FLORIDA HOUSING FINANCE CORPORATION
Board Meeting
February 22, 2017
Action Items

I. LEGAL

A. American Residential Development, LLC, Madison Highlands, LLLC, Patrick Law, Jonathan L. Wolf, Berkshire Square, Ltd, Hawthorne Park Ltd, and Southwick Commons, Ltd. v. Florida Housing Finance Corporation, DOAH Case Nos. 16-6698BID and 16-6699BID, FHFC Case Nos. 2016-048BP and 2016-049BP (Intervenors Heritage Oaks, LLLP, and HTG Anderson Terrace, LLC)

1. Background

a) On October 28, 2016, Florida Housing published the proposed Request for Applications ("RFA") 2016-113 on the agency's website, which RFA solicited applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding ("tax credits") for affordable housing developments located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. Petitioners timely filed challenges to the terms and specifications of the RFA with Florida Housing, which challenges were forwarded to DOAH with a request to assign an administrative law judge (ALJ). Petitioners also filed associated rule challenges directly with DOAH. These cases were consolidated and a final hearing date of November 28 was set. However, all parties ultimately agreed that no evidentiary hearing would be required, and instead filed a Joint Stipulation, the deposition of Steve Auger, and Proposed Recommended Orders with the ALJ. It should be noted that pursuant to Section 120.57(3), Fla. Stat., Florida Housing allowed the submittal of applications under this RFA but has taken no action at this point to open, review, or score any of these applications.

b) Petitioners have raised two basic issues which they contend should invalidate the RFA. First, they allege that various criteria associated with the limitations on funding developments within RECAP areas violate provisions of federal and state law. Secondly, they allege that allowing local governments to select projects that will receive local contributions amounts to an illegal delegation of Florida Housing's decision-making authority. Florida Housing and the Intervenors disagree with these allegations.

2. Present Situation

a) The Stipulation, deposition, and proposed orders were filed with Administrative Law Judge D.R. Alexander at the Division of Administrative Hearings in Tallahassee, Florida. This same ALJ also heard the rule challenges filed by Petitioners which raised similar issues. On January 18, 2017, the ALJ issued a Final Order rejecting all of the rule challenges. On January 25, 2017, the ALJ issued a Recommended Order finding that the Petitioners had failed to demonstrate that any provisions of the RFA violated applicable law or were unreasonable, arbitrary, or capricious, and recommending that Florida Housing enter a Final Order dismissing the Petitions. Petitioners timely filed three exceptions to five Findings of Fact, four Conclusions of Law, and an evidentiary ruling. Florida Housing timely filed Responses to these Exceptions, in which both Intervenors joined. A copy of the Recommended Order is attached as Exhibit A. A copy of Petitioners' Exceptions is attached as Exhibit B, and a copy of Florida Housing's Responses to Exceptions is attached as Exhibit C.

3. Recommendation

a) Staff recommends that the Board reject all of Petitioners' Exceptions, adopt the Findings of Fact of the Recommended Order, the Conclusions of Law of the Recommended Order, and the Recommendation of the Recommended Order, and issue a Final Order dismissing the Petitions.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN RESIDENTIAL DEVELOPMENT LLC; PATRICK LAW; MADISON HIGHLANDS, LLC; JONATHAN L. WOLF; BERKSHIRE SQUARE, LTD; HAWTHORNE PARK, LTD; AND SOUTHWICK COMMONS, LTD,

Petitioners,

vs. Case Nos. 16-6698BID
16-6699BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HERITAGE OAKS, LLLP; AND HTG ANDERSON TERRACE, LLC,

Intervenors.
_____/

RECOMMENDED ORDER

This matter came before D. R. Alexander, Administrative Law Judge of the Division of Administrative Hearings (DOAH), after the parties waived a final hearing and submitted a stipulated record. The parties are represented as follows.

APPEARANCES

For Petitioners: Craig D. Varn, Esquire
Manson Bolves Donaldson Varn, P.A.
Suite 201
204 South Monroe Street
Tallahassee, Florida 32301-1591

For Respondent: Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

For Intervenor: Michael P. Donaldson, Esquire
(Heritage Park) Carlton Fields Jorden Burt, P.A.
Post Office Box 190
Tallahassee, Florida 32302-0190

For Intervenor: Maureen McCarthy Daughton, Esquire
(HTG) Maureen McCarthy Daughton, LLC
Suite 304
1725 Capital Circle Northeast
Tallahassee, Florida 32308-0595

STATEMENT OF THE ISSUE

The issue is whether certain specifications in Request for Applications 2016-113 (RFA-113) issued by Respondent, Florida Housing Finance Corporation (Florida Housing), are contrary to Florida Housing's governing statutes, rules, or policies in violation of section 120.57(3)(f), Florida Statutes (2016).[1/]

PRELIMINARY STATEMENT

After Florida Housing published its notice soliciting applications pursuant to RFA-113, on November 15, 2016, American Residential Development, LLC (ARD), Madison Highlands, LLC (Madison), and Patrick Law (Law) filed with Florida Housing a Petition for Administrative Determination of Invalidity of RFA-2016-113 (Petition). On the same date, Jonathan L. Wolf (Wolf), Berkshire Square, Ltd (Berkshire), Hawthorne Park, Ltd (Hawthorne), and Southwick Commons, Ltd (Southwick), filed with Florida Housing a second Petition challenging the same

specifications. The Petitions were referred by Florida Housing to DOAH with a request that a formal hearing be conducted. They were docketed as Case Nos. 16-6698 and 16-6699, assigned to Administrative Law Judge Peterson, consolidated, and then transferred to the undersigned. Intervenors Heritage Oaks, LLLP (Heritage), and HTG Anderson Terrace, LLC (HTG), who intend to file applications in response to the RFA-113 solicitation, were authorized to intervene in support of Florida Housing.

Because rule challenges related to RFA-113 were also filed by the same Petitioners, a separate final order was entered in Case Nos. 16-6610RU and 16-6611RU. See § 120.57(1)(e), Fla. Stat., which now authorizes a person challenging agency action to file a collateral rule challenge under section 120.56 regarding the agency's use of an invalid or unadopted rule in a section 120.57 proceeding.

All parties agreed to waive a final hearing and submit a stipulated record. The record consists of Joint Exhibits 1 through 3: RFA-113, as modified; 26 U.S.C.S. § 42 of the Internal Revenue Code (IRC); and Florida Housing's 2016 Qualified Allocation Plan (QAP). Also, Florida Housing offered Exhibit 1, which is the deposition of former Executive Director Steve Auger. Although Petitioners do not stipulate to any parts of the deposition, all exhibits are accepted in evidence.

Finally, the parties submitted a Joint Stipulation of certain facts.

Proposed recommended orders (PROs) were filed by Petitioners and Florida Housing, and they have been considered in the preparation of this Recommended Order. Intervenors have joined in Florida Housing's PRO.

FINDINGS OF FACT

A. The Parties

1. Florida Housing is a public corporation created pursuant to section 420.504. One of its responsibilities is to award low-income housing tax credits, which developers use to finance the construction of affordable housing. Tax credits are made available to states annually by the United States Treasury Department and are then awarded pursuant to a competitive cycle that starts with Florida Housing's issuance of an RFA. This proceeding concerns RFA-113.

2. Petitioners ARD and Madison are developers of affordable housing units and submit applications for tax credits. Law and Wolf are principals of a developer of affordable housing units. Berkshire, Hawthorne, and Southwick are limited partnerships that have submitted applications for tax credits. All Petitioners intend to submit applications in response to RFA-113.

