**STATE OF FLORIDA**
**FLORIDA HOUSING FINANCE CORPORATION**

JPM OUTLOOK ONE LIMITED PARTNERSHIP

Petitioner,

vs. DOAH Case No. 17-2499BID

FLORIDA HOUSING FINANCE CORPORATION, FHFC Case No. 2017-018BP

Respondent,

_____/

GRANDE PARK LIMITED PARTNERSHIP

Petitioner,

vs. DOAH Case No. 17-2500BID

FLORIDA HOUSING FINANCE CORPORATION, FHFC Case No. 2017-019BP

Respondent,

and

HAMMOCK RIDGE II, LLC,

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 28, 2017. All Petitioners in these consolidated cases were Applicants under Request for



FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Jennifer L. Marshall /DATE: 7/28/2017

Applications 2016-110: Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA"). The matter for consideration before this Board is a Recommended Order pursuant to §§120.57(2) and (3)(e), Fla. Stat., and Rule 67-60.009(3)(b), Fla. Admin. Code, the Exceptions to the Recommended Order, and Responses thereto.

On October 7, 2016, Florida Housing issued the RFA which solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding ("tax credits") for the construction of affordable housing developments. A modification to the RFA was issued on November 10, 2016. On December 2, 2016, Applications were submitted in response to the RFA by a number of Developers including Petitioners and Intervenors. On March 24, 2017, Florida Housing posted notice of its intended decision to award funding to 10 Applicants including Intervenor Hammock Ridge. Petitioners JPM Outlook and Grande Park were determined to be ineligible for funding.

Petitioners timely filed notices of intent to protest followed by formal written protests pursuant to §120.57(3), Fla. Stat. (2016). After a review of the Petitions, Florida Housing determined that no disputes of material fact existed, and referred the cases to the Division of Administrative Hearings (DOAH) for informal proceedings per its contract with Florida Housing to provide informal hearing officers. On May 1, 2017 the Administrative Law Judge acting as informal hearing

officer consolidated the cases into this single action, and granted a motion to intervene from Hammock Ridge II, LLC.

An informal hearing took place on May 15, 2017 in Tallahassee, Florida, before the Honorable Administrative Law Judge Lawrence P. Stevenson ("Hearing Officer"). Petitioners, Respondent and Intervenors timely filed Proposed Recommended Orders.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order on June 29, 2017. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer therein recommended that Florida Housing issue a Final Order affirming Florida Housing's scoring and ranking decisions regarding all issues and parties.

On July 10, 2017 Petitioners filed Exceptions to Recommended Order, attached hereto as Exhibit B ("Exceptions"), objecting to the Conclusions of Law in ¶¶ 50-53, and to the Recommendation of the Recommended Order. On July 13, 2017, Florida Housing and the Intervenors filed a Joint Response to Petitioners' Exceptions, attached hereto as "Exhibit C."

## RULING ON EXCEPTIONS

1. Petitioners take exception to the Conclusions of Law set forth in ¶¶ 50-53 of the Recommended Order, in which the Hearing Officer concluded that

Petitioners had failed to carry their burden of showing that the errors in their petitions should have been waived as minor irregularities.

2. The Board finds that it has substantive jurisdiction over the issues presented in ¶¶ 50-53 of the Recommended Order.

3. After a review of the record, the Board finds that the Conclusions of Law set forth in ¶¶ 50-53 of the Recommended Order are reasonable and based upon competent, substantial evidence, and rejects Petitioners' Exception.

RULING ON THE RECOMMENDED ORDER

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

5. The Conclusions of Law of the Recommended Order are reasonable and supported by competent, substantial evidence.

6. Petitioners' Exceptions to the Recommended Order are rejected.

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

ORDER

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

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

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

**IT IS HEREBY ORDERED** that Florida Housing's scoring and ranking of RFA 2016-110 is **AFFIRMED** is and the relief requested in the Petitions is **DENIED.**

**DONE and ORDERED** this 28th day of July, 2017.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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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

JPM OUTLOOK ONE LIMITED PARTNERSHIP,

Petitioner,

vs. Case No. 17-2499BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG HAMMOCK RIDGE II, LLC,

Intervenor.
_____/

GRANDE PARK LIMITED PARTNERSHIP,

Petitioner,

vs. Case No. 17-2500BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG HAMMOCK RIDGE II, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in these cases on May 15, 2017, before Lawrence P. Stevenson, a duly-designated

Administrative Law Judge, sitting as an informal hearing officer pursuant to sections 120.57(2) & (3), Florida Statutes, in Tallahassee, Florida.

APPEARANCES

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For Respondent: Christopher McGuire, Esquire
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For Intervenor: Maureen McCarthy Daughton, Esquire
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STATEMENT OF THE ISSUE

At issue in this proceeding is whether the actions of the Florida Housing Finance Corporation ("Florida Housing") concerning the review and scoring of the responses to Request for Applications 2016-110, Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA"), was clearly erroneous, contrary to competition, arbitrary or capricious. Specifically, the issue is whether Florida Housing acted contrary to the agency's governing statutes, rules, policies, or the RFA specifications in finding that the applications of Petitioners JPM Outlook One Limited Partnership

("JPM Outlook") and Grande Park Limited Partnership ("Grande Park") were ineligible for funding.

