi-Ann V. Livingstone was assigned to conduct the final hearing. Prior to the final hearing, Kissimmee stipulated that it was not eligible for funding.

The hearing was conducted as scheduled on April 3, 2023 and April 5, 2023. Seven contested issues proceeded to the hearing, briefly summarized below.

a) MJHS challenged LDG's application for failure to include all anticipated costs (impact fees) in its Development Cost Pro Forma;

b) Heritage and SP Field challenged MJHS's and MHP's equity proposals for failing to meet the RFA requirements to state the amount of proposed equity to be paid prior to construction completion;

c) Heritage challenged MHP's application for failing to accurately disclose all principals of its non-investor limited partner, SLP;

d) DM Redevelopment challenged the proximity points SP Field received for its selected pharmacy because SP Field listed the incorrect address and incorrect distance in its application; and

e) Autumn Palms and SP Field challenged Bayside Breeze and Bayside Gardens for failing to disclose all Principals accurately.

After consideration of the oral and documentary evidence presented, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 31, 2023. The ALJ found that:

1) LDG's application materially deviated from the RFA requirement to disclose all anticipated expenses because LDG failed to include anticipated impact fees within its cost proforma. The ALJ determined that LDG is ineligible for funding.

2) Based on prior Florida Housing case precedent, certain contributions in MHP's and MJHS's equity proposals could not be counted as a source of construction funding because the proposals are unclear and ambiguous regarding the amount of equity to be paid before construction completion. The exclusion of those contributions caused a funding shortfall which rendered MHP and MJHS ineligible for funding.

3) MHP's written operating agreement contradicted the oral testimony regarding the principals of the SLP entity disclosed in MHP's application. The

evidence presented demonstrated that MHP inaccurately listed the principals of SLP, and the failure to disclose all principals of each entity renders the MHP application ineligible.

4) Since the pharmacy selected in the SP Field application does not exist as listed in its application, SP Field cannot claim proximity points for it. SP Field remains an eligible application without those proximity points but does not achieve the proximity funding preference.

5) Bayside Breeze and Bayside Gardens provided written evidence supporting the credible testimony that the correct principals were disclosed to Florida Housing in the application. Bayside Breeze and Bayside Gardens remain eligible applications.

The ALJ recommended that Florida Housing enter a final order finding: (i) LDG, MHP, MJHS, and Kissimmee ineligible for funding; (ii) SP Field eligible for funding but not eligible for the proximity funding preference; and (iii) Bayside Breeze and Bayside Gardens eligible for funding. A true and correct copy of the Recommended Order is attached as "Exhibit A."

On June 12, 2023, MHP and MJHS filed joint exceptions to the Recommended Order, a copy of which is attached as "Exhibit B." On June 28, 2023, Heritage and Florida Housing filed a joint response to those exceptions, a copy of which is attached as "Exhibit C."

MHP's and MJHS's Exception No. 1 to Paragraphs 52 through 56

1. MHP and MJHS filed an exception to the Findings of Fact in paragraphs 52 through 56 of the Recommended Order.

2. After a review of the record, the Board finds that the Findings of Fact in paragraphs 52 through 56 are supported by competent substantial evidence.

3. The Board rejects the exceptions to the Findings of Fact in paragraphs 52 through 56 of the Recommended Order.

MHP's and MJHS's Exception No. 2 to Paragraphs 61 through 65

4. MHP and MJHS filed an exception to the Findings of Fact in paragraphs 61 through 65 of the Recommended Order.

5. After a review of the record, the Board finds that the Findings of Fact in paragraphs 61 through 65 are supported by competent substantial evidence.

6. The Board rejects the exceptions to the Findings of Fact in paragraphs 61 through 65 of the Recommended Order.

MHP's and MJHS's Exception No. 3 to Paragraphs 79 through 83

7. MHP and MJHS filed an exception to the Findings of Fact in paragraphs 79 through 83 of the Recommended Order.

8. After a review of the record, the Board finds that the Findings of Fact in paragraphs 79 through 83 are supported by competent substantial evidence.

9. The Board rejects the exceptions to the Findings of Fact in paragraphs 79 through 83 of the Recommended Order.

MHP's and MJHS's Exception No. 4 to Paragraphs 135 through 137

10. MHP and MJHS filed an exception to the conclusions of law in paragraphs 135 through 137 of the Recommended Order.

11. The Board finds that it has substantive jurisdiction over the issues presented in paragraphs 135 through 137 of the Recommended Order.

12. After a review of the record, the Board finds that the Conclusions of Law in paragraphs 135 through 137 are reasonable and supported by competent substantial evidence.

13. The Board rejects the exceptions to the Conclusions of Law in paragraphs 135 through 137.

MHP's and MJHS's Exception No. 5 to Paragraph 144

14. MHP and MJHS filed an exception to the conclusions of law in paragraph 144 of the Recommended Order.

15. The Board finds that it has substantive jurisdiction over the issues presented in paragraph 144 of the Recommended Order.

16. After a review of the record, the Board finds that the Conclusions of Law in paragraph 144 are reasonable and supported by competent substantial evidence.

17. The Board rejects the exceptions to the Conclusions of Law in paragraph 144.

MHP's and MJHS's Exception No. 6 to Paragraphs 146 through 151

18. MHP and MJHS filed an exception to the conclusions of law in paragraphs 146 through 151 of the Recommended Order.

19. The Board finds that it has substantive jurisdiction over the issues presented in paragraphs 146 through 151 of the Recommended Order.

20. After a review of the record, the Board finds that the Conclusions of Law in paragraphs 146 through 151 are reasonable and supported by competent substantial evidence.

21. The Board rejects the exceptions to the Conclusions of Law in paragraphs 146 through 151.

MHP's and MJHS's Exception No. 7 to Recommendation Subparagraphs (b) and (c)

22. MHP and MJHS filed an exception to the recommendations in subparagraphs (b) and (c) of the Recommended Order.

23. The Board finds that it has substantive jurisdiction over the issues presented in recommendation subparagraphs (b) and (c) of the Recommended Order.

24. After a review of the record, the Board finds that the Findings of Fact in recommendation subparagraphs (b) and (c) are supported by competent substantial evidence and/or the Conclusions of Law in recommendation

subparagraphs (b) and (c) are reasonable and supported by competent substantial evidence.

25. The Board rejects the exceptions to the Findings of Fact and/or Conclusions of Law in recommendation subparagraphs (b) and (c).

Ruling on the Recommended Order

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

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

3. The Recommendations of the Recommended Order are 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:

(a) LDG's application is ineligible for funding under the RFA;

(b) MHP's application is ineligible for funding under the RFA;

(c) MJHS's application is ineligible for funding under the RFA;

(d) SP Field's application is eligible for funding under the RFA but is not eligible for the proximity funding preference;

(e) Bayside Breeze's application is eligible for funding under the RFA;

(f) Bayside Garden's application is eligible for funding under the RFA; and

(g) Kissimmee's application is ineligible for funding under the RFA.

DONE and ORDERED this 21st day of July, 2023.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

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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

MJHS SOUTH PARCEL, LTD.,

Petitioner,

vs. Case No. 23-0903BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PINNACLE 441 PHASE 2, LLC,
LDG MULTIFAMILY, LLC, AND KISSIMMEE
LEASED HOUSING ASSOCIATES II, LLLP,

Intervenors.
_____/

DM REDEVELOPMENT, LTD.,

Petitioner,

vs. Case No. 23-0904BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE BREEZE REDEVELOPMENT, LLLP,
SP FIELD LLC, AND KISSIMMEE LEASED
HOUSING ASSOCIATES III, LLLP,

Intervenors.
_____/

HERITAGE VILLAGE SOUTH, LTD.,

Petitioner,

vs. Case No. 23-0905BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

and

MHP FL IX LLLP,

Intervenor.
_____/

SP FIELD, LLC,

Petitioner,

vs. Case No. 23-0906BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

AUTUMN PALMS NFTM, LLC,

Petitioner,

vs. Case No. 23-0907BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE BREEZE REDEVELOPMENT, LLLP,

Intervenor.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted by Zoom Conference before Administrative Law Judge (ALJ) Jodi-Ann V. Livingstone of the Division of Administrative Hearings (DOAH), on April 3 and 5, 2023.

APPEARANCES

For Respondent Florida Housing Finance Corporation (Florida Housing):

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Ethan S. Katz, Esquire
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For MJHS South Parcel, Ltd. (MJHS), and MHP FL IX, LLLP (MHP):

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For LDG Multifamily, LLC (LDG):

Laura S. Olympio, Esquire
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For Heritage Village South, Ltd. (Heritage), and DM Redevelopment, Ltd. (DM Redevelopment):

Christopher Brian Lunny, Esquire
Melissa Hedrick, Esquire
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For SP Field LLC (SP Field):

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For Autumn Palms NFTM, LLC (Autumn Palms), and Kissimmee Leased Housing Associates II, LLLP (Kissimmee):

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STATEMENT OF THE ISSUES

The issues to be determined are whether, with respect to each application filed, Florida Housing's review and decision-making process in response to the Request for Applications 2022-205 SAIL Financing of Affordable Multifamily Housing Developments to be used in conjunction with Tax-Exempt Bonds and Non-Competitive Housing Credits (RFA) was contrary to its governing statutes, rules or policies, or the RFA's specifications.

PRELIMINARY STATEMENT

On November 14, 2022, Florida Housing issued an RFA through which it expects to award State Apartment Incentive Loan (SAIL) financing to be used in conjunction with tax-exempt bonds and non-competitive housing credits

and National Housing Trust Fund (NHTF) funding. The deadline to submit applications was December 29, 2022. On January 27, 2023, Florida Housing announced its intent to award funding to ten applicants, including MHP, Bayside Breeze, Kissimmee, and SP Field.

Petitioners MJHS, DM Redevelopment, Heritage, SP Field, and Autumn Palms (collectively, Petitioners), timely filed Notices of Intent to Protest, and subsequently, Formal Written Protests and Petitions for Administrative Hearing (Petitions).[1] The Petitions were forwarded to DOAH on March 6, 2023, and assigned to the undersigned ALJ. The cases were consolidated by Order dated March 7, 2023, and scheduled for hearing to commence April 3, 5, and 6, 2023, by Zoom.

MJHS's Petition (Case No. 23-0903BID) challenges Florida Housing's preliminary funding awards to Pinnacle and Kissimmee, as well as Florida Housing's eligibility determination for LDG. LDG and Kissimmee timely intervened. Prior to the final hearing, MJHS and Pinnacle resolved their differences and MJHS filed a Motion to Amend Formal Written Protest and Petition for Formal Administrative Proceeding to remove its complaints as to Pinnacle, which was granted. Also, prior to the final hearing, Kissimmee stipulated that it was not eligible for funding under the RFA. Accordingly, MJHS's only remaining challenge is Florida Housing's determination that LDG was eligible for funding consideration.

DM Redevelopment's Petition (Case No. 23-0904BID) challenges Florida Housing's preliminary funding awards to SP Field, Bayside Breeze, and Kissimmee. DM Redevelopment dropped its challenge to Bayside Breeze's eligibility prior to the final hearing. Since Kissimmee has agreed that it was

[1] Another Petitioner, Casa San Juan Diego, Ltd., timely protested, but on May 26, 2023, filed a Notice of Voluntary Dismissal and its case was closed.

ineligible for funding, DM Redevelopment's only remaining challenge is to SP Field's entitlement to the Proximity Funding Preference.

Heritage's Petition (Case No. 23-0905BID) challenges Florida Housing's preliminary funding award to MHP and the eligibility determination for MJHS.

SP Field's Petition (Case No. 23-0906BID) initially challenged Florida Housing's designation of St. Joseph's Manor's application as a Priority II application. SP Field moved to amend its Petition to challenge Florida Housing's preliminary funding award to MHP and Bayside Gardens, as well as the preliminary eligibility determination for MJHS and Bayside Breeze, which was granted. The amendment ended SP Field's challenge to the St. Joseph's Manor application.

Autumn Palms' Petition (Case No. 23-0907BID) challenges Florida Housing's preliminary funding award to Bayside Breeze.

On March 30, 2023, the parties filed a Joint Pre-hearing Stipulation, in which they stipulated to a number of facts. The agreed facts are incorporated in the findings below, to the extent relevant.

The hearing commenced as scheduled and was completed on April 5, 2023. At the final hearing, all parties offered the testimony of Marisa Button. MJHS offered the testimony of Samuel Bick, Christopher Shear, and Kenneth Naylor. Heritage offered the testimony of Kenneth Naylor and Christopher Shear. Autumn Palms offered the testimony of Michael Allen and Carol Gardner. LDG offered the testimony of Samuel Bick. MHP offered the testimony of Christopher Shear. Bayside Breeze, Bayside Gardens, and SP Field offered the testimony of Carol Gardner.

The following exhibits were admitted into evidence: Joint Exhibits 1 through 16; MJHS Exhibits 1, 3, and 6 through 8; DM Redevelopment Exhibits 1 through 5; Heritage Exhibits 1 through 3 and 33 through 37; Autumn Palms Exhibits 1 through 8; Casa San Juan Exhibits 1 through 6; SP Field Exhibits 1, 2, and 4; MHP Exhibits 1 through 3; and Bayside Breeze Exhibit 1.

A three-volume Transcript of the final hearing was filed with DOAH on May 1, 2023. The parties timely filed Proposed Recommended Orders (PROs), which were duly considered in preparing this Recommended Order.

All references to the Florida Statutes and the Florida Administrative Code are to the 2022 versions, unless otherwise noted.

FINDINGS OF FACT

Based on the stipulated findings of fact, the evidence adduced at the final hearing, and the entire record in this proceeding, the Findings of Fact are as follows:

The Parties

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes, whose address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301. For the purposes of these proceedings, Florida Housing is an agency of the State of Florida.

2. Florida Housing's purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to section 420.5099, Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low income housing tax credits.

3. MJHS is an applicant in response to the RFA and was assigned application number 2023-157BS. MJHS's application was preliminarily deemed eligible for consideration, but was not selected for funding.

4. DM Redevelopment is an applicant in response to the RFA and was assigned application number 2023-129BSN. DM Redevelopment was preliminarily deemed eligible for consideration, but was not selected for funding.

5. Heritage is an applicant in response to the RFA and was assigned application number 2023-143SN. Heritage was preliminarily deemed eligible for consideration, but was not selected for funding.

6. SP Field is an applicant in response to the RFA and was assigned application number 2023-120SN. SP Field was deemed eligible and was preliminarily selected for funding.

7. Autumn Palms is an applicant in response to the RFA and was assigned application number 2023-130SN. Autumn Palms was preliminarily deemed eligible for consideration, but was not selected for funding.

8. Kissimmee is an applicant in response to the RFA and was assigned application number 2023-158BS. Kissimmee was deemed eligible and was preliminarily selected for funding.

9. LDG is an applicant in response to the RFA and was assigned application number 2023-123BSN. LDG was preliminarily deemed eligible for consideration, but was not selected for funding.

10. Bayside Breeze is an applicant in response to the RFA and was assigned application number 2023-151BSN. Bayside Breeze was deemed eligible and was preliminarily selected for funding.

11. MHP is an applicant in response to the RFA and was assigned application number 2023-142BS. MHP was deemed eligible and was preliminarily selected for funding.

12. Bayside Gardens is an applicant in response to the RFA and was assigned application number 2023-153BSN. Bayside Gardens was

preliminarily deemed eligible for consideration, but was not selected for funding.

The Competitive Application Process

13. Florida Housing is authorized to allocate housing credits and other funding, such as SAIL funding, by means of request for proposal or other competitive solicitation in section 420.507(48) and Florida Administrative Code Chapter 67-60, which govern the competitive solicitation process. Chapter 67-60 provides that Florida Housing allocates its competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes.

14. The competitive application process is commenced by the issuance of a request for applications. A request for applications is equivalent to a "request for proposal" as indicated in rule 67-60.009(4).

15. The RFA was issued on November 14, 2022, and responses were due December 29, 2022 (the application deadline). The RFA was modified on November 18, 29, and December 20, 2022.

16. Through the RFA, Florida Housing expects to award an estimated $60,240,702 in SAIL financing.

17. Florida Housing received 46 applications in response to the RFA.

18. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors (the Board). The review committee found 41 applications eligible and five applications ineligible for consideration for funding. Through the ranking and selection process outlined in the RFA, ten applications were preliminarily recommended for funding. The review committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

19. On January 27, 2023, the Board met and considered the recommendations of the review committee. On the same day, all applicants responding to the RFA received notice that the Board determined whether applications were eligible or ineligible for consideration for funding, and that

certain eligible applicants were preliminarily selected for funding, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets on the Florida Housing website, ***.floridahousing.org, one listing the Board approved scoring results for the RFA and one identifying the applications which Florida Housing proposed to fund.

20. In the January 27, 2023, posting, Florida Housing announced its intention to award funding to ten applicants, including MHP, Bayside Breeze, Kissimmee, and SP Field.

21. Petitioners timely filed Notices of Protest and Petitions for Formal Administrative Proceedings. Intervenors timely intervened. The Petitions filed were referred to DOAH and consolidated.

22. No challenges were made to the terms or specifications of the RFA.

The RFA Ranking and Selection Process

23. The RFA contemplates a structure in which the applicant is scored on eligibility items and obtains points for other items. A summary of the eligibility items is available in section 5.A.1 of the RFA. Only applications that meet all the eligibility items will be eligible for funding and considered for funding selection.

24. There are no challenges to the total points awarded to any application.

25. The RFA states the total SAIL funding available and how that funding will be allocated amongst applicants with different demographics and geographic funding areas.

26. The RFA utilizes various funding tests such as the SAIL Geographic Funding Test and SAIL Demographic Funding Test, as outlined in the RFA, to determine if enough SAIL funding is available to select an application for funding.

27. The RFA uses a County Award Tally as defined in the RFA and outlines the funding goals.

28. All 46 applications for the RFA were received, processed, deemed eligible or ineligible, scored, and ranked, pursuant to the terms of the RFA, Florida Administrative Code Chapters 67-48 and 67-60, and applicable federal regulations.

LDG's Application—Impact Fees

29. LDG timely submitted an application in response to the RFA for a proposed development named The Apex, located in Hernando County.

30. Florida Housing's review committee deemed LDG's application eligible for funding, but LDG was not preliminarily selected for funding.

31. The RFA states under Section Four, Subpart A.10.c:

> *All Applicants must complete the Development Cost Pro Forma listing the anticipated expenses or uses, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation funding).* The sources must equal or exceed the uses. If a funding source is not considered and/or if the Applicant's funding Request Amount is adjusted downward, this may result in a funding shortfall. If the Application has a funding shortfall in either the Construction/Rehab and/or the Permanent Analysis of the Applicant's Development Cost Pro Forma, the amount of the adjustment(s), to the extent needed and possible, will be offset by increasing the deferred Developer Fee up to the maximum eligible amount as provided below.
>
> *The Development Cost Pro Forma must include all anticipated costs of the Development construction*, rehabilitation and, if applicable, acquisition, including the Developer Fee and General Contractor fee. (Emphasis added).

32. Each applicant was required to submit, as part of its application, a Development Cost Pro Forma (Cost Pro Forma) detailing both the anticipated costs and funding sources of the proposed development.

33. Florida Housing uses the Cost Pro Forma to evaluate the financial feasibility of the proposed development. To be eligible for funding, the applicant's sources of funding must equal or exceed the uses of that funding—a Cost Pro Forma that shows a deficit or funding shortfall is not eligible for funding.

34. The Cost Pro Forma sheet identifies "Impact Fees" as a General Development Cost that, according to the sheet, applicants must "list in detail."

35. LDG did not list an amount for impact fees in its Cost Pro Forma and did not provide an explanation in the application for not including an amount.

36. Samuel Bick (Mr. Bick), senior development manager for the southeast region for LDG, testified that LDG's consultants attempted to confirm the anticipated impacts fees for the City of Brooksville but were unable to secure reliable information as to what they were. The proposed development is in the City of Brooksville. The City of Brooksville is located in Hernando County.

37. As part of the application completion process, Mr. Bick sent an email to other collaborators on the LDG Application seeking information about what the impact fees for the development would be.

38. Christopher Shear (Mr. Shear), chief operating officer of McDowell Housing Partners, testified on behalf of MJHS at the final hearing. Mr. Shear testified that he was able to locate a publicly available Hernando County impact fee schedule on the Hernando County website through a quick internet search.

39. The Hernando County impact fee schedule provides per unit impact fees for different kinds of residential developments, including multi-family units that are three to ten stories. Mr. Shear testified that LDG's proposed development was three stories high and that the fee schedule would be

applicable to any development in Hernando County. And, if the development was located in a city, additional fees may be associated with the development.

40. Mr. Bick confirmed that the portion of the Hernando County impact fee schedule, titled "Multifamily unit three to ten stories fees per unit," fairly characterized LDG's proposed development, which sought to develop 216 units of affordable housing, and that according to the schedule, the impact fees would potentially amount to over one million dollars.

41. Marissa Button (Ms. Button), director of multifamily programs at Florida Housing, testified that if the impact fees provided for on the Hernando County impact fee schedule were included in LDG's Cost Pro Forma, it would not create a funding shortfall. That is because LDG's Cost Pro Forma includes surpluses, like a deferred developer fee, that could be used to offset potential impact fees.

42. It is clear that LDG anticipated that there would be impact fees associated with its proposed development, but it was not sure what the amount would be.

43. As set forth above, all applicants are required to complete a Cost Pro Forma, and when completing the Cost Pro Forma, the applicant "must include all anticipated costs of the Development."