3. Intervenors Heritage and HTG are developers of affordable housing who intend to file applications pursuant to RFA-113.

B. Background

4. On October 28, 2016, Florida Housing published on its website proposed solicitation RFA-113, a 121-page document inviting applications for the award of up to $14,669,052.00 in housing tax credits for the development of affordable, multifamily housing located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. After Petitioners gave notice of their intent to challenge RFA-113, Florida Housing attempted to resolve the dispute by modifying the solicitation on November 13, 2016. The modification did not resolve the dispute.

5. On November 15, 2016, Petitioners timely filed with Florida Housing two Petitions, each challenging the same specifications in RFA-113, as modified.

C. The RFA Process

6. The federal Low-Income Housing Credit Program is governed by 26 U.S.C.S. § 42 (section 42). The program allocates federal income tax credits to states annually on a per capita basis to help facilitate private development of affordable low-income housing.

7. As the housing credit agency for the State of Florida, Florida Housing has the authority to administer various federal and state affordable housing programs, including the Low-Income Housing Credit Program. See § 420.5099(1), Fla. Stat.

8. Because the demand for housing credits exceeds the amount available, Florida Housing administers the program through a competitive process using RFAs. Based upon factors in the RFAs, the applications are scored and competitively ranked by an evaluation committee to determine which applications will be allocated tax credits.

9. Selection and preference criteria for the low-income housing tax credit programs are found in the 2016 QAP adopted by Florida Administrative Code Rule 67-48.002(95). These criteria are intended to provide general, but not specific, guidance for the entire housing credit program, and not just RFA-113. More specific guidance is found in the individual RFAs, tailored to each type of solicitation.

10. Florida Housing issues around 15 to 20 RFAs annually. The specifications being challenged in this case are found in RFA-113. The Petitions raise two broad areas of concern, which are labeled in Petitioners' PRO as "Exclusion of Eligible Developments from Funding" and "Illegal Delegation to Local Governments."

D. Exclusion of Eligible Developments

11. A new eligibility provision in RFA-113 is the Racially and Ethnically Concentrated Areas of Poverty (RECAP). RECAP areas make up less than 3.5 percent of all census tracts in the State and are defined in the RFA as an area where "at least 40 percent of the population is living below the poverty line and in which a concentration of individuals who identify as other than non-Hispanic White exceeds 50 percent of the population of the census tract." Jt. Ex. 1, p. 2. Florida Housing has placed a link on its website identifying each RECAP area in the State. Petitioners do not contend they were unaware of RECAP areas before RFA-113 was issued.

12. The RECAP concept was developed after a series of workshops, public dialogue, and discussions with stakeholders. The purpose of the concept is to allow Florida Housing to "appropriately balance" the location of affordable housing projects. Without the RECAP limitation, described below, Florida Housing is concerned that developers would choose to build low-income housing only in the poorest areas of a county or areas with the highest concentration of minorities. The RECAP limitation ensures that affordable housing will be available throughout the county. Whether this concept will be a permanent fixture in future RFAs depends on whether RECAP achieves its intended purpose.

13. RFA-113 provides that five categories of development are eligible for receiving tax credits: new construction, rehabilitation, acquisition and rehabilitation, redevelopment, and acquisition and redevelopment. See § 4A.5.c.(2).

14. Section 4A.5.c.(1) provides the following limitation on eligibility for tax credit funding for three categories of development located within a RECAP area:

> With one exception, proposed Developments that select a Development Category of New Construction, Rehabilitation, or Acquisition and Rehabilitation at question 5.c.(2) of Exhibit A are not eligible to receive funding under this RFA if any part of the proposed Development is located in a RECAP designated area. The one exception to the above prohibition is for a proposed Development where the Applicant selects and qualifies for Local Government Areas of Opportunity Funding points as outlined in Section Four A.10.(b) of the RFA. Proposed Developments that are located in a RECAP designated area where the Applicant selects and qualifies for the Development Category of Redevelopment or Acquisition and Redevelopment at question 5.c.(2) of Exhibit A are eligible for funding under this RFA.

15. Therefore, new construction, rehabilitation, and acquisition and rehabilitation categories are not eligible to receive funding if any part of the proposed development is located in a RECAP area. If, however, such a development is in a RECAP area and qualifies for Local Government Areas of Opportunity Funding points, the project is eligible for funding.

16. A Local Government Area of Opportunity is defined in Section Two of the RFA as follows:

> Developments receiving a high level of Local Government interest in the project as demonstrated by an irrevocable funding contribution that equals or exceeds 2.5 times the Total Development Cost Per Unit Base Limitation (exclusive of any add-ons or multipliers), as provided in Item 7 of Exhibit C to the RFA, for the Development Type committed to for the proposed Development.

17. In plainer terms, in order for an applicant to receive points for a local government contribution, it must demonstrate that the county has contributed a cash loan or grant for the proposed development. See § 4A.10.b. Having done so, the applicant is then eligible for funding even if all or part of the proposed development lies within a RECAP area.

18. Petitioners contend the specifications which limit funding for certain types of projects violate section 42 and are illegal. But they cite no provision in section 42 which requires Florida Housing to conform to every requirement in the IRC in order to allocate housing credits. And nothing in the IRC prevents local housing agencies from setting eligibility requirements for funding, or requires that all projects located in low-income areas are automatically eligible for funding.

19. Petitioners also assert the limitations in the RFA run afoul of chapter 420. However, Florida Housing has the

authority to adopt allocation procedures that take into account a number of considerations during the competitive solicitation process. They include "the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the application to proceed to completion of the project in the calendar year for which the credit is sought." § 420.5099(2), Fla. Stat. The challenged specifications address these considerations.

20. In conjunction with their RECAP argument, Petitioners contend the limitations prevent the same three categories of development from receiving a 30 percent "boost" in their cost basis, which allows them to receive a larger allocation of tax credits and makes the project more financially feasible. They argue this violates section 42. For the reasons cited above, this contention is rejected. Notably, an application without a boost could be selected for funding, while an application receiving one is not automatically selected for funding.

E. Illegal Delegation to Local Governments

21. Petitioners generally contend Florida Housing has unlawfully delegated authority to local governments to select eligible applications. More specifically, they assert Florida Housing has failed to establish any standards to be used by

local governments when providing cash or loans; the local government essentially picks the winner, as RFA section 2 limits funding eligibility to only one locally-funded developer for each jurisdiction; and section 4A.6.a.(2) allows a locally-funded developer to receive preferential treatment in the award process by waiving two eligibility requirements.

22. For many years, Florida Housing has considered local government input in the selection process by giving applicants points for local government contributions and requiring forms signed by the local government officials certifying compliance with zoning, site plan, and infrastructure requirements. Thus, reliance on local government input is not a new concept in the solicitation process.

23. Florida Housing relies on local governments to evaluate such things as the location of the proposed housing project, the relative need in the area for low-income housing, the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project. This is because without local input, it would be difficult, if not impossible, for Florida Housing to evaluate these factors for every applicant for every RFA. Florida Housing also takes into account a local government's revitalization plan in making its funding selection, a requirement in the QAP. See Jt. Ex. 3, p. 1, § I.B.

(in allocating credits, the agency must consider the "project's characteristics including housing as part of a community revitalization plan").

24. Other than establishing the minimum amount and type of funding by a local government, Florida Housing does not direct local governments how to evaluate or select projects to receive local approvals or funding. Attempting to provide specific criteria for local governments would be impractical, as there are hundreds of local jurisdictions in the State, and Florida Housing believes that local governments, and not someone in Tallahassee, can best evaluate local concerns for revitalizing those communities. Notably, local governments do not have a final say over which projects get funded and which do not, and local funding does not guarantee an applicant will be awarded tax credits.