PRELIMINARY STATEMENT

On October 7, 2016, Florida Housing issued the RFA, which solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding for the construction of affordable housing developments. Florida Housing issued a modification to the RFA on November 10, 2016. On December 2, 2016, a number of developers submitted applications in response to the RFA, including Petitioners JPM Outlook and Grande Park, and Intervenor Hammock Ridge II, LLC ("Hammock Ridge"). On March 24, 2017, Florida Housing posted notice of its intended decision to award funding to 10 applicants, including Hammock Ridge. Petitioners JPM Outlook and Grande Park were determined to be ineligible for funding.

JPM Outlook and Grande Park timely filed with Florida Housing their notices of protest, followed by a Formal Written Protest and Petition for Administrative Hearing ("Petition") for each Petitioner, pursuant to section 120.57(3) and Florida Administrative Code Rules 67-60.009 and 28-110.004.

On April 24, 2017, Hammock Ridge filed with Florida Housing its Petition for Leave to Intervene in both cases, pursuant to Florida Administrative Code Rule 28-106.205.

On April 25, 2017, Florida Housing forwarded the cases to the Division of Administrative Hearings ("DOAH"). By Orders dated May 1, 2017, the cases were consolidated for hearing and Hammock Ridge's Petition for Leave to Intervene was granted.

All parties agreed that the issues raised in the Petition were matters of law and that there were no disputed issues of material fact requiring resolution at the hearing. Therefore, this proceeding was conducted as an informal hearing pursuant to sections 120.57(2) and (3). The parties submitted a Prehearing Stipulation setting forth the agreed facts as to the RFA process and the scoring issue raised in this proceeding.

The informal hearing was held on May 15, 2017. At the hearing, Joint Exhibits 1 through 10 were admitted into evidence. Petitioners presented the testimony of Brian Parent, a principal of both companies who was involved in preparing the applications. Florida Housing presented the testimony of Ken Reecy, its Director of Multifamily Programs. Intervenor called no witnesses. All three parties presented oral argument.

The one-volume Transcript of the final hearing was filed at DOAH on June 1, 2017. On June 8, 2017, Petitioners filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders, which was granted orally on June 9, 2017, and memorialized in a written Order Granting Extension of Time on June 12, 2017. All three parties submitted Proposed Recommended

Orders on June 13, 2017, as set forth in the Order Granting Extension of Time. The Proposed Recommended Orders have been given due consideration in the preparation of this Recommended Order.

Unless otherwise stated, all statutory references are to the 2016 edition of the Florida Statutes.

## FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following Findings of Fact are made:

1. JPM Outlook is a Florida limited partnership based in Jacksonville, Florida, that is in the business of providing affordable housing.

2. Grande Park is a Florida limited partnership based in Jacksonville, Florida, that is in the business of providing affordable housing.

3. Hammock Ridge is a Florida limited liability company based in Coconut Grove, Florida, that is in the business of providing affordable housing.

4. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. For the purposes of this proceeding, Florida Housing is an agency of the State of Florida. Its 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.

5. The low income housing tax credit program was enacted to incentivize the private market to invest in affordable rental housing. These tax credits are awarded competitively to housing developers in Florida for rental housing projects that qualify. The credits are then normally sold by developers for cash to raise capital for their projects. The effect of this sale is to reduce the amount that the developer would have to borrow otherwise. Because the total debt is lower, a tax credit property can (and must) offer lower, more affordable rents. Developers also covenant to keep rents at affordable levels for periods of 30 to 50 years as consideration for receipt of the tax credits.

6. Housing tax credits are not tax deductions. For example, a $1,000 deduction in a 15-percent tax bracket reduces taxable income by $1,000 and reduces tax liability by $150, while a $1,000 tax credit reduces tax liability by $1,000. The demand for tax credits provided by the federal government exceeds the supply.

7. Florida Housing is authorized to allocate housing tax credits and other funding by means of a request for proposal or other competitive solicitation in section 420.507(48). Florida

Housing has adopted chapter 67-60 to govern the competitive solicitation process for several different programs, including the program for tax credits. Chapter 67-60 provides that Florida Housing allocate its housing tax credits, which are made available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3).

8. In their applications, applicants request a specific dollar amount of housing tax credits to be given to the applicant each year for a period of 10 years. Applicants will normally sell the rights to that future stream of income tax credits (through the sale of almost all of the ownership interest in the applicant entity) to an investor to generate the amount of capital needed to build the development. The amount which can be received depends upon the accomplishment of several factors, such as a certain percentage of the projected Total Development Cost; a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated area of some counties. This, however, is not an exhaustive list of the factors considered.

9. Housing tax credits are made available through a competitive application process 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(3). The RFA in this case was issued on October 7, 2016.

A modification to the RFA was issued on November 10, 2016, and responses were due December 2, 2016. A challenge was filed to the terms, conditions, or requirements of the RFA by parties not associated with the instant case, but that challenge was dismissed prior to hearing.

10. Through the RFA, Florida Housing seeks to award up to an estimated $12,312,632 of housing tax credits to qualified applicants to provide affordable housing developments in Medium Counties, as well as up to an estimated $477,091 of housing tax credits to qualified applicants to provide affordable housing developments in Small Counties other than Monroe County.

