

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

LA ESTANCIA, LTD.,

Petitioner,

FHFC Case No. 2020-0047BP  
DOAH Case No.: 20-3582BID

vs.

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

PARTNERSHIP IN HOUSING, INC.,

Intervenor.

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**FINAL ORDER**

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on October 16, 2020. Petitioner La Estancia, Ltd. (“La Estancia”) and Intervenor Partnership in Housing, Inc. (hereinafter “Pueblo Bonito”) were Applicants under Request for Applications 2020-104, SAIL Funding for Farmworker and Commercial Fishing Worker Housing (“the RFA”). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On July 17, 2020, Florida Housing posted notice of its intended decision to award funding to Pueblo Bonito. The Board found that La Estancia satisfied all mandatory and eligibility requirements but was not awarded funding based upon the ranking criteria in the RFA. Petitioner timely filed a notice of intent to protest and formal written protest as required by section 120.57(3), Fla. Stat. challenging the Corporation's scoring and ranking of Applicants for funding under the RFA. Pueblo Bonito timely filed a Notice of Appearance/Motion to Intervene. Florida Housing referred the petition to the Division of Administrative Hearings for a formal hearing.

The central issue is whether Florida Housing's decision to award funding under the RFA was contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. More specifically, the issue is whether Florida properly scored the narrative portion of the RFA for La Estancia and Pueblo Bonito.

Applicants in this RFA were to be scored on a 100-point scale. Up to 15 points could be awarded for the narrative portion of the application called "Current and Future Need for Farmworker or Commercial Fishing Worker Housing in the Area ("Need")." Both La Estancia and Pueblo Bonito were awarded 12 points for this section. La Estancia contended that it should have received more points than Pueblo Bonito for this section, and thus received more total points and been awarded funding instead of Pueblo Bonito. La Estancia also contended that the action of

Florida Housing's Board of Directors was invalid because it had not been briefed on the designation of Limited Development Areas that occurred after the application deadline.

A hearing was conducted on September 10, 2020 before Administrative Law Judge Garnett Chisenhall. All parties filed Proposed Recommended Orders. After reviewing the Proposed Recommended Orders, the Administrative Law Judge issued a Recommended Order on October 1, 2020. The Recommended Order found that Florida Housing's scoring of both applications was reasonable, that the Board action was not invalid, and recommended that the petition of La Estancia be dismissed. A copy of the Recommended Order is attached as Exhibit A.

On October 6, 2020, La Estancia filed Exceptions to the Administrative Law Judge's recommendations. Also on October 6, 2020, Florida Housing filed a response to those exceptions. On October 7, 2020, Pueblo Bonito filed a response to the exceptions. Copies of the Exceptions and Responses to Exceptions are attached as Exhibits B, C, and D respectively.

### **RULING ON EXCEPTIONS**

#### **La Estancia's Exception to Finding of Fact 13**

1. Las Estancia filed an exception to the Finding of Fact set forth in the third sentence of Paragraph 13 of the Recommended Oder.

2. After a review of the record, the Board finds that the third sentence in Finding of Fact 13 is not supported by competent substantial evidence and is modified as follows:

13. The occupancy rate for the housing stock in Lee County for the period of August 2019 through January 2020 was 91.67 percent as compared to 95.83 percent for the period of September 2018~~9~~ through 2019~~20~~.

3. The Board accepts La Estancia's exception to the third sentence of Finding of Fact 13.

#### La Estancia's Exception to Finding of Fact 27

4. La Estancia filed an exception to the Finding of Fact in Paragraph 27 of the Recommended Order.

5. After a review of the record, the Board finds that the Finding of Fact in Paragraph 27 is reasonable and supported by competent substantial evidence.

6. The Board rejects the exception to the Finding of Fact in Paragraph 27.

#### La Estancia's Exception to Conclusion of Law 34

7. La Estancia filed an exception to the Conclusion of Law set forth in Paragraph 34 of the Recommended Order.

8. After a review of the record, the Board finds that the Conclusion of Law set forth in Paragraph 34 is reasonable and supported by competent substantial evidence.

9. The Board rejects the exception to the Conclusion of Law in Paragraph 34.

La Estancia's Exception to Conclusion of Law 35

10. La Estancia filed an exception to the Conclusion of Law in Paragraph 35 of the Recommended Order.

11. After a review of the record, the Board finds that the Conclusion of Law set forth in Paragraph 35 is reasonable and supported by competent substantial evidence.

12. The Board rejects the exception to the Conclusion of Law in Paragraph 35.

La Estancia's Exception to Conclusion of Law 36

13. La Estancia filed an exception to the Conclusion of Law set forth in Paragraph 36 of the Recommended Order.

14. After a review of the record, the Board finds that the Conclusion of Law in Paragraph 36 is reasonable and supported by competent substantial evidence.

15. The Board rejects the exception to the Conclusion of Law in Paragraph 36.

La Estancia's Exception to Conclusion of Law 38

16. La Estancia filed an exception to the Conclusion of Law in Paragraph 38 of the Recommended Order.

17. After a review of the record, the Board finds that the Conclusion of Law set forth in Paragraph 38 is reasonable and supported by competent substantial evidence.

18. The Board rejects the exception to the Conclusion of Law in Paragraph 38.

La Estancia's Exception to the Recommendation

19. La Estancia filed an exception to the Recommendation set forth in the Recommended Order.

20. After a review of the record, the Board finds that the Recommendation is reasonable and supported by competent substantial evidence.

21. The Board rejects the exception to the Recommendation in the Recommended Order.

**Ruling on the Recommended Order**

22. The Findings of Fact set out in the Recommended Order are supported by competent substantial evidence with the exception of Finding of Fact in Paragraph 13 which is modified as stated herein.

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

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

**ORDER**

In accordance with the foregoing, it is hereby ORDERED:

A. The Findings of Fact in the Recommended Order are adopted as Florida Housing's Findings of Fact and incorporated by reference as though fully set forth in this Order with the exception of Finding of Fact in Paragraph 13 which is modified as stated herein.