CONCLUSIONS OF LAW

25. This case involves a protest to specifications in RFA-113. Section 120.57(3)(f) provides:

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

26. Petitioners must demonstrate the factual basis for their challenge by a preponderance of the evidence. Fla. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1), Fla. Stat.

27. Petitioners are substantially affected by the challenged specifications and have standing to bring this action. Intervenors also have standing to participate.

28. Petitioners are challenging the specifications in the RFA as opposed to challenging an award of tax credits. Therefore, "a challenge to the [RFA] must be directed to specifications that are so vague that applicants cannot formulate an accurate [application], or are so unreasonable that they are either impossible to comply with or too expensive to do so and remain competitive." Advocacy Ctr. for Pers. with Disab., Inc. v. Dep't of Child. & Fam. Servs., 721 So. 2d 753, 755 (Fla. 1st DCA 1998). See also Hadi v. Liberty Behavioral Health Corp., 927 So. 2d 34, 38 (Fla. 1st DCA 2006)(to prevail in a challenge to specifications, a challenger must show the agency's decision to include the specifications in the solicitation was arbitrary or capricious).

29. Petitioners do not claim the challenged specifications are so vague that they cannot formulate an accurate application. Rather, they contend the specifications are unreasonable and arbitrary and capricious. On these issues, the record shows the RECAP specifications were adopted after a thoughtful and deliberative process which included workshops, public dialogue, and discussions with stakeholders, including presumably Petitioners. Their purpose is to ensure low-income affordable housing is available throughout the local jurisdiction, and not just in limited areas. Similarly, reliance on local government input was shown to be necessary, as the local governments provide essential insight and information on how tax credits can best be used to revitalize their communities. The specifications are neither unreasonable nor arbitrary or capricious.

30. Throughout their PRO, Petitioners argue that Florida Housing has violated section 42 by excluding certain developments from funding and illegally delegating authority to local governments. But federal law does not govern this proceeding, and there is no evidence that the Department of Housing and Urban Development or the Internal Revenue Service has mandated that Florida Housing comply with section 42, word for word, as a condition precedent to serving as the state's housing credit agency. Absent a statutory requirement that

Florida Housing seek pre-approval from the federal government or adopt procedures that are identical to federal procedures, allegations concerning a deviation from federal standards cannot be adjudicated in this forum. See, e.g., Bridges of Am., Inc. v. Dep't of Corr., Case No. 16-5237BID (Fla. DOAH Nov. 23, 2016; Fla. DOC Dec. 15, 2016).

31. Finally, nothing in chapter 420 prevents Florida Housing from setting eligibility requirements for funding, excluding certain categories of projects from eligibility, or receiving local government input in the manner that it does.

32. In summary, Petitioners have failed to prove the specifications are contrary to Florida Housing's governing statutes, rules, or policies or that they are unreasonable, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

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 the Petitions.

DONE AND ENTERED this 25th day of January, 2017, in Tallahassee, Leon County, Florida.

D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of January, 2017.

ENDNOTE

[1/] As a basis for relief, the Petitions allege RFA-113 exceeds the agency's grant of legislative authority; enlarges, modifies, or contravenes the specific provisions of law implemented; and contains "non-rule policies that are arbitrary and capricious." Petitions, pp. 17 and 18. None implicate section 120.57(3)(f). In the parties' Joint Stipulation, however, the issue is broadly redefined as "[w]hether the terms, conditions and specifications of RFA 2016-113 are invalid pursuant to Section 120.57(3), F.S." Jt. Stip., ¶ H.4.

COPIES FURNISHED:

Kate Flemming, Corporation Clerk
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

Craig D. Varn, Esquire
Manson Bolves Donaldson Varn, P.A.
204 South Monroe Street, Suite 201
Tallahassee, Florida 32301-1591
(eServed)

Michael P. Donaldson, Esquire
Carlton Fields Jorden Burt, P.A.
Post Office Box 190
Tallahassee, Florida 32302-0190
(eServed)

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

Douglas P. Manson, Esquire
Manson Bolves Donaldson Varn, P.A.
1101 Swann Avenue
Tampa, Florida 33606-2637
(eServed)

Maureen M. Daughton, Esquire
Maureen McCarthy Daughton, LLC
1725 Capital Circle Northeast, Suite 304
Tallahassee, Florida 32308-0595
(eServed)

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
(eServed)

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

AMERICAN RESIDENTIAL DEVELOPMENT, LLC, MADISON HIGHLANDS, LLC, PATRICK LAW JONATHAN WOLF, BERKSHIRE SQUARE, LTD., HAWTHORNE PARK, LTD. and SOUTHWICK COMMONS, LTD.,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HERITAGE OAKS, LLLP, AND HTG ANDERSON TERRACE, LLC,

Intervenors.
_____)

FHFC Case Nos.: 2016-048BP
2016-049BP

DOAH Case Nos.: 16-6698BID
16-6699BID

PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

INTRODUCTION

Petitioners, American Residential Development, LLC, Madison Highlands, LLC, Patrick Law, Jonathan L. Wolf, Berkshire Square, Ltd., Hawthorne Park, Ltd., and Southwick Commons, Ltd., challenged Florida Housing Finance Corporation's 2016 Request for Applications ("RFA" or "RFA 2016-113" or "Large County RFA") as the RFA contains provisions that are invalid exercises of non-rule policy and are without a basis in or are contrary to the law implemented.

FACTS

On November 15, 2016, American Residential Development, LLC, Madison Highlands, LLC, and Patrick Law filed with Florida Housing a Petition for Administrative Determination of Invalidity of RFA 2016-113 ("Petition"). On the same date, Jonathan L. Wolf, Berkshire Square, Ltd., Hawthorne Park, Ltd., and Southwick Commons, Ltd., filed with Florida Housing a second Petition challenging the same specifications. The Petitions were referred by Florida Housing to DOAH with a request that a formal hearing be conducted. Because rule challenges related to the RFA were also filed by Petitioners, a separate final order was entered in Case Nos. 16-6610RU and 16-6611RU.

The Recommended Order correctly notes that "[a]ll parties agreed to waive a final hearing and submit a stipulated record. The record consists of Joint Exhibits 1 through 3: RFA-113, as modified; 26 U.S.C.S. § 42 of the Internal Revenue Code ("IRC"); and Florida Housing's 2016 Qualified Allocation Plan ("QAP"). Also, Florida Housing offered Exhibit 1, which is the deposition of former Executive Director Steve Auger. Although Petitioners did not stipulate to any parts of the deposition, all exhibits are accepted in evidence."

A Recommended Order was issued by the ALJ on January 25, 2017 and these exceptions are timely filed. Section 120.57(3), Florida Statutes ("F.S.").

SUMMARY OF PETITIONERS' EXCEPTIONS

Exception No. 1: The conclusion of the ALJ in Findings of Fact ("FOF") 18 and 20 are clearly erroneous in that it is the duty of the FHFC to comply with all of the provisions of section 42 of the Internal Revenue Code when evaluating and awarding federal tax credits and Conclusions of Law ("COL") 30, 31 and 32 depart from the essential requirements of law.