11. By the terms of the RFA, a review committee made up of Florida Housing staff reviewed and scored each application. These scores were presented in a public meeting and the committee ultimately made a recommendation as to which projects should be funded. This recommendation was presented to Florida Housing's Board of Directors ("the Board") for final agency action.

12. On March 24, 2017, all applicants received notice that the Board had approved the recommendation of the review committee concerning which applications were eligible or ineligible for funding and which applications were selected for awards of housing tax credits, subject to satisfactory completion of the credit underwriting process. The notice was provided by the posting on Florida Housing's website (www.floridahousing.org) of two

spreadsheets, one listing the "eligible" and "ineligible" applications and one identifying the applications which Florida Housing proposed to fund.

13. Florida Housing announced its intention to award funding to 10 developments, including Intervenor Hammock Ridge. Petitioners JPM Outlook and Grande Park were deemed ineligible.

14. If JPM Outlook and Grande Park had been deemed eligible, each would have been in the funding range based on its assigned lottery number and the RFA selection criteria. If Grande Park had been deemed eligible, Hammock Ridge would not have been recommended for funding.

15. Petitioners JPM Outlook and Grande Park timely filed notices of protest and petitions for administrative proceedings.

16. The scoring decision at issue in this proceeding is based on Florida Housing's decision that Petitioners failed to submit as Attachment 1 to Exhibit A the correct and properly signed version of the Applicant Certification and Acknowledgment Form. Petitioners' admitted failure to submit the correct Applicant Certification and Acknowledgement Form was the sole reason that Florida Housing found Petitioners' applications to be ineligible for funding.

17. Section Four of the RFA was titled, "INFORMATION TO BE PROVIDED IN APPLICATION." Listed there among the Exhibit A

submission requirements was the Applicant Certification and Acknowledgement Form, described as follows:

> The Applicant must include a signed Applicant Certification and Acknowledgement form as Attachment 1 to Exhibit A to indicate the Applicant's certification and acknowledgement of the provisions and requirements of the RFA. The form included in the copy of the Application labeled "Original Hard Copy" must reflect an original signature (blue ink is preferred). The Applicant Certification and Acknowledgement form is provided in Exhibit B of this RFA and on the Corporation's Website http://www.floridahousing.org/Developers/MultiFamilyPrograms/Competitive/2016-110/RelatedForms/ (also accessible by clicking here). Note: If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered.

The final sentence of the quoted language is referred to by Florida Housing as the "effects clause."

18. The November 10, 2016, modifications to the RFA were communicated to applicants in three ways. First, Florida Housing provided a Web Board notice. The Florida Housing Web Board is a communication tool that allows interested parties and development partners to stay apprised of modifications to procurement documents. Second, each RFA issued by Florida Housing, including the one at issue in this proceeding, has its own specific page on Florida Housing's website with hyperlinks to all documents related to that RFA. Third, Florida Housing released an Official Modification Notice that delineated every modification, including

a "blackline" version showing the changes with underscoring for emphasis.

19. Brian Parent is a principal for both JPM Outlook and Grande Park. Mr. Parent received the Web Board notification of the RFA modifications via email. Upon receiving the email, Mr. Parent reviewed the modifications on the Florida Housing website.

20. The modification to the RFA, posted on Florida Housing's website on November 10, 2016, included the following modification of the Applicant Certification and Acknowledgement Form, with textual underscoring indicating new language:

> Pursuant to Rule 67-60.005, F.A.C., Modification of Terms of Competitive Solicitations, Florida Housing hereby modifies Item 2.b.(4) of the Applicant Certification and Acknowledgement Form to read as follows:
>
> (4) Confirmation that, if the proposed Development meets the definition of Scattered Sites, all Scattered Sites requirements that were not required to be met in the Application will be met, including that all features and amenities committed to and proposed by the Applicant that are not unit-specific shall be located on each of the Scattered Sites, or no more than 1/16 mile from the Scattered Site with the most units, or a combination of both. If the Surveyor Certification form in the Application indicates that the proposed Development does not consist of Scattered Sites, but it is determined during credit underwriting that the proposed Development does meet the definition of Scattered Sites, all of the Scattered Sites requirements must have been

> met as of Application Deadline and, if all Scattered Sites requirements were not in place as of the Application Deadline, the Applicant's funding award will be rescinded;
>
> Note: For the Application to be eligible for funding, the version of the Applicant Certification and Acknowledgement Form reflecting the Modification posted 11-10-16 must be submitted to the Corporation by the Application Deadline, as outlined in the RFA.

21. Rule 67-48.002(105) defines "Scattered Sites" as follows:

> "Scattered Sites," as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a "Scattered Site"). For purposes of this definition "contiguous" means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement, provided the easement is not a roadway or street. All of the Scattered Sites must be located in the same county.

22. The RFA modification included other changes concerning Scattered Sites. Those changes either modified the Surveyor Certification Form itself or required applicants to correctly provide information concerning Scattered Sites in the Surveyor Certification Form.

23. Each Petitioner included in its application a Surveyor Certification Form indicating that its proposed development sites did not consist of Scattered Sites. The Surveyor Certification

Forms submitted were the forms required by the modified RFA. There was no allegation that Petitioners incorrectly filled out the Surveyor Certification Forms.