B. 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.

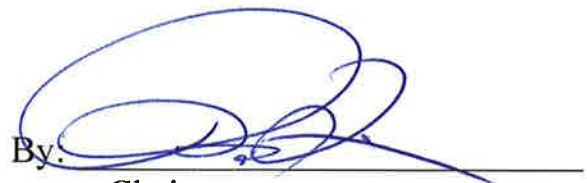
C. The Recommendation of the Recommended Order is adopted as Florida Housing's Order and incorporated by reference as though fully set forth in this Order.

It is hereby ORDERED that La Estancia's formal written protest is dismissed, and funding is awarded to Pueblo Bonito, subject to the successful completion of credit underwriting.

**DONE and ORDERED** this 16<sup>th</sup> day of October, 2020.



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

LA ESTANCIA, LTD.,

Petitioner,

vs.

Case No. 20-3582BID

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

PARTNERSHIP IN HOUSING, INC.,

Intervenor.

---

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted in Tallahassee, Florida, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH"), on September 10, 2020.

APPEARANCES

For Petitioner: M. Christopher Bryant, Esquire  
Oertel, Fernandez, Bryant & Atkinson, P.A.  
Post Office Box 1110  
Tallahassee, Florida 32302-1110

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

For Intervenor: Michael P. Donaldson, Esquire  
Carlton Fields  
215 South Monroe Street, Suite 500  
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue is whether Florida Housing Finance Corporation's ("Florida Housing") review and scoring of the applications responding to RFA 2020-104 SAIL Funding for Farm Worker and Commercial Fishing Worker Housing ("the RFA") were clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

Florida Housing issued the RFA on April 15, 2020, seeking applications for financing to supplement the construction or rehabilitation of affordable housing for farm workers or commercial fishing workers. On May 19, 2020, La Estancia, Ltd. ("La Estancia"), and Partnership in Housing, Inc. ("Pueblo Bonito"), submitted applications in response to the RFA.

Florida Housing posted notice of its intent to award funding to Pueblo Bonito on July 17, 2020. La Estancia petitioned for a formal administrative hearing on August 3, 2020, alleging that its application should have received a higher score than Pueblo Bonito's and should have thus been selected for funding. Florida Housing referred this matter to DOAH on August 13, 2020, and the undersigned issued a Notice scheduling the final hearing for September 10, 2020. The undersigned also issued on August 18, 2020, an Order granting Pueblo Bonito's Motion to Intervene.

The final hearing took place as scheduled. Joint Exhibits 1 through 7 were accepted into evidence. La Estancia called Steve Auger as a witness and introduced Exhibits 2, 6, and 9 through 12 into evidence. Florida Housing

called Marisa Button as a witness and introduced no exhibits into evidence. Pueblo Bonito introduced Exhibits 1<sup>1</sup> through 4 and 7 into evidence but called no witnesses.

The final hearing Transcript was filed on September 14, 2020. By agreement of the parties, the proposed recommended orders were filed on September 25, 2020, and considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the evidence adduced at the final hearing, the record as a whole, the stipulated facts, and matters subject to official recognition, the following Findings of Fact are made:

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes (2020).<sup>2</sup> Its purpose is to promote public welfare by administering the financing of affordable housing in Florida.
2. Florida Housing is authorized by section 420.507(48), to allocate federal low income housing tax credits, State Apartment Incentive Loans (“SAIL”), and other funding by means of competitive solicitations. Florida Administrative Code Chapter 67-60 provides that Florida Housing will allocate its competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes.
3. Funding is available through a competitive application process commenced by the issuance of a Request for Applications, which is equivalent to a “request for proposal” as described in rule 67-60.009(4).

<sup>1</sup> Pueblo Bonito’s Exhibit 1 is the deposition of Nancy Muller of Florida Housing.

<sup>2</sup> Unless stated otherwise, all statutory references shall be to the 2020 version of the Florida Statutes.

4. Through the RFA, Florida Housing seeks to award up to an estimated total of \$5,131,050 in SAIL Financing for the construction or rehabilitation of affordable housing developments for farm workers and commercial fishing workers. The RFA was issued on April 15, 2020, and a modified version was issued on April 24, 2020. The application deadline was May 19, 2020.

5. La Estancia and Pueblo Bonito submitted applications proposing the rehabilitation of existing farm worker housing in Hillsborough and Lee Counties, respectively. Both applications were deemed eligible for funding.

6. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors ("the Board").

7. The scoring of the applications was based on a 100-point scale. Applicants submitting a Principal Disclosure Form that had been stamped "pre-approved" received five points. The remaining points were awarded based on the subjective scoring of narrative sections within the applications, and the maximum points were available as follows:

- Current and Future Need for Farm Worker or Commercial Fishing Worker Housing in the Area ("Need"): 15 points
- Experience Operating and managing Farm Worker or Commercial Fishing Worker Housing ("Experience"): 20 points
- Outreach, Marketing, and Referral ("Outreach"): 30 points
- Resident Access to Onsite and Offsite Programs, Services, and Resources ("Access"): 30 points.

8. With regard to Need, the 2019 Rental Market Study prepared for Florida Housing by the Shimberg Center for Housing Studies at the University of Florida determined that 14.2 percent of Florida's farm workers are employed in Hillsborough County and 2.55 percent are employed in Lee County. Pueblo Bonito noted in its application that its development is only three miles from the Collier County line, and 5.63 percent of the state's farm workers are employed in Collier County. La Estancia did not reference

Manatee County in its application but noted in its request for a formal administrative hearing that its development is a similar distance from Manatee County, and 6.88 percent of the state's farm workers are employed there.

9. The Shimberg study also calculated need for farm worker housing type by county with 3,813 multifamily units needed in Hillsborough County, 741 multifamily units needed in Lee County, 1,546 multifamily units needed in Collier County, and 2,337 multifamily units needed in Manatee County.

10. For some RFAs, Florida Housing imposes additional conditions on applications for developments located in Limited Development Areas ("LDAs"). The main purpose of an LDA is to protect Florida Housing's funded developments in a particular area. An LDA is generally an area that Florida Housing has placed a boundary around that limits different types of new development. Florida Housing annually publishes an LDA Chart on its website listing areas or counties that may apply in the RFA cycle for the coming year. The mere existence of an LDA does not prohibit development within the LDA. This is especially true for rehabilitation projects like those proposed in the instant case.