44. By failing to include an anticipated impact fee, LDG failed to meet an essential requirement of the RFA.

MHP's Application—Equity Proposal

45. MHP timely submitted an application for a new high-rise development named Southpointe Vista Phase II located in Miami-Dade County.

46. Florida Housing's review committee deemed MHP's application eligible and preliminarily selected the application for funding.

47. Section Four 10.(2)(d) of the RFA requires submission of a Housing Credit Equity Proposal (Equity Proposal) with each application. The RFA requires the Equity Proposal to meet specific requirements for the equity to be counted as a source of funding in the Cost Pro Forma.

48. If an applicant will be syndicating or selling the housing credits it will receive under the RFA, the applicant's Equity Proposal must, among other requirements, "state the proposed amount of equity to be paid prior to construction completion."

49. MHP's Equity Proposal contemplates the syndication or sale of housing credits.

50. The purpose of the Equity Proposal is to ensure that applicants have vetted their proposed developments with an equity provider and are likely to obtain funding.

51. MHP's application includes a December 22, 2022, letter (the MHP Equity Letter) from Wells Fargo, its proposed equity provider, discussing the terms and conditions for financing the Southpointe Vista Phase II development. The MHP Equity Letter contains a capital contribution schedule which provides for disbursements in four installments. The terms set forth for Capital Contribution #2 are provided below:

> Capital Contribution #2: $5,643,313 (22.25%) To be contributed upon the latter of (i) 95% construction completion or (ii) January 1, 2025, based on percentage of completion under a construction loan format (approved draws).

52. Capital Contribution #2 provided for in the MHP Equity Letter does not make clear that the capital being contributed will be paid prior to construction completion. Instead, it provides two alternate conditions precedent for payment and indicates that the equity will be paid upon completion of the latter of the two.

53. It is unclear from the language in the letter whether "January 1, 2025," will be prior to construction completion. It is possible that construction will be completed before January 1, 2025. In that event, based on the MHP Equity Letter, Capital Contribution #2 will be paid *after* construction is completed.

54. Since it is unclear when Capital Contribution #2 would be paid—that is, before or after construction completion—it cannot be counted as a source to be paid "prior to construction completion" as required by the terms of the RFA.

55. When Capital Contribution #2 from MHP's Equity Letter is not considered in the analysis of funding sources and uses, MHP is left with a funding shortfall.

56. With a funding shortfall in its Cost Pro Forma, MHP's application is ineligible for funding under the RFA.

MJHS Application –Equity Proposal

57. MJHS timely submitted an application for a new high-rise development named Garden House located in Miami-Dade County.

58. Florida Housing's review committee deemed the MJHS application eligible for funding, but the application was not preliminarily selected for funding.

59. MJHS's Equity Proposal contemplates the syndication or sale of housing credits.

60. MJHS's application includes a December 16, 2022, letter (the MJHS Equity Letter) from CREA, its proposed equity provider. The letter provides that the Garden House project has a construction completion date of January 2025. It contains a capital contribution schedule with four contribution installments. The terms of the Second Installment are set forth below:

> 2) $ 9,630,143 (40.00%) (the "Second Installment"), will be funded upon the later to occur of November 1, 2024 and satisfaction of the following conditions, as reasonably determined by the Special Limited Partner:
>
> a) 98% lien-free (up to $100,000 of liens may be bonded over) Construction Completion of the Property sufficient for all residential rental units to be "placed in service" within the meaning of Section 42 of the Code

> b) the issuance of all required temporary certificates of occupancy (with the appropriate life and safety certifications) permitting occupancy of all residential rental units
>
> c) receipt of the accountant's draft Cost Certification
>
> d) no payable developer fee will be released under this Third Installment until 100% lien free Construction Completion, as evidenced by the architect's substantial completion certification that the Property has been completed in accordance with the Plans and Specifications.
>
> e) receipt by the Special Limited Partner of satisfactory evidence that all environmental requirements as required in a Phase I or Phase II ESA have been met, (if applicable) unless the Special Limited Partner determines during underwriting that the conditions cannot be met until a subsequent installment
>
> f) execution of a property management agreement if not required at closing
>
> g) evidence that the CSS provider has been engaged, the CSS has been started, and the final CSS will be delivered by January 31st in the year following when the Property is Placed in Service.

61. Pursuant to the terms of the Second Installment, the capital contribution would be paid on the later of November 1, 2024, or after satisfaction of the terms in (a) through (g). Although it is clear from a complete reading of the MJHS Equity Letter that November 1, 2024, would occur prior to the construction completion date, which is listed as January 2025, it is not clear that each and every term listed in subparts (a) through (g) would be satisfied prior to construction completion. If any one of the events listed in subparts (a) through (g) occurs after construction ends, the funds will not be available before construction completion.

62. Florida Housing takes issue with the condition in subpart (c), specifically. The undersigned is persuaded by Ms. Button's testimony that it is unclear whether the accountant's draft Cost Certification would be received before construction completion.

63. Because it is not clear that the Second Installment will be paid prior to construction completion, the installment cannot be included as a funding source in MJHS's Cost Pro Forma.

64. When the Second Installment is removed as a construction funding source, the sources no longer meet or exceed the uses in the Cost Pro Forma, and MJHS is left with a funding shortfall.

65. With a funding shortfall in its Cost Pro Forma, MJHS's application is ineligible for funding under the RFA.

MHP Application—Principal Disclosure

66. As an eligibility item, the RFA requires that applicants identify their "principals" by completing and submitting with their applications a Principals of the Applicant and Developer(s) Disclosure Form (Principals Disclosure Form).

67. "Principal" is defined under rule 67-48.002(94) as follows:

> (94) "Principal" has the meanings set forth below and any Principal other than a natural person must be a legally formed entity as of the Application deadline:
>
> (a) For a corporation, each officer, director, executive director, and shareholder of the corporation.
>
> (b) For a limited partnership, each general partner and each limited partner of the limited partnership.
>
> (c) For a limited liability company, each manager and each member of the limited liability company.

> (d) For a trust, each trustee of the trust and all beneficiaries of majority age (i.e.; 18 years of age) as of Application deadline.
>
> (e) For a Public Housing Authority, each officer, director, commissioner, and executive director of the Authority.

68. When completing the Principals Disclosure Form, applicants must comply with rule 67-48.0075(8) through (9), which states:

> (8) Unless otherwise stated in a competitive solicitation, disclosure of the Principals of the Applicant must comply with the following:
>
> (a) The Applicant must disclose all of the Principals of the Applicant (first principal disclosure level). For Applicants seeking Housing Credits, the Housing Credit Syndicator/Housing Credit investor need only be disclosed at the first principal disclosure level and no other disclosure is required;
>
> (b) The Applicant must disclose all of the Principals of all the entities identified in paragraph (a) above (second principal disclosure level);
>
> (c) The Applicant must disclose all of the Principals of all of the entities identified in paragraph (b) above (third principal disclosure level). Unless the entity is a trust, all of the Principals must be natural persons; and
>
> (d) If any of the entities identified in (c) above are a trust, the Applicant must disclose all of the Principals of the trust (fourth principal disclosure level), all of whom must be natural persons.
>
> (9) Unless otherwise stated in a competitive solicitation, disclosure of the Principals of each Developer must comply with the following:
>
> (a) The Applicant must disclose all of the Principals of the Developer (first principal disclosure level); and

> (b) The Applicant must disclose all of the Principals of all the entities identified in paragraph (a) above (second principal disclosure level).

69. The RFA states that "[t]o meet eligibility requirements, the Principals Disclosure Form must identify […] the Principals of the Applicant and Developer(s) as of the Application Deadline."

70. Failure to accurately identify and disclose a principal renders an application ineligible for funding.

71. Florida Housing uses the Principals Disclosure Form to vet the disclosed principals for a number of reasons, including to determine if any principal is in financial arrearages with Florida Housing and to ensure the principal is not on an insurance deficiency report.

72. MHP provided its principal disclosures on the Principals Disclosure Form attached to its application (the MHP Principals Disclosure).

73. In the first principal disclosure level, MHP named three principals: (1) MHP FL IX GP, LLC; (2) William P. McDowell (Mr. McDowell); and (3) MHP FL IX SLP, LLC (SLP).

74. At the second principal disclosure level, MHP listed Mr. McDowell as a natural person member and manager of SLP. Mr. McDowell is the only principal listed for SLP.

75. At the second principal disclosure level, MHP identified: (1) W. Patrick McDowell 2001 Trust; (2) Archipelago Housing, LLC; and (3) Shear Holdings, LLC, as members and managers of MHP FL IX GP, LLC.

76. SLP's articles of organization, filed with the Florida Department of State in August 2022, identify three members and managers: (1) W. Patrick McDowell 2001 Trust; (2) Archipelago Housing, LLC; and (3) Shear Holdings, LLC.

77. The three members/managers listed on the articles of organization filing for SLP are included in MHP's Principal Disclosure as principals of MHP FL IX GP, LLC, but not as principals of SLP. As set forth above, the

principal listed for SLP in the MHP Principals Disclosure Form is Mr. McDowell.

78. At the final hearing, Mr. Shear acknowledged the discrepancy between SLP's articles of organization and MHP's Principals Disclosure Form. He testified that, contrary to the principals listed on SLP's articles of organization, SLP's sole principal is, and always has been, Mr. McDowell.

79. Mr. Shear testified that SLP's articles of organization were filed with incorrectly listed managers and members, by a third-party vendor in August 2022. He testified that SLP had an established oral operating agreement that was in place at the time MHP submitted its application to Florida Housing, and that under the terms of this oral agreement, SLP was initially formed in October 2020, with Mr. McDowell as the sole manager and member of SLP. He further testified that this oral agreement remained in place and was orally agreed to again by MHP on December 15, 2022—shortly before the application deadline. The agreement was then ultimately memorialized in writing in February of 2023, identifying Mr. McDowell as the sole manager and member. The written operating agreement executed in February 2023 reflected an effective date of December 15, 2022. Mr. Shear's testimony on this matter was not persuasive or credible and is not credited.

80. The written operating agreement, executed in February 2023, after MHP had already submitted its application, provided that Shear Holdings, the McDowell Trust, and Archipelago were "withdrawing members" and that the three withdrawing members had agreed to transfer their membership interest in SLP to Mr. McDowell, who would become SLP's sole member and manager. This contradicts Mr. Shear's testimony that Shear Holdings, the McDowell Trust, and Archipelago never had a membership interest in SLP.

81. Mr. Shear's claim that Mr. McDowell has always been the sole manager and member of SLP is not credible or supported by additional evidence.

82. The evidence presented supports a finding that the MHP Principals Disclosure Form, submitted as part of its application, inaccurately listed Mr. McDowell as the principal of SLP.

83. MHP's failure to disclose W. Patrick McDowell 2001 Trust, Archipelago Housing, LLC, and Shear Holdings, LLC, as principals of SLP as of the application deadline renders the application ineligible for funding.

Bayside Breeze and Bayside Gardens Applications—Principals Disclosures

84. Bayside Breeze timely submitted an application for a development named Bayside Breeze located in Okaloosa County. Bayside Breeze's application was deemed eligible and was preliminarily selected for funding.

85. Bayside Gardens timely submitted an application for a development named Bayside Gardens located in Okaloosa County. Bayside Gardens' application was deemed eligible, but was not preliminarily selected for funding.

86. The challenge to the Principals Disclosure Form included in Bayside Breeze's application (the Bayside Breeze Principals Disclosure) is that the articles of organization for TEDC Bayside Breeze GP, LLC, shows the manager of that LLC to be Tacolcy Economic Development Corporation (TEDC) and not TEDC Affordable Communities, Inc. (TEDC Affordable), as shown on the Bayside Breeze Principals Disclosure.

87. The challenge to the Principals Disclosure Form included in Bayside Gardens' application (the Bayside Gardens Principals Disclosure) is that the articles of organization for TEDC Bayside Gardens GP, LLC, shows the manager of that LLC to be TEDC and not TEDC Affordable, as shown on the Bayside Gardens Principals Disclosure.

88. At the second level of the Bayside Gardens Principals Disclosure, it listed TEDC Affordable as the managing member of a general partner, TEDC Bayside Gardens GP, LLC. Likewise, the second level of the Bayside Breeze

Principals Disclosure listed TEDC Affordable as the managing member of a general partner, TEDC Bayside Breeze GP, LLC.

89. The articles of organization for TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, both filed with the Florida Division of Corporations on or about December 12, 2022, identify TEDC, and not TEDC Affordable, as the manager.

90. Carol Gardner (Ms. Gardner), the executive director of both TEDC and TEDC Affordable, persuasively and credibly testified that the information listed in the applications for Bayside Gardens and Bayside Breeze is correct, in that the managing member for both TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, is TEDC Affordable.

91. TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, were both created in December 2022 expressly for the purpose of applying to Florida Housing for financing.

92. The articles of organization filed for TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, were incorrect—an error was made by an attorney who prepared the filings.

93. TEDC and TEDC Affordable share a board of directors, officers, and president. On December 5, 2022, the board of directors met for a board meeting. Meeting minutes were taken from the meeting memorializing the board's decisions and discussions. During that meeting, TEDC discussed that it would submit four applications for the Florida Housing RFA, including the applications for Bayside Breeze and Bayside Gardens, for which it would utilize TEDC Affordable as the manager. The meeting minutes corroborate Ms. Gardner's testimony.

94 In February 2023, TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, each filed annual reports with the Florida Department of State, wherein both LLCs identified TEDC Affordable, and not TEDC, as the manager, correcting the error from the December 2022 filing.

95. The Bayside Breeze and Bayside Gardens Principals Disclosure Forms were correct, and, accordingly, Bayside Breeze and Bayside Gardens remain eligible applications.

SP Field Application—Proximity Points

96. SP Field timely submitted an application for a development named Calusa Pointe II located in Palm Beach County.

97. Florida Housing's review committee deemed the SP Field application eligible and preliminarily selected the application for funding.

98. Section Four A.5.e of the RFA requires applicants to earn "proximity points" based on the distance between the proposed development and transit or community services.

99. Pursuant to the RFA, community services eligible for proximity points include grocery stores, medical facilities, pharmacies, and public schools.

100. Proximity point totals are calculated using the Transit and Community Service Scoring Charts, which identify the number of points an applicant receives based on the distance in miles between the Development Location Point and each type of service.

101. The RFA requires large county applicants, like SP Field (whose proposed development is located in Palm Beach County), to earn a minimum of 10.5 proximity points in order to be eligible for funding.

102. The RFA creates a proximity funding preference for large county applicants who attain 12.5 proximity points or more.

103. In its application, SP Field claimed 14 total proximity points. Of the 14 total claimed proximity points, SP Field included two points for its proposed development's proximity to a pharmacy called K&M Drugs.

104. SP Field's application states that K&M Drugs is located at 364 South Main Street, Belle Glade, Florida 33430, with a distance of 1.20 miles from the SP Field development.

105. It is not in dispute that on the application deadline, K&M Drugs was actually located at 624 South Main Street, Belle Glade, Florida 33430.

106. K&M Drugs moved from 364 South Main Street to 624 South Main Street at some point prior to the application deadline.

107. K&M Drugs' address at 624 South Main Street is a distance of 0.91 miles from the SP Field development. Its current location on South Main Street is closer to the proposed development than its previous address.

108. At a distance of 0.91 miles from the proposed development, K&M Drugs would have earned SP Field 2.5 proximity points, as opposed to the two proximity points it received utilizing K&M Drugs' old address.

109. If SP Field does not get any points for its proximity to K&M Drugs, it will have 12 proximity points. At 12 proximity points, SP Field would remain eligible for funding, but would not qualify for the proximity funding preference.

110. Since K&M Drugs, as it is listed on SP Field's application, does not exist, SP Field cannot claim proximity points for it.

CONCLUSIONS OF LAW

111. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 120.57(3).

112. Pursuant to section 120.57(3)(f), the burden of proof rests with the individual Petitioners as the parties opposing the proposed agency action. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). The standard of proof is preponderance of the evidence. *See Dep't of Transp. v. J.W.C. Co., Inc.*, 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

113. Section 120.57(3)(f) provides, in part, as follows:

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation

> specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

114. "De novo proceeding," as used in section 120.57(3)(f), describes a form of intra-agency review. In such proceedings, "[t]he 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.

115. A bid protest proceeding is not simply a record review of the information that was before the agency. A new evidentiary record based upon the facts established at DOAH is developed. *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

116. After determining the relevant facts based on the evidence presented at hearing, Florida Housing's intended action will be upheld unless it is contrary to the governing statutes, the corporation's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

117. The Florida Supreme Court explained the clearly erroneous standard as follows:

> A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it

> bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

118. An action is contrary to competition if it interferes with the purposes of competitive procurement. The purpose of the competitive bidding process is described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931), as:

> (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 for the county at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the county, by affording an opportunity for an exact comparison of bids.

119. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." *Hadi v. Lib. Behav. Health Corp.*, 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If an agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *J.D.*, 114 So. 3d at 1130. Under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." *Adam Smith Enters., Inc. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless, the reviewing

court must consider 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 each of these factors to its final decision. *Id.*

120. It has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. State Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

121. Pursuant to rule 67-60.008, Florida Housing has reserved the right to waive minor irregularities in an application. Under this rule, 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 [Florida Housing] or the public."

LDG Application—Impact Fees

122. Petitioner MJHS challenges the eligibility of LDG's application on the grounds that it should be deemed ineligible for funding because the application failed to include all anticipated costs—specifically, the impact fees—in its Cost Pro Forma.

123. The RFA contains a clear requirement that all anticipated expenses be included on each applicant's Cost Pro Forma. Additionally, rule 67-60.006(1) provides that "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."

124. MJHS demonstrated that LDG anticipated that there would be impact fees associated with its proposed development and demonstrated

through competent evidence that those fees would be, at a minimum (with possible additional fees by the City): the amount provided for in the Hernando County impact fee schedule.

125. LDG admits that it sought out information on its project's potential impact fees, but could not determine how much said fees would be prior to the application deadline. Apparently, though, LDG only sought out impact fee information from the City of Brooksville, when there was available public information on Hernando County's impact fees.

126. Each applicant for the RFA was required to complete a Cost Pro Forma and, with it, disclose its anticipated impact fees.

127. LDG's failure to include its anticipated impact fees in its Cost Pro Forma cannot be waived as a minor irregularity.

128. LDG's failure to include anticipated impact fees is not a minor irregularity because it results in the omission of material information, creates uncertainty that the terms and requirements of the competitive solicitation have been met, and provides a competitive advantage or benefit not enjoyed by other applicants.

129. Florida Housing argues that MJHS has not proved that there are impact fees associated with LDG's development and that, even if the impact fees are calculated pursuant to the Hernando County impact fee schedule, the evidence demonstrates that no funding shortfall would exist, because LDG's Cost Pro Forma includes a deferred developer fee that could be used to offset potential impact fees.

130. The undersigned does not find this argument convincing. Even if the inclusion of the Hernando County impact fees would not result in a funding shortfall, LDG omitted material information from its Cost Pro Forma. The amount listed for an applicant's impact fees directly affects the calculations of whether the applicant's equity sources cover its uses. Moreover, the only known amount is the County impact fees, not the additional impact fees that would be assessed by the City of Brooksville.

131. LDG argues that "[n]ot listing an amount for impact fees within an applicant's Development Cost Pro Forma does not affect Florida Housing's review or eligibility determination unless the Development Cost Pro Forma demonstrates a funding shortfall." But, Florida Housing cannot determine whether or not a funding shortfall exists absent the inclusion of all anticipated costs, including the impact fees.

132. MJHS met its burden to prove that Florida Housing's initial decision that LDG's application is eligible for funding was clearly erroneous and contrary to the requirements of the RFA.

MHP and MJHS Applications—Equity Proposal

133. Petitioners Heritage and SP Field challenge the eligibility of MHP's and MJHS's applications alleging that both failed to provide an Equity Proposal that met the requirements in the RFA and such error led to a funding shortfall which renders both applications ineligible.

134. In order to count an Equity Proposal as a source of funding, it must comply with certain RFA requirements, one of which is to state the amount of proposed equity to be paid prior to construction completion. An Equity Proposal is responsive only to the extent that the amount of equity to be paid prior to construction completion is clearly stated. *Vistas at Fountainhead LP v. Fla. Hous. Fin. Corp.*, Case No. 19-2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part, FHFC No. 2019-030BP (FHFC August 2, 2019). If material ambiguity exists, the funds may not be considered as equity to be paid before construction completion. *Id.*

135. MHP's and MJHS's Equity Proposals are ambiguous—it is not clear when the second installment of both equity proposals will be paid. MHP's Equity Proposal contains a date which, if construction is completed before that date, then equity would be paid after construction completion. MJHS's Equity Proposal contains seven conditions that must be completed before the release of the equity payment.

136. MHP's Capital Contribution #2 and MJHS's Second Installment must be excluded from the construction financing analysis because both create a material ambiguity in their respective applications as to when they will be paid. The exclusion of those funds results in construction funding shortfalls in both applications, causing both to be ineligible.

137. Heritage and SP Field met their burden to demonstrate that Florida Housing's decision deeming MHP's and MJHS's applications eligible is contrary to the RFA specifications. Florida Housing's preliminary scoring of the MHP and MJHS applications is clearly erroneous and contrary to competition.

Principals Disclosures

138. The RFA requires the Principals Disclosure Form to identify the principals of the applicant as of the application deadline.

139. Pursuant to the RFA and rule 67-48.0075(8) through (9), an applicant must properly disclose all principals in its business structure. Failure to do so renders an application ineligible for funding.