24. However, the Applicant Certification and Acknowledgement Form submitted by each of the Petitioners was the original form, not the form as modified to include the underscored language set forth in Finding of Fact 20 regarding the effect of mislabeling Scattered Sites on the Surveyor Certification Form.

25. The failure of JPM Outlook and Grande Park to submit the correct Applicant Certification and Acknowledgement Form was the sole reason that Florida Housing found them ineligible for funding.

26. In deposition testimony, Ken Reecy, Florida Housing's Director of Multifamily Programs, explained the purpose of the Applicant Certification and Acknowledgement Form:

> There's a number of things that we want to be sure that the applicants are absolutely aware of in regard to future actions or requirements by the Corporation. If they win the award, there are certain things that they need to know that they must do or that they are under certain obligations, that there's certain obligations and commitments associated with the application to make it clear what the requirements--what certain requirements are, not only now in the application, but also perhaps in the future if they won awards.

27. At the conclusion of a lengthy exposition on the significance of the modified language relating to Scattered Sites, Mr. Reecy concluded as follows:

> [W]e wanted to make sure that if somebody answered the question or did not indicate that they were a scattered site, but then we found out that they were, in fact, a scattered site, we wanted to make it absolutely clear to everyone involved that in the event that your scattered sites did not meet all of those requirements as of the application deadline, that the funding would be rescinded.

28. Petitioners argue that the failure to submit the modified Applicant Certification and Acknowledgement Form should be waived as a minor irregularity. Their simplest argument on that point is that their applications did not in fact include Scattered Sites and therefore the cautionary language added to the Applicant Certification and Acknowledgement Form by the November 10, 2016, modifications did not apply to them and could have no substantive effect on their applications.

29. Petitioners note that their applications included the substantive changes required by the November 10, 2016, modifications, including those related to Scattered Sites. Petitioners submitted the unmodified Applicant Certification and Acknowledgement Form as Attachment 1 to their modified Exhibit A.

30. Petitioners further note that the "Ability to Proceed Forms" they submitted with their applications on December 2, 2016, were the forms as modified on November 10, 2016. They assert that

this submission indicates their clear intent to acknowledge and certify the modified RFA and forms, regardless of their error in submitting the unmodified Applicant Certification and Acknowledgement Form.

31. Petitioners assert that the Scattered Sites language added to the Applicant Certification and Acknowledgement Form by the November 10, 2016, modifications was essentially redundant. Mr. Reecy conceded that the warning regarding Scattered Sites was not tied to any specific substantive modification of the RFA. The language was added to make it "more clear" to the applicant that funding would be rescinded if the Scattered sites requirements were not met as of the application deadline. Petitioners point out that this warning is the same as that applying to underwriting failures generally.

32. Petitioners assert that the new language had no substantive effect on either the Applicant Certification and Acknowledgement Form or on the certifications and acknowledgements required of the applicants. Even in the absence of the modified language, Petitioners would be required to satisfy all applicable requirements for Scattered Sites if it were determined during underwriting that their applications included Scattered Sites.

33. Petitioners conclude that, even though the modified Applicant Certification and Acknowledgement Form was not included with either of their applications, the deviation should be waived

as a minor irregularity. Florida Housing could not have been confused as to what Petitioners were acknowledging and certifying. The unmodified Applicant Certification and Acknowledgement Form was submitted with a modified Attachment 1 that included all substantive changes made by the November 10, 2016, modifications to the RFA. Petitioners gained no advantage by mistakenly submitting an unmodified version of the Applicant Certification and Acknowledgement Form. The submittal of the unmodified version of the form was an obvious mistake and waiving the mistake does not adversely impact Florida Housing or the public.

34. Mr. Reecy testified that he could recall no instance in which Florida Housing had waived the submittal of the wrong form as a minor irregularity. He also observed that the credibility of Florida Housing could be negatively affected if it waived the submission of the correct form in light of the "effects clause" contained in Section Four:

> Due to the fact that we did have an effects clause in this RFA and we felt that, in accordance with the rule requirements regarding minor irregularities, that it would be contrary to competition because we wanted everybody to sign and acknowledge the same criteria in the certification; so we felt that if some did--some certified some things and some certified to others, that that would be problematic.
>
> And the fact that we had very specifically instructed that if we did not get the modified version, that we would not consider it, and then if we backed up and considered it, that

that would erode the credibility of the Corporation and the scoring process.

35. Mr. Reecy testified that the modification to the Applicant Certification and Acknowledgement Form was intended not merely to clarify the Scattered Sites requirement but to strengthen Florida Housing's legal position in any litigation that might ensue from a decision to rescind the funding of an applicant that did not comply with the Scattered Sites requirements as of the application deadline. He believed that waiving the "effects clause" would tend to weaken Florida Housing's legal position in such a case.

36. Petitioners had clear notice that they were required to submit the modified Applicant Certification and Acknowledgement Form. They did not avail themselves of the opportunity to protest the RFA modifications. There is no allegation that they were misled by Florida Housing or that they had no way of knowing they were submitting the wrong form. The relative importance of the new acknowledgement in the modified form may be a matter of argument, but the consequences for failure to submit the proper form were plainly set forth in the effects clause. Florida Housing simply applied the terms of the modified RFA to Petitioners' applications and correctly deemed them ineligible for funding.