11. An RFA must specifically reference the LDA in order for the LDA to apply.

12. The first draft of the 2020 LDA Chart was not published by Florida Housing until May 29, 2020, and thus the modified RFA issued on April 24, 2020, included no reference to the LDA Chart. Nor did the RFA include any specific provisions regarding LDAs.

13. The first draft of the 2020 LDA Chart and each subsequent draft or amendment included Lee County for farm worker housing. Florida Housing indicated that the basis for Lee County's LDA designation was a downward trend in occupancy rates. The occupancy rate for the housing stock in Lee County for the period of August 2019 through January 2020 was 91.67 percent as compared to 95.83 percent for the period of September 2019

through February 2020. Based on this trend, Lee County was proposed as an LDA for the 2020/2021 Florida Housing RFA funding cycle, which became effective July 10, 2020.

14. The following table reflects how the review committee awarded points to the two applicants:

	Pueblo Bonito	La Estancia
Principal Disclosure Form (5)	5	5
“Need” (15)	12	12
“Experience” (20)	16	17
“Outreach” (30)	27	27
“Access” (30)	25	24
Total (100)	85	85

15. In the event of a tie, Florida Housing designed the RFA and the associated rules to incorporate a series of “tie-breakers.” The tiebreakers, in the order of applicability, were:

- a. By points received for the Need criterion, with more points preferred. Both applicants received 12 points for need.
- b. By SAIL Request Amount Per Unit, with lower SAIL funds per unit preferred. Both applicants requested \$50,000 in SAIL funds per unit.
- c. By Total SAIL Request Amount as a percentage of Total Development Cost (“TDC”), with applicants whose SAIL request amount is 90 percent or less of TDC preferred. Both applicants’ Total SAIL Request Amount was 90 percent or less of their respective TDCs.
- d. By a Florida Job Creation Preference. Both applicants satisfied this preference.
- e. By lottery numbers randomly assigned to the applications when they were submitted to Florida Housing. Pueblo Bonito had lottery number 1, and La Estancia had lottery number 2.

16. Nancy Muller was the Review Committee member assigned to review and score the “Need” narrative section of the Applications responding to the RFA. Ms. Muller is currently a Policy Specialist with Florida Housing. Prior to her current position, Ms. Muller was, for many years, the Director of Policy and Special Programs.

17. In reviewing and scoring the applications submitted to Florida Housing in the instant case, Ms. Muller indicated that she first read the narrative question of the RFA and broke the question down into four separate component parts. The components included: (a) current and future need for farm workers over the next 10 to 15 years; (b) location and proximity of farms and other types of farm work that typically use farm worker labor; (c) information concerning the types of crops, seasons, etc. and the demand for specific farm worker housing; and (d) whether waivers have been requested or granted for either the proposed Development or Developments in the area. Next, Ms. Muller reviewed each application against those component parts and ultimately awarded La Estancia and Pueblo Bonito 12 points each for their respective response to the need section.

18. Marisa Button, Florida Housing’s corporate representative, testified that just because the documented need for farm worker housing is higher in Hillsborough County than it is in Lee County does not mean that La Estancia should have received a higher score in the narrative section than Pueblo Bonito because the RFA “sets forth a much more nuanced request for the description of the current and future needs in the area for the proposed development. So it’s not limited to just a flat-out look at the county under the Shimberg study. If [that] were the case, we wouldn’t need to have a narrative scoring component of the RFA.”

19. Ms. Muller and Ms. Button persuasively testified that numeric need was just one of the components an applicant needed to address in responding to the needs question. In fact, Ms. Muller indicated she recognized the greater numeric need for farm worker housing in Hillsborough County, and

the greater need factored into her consideration of that particular component. However, Ms. Muller pointed out that because both proposed projects were rehabilitation of existing units, neither was actually addressing nor reducing the numeric need for new units. Ms. Muller acknowledged that La Estancia's response at this component of the need analysis was "stronger" because of the greater need.

20. Nevertheless, Ms. Muller indicated that while La Estancia demonstrated a greater numeric need, Pueblo Bonito's response was "stronger" in other areas of the overall need response. Specifically, Pueblo Bonito provided a stronger response as to the location and proximity of farms and other types of farm work that use farm worker labor. Ms. Muller considered and evaluated the strengths and weaknesses of each response and no one component was weighted greater than any other component.

21. Based on the scoring and tie-breakers, the review committee recommended Pueblo Bonito for funding. However, the Board's deliberations were not to be limited to the review committee's recommendation or information provided by the review committee. With regard to the Board's funding selection, the RFA stated that:

[t]he Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding.

22. The Board met on July 17, 2020, to consider the review committee's recommendation and preliminarily selected Pueblo Bonito for funding, subject to satisfactory completion of the credit underwriting process.<sup>3</sup> Florida

<sup>3</sup> The RFA also employed a "Funding Test" to be used in the selection of applications for funding. The "Funding Test" required that the amount of unawarded SAIL funding must be enough to fully fund that applicant's SAIL request amount. After the selection of Pueblo Bonito for funding, there was only \$1,131,050 in SAIL funding remaining, and that was not enough to fund La Estancia's \$4,200,000 SAIL request.



Housing staff did not inform the Board that Lee County had been designated as an LDA for farm worker housing on the 2020 LDA Chart. Also, there is no evidence that any Board member knew of Lee County's LDA status or of declining farm worker housing occupancy when they voted to select Pueblo Bonito for funding.

23. La Estancia could not have presented the information regarding Lee County's LDA status to the Board. The RFA contains a "noninterference" clause prohibiting an applicant or its representative from contacting Board members or Florida Housing's staff "concerning their own or any other Applicant's Application" during the period beginning with the application deadline and continuing until the Board "renders a final decision on the RFA." If an applicant makes such contact in an attempt to influence the selection process, then that applicant's application is disqualified. As a result, La Estancia was unable to correct the review committee's omission of information regarding declining farm worker housing occupancy levels in Lee County.

24. Ms. Button testified that it was Florida Housing's practice not to apply new standards or requirements that changed after the application deadline when scoring applications. She stated that Florida Housing scores "based on the terms of the RFA and we wouldn't retroactively apply something to those applications after they've been submitted." She specifically testified that if a county is designated as an LDA after the application deadline, Florida Housing would not apply that designation to the application. She also testified that one of the reasons for not considering new requirements after the application deadline is that applicants would not be allowed to amend their applications to address these new requirements.