140. The Department of State's duty to file documents is strictly ministerial. § 605.0210(5), Fla. Stat. The filing of a document on the Department of State's website does not: (a) affect the validity or invalidity of the document in whole or part; (b) relate to the correctness or incorrectness of information contained in the document; or (c) create a presumption that the document is valid or invalid, or that information contained in the document is correct or incorrect. *Id.*

141. When a conflict arises between the filings with the Division of Corporations and the application, additional evidence may be proffered to determine whether the application was correct as of the application deadline. *Heritage at Pompano Housing Partners, LTD. v. Fla. Hous. Fin. Corp.*, Case No. 14-1361BID (Fla. DOAH June 10, 2014; FHFC June 13, 2014).

MHP's Application—Principals Disclosure

142. Petitioner Heritage challenges the eligibility of MHP's application, alleging that MHP failed to disclose the principals of SLP, a non-investor limited partner.

143. The challenge to the application is based on an undisputed inconsistency between the managing member listed for SLP on the MHP Principals Disclosure Form and different managing members listed in a filing by SLP made with the Division of Corporations.

144. Mr. Shear, MHP's corporate representative, provided testimony that the information contained in the MHP Principals Disclosure Form was correct, because of oral agreements in place between the implicated persons. But his testimony was not credible or persuasive on this point. There was no documentary proof corroborating his testimony. The only documentation was created after the application deadline, purporting to be retroactively effective. The documentation only proved that there was a change in managing members documented after the application deadline. The undersigned finds that the correct principal as of the application deadline was not disclosed for SLP on the MHP Principals Disclosure Form.

145. MHP contends that even if the correct principal was not disclosed for SLP, MHP has satisfied the RFA's requirement because the three entities Heritage argues should have been listed as SLP's principals are contained elsewhere within the Principals Disclosure Form, thereby "allowing Florida Housing to investigate the backgrounds of each individual in furtherance of its goal to exclude individuals with questionable histories."

146. In support of its argument, MHP relies on *Ambar Riverview, Ltd. v. Florida Housing Finance Corporation*, DOAH Case No. 19-1261BID (Fla. DOAH May 21, 2019; FHFC June 21, 2019). In *Ambar*, the petitioner argued that the successful applicant should be deemed ineligible because it failed to identify the multiple roles of certain disclosed principals. The successful applicant's Principals Disclosure Form identified several persons as "officers"

of the corporation but failed to indicate that they were also "directors." Their status as directors was revealed elsewhere in the application. The ALJ concluded that the identification of all principals on the Principals Disclosure Form was sufficient and that there was no requirement to state the multiple roles of each principal in the Principals Disclosure Form. The ALJ further concluded that, in any event, the information regarding the multiple roles of the disclosed principals could be found within the four corners of the application and "[a]t most, [the successful applicant's] failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity." *Ambar*, Case No 19-1261BID, RO at 67.

147. The facts at issue in the case at hand are distinguishable from those in *Ambar*. MHP's error was not simply failing to correctly identify all the appropriate roles for each principal listed, but rather, failing to correctly identify the principals. Further, the ALJ found in *Ambar* that the application of the challenged applicant was "correct and complete." The undersigned does not find the same here.

148. The facts in this case are more analogous to those presented in *HTG Village View LLC v. Florida Housing Finance Corporation, et al.*, Case No. 18-2156BID (Fla. DOAH July 27, 2018), adopted in pertinent part, FHFC No. 2018-017BP (FHFC September 14, 2018).

149. As here, the challenged applicant in *HTG Village View* argued that its error in failing to disclose all principals of an entity should be waived as a minor irregularity because the undisclosed principal was disclosed elsewhere on the form as a principal of a different entity. The ALJ determined that the failure to disclose that individual as a principal of each entity was a material deviation which rendered the application ineligible. *HTG Village View*, Case No. 18-2156BID, RO at 53, 76-78.

150. MHP's failure to name the correct principals of SLP is contrary to the requirements of the RFA.

151. Florida Housing's preliminary scoring of the MHP application is clearly erroneous and contrary to competition. For this reason, in addition to MHP's failure to meet the RFA's Equity Proposal requirements, MHP is ineligible for funding.

Bayside Breeze and Bayside Garden Applications—Principals Disclsoures

152. Autumn Palms and SP Field challenge the eligibility of the Bayside Breeze and Bayside Gardens (collectively, the Baysides) applications, claiming that the applications failed to accurately disclose their principals.

153. The challenge relates solely to a conflict between the information provided on the Principals Disclosure Forms and information filed with the Division of Corporations.

154. It is not in dispute that the manager listed for TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, in their articles of organization filings with the Division of Corporations do not match the principals listed for those entities on the Bayside Principals Disclosure Forms.

155. The competent, substantial evidence presented at hearing, including convincing testimony of Ms. Gardner and the board minutes for TEDC and TEDC Affordable, establish that the manager of TEDC Bayside Breeze GP, LLC, and TEDC Bayside Gardens GP, LLC, was TEDC Affordable, as of the application deadline. Accordingly, the information presented in the Baysides Principals Disclosures Forms was correct as of the application deadline.

156. Petitioners Autumn Palms and SP Field failed to prove that Florida Housing's eligibility determination for the Baysides should be overturned. The Baysides applications are eligible for funding.

SP Field Application—Proximity Points

157. Petitioner DM Redevelopment challenges the proximity points received by SP Field for its listed pharmacy. DM Redevelopment argues that SP Field is not entitled to the two points for its pharmacy because SP Field listed the incorrect address and distance in its application.

158. Under the RFA, applicants earn proximity points based on the distance between the proposed development and transit or community services. Applicants are required to provide three identifying elements for community services: the name, address, and distance. In its application, SP Field claimed points for proximity to K&M Drugs but provided the wrong address and distance. SP Field does not dispute the errors but argues that the errors are minor irregularities.

159. DM Redevelopment argues that waiving SP Field's mistake as a minor irregularity would effectively allow SP Field to amend its application to correct an error discovered in this proceeding. Further, such waiver would create a competitive advantage or benefit not enjoyed by other applicants.

160. DM Redevelopment also argues that Florida Housing may not consider any "submissions made after the bid or proposal opening which amend or supplement the bid or proposal." § 120.57(3)(f), Fla. Stat.

161. By seeking a waiver for a minor irregularity, SP Field would require Florida Housing to look past both the incorrect address and the incorrect distance for K&M Drugs.

162. As testified to by Ms. Button, the purpose of the proximity points requirement is to essentially accord a higher ranking to developments that are closer to certain desirable community services. A distance of .91 miles garners more points than a distance of 1.2 miles. It is clear that the correct distance is material to an application as even a change in distance of only 0.29 miles changes the amount of proximity points SP Field would receive.

163. SP Field's errors as to the address and distance to K&M Drugs are material deviations from the RFA specifications and cannot be waived as minor irregularities.

164. Florida Housing's preliminary scoring of the SP Field application to award two proximity points for its proximity to a pharmacy—a community service—is clearly erroneous and contrary to competition.

165. SP Field is ineligible for the proximity funding preference.

Kissimmee Application – Principals Disclosure

166. As stipulated to by the parties, Florida Housing's preliminary scoring of the Kissimmee application is clearly erroneous and contrary to Florida Housing's RFA specifications, rules, or its governing statutes. Kissimmee is not eligible for funding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing issue a final order finding that:

(a) LDG's application is ineligible for funding under the RFA;

(b) MHP's application is ineligible for funding under the RFA;

(c) MJHS's application is ineligible for funding under the RFA;

(d) SP Field's application is eligible for funding under the RFA, but is not eligible for the proximity funding preference;

(e) Bayside Breeze's application is eligible for funding under the RFA;

(f) Bayside Garden's application is eligible for funding under the RFA; and

(g) Kissimmee's application is ineligible for funding under the RFA.

DONE AND ENTERED this 31st day of May, 2023, in Tallahassee, Leon County, Florida.

JODI-ANN V. LIVINGSTONE
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 31st 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.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MJHS FL SOUTH PARCEL, LTD.,

Petitioner, DOAH Case No. 23-0903BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PINNACLE 441 PHASE 2, LLC, AND
LDG MULTIFAMILY, LLC,

Intervenors.

_____/

DM REDEVELOPMENT, LTD.,

Petitioner, DOAH Case No. 23-0904BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE BREEZE REDEVELOPMENT, LLLP,
SP FIELD, LLC and KISSIMMEE LEASED
HOUSING ASSOCIATES II, LLLP,

Intervenor.

_____/

HERITAGE VILLAGE SOUTH, LTD.,

Petitioner, DOAH Case No. 23-0905BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

And

MHP FL IX LLLP,

Intervenor.

SP FIELD, LLC,

Petitioner, DOAH Case No. 23-0906BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

AUTUMN PALMS NFTM, LLC,

Petitioner, DOAH Case No. 23-0907BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

BAYSIDE BREEZE REDEVELOPMENT, LLLP

Intervenor.

CASA SAN JUAN DIEGO, LTD.,

Petitioner, DOAH Case No. 23-0908BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE GARDENS REDEVELOPMENT, LLLP

Intervenor.

MHP FL IX LLLP'S' AND MJHS FL SOUTH PARCEL, LTD.'S JOINT EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to section 120.57(1)(k), Florida Statutes, and Florida Administrative Code Rule 28-106.217, MHP FL IX LLLP ("MHP") and MJHS FL South Parcel, Ltd. ("MJHS"), jointly file the following exceptions to the Recommended Order issued in this proceeding. This proceeding involves Florida Housing's review and decision-making process in response to the Request for Applications 2022-205 SAIL Financing of Affordable Multifamily Housing Developments to be used in conjunction with Tax- Exempt Bonds and Non-Competitive Housing Credits (the "RFA") was contrary to its governing statutes, rules or policies, or the RFA's specifications.

For the reasons set forth below, MHP and MJHS urge Florida Housing to reject findings of fact in the Recommended Order that are not supported by competent, substantial evidence. MHP and MJHS also urge Florida Housing to reject conclusions of law in the Recommended Order that are not reasonable and not supported by the record evidence. Finally, MHP and MJHS urge Florida

Housing to reject recommendations that MHP's and MJHS's applications are ineligible for funding under the RFA.

BACKGROUND

This case concerns the eligibility of MHP's and MJHS's Applications to receive funding from Florida Housing pursuant to RFA No. 2022-205. Florida Housing initially determined both applications to be eligible for funding and preliminarily decided to fund MHP's application. Although the MHP and MJHS Applications were among the highest-ranked responses to the RFA, due to additional points afforded to self-sourced applications that elected to covenant additional self-sourced capital and/or voluntarily and irrevocably committing to waive the option to convert the Development to market rate for an extended period of time, the ALJ issued a Recommended Order concluding that both applications were ineligible for funding due to a strained reading of their respective Housing Credit Equity Proposals ("Equity Proposals") and alleged technical errors in MHP's Principals Disclosure Form. Although Florida Housing initially deemed both MHP and MJHS to have valid Equity Proposals that met the requirements of the RFA specifications, the ALJ found that certain terms and conditions within the respective Equity Proposals, specifically within Capital Installment #2, created "ambiguities" which led the ALJ to question whether the equity installment might not occur until after construction completion, defined under the RFA as Final Certificate of Occupancy. For that reason, the ALJ excluded Capital Installment #2 should not be included as a Construction Funding Source within the Development Cost Proforma, thereby artificially leading to a funding shortfall within the Construction phase source and use analysis.

The ALJ's findings of ineligibility are misplaced. MHP and MJHS submitted Equity Proposals that were not preliminary in nature, as is customary for applicants to submit at the point of RFA submission. Instead, MHP and MJHS's Equity Letters provided meticulously detailed full

terms and conditions that reflected a thorough vetting of the proposed projects by their equity providers and that could be closed on if the transactions proceeded with an award of funding under the RFA. Even though undisputed evidence was provided at hearing demonstrating that the same detailed terms and conditions of MHP and MJHS's Equity Letter language and calculation of construction funding sources has been accepted by Florida Housing staff during the credit underwriting process and approved by Florida Housing's Board within the Credit Underwriting Reports, the ALJ inexplicably held the letters' specificity *against* MHP and MJHS by speculating that the fully detailed terms somehow created "ambiguity" about when the funding under Capital Installment #2 would be delivered. Speculations and ambiguity are not sufficient to support "findings of fact."

Similarly, the ALJ recommended that MHP's application be found ineligible for funding based on a hyper technical Principal Disclosure matter—because entities and individuals clearly identified on MHP's principals disclosure form were allegedly listed on the wrong portion of the form.[1] There is no allegation or finding in this case that MHP failed to disclose a required principal—only that those disclosed were listed on the wrong line of the form. As explained below, such a finding is not only unreasonable but also inconsistent with Florida Housing's recent precedent.

MHP and MJHS take exception to the ALJ's findings and conclusions identified below because they are not supported by competent, substantial record evidence and are unreasonable. The competent, substantial evidence in the record establish that MHP's and MJHS's Equity Proposals not only met the RFA requirements, but also calculated the amount of housing credit funding within their respective Development Cost Proformas accurately and consistently with the

[1] MJHS's Principal Disclosures are not at issue.

well-established precedent of the credit underwriting process, a process that is required to maintain and uphold the RFA requirements and is governed under the same administrative Rules as the RFA. *See* Fla. Admin. Code Chapters 67-48 and 67-21. Furthermore, MHP properly disclosed all required principals and no material information was omitted from the application. Thus, the application met the Principal Disclosure requirements as established under the RFA. Because the ALJ's findings on these issues are unsupported by **competent, substantial evidence** and the conclusions unreasonable, MHP and MJHS respectfully request Florida Housing determine that both MHP's and MJHS's Applications are eligible for, and entitled to, funding by Florida Housing.

STANDARD OF REVIEW

A. Standard Applicable to Exceptions

MHP and MJHS do not seek to have Florida Housing re-weigh the evidence presented at the final hearing, nor do they seek to substitute new findings for those factual matters decided by the administrative law judge. MHP and MJHS file these Exceptions with the full understanding that, at this stage of review, Florida Housing is not free to re-weigh the evidence or to reject findings of fact unless there is no competent, substantial evidence to support them. *See Health Care & Retirement Corp. v. Dep't of Health & Rehab. Servs.,* 516 So. 2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Schumacker v. Dep't of Prof'l Regulation,* 611 So. 2d 75 (Fla. 4th DCA 1982). Instead, MHP and MJHS challenge findings of fact made by the ALJ that are not supported by competent, substantial record evidence. MHP and MJHS take exception to these unsupported findings of fact and urges Florida Housing to reject them.

"Competency of evidence refers to its admissibility under legal rules of evidence. 'Substantial' requires that there be some **(more than a mere iota or scintilla)**, real, material,

pertinent, and relevant evidence **(as distinguished from ethereal metaphysical, speculative or merely theoretical evidence or hypothetical possibilities)** having definite probative value (that is, 'tending to prove')." *Lonergan v. Estate of Budahazi*, 669 So. 2d 1062, 1064 (Fla. 5th DCA 1996) (emphasis added) (quoting *Dunn v. State*, 454 So. 2d 641, 649 n.11 (Fla. 5th DCA 1984 (Cowart, J., concurring specially)); *see also De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) (explaining that substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can be **reasonably inferred**" and "such relevant evidence as a reasonable mind would accept as **adequate to support a conclusion**") (emphasis added); *Demichael v. Dep't of Mgmt. Servs., Div. of Ret.*, 334 So. 3d 691, 695 (Fla. 1st DCA 2022) ("Competent, substantial evidence is evidence that is 'sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.' ") (quoting *De Groot*, 95 So. 2d at 916).

Florida Housing is free to reject or modify erroneous conclusions of law over which it has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. Florida law is clear that Florida Housing is not bound by the judge's conclusions of law. § 120.57(1)(l), Fla. Stat.; *B.J. v. Dep't of Children & Family Servs.*, 983 So. 2d 11 (Fla. 1st DCA 2008) (explaining that an agency may disregard an ALJ's conclusions of law without limitation). Florida Housing is also free to interpret administrative rules over which it has substantive jurisdiction. *See id*. Additionally, Florida Housing has no duty to accept conclusions of law that have been mis-labeled as findings of fact. An agency is free to reject conclusions of law even when they are characterized as factual findings. *See Harloff v. City of Sarasota*, 575 So. 2d 1324 (Fla. 2nd DCA 1991); *McPherson v. Sch. Bd. of Monroe Cty.*, 505 So. 2d 682 (Fla. 3rd DCA 1987). The distinction between findings of fact and conclusions of law does not depend upon how such findings and conclusions are labeled in the

Recommended Order. *See Kinney v. Dep't of State, Div. of Licensing,* 501 So. 2d 129, 132 (Fla. 5th DCA 1987) (holding that erroneously labeling a factual finding as a conclusion of law does not make it so). To the extent a finding of fact is mislabeled as a conclusion of law, the finding should be considered a part of the "conclusion of law" section, and vice versa. *See Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs.*, 500 So. 2d 620, 623 (Fla. 1st DCA 1986) ("The label affixed to a particular finding by the hearing officer or the agency is not necessarily determinative of its nature.").

Frequently, an administrative agency is in a far better position than the ALJ to rule on such matters, particularly as they relate to the interpretation and intent of rules, opinions, and other written documents prepared and issued by the agency. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1998) (courts must defer to the expertise of an agency in interpreting its own rules); *Harloff v. City of Sarasota*, 575 So. 2d 1324 (Fla. 1st DCA 1991) (court gave great weight to the agency's interpretations of the statutes).

Matters infused with overriding policy considerations are left to agency discretion. *Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs*., 500 So. 2d 620, 623 (Fla. 1st DCA 1986); *Pillsbury v. State, Dep't of Health & Rehab. Servs*., 744 So. 2d 1040 (Fla. 1st DCA 1999); *McDonald v. Dep't of Banking & Fin*., 346 So. 2d 569, 579 (Fla. 1st DCA 1977). Though the Florida Constitution has been amended to prevent courts from deferring to Agency interpretations of law and rule, that standard does not apply here.[2] The Agency's rulings on exceptions represent the Agency's opportunity to interpret its laws and rules, and to correct errant interpretations of Agency rules, as occurred here.

[2] *See* Art. V, § 21, Fla. Const.

Finally, an agency is required to follow its own precedent. *Gessler v. Dept. of Bus. & Prof'l Regulation*, 627 So. 2d 501 (Fla. 4th DCA 1993), *superseded on other grounds*, *Caserta v. Dep't of Bus. & Prof'l Regulation*, 686 So. 2d 5651 (Fla. 5th DCA 1996) (a principle of *stare decisis* applies to state decisions); *Plante, VMD v. Dep't of Bus. & Prof'l Regulation*, 716 So. 2d 790 (Fla. 4th DCA 1998); *Nordheim v. Dep't of Envt'l Prot.*, 719 So. 2d 1212 (Fla. 3d DCA 1998).

Section 120.57(1)(l), Florida Statutes, establishes the scope of an agency's authority with respect to its treatment of a recommended order. That authority is limited with respect to findings of fact, which may not be rejected or modified unless the agency first reviews the entire record and determines that a finding of fact is not supported by competent, substantial evidence or that the proceeding itself did not comport with the essential requirements of law.

Agencies have more discretion in their treatment of conclusions of law if those conclusions fall within the areas of the law or relate to the interpretation of rules over which the agency has substantive jurisdiction. Within those areas, an agency may reject or modify conclusions of law as long as it states its reasons and finds that its substituted conclusions are at least as reasonable as those of the ALJ. As the funding agency, Florida Housing has substantive jurisdiction over the legal conclusions relating to its process for awarding funding including the implementation of the RFA.

MHP and MJHS take exception to the findings of fact and conclusions of law described below.

EXCEPTION NO. 1

Challenging Finding of Fact Paragraphs 52 through 56

MHP Equity Letter Issue

In Finding of Fact Paragraphs 52 through 56 the ALJ made findings regarding the sufficiency of MHP's Equity Letter in its application:

> 52. Capital Contribution #2 provided for in the MHP Equity Letter does not make clear that the capital being contributed will be paid prior to construction completion. Instead, it provides two alternate conditions precedent for payment and indicates that the equity will be paid upon completion of the latter of the two.
>
> 53. It is unclear from the language in the letter whether "January 1, 2025," will be prior to construction completion. It is possible that construction will be completed before January 1, 2025. In that event, based on the MHP Equity Letter, Capital Contribution #2 will be paid after construction is completed.
>
> 54. Since it is unclear when Capital Contribution #2 would be paid—that is, before or after construction completion—it cannot be counted as a source to be paid "prior to construction completion" as required by the terms of the RFA.
>
> 55. When Capital Contribution #2 from MHP's Equity Letter is not considered in the analysis of funding sources and uses, MHP is left with a funding shortfall.
>
> 56. With a funding shortfall in its Cost Pro Forma, MHP's application is ineligible for funding under the RFA.

MHP takes exception to the findings of fact in paragraphs 52 through 56 of the Recommended Order because they are not supported by competent, substantial record evidence.

As stated above, to meet the competent, substantial evidence standard requires that there be "some **(more than a mere iota or scintilla)**, real, material, pertinent, and relevant evidence **(as distinguished from ethereal metaphysical, speculative or merely theoretical evidence or hypothetical possibilities)** having definite probative value (that is, 'tending to prove')." *Lonergan*, 669 So. 2d at 1064 (Fla. 5th DCA 1996) (emphasis added). Because the findings of fact in these

paragraphs are based on wholly speculative or theoretical assertions of what *could* happen, they are not supported by competent, substantial evidence and should be rejected.