Exception No. 2: The conclusion of the ALJ in Findings of Fact ("FOF") 22, 23 and 24 that FHFC may delegate selection of projects for awards of points in the

awarding of federal tax credits without statutory authority and without criteria to be used by the local government are clearly erroneous in that the FHFC must comply with all of the provisions of section 42 of the Internal Revenue Code in guiding the selection process for evaluating and awarding credits in the Code and Conclusions of Law ("COL") 29, 30, and 32 are contrary to the essential requirements of law.

Exception No. 3: The ALJ based his ruling on factual evidence, specifically the deposition of the Executive Director, which was beyond the stipulated facts. Reliance upon facts outside the stipulation is fundamental error and reliance thereon was contrary to the essential requirements of law.

EXCEPTIONS

Exception No. 1: The conclusion of the ALJ in Findings of Fact ("FOF") 18 and 20 are clearly erroneous in that it is the duty of the FHFC to comply with all of the provisions of section 42 of the Internal Revenue Code when evaluating and awarding federal credits and Conclusions of Law ("COL") 30, 31 and 32 depart from the essential requirements of law.

Findings of Fact 18 & 20 are clearly erroneous and will be argued together

1. The ALJ found in **FOF 18** that:

> Petitioners contend the specifications which limit funding for certain types of projects violate section 42 and are illegal. But they cite no provision in section 42 which requires Florida Housing to conform to every requirement in the IRC in order to allocate housing credits.

2. The ALJ found in **FOF 20** that:

> In conjunction with their RECAP argument, Petitioners contend the limitations prevent the same three categories of development from receiving a 30 percent "boost" in their cost basis, which allows them to receive a larger allocation of tax credits and makes the project more financially feasible. They argue this violates section 42. For the reasons cited above, this contention is rejected.

3. Section 42 of the Code requires that each state designate a "housing credit agency" responsible for the proper allocation and distribution of Housing Credits in compliance with Section 42 criteria and guidelines. IRC Sec. 42(h)(8)(A). That section states that "[t]he term 'housing credit agency' means any agency *authorized to carry out this subsection*." The provision on its face requires that the housing credit agency carry out the entire section.

4. The IRC does not authorize the housing credit agency responsible for the administration of the program to pick and choose what provisions the agency will follow and which it may choose to ignore.

5. The IRC expressly provides that any development located in a "high cost area" defined as a Qualified Census Tract ("QCT") or a Difficult Development Area ("DDA") is entitled to a 30% Boost in its basis (the "Boost"). Housing credit agencies may designate any developments within the state as being in a DDA if the agency determines that the development requires the Boost in order to be financially feasible. IRC Sec. 42(d)(5)(B)(v). There is no limitation on the type of project that is eligible to receive the Boost.

6. According to the United States Supreme Court, the guidelines for allocating housing tax credits must contain "certain preferences, including that low-income housing units … be built in census tracts populated predominantly by low-income residents." IRC Sec. 42(m)(1)(B)(ii)(III) and 42(d)(5)(B)(ii)(I). Federal law thus favors the distribution of these tax credits for the development of housing units in low-income areas. *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.*, 135 S.Ct. 2507, 192 L. Ed. 2d 514 (2015).

7. The term "the development of housing units" is a broad term without limitations.

8. Instead of giving preference to QCTs, RFA 2016-113 specifically denies the preference to developments of New Construction, Rehabilitation, or Acquisition and Rehabilitation located in a QCT and RECAP designated area and denies consideration for funding.

9. Most projects would not be economically feasible to construct without the ability to qualify for a Boost.

10. In authorizing a "housing credit agency" to grant credits, neither Florida Statutes nor the IRC limits the type of the development to be funded with the Boost if it is located within a QCT or a DDA. In fact, nothing in Florida Statutes or the IRC gives Florida Housing the authority to prohibit funding for certain types of proposed developments.

11. Contrary to the express language of Section 42 of the IRC Florida Housing removes the eligibility for a 30% Boost for those applicants that intend to construct, New Construction; Rehabilitation or Acquisition and Rehabilitation developments located within a QCT or DDA if any part of the development is also located in a Racially and Ethnically Concentrated Areas of Poverty ("RECAP"). RFA 2016-113, p. 13. There is nothing in the IRC authorizing the selective qualification of two types of projects out of five eligible projects for funding and discriminating in this manner contrary to the intent of encouraging competition for projects in these areas.

> c. RECAP / Development Category / Rental Assistance (RA) Level / Concrete Construction:
>
> > (1) RECAP
> >
> > With one exception,[1] proposed Developments that select a Development Category of New Construction, Rehabilitation, or Acquisition and Rehabilitation at question 5.c.(2) of Exhibit A are not eligible to receive funding under this RFA if any part of the proposed Development is located in a RECAP. The one exception to the above prohibition is a proposed Development that selects and qualifies for Local Government Area of Opportunity Funding as outlined in Section Four A.10.(2) of the RFA.

RFA 2016-113, Section Four A.5.c.(1).

[1] The exception is stated further in the subsection "If any part of the proposed Development is located in a RECAP designated area, the entire proposed Development will be considered to be located in a RECAP designated area and the Application will only be eligible for funding under this RFA if it qualifies (a) for the Local Government Areas of Opportunity Funding points exception if New Construction or Rehabilitation (with or without Acquisition) Development Category or (b) for the Redevelopment (with or without Acquisition) Development Category."

12. Florida Housing has created and defined the term "RECAP" as a "[c]ensus tract in which at least 40 percent of the population is living below the poverty line and in which a concentration of individuals who identify as other than non-Hispanic White exceeds 50 percent of the census tract. RECAP tracts are designated using the average of the three most recent 5-yr. averages of the American Community Survey, excluding high margin of error tracts." RFA 2016-113, p. 2. In other words, a RECAP tract is a census tract with a very low-income, non-white majority population. Those areas are being denied the competitive opportunity of having New Construction, Rehabilitation, or Acquisition and Rehabilitation projects considered for funding unless the *local government* selects the project. This creates the opportunity for racial discrimination in the selection of housing projects in a RECAP by the local governments.[2]

13. If not located within a RECAP, all types of projects, i.e., New Construction (where 50% or more of the units are new construction); Rehabilitation (where less than 50% of the units are new construction); Acquisition and Rehabilitation (acquisition and less than 50% of the units are new construction); Redevelopment (where 50% or more of the units are new construction); and Acquisition and Redevelopment (acquisition and 50% or more of the units are new construction), may receive the Boost if located within a QCT or DDA. RFA 2016-113, p. 14.

14. No justification exists in precluding the eligibility of New Construction, Rehabilitation, or Acquisition and Rehabilitation from being qualified to participate in "the

[2] "Officials from HUD's Office of Fair Housing and Equal Opportunity and Office of General Counsel have cited fair housing concerns in relation to any preferences or requirements for local approval or support because of the discriminatory influence these factors could have on where affordable housing is built." U. S. GAO Report to the Chairman of the U. S. Senate Committee on the Judiciary dated May 16, 2016 at p. 15, and available in its entirety at: *www.gao.gov/assets/680/677056.pdf.*

development of housing units." To eliminate those types of projects is to discriminate in favor of some developers while at the same time providing the opportunity for racial discrimination.

15. Florida Housing has not only eliminated the Boost for New Construction, Redevelopment and Acquisition and Redevelopment in a RECAP, but it specifically determined that they "are not eligible to receive funding under this RFA." RFA 2016-113, p. 13. Without explanation, Florida Housing will allow the remaining two types, Redevelopment and Acquisition and Redevelopment, to receive funding despite being located within a RECAP. RFA 2016-113, p. 13.