CONCLUSIONS OF LAW

37. Pursuant to sections 120.569 and 120.57(2) and (3), Florida Statutes, the Division of Administrative Hearings has jurisdiction of the parties and the subject matter of this proceeding. Florida Housing's decisions in this case affected the substantial interests of each of the parties, and each has standing to challenge Florida Housing's scoring and review decisions.

38. This is a competitive procurement protest proceeding and as such is governed by section 120.57(3)(f), which provides as follows in pertinent part:

> 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. . . .

39. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioners as the parties opposing the proposed agency action. See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioners must prove by a preponderance of the evidence that Florida

Housing's proposed action is arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency. Dep't of Transp. v. Groves-Watkins Constructors, 530 So. 2d 912, 913-914 (Fla. 1988); Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). See also § 120.57(1)(j), Fla. Stat.

40. The First District Court of Appeal has interpreted the process set forth in section 120.57(3)(f) as follows:

> A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes (Supp. 1996)[1/] provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. See § 120.57(3)(f), Fla. Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

41. The ultimate issue in this proceeding is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal

specifications." In addition to proving that Florida Housing breached this statutory standard of conduct, Petitioners also must establish that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

42. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law 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." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004)(citations omitted); see also Anderson v. Bessemer City, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

43. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values

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

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977)(quoting Wester v. Belote, 138 So. 721, 723-724 (Fla. 1931)).

44. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if it is not supported by facts or logic. See Agrico Chem. Co. v. Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

45. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "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 Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

46. However, if a decision 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. Dravo Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632 n.3 (Fla. 2d DCA 1992).

47. Rule 67-60.006 is titled, "Responsibility of Applicants." Subsection (1) of the rule provides as follows:

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

48. Rule 67-60.008 provides:

> The Corporation may waive Minor Irregularities in an otherwise valid Application. Mistakes clearly evident to the Corporation on the face of the Application, such as computation and typographical errors may be corrected by the Corporation; however, the Corporation shall have no duty or obligation to correct any such mistakes.

49. Rule 67-60.002(6) defines "minor irregularity" to mean "a variation in a term or condition of an Application pursuant to this rule chapter that does not provide a competitive advantage or benefit not enjoyed by other Applicants, and does not adversely impact the interests of the Corporation or the public."

50. In the instant case, Florida Housing provided adequate justification for its determination that the failure of Petitioners to submit the correct Applicant Certification and Acknowledgement Form was not a minor irregularity. The submission of the wrong form was not an error that Florida Housing could correct. More important, the interest of Florida

Housing in maintaining the credibility and integrity of its bidding process requires that it enforce the "effects clause" when no prospective vendor has contested its use via a challenge to the RFA specifications. See Consultech of Jacksonville, Inc. v. Dep't of Health, 876 So. 2d 731, 734 (Fla. 1st DCA 2004) (vendor waived right to challenge agency's weighting of cost proposals by failing to timely file a specifications protest); Optiplan, Inc. v. Sch. Bd. of Broward Cnty., 710 So. 2d 569, 572 (Fla. 4th DCA 1998)(by failing to timely file specifications protest, vendor waived right to challenge evaluation criteria in its award challenge).

51. The effects clause is not ambiguous: "If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered." Florida Housing reasonably points out that waiving such a specific mandatory requirement in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. See St. Elizabeth Gardens v. Fla. Hous. Fin. Corp., Case No. 16-4132BID, RO at 47-48 (Fla. DOAH Oct. 18, 2016; FHFC Nov. 28, 2016). Applicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public

confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.

52. To be a minor irregularity, a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of Florida Housing or the public. Even if it is accepted that Petitioners gained no competitive advantage by submitting the wrong Applicant Certification and Acknowledgement Form, Florida Housing has articulated sufficient reasons why Petitioners' noncompliance does not meet the definition of a minor irregularity because of its adverse effect on the interests of Florida Housing and the public in a fair bidding process conducted on a level playing field according to clear specifications.

53. It is concluded that Petitioners have failed to carry their burden of proving that Florida Housing's proposed decision in these consolidated cases was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

## RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that the Florida Housing Finance Corporation enter a final order confirming its initial decision finding JPM Outlook One Limited Partnership and Grande Park Limited

Partnership ineligible for funding, and dismissing each Formal Written Protest and Petition for Administrative Hearing filed by JPM Outlook One Limited Partnership and Grande Park Limited Partnership.

DONE AND ENTERED this 29th day of June, 2017, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of June, 2017.

ENDNOTE

[1/] The meaning of the operative language has remained the same since its adoption in 1996:

> In a competitive-procurement protest, no submissions made after the bid or proposal opening amending or supplementing the bid or proposal shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, 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 bid or proposal specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious. . . .

§ 120.57(3)(f), Fla. Stat. (1997).