Pursuant to the terms of the RFA, if an applicant will be syndicating/selling the Housing Credits, the Equity Proposal must, among other things, "state the proposed amount of equity to be paid prior to construction completion." (Jt. Stip. ¶ 33; J-1, p. 71; T. 192, Button). MHP's Equity Proposal contemplates the syndication or sale of Housing Credits. (Jt. Stip. ¶¶ 34, 54; J-15, J-6).

The RFA does not contain explicit instructions as to what language would or would not suffice to fulfill this requirement. For example, the RFA does not prohibit "latter of" dates in relation to the payment of any equity installments within an equity proposal. (Jt. Stip. ¶ 40). The RFA also does not prohibit an equity installment within an Equity Proposal from stipulating multiple and/or various conditions for the payment of any equity installment. (Jt. Stip. ¶ 61; T. 208, Button; T. 266, Shear). The RFA does not require the submission of any information relating to construction schedules or timelines. (T. 203, Button). Thus, under the RFA, an applicant is free to fulfill this requirement however it chooses so long as the Equity Proposal meets the explicit RFA conditions.

Additionally, the RFA states: If syndicating/selling the Housing Credits, the Housing Credit equity proposal must meet the following criteria:

- Be executed by the equity provider;
- Include specific reference to the Applicant as the beneficiary of the equity proceeds;
- State the proposed amount of equity to be paid prior to construction completion;
- State the anticipated Housing Credit Request Amount;
- State the anticipated dollar amount of Housing Credit allocation to be purchased; and

- State the anticipated total amount of equity to be provided

(J-1, p. 71). Notably, the ALJ did *not* find that MHP's equity proposal failed to meet the any of these criteria.

The evidence at the final hearing established that the purpose of the Equity Proposal is to "ensure that the applicant entity has vetted its proposed development with an equity provider. That they understand what is required with regard to the syndication of investment of the housing tax credit resource they're going to be administered from Florida Housing." (T. 192, Button). The ALJ found in paragraph 50 of the Recommended Order that "[t]he purpose of the Equity Proposal is to ensure that applicants have vetted their proposed developments with an equity provider and are likely to obtain funding."

The evidence at the final hearing further established that many applicants submit equity proposals that are merely conceptual in an effort to simply check the RFA requirement box. Such equity letters are not commitments in nature, but rather preliminary indications of the current market conditions and provide the amount of equity to be paid prior to construction completion without explanatory detail, or the actual detailed terms and conditions for the payment of such equity. Others, like the MHP Equity Letter, are thoroughly vetted by equity investors and meticulously detailed as to the terms and conditions. (T. 265, Shear). As Mr. Shear credibly explained, because the MHP project has been in the "pipeline for a couple of years," its Equity Letter reflects a full-term sheet. (T. 265, Shear).[3]

[3] Counsel for MHP notes that some of Mr. Shear's testimony in this portion of the transcript was stricken by the ALJ. (T. 261-66, Shear). Thus, counsel has cited only that portion of Mr. Shear's testimony that was strictly factual and directly responsive to the question the ALJ wanted answered. (*See id*.).

In addition to the equity letter requirement, Exhibit A to the RFA describes the Development Cost Pro Forma requirements and states in relevant part: "HC Equity Proceeds Paid Prior to Completion of Construction **which is Prior to Receipt of Final Certificate of Occupancy** or in the case of Rehabilitation, prior to placed-in service date as determined by the Applicant." (Jt. Stip. ¶ 53; J-1, p. 134 of 221 (emphasis added); T. 258-59, Shear). Next to this requirement is a blank line for applicants to provide an amount. (*Id*.). The undisputed record evidence establishes that "equity proceeds prior to construction" means proceeds delivered prior to the issuance of a permanent, final certificate of occupancy. (T. 207, Button).

Attachment 12 to MHP's Application is a letter dated December 22, 2022, from Wells Fargo to MHP regarding the terms and conditions of financing MHP's proposed development (the "MHP Equity Letter"). The MHP Equity Letter contains full terms and conditions for the scheduled capital contributions (equity pay-ins). (Jt. Stip. ¶ 35; J-15, pp. 70-78).

> Capital Contributions #1, #2, and #3 in the MHP Equity Letter provide as follows:
>
> Capital Contribution #1: $3,804,481 (15.00%) at Partnership Closing anticipated August 1, 2023, upon the approved closing draw schedule, with any remaining funding to be advanced based on percentage of completion under a construction loan format (approved draws).
>
> *This installment is estimated to pay up to $2,125,851 of Developer Fee. Developer Fee. As the development budget changes between the time of this term sheet and the Transaction closing, the Developer Fee Holdbacks noted in Capital Contributions #3 and #4 need to be maintained. Paid Developer Fee at closing will be adjusted to maintain paid Developer Fee Holdbacks. In no event will paid fee at closing exceed 33% of total paid fee*.
>
> Capital Contribution #2: $5,643,313 (22.25%) To be contributed upon the latter of (i) **95% construction completion or (ii) January 1, 2025**, based on percentage of completion under a construction loan format (approved draws).
>
> Capital Contribution #3: $2,513,494 (9.91%) To be contributed upon the latter of (i) **final Certificate of Occupancy for 100% of the units**, (ii) lien free construction completion of the property, substantially in accordance with the plans and

> specifications, (iii) receipt of an estimate of eligible basis and estimate of 50% test calculation prepared by General Partner or (v) February 1, 2025.
>
> *This installment is estimated to pay $2,125,851 of developer fee. As the development budget changes between the time of this term sheet and the Transaction closing, in no event shall this payment of Developer Fee be less than 4.0% of the GC Contract, nor total Developer Fee paid fee, through Capital Contribution #3, exceed 66% of total paid fee*.

(Jt. Stip. ¶ 36; J-15, pp. 71-72). The aggregate equity of Capital Contribution #1 and Capital Contribution #2 is $9,447,794. (*Id*.). MHP thereby provided an amount of $9,447,794, under the Construction/Rehab Analysis portion within the Development Cost Proforma to reflect the summation of equity to be funded before the receipt of "final certificate of occupancy for 100% of the units" as required under Capital Contribution #3. The plain language of the Equity Proposal demonstrates that Capital Contribution #1 and Capital Contribution #2 sequentially occur before Capital Contribution #3.

Notably, the ALJ did not find that the MHP Equity Letter was deficient under the purpose and intent of the RFA. Instead, the ALJ made the speculative finding that it is "possible" Capital Contribution #2 *could* be paid after construction is completed. Despite the ALJ's speculation, all of the credible record evidence demonstrates that Capital Contribution #2 would be paid *prior* to construction completion. Indeed, not a scintilla of evidence was offered that Capital Contribution #2 would be paid after construction completion. The term "possible" in and of itself is not competent, substantial evidence to sustain a finding of fact. Thus, the ALJ's findings of "ambiguity" are not based on anything more than abject speculation. *See Lonergan*, 669 So. 2d at 1064.

Moreover, the ALJ was not presented with any evidence in the record regarding the procedural closing and construction timelines of MHP's application under the RFA. This is because

the credit underwriting process is a de novo process during which the construction contract, and thereby final construction timeline, is established. (*See* T. 229, 202-03, Button). Thus, the ALJ's findings of ambiguity at this stage are not supported by competent, substantial evidence.

Further, the undisputed record evidence establishes that MHP's Development Cost Pro Forma provided an amount of $9,447,794.00 as the "HC Equity Proceeds Paid Prior to Completion of Construction which is Prior to Receipt of Final Certificate of Occupancy." (J-15, p. 26; T. 259-60, Shear). Additionally, Mr. Shear credibly testified that the amounts set forth in Capital Contribution #1 and #2 on MHP's Equity Letter equal the amount identified on MHP's Development Cost Pro Forma contained within its Application as the "HC Equity Proceeds Paid Prior to Completion of Construction which is Prior to Receipt of Final Certificate of occupancy." (T. 270, Shear; J-15, pp. 71-72). MHP therefore accurately reflected the aggregate of Capital Contributions #1 and #2 in an amount of $9,447,794.00 on the RFA Pro Forma as a construction phase source of financing and do not exhibit a funding shortfall. Indeed, $9,447,794.00 is the aggregate of Capital Contributions #1 and #2. Thus, the amount of equity to be paid prior to construction completion is readily apparent and accurately reflected on MHP's Development Cost Pro Forma, within the four corners of the application.

Moreover, as it relates to Capital Contribution #2, the credible evidence establishes that 95% construction completion is less than 100% construction completion. (T. 216, Button; *see also* T. 270, Shear). Thus, the credible evidence establishes that romanette (i) of Capital Contribution #2 must be prior to construction completion. (T. 216, Button). The RFA defines Construction Completion as receipt of **Final Certificate of Occupancy**. (J-1, pp. 13, 134). At hearing, Ms. Button admitted that completion of construction occurs upon the issuance of a permanent certificate of occupancy and that there was no indication in MHP's equity credit letter that a

permanent (final) certificate of occupancy would be obtained prior to the contributions from Capital Contribution #1 or Capital Contribution #2. (T. 218, Button). Additionally, Ms. Button agreed that Capital Contributions #3 and #4 in the MHP Equity Letter are clearly considered to be post completion of construction contributions because Capital Contribution #3 is the first time a final certificate of occupancy for 100% of the units is mentioned within any of the installments. (T. 218-19, Button; see also T. 270-71 Shear).

Thus, reading each capital contribution in *pari materia*—which the ALJ clearly did not as the Recommended Order only references Capital Contribution #2—the plain language makes clear that Capital Contribution #1 is due at closing and Capital Contribution #2 is due at 95% construction completion, which clearly precedes Capital Contribution #3, due at Final Certificate of Occupancy.

Instead of reading the installments in *pari materia*, the ALJ found that if Capital Contribution #2 is read in isolation, the attachment of a date certain to the installment description creates an ambiguity in the terms. However, the RFA does not require any projected or final construction timelines to be provided within the RFA response. Therefore, the ALJ's purely speculative finding that construction completion and Final Certificates of Occupancy *might* be achieved before January 1, 2025, is not supported by competent, substantial evidence and, further, is something that at best should occur during the credit underwriting process.[4] In addition, the undisputed record evidence establishes that the detailed term language in MHP's equity letter is common at credit underwriting and does not cause any confusion or ambiguity in the terms. (T. 225-26, Button; MJHS-8, p. 1371).

[4] From a practical standpoint, there is no way to underwrite, close, and complete construction by the Date Certain.

The credible evidence establishes that credit underwriting is a de novo review of all the information in an application, as well as a review of the applicant sponsor team, the developer and the applicant entities, and the development itself. (T. 86, 229, Button). At both the RFA application stage and the credit underwriting stage, Florida Housing reviews the applicant's proposal to ensure the applicant has sufficient funds to complete construction and complete the project as a whole. (T. 203-04, Button). The purpose of the credit underwriting process is to "ensure the feasibility of the development and that the funding should move forward." (T. 86, Button). The same pro forma that is submitted by applicants as part of their applications is used in credit underwriting. (T. 105, Button). However, as it relates to equity letters, Florida Housing "often" receives equity letters in applications that are "completely different" from what the applicant ultimately uses in underwriting. (T. 229, Button). In fact, the original credit equity letters are not even considered once applicants reach the credit underwriting stage. (T. 227, Button).

Indeed, credible evidence was presented at the final hearing that Florida Housing has accepted and approved equity proposals with consistent and similar terms, conditions, and "latter of" dates to that of the MHP Equity Letter during credit underwriting. (MJHS-8, p. 21; T. 225-26, Button). Although such credit underwriting reports contain dates and conditions tied to installment payments, Florida Housing did not consider those to cause any sort of confusion or ambiguity. (T. 226, Button). The RFA specifications continue to be upheld during the credit underwriting process and both credit underwriting and the RFA are governed by the same rules—chapters 67-48 and 67-21 of the Florida Administrative Code.

An equity letter that is acceptable at credit underwriting thereby must be acceptable at the application process. To find otherwise is not only not supported by the competent, substantial

record evidence, it would be illogical, antithetical, and undermine Florida Housing's mission and the overall competitive application and underwriting process.

In view of all the evidence presented at the final hearing, MHP urges Florida Housing to reject the ALJ's findings in these paragraphs because they are unsupported by competent, substantial evidence. MHP further urges Florida Housing to find that the competent substantial evidence establishes that there is no ambiguity in the within MHP's Equity Letter because the plain language of Capital Contribution #1, due at closing, and Capital Contribution #2, due at 95% construction completion, each clearly preceded Capital Contribution #3, due at final certificate of occupancy.

EXCEPTION NO. 2

Challenging Finding of Fact Paragraphs 61 through 65

In Finding of Fact Paragraphs 61 through 65 the ALJ made findings regarding the sufficiency of MJHS's Equity Letter included with its application:

> 61. . . . [A]lthough it is clear from a complete reading of the MJHS Equity Letter that November 1, 2024, **would occur prior to the construction completion date**, which is listed as January 2025, it is not clear that each and every term listed in subparts (a) through (g) would be satisfied prior to construction completion. If any one of the events listed in subparts (a) through (g) occurs after construction ends, the funds will not be available before construction completion.
>
> 62. . . . [T]he undersigned is persuaded by Ms. Button's testimony that it is unclear whether the accountant's draft Cost Certification would be received before construction completion
>
> 63. Because it is not clear that the Second Installment will be paid prior to construction completion, the installment cannot be included as a funding source in MJHS's Cost Pro Forma.
>
> 64. When the Second Installment is removed as a construction funding source, the sources no longer meet or exceed the uses in the Cost Pro Forma, and MJHS is left with a funding shortfall.

> 65. With a funding shortfall in its Cost Pro Forma, MJHS's application is ineligible for funding under the RFA.

MJHS takes exception to the ALJ's findings of fact in paragraphs 61 through 65 of the Recommended Order because they are not supported by competent, substantial record evidence.

If an applicant will be syndicating/selling the Housing Credits, the RFA requires that the Equity Proposal must, among other things, "state the proposed amount of equity to be paid prior to construction completion." (Jt. Stip. ¶ 33; J-1, p. 71; T. 192, Button). MJHS's Equity Proposal contemplates the syndication or sale of Housing Credits. (Jt. Stip. ¶¶ 34, 54; J-6).

As stated above under Exception No. 1, the RFA does not contain explicit instructions as to what language would or would not suffice to fulfill this requirement. Thus, under the RFA, an applicant is free to fulfill this requirement however it chooses so long as the purpose of the equity proposal is, indeed, met. Additionally, the purpose of the Equity Proposal is to "ensure that the applicant entity has vetted its proposed development with an equity provider. That they understand what is required with regard to the syndication of investment of the housing tax credit resource they're going to be administered from Florida Housing." (T. 192, Button; *see also supra* Exception No. 1).

The undisputed evidence at the final hearing demonstrated that many applicants submit equity proposals that are conceptual in an effort to simply check the RFA requirement box. (*See supra* Exception No. 1). Others, however, like the MJHS Equity Letter, are not preliminary letters to merely satisfy the application requirements, but rather are thoroughly vetted by equity investors and meticulously detailed as to the terms and conditions necessary for closing. (T. 265, Shear). As Mr. Shear credibly explained, because the MJHS project has been in the "pipeline for a couple of years," its Equity Letters reflects a full-term sheet. (T. 265, Shear).

In addition to the Equity Proposal requirement, Exhibit A to the RFA describes the Development Cost Pro Forma requirements and states in relevant part: "HC Equity Proceeds Paid Prior to Completion of Construction **which is Prior to Receipt of Final Certificate of Occupancy** or in the case of Rehabilitation, prior to placed-in service date as determined by the Applicant." (Jt. Stip. ¶ 53; J-1, p. 134 of 221 (emphasis added); T. 258-59, Shear). Next to this requirement is a blank line for applicants to provide an amount. (*Id*.). The undisputed record evidence establishes that "equity proceeds prior to construction" means proceeds delivered prior to the issuance of a permanent, final certificate of occupancy. (T. 207, Button).

Attachment 12 to MJHS's Application is a December 16, 2022, letter from CREA to MJHS providing the terms and conditions for a limited partnership in the Garden House development (the "MJHS Equity Letter"). As the ALJ found in paragraph 60 of the Recommended Order, the credible evidence clearly establishes that the MJHS Equity Letter contained a "Construction Completion Date" of January 2025. (J-6, p. 81; T. 205-06, Button).

The MJHS Equity Letter further contains a detailed capital contribution schedule with four contribution installments. (Jt. Stip. ¶ 55; J-6, pp. 79-84).

The First and Second Installments in the MJHS Equity Letter provides as follows:

> 1) $ 4,815,071 (20.00%) (the "First Installment"), will be funded upon the later to occur of the execution of the Partnership Agreement and satisfaction of the following conditions, as reasonably determined by the Special Limited Partner:
>
> a) the Limited Partner's admission to the Partnership
>
> b) receipt by the Special Limited Partner of due diligence documentation customary to closing a LIHTC transaction
>
> c) closing of all Property sources and funding of those sources as required pursuant to the Financial Forecasts

d) receipt of a fixed rate commitment for the Permanent Loan(s)

e) receipt of any necessary building permits or approved will-issue letters

2) $ 9,630,143 (40.00%) (the "Second Installment"), will be funded upon the later to occur of November 1, 2024 and satisfaction of the following conditions, as reasonably determined by the Special Limited Partner:

a) 98% lien-free (up to $100,000 of liens may be bonded over) Construction Completion of the Property sufficient for all residential rental units to be “placed in service” within the meaning of Section 42 of the Code

b) the issuance of all required temporary certificates of occupancy (with the appropriate life and safety certifications) permitting occupancy of all residential rental units

c) receipt of the accountant’s draft Cost Certification

d) no payable developer fee will be released under this Third Installment until 100% lien free Construction Completion, as evidenced by the architect’s substantial completion certification that the Property has been completed in accordance with the Plans and Specifications

e) receipt by the Special Limited Partner of satisfactory evidence that all environmental requirements as required in a Phase I or Phase II ESA have been met, (if applicable) unless the Special Limited Partner determines during underwriting that the conditions cannot be met until a subsequent installment

f) execution of a property management agreement if not required at closing

g) evidence that the CSS provider has been engaged, the CSS has been started, and the final CSS will be delivered by January 31st in the year following when the Property is Placed in Service.

(Jt. Stip. ¶ 56; J-6, pp. 82-83).

The Third Installment in the MJHS Equity Letter provides funding as follows:

(4) $ 9,530,143 (39.90%) (the "Third Installment"), will be funded upon the later to occur of October 1, 2025 and satisfaction of the following conditions, as reasonably determined by the Special Limited Partner:

a) the achievement of Stabilized Operations (as defined below)

b) receipt and approval of the Special Limited Partner's third-party review of all of the first year's tenant files for compliance with the Code and State requirements

c) receipt of the accountant's final Cost Certification and the 50% test

d) payment in full of the Construction Loan and closing and funding of the Permanent Loans (which may occur simultaneously with the payment of this Installment)

f) receipt of the final as-built ALTA survey of the Property

g) the issuance of all required permanent certificates of occupancy permitting immediate occupancy of all residential units

h) evidence of forms 8609 submission to the State FHA

"Stabilized Operations" means a 90 consecutive day period following Construction Completion upon which: (i) the Property has achieved initial Qualified Occupancy, (ii) the Property has maintained physical occupancy of at least 90.00%, (iii) closing and funding of the Permanent Loan has occurred or will occur concurrently, and (iv) the Property has satisfied the Debt Coverage Ratio requirement in Section 3.

(J-6, p. 83).[5] A permanent certificate of occupancy is synonymous with a final certificate of occupancy. (T. 267, Shear).

[5] Mr. Shear testified that the "4)" in front of the Third Installment was a scrivener's error. (T. 267, Shear).

Notably, the ALJ did *not* find that MJHS's Equity Proposal failed to meet the stipulated RFA criteria required for Equity Proposals. In fact, the ALJ found that "it is clear" that November 1, 2024 would occur prior to the construction completion date, which is listed as January 2025. Nevertheless, the ALJ found that "it is not clear that each and every term listed in subparts (a) through (g) would be satisfied prior to construction completion. If any one of the events listed in subparts (a) through (g) occurs after construction ends, the funds will not be available before construction completion." As with the ALJ's findings on the MHP Equity Letter, this is a purely speculative finding that is not supported by competent, substantial record evidence.

Capital Contribution #2 condition (a) requires 98% lien-free completion. The undisputed evidence concludes that 98% lien-free completion occurs before final certificate of occupancy (T. 208-09, Button). Capital Contribution #2 condition (b) requires the issuance of all **temporary** certificates of occupancy. The undisputed evidence concluded that **temporary** certificates of occupancy are in advance of **final** certificates of occupancy (T. 209-10, Button).

Capital Contribution #2 condition (c) requires the receipt of an accountant's **draft** cost certification. Draft cost certifications are by definition a draft. Incredibly, the ALJ was not provided any evidence in the record regarding MHP's ability to deliver a **draft** cost certification prior to construction completion (final certificate of occupancy) except for Ms. Button's testimony, who readily acknowledged that the receipt of an accountant's draft cost certification can be accomplished prior to construction completion. (T. 209, Button). Thus, there is no competent, substantial evidence to support the ALJ's findings of fact regarding MJHS' Equity Proposal.