25. Even if the July 10 LDA designation had applied to this RFA, there is no evidence that it would have changed Florida Housing's scoring decision. The primary purpose for the LDA designation is to discourage new construction that could harm existing developments. In this case, both

applicants are proposing to rehabilitate existing developments, and the evidence shows that Florida Housing would not prohibit the funding of a rehabilitation project even if it were in an LDA. Florida Housing has funded the rehabilitation of farm worker developments located in LDAs since 2013 or 2014. In RFA 2017-104, the only previous farm worker RFA in evidence, the LDA designation did not even apply to rehabilitation projects that were in Florida Housing's portfolio. Ms. Muller testified that because the two applicants in this case both involved rehabilitation of developments in Florida Housing's portfolio, the LDA designation would have been "moot," unless the physical occupancy rates were dire, which they were not. She also testified that "preservation of existing developments is of much less, if any, importance related to LDA."

26. Ms. Button testified that she did not specifically inform the Board of the LDA designation "because it's not relevant to the terms for which the applications were scored for this RFA, it was not a part of the RFA terms, and the applicants did not, you know, apply with that designation put in place. It's for a future prospective funding cycle and it was not effective until after the application due date."

27. The greater weight of the evidence indicates that Florida Housing's review and scoring of the applications responding to the RFA were not clearly erroneous, contrary to competition, arbitrary, or capricious.

#### CONCLUSIONS OF LAW

28. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat.

29. The protest to Florida Housing's proposed actions is governed by section 120.57(3)(f), which provides as follows:

"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."

30. *Colbert v. Department of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it."

31. An agency action is "contrary to competition" if it unreasonably interferes with the purposes of competitive procurement, which has been described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931), as protecting the public against collusive contracts and to secure fair competition upon equal terms to all bidders.

32. A capricious action "is taken without thought or reason or irrationally." *Agrico Chem. Co. v. Dep't of Env'tl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). "An arbitrary decision is one that is not supported by facts or logic[.]" *Id.* The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Enter. v. Dep't of Env'tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), stated that "[i]f an administrative decision is justifiable under any analysis that a reasonable

person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious.”

33. Although competitive-procurement protest proceedings are described in section 120.57(3)(f) as *de novo*, competitive-procurement protest hearings are a “form of intra-agency review[,]” in which the object is to evaluate the action taken by the agency. *State Contracting and Eng’g Corp. v. Dep’t of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998)

34. La Estancia failed to demonstrate that Florida Housing’s review and scoring of the applications responding to the RFA were clearly erroneous, contrary to competition, arbitrary, or capricious.

35. La Estancia argues that either the scorer, the Review Committee, or the Board should have given more weight to the Shimberg study’s conclusions that there were more farm workers in Hillsborough County than in Lee County, and that more new housing units were needed in Hillsborough County than in Lee County. The evidence shows that Florida Housing did consider this study in the scoring of the applications, but that it did not rely on it to the exclusion of the actual narrative responses in the applications. Ms. Muller sufficiently explained her well-reasoned process for evaluating the narrative portions of the applications, and there is no question that she was qualified to perform that evaluation. Her scoring of the application section was a rational, good faith exercise of her honest judgment based on consideration of the relevant factors.

36. La Estancia also argues that the designation of Lee County as an LDA for farm worker housing in the upcoming RFA cycle should have been considered when scoring the RFA. The evidence is clear, however, that the 2020 LDA chart was inapplicable to the applications in the RFA, and that even if it had been, it would not necessarily have changed the scoring or selection process. If Florida Housing had used the 2020 LDA chart in its determination, that might well have been considered clearly erroneous, contrary to competition, arbitrary, or capricious.

37. Despite the fact that the LDA Chart did not exist as of the application deadline and the fact that the LDA Chart was not referenced in the RFA or specifically considered by Ms. Muller, La Estancia argues that the Board should have been advised of its existence. If it had been so advised, La Estancia further argues that the Board could have awarded funding to it rather than to Pueblo Bonito. In support of this argument, La Estancia notes the RFA's statement that:

[t]he Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding.

38. Ms. Button provided a rational explanation for why Florida Housing's staff did not inform the Board at the July 17, 2020, meeting that Lee County had been designated as an LDA for farm worker housing or the reasons why it had been so designated on the LDA Chart.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a Final Order dismissing La Estancia, Ltd.'s formal written protest and awarding funding to Partnership in Housing, Inc.

DONE AND ENTERED this 1st day of October, 2020, in Tallahassee, Leon  
County, Florida.

*Garnett Chisenhall*

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G. W. CHISENHALL  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of October, 2020.

COPIES FURNISHED:

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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**

LA ESTANCIA, LTD.,

Petitioner,

v.

FLORIDA HOUSING FINANCE  
CORPORATION,

DOAH CASE NO. 20-3582BID  
FHFC CASE NO. 2020-047BP

Respondent,

and

PARTNERSHIP IN HOUSING, INC.,

Intervenor

**PETITIONER LA ESTANCIA, LTD.'S EXCEPTIONS TO RECOMMENDED ORDER  
AND REQUEST FOR APPEARANCE BEFORE THE BOARD**

Pursuant to Section 120.57(3)(e), Fla. Stat., and Rules 28-106.207(1) and 67-60.009(2), Fla. Admin. Code, Petitioner LA ESTANCIA, LTD. ("Petitioner" or "La Estancia") hereby files its Exceptions to the Recommended Order entered in this matter on Thursday, October 1, 2020. La Estancia requests the opportunity to appear in person before the Board at its October 16 meeting to present argument on these Exceptions.

**Introduction, Overview, and Relief Requested**

1. The Administrative Procedure Act (Chapter 120, Florida Statutes) guarantees the right of parties to an administrative proceeding to file exceptions to recommended orders entered by Administrative Law Judges (ALJs). A state agency (which includes Florida Housing Finance Corporation for Chapter 120 proceedings) may reject or modify findings of fact if they are not supported by competent substantial evidence. An agency may reject or modify conclusions of law



over which it has substantive jurisdiction, as long as its reasons for doing so are stated with particularity and the substituted conclusion of law is as or more reasonable than the ALJ's conclusion of law.