16. There is no justification in statute or rule for the adoption of this policy of excluding three valid types of projects which are located within a QCT or DDA qualifying for a Boost or making such determination based, in part, upon whether the tract is composed of "non-Hispanic White(s)." This policy was not adopted by rule, and the elimination of the qualification to be considered for the Boost is arbitrary and capricious and abrogates an applicant's right to offer to construct New Construction or Rehabilitation or Acquisition and Rehabilitation projects.

17. Agency action will be found to be "clearly erroneous" if it is without rational support and, consequently, the administrative law judge has a "definite and firm conviction that a mistake has been committed." *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *see also, Pershing Indus., Inc. v. Dep't of Banking & Fin.*, 591 So. 2d 991, 993 (Fla. 1st DCA 1991). Agency action may also be found to be "clearly erroneous" if the agency's interpretation of the applicable law conflicts with its plain meaning and intent. *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). There is no rational basis to discriminate against the development housing units by New Construction or Rehabilitation or Acquisition and Rehabilitation.

Conclusions of Law 30, 31 & 32 are contrary to the essential requirements of law

18. In **COL 30**, the ALJ asserts that:

> *Throughout their PRO, Petitioners argue that Florida Housing has violated section 42 by excluding certain developments from funding* and illegally delegating authority to local governments. *But federal law does not govern this proceeding*, and there is no evidence that the Department of Housing and Urban Development or the Internal Revenue Service has mandated that Florida Housing comply with section 42, word for word, as a condition precedent to serving as the state's housing credit agency. [Emphasis added].

19. In ¶ 7 of the Proposed Order, the ALJ indicates a contrary conclusion in interpreting the delegation of authority to Florida Housing to administer the IRC provisions; he states:

> As the housing credit agency for the State of Florida, Florida Housing has the authority to administer various federal and state affordable housing programs, including the Low-Income Housing Credit Program. See § 420.5099(1), Fla. Stat.

20. In **COL 31** of the Proposed Order, the ALJ states:

> Finally, nothing in chapter 420 prevents Florida Housing from setting eligibility requirements for funding, excluding certain categories of projects from eligibility, or receiving local government input in the manner that it does.

21. Florida Housing administers the law as it is delegated to it. Nothing in Chapter 420, F.S., restricts the eligibility requirements for project type from funding. Those eligibility requirements are not restricted in any manner in the IRC. And it is on 26 USC Section 42 that Florida Housing must rely for authority to restrict the type housing project eligible for funding within the QCT or DDAs. No such restriction exists.

22. In **COL 32** of the Proposed Order, the ALJ concludes:

> Petitioners have failed to prove the specifications are contrary to Florida Housing's governing statutes, rules, or policies or that they are unreasonable, arbitrary, or capricious.

23. Section 420.5099(2), F.S., provides that Florida Housing is to adopt the allocation procedures for tax credits and identifies the following factors that it may take into consideration: "the timeliness of the application; the location of the proposed housing project; the relative need in the area for low-income housing and the availability of such housing; the economic feasibility of the project; and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought." Noticeably absent from the criteria is any reference to the type of development, i.e., new development, rehabilitation, etc.

24. As such, there is no authorization for Florida Housing to discriminate and withhold funding for certain types of proposed developments, such as new construction. The term RECAP is not found in Chapter 420, F.S., Section 42 of the IRC, or Chapters 67-48 or 67-60, F.A.C., all of which constitutes Florida Housing's authority for allocating tax credits. Despite this, Florida Housing has developed RECAP to preclude development of new construction, rehabilitation and acquisition and rehabilitation of existing projects in low income racially concentrated areas.

25. Further, RFA 2016-113 is directly contrary to the express designation of DDA and QCT areas guiding Florida Housing through the delegations included in Section 42 of the IRC.

26. The Department of Housing and Urban Development, in Docket No. FR-5898-N-01, identified the Statutorily Mandated Designation of Difficult Development Areas and Qualified Census Tracts for 2016. It published the Notice in the Federal Register at Vol. 80, No. 226/ Tuesday, November 24, 2015/ Notices at p. 73201, 73202-73203 which states:

> In the case of buildings located in designated DDAs or designated QCTs, eligible basis can be increased up to 130 percent from what it would otherwise be. This means that the available credits also can be increased by up to 30 percent. … IRC Section 42(d)(5)(B)(v) allows states to award an increase in basis up to 30 percent

> to buildings located outside of federally designated DDAs and QCTs if the increase is necessary to make the building financially feasible. … *Rules for such designations shall be set forth in the LIHTC-allocating agencies' qualified allocation plans (QAPs).* [Emphasis added].[3]

27. Section 420.507(48), F.S., grants Florida Housing the authority to "award its annual allocation of low-income housing tax credits … by request for proposals or other competitive solicitation." Rule 67-60.010(3), F.A.C., provides that Florida Housing "may establish other funding priorities as deemed appropriate for a competitive program or solicitation." Limiting the type of construction that is eligible does not advance competition but restricts it by making fewer projects eligible and encourages favoritism and preferential treatment.

28. An act is "contrary to competition" if it runs contrary to the objectives of competitive bidding, which have been long held as follows: to protect the public against collusive contracts*; to secure fair competition upon equal terms to all bidders;* to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense. *Wester v. Belote*, 138 So. 2d 721, 723-24 (Fla. 1931); *see also, Harry Pepper & Assoc., Inc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

29. Limiting projects from eligibility does not advance the objective of competition.

30. Limiting the eligibility of some development types has no basis in the enabling legislation and Florida Housing has no authority to restrict the development classes and is the antithesis of a competitive selection process. The applications should be rescored after removing this limitation on the eligibility of New Construction or Rehabilitation or Acquisition and Rehabilitation from consideration.

[3] "LIHTC" – Low Income Housing Tax Credits

Exception No. 2: The conclusion of the ALJ in Findings of Fact ("FOF") 22, 23 and 24 that FHFC may delegate selection of projects for awards of points in the awarding of federal tax credits without statutory authority and without criteria to be used by the local government are clearly erroneous in that the FHFC must comply with all of the provisions of section 42 of the Internal Revenue Code in guiding the selection process for evaluating and awarding credits in the Code and Conclusions of Law (COL) 29, 30, and 32 are contrary to the essential requirements of law.

31. Section 42 of the Code requires that each state designate a "housing credit agency" responsible for the proper allocation and distribution of Housing Credits in compliance with Section 42 criteria and guidelines. IRC Sec. 42(h)(8)(A). That section states that "[t]he term 'housing credit agency' means any agency authorized to carry out this subsection." The provision on its face requires that the housing credit agency carry out the entire section.

32. The Code does not authorize a housing credit agency to delegate its authority to administer any portion of the selection process for awarding credits to a local government.

33. No local government has been designated by the legislature to administer Section 42 of the Code and no local government is authorized to administer Section 42 as a housing credit agency.

34. Nothing in Chapter 420, F.S., authorizes Florida Housing to delegate all or any portion of the allocation of points used to select qualifying projects for an award of housing credits.

35. The ALJ correctly finds that Florida Housing is designated as the "housing credit agency" for the State of Florida and "Florida Housing has the authority to administer various federal and state affordable housing programs, including the Low-Income Housing Credit Program. See § 420.5099(1), Fla. Stat." (**FOF 7**).

36. Section 420.507(48), F.S., authorizes Florida Housing to award its annual allocation of low-income housing tax credits by request for proposals or other competitive

solicitation. Section 42 of the Code directs state housing credit agencies to adopt a Qualified Allocation Plan ("QAP"). In Florida the QAP is approved by the governor of the State and is incorporated by reference into Florida Housing rules. Nothing in the QAP allows for the administration of the process of awarding credits to any other entity of state or local government.