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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**
**DIVISION OF ADMINISTRATIVE HEARINGS**

JPM OUTLOOK ONE LIMITED PARTNERSHIP

Petitioner,

vs. DOAH Case No. 17-2499BID
FHFC Case No. 2017-018BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,
_____/

GRANDE PARK LIMITED PARTNERSHIP

Petitioner,

vs. DOAH Case No. 17-2500BID
FHFC Case No. 2017-019BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG HAMMOCK RIDGE II, LLC,

Intervenor.
_____/

**JPM OUTLOOK ONE LIMITED PARTNERSHIP**
**AND GRAND PARK LIMITED PARTNERSHIP'S**
**EXCEPTIONS AND OBJECTIONS TO RECOMMENDED ORDER**

Pursuant to section 120.57(3)(e), Florida Statutes, ("F.S.") and Rule 28-106.217, Florida Administrative Code ("F.A.C."), JPM Outlook One Limited Partnership and Grand Park Limited Partnership ("Petitioners"), hereby file their objections and exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") on June 29, 2017, as follows:

## Introduction

The main legal and factual issue presented in these objections and exceptions involve whether the Florida Housing as a policy matter should waive a minority irregularity. Specifically, Petitioners on December 2, 2016, submitted Applications as required by the RFA. Petitioners while including the correct modified Exhibit A and Ability to Proceed Forms mistakenly included a prior version of the Applicant Certification and Acknowledgment Form ("Form") with its Application. In its review Florida Housings found Petitioners' Application ineligible because the modified Form was not included in Petitioners' Application. The ALJ in his Recommended Order upheld Florida Housing's scoring decision even though he agreed that using the wrong Form may have indeed been a minor irregularity. Petitioners object to the ultimate conclusion that the deviation here could not be waived as a minor irregularity.

## Standard of Review

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 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 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. Petitioners takes exception to the conclusions of law described below.

Petitioners are required by controlling case law to raise these issues by exception, or risk waiving the issue for subsequent judicial review. When a party to an administrative proceeding does not file exceptions to a recommended order, it waives objections and those matters are not preserved for possible subsequent appellate review. *Kantor v. School Board of Monroe County*, 648 So. 2d 1266, 1267 (Fla. 3rd DCA 1995), citing *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

Petitioners take exception to Conclusions of Law 50-53, which provide as follows:

Conclusions of Law 50-53

> 50. In the instant case, Florida Housing provided adequate justification for its determination that the failure of Petitioners to submit the correct Applicant Certification and Acknowledgement Form was not a minor irregularity. The submission of the wrong form was not an error that Florida Housing could correct. More important, the interest of Florida Housing in maintaining the credibility and integrity of its bidding process requires that it enforce the "effects clause" when no prospective vendor has contested its use via a challenge to the RFA specifications. *See Consultech of Jacksonville, Inc. v. Dep't of Health*, 876 So. 2d 731, 734 (Fla. 1st DCA 2004) (vendor waived right to challenge agency's weighting of cost proposals by failing to timely file a specifications protest); *Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569, 572 (Fla. 4th DCA 1998)(by failing to timely file specifications protest, vendor waived right to challenge evaluation criteria in its award challenge).
>
> 51. The effects clause is not ambiguous: "If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered." Florida Housing reasonably points out that waiving such a specific mandatory requirement in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. See St. *Elizabeth Gardens v. Fla. Hous. Fin. Corp.*, Case No. 16-

> 4132BID, RO at 47-48 (Fla. DOAH Oct. 18, 2016; FHFC Nov. 28, 2016). Applicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.
>
> 52. To be a minor irregularity, a variation must not provide the bidder a competitive advantage and must not adversely affect the interests of Florida Housing or the public. Even if it is accepted that Petitioners gained no competitive advantage by submitting the wrong Applicant Certification and Acknowledgement Form, Florida Housing has articulated sufficient reasons why Petitioners' noncompliance does not meet the definition of a minor irregularity because of its adverse effect on the interests of Florida Housing and the public in a fair bidding process conducted on a level playing field according to clear specifications.
>
> 53. It is concluded that Petitioners have failed to carry their burden of proving that Florida Housing's proposed decision in these consolidated cases was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

In these conclusions the ALJ concludes that Florida Housing has the discretion to not waive a deviation here as a minor irregularity. Petitioners object to these conclusions as not being consistent with how Florida Housing has treated other identified minor irregularities throughout its RFA process. Indeed as a policy matter, Florida Housing has taken the position that the decision to grant funds through its competitive processes should not be based on insignificant scoring issues. This is exactly why Florida Housing moved away from the very formalistic process previously used to its current RFA process which includes the ability to waive minor irregularities *Douglas Gardens v. Florida Housing Finance Corporation*, DOAH Case No. 16-0418 (Final Order entered March 18, 2016).

In interpreting what a minor irregularity is for purposes of the RFA process, Florida Housing has indicated that if the deviation can be remedied or corrected by using information

found elsewhere in the application then it not penalize an applicant and consider the deviation a minor irregularity that would be waived. *Rosedale Holdings, LLC, H&H Development, LLC and Brookestone I, LP v. Florida Housing Finance Corporation*, FHFC Case No. 2013-038BP (Final Order entered June 13, 2014). In *Rosedale* Florida Housing waived deviations in mandatory requirements as minor irregularities including: typographical errors in Site Control documents, missing pages in equity commitment letters, and missing information in equity commitment letters.