2. Ultimately, Petitioner seeks to have its application for SAIL funding for the acquisition and rehabilitation of an existing twenty-three (23) year old, 84 unit farmworker housing development in Hillsborough County. Currently, eight of La Estancia's 84 four-bedroom apartment units are not functional and out of service, due to its current owners lacking the resources to upkeep the property. Funding La Estancia would both maintain and increase the number of useable farmworker housing units in Hillsborough County.

3. There was \$5,131,500 in SAIL funding initially made available in this RFA. The two applications submitted (for La Estancia and Intervenor's Pueblo Bonito) achieved overall tie scores, and both satisfied all tie-breakers, which is extremely rare in RFAs that are based on the subjective scoring of applications with lengthy narrative sections. (Notably, the only one of the four narrative sections whose score was used as a tie-breaker – the first tie-breaker – was Current and Future Need for Farmworker Housing, which emphasizes the importance of the need factor in the selection process for the RFA.) The applications were thus deemed to be virtually indistinguishable in overall content quality and merit, and the selection decision was based on lottery number: 1 vs. 2.

4. As was argued before the ALJ, and as will be addressed in these Exceptions, La Estancia believes the numeric scoring of the applications failed to adequately consider the great disparity in need for additional multifamily farmworker housing units in Hillsborough and Lee Counties, where the two developments at issue are located. This disparity in need is not just La Estancia's opinion; it is the conclusion calculated by the Shimberg Center for Housing Studies, in

the most recent report (May 2019) prepared specifically for Florida Housing's use, as well as by the Florida Housing staff that designated Lee County as a "Limited Development Area" (or "LDA") expressly for farmworker housing, but did not designate Hillsborough County as such.

5. More importantly, though, even if there were no scoring changes, the RFA expressly states that Florida Housing's Board of Directors is not limited to the assigned scores or the staff recommendations when making its funding selection. The Board may consider any other information that the Board deems relevant.

6. The Board was not made aware, prior to its July 17 selection decision, that occupancy levels in existing farmworker housing were declining, and that Florida Housing had just designated Lee County as an LDA expressly for farmworker housing. The Board should have been given the opportunity to decide if the declining occupancy levels, and the LDA designation, suggested that the better use of SAIL funding resources was to rehabilitate the Hillsborough County development, La Estancia. The Board should also have been given the opportunity to decide if the scoring of "Current and Future Need for Farmworker Housing" was inconsistent with the findings regarding farmworker housing occupancy rates in these two counties by the other Florida Housing staff that were compiling the LDA designations.

7. Alternatively, the Board could have acted to fund both applications. After selection of Pueblo Bonito and its \$4.0 million request, there was \$1,131,500 in SAIL funding remaining available in this RFA. La Estancia strongly urges the Board to supplement this remaining amount with additional SAIL funds in order to fund both applications; an additional \$3,068,500 would be sufficient. La Estancia suggests that there are significant unallocated SAIL funds from prior 2020 SAIL RFAs, along with program income and the 2020-2021 fiscal year SAIL appropriation for farmworker housing, to fund this development.

**Exception to Finding of Fact 13 (consented)**

8. Petitioner takes exception to the third sentence of Finding of Fact paragraph 13, which reads as follows:

The occupancy rate for the housing stock in Lee County for the period of August 2019 through January 2020 was 91.67 percent as compared to 95.83 percent for the period of September 2019 through February 2020.

This finding relates to the factual basis for Florida Housing having designated Lee County as a Limited Development Area for farmworker housing on a posted list with a stated effective date of July 10, 2020; that factual basis was declining occupancy of farmworker housing in Lee County over consecutive years. The underscored years in this sentence are incorrect and not supported by competent substantial evidence.

9. The undisputed evidence shows the 95.83 percent occupancy rate is from the period September 2018 through February 2019. The error apparently arose from a typographical error contained in the Proposed Recommended Order of Intervenor, which was then compounded by the Administrative Law Judge's effort to correct the typographical error by changing the years. Unfortunately, he changed them to the wrong years; the correct years are as demonstrated in La Estancia Exhibit 6 (Florida Housing's Answers to La Estancia's Second Set of Interrogatories, and specifically the answer to Interrogatory 6); and in a County Occupancy Date chart posted on Florida Housing's website, which was admitted into evidence as La Estancia Exhibit 12.

10. Undersigned counsel for Petitioner has discussed this apparent error with counsel for Florida Housing and counsel for the Intervenor. All parties agree that the Final Order should correct the third sentence of Finding of Fact 13 to read:

The occupancy rate for the housing stock in Lee County for the period of August 2019 through January 2020 was 91.67 percent as compared to 95.83 percent for the period September 2018 through

February 2019.

**Exception to Finding of Fact 27**

11. La Estancia takes exception to Finding of Fact 27, which is a mixed statement of fact and law, and which reads as follows:

The greater weight of the evidence indicates that Florida Housing's review and scoring of the applications responding to the RFA were not clearly erroneous, contrary to competition, arbitrary, or capricious.

It is unclear whether the ALJ intended this summary statement to apply only to the "review and scoring" of the application or also to the selection of Pueblo Bonito as the preliminarily funded application.

12. As to the review and scoring, Petitioner believes that Florida Housing gave insufficient weight to the significant disparity in relative need for affordable housing in Hillsborough County (where La Estancia is located) and in Lee County (where Intervenor's Pueblo Bonito development is located); and to the declining occupancy of existing farmworker housing in Lee County; and to Florida Housing's concern that the Lee County need was weak enough that new farmworker units would further harm the existing farmworker units, as evidenced by Lee County's inclusion on the LDA list. Although the ALJ appears to agree with Florida Housing and the Intervenor that the LDA designation of Lee County for farmworker housing did not apply to this RFA, the ALJ and Florida Housing completely disregarded the applicability of underlying decline in occupancy as "other relevant information." In other words, even assuming the LDA designation itself was technically irrelevant to this RFA because of its timing relative to the RFA's application deadline, the underlying data of declining occupancy could have been and should have been considered. The failure to consider the information renders it arbitrary. Determining whether a state agency (which includes Florida Housing for purposes of this proceeding) acted arbitrarily

and capriciously involves consideration of, among other things, whether the agency “has considered all factors” and “given actual, good faith consideration to the factors.” *Adam Smith Enter. v. Dep’t of Env’tl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

13. Further, if the “review and scoring” deemed acceptable by the ALJ includes the Board’s decision to select the Intervenor’s application for funding, the decision was arbitrary and capricious because the Board was denied the ability to determine if there was other relevant information it should consider, and if there was other relevant information, then to consider it.