37. Under federal law, Florida Housing must distribute Low-Income Housing Tax Credits to applicants pursuant to a specific Qualified Allocation Plan ("QAP"). IRC Sec. 42(m)(l)(A); *see also, Lakesmart Associates, Ltd. v. Florida Housing Finance Corp.*, DOAH Case No. 00-4287RU, ¶ 4 (R.O. Feb. 7, 2001)("The Corporation allocates the state's share of tax credits to eligible recipients pursuant to a Qualified Allocation Plan ('QAP') that federal law requires be prepared."). The QAP must contain certain selection criteria mandated by federal law and must be adopted by rule. IRC Sec. 42(m)(l); *see also, Allapattah Housing Partners v. Florida Housing Finance Corp.*, DOAH Case No. 11-3971RP (F.O. Oct. 10, 2011).

38. Allocation of credits by local government through their selection of projects for funding is done without regard to the selection criteria mandated under the Act and adopted within the QAP.

39. Because of the large number of applicants qualifying for all available points authorized in the RFA, Florida Housing has established and consistently made its selections based upon the tie-breaker random assignment of places in the queue. Stipulation ¶¶ 16 – 17.

40. Nonetheless, the RFA qualifies any project obtaining the designation of a Local Government Area(s) of Opportunity to be entitled to award 10 additional points to an applicant that is not available to any other applicant from that jurisdiction. RFA 2016-113, p. 39. By adding ten additional points based upon a local government's selection is the determinative and deciding factor. Florida Housing has been divested of the authority to select the projects and the

local government entity has become the selection committee. Nowhere has the legislature authorized or designated any authority in local governments to be the selection committee.

41. Section Four (A)(10) states in pertinent part:

> Local Government Areas of Opportunity Funding Points (10 points):
> In order for an Applicant to receive points, the Applicant must demonstrate a high level of Local Government interest in the project via an increased amount of Local Government contributions in the form of cash loans and/or cash grants, as outlined below.

Finding of Fact 22 is clearly erroneous and is not supported by substantial competent evidence

42. Florida Housing is effectively using the local government's contribution of cash, loans of cash, or grants as the deciding factor for selecting the successful applicant from among competing eligible projects since only one project is qualified to receive the allocation of the ten points.

43. The ALJ misconstrues the facts and mixes local governments providing zoning information, site plans and infrastructure requirements with authorizing the awarding of points in the selection process to just one project in a jurisdiction to receive an award of housing credits. As a practical matter, under the IRC, each applicant must meet the RFA zoning, site plans and infrastructure requirement as a threshold determination and the local government assistance in providing that information is done equally to establish those eligible projects. The ALJ's statement in **FOF 22** that "reliance on local government input is not a new concept in the solicitation process" is generally correct but it does not extend as far as the ALJ suggests. Awarding additional points for local government funding has become the deciding factor in the selection process. The ALJ's conclusion is clearly misleading and erroneous.

44. Allowing local government funding to be a deciding factor in the selection process from among all eligible projects has not been in place "for many years" as incorrectly set

forth in **FOF 22** but was only tried for a limited geographic area one previous time by FHFC for Duval/County Jacksonville.[4]

45. **FOF 22** is clearly erroneous and should be overturned.

Finding of Fact 23 is not supported by competent evidence and is clearly erroneous

46. In **FOF 23**, the ALJ suggests that the local governments make substantive decisions about project locations, need, availability and economic feasibility which Florida Housing relies upon to make a selection. There is no support in the stipulation for that finding. In fact that statement contradicts what the ALJ states in paragraphs 8 & 9, where it defines where the selection criteria are found in the process. He states:

> 8. Because the demand for housing credits exceeds the amount available, Florida Housing administers the program through a competitive process using RFAs. Based upon factors in the RFAs, the applications are scored and competitively ranked by an evaluation committee to determine which applications will be allocated tax credits.
>
> 9. Selection and preference criteria for the low-income housing tax credit programs are found in the 2016 QAP adopted by Florida Administrative Code Rule 67-48.002(95). … More specific guidance is found in the individual RFAs, tailored to each type of solicitation.

Local government threshold determinations as to general development criteria for all development within the jurisdiction is input relied upon by Florida Housing as part of the application process for each applicant so that the applications are graded on a consistent basis. Local government input is to assure that each project qualifies by meeting the local code criteria that local governments adopt and apply for all development within the jurisdiction not just LIHTC. When Florida Housing goes beyond the consistent application of local codes to all applicants and makes the local government funding the deciding factor in the selection of projects, it effectively abandons the application of the uniform selection criteria in the QAP and

[4] Page 38 of RFA 2015-107. This was the first and only previous time FHFC utilized a local funding preference to select a development.

the RFA with no oversight over or assurance that the project locally selected complies with the IRC requirements. It is no longer a level playing field and competition for an award of project funding no longer exists.

47. Basing the award of housing credits on whether there is a local government contribution is improper and **FOF 23** is clearly erroneous.

Finding of Fact 24 is not supported by competent evidence and is clearly erroneous

48. **FOF 24** states in its entirety that:

> Other than establishing the minimum amount and type of funding by a local government, Florida Housing does not direct local governments how to evaluate or select projects to receive local approvals or funding. Attempting to provide specific criteria for local governments would be impractical, as there are hundreds of local jurisdictions in the State, and Florida Housing believes that local governments, and not someone in Tallahassee, can best evaluate local concerns for revitalizing those communities. Notably, local governments do not have a final say over which projects get funded and which do not, and local funding does not guarantee an applicant will be awarded tax credits.

49. Each sentence within **FOF 24** has practical consequences why it is clearly erroneous. The effect of a local government awarding local funding and becoming an "area of opportunity" not only awards the project 10 additional points which are not available to any other project within the jurisdiction, it waives certain requirements for meeting eligibility in the evaluation process that all other candidates must meet to be eligible. By granting the additional ten points, the selection by the local government is the deciding factor in the selection of a project for funding and the local government, and not Florida Housing, has become in effect a state "housing credit agency". However when the local government applies its selection criteria it is the exercise of local government discretion and considerations absent from the provisions in the Code. The ALJ's finding that "Florida Housing does not direct local governments how to evaluate or select projects to receive local approvals or funding" demonstrates the unbridled

discretion delegated to the local governments. The ALJ should have found that the failure of Florida Housing to direct a local government to utilize the selection consistent with section 42 of the Code was an abuse of discretion and to further ensure that the selection criteria complies with the Code. These errors and omissions make his finding clearly erroneous.

50. The second sentence is equally erroneous, stating: "Attempting to provide specific criteria for local governments would be impractical." In fact the IRC provides the specific selection criteria that must be adhered to in selecting the successful candidate for funding. The ALJ found to the opposite of his finding in **FOF 24** when he states:

> Because the demand for housing credits exceeds the amount available, Florida Housing administers the program through a competitive process using RFAs. Based upon factors in the RFAs, the applications are scored and competitively ranked by an evaluation committee to determine which applications will be allocated tax credits.

51. The ALJ cannot have it both ways; the selection process has to be based upon the criteria in the RFA and the local governments are not permitted to make selections without following the IRC and the criteria within the RFA.

52. Since the administration and awarding housing credits must conform to the procedures and criteria outlined in section 42, the ALJ's finding in the second sentence of FOF 24 is clearly erroneous because the local governments make the selection without regard to the factors in the RFA.