Capital Contribution #2 condition (d) is not a condition but rather a statement that no payable developer fee will be released until 100% lien-free completion. Capital Contribution #2 condition (e) requires MHP to provide evidence that all environmental conditions stipulated in the

Phase I or II environmental report have been met. Capital Contribution #2 condition (f) requires the execution of a property management agreement if not required at closing. Capital Contribution #2 condition (g) requires evidence that a CSS (cost segregation study) provider has been engaged and the CSS has been started and the final CSS will be delivered by January 31st in the year following when the Property is Placed in Service. The competent, substantial evidence in the record establishes that these are all items that are accomplished prior to construction completion. (T. 209, Button). All further terms and conditions outlined within the Equity Proposal are further detailed, negotiated, and formalized during the de novo credit underwriting process. (T. 229, Button).

As noted above, the ALJ did not find that the MJHS Equity Letter was deficient under the purpose and intent of the RFA. Instead, the ALJ again speculated and found that it is not clear that all conditions—(a), (b), (d), (e), (f), or (g)—of MJHS's Equity Proposal would be satisfied prior to construction completion (final certificate of occupancy). However, only condition (c) was actually challenged. Thus, the ALJ's findings on this point are both entirely speculative and not supported by competent, substantial evidence.

Additionally, while the ALJ found that it is "unclear" whether the accountant's draft cost certification, referenced in condition (c) of the second installment, would be received before construction completion, Ms. Button did not deny that receipt of the draft cost certification *can* be accomplished before construction completion. (T. 209, Button). More importantly, it is just a draft, which can be completed at any time and is something over which MJHS has complete control. To find an otherwise highly detailed equity letter to be ambiguous on this basis alone when all of the evidence presented at the hearing demonstrates that the second installment would be paid prior to construction completion does not amount to competent, substantial evidence. Indeed, as with the

MHP Equity Letter, not a scintilla of evidence was offered that the second installment would be paid after construction completion. *See Lonergan*, 669 So. 2d at 1064.

The undisputed record evidence further establishes that MJHS's Development Cost Pro Forma contained within its Application provided the amount of $14,445,214.00 as the "HC Equity Proceeds Paid Prior to Completion of Construction which is Prior to Receipt of Final Certificate of Occupancy." (J-6, p. 26; T. 259, Shear). Additionally, Mr. Shear credibly testified that this amount is the aggregate amount of the First and Second Installments on the MJHS Equity Letter. (T. 266-67, Shear; J-6, pp. 26, 82). MJHS therefore accurately reflected the aggregate of the first and second installments in an amount of $14,445,214.00 as a construction phase source of financing which does not exhibit a funding shortfall. Thus, the amount of equity to be paid prior to construction completion is readily apparent and accurately reflected on MJHS's Development Cost Pro Forma, within the four corners of the application.

Moreover, the MJHS Equity Letter clearly states that the Second Installment will be funded upon the later to occur of November 1, 2024, and satisfaction of conditions. (J-6, p. 82; T. 266, Shear). The ALJ could not deny that the November 1, 2024, date referenced is earlier than the construction completion date of January 2025 identified on the MJHS Equity Letter. (See R.O., ¶ 61; T. 208, Button; J-6, pp. 81-82; see also T. 268, Shear). Additionally, the credible evidence establishes that all of the bulleted items listed within the Second Installment of the MJHS Equity Letter "generally are items that are prior to construction completion." (T. 209, Button). Indeed, there was no disagreement that 98% construction completion is less than 100% construction completion. (T. 209, Button; T. 267, Shear). Likewise, there was no disagreement that a temporary certificate of occupancy, which was referenced in the Second Installment, comes before a final certificate of occupancy, which was referenced in the Third Installment. (T. 209, Button; T. 266-

67, Shear). And, as previously stated, the RFA defines construction completion as receipt of final certificate of occupancy. (J-1, pp. 13, 134; see also T. 207, Button).

Additionally, despite the ALJ's finding that it is "unclear" whether the draft cost certification would be received before construction completion, Ms. Button agreed that it can be accomplished prior to construction completion. (T. 209, Button). Indeed, Ms. Button confirmed that an architect's "substantial completion certification" referenced in the fourth condition under the Second Installment occurs before final certificates of occupancy are issued. (T. 210, Button).

The credible evidence further establishes that the October 1, 2025, date referenced in the Third installment would occur after the construction completion date of January 2025. (T. 211-12, Button; *see also* T. 268-69, Shear). Indeed, the Third Installment refers to post-construction funding, which as Mr. Shear explained, would occur after the construction complete date identified in the MJHS Equity Letter. (T. 212, Button; T. 268-69, Shear). As such, the $9.5 million identified in the Third Installment was not included in the amount of equity to be paid prior to construction identified on MJHS's pro forma. (T. 269, Shear; J-6, p. 26).

Thus, despite the ALJ's finding that the MJHS Equity Letter was somehow ambiguous because construction completion may occur before the November 1, 2024 "later of" date within the Second Installment, the evidence presented at the final hearing—including testimony from Ms. Button—demonstrates that there is no real ambiguity. Indeed, reading each installment in *pari materia*—which the ALJ clearly did not as the Recommended Order refers only to the second installment—the plain language makes clear that the first and second installments would be paid prior to construction completion.

Additionally, the credible evidence establishes that the detailed term language in the MJHS Equity Letter is common at credit underwriting and does not cause any confusion. (T. 225-26,

Button; MJHS-8, p. 1371). In fact, Florida Housing and their credit underwriter have accepted the exact same terms and conditions outlined in the MJHS Equity Proposal during credit underwriting and the Florida Housing Board of Directors have approved credit underwriting reports with these same terms and conditions. (T. 225-26, Button; MJHS-8, p. 1371; *see supra* Exception No. 1).

Indeed, credible evidence was presented at the final hearing that Florida Housing has accepted and approved equity proposals with consistent and similar terms, conditions, and "latter of" dates to that of the MJHS Equity Letter during credit underwriting. (MJHS-8, p. 21; T. 225-26, Button). Although such credit underwriting reports contain dates and conditions tied to installment payments, Florida Housing did not consider those to cause any sort of confusion or ambiguity. (T. 226, Button).

An equity letter that is acceptable at credit underwriting must be acceptable at the application process. To find otherwise is not only not supported by the competent, substantial record evidence, it would be illogical, antithetical to, and undermine the overall competitive application and underwriting process.

In view of all the ***competent, substantial*** evidence presented at the final hearing, MJHS urges Florida Housing to reject the ALJ's findings in these paragraphs because they are unsupported by competent, substantial evidence. MJHS further urges Florida Housing to find that the competent, substantial evidence establishes that there is no ambiguity within MJHS's Equity Letter because the proposal and MJHS's Development Cost Pro Forma clearly stated the proposed amount of equity to be paid prior to construction completion and completed the Development Cost Proforma based precedent set during credit underwriting.

EXCEPTION NO. 3

Challenging Finding of Fact Paragraphs 79 through 83

MHP Principals Disclosure Form

In Finding of Fact Paragraphs 79 through 83 the ALJ made findings regarding the accuracy of MHP's Principals Disclosure Form:

> 79. . . . [M]r. Shear's testimony on this matter was not persuasive or credible and is not credited.
>
> 80. The written operating agreement, executed in February 2023, after MHP had already submitted its application, provided that Shear Holdings, the McDowell Trust, and Archipelago were "withdrawing members" and that the three withdrawing members had agreed to transfer their membership interest in SLP to Mr. McDowell, who would become SLP's sole member and manager. This contradicts Mr. Shear's testimony that Shear Holdings, the McDowell Trust, and Archipelago never had a membership interest in SLP.
>
> 81. Mr. Shear's claim that Mr. McDowell has always been the sole manager and member of SLP is not credible or supported by additional evidence.
>
> 82. The evidence presented supports a finding that the MHP Principals Disclosure Form, submitted as part of its application, inaccurately listed Mr. McDowell as the principal of SLP.
>
> 83. MHP's failure to disclose W. Patrick McDowell 2001 Trust, Archipelago Housing, LLC, and Shear Holdings, LLC, as principals of SLP as of the application deadline renders the application ineligible for funding.

MHP takes exception to the ALJ's findings of fact in paragraphs 79 through 83 of the Recommended Order because they are not supported by competent, substantial evidence.

The undisputed record evidence establishes that the purpose of the principal disclosures form is to allow Florida Housing to vet the principals of the applicant and developer to ensure that they are not in financial arrearages to Florida Housing and not on an insurance deficiency report. (T. 168, Button).

To facilitate the principal disclosures process, Florida Housing offers an Advance Review process, which provides applicants the opportunity to submit their principal disclosures form to Florida Housing for review before the application deadline to ensure that the applicant has made the proper disclosures for the types of principals they identified. (T. 172, Button). Applicants who utilize this process can receive 5 points if the form is stamped "Approved" at least 14 days prior to the application deadline. (T. 172, Button; J-1, p. 15 of 221).

MHP timely submitted a Priority I Application (Application No. 2023-142BS) in response to the RFA for a self-sourced development named Southpointe Vista (Phase II) located in Miami-Dade County. (Jt. Stip. ¶ 30; J-15). Florida Housing deemed MHP's Application eligible for funding and preliminarily selected the Application for funding pursuant to the terms of the RFA. (Jt. Stip. ¶ 31; J-5). MHP received a score of 19, while Heritage Village received a score of 15 under the RFA specifications. (J-4).

The Principal Disclosures Form submitted with MHP's Application was stamped "APPROVED," demonstrating that it had been submitted and approved through Florida Housing's Advance Review process. (J-15, p. 37; T. 138, Shear; T. 172-73, Button). Thus, MHP was awarded five points because its form was stamped "Approved" at least 14 days prior to the application deadline. (T. 174, Button).

Relevant in this case, and in accordance with Florida Housing's rules, at the First Principal Disclosure Level, MHP identified three principals of the Applicant:

(1) MHP FL IX GP, LLC as a General Partner;

(2) William P. McDowell as an Investor LP; and

(3) MHP FL IX SLP, LLC ("SLP") as a Non-Investor LP.

(Jt. Stip. ¶¶ 45, 46; J-15, p. 37 of 97).

At the Second Principal Disclosure Level, MHP identified as Members and Managers of MHP FL IX GP, LLC:

(1) W. Patrick McDowell 2001 Trust,

(2) Archipelago Housing, LLC, and

(3) Shear Holdings, LLC

(J-15, p. 37 of 97). Also at the Second Principal Disclosure Level, MHP identified William P. McDowell as a natural person and the sole member and manager of SLP. (Jt. Stip. ¶ 47; J-15, p. 37 of 97).

After Florida Housing made its preliminary decision, Heritage Village filed a Petition alleging that MHP's principal disclosures were incorrect and, as a result, MHP should not be eligible for funding under the RFA. Specifically, Heritage Village presented an Articles of Organization filing with the Florida Department of State in August 2022 for SLP, which identifies three members and three managers:

(1) W. Patrick McDowell 2001 Trust;

(2) Shear Holdings, LLC; and

(3) Archipelago Housing, LLC.

(HV-35, p. 3). Based solely upon records found at the Department of State, the ALJ found that MHP's Application should have identified these three entities as member and managers of SLP, rather than identifying William P. McDowell as the sole member and manager of SLP.

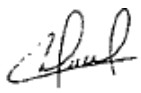
As noted above, William P. McDowell, W. Patrick McDowell 2001 Trust, Shear Holdings, LLC, and Archipelago Housing, LLC were all clearly disclosed in MHP's Principal Disclosure Form. (J-15, p. 37 of 97). Thus, every individual and entity the challengers alleged were

misidentified were actually contained within MHP's Principals Disclosure Form. Every person that Florida Housing might seek to investigate was disclosed.

Additionally, contrary to the corporate filing presented by Heritage Village, W. Patrick McDowell 2001 Trust, Shear Holdings, LLC, and Archipelago Housing, LLC ***were never*** the manager or member of SLP and, therefore, MHP accurately represented the Principals as required by the RFA. (T. 129, 133, Shear). At the final hearing, Chris Shear, Chief Operating Officer of McDowell Housing Partners, credibly testified that SLP had an established oral operating agreement that was in place at the time the MHP Application was submitted to Florida Housing. (T. 152, Shear). Under the terms of this oral agreement, SLP was initially formed in October 2020, with William P. McDowell as the sole manager and member of SLP. (T. 152, Shear; MHP-1). MHP submitted an application for SAIL funding to Florida Housing under RFA 2021-205 in October 2021 based on this oral agreement. (*Id.*). This oral agreement remained in place was orally agreed to again by MHP on December 15, 2022—ahead of the Application Deadline. (*Id.*).

In response to the SLP Articles of Organization brought forth by Heritage Village, Mr. Shear credibly testified that the Articles were erroneously filed with the Department of State by a third-party vendor in August 2022. (T. 132, Shear; HV-35). The Articles should have reported William P. McDowell as the sole manager and member of SLP. (T. 136, Shear). This testimony was unrebutted at trial.

The signature line on the Articles indicates that an attorney signed the Articles:



Christoper Shear
By: Carlos Alvarez, Attorney-in-Fact

(HV-35, p. 5). Mr. Shear was not aware of the contents of the filed Articles of Organization when the verbal operating agreement for SLP was reached on December 15, 2022, or when he submitted the MHP Application on December 20, 2022. (T. 139, 165-66, Shear).

Thus, the operating agreement and corresponding Principal Disclosures Form were accurate at the time the MHP Application was submitted to Florida Housing. (*Id*.). The agreement was then ultimately memorialized in writing in February of 2023, identifying William P. McDowell as the sole manager and member. (T. 152-53, Shear; MHP-1). The written operating agreement executed in February 2023 reflected an effective date of December 15, 2022, the latest date upon which it was orally agreed that William P. McDowell was the sole member and manager.

Again, Mr. McDowell was already identified in the MHP Principal Disclosure Form. Mr. Shear credibly testified that William P. McDowell has always been the sole member and manager of SLP and, thus, that MHP's principal disclosures form accurately disclosed the principal of SLP. (T. 155-57, Shear).

Despite the ALJ's inexplicable and unsupported findings discrediting Mr. Shear's explanation, Mr. Shear's explanation about the agreement was clear and consistent throughout the litigation. In answers to interrogatories propounded by Heritage Village prior to the final hearing, Mr. Shear, on behalf of MHP, admitted that the oral operating agreement for SLP was not written or signed until February 17, 2023. (HV-37, p. 4). In these same interrogatory answers, Mr. Shear explained that the agreement existed prior to February 17, 2023 "as an oral and implied operating agreement, as allowed by Florida law." (HV-37, p. 4).

Mr. Shear credibly testified that because entities like SLP are created for the single purpose of submitting applications to Florida Housing, it is not uncommon in the industry to have oral operating agreements in place before expending resources on lawyers to assist with the formulation

of a written agreement. (T. 154, Shear). To be sure, partnership agreements in Florida can be "oral, implied, in a record, or in any combination thereof." § 620.1102(14), Fla. Stat. Notably, the Recommended Order utterly ignores Florida law on this point.

Mr. Shear further credibly testified that, contrary to the erroneously filed Articles of Organization, W. Patrick McDowell 2001 Trust, Shear Holdings, LLC, and Archipelago Housing, LLC never had a membership interest in SLP. (T. 133, Shear). Mr. Shear credibly explained that he decided against filing an amendment to these Articles of Organization with the Division of Corporations until after the Application had been submitted because he was concerned about raising flags or drawing scrutiny from his competitors during the appeal period. (T. 133-35, Shear).

In sum, Mr. Shear never wavered that the sole member and manager of SLP is William P. McDowell, as correctly reported on MHP's Principal Disclosures Form. And not a single witness refuted Mr. Shear's testimony. There is simply no basis in the record to discredit Mr. Shear's sworn testimony based on a corporate filing pulled from a website.

Even if Mr. Shear was not being truthful in his testimony, and he certainly was truthful, the undisputed record evidence establishes that MHP disclosed W. Patrick McDowell 2001 Trust, Shear Holdings, LLC, and Archipelago Housing, LLC at the Second Disclosure Level for MHP FL IX GP, LLC on MHP's Principal Disclosures Form. (J-15, p. 37 of 97; T. 176, 178-79). Therefore, the eligibility requirement under the RFA "[t]o meet eligibility requirements, the Principals Disclosure Form must identify, pursuant to subsections 67- 48.002(94), 67-48.0075(8) and 67-48.0075(9), F.A.C., the Principals of the Applicant and Developer(s) as of the Application Deadline" has been met. (J-1, p. 15). Indeed, Ms. Button admitted that because they were all disclosed as principals of MHP FL IX GP, LLC, Florida Housing was able to vet each of them. (T. 176, 178-80, 183, Button). Ms. Button also confirmed that not a single individual or entity was

missing from MHP's Principal Disclosures Form. (T. 180, Button). In fact, Ms. Button specifically admitted that every name of every company and individual associated with MHP's project is disclosed on MHP's Principal Disclosures Form. (T. 183, Button).

Ms. Button further admitted that "Florida Housing does not take a position that the Sunbiz filings automatically control. And I think there's something legally by statute that supports that; that Sunbiz filings are not just automatically what is accurate." (T. 412-13, Button). Indeed, section 605.0210, Florida Statutes, clearly states that filing a document with the Department of State "***does not [c]reate a presumption*** that the document is valid or invalid or that the information contained in the document is correct or incorrect." § 605.0210(5)(c), Fla. Stat. (emphasis added).

In light of all of this record evidence, the ALJ's findings that Mr. Shear's testimony was "not persuasive or credible" is not supported by any competent, substantial evidence in the record. The only evidence to support the ALJ's findings on this issue is a corporate filing that everyone in this proceeding admitted are not automatically accurate. Indeed, this point is so fundamental that Florida legislators wrote it into statute. Thus, such corporate filings simply cannot amount to competent, substantial evidence. *See Lonergan*, 669 So. 2d at 1064.

Moreover, while the ALJ appeared to be persuaded by the fact that Mr. Shear and his partners sought to memorialize the oral operating agreement after the application deadline, she utterly failed to acknowledge or otherwise reconcile the undisputed fact that oral operating agreements are permitted by law. To rely on corporate filings that Florida law and Florida Housing admit are not automatically accurate over the sworn and unrebutted testimony of the only person with actual knowledge of the relevant entities is not competent or substantial evidence. Findings of fact premised on such demonstratively weak "evidence" are simply insufficient. *See Lonergan*, 669 So. 2d at 1064.

Based on the ***competent, substantial record*** evidence in the record, Florida Housing should reject the ALJ's findings on this issue and find Mr. Shear's testimony to be credible. However, even if Florida Housing finds that W. Patrick McDowell 2001 Trust, Archipelago Housing, LLC, and Shear Holdings, LLC should have been disclosed multiple times on its principals disclosure form, it should find that, at worst, MHP's failure to disclose them multiple times is a waivable minor irregularity under Florida Housing's rule because such a finding is consistent with Florida Housing's precedent, as explained more fully below.

Accordingly, MHP takes exception to the ALJ's findings in paragraphs 79 through 83 of the Recommended Order and Florida Housing should find that they are unsupported by competent, substantial evidence because MHP's Principals Disclosure Form was complete and appropriately disclosed its members and managers.

EXCEPTION NO. 4

Challenging Conclusions of Law Paragraphs 135 through 137

In Conclusions of Law Paragraphs 135 through 137, the ALJ made conclusions regarding the sufficiency of MHP's and MJHS's Equity Proposals:

> 135. MHP's and MJHS's Equity Proposals are ambiguous—it is not clear when the second installment of both equity proposals will be paid. MHP's Equity Proposal contains a date which, if construction is completed before that date, then equity would be paid after construction completion. MJHS's Equity Proposal contains seven conditions that must be completed before the release of the equity payment.
>
> 136. MHP's Capital Contribution #2 and MJHS's Second Installment must be excluded from the construction financing analysis because both create a material ambiguity in their respective applications as to when they will be paid. The exclusion of those funds results in construction funding shortfalls in both applications, causing both to be ineligible.
>
> 137. Heritage and SP Field met their burden to demonstrate that Florida Housing's decision deeming MHP's and MJHS's applications eligible is contrary to the RFA specifications. Florida Housing's preliminary scoring of

the MHP and MJHS applications is clearly erroneous and contrary to competition.

MHP and MJHS take exception to the ALJ's conclusions of law in paragraphs 135 through 137 of the Recommended Order because they are unreasonable. In support of their challenges to the MHP and MJHS Equity Letters, Heritage Village and Florida Housing relied on two previous decisions: *Rosedale Holding v. Florida Housing Finance Corporation*, Case No. 2013-038 (DOAH May 12, 2014; FHFC June 13, 2014), and *The Vistas at Fountainhead Limited Partnership v. Florida Housing Finance Corporation, et al*., Case No. 19- 2328BID (DOAH July 16, 2019, FHFC Aug. 5, 2019). However, the facts presented in each of those cases are very dissimilar to the facts here.

As in the case, the issue raised in *Rosedale* was whether an funding installment should be considered as provided prior to construction completion, or whether it described a post-construction payment. If considered a post-construction payment, the application in *Rosedale* would face a funding shortfall prior to the completion of construction, and would be ineligible.

In *Rosedale*, an applicant's equity letter indicated that a funding installment would be paid only upon receipt of the *final* certificate of occupancy, the receipt of certification from a construction inspector that construction was complete, and confirmation from the lender that construction was complete. Thus, the pay-in schedule at issue there left no doubt that the disputed payment would only arrive after construction was completed. *Rosedale*, RO at pp. 12-13. Though other portions of the Pro Forma indicated that the installment would be paid prior to construction completion, that statement was clearly inconsistent with the description of the pay-in schedule included with the application. Properly, the ALJ and Florida Housing both concluded that the application at issue in *Rosedale* should not be funded, as the pay-in schedule made it very clear that the disputed installment would not be paid until construction was completed, resulting in a

shortfall. Unlike the facts in Rosedale, the MHP and MJHS letters do not contain any statement that would suggest that Installment No. 2 would only occur after the issuance of a final certificate of occupancy or after construction was complete. To the contrary, the installments described in MHP's equity credit letter make it clear that Installment No. 2 occurs prior to completion of construction (95%), and the third installment will be made after construction is completed (at 100%). Additionally, MJHS's equity credit letter makes clear that the first and second installments would be paid on the later of a date certain or completion of several conditions, which take place before completion of construction.