14. The ALJ addressed the Board’s selection process and the relevant RFA provision on Board action in Findings of Fact 21 and 22; Petitioner does not dispute these findings. But what that RFA provision makes clear is that it is the Board’s decision as to what, if any, “other information” is relevant in its selection decision. The Board was not informed by staff that a week before its meeting, Lee County had been designated an LDA for farmworker housing. Perhaps more importantly, the Board was not informed that the occupancy level of farmworker housing in Lee County had declined over three straight years, measured by similar six month periods, the last of which concluded four months before this RFA’s application deadline. Florida Housing staff knew at least as early as May 2020 that this occupancy decline was occurring; how far in advance of May 2020 the staff was aware of this is not known.

15. In summary, the RFA provides for a selection process that includes:

. . . the applications, the [staff Review] Committee’s scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding.

[Emphasis added] Petitioner does not expect the Board on its own to seek out any such “other information” to determine its relevance. The Board appropriately relies on staff to present potentially relevant information to the Board, for the Board to then determine if that information

is relevant, and if so to factor it into the selection decision. The error here was staff not informing the Board of this potentially relevant information – information which staff had already gathered, evaluated, and used as the basis for an LDA designation proposed in late May 2020, and finalized in early July 2020.

**Exception to Conclusion of Law 34**

16. Conclusion of Law 34 states as follows:

La Estancia failed to demonstrate that Florida Housing’s review and scoring of the applications responding to the RFA were clearly erroneous, contrary to competition, arbitrary, or capricious.

For the same reasons just stated in the exception to Finding of Fact 27, Petitioner takes exception to Conclusion of Law 34.

17. The failure to give appropriate weight to the Shimberg Center’s determination of disparate need for farmworker housing in Lee and Hillsborough Counties was contrary to competition, and was arbitrary and capricious. The failure of staff to inform this Board of the LDA designation, of the declining occupancy trend, and of the concerns regarding the need for farmworker housing in Lee County that such designation exemplifies was also arbitrary, capricious, and contrary to competition.

**Exception to Conclusion of Law 35**

18. Petitioner takes exception to a portion of the final sentence of paragraph 35, which reads: “Her scoring of the application section was a rational, good faith exercise of her honest judgment based on consideration of the relevant factors.” Petitioner takes exception to the underscored portion for the reasons set forth in the exception to paragraph 27: the proposed designation of Lee County as an LDA for farmworker housing, and the declining occupancy of existing farmworker housing in Lee County that resulted in that LDA designation, were relevant

factors that were not considered. This information was known to Florida Housing, but not to Ms. Muller, when she scored the application and when the review committee convened to determine scores. Since this information was not considered, Ms. Muller's judgment was not based on all relevant factors.

**Exception to Conclusion of Law 36**

19. The first sentence of Conclusion of Law 36 states as follows:

La Estancia also argues that the designation of Lee County as an LDA for farm worker housing in the upcoming RFA cycle should have been considered when scoring the RFA.

20. This conclusion, by omission, misstates the entirety of Petitioner La Estancia's position. Even if the LDA designation was technically irrelevant for purposes of this RFA, the underlying data that led to the LDA designation was information that this Board may well have deemed relevant, and factored into the selection decision. By not affording the Board the opportunity to consider this information, Florida Housing departed from the process set out in the RFA.

**Exception to Conclusion of Law 38**

21. Conclusion of Law 38 states as follows:

Ms. Button provided a rational explanation for why Florida Housing's staff did not inform the Board at the July 17, 2020, meeting that Lee County had been designated as an LDA for farm worker housing or the reasons why it had been so designated on the LDA Chart.

22. Petitioner takes exception to this conclusion for the same reasons set forth in the previous exceptions. The decision of what information is relevant to consider in making a funding selection is the Board's decision to make, not Ms. Button's. Petitioner believes that Ms. Button handles her responsibilities with a high degree of integrity, competence and effectiveness, but

deciding what information is relevant for the Board to consider is not one of those responsibilities. The RFA clearly and unequivocally vests in the Board the decision of what is relevant for it to consider. To take that authority away from the Board by limiting the information presented to it is contrary to the terms of the RFA, and is arbitrary and capricious.

**Recommendation**

23. In his Recommendation, the ALJ recommends dismissing La Estancia's protest, and awarding funding to Intervenor Partnership in Housing, Inc., the Applicant for Pueblo Bonito. For the reasons set forth in these Exceptions, La Estancia asserts that Florida Housing should, after Board consideration of all information that it deems relevant, award funding to La Estancia; or, alternatively, fund both La Estancia and Pueblo Bonito.

**FILED AND SERVED** this 6th day of October, 2020.

*/s/ M. Christopher Bryant*

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**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that the original of the foregoing has been filed electronically with Corporation Clerk, Florida Housing Finance Corporation ([CorporationClerk@floridahousing.org](mailto:CorporationClerk@floridahousing.org)) and copies have been furnished to the following by e-mail this this 6th day of October, 2020:

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/s/ M. Christopher Bryant  
ATTORNEY

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

LA ESTANCIA, LTD.,

Petitioner,  
vs.

DOAH Case No.: 20-3582BID

FLORIDA HOUSING FINANCE CORPORATION,

FHFC Case No. 2020-0047BP

Respondent,

and

PARTNERSHIP IN HOUSING, INC.,

Intervenor.

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**FLORIDA HOUSING'S RESPONSE TO EXCEPTIONS**

Respondent, Florida Housing Finance Corporation, hereby submits this response to Petitioner La Estancia's Exceptions to Recommended Order filed on October 6, 2020, pursuant to Rule 28-106.217(1), Fla. Admin. Code.

Section 120.57(1)(k), Florida Statutes, sets forth the standards by which an agency must consider exceptions filed to a Recommended Order, and in relevant part provides:

The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number and paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.