53. The final sentence of **FOF 24** is clearly erroneous in that if the local government awards such support to more than one project, no project in the jurisdiction gets the preferential treatment as to additional points or waiver of certain application criteria. If only one eligible project receives the local government funding preference it is the deciding factor and does in fact guarantee that that project will get awarded the tax credits.

Conclusion of Law 29 is contrary to the essential requirements of law.

54. That part of **COL 29** relevant to local government funding is in error as a matter of law states:

> Similarly, reliance on local government input was shown to be necessary, as the local governments provide essential insight and information on how tax credits can best be used to revitalize their communities.[5] The specifications are neither unreasonable nor arbitrary or capricious.

As noted in the discussions of **FOFs 22 – 24**, the delegation of the selection authority to the local government to select a project for local funding without requiring it to consider the factors in either the IRC or the RFA demonstrates that the legal conclusion is contrary to the law. Under federal law, Florida Housing must distribute Low-Income Housing Tax Credits to applicants pursuant to a specific Qualified Allocation Plan ("QAP"). IRC Sec. 42(m)(l)(A); *see also, Lakesmart Associates, Ltd. v. Florida Housing Finance Corp.*, DOAH Case No. 00-4287RU, ¶ 4 (R.O. Feb. 7, 2001)("The Corporation allocates the state's share of tax credits to eligible recipients pursuant to a Qualified Allocation Plan ('QAP') that federal law requires be prepared."). The QAP must contain certain selection criteria mandated by federal law. IRC Sec. 42(m)(l); *see also, Allapattah Housing Partners v. Florida Housing Finance Corp.*, DOAH Case No. 11-3971RP (F.O. Oct. 10, 2011). Therefore **COL 29** is incorrect as a matter of law.

Conclusion of Law 30 is contrary to the essential requirements of law.

55. The ALJ in **COL 30** states in pertinent part that:

> But federal law does not govern this proceeding, and there is no evidence that the Department of Housing and Urban Development or the Internal Revenue Service has mandated that Florida Housing comply with section 42, word for word, as a condition precedent to serving as the state's housing credit agency.

[5] This finding of the ALJ shows reliance upon information outside the record. Deposition of Steve Auger, December 2, 2016, p. 58, starting at line 12 and concluding on p. 59, line 7. This reliance supports Exception 3 herein.

56. In fact, in *Lakesmart Associates, Ltd. v. Florida Housing Finance Corp.*, DOAH Case No. 00-4287RU, *supra,* the ALJ in that proceeding expressly found that in fact federal law requires the state to adopt a QAP consistent with section 42 and that the QAP controls the criteria in the selection process. The ALJ concluded as a matter of law that there is no evidence to conclude that HUD or the IRS required that the state's housing credit agency had to comply with section 42 of the Code.[6] In fact, HUD has taken a very strong position on its oversight responsibility for compliance with fair housing laws that apply to developments receiving credits under the IRC.

> HUD has oversight, enforcement and rulemaking authority under the Fair Housing Act, which applies to private market as well as government subsidized and insured housing and includes LIHTC. HUD has a Memorandum of Understanding with the Treasury and the Department of Justice "in cooperative efforts to promote enhanced compliance with the Fair Housing Act for the benefit of residents of low-income housing tax credit properties and the general public." HUD continues to work with the IRS in an effort to improve oversight and compliance with fair housing and civil rights requirements in LIHTC.[7]

COL 30 is incorrect as a matter of law based upon the finding in *Lakesmart, supra.*

Conclusion of Law 32 is contrary to the essential requirements of law.

57. **COL 32** is contrary to the essential requirements of law since it summarily concludes those issue discussed herein are correct contrary to the correct authorities cited.

58. For both Exceptions 1 and 2, Florida Housing is undertaking procedures to promote housing in high opportunity areas and to avoid fair housing related concerns in response

[6] Interestingly enough, the only discussions concerning HUD's involvement in the selection process is found outside the stipulated record; in the deposition of Steve Auger. It is improper for the ALJ to rely upon the non-stipulated evidence in basing his decision.

[7] U.S. Housing and Urban Development letter of April 12, 2016, attached as an exhibit to the U. S. GAO Report to the Chairman of the U. S. Senate Committee on the Judiciary dated May 16, 2016 and available in its entirety at: *www.gao.gov/assets/680/677056.pdf*

to the issues arising under the *Inclusive Communities* case.[8] While justified in trying to avoid concentrating housing in poverty areas, Florida Housing is going about it in a way that is procedurally flawed. The selection criteria and process is not contained in the QAP and Florida Housing has no statutory authority to deny the Boost treatment to three development types. In both Exception 1 and 2, Florida Housing is delegating authority to local governments without express authority to do so.

59. Florida Housing should reject the application of those provisions addressed in Exceptions 1 and 2, rescore the applications, and allocate housing credits accordingly.

Exception No. 3: The ALJ based his ruling on factual evidence, specifically the deposition of the Executive Director, which was beyond the stipulated facts. Reliance upon facts outside the stipulation is fundamental error and reliance thereon was contrary to the essential requirements of law.

60. In the RFO at p. 3, the ALJ states:

> All parties agreed to waive a final hearing and submit a stipulated record. The record consists of Joint Exhibits 1 through 3: RFA-113, as modified; 26 U.S.C.S. § 42 of the Internal Revenue Code (IRC); and Florida Housing's 2016 Qualified Allocation Plan (QAP). Also, Florida Housing offered Exhibit 1, which is the deposition of former Executive Director Steve Auger. *Although Petitioners do not stipulate to any parts of the deposition,* all exhibits are accepted in evidence. [Emphasis added].

61. Petitioners did not stipulate to any testimony of former Executive Director Steve Auger and, therefore, it was improperly considered by the ALJ.

62. In Petitioners' Response to FHFC's Motion to Strike, it was again made clear that Petitioners did not stipulate to any parts of Mr. Auger's deposition:

> Florida Housing also appears to be attempting to force Petitioners to stipulate to the deposition of Mr. Auger as factual evidence in this proceeding. In the Motion to Strike, Florida Housing notes Petitioners' position that the Proposed Final Order cannot be considered as it is not a stipulated fact. Florida Housing then

[8] *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project*, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015).

> argues that the "Joint Stipulation, however, listed this exhibit and all parties stipulated that excerpts from this exhibit may be offered as evidence by the parties." While true, Florida Housing conveniently omits the relevant portion of that sentence of the stipulation that states "[w]hile excerpts from this deposition may be offered as evidence by the parties in their proposed orders, **Petitioners have not stipulated to any parts of this deposition**." If Florida Housing felt there were additional facts it needed to defend its failure to properly adopt these non-rule policies it should have taken the steps necessary to establish them. Regardless, suggesting that Petitioners stipulated to any parts of the deposition is false. Absent such a stipulation, the deposition cannot be considered. Palm Beach Community College v. Div. of Retirement, 579 So. 2d 300, 302 (Fla. 4th DCA 1991) (citing Lopez v. Dublin Company, 489 So. 2d 805, 807 (Fla. 3d DCA 1986)).

63. Therefore, FHFC should remand the matter to the Division of Administrative Hearings for the issuance of a recommended order based solely upon the stipulation. Basing the recommended order on "matters beyond the stipulated facts" requires reversal and remand "to only consider the stipulations." *Palm Beach Community College v. Div. of Retirement,* 579 So. 2d 300, 302 (Fla. 4th DCA 1991); *see also*: *Collins v. Timber,* 536 So. 2d 351 (Fla. 1st DCA 1988).

RESPECTFULLY SUBMITTED this 6th day of February, 2017.