Similarly, in *The Vistas at Fountainhead*, the disputed funding installment was to occur "concurrent with permanent loan closing," creating an ambiguity as to whether permanent loan closing was or could be paid before or after the completion of construction. *The Vistas*, RO at p. 8. The ALJ determined that the question of whether the installment description created an ambiguity was a question of law subject to de novo review by the ALJ, without any deference accorded to Florida Housing's view of the language. *The Vistas*, RO at p. 33. The facts in *The Vistas* made it clear that the disputed payment would only occur after "physical occupancy for 90 days," again clearly establishing that the installment would only be made after construction was completed. R.O. at p. 35.

In this case, by contrast, there was no ambiguity in either the MHP or MJHS Equity Letter as to the amount that would be paid prior to construction completion. Thus, the cases cited by Florida Housing and Heritage Village are inapposite, and the conclusions of the ALJ on this point are unreasonable.

Moreover, as to credit underwriting, Ms. Button admitted that "it is often the case" that Florida Housing sees a different equity letter provided as part of the application than the one that

is provided at credit underwriting. (T. 229-30, Button). Indeed, Ms. Button testified that "often … a completely different equity provider is ultimately used in underwriting." (T. 229, Button). Thus, to render MHP and MJHS ineligible for equity letters simply because they are more detailed than the ones Florida Housing typically sees at the application stage would be contrary to the goals established in the RFA. Further, it would be contrary to the stated purpose of the equity proposal which is to ensure applicants have vetted their proposed developments with an equity provider. (T. 192, 202, Button).

Thus, MHP and MJHS urge Florida Housing to conclude that the MHP and MJHS applications remain eligible for funding under the RFA.

EXCEPTION NO. 5

Challenging Conclusions of Law No. 144

In Conclusions of Law Paragraph 144, the ALJ made conclusions regarding the accuracy of the contents of MHP's Principals Disclosure Form.

> 144. Mr. Shear, MHP's corporate representative, provided testimony that the information contained in the MHP Principals Disclosure Form was correct, because of oral agreements in place between the implicated persons. But his testimony was not credible or persuasive on this point. There was no documentary proof corroborating his testimony. The only documentation was created after the application deadline, purporting to be retroactively effective. The documentation only proved that there was a change in managing members documented after the application deadline. The undersigned finds that the correct principal as of the application deadline was not disclosed for SLP on the MHP Principals Disclosure Form.

MHP takes exception to the ALJ's conclusion of law in paragraph 144 of the Recommended Order because it is unreasonable in light of the evidence presented at trial and as explained in Exception number 3 above and not supported by competent substantial evidence.

In Florida, partnership agreements can be "oral, implied, in a record, or in any combination thereof." § 620.1102(14). Additionally, section 605.0210, Florida Statutes, unambiguously states

that filing a document with the Department of State "does not [c]reate a presumption that the document is valid or invalid or that the information contained in the document is correct or incorrect." § 605.0210(5)(c), Fla. Stat. Indeed, Ms. Button admitted that "Florida Housing does not take a position that the Sunbiz filings automatically control. (T. 412-13, Button).

Mr. Shear, the only witness with personal knowledge of the business dealings of MHP, credibly testified that SLP had established an oral operating agreement that was in place at the time MHP's Application was submitted to Florida Housing and had a single member and manager—Mr. McDowell. (T. 152, Shear). The ALJ's conclusion that "there was no documentary proof corroborating his testimony" is unreasonable and fundamentally misunderstands the concept of competent, substantial evidence. There is no requirement in Florida law (indeed, the ALJ notably cites to none) that the testimony of a sworn witness with personal knowledge about which that they are testifying need be "corroborated" by additional "documentary proof." The ALJ's invention of this requirement is not reasonable and not consistent with Florida law.

MHP strongly urges Florida Housing to reject these unreasonable and unsupported conclusions of law in the Recommended Order.

EXCEPTION NO. 6

Challenging Conclusions of Law Nos. 146 through 151

In Conclusions of Law Paragraphs 146 through 151, the ALJ made conclusions regarding application of precedent regarding inaccurate information on the Principals Disclosure Form.

> 146. In support of its argument, MHP relies on Ambar Riverview, Ltd. v. Florida Housing Finance Corporation, DOAH Case No. 19-1261BID (Fla. DOAH May 21, 2019; FHFC June 21, 2019). In Ambar, the petitioner argued that the successful applicant should be deemed ineligible because it failed to identify the multiple roles of certain disclosed principals. The successful applicant's Principals Disclosure Form identified several persons as "officers" of the corporation but failed to indicate that they were also "directors." Their

> status as directors was revealed elsewhere in the application. The ALJ concluded that the identification of all principals on the Principals Disclosure Form was sufficient and that there was no requirement to state the multiple roles of each principal in the Principals Disclosure Form. The ALJ further concluded that, in any event, the information regarding the multiple roles of the disclosed principals could be found within the four corners of the application and "[a]t most, [the successful applicant's] failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity." *Ambar*, Case No 19-1261BID, RO at 67.
>
> 147. The facts at issue in the case at hand are distinguishable from those in Ambar. MHP's error was not simply failing to correctly identify all the appropriate roles for each principal listed, but rather, failing to correctly identify the principals. Further, the ALJ found in Ambar that the application of the challenged applicant was "correct and complete." The undersigned does not find the same here.
>
> 148. The facts in this case are more analogous to those presented in HTG Village View LLC v. Florida Housing Finance Corporation, et al., Case No. 18-2156BID (Fla. DOAH July 27, 2018), adopted in pertinent part, FHFC No. 2018-017BP (FHFC September 14, 2018).
>
> 149. As here, the challenged applicant in HTG Village View argued that its error in failing to disclose all principals of an entity should be waived as a minor irregularity because the undisclosed principal was disclosed elsewhere on the form as a principal of a different entity. The ALJ determined that the failure to disclose that individual as a principal of each entity was a material deviation which rendered the application ineligible. HTG Village View, Case No. 18-2156BID, RO at 53, 76-78.
>
> 150. MHP's failure to name the correct principals of SLP is contrary to the requirements of the RFA.
>
> 151. Florida Housing's preliminary scoring of the MHP application is clearly erroneous and contrary to competition. For this reason, in addition to MHP's failure to meet the RFA's Equity Proposal requirements, MHP is ineligible for funding.

MHP takes exception to the ALJ's conclusions of law in paragraphs 147 through 151 of the Recommended Order because they are unreasonable. The ALJ concluded that MHP's application should be deemed ineligible due to a failure to properly disclose all principals. The ALJ's conclusion was drawn from a review of an incorrectly prepared corporate document filed

with the Department of State. Florida law makes it clear that the records maintained with the Department of State do not control. Rather, the agreements among the principals do. § 605.0210(5), Fla. Stat.

The unrefuted testimony in this proceeding confirms that the proper principals were disclosed within the MHP Application. Other than a corporate filing that both Florida law and Florida Housing recognize is not necessarily correct, no evidence refuted the credible testimony of Mr. Shear on this issue. Additionally, oral partnership agreements are explicitly permitted under Florida law, a fact that, as noted above, the Recommended Order utterly and inexplicably fails to acknowledge. *See* § 620.1102(14), Fla. Stat. (defining a "partnership agreement" as "the partners' agreement, whether oral, implied, in a record, or in any combination thereof, concerning the limited partnership").

Moreover, the ALJ's attempt to distinguish the facts in this case from *Ambar Riverview, Ltd. v. Florida Housing Finance Corporation*, DOAH Case No. 19-1261BID (Fla. DOAH May 21, 2019; FHFC June 21, 2019), is not consistent with the evidence and unreasonable. In *Ambar*, an unfunded applicant argued that the successful applicant should be deemed ineligible because it failed to identify the multiple roles of certain disclosed principals. The successful applicant's Principals Disclosure Form identified several persons as "officers" of the corporation but failed to indicate that they were also "directors."

ALJ Darren A. Schwartz rejected the unfunded applicant's argument, concluding that the identification of all principals on the Principals Disclosure Form was sufficient and that there was no requirement to state the multiple roles of each principal in the Principals Disclosure Form. ALJ Schwartz further concluded that, in any event, the information regarding the multiple roles of the disclosed principals could be found within the four corners of the application and "[a]t most, [the

successful applicant's] failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity." *Ambar* RO at ¶ 67.

The same is true in this case. All individuals that the ALJ concluded were not disclosed properly were each identified within MHP's Principal Disclosure Form itself. Thus, as in *Ambar*, Florida Housing was provided with adequate information to research the background of every individual involved. Florida Housing is required to follow prior precedent that contains similar facts. *See Villa Capri Assoc. v. Fla. Hous. Fin. Corp*., 23 So. 3d 795 (Fla. 1st DCA 2009) (quoting *Brookwood-Walton Cty. Convalescent Ctr. v. Ag. for Health Care Admin*., 45 So. 2d 22, 229 (Fla. 1st DCA 2009)); § 120.68(7)(e)3, Fla. Stat.

The case relied on by the ALJ, *HTG Village View LLC v. Florida Housing Finance Corporation, et al.*, Case No. 18-2156BID (Fla. DOAH July 27, 2018), adopted in pertinent part, FHFC No. 2018-017BP (FHFC September 14, 2018), is distinguishable on this point. In that case, a principal was listed in the wrong tier of the applicant's Principals Disclosure Form. *Id.* at ¶¶ 44-45. However, unlike here, there was no testimony in that case that the principals identified on the Principals Disclosure Form were, in fact, correct despite an apparent conflict with information listed on Sunbiz. In this case, the sworn testimony of the only witness with personal knowledge of the Applicant's business dealings testified under oath before the ALJ that the information in MHP's Principals Disclosure Form was accurate when the application was filed.

Even if Florida Housing were to conclude that the proper principals were not correctly identified, it is undisputed that every company and individual which the ALJ concluded should have been disclosed was actually contained within the MHP Principals Disclosure Form. Those names are disclosed within the Principal Disclosure Form, allowing Florida Housing to investigate the backgrounds of each individual in furtherance of its goal to exclude individuals with

questionable histories. As was the case in *Ambar*, MHP disclosed each of its principals within its Principal Disclosure Form, allowing Florida Housing to perform its vetting function. No material omission was made within MHP's Application. It remains eligible for funding, and, based upon its scoring and ranking, should be funded.

Thus, at worst, the failure to disclose the principals multiple times would be properly characterized as a minor irregularity, as no material information was omitted; no uncertainty that the requirements of the competitive solicitation have been met is present; no competitive advantage is conferred; and waiving any irregularity would not adversely impact the interests of the Corporation or the public. *See* Fla. Admin. Code R. 67-60.008. In fact, the Corporation's goals are better met by waiving any minor irregularity, as MHP best met the RFA's stated goals and was the highest scored and ranked applicant in this proceeding. (J-4).

Ultimately, the ALJ's conclusions in these paragraphs are unreasonable because the ALJ's findings upon which the conclusions rest are unsupported by competent, substantial evidence. While the disclosures may have differed from information available on the website of the Division of Corporations, sunbiz.org, Florida Housing neither requires nor relies on sunbiz.org information in evaluating and selecting applications for funding. (T. 412-13, Button). This approach is consistent with Florida law. *See, e.g.*, §§ 605.0210 and 607.0125, Fla. Stat. (noting that the Department of State's duty to file corporate documents is ministerial, and does not create a presumption that the filings contents are correct or incorrect). Florida Housing should reject these unreasonable and unsupported conclusions of law.

EXCEPTION NO. 7

Challenging Recommendation Subparagraphs (b) and (c)

In Recommendation subparagraphs (b) and (c), the ALJ recommended

(b) MHP's application is ineligible for funding under the RFA;

(c) MJHS's application is ineligible for funding under the RFA;

MHP and MJHS take exception to these paragraphs for the reasons set forth in Exception Nos. 1 through 6 above.

CONCLUSION

For these reasons, MHP and MJHS urge Florida Housing to reject the ALJ's recommendations that MHP's and MJHS's applications are ineligible for funding under the RFA. MHP and MJHS further urge Florida Housing to specifically find that both applications are eligible and that MJHS's application should be funded.

Respectfully Submitted, this 14th day of June 2023.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 14th day of June 2023 to:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MJHS SOUTH PARCEL, LTD.,

Petitioner,

vs. **DOAH Case No. 23-0903BID**

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

KISSIMMEE LEASED HOUSING ASSOCIATES III, LLLP, and LDG MULTIFAMILY, LLC,

Intervenors.
_____/

DM REDEVELOPMENT, LTD.,

Petitioner,

vs. **DOAH Case No. 23-0904BID**

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE BREEZE REDEVELOPMENT, LLLP, SP FIELD LLC, and KISSIMMEE LEASED HOUSING ASSOCIATES III, LLLP,

Intervenors.
_____/

HERITAGE VILLAGE SOUTH, LTD.,

Petitioner,

vs. **DOAH Case No. 23-0905BID**

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

MHP FL IX LLLP,

Intervenor.
_____/

SP FIELD, LLC,

Petitioner,

vs. **Case No. 23-0906BID**

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

AUTUMN PALMS NFTM, LLC,

Petitioner, **Case No. 23-0907BID**

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE BREEZE REDEVELOPMENT, LLLP,

Intervenor.
_____/

CASA SAN JUAN DIEGO, LTD.,

Petitioner,

vs. **Case No. 23-0908BID**

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BAYSIDE GARDENS REDEVELOPMENT, LLLP,

Intervenor.
_____/

PETITIONER HERITAGE VILLAGE SOUTH, LTD. AND RESPONDENT FLORIDA HOUSING FINANCE CORPORATION'S JOINT RESPONSES TO JOINT EXCEPTIONS FILED BY MHP FL IX LLLP AND MJHS FL SOUTH PARCEL, LTD.

Pursuant to Florida Administrative Code Rule 28-106.217, Petitioner, Heritage Village South, Ltd. ("Heritage Village"), and Respondent, Florida Housing Finance Corporation ("Florida Housing"), respond to the Joint Exceptions to Recommended Order filed by Intervenor, MHP FL IX LLLP ("MHP") and Petitioner, MJHS FL South Parcel Ltd., ("MJHS") (the "Exceptions"). The Exceptions were filed on June 14, 2023 and challenge the Recommended Order entered on May 31, 2023 by Administrative Law Judge Jodi-Ann V. Livingstone (the "ALJ"). In sum, the Exceptions challenge no less than fifteen (15) Findings of Fact and nine (9) Conclusions of Law. Heritage Village and Florida Housing respond to each of these many Exceptions and request that all be denied.

Introduction

This case stems from Florida Housing's proposed award of an estimated $60,240,702 in State Apartment Incentive Loan ("SAIL") financing. Stip., p. 19, ¶ 17. On November 14, 2022,

Florida Housing issued Request for Applications 2022-205 SAIL Financing of Affordable Multifamily Housing Developments to be used in conjunction with Tax-Exempt Bonds and Non-Competitive Housing Credits ("the RFA"). Stip., p. 17, ¶ 2; p. 19, ¶ 16. Responses were due on December 29, 2022. *Id.*

On January 27, 2023, Florida Housing's Board of Directors ("Board") met and considered the recommendations made by the Review Committee for the RFA. Stip., p. 20, ¶ 20. On the same day, all Applicants were notified that the Board had preliminarily selected ten Applicants for funding, subject to satisfactory completion of the credit underwriting process. *Id.* MHP was one of the Applicants the Agency proposed to fund. Stip., p. 20, ¶ 21.

Heritage Village timely filed a Notice of Protest and Petitions for Formal Administrative Proceedings ("Petition"). Heritage Village's Petition contended that MHP and MJHS were both ineligible for SAIL funds. MJHS, DM Redevelopment, Ltd. ("DM Redevelopment"), SP Field, LLC ("SP Field"), Autumn Palms NFTM, LLC ("Autumn Palms") and Casa San Juan Diego, Ltd. ("Casa San Juan") similarly filed Petitions, and the challenged parties intervened. Stip., p. 20, ¶ 22. The petitions were referred to DOAH and consolidated. *Id.*

The parties to this case prepared and submitted a detailed Joint Prehearing Stipulation ("Stipulation") with information about each party, the RFA funding process, and disputed issues remaining to be resolved by the ALJ. At the hearing, Joint Exhibits J-1–J-16 were admitted into evidence. Similarly accepted into evidence were Heritage Village's Exhibits H-1–H-3 and H-33–H-37, MJHS's Exhibits MJHS-1, MJHS-3, and MJHS-6–MJHS-8, and MHP's Exhibits MHP-1–MHP-3. All three parties presented the testimony of Marisa Button, Florida Housing's Director of Multifamily Allocations. In addition, Heritage Village offered the testimony of Kenneth Naylor,

President of Development of Atlantic Pacific Companies. MJHS and MHP each relied on the testimony of Christopher Shear, COO and Project Partner of McDowell Housing Partners.

A transcript of the hearing was filed on May 1, 2023. The parties timely submitted Proposed Recommended Orders on May 11, 2023. The ALJ issued a Recommended Order on May 31, 2023. The ALJ recommended that applications submitted by MJHS and MHP are ineligible for funding. The ALJ concluded that both MJHS and MHP's Equity Proposals are ambiguous and it is not clear when the second installment will be paid. The exclusion of those funds results in construction funding shortfalls in both applications. The ALJ also concluded that MHP failed to disclose the correct principals, and the testimony of MHP's representative was simply not credible or persuasive on that issue. Accordingly, MJHS and MHP are ineligible for funding.

MHP and MJHS filed Joint Exceptions on June 14, 2023, and assert that the ALJ's Findings of Fact are not supported by competent, substantial evidence and the Conclusions of Law are unreasonable because the ALJ "strained" the reading of both MHP and MJHS's Equity Proposals and "created" ambiguities. MHP also takes exception to the finding that it is ineligible for failure to accurately complete its Principals Disclosure Form.

As shown herein, the Board should adopt the Recommended Order in its entirety. The ALJ's Findings of Facts are all supported by competent, substantial evidence and the Conclusions of Law are reasonable and consistent with the RFA, Florida Housing's policies, Florida Administrative Code, and Florida Statutes. For these reasons, the Board should reject all of MJHS and MHP's Exceptions and adopt the Recommended Order.

Standard of Review

The rules of decision applicable in bid protests are set forth in section 120.57(3)(f), Florida Statutes, which provides for:

> . . . 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 proceeding shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

Section 120.57, Florida Statutes, establishes the specific and limited parameters for Florida Housing and the Board's review of a Recommended Order and issuance of a Final Order. Florida Housing may adopt a Recommended Order in its entirety or may, under certain limited, prescribed circumstances, modify or reject findings of fact and conclusions of law. *See* § 120.57(1)(1), Fla. Stat. Florida Housing's Final Order must include an explicit ruling on each exception. § 120.57(1)(k), Fla. Stat.

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

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

At this stage of review, Florida Housing is not free to reweigh the evidence or to reject factual findings unless there is no competent substantial evidence to support them. *See Health Care & Ret. Corp. of Am. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987); *Schumacher v. Dep't of Prof. Regul.*, 611 So. 2d 75, 76 (Fla. 4th DCA 1992); *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 conclusionary ground that they are not supported by competent substantial evidence, without offering specific reasons for such rejection.").

"Competent" evidence is evidence that 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, 861 (Fla. 4th DCA 1997) (citing *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). "Substantial" evidence is evidence from which the fact at issue can be reasonably inferred, and which a reasonable mind would accept as adequate to support a conclusion. *Id.* Thus, the term "substantial evidence" does not relate to the quality, character, convincing power, probative value, or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *Scholastic Book Fair, Inc. v. Unemployment Appeals Comm'n*, 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

Similarly, Florida Housing may not substitute its findings simply because it would have determined factual questions differently. *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) (agency may not reject findings of fact supported by competent substantial evidence even if alternate findings were also supported by competent substantial evidence); *Heifetz v. Dep't of Bus. Regul., Div. of Alcoholic Bevs. & 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."). "Factual inferences are to be drawn by the hearing officer as trier of fact." *Id.* at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of fact. § 120.57(1)(1), Fla. Stat. Therefore, if the record contains any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing its Final Order. *See e.g., Walker v. Bd. of Pro. Eng'rs*, 946 So. 2d 604, 605 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

In addition, an agency has no authority to make independent or supplemental findings of fact. *See e.g., City of N. Port, Fla. v. Consol. Minerals, Inc.*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("The agency's scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence. The agency makes no factual findings in reviewing the recommended order.") (citations omitted). Florida Housing may not attempt to resolve evidentiary conflicts or judge the credibility of witnesses. *See Belleau v. Dep't of Envt'l Prot.*, 695 So. 2d 1305, 1306-07 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995).

Florida Housing may modify or reject conclusions of law over which it has substantive jurisdiction. § 120.57(1)(1), Fla. Stat.; *see generally Barfield v. Dep't of Health*, 805 So. 2d 1008, 1010-11 (Fla. 1st DCA 2001). When modifying or rejecting conclusions of law, Florida Housing must state with particularity the reasons for the modification or rejection, and must make a finding that its substituted conclusion of law is as or more reasonable than the conclusion modified or rejected. § 120.57(1)(1), Fla. Stat.