Similarly in *Pinnacle Rio. LLC v. Florida Housing Finance Corporation*, DOAH Case No. 14-1398BID (Final Order entered June 13, 2014) an applicant failed to provide a complete mandatory RFA document which was an obvious deviation. Florida Housing however concluded that the deviation was a minor irregularity because all of the required information could be found in the other parts of the document actually submitted. Florida Housing waived the minor irregularity.

In *Heritage at Pompano Housing Partners, Ltd. v. Florida Housing Finance Corporation,* DOAH Case No. 14-1361BID (Final Order entered June 13, 2014), Florida Housing was confronted with a challenge to the location of the tie breaker proximity point for a Public School. The proximity point selected for the Public School was not at the front door of the school as required by the RFA. Florida Housing concluded that even if the application deviated from the mandatory RFA specifications by using the wrong door, the deviation was not material and provided no competitive advantage to the applicant because even if the correct door had been selected the same amount of points would result. The same conclusion was reached in the case of *Redding Development Partners, LLC. v. Florida Housing Finance Corporation,*

DOAH Case No. 16-1137BID (Final Order entered May 12, 2016). In both cases Florida Housing waived the identified minor irregularity.

In *Rosedale, Pinnacle, Heritage and Redding,* Florida Housing found deviations in applications responding to RFAs, but used its discretion to not disqualify the applicant for what it considered minor irregularities. In all these cases Florida Housing waived these deviations from mandatory RFA requirements.

In at least one other case an applicant used the correct Applicant and Certification and Acknowledgement Form, but it was shown at hearing that the applicant actually provided information to Florida Housing that was not in compliance with the Form *Capital Grove Limited Partnership v. Florida Housing,* DOAH Case No. 15-2385BID (Final Order 8-7-15) In the *Capital Grove* case it was shown that an applicant provided information to a local government concerning the number of units in a proposed Development that was not consistent with the information provided to Florida Housing in its Application. This inconsistency was found to be in violation of a specific requirement of the Application Certification and Acknowledgment Form itself which required applicants to provide the same information to third parties as it provided to Florida Housing. Nonetheless in *Capital Grove* Florida Housing waived the deviation as a minor irregularity because the deviation led to no additional points. Apparently Florida Housing in *Capital Grove* was more concerned about the correct Form being used rather than the actual substance of what the applicant actually submitted. Ironically the same developer benefited from Florida Housing's action in the *Capital Grove* and the actions taken here. (T. at pg. 40)

While the ALJ talks about a "slippery slope" in waiving or not waiving minor irregularities the instant case is an example that Florida Housing is already going down that

"slippery slope." Using the correct Form would not have changed the number of the points Petitioners were entitled to receive. No perceptible advantage competitive or otherwise was conveyed to Petitioners by using the unmodified Form. Additionally in this case under its current process Florida Housing lacks the discretion to waive or not waive a minor irregularity once the minor irregularity has been determined. To hold otherwise would create the appearance of an opportunity for favoritism. In essence Florida Housing could conceivably waive deviations for its preferred applicants while not waiving deviations for others. This would clearly be contrary to competition as well as arbitrary and capricious. This is exactly the dilemma faced by Florida Housing in the case of *Twin Lakes at Lakeland, LLLP v. Florida Housing*, FHFC Case No. 2012-005UC (Final Order entered June 8, 2012) where Florida Housing in its Final Order at page 4 observed as follows:

> "Petitioner's assertion that the materiality of the inconstancy be taken into account when scoring is without merit. This type of scrutiny would create a new standard in the rule. It would require staff to determine which inconsistencies are material, and which are not. Without adequate rules to govern this type of evaluation, staff would be forced to speculate and make subjective and possibly arbitrary decisions."

The ALJ's and Florida Housing's "effect clause" conclusion also is problematic in that if the ALJ is correct that if an effects clause exists then that somehow makes a requirement a more mandatory requirement which cannot be waived, then no waiver could ever result because everything in the RFA is mandatory. As page 56 and 57 mandatory RFA provisions are included, which makes everything in the RFA mandatory. (Jt. Ex. 4 pg. 56-57) Additionally at page 9 the RFA indicates that the provisions of Rule 67-60, F.A.C. applies to all Applications. Rule 67-60.006, F.A.C. provides:

> (1) The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness

> with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall not be considered.

This language makes all provisions of the RFA mandatory and thus an "effect clause" governs the entire "competitive solicitation." This same rule however incorporates the minor irregularity provisions. This clearly shows a desire to waive any irregularities even those that have "effect clause" language. So Florida Housing's own RFA and Rules don't support the "effect clause" rationale for not waiving this irregularity as a minor deviation. To allow Florida Housing to deviate from its consistent past practice of waiving minor irregularities is at best whimsical, arbitrary and capricious.

## CONCLUSION

Petitioners, based on these objections and exceptions requests that a Final Order be entered which:

A. Rejects the conclusions identified herein and the recommendation section and find and conclude that the deviation here was a minor irregularity;

B. Finds that Petitioners' Applications are eligible for funding.

Respectfully submitted,

CARLTON, FIELDS, JORDEN BURT, P.A.