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.

It is the job of the Administrative Law Judge (“the ALJ”) to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. Rogers v. Department of Health, 920 So.2d 27 9Fla. 1st DCA 2005); B.J. v. Department of Children and Family Services, 983 So.2d 11 (Fla. 1st DCA 2008) “Competent substantial evidence,” is defined as: “[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.” Dept. of Highway Safety and Motor Vehicles v. Wiggins, 151 So.3d 457 (Fla. 1st DCA 2014), quoting DeGroot v. Sheffield, 95 So.2d 912, 916 (Fla.1957)

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

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

The first seven paragraphs of Petitioner’s Exceptions constitute what it labels as an Introduction. This introduction is essentially a rearguing of its case and a plea for additional funding, but it should not be considered as an “exception” to the Recommended Order. Rule 28-106.217, Fla. Admin. Code, requires that exceptions “shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record.” The Introduction does none of these.

First Exception

Petitioner takes exception to Finding of Fact 13, in which the ALJ incorrectly stated the dates regarding occupancy rates for housing stock in Lee County. While not relevant to the outcome of this case, Florida Housing agrees that the ALJ made a clerical error which should be corrected in the Final Order. This exception should therefore be accepted.

Second Exception

Petitioner takes exception to Finding of Fact 27, where the ALJ found that the evidence showed that Florida Housing's review and scoring of the applications was not clearly erroneous, contrary to competition, arbitrary, or capricious. Interestingly, Petitioner never once asserts that this finding was not supported by competent substantial evidence or does not comply with essential requirements of law, necessary elements under the provisions of Chapter 120 for this Board to reject or modify a finding of fact.

Petitioner first argues that the ALJ should have weighed the evidence differently and that Florida Housing's scorer should have considered evidence that was not contained in the applications. Petitioner then argues that the Board should have considered other evidence that was not before it. While this does not appear to have anything to do with the review and scoring of the applications, the ALJ found that Florida Housing had provided a rational explanation for why the Board was not briefed on the irrelevant 2020 Limited Development Area (LDA) designation.

Petitioner is simply disagreeing with the ALJ's finding and asking this Board to reweigh the evidence. There was competent substantial evidence to support the ALJ's finding, and Florida Housing has no authority to reject or modify such findings of fact. This exception must therefore be rejected.

Third Exception

Petitioner takes exception to Conclusion of Law 34, in which the ALJ concluded that Petitioner failed to demonstrate that Florida Housing's review and scoring of the applications was clearly erroneous, contrary to competition, arbitrary or capricious. Petitioner's argument is the same as its exception to Finding of Fact 27 and must be rejected for the same reasons.

Fourth Exception

Petitioner takes exception to the final sentence of Conclusion of Law 35, in which the ALJ concluded that Florida Housing's scoring of the applications was "a rational, good faith exercise of her honest judgment based on consideration of the relevant factors." Petitioner argues that the scorer did not consider information that was not included in the applications and should have considered the 2020 LDA designation in her scoring. The ALJ found, however, that the LDA designation was "inapplicable to the applications in the RFA" and that if it had been considered "that might well have been considered clearly erroneous, contrary to competition, arbitrary, or capricious." (Conclusion of Law 36) This conclusion was reasonable and supported by competent substantial evidence, and the exception must therefore be rejected.

Fifth Exception

Petitioner takes exception to Conclusion of Law 36, which summarized one of Petitioner's arguments during the hearing. Petitioner argues that this conclusion did not accurately reflect "the entirety" of its position. Petitioner does not dispute that this conclusion accurately reflected one of Petitioner's arguments, and even if it had that would not have been relevant to the ultimate outcome. This conclusion was reasonable and supported by competent substantial evidence, and the exception must therefore be rejected.

Sixth Exception

Petitioner takes exception to Conclusion of Law 38, in which the ALJ found that Florida Housing provided a rational explanation for why it did not brief the Board on the irrelevant 2020 LDA designation. Petitioner reiterates its previous exceptions, but also notes that “deciding what information is relevant for the Board to consider is not one of [staff’s] responsibilities.” It is difficult to understand how Petitioner can fault Florida Housing staff for not providing information that it has no responsibility to provide. In any case, this conclusion was reasonable and supported by competent substantial evidence, and the exception must therefore be rejected.

Seventh Exception

Petitioner takes exception to the ALJ’s recommendation that Petitioner’s petition should be dismissed. For the reasons stated above, this exception must be rejected.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors accept the arguments presented in Petitioner’s First Exception, reject the remainder of Petitioner’s Exceptions, and issue a Final Order accordingly.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail this 6th day of October, 2020 to the following:

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**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

LA ESTANCIA, LTD.,

Petitioner,

FHFC CASE NO. 2020-047BP

v.

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent,

and

PARTNERSHIP IN HOUSING, INC.,

Intervenor.

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**PARTNERSHIP IN HOUSING, INC.'S  
RESPONSE TO EXCEPTIONS TO RECOMMENDED ORDER**

Partnership in Housing, Inc. (“Pueblo Bonito”), responds to the Exceptions to Recommended Order (“Exceptions”) filed by La Estancia, Ltd. as follows:

I. Introduction

Following a formal hearing, a Recommended Order was issued in this case by the Administrative Law Judge (“ALJ”) on October 1, 2020, recommending that a final order be entered. The ALJ recommended that the Application submitted by Pueblo Bonito be funded and the La Estancia challenge be dismissed. On October 6, 2020, La Estancia not satisfied with the ALJ’s findings, conclusions and



recommendation, filed its Exceptions to the ALJ's Recommended Order. The Exceptions challenge the ALJ's Conclusions of Law numbers 34-36, 38. The Exceptions also call into question the ALJ's Findings of Fact numbers 13 and 27. The ALJ's Findings of Fact with the exception of portions of finding of fact 13 are supported by competent substantial evidence and the Conclusions of Law are consistent with the RFA, Florida Law and both Florida Housing Rules and its policies concerning the scoring of applications submitted in response to RFAs. The Exceptions other than a clarification at Paragraph 13 should be denied by this Board and the Recommended Order adopted in toto.