The labeling of a legal conclusion as a "finding of fact" does not convert the conclusion into a factual finding. *See Pillsbury v. Dep't of Health and Rehab. Servs.*, 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999). Rather, the true nature and substance of the ALJ's statement controls. *JJ Taylor Cos., Inc. v. Dep't of Bus. & Pro. Regul.,* 724 So. 2d 192, 193 (Fla. 1st DCA 1999); *see also Baptist Hosp., Inc.*, 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 weighing the evidence or determining a witness's credibility – are factual matters to be determined by the ALJ. *See id.*

"Ultimate facts are those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other and are the final resulting effects which are reached by the process of logical reasoning from the evidentiary facts." *Feldman v. Dep't of Transp.*, 389 So. 2d 692, 694 (Fla. 4th DCA 1980). The question whether the facts establish a violation of a rule or statute, for example, involves a question of ultimate fact that Florida Housing may not reject without adequate explanation. *See Goin v. Comm'n on Ethics,* 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

Response to Exception Number One

In Exception No. 1, MHP takes exception to the ALJ's Findings of Fact in paragraphs 52 through 56 which were as follows:

> 52. Capital Contribution #2 provided for in the MHP Equity Letter does not make clear that the capital being contributed will be paid prior to construction completion. Instead, it provides two alternate conditions precedent for payment and indicates that the equity will be paid upon completion of the latter of the two.
>
> 53. It is unclear from the language in the letter whether "January 1, 2025," will be prior to construction completion. It is possible that construction will be completed before January 1, 2025. In that event, based on the MHP Equity Letter, Capital Contribution #2 will be paid *after* construction is completed.
>
> 54. Since it is unclear when Capital Contribution #2 would be paid—that is, before or after construction completion—it cannot be counted as a source to be paid "prior to construction completion" as required by the terms of the RFA.
>
> 55. When Capital Contribution #2 from MHP's Equity Letter is not considered in the analysis of funding sources and uses, MHP is left with a funding shortfall.
>
> 56. With a funding shortfall in its Cost Pro Forma, MHP's application is ineligible for funding under the RFA.

Each of these findings, however, are amply rooted in competent, substantial evidence received at final hearing regarding the clear RFA mandate that each applicant's Equity Proposal plainly "[s]tate the proposed amount of equity to be paid prior to construction completion." Exh.

J-1, p. 71. Simply put, MHP's Equity Proposal completely ignored this requirement and MHP's corporate representative even admitted that MHP's Equity Proposal lacked a "definitive time line of construction completion." Tr., pp. 281-282. Against this backdrop, the Board need not look further, as MHP's lengthy exceptions improperly invite the Board to re-weigh evidence and fashion a completely different set of findings which contradict the RFA and invite reversible error. Each of these points is demonstrated below.

The RFA is clear: each Applicant who wishes to syndicate or sell housing credits must submit an Equity Proposal which satisfies certain strict requirements. The Equity Proposal "must meet the following criteria:"

- Be executed by the equity provider;
- Include specific reference to the Applicant as the beneficiary of the equity proceeds;
- **State the proposed amount of equity to be paid prior to construction completion;**
- State the anticipated Housing Credit Request Amount;
- State the anticipated dollar amount of Housing Credit allocation to be purchased; and
- State the anticipated total amount of equity to be provided.

Stip. p. 22, ¶ 33 (citing Exh. J-1, the RFA, p. 71) (emphasis added).

In this case, all applications in the DOAH proceeding – except MHP and MJHS – included equity proposals that easily satisfied those requirements. *See* Exh. J-7, p. 68; Exh. J-8, p. 70; Exh. J-9, p. 88; Exh. J-10, p. 76; Exh. J-11, p. 72; Exh. J-12, p. 68; Exh. J-13, p. 94; Exh. J-14, p. 81; Exh. J-16, p. 81.

MHP's Equity Proposal, however, failed to include any language which plainly stated the amount of equity paid prior to construction completion. Exh. J-15, p. 72; *see also*, Tr. p. 195, lines 14-17 (testimony from Marisa Button confirming that MHP's Equity Proposal did not "clearly state the proposed amount of equities to be paid prior to construction completion").

As Heritage Village pointed out below, this error was compounded by the fact that MHP's Equity Proposal was markedly vague about the timing of its second capital contribution. Indeed, MHP's Equity Proposal described its first two contributions as follows:

> Capital Contribution #1: $3,804,481 (15.00%) at Partnership Closing anticipated August 1, 2023, upon the approved closing draw schedule, with any remaining funding to be advanced based on percentage of completion under a construction loan format (approved draws).
>
> *This installment is estimated to pay up to $2,125,851 of Developer Fee. Developer Fee. As the development budget changes between the time of this term sheet and the Transaction closing, the Developer Fee Holdbacks noted in Capital Contributions #3 and #4 need to be maintained. Paid Developer Fee at closing will be adjusted to maintain paid Developer Fee Holdbacks. In no event will paid fee at closing exceed 33% of total paid fee.*
>
> Capital Contribution #2: $5,643,313 (22.25%) To be contributed upon the latter of (i) 95% construction completion or (ii) January 1, 2025, based on percentage of completion under a construction loan format (approved draws).

Exh. J-15, pp. 71-72.

When asked whether MHP's Capital Contribution #2 was vague as to its timing, Ms. Button confirmed this fact unequivocally:

> Q: In Florida Housing's view, is it possible to determine from the plain language of this equity proposal whether capital contribution number two will be paid prior to construction completion?
>
> A: No.

Tr. p. 196, lines 6-10. Ms. Button's testimony, along with the documentary evidence of MHP's Equity Proposal, provides ample competent, substantial evidence to support the ALJ's findings in paragraphs 52 to 54. *E.g.*, *Recommended Order*, ¶ 52 ("Capital Contribution #2 provided for in the MHP Equity Letter does not plainly state, as required by the RFA, that the capital being contributed will be paid prior to construction completion. Instead, it provides two alternate conditions

precedent for payment and indicates that the equity will be paid upon completion of the latter of the two.").[1]

Although MHP's Exceptions repeatedly suggest that construction completion would occur after January 1, 2025 and that "Capital Contribution #2 would be paid *prior to* construction completion," MHP's Exceptions are belied by the testimony of MHP's Corporate Representative (Mr. Shear) who candidly admitted that the equity proposal contained no "definitive time line of construction completion:"

> Q: Mr. Shear, show us the language in the equity proposal where it plainly states that construction was guaranteed to be completed after January 1, 2025?
>
> **A: There is no such language which explicitly guarantees anything related to a definitive time line of construction completion.**

Tr. pp. 281-282 (emphasis added). In sum, the hearing officer's findings were corroborated by the admissions of MHP's own representative, and the record is replete with evidence supporting the ALJ's finding (and Florida Housing's testimony) that "it is unclear when Capital Contribution #2 would be paid . . . .".[2]

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[1] The record also shows that nothing in MHP's Equity Proposal clarified the proposal's intentionally qualifying language that Capital Contribution #2 would somehow be "based on percentage of completion under a construction loan format (approved draws)." Exh. J-15, pp. 71-72. MHP chose not to provide any construction loan format or approved draw information in its proposal, which in and of itself, renders the timing of Capital Contribution #2 undecipherable. *See*, *e.g.*, Tr. p. 196, lines 3-5 (Ms. Button confirming that MHP did not provide any construction loan format or approved draw information).

[2] Even though the RFA's requirements are targeted to statements which must be made in the Equity Proposal, MHP's Exceptions continue its argument below that a construction timeline could somehow be gleaned from "context clues" lying in MHP's Pro Forma Development Form. Tr. p. 228; lines 3-11. This argument must be rejected for two reasons: (1) the RFA's requirements are focused upon obligations of the investor and what express statements must be made by the investor in the equity proposal (not the applicant in its accounting worksheets); and (2) the Board is not permitted to find alternative facts if the record demonstrates that the hearing officer's findings were rooted in competent substantial evidence. *Walker*, 946 So. 2d at 605; *Bradley*, 510 So. 2d at 1123. Simply put, there is no reason to reject the recommendation here.

The ALJ's remaining findings in paragraphs 54 through 56 are simply a recitation of the RFA requirements and the parties' stipulations. The RFA requires Florida Housing not count any funding source in an equity proposal which fails to meet the RFA's express requirements. Stip., p. 22, ¶ 32. As such, Florida Housing properly removed Capital Contribution #2 from the available sources listed in MHP's Development Cost Pro Forma.

The parties then stipulated below that, the RFA states under Section Four, Subpart A.10.c:

> All Applicants must complete the Development Cost Pro Forma listing the anticipated expenses or uses, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation funding). **The sources must equal or exceed the uses. If a funding source is not considered and/or if the Applicant's funding Request Amount is adjusted downward, this may result in a funding shortfall.** If the Application has a funding shortfall in either the Construction/Rehab and/or the Permanent Analysis of the Applicant's Development Cost Pro Forma, the amount of the adjustment(s), to the extent needed and possible, will be offset by increasing the deferred Developer Fee up to the maximum eligible amount as provided below.
>
> The Development Cost Pro Forma must include all anticipated costs of the Development construction, rehabilitation and, if applicable, acquisition, including the Developer Fee and General Contractor fee.

Stip. pp. 23-24, ¶ 37 (citing Exh. J-1, the RFA, pp. 79-80) (emphasis in original stipulation).

In addition, the parties expressly stipulated that "[i]f Capital Contribution #2 from MHP's Equity Letter is not considered in the analysis of funding sources and uses, the result is a funding shortfall (i.e. sources are less than uses)." Stip., p. 24, ¶ 38. Finally, the parties also stipulated that the RFA required each application's funding sources to "equal or exceed uses" in order to be eligible for funding. *Id*. at ¶ 39.[3]

[3] Paragraph 39 of the parties' Joint Stipulation provides: "Section Five, Subpart A.1 of the RFA contains a summary listing of eligibility items. The RFA states that 'Only Applications that meet all of the following Eligibility Items will be eligible for funding.' The Section Five, Subpart A.1

Each of these stipulations are binding and form the basis for the ALJ's findings in paragraphs 54 through 56. *E.g., Palm Beach Cmty. Coll. v. State of Fla., Dep't of Admin.*, 579 So. 2d 300, 302 (Fla. 4th DCA 1991) ("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

Although much of MHP's Exception attempts to raise issues about credit underwriting, the fact remains that credit underwriting is a completely separate process that has absolutely nothing to do with whether MHP's Equity Proposal met the requirements of the RFA. Tr. p. 229; lines 4-21. "Credit underwriting is a de novo review of all information supplied, received or discovered during or after any competitive solicitation scoring and funding preference process…" Fla. Admin. Code R. 67-48.0072. As such, those portions of the Exceptions warrant no further response.

For these reasons, Findings of Fact 52 through 56 are supported by competent, substantial evidence in the record. MHP's Exception No. 1 should be rejected.

Response to Exception Number Two

In Exception No. 2, MJHS takes exception to the ALJ's Findings of Fact in paragraphs 61 through 65 which were as follows:

> 61. . . . Although it is clear from a complete reading of the MJHS Equity Letter that November 1, 2024, would occur prior to the construction completion date, which is listed as January 2025, it is not clear that each and every term listed in subparts (a) through (g) would be satisfied prior to construction completion. If any one of the events listed in subparts (a) through (g) occurs after construction ends, the funds will not be available before construction completion.
>
> 62. . . . The undersigned is persuaded by Ms. Button's testimony that it is unclear whether the accountant's draft Cost Certification would be received before construction completion.

---

chart contains the following eligibility item: 'Development Cost Pro Forma provided showing sources that equal or exceed uses.'" Stip. p. 24, ¶ 39 (citing Exh. J-1, the RFA, pp. 92-93).

63. Because it is not clear that the Second Installment will be paid prior to construction completion, the installment cannot be included as a funding source in MJHS's Cost Pro Forma.

64. When the Second Installment is removed as a construction funding source, the sources no longer meet or exceed the uses in the Cost Pro Forma, and MJHS is left with a funding shortfall.

65. With a funding shortfall in its Cost Pro Forma, MJHS's application is ineligible for funding under the RFA.

In this case, MJHS's Equity Proposal suffered the same defect as the one submitted by MHP. The Equity Proposal in MJHS's Application failed to plainly "[s]tate the proposed amount of equity to be paid prior to construction completion." Exh. J-1, p. 71; Tr. p. 198, lines 11-14 (Testimony of Ms. Button confirming that the MJHS Equity Proposal does not clearly state the amount of equity that will be paid prior to construction completion). Simply put, the MJHS Equity Proposal lacks the certainty required by the RFA.

Adding to this uncertainty, the MJHS Proposal recited a series of events and conditions for each of its four (4) installments. According to the MJHS Equity Proposal, each installment will be paid on the "later to occur" of a calendar date and satisfaction of those conditions. Exh. J-6, pp. 82-83.

Heritage Village challenged MJHS's classification of the second installment, which is payable on the later of November 1, 2024 and satisfaction of **seven** conditions. Exh. J-6, p. 82. The MJHS Second Installment is detailed as follows:

> $9,630,143 (40.00%) (the "Second Installment"), will be funded **upon the later to occur** of November 1, 2024 and satisfaction of the following conditions, as reasonably determined by the Special Limited Partner:
>
> a) 98% lien-free (up to $100,000 of liens may be bonded over) Construction Completion of the Property sufficient for all residential rental units to be "placed in service" within the meaning of Section 42 of the Code

> b) the issuance of all required temporary certificates of occupancy (with the appropriate life and safety certifications) permitting occupancy of all residential rental units
>
> c) receipt of the accountant's draft Cost Certification
>
> d) no payable developer fee will be released under this Third Installment until 100% lien free Construction Completion, as evidenced by the architect's substantial completion certificate that the Property has been completed in accordance with the Plans and Specifications
>
> e) receipt by the Special Limited Partner of satisfactory evidence that all environmental requirements as required in a Phase I or Phase II ESA have been met, (if applicable) unless the Special Limited Partner determines during underwriting that the conditions cannot be met until a subsequent installment
>
> f) execution of a property management agreement if not required at closing
>
> g) evidence that the CSS provider has been engaged, the CSS has been started, and the final CSS will be delivered by January 31st in the year following when the Property is Placed in Service

Stip., pp. 28-29, ¶ 56; Exh. J-6, pp. 82-83 (emphasis added).

During proceedings below, Florida Housing testified that it is impossible to determine when the second installment will be paid. Tr., p. 198, line 25–p. 199, line 3. Ms. Button testified that the Equity Proposal provides no indication of when the listed conditions will occur. *See* Tr., p. 199, line 11–p. 200, line 5. If any one of those events transpires after construction ends, the funds will not be available before construction completion. *See* Exh. J-6, pp. 82-83.

As the Recommended Order finds, Ms. Button testified that the MJHS Equity Proposal does not identify the date when MJHS would have "receipt of the accountant's draft cost certification." Tr., pp. 199, lines 17-22. Accordingly, it is impossible to conclude that the draft cost certification will certainly be obtained prior to construction completion.

The ALJ was persuaded by Ms. Button's testimony that it is unclear whether the accountant's draft Cost Certification, as required by subpart (c), would be received before

construction completion. This determination is based on competent, substantial evidence – the testimony of Ms. Button. Tr. p. 210, lines 15-17. Although MJHS's Exceptions suggest that there should be some unusual emphasis placed upon a **draft** cost certification, MJHS has overlooked the fact that Ms. Button clearly testified that construction could be complete before a **draft** certification is received. *Id.* at pp. 210-211 ("Yes, and construction could be complete prior to any receipt of a draft of account[ant's] cost certification as well. So yes.").

In addition, the record shows that Ms. Button's testimony was corroborated by the testimony of Ken Naylor, a representative of Heritage Village:

> Q: Yes. Mr. Naylor, there has been talk here about a cost certification from accountants. What is that?
>
> A: That is a third-party auditing firm that the developer engages to create a certification of all the costs that are in the development which ultimately is reviewed by the investor limited partner to their satisfaction and reviewed in multiple draft iterations with Florida Housing.
>
> Q: Can that happen after construction completion?
>
> A: Yes.

Tr. p. 242, lines 4-14.

Against this backdrop, it is easy to see how the ALJ found Ms. Button's testimony to be persuasive. That is the sole province of an ALJ in these proceedings: to weigh the evidence and determine the credibility of the witnesses. *Heifetz*, 475 So. 2d at 1281 ("It is the hearing officer's function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based upon competent, substantial evidence.").

Much like Exception No. 1, the remainder of the ALJ's findings flow from the language of the RFA and the parties' binding stipulations. The parties stipulated below that if an Applicant will

be "syndicating/selling the Housing Credits," the Equity Proposal "must meet the following criteria:"

- Be executed by the equity provider;
- Include specific reference to the Applicant as the beneficiary of the equity proceeds;
- **State the proposed amount of equity to be paid prior to construction completion;**
- State the anticipated Housing Credit Request Amount;
- State the anticipated dollar amount of Housing Credit allocation to be purchased; and
- State the anticipated total amount of equity to be provided.

Stip. p. 27, ¶ 52 (citing Exh. J-1, the RFA, p. 71) (emphasis added).

The parties then stipulated below that, the RFA states under Section Four, Subpart A.10.c:

> All Applicants must complete the Development Cost Pro Forma listing the anticipated expenses or uses, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation funding). **The sources must equal or exceed the uses. If a funding source is not considered and/or if the Applicant's funding Request Amount is adjusted downward, this may result in a funding shortfall.** If the Application has a funding shortfall in either the Construction/Rehab and/or the Permanent Analysis of the Applicant's Development Cost Pro Forma, the amount of the adjustment(s), to the extent needed and possible, will be offset by increasing the deferred Developer Fee up to the maximum eligible amount as provided below.
>
> The Development Cost Pro Forma must include all anticipated costs of the Development construction, rehabilitation and, if applicable, acquisition, including the Developer Fee and General Contractor fee.

Stip. p. 29, ¶ 57 (citing Exh. J-1, the RFA, pp. 79-80) (emphasis in original stipulation).

In addition, the parties expressly stipulated that "[i]f the Second Installment from MJHS's Equity Letter is not considered in the analysis of funding sources and uses, the result is a funding shortfall (i.e. sources are less than uses)." Stip. p. 29, ¶ 58. Finally, the parties again stipulated that the RFA required funding sources to "equal or exceed uses" in order for an applicant to be eligible for funding. *Id.* at ¶ 59.

Each of these stipulations are binding and form the basis for the ALJ's findings in paragraphs 61 through 65. *E.g., Palm Beach Cmty. Coll.*, 579 So. 2d at 302 ("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist").

Simply put, there is ample competent substantial evidence to support the ALJ's findings in paragraphs 61 through 65. Although MJHS devotes pages and pages in an attempt to build an argument that its Equity Proposal could still somehow suffice in light of all the many pages in its Application, the simple fact remains that the RFA requires the Equity Proposal to state the amounts available prior to construction completion and Florida Housing cannot accept materially ambiguous responses to RFA requirements. *Vistas at Fountainhead Ltd. P'ship*, No. 19-2328BID, ¶¶ 46-49 (Fla. DOAH July 16, 2019) (Recommended Order), No. 2019-030BP (FHFC Aug. 5, 2019) (Final Order).[4] The RFA requires clarity from the investor, and that was clearly lacking here, as MJHS readily admitted below:

> Q: Where in your equity proposal does it plainly state that this second installment, and all seven of these conditions, will occur before construction completion?
>
> A: Doesn't state it in the letter, it's inferred.

Tr. p. 284, lines 16-20.

For all these reasons, Findings of Fact 61 through 65 are supported by competent substantial evidence in the record. MJHS's Exception No. 2 should be rejected.

[4] Like MHP, MJHS argues that Florida Housing should have been able to decipher a construction timeline from context clues in the application. For the same reasons articulated in footnote 2 *supra*, this argument also fails.

Response to Exception Number Three

In Exception No. 3, MHP takes exception to the ALJ's Findings of Fact in paragraphs 79 through 83, as follows:

> 79. . . . Mr. Shear's testimony on this matter was not persuasive or credible and is not credited.
>
> 80. The written operating agreement, executed in February 2023, after MHP had already submitted its application, provided that Shear Holdings, the McDowell Trust, and Archipelago were "withdrawing members" and that the three withdrawing members had agreed to transfer their membership interest in SLP to Mr. McDowell, who would become SLP's sole member and manager. This contradicts Mr. Shear's testimony that Shear Holdings, the McDowell Trust, and Archipelago never had a membership interest in SLP.
>
> 81. Mr. Shear's claim that Mr. McDowell has always been the sole manager and member of SLP is not credible or supported by additional evidence.
>
> 82. The evidence presented supports a finding that the MHP Principals Disclosure Form, submitted as part of its application, inaccurately listed Mr. McDowell as the principal of SLP.
>
> 83. MHP's failure to disclose W. Patrick McDowell 2001 Trust, Archipelago Housing, LLC, and Shear Holdings, LLC, as principals of SLP as of the application deadline renders the application ineligible for funding.

MHP alleges that Findings of Fact 79 through 83 are not supported by competent, substantial evidence. When laid bare, however, MHP's exceptions are nothing more than an effort to have Florida Housing's Board improperly reverse the ALJ's credibility determination and somehow accept Mr. Shear's testimony below as accurate. But that is not, and never has been, the role of a reviewing body when considering an ALJ's recommended order.