/s/ *Michael P. Donaldson*

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*Attorneys for JPM Outlook One Limited Partnership and Grande Park Limited Partnership*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been filed by E-Mail this 10th day of July, 2017 to:

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*/s/ Michael P. Donaldson*
MICHAEL P. DONALDSON

**STATE OF FLORIDA**
**DIVISION OF ADMINISTRATIVE HEARINGS**

JPM OUTLOOK ONE LIMITED PARTNERSHIP

Petitioner,

vs. DOAH Case No. 17-2499BID

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Respondent,
_____/

GRANDE PARK LIMITED PARTNERSHIP

Petitioner,

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FLORIDA HOUSING FINANCE CORPORATION, FHFC Case No. 2017-019BP

Respondent,

and

HAMMOCK RIDGE II, LLC,

Intervenor.
_____/

**RESPONDENT'S AND INTERVENOR'S JOINT RESPONSE TO PETITIONERS' EXCEPTIONS AND OBJECTIONS TO RECOMMENDED ORDER**

Respondent Florida Housing Finance Corporation, and Intervenor Hammock Ridge II, LLC, hereby submit their Response to Petitioners JPM Outlook One LP ("JPM Outlook") and Grande Park LP ("Grande Park") Exceptions and Objections to Recommended Order.

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.

Petitioners make no allegations in their Exception that the proceedings on which the findings were based did not comply with the essential requirements of law. Because this was an informal hearing there were no disputed issues of material fact, and Petitioners make no allegations in their Exception that any Findings of Fact were not based on competent substantial evidence.

It is the job of 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)*

**Response to Exception.**

Petitioners have filed a single exception to Conclusions of Law 50-53 in the Recommended Order, in which the Administrative Law Judge (ALJ) concluded that Petitioners had failed to carry their burden of showing that the errors in their petitions should have been waived as minor irregularities. Their argument is essentially that these conclusions are inconsistent with Florida Housing's past practices in determining whether an error in an application should be considered a minor irregularity.

In their Proposed Recommended Order and in their Exception, Petitioners cite to several cases in which Florida Housing has waived minor irregularities. However, Petitioners have identified no cases in which Florida Housing has waived the submittal of the wrong form in an application, as was the case here. In fact, in the only two reported cases involving submittal of the wrong form, Florida Housing consistently found that the Applicants were ineligible for funding and that the errors could not be waived as minor irregularities. *See* Oasis at Renaissance Preserve I, LP v. Florida Housing Finance Corporation, DOAH Case No., 17-00486BID (Final Order dated March 24, 2017); Douglas Gardens V, Ltd. v. Florida Housing Finance Corporation, DOAH Case No., 16-00418BID (Final Order dated March 18, 2016). Petitioners' argument that Florida Housing acted inconsistently is without merit, and was not accepted by the ALJ.

Petitioners allege in the Introduction to their Exception that the ALJ "agreed that using the wrong Form may have indeed been a minor irregularity." Petitioners cite to no record basis for this allegation, and the ALJ was quite clear that the opposite is true. In Conclusion 50 he

states that "Florida Housing provided adequate justification for its determination that the failure of Petitioners to submit the correct Applicant Certification and Acknowledgement Form was not a minor irregularity." In Conclusion 52 he states that "Florida Housing has articulated sufficient reasons why Petitioners' noncompliance does not meet the definition of a minor irregularity because of its adverse effect on the interests of Florida Housing and the public in a fair bidding process conducted on a level playing field according to clear specifications."

Petitioners also suggest that the ALJ's conclusions regarding the "effects clause"[1] is somehow problematic if it would lead to the conclusion that no requirement in an RFA can ever be waived. That, however, is not what the ALJ concluded, nor does it represent Florida Housing's interpretation of the effects clause. What the ALJ actually concluded in Conclusion 51 was that waiving a specific mandatory requirement in the RFA would "put it on a 'slippery slope' in which any mandatory requirement might be considered waivable." Florida Housing does not read the Recommended Order to say that mandatory requirements can never be waived under any circumstances.

Most of the ALJ's Findings of Fact were either recitations of facts stipulated to by all parties, or a reiteration of the parties' positions, assertions, or testimony. In Finding of Fact 36, however, he did make one ultimate finding that has not been disputed:

> 36. Petitioners had clear notice that they were required to submit the modified Applicant Certification and Acknowledgement Form. They did not avail themselves of the opportunity to protest the RFA modifications. There is no allegation that they were misled by Florida Housing or that they had no way of knowing they were submitting the wrong form. The relative importance of the new acknowledgement in the modified form may be a matter of argument, but the consequences for failure to submit the proper form were plainly set forth in the effects clause. Florida Housing simply applied the terms of the modified RFA to Petitioners' applications and correctly deemed them ineligible for funding.

[1] The RFA provides: "If the Applicant provides any version of the Applicant Certification and Acknowledgement form other than the version included in this RFA, the form will not be considered."

The Conclusions of Law made by the ALJ in this case were supported by competent substantial evidence, and Petitioners have not made a persuasive argument as to why Florida Housing should reject these conclusions or replace them with more reasonable ones. This Exception should therefore be rejected.

WHEREFORE, Florida Housing and Intervenors respectfully request that the Board of Directors reject the arguments presented in Petitioners' Exception, and adopt the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order as its own and issue a Final Order consistent with same in this matter.

Respectfully submitted this 13th day of July, 2017.

/s/ Chris McGuire
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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 13th day of July, 2017 to the following:

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