## II. Standard of Review

The rules of decision applicable in bid protests are set forth in Section 120.57(3)(f), Florida Statutes ("F.S."), 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, F.S., establishes the specific and limited parameters for Florida Housing and the Board of Director'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), F.S. Florida Housing's final order must include an explicit ruling on each exception.

Florida Housing may not modify or reject an ALJ's finding of fact unless it determines from a review of the entire record - and states with particularity in the final order - that the finding of fact was not based on competent substantial evidence, or that the proceedings on which the finding was based did not comply with the essential requirements of law. *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, 860 (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).

As part of this analysis, Florida Housing may not reweigh the evidence. Similarly, Florida Housing may not substitute its findings simply because it would have determined factual questions differently than the ALJ. *F.U.S.A., FTP-NEA v. Hillsborough Cnty. Coli.*, 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. Regulation, 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 [ALJ] as a trier of fact." *Id.* at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of facts. §120.57(1)(1), F.S. 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 Prof Eng'rs*, 946 So. 2d 604 (Fla. 1st DCA

2006); Fla. *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("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.") (emphasis added, citations omitted).

Florida Housing may modify or reject conclusions of law where it has substantive jurisdiction. § 120.57(1)(1), F.S. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998) (affirming final order in which Florida Housing rejected ALJ's interpretation of Florida Housing's rule); *see generally Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 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), F.S.

Additionally, 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. v. Dep't of Bus. & Prof'l Regulation*, 724 So. 2d 192 (Fla. 1st DCA 1999); *see also Baptist Hosp.*, 500 So. 2d 623; *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985). Matters that are susceptible of 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 Baptist Hosp.*, 500 So. 2d at 623; *Homes*, 480 So. 2d at 153.

“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 696, 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).

### III. Response

La Estancia's Exceptions include an introductory section. This introductory section purports to provide information for the Board to consider in ruling on the Exceptions. This section includes a recitation of some of the facts of the case (in light most favorable to La Estancia), along with arguments made at hearing and

addressed in the proposed recommended order filed by La Estancia. In essence La Estancia in this introductory section is simply rearguing its case made to the ALJ in the hopes that the Board will overturn the well-reasoned findings and conclusions found in the Recommended Order. This Board should only consider this section as legal argument in its consideration of any specific exceptions made and not as an opportunity to simply reargue the case.

The job of the Board at this juncture of the proceeding is not one of reweighing the evidence or testimony but is instead limited to determining whether the questioned Findings of Fact are supported by competent substantial evidence. The challenged findings here are all supported in the record by competent substantial evidence and La Estancia cannot argue otherwise.

In their Exceptions, La Estancia takes issue with the ALJ's Finding of Facts numbers 13 and 27 which provide as follows:

13. The first draft of the 2020 LDA Chart and each subsequent draft or amendment included Lee County for farm worker housing. Florida Housing indicated that the basis for Lee County's LDA designation was a downward trend in occupancy rates. The occupancy rate for the housing stock in Lee County for the period of August 2019 through January 2020 was 91.67 percent as compared to 95.83 percent for the period of September 2019 through February 2020. Based on this trend, Lee County was proposed as an LDA for the 2020/2021 Florida Housing RFA funding cycle, which became effective July 10, 2020.

27. The greater weight of the evidence indicates that Florida Housing's review and scoring of the applications responding to the RFA were not clearly erroneous, contrary to competition, arbitrary, or capricious.

In essence the ALJ in these findings and the ones in between explains the factual discussion of why the LDA was issued and based on all the findings in between finds that the greater weight of the evidence supports Florida Housing's review and scoring. In their Exceptions La Estancia simply attempts to reargue its case to the Board seeking a different outcome. The ALJ reasonably finds that Florida Housing did not act arbitrary or capricious in its review and scoring or in not providing additional evidence to the Board. While La Estancia may not like these findings it is not the Board's job now to substitute these findings simply because La Estancia would have determined the factual questions differently. La Estancia correctly points out however that Finding of Fact 13 should be corrected to be consistent with the record evidence as to the dates of the trending occupancy rates. Pueblo Bonito agrees that the Finding of Fact 13 should be amended to include the correct dates. The Exceptions should otherwise be rejected.

La Estancia next takes exception to Conclusions of Law numbers 34-36 and 38 which provide as follows:

34. La Estancia failed to demonstrate that Florida Housing's review and scoring of the applications responding to the RFA were clearly erroneous, contrary to competition, arbitrary, or capricious.

35. La Estancia argues that either the scorer, the Review Committee, or the Board should have given more weight to the Shimberg study's conclusions that there were more farm workers in Hillsborough County than in Lee County, and that more new housing units were needed in Hillsborough County than in Lee County. The evidence shows that Florida Housing did consider this study in the scoring of the applications, but that it did not rely on it to the exclusion of the actual narrative responses in the applications. Ms. Muller sufficiently explained her well-reasoned process for evaluating the narrative portions of the applications, and there is no question that she was qualified to perform that evaluation. Her scoring of the application section was a rational, good faith exercise of her honest judgment based on consideration of the relevant factors.

36. La Estancia also argues that the designation of Lee County as an LDA for farm worker housing in the upcoming RFA cycle should have been considered when scoring the RFA. The evidence is clear, however, that the 2020 LDA chart was inapplicable to the applications in the RFA, and that even if it had been, it would not necessarily have changed the scoring or selection process. If Florida Housing had used the 2020 LDA chart in its determination, that might well have been considered clearly erroneous, contrary to competition, arbitrary, or capricious.

38. Ms. Button provided a rational explanation for why Florida Housing's staff did not inform the Board at the July 17, 2020, meeting that Lee County had been designated as an LDA for farm worker housing or the reasons why it had been so designated on the LDA Chart.

In these conclusions the ALJ, based on a clear reading of the RFA, and the competent substantial evidence concludes that the review of the responses to the RFA was based on relevant factors and was not arbitrary or capricious. Additionally the conclusions explain the reasons why information concerning the LDA was not provided to the Board. The conclusions are based on the competent substantial evidence in the record. The exceptions should be rejected and a Final Order entered



accepting the Recommended Order in toto, including the correction of Finding of Fact 13, should be entered.

Respectfully submitted this 7th day of October, 2020.

/s/ Michael P. Donaldson

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Mail this 7th day of October 2020 to:

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