It is the ALJ's role, and the ALJ only, to weigh the evidence and determine a witness's credibility. *Prysi v. Dep't of Health*, 823 So. 2d 823, 825 (Fla. 1st DCA 2002) ("An agency is not authorized to weigh evidence, judge credibility or otherwise interpret the evidence to fit its desired conclusion."); *Heifetz,* 475 So. 2d at 1281; *Baptist Hosp., Inc*., 500 So. 2d at 623 ("Matters that

are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer."). When the evidence presented supports two inconsistent findings, it is the ALJ's role to decide the issue. *Heifetz,* 475 So. 2d at 1281.

Here, the ALJ determined that Mr. Shear was not a credible witness. As such, the ALJ was not required to accept any of Mr. Shear's testimony. Instead, the ALJ appropriately accepted the language of the special limited partner ("SLP")'s written operating agreement which disclosed three (3) "withdrawing members" who were not disclosed on MHP's Principal Disclosure Form with respect to the SLP. Although Mr. Shear attempted to testify that those members were never really members of the SLP, the written operating agreement disclosed them as "withdrawing" members. Even Mr. Shear admitted that the SLP written operating agreement was carefully vetted with counsel, so its language simply was not a mistake:

> Q: And Mr. Shear, you describe this document [the operating agreement], you agree with me that it was carefully vetted with the Nelson Mullens lawyers to make sure it was 100 percent accurate, right?
>
> A: Yes, they vetted it thoroughly. They proposed the language to reflect and memorialize the true membership interest in the company based on the facts that we had provided them . . . .

Tr. p. 136, lines 4-11. The SLP operating agreement was signed by Mr. Shear and two other individuals who reviewed its content carefully before they executed it. *Id*. at lines 17-20.

Simply put, the ALJ weighed the credibility of Mr. Shear's testimony, considered the "carefully vetted" SLP operating agreement which contradicted his testimony and found that MHP's disclosures about ownership of the SLP were simply not accurate. Florida Housing should reject MHP's invitation to re-weigh the evidence or draw a different conclusion with respect to the credibility of witnesses below. *See Belleau*, 695 So. 2d at 1306-07; *Dunham*, 652 So. 2d at 896.

For these reasons, Findings of Fact 81 through 83 are supported by competent substantial evidence and MHP's Exception No. 3 should be rejected.

Response to Exception Number Four

In Exception No. 4, MHP and MJHS take exception to the ALJ's Conclusions of Law in paragraphs 135 through 137, as follows:

> 135. MHP's and MJHS's Equity Proposals are ambiguous—it is not clear when the second installment of both equity proposals will be paid. MHP's Equity Proposal contains a date which, if construction is completed before that date, then equity would be paid after construction completion. MJHS's Equity Proposal contains seven conditions that must be completed before the release of the equity payment.
>
> 136. MHP's Capital Contribution #2 and MJHS's Second Installment must be excluded from the construction financing analysis because both create a material ambiguity in their respective applications as to when they will be paid. The exclusion of those funds results in construction funding shortfalls in both applications, causing both to be ineligible.
>
> 137. Heritage and SP Field met their burden to demonstrate that Florida Housing's decision deeming MHP's and MJHS's applications eligible is contrary to the RFA specifications. Florida Housing's preliminary scoring of the MHP and MJHS applications is clearly erroneous and contrary to competition.

Each of these conclusions relate to the parties' Equity Proposals which were discussed *supra*. To ensure an Applicant has sufficient funds to construct its Development, the RFA requires the Equity Proposal to "[s]tate the proposed amount of equity" that will be paid before construction is complete. Exh. J-1, p. 71. In cases like this, where an Equity Proposal fails to state the amounts paid prior to construction completion, Florida Housing has established precedent to follow. *E.g., Flagship Manor, LLC v. Fla. Hous. Fin. Corp*., 199 So. 3d 1090, 1094 (Fla. 1st DCA 2016) ("An agency generally must follow its own precedents."); *Plante, V.M.D. v. Dep't of Bus. & Prof'l Regul.*, 716 So. 2d 790, 791 (Fla. 4th DCA 1998).

In short, Florida Housing has repeatedly found that an Equity Proposal "is responsive" "only to the extent the amount of equity to be paid prior to construction completion is clearly stated." *HTG Oak Valley, LLC, v. Fla. Hous. Fin. Corp.*, No. 19-2275BID, ¶ 58 (Fla. DOAH July 16, 2019) (Recommended Order), No. 2019-032BP (FHFC Aug. 5, 2019) (Final Order); *Vistas at Fountainhead Ltd. P'ship*, No. 19-2328BID, ¶ 46 (Fla. DOAH July 16, 2019) (Recommended Order), No. 2019-030BP (FHFC Aug. 5, 2019) (Final Order) (consolidated for final hearing). If "the amount of pre-completion equity is unclear, the equity proposal must be considered non-responsive." *HTG Oak Valley*, No. 19-2275BID, at ¶ 58; *Vistas at Fountainhead*, No. 19-2328BID, at ¶ 46. "[A]n ambiguously expressed amount is no different, in the context of a competitive evaluation, from an unexpressed amount." *Id*.

It is indisputable that neither MHP nor MJHS's Equity Proposal stated whether the challenged installment will be paid before the end of construction. Instead, both Equity Proposals provided only that the payment will be made upon the latter of certain conditions, or a calendar date. Exh. J-6, pp. 82-83; Exh. J-15, p. 72. MHP and MJHS's exceptions nonetheless contend that their submissions should be deemed responsive. Both Applicants insist that the timing of the second installment can be gleaned from "context clues" in their Applications. Simply put, they each argue that a finding could be made by "inference" because the amounts are not plainly stated as required by the RFA.

However, MHP's and MJHS's argument contains a "fatal flaw" — "it implicitly revises" the RFA "to include an unstated proviso to the effect that ambiguous or uncertain responses will be given the most reasonable interpretation." *HTG Oak Valley*, No. 19-2275BID, at ¶ 59; *Vistas at Fountainhead*, No. 19-2328BID, at ¶ 47. This approach is expressly prohibited by the Agency's precedent.

HTG Oak Valley and *Vistas at Fountainhead* reject the premise that, "in determining conformity," Florida Housing "may use its best judgment to ascertain" the most likely "meaning of an uncertain or unclear response." *HTG Oak Valley*, No. 2019-35 032BP, at ¶ 57; *see also Vistas at Fountainhead*, No. 19-2328BID, at ¶ 45. Both cases recognize that "an uncertain response inherently" leaves "room for interpretation." *HTG Oak Valley*, No. 19-2275BID, at ¶ 64; *Vistas at Fountainhead*, No. 19-2328BID, at ¶ 52. If Florida Housing "were able to exercise the power to construe, it would have opportunities to show favoritism and, conversely, to act on bias." *Id.*

Accordingly, the Agency is not permitted to consider the investor's "intent" in drafting the Equity Proposal or attempt to measure the likelihood that an ambiguous installment "might be paid prior to construction completion." *HTG Oak Valley*, No. 19-2275BID, at ¶ 56; *Vistas at Fountainhead*, No. 19-2328BID, at ¶ 44. When determining whether an Applicant has satisfied the RFA's requirements, Florida Housing looks only to the Equity Proposal's plain language. Tr., p. 193, lines 3-7. If Florida Housing adopted the "'most reasonable' interpretation of an ambiguous response" it would "undermine confidence in the integrity of the competition…." *Vistas at Fountainhead*, No. 19-2328BID at ¶ 56. To that end, a material ambiguity is a substantial, nonwaivable deviation. *Id.* at ¶ 57.

Neither MJHS's Equity Proposal nor MHP's Equity Proposal provided any indication that the second equity installment will undoubtedly be available before construction is complete. Accordingly, the challenged payment cannot be properly categorized as a construction funding source. *See* Exh. J-1, p. 80 (recognizing that Agency may decline to consider funding sources); *HTG Oak Valley*, No. 19-2275BID, at ¶ 76 (concluding that ambiguous capital contribution must be excluded from the Applicant's construction funding); *Vistas at Fountainhead*, No. 19-2328BID, at ¶ 64 (same).

The second capital contribution in MHP's Equity Proposal is identified as a funding source available during construction in the Construction/Rehab Analysis of the Development Cost Pro Forma. Exh. J-15, p. 26; Tr., p. 197, lines 7-10. Similarly, the second installment in MJHS's Equity Proposal is included in the Construction/Rehab Analysis. Exh. J-6, p. 26; Tr., p. 200, lines 11-14.

When these ambiguous contributions are removed as construction funding sources, both MHP and MJHS are left with construction funding shortfalls. Stip., p. 24, ¶ 38; p. 29, ¶ 58. Each Applicant has therefore failed to satisfy the RFA's requirement to submit a Development Cost Pro Forma showing funding sources that meet or exceed uses. Exh. J-1, p. 93.

Accordingly, the ALJ properly concluded that both MHP and MJHS's Equity Proposals are ambiguous and that MHP's Capital Contribution #2 and MJHS's Second Installment must be excluded from the construction financing analysis because both create a material ambiguity in their respective applications as to when they will be paid, rendering the applications ineligible. For these reasons, MHP and MJHS's Exception No. 4 should be rejected.[5]

Response to Exception Number Five

In Exception No. 5, MHP takes exception to the ALJ's Conclusion of Law in paragraph 144, as follows:

> 144. Mr. Shear, MHP's corporate representative, provided testimony that the information contained in the MHP Principals Disclosure Form was correct, because of oral agreements in place between the implicated persons. But his testimony was not credible or persuasive on this point. There was no documentary proof corroborating his testimony. The only documentation was created after the application deadline, purporting to be retroactively effective. The documentation

[5] Much of MHP and MJHS's exceptions are devoted to a discussion of *Rosedale Holding v. Fla. Hous. Fin. Corp.*, Case No. 2013-038 (Fla. DOAH May 12, 2014) (Recommended Order), No. 2013-038BP (FHFC June 13, 2014) (Final Order). But *Rosedale* is not even cited within the Recommended Order. The exception is thus patently improper to the extent that appropriate and specific citations to the record have not been made. *See* Fla. Admin. Code R. 28-106.217(1). Regardless, even if the Board were to consider *Rosedale*, the result would be same: *Rosedale* supports the ALJ's recommendations here.

> only proved that there was a change in managing members documented after the application deadline. The undersigned finds that the correct principal as of the application deadline was not disclosed for SLP on the MHP Principals Disclosure Form.

MHP alleges that Conclusion of Law 144 is unreasonable. MHP argues that Florida partnership agreements can be oral and that a document filed with the Department of State does not create a presumption of validity or invalidity that the information contained within the document is correct or incorrect. Similarly, Ms. Button testified that "Florida Housing does not take a position that the Sunbiz filings automatically control." Therefore, MHP reaches the conclusion that Mr. Shear's testimony regarding the operating agreement in place and the named principals must be credible because he is the witness with personal knowledge.

Once again, MHP's exception requests that Florida Housing reweigh the evidence considered by the ALJ. As discussed in Response to Exception No. 3, the ALJ weighed the evidence and determined that Mr. Shear's testimony was not credible. The ALJ acknowledged in paragraph 140 that, pursuant to Florida Statute section 605.0210(5), the filing of a document on the Department of State's website does not (a) affect the validity or invalidity of the document in whole or part; (b) relate to the correctness or incorrectness of information contained in the document; or (c) create a presumption that the document is valid or invalid, or that information contained in the document is correct or incorrect. Similarly, in paragraph 141, the ALJ concluded that "[w]hen a conflict arises between the filings with the Division of Corporations and the application, additional evidence may be proffered to determine whether the application was correct as of the application deadline. *Heritage at Pompano Housing Partners, LTD. v. Fla. Hous. Fin. Corp.*, Case No. 14-1361BID (Fla. DOAH June 10, 2014; FHFC June 13, 2014)." Rule 67-48.0075 mandates the identification of "all of the Principals of all the entities" disclosed within that first

disclosure level. Fla. Admin. Code R. 67-48.0075(8)(b) (emphasis added). MHP simply failed to do so here.

With this background, the ALJ reasonably concluded that the correct principal was not disclosed by the application deadline. For these reasons, MHP's Exception No. 5 should be rejected.

Response to Exception Number Six

In Exception No. 6, MHP takes exception to the ALJ's Conclusions of Law in paragraphs 146 through 151, as follows:

> 146. In support of its argument, MHP relies on *Ambar Riverview, Ltd. v. Florida Housing Finance Corporation*, DOAH Case No. 19-1261BID (Fla. DOAH May 21, 2019; FHFC June 21, 2019). In *Ambar*, the petitioner argued that the successful applicant should be deemed ineligible because it failed to identify the multiple roles of certain disclosed principals. The successful applicant's Principals Disclosure Form identified several persons as "officers" of the corporation but failed to indicate that they were also "directors." Their status as directors was revealed elsewhere in the application. The ALJ concluded that the identification of all principals on the Principals Disclosure Form was sufficient and that there was no requirement to state the multiple roles of each principal in the Principals Disclosure Form. The ALJ further concluded that, in any event, the information regarding the multiple roles of the disclosed principals could be found within the four corners of the application and "[a]t most, [the successful applicant's] failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity." *Ambar*, Case No 19-1261BID, RO at 67.
>
> 147. The facts at issue in the case at hand are distinguishable from those in *Ambar*. MHP's error was not simply failing to correctly identify all the appropriate roles for each principal listed, but rather, failing to correctly identify the principals. Further, the ALJ found in *Ambar* that the application of the challenged applicant was "correct and complete." The undersigned does not find the same here.
>
> 148. The facts in this case are more analogous to those presented in *HTG Village View LLC v. Florida Housing Finance Corporation*, et al., Case No. 18-2156BID (Fla. DOAH July 27, 2018), adopted in pertinent part, FHFC No. 2018-017BP (FHFC September 14, 2018).
>
> 149. As here, the challenged applicant in *HTG Village View* argued that its error in failing to disclose all principals of an entity should be waived as a minor irregularity because the undisclosed principal was disclosed elsewhere on the form

> as a principal of a different entity. The ALJ determined that the failure to disclose that individual as a principal of each entity was a material deviation which rendered the application ineligible. *HTG Village View*, Case No. 18-2156BID, RO at 53, 76-78.
>
> 150. MHP's failure to name the correct principals of SLP is contrary to the requirements of the RFA.
>
> 151. Florida Housing's preliminary scoring of the MHP application is clearly erroneous and contrary to competition. For this reason, in addition to MHP's failure to meet the RFA's Equity Proposal requirements, MHP is ineligible for funding.

MHP alleges that Conclusions of Law 146 through 151 are unreasonable. MHP essentially makes the same arguments raised in Exception No. 5, and further raises exception to the ALJ's analysis of *Ambar*. MHP argues that, like in *Ambar*, all individuals that needed to be disclosed were identified within MHP's Principal Disclosure Form.

However, the instant case is distinguishable from *Ambar* for two reasons. First, *Ambar* addressed a different error in the Principal Disclosure Form. While MHP's Application failed to identify mandatory Principals, the challenged application in *Ambar* contained no such omission. *See Ambar*, No. 19-1261, at ¶ 23 ("Significantly, Ambar does not argue that [the Applicant] failed to disclose a principal."). The *Ambar* applicant instead neglected to explain that persons who had been disclosed as principals held multiple roles within the listed organization. *Id.* The *Ambar* applicant, for example, identified one individual as an executive director without explaining that the person also served as an officer. *Id.* Florida Housing and the ALJ concluded that disclosure of numerous positions was not required. *Id.* at ¶ 46.

Second, the minor irregularity analysis articulated in *Ambar* is inapplicable here. The Recommended Order in *Ambar* concluded that—even if the Applicant had been required to describe each role held by the listed Principals—the failure to do so could be waived by the Agency. *Id.* at ¶ 47. As explained by the ALJ, information about those multiple positions was

contained elsewhere in other sections of the Application. *Id.* at ¶¶ 44-45. Here, no other portion of MHP's Application identified Shear Holdings, the McDowell Trust, or Archipelago as the Principals of SLP. MHP's error is therefore incapable of being considered a minor irregularity.

Because of these distinctions, *Ambar* cannot determine the outcome of the instant proceeding. This case is instead more akin to *HTG Village View v. Fla. Hous. Fin. Corp.*, No. 18-2156BID (Fla. DOAH July 27, 2018) (Recommended Order), No. 2018- 017BP (FHFC Sept. 17, 2018) (Final Order). In *HTG Village View*, the Applicant omitted the name of a required Principal in the third principal disclosure level. *Id.* at ¶ 50. The Applicant was accordingly declared ineligible—even though that very same Principal had already been named in the second principal disclosure level. *Id.* at ¶¶ 50, 53. The ALJ determined that "[t]he RFA required that applicants disclose Principals in the Principal Disclosure Form for each type of entity." *Id.* at ¶ 50. The Applicant's failure to do so was deemed "a material deviation that cannot be waived." *Id.* at ¶ 53. The same result is compelled here. MHP's failure to name the correct Principals for SLP violates rule 67-48.0075, even if those entities are listed elsewhere as Principals of a different entity. MHP is therefore ineligible for funding. Exh. J-1, p. 93; Tr., p. 173, lines 23-25.

The ALJ then reasonably concluded that the correct principal was not disclosed by the application deadline. For these reasons, MHP's Exception No. 6 should be rejected.

Response to Exception Number Seven

In Exception No. 7, MHP and MJHS take exception to the ALJ's Conclusions of Law in subparagraphs (b) and (c), as follows:

> (b) MHP's application is ineligible for funding under the RFA;
>
> (c) MJHS's application is ineligible for funding under the RFA.

MHP and MJHS take exception to the ultimate recommendation that MHP and MJHS are ineligible for funding under the RFA. The ALJ's recommendation is based on Findings of Fact supported by competent, substantial evidence and reasonable Conclusions of Law. For all of the reasons addressed above in this Response, the recommendation is well-founded and should stand. Accordingly, MHP and MJHS's Exception No. 7 should be rejected.

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CERTIFICATE OF SERVICE

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Page 1 of 1

RFA 2022-205 List of Applications Awarded if Recommended Order is Adopted

SAIL Funding Balance Available	5,379,202
Family Demographic Funding Balance Available	2,578,482
Elderly Demographic Funding Balance Available	2,800,720
Self-Sourced Applicant Funding Balance	MERGED
Non-Self-Sourced Applicant Funding Balance	MERGED

Small County Funding Balance Available	-
Medium County Funding Balance Available	-
Large County Funding Balance Available	5,379,202

NHTF Funding will be 100% allocated in accordance with Exhibit H

Application Number	Name of Development	County	County Size	Name of Authorized Principal	Name of Developers	Dev Category	Demo. Commitment	SAIL Request	ELI Request	Total SAIL Request (SAIL + ELI)	Eligible For Funding?	Veterans Preference?	Self-Sourced Applicant?	Priority Level?	Total Points	Per Unit Construction Funding Preference	Leveraging Level	Proximity Funding Preference	Florida Job Creation Preference	Lottery Number
2023-118SN	Skyway Lofts II	Pinellas	L	Shawn Wilson	Blue SWL2 Developer, LLC	NC	F	$750,000	$0	750,000	Y	N/A	N	1	10	Y	A	Y	Y	27
2023-119SN	Pinnacle 441, Phase 2	Broward	L	David O. Deutch	Pinnacle Communities, LLC	NC	F	$4,000,000	$750,000	4,750,000	Y	N/A	N	1	15	Y	A	Y	Y	34
2023-125SN	Burlington Post II	Pinellas	L	Oscar Sol	Burlington Post 2 Dev, LLC	NC	E, Non-ALF	$2,500,000	$636,000	3,136,000	Y	Y	N	1	15	Y	A	Y	Y	26
2023-129BSN	The Residences at Martin Manor	Palm Beach	L	Kenneth Naylor	DM Redevelopment Developer, LLC	NC	F	$4,940,000	$750,000	5,690,000	Y	N/A	N	1	15	Y	A	Y	Y	18
2023-136SN	Perrine Village II	Miami-Dade	L	Kenneth Naylor	APC Perrine Development II, LLC	NC	E, Non-ALF	$8,400,000	$750,000	9,150,000	Y	Y	N	1	15	Y	A	Y	Y	3
2023-143SN	Heritage Village South	Miami-Dade	L	Kenneth Naylor	Heritage Village South Development, LLC	NC	F	$6,228,000	$750,000	6,978,000	Y	N/A	N	1	15	Y	A	Y	Y	1
2023-146SN	Clearwater Gardens	Pinellas	L	Brett Green	Archway Clearwater Gardens Developer, LLC	NC	F	$4,657,500	$750,000	5,407,500	Y	N/A	N	1	15	Y	A	Y	Y	25
2023-151BSN	Bayside Breeze	Okaloosa	M	Carol Gardner	TEDC Affordable Communities, Inc.; Bayside Development of Fort Walton, LLC; 42 Partners, LLC	NC	E, Non-ALF	$6,850,000	$750,000	7,600,000	Y	Y	N	1	15	Y	A	Y	Y	13
2023-160BSN	The Enclave at Canopy Park	Orange	L	Brett Green	The Enclave at Canopy Park Developer, LLC	NC	F	$7,900,000	$750,000	8,650,000	Y	N/A	N	1	15	Y	A	Y	Y	43
2023-161SN	WRDG T4 Phase Two	Hillsborough	L	Leroy Moore	WRDG T4 Phase Two Developer, LLC	NC	F	$2,000,000	$750,000	2,750,000	Y	N/A	N	1	15	Y	A	Y	Y	16

On May 17, 2023, Application 2023-134SN St. Joseph Manor II, withdrew. Since the withdrawal did not affect the selection process, St Joseph Manor II is not included in this list.