Manson Bolves Donaldson Varn
1101 W. Swann Avenue
Tampa, Florida 33606
Telephone: (813) 514-4700

By: _____
Douglas Manson, Esq.
Florida Bar No. 542687
dmanson@mansonbolves.com
Craig D. Varn
Florida Bar No. 090247
cvarn@mansonbolves.com
William S. Bilenky, Esq.
Florida Bar No. 0154709
bbilenky@mansonbolves.com

CERTIFICATE OF SERVICE

I hereby certify this 6th day of February, 2017, that a true and correct copy of the foregoing has been served by electronic mail upon the following:

Kate Flemming, Corporation Clerk Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, Florida 32301-1329 Kate.Flemming@flhousing.org	Michael P. Donaldson, Esquire Carlton Fields Jorden Burt, P.A. Post Office Box 190 Tallahassee, Florida 32302-0190 mdonaldson@carltonfields.com
Christopher Dale McGuire, Esquire Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000 Tallahassee, Florida 32301-1329 Chris.McGuire@flhousing.org	Maureen M. Daughton, Esquire Maureen McCarthy Daughton, LLC 1725 Capital Circle Northeast, Suite 304 Tallahassee, Florida 32308-0595 mdaughton@mmd-lawfirm.com

s/_____
Attorney

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN RESIDENTIAL DEVELOPMENT, LLC; MADISON HIGHLANDS, LLC; PATRICK LAW; JONATHAN L. WOLF; BERKSHIRE SQUARE, LTD; HAWTHORNE PARK LTD; and SOUTHWICK COMMONS, LTD

Petitioners,

vs.

DOAH Case Nos. 16-6698BID
16-6699BID

FLORIDA HOUSING FINANCE CORPORATION,

FHFC Case Nos.: 2016-048BP
2016-049BP

Respondent,

and

HERITAGE OAKS, LLLP, and HTG ANDERSON TERRACE, LLC,

Intervenors.
_____/

RESPONDENT FLORIDA HOUSING FINANCE CORPORATION
RESPONSE TO PETITIONERS' EXCEPTIONS

Respondent, Florida Housing Finance Corporation, hereby submits its Response to Petitioners American Residential Development, LLC, Madison Highlands, LLC, Patrick Law, Jonathan L. Wolf, Berkshire Square, Ltd., Hawthorne Park, Ltd., and Southwick Commons, Ltd.'s Exceptions to Recommended Order. These cases were conducted in accordance with Sections 120.57(1) and (3), Fla. Stat.

Section 120.57(3)(f), Fla. Stat., provides:

> 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.

Section 120.57(1)(l) provides:

> (l) The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law.

Section 120.57(1)(k), Fla. Stat., requires Florida Housing to include an explicit ruling on each exception. It also requires each exception to clearly identify the disputed portion of the recommended order by page number or paragraph, to identify the legal basis for the exception, and to include appropriate and specific citations to the record.

Response to First Exception

Petitioners take Exception to Findings of Fact (FOF) 18 and 20 and to Conclusions of Law (COL) 30, 31, and 32, in which the Administrative Law Judge (ALJ) made several findings and conclusions concerning whether Florida Housing was in compliance with federal regulations. Because the criteria by which an agency evaluates findings of fact and conclusions of law are different, exceptions to findings of fact and conclusions of law will be addressed separately.

Findings of Fact 18 and 20

The ALJ found in FOF 18 that:

> Petitioners contend the specifications which limit funding for certain types of projects violate section 42 and are illegal. But they cite no provision in section 42 which requires Florida Housing to conform to every requirement in the IRC in order to allocate housing credits. And nothing in the IRC prevents local housing agencies from setting eligibility requirements for funding, or requires that all projects located in low-income areas are automatically eligible for funding.

The ALJ found in FOF 20 that:

> In conjunction with their RECAP argument, Petitioners contend the limitations prevent the same three categories of development from receiving a 30 percent "boost" in their cost basis, which allows them to receive a larger allocation of tax credits and makes the project more financially feasible. They argue this violates section 42. For the reasons cited above, this contention is rejected. Notably, an application without a boost could be selected for funding, while an application receiving one is not automatically selected for funding.

Petitioners suggest that because IRC Section 42 requires that each state designate a "housing credit agency," which is defined as any agency "authorized to carry out this subsection," that this federal regulation requires Florida Housing to "carry out" the entirety of IRC Section 42, and therefore that Petitioners did in fact cite to a "provision in section 42 which requires Florida Housing to conform to every requirement in the IRC." A definition authorizing an agency to carry out a program, however, does not require an agency to conform to every requirement in the regulation, and the ALJ's finding in this regard was not an unreasonable interpretation of relevant law.

Petitioners also re-raise the argument that because IRC Section 42 does not distinguish between types of projects that could qualify for a 30% "Boost" in its basis, Florida Housing does not have the authority to deny the Boost to any developments located within a QCT or DDA. This argument, that any project that might qualify for a Boost under IRC Section 42 may not be found to be ineligible, was correctly rejected by the ALJ; his finding that "an application without a boost could be selected for funding, while an application receiving one is not automatically selected for funding" was supported by competent, substantial evidence.

Petitioners make various other arguments as to why the criteria in the RFA are not based upon sound policy decisions, including references to racial discrimination and GAO reports that were not raised previously and thus were not considered by the ALJ. However, none of these arguments are relevant to the Findings of Fact to which exception is being taken, each of which addressed simply whether the criteria in the RFA violate IRC Section 42. There is competent substantial evidence in the record to support Findings of Fact 18 and 20, and this Exception should therefore be rejected.

Conclusions of Law 30, 31, and 32

In COL 30, the ALJ concludes that:

> Throughout their PRO, Petitioners argue that Florida Housing has violated section 42 by excluding certain developments from funding and illegally delegating authority to local governments. But federal law does not govern this proceeding, and there is no evidence that the Department of Housing and Urban Development or the Internal Revenue Service has mandated that Florida Housing comply with section 42, word for word, as a condition precedent to serving as the state's housing credit agency. Absent a statutory requirement that Florida Housing seek pre-approval from the federal government or adopt procedures that are identical to federal procedures, allegations concerning a deviation from federal standards cannot be adjudicated in this forum. See, e.g., Bridges of Am., Inc. v. Dep't of Corr., Case No. 16-5237BID (Fla. DOAH Nov. 23, 2016; Fla. DOC Dec. 15, 2016).

Petitioners argue in their Exception that this conclusion is contrary to Finding of Fact 7, in which the ALJ found that Florida Housing "has the authority to administer various federal and state affordable housing programs." Petitioners offer no explanation as to how the conclusion is contrary to the finding, nor any argument as to why the conclusion of law is erroneous.

In COL 31, the ALJ concludes that:

> Finally, nothing in chapter 420 prevents Florida Housing from setting eligibility requirements for funding, excluding certain categories of projects from eligibility, or receiving local government input in the manner that it does.

Petitioners argue in their Exception that there is no provision in Chapter 420, Fla. Stat., nor in

IRC Section 42, that explicitly restricts the eligibility requirements for project types from funding. Section 420.5099(2), Fla. Stat., grant Florida Housing broad authority to adopt allocation procedures that take into account timeliness, location, need, availability, and feasibility of any project. Pursuant to Section 120.57(3), Fla. Stat., Petitioners have the burden of proving that Florida Housing's proposed actions are contrary to its governing statutes. Petitioners have failed to demonstrate that the ALJ's conclusion of law is incorrect.

In COL 32, the ALJ concludes that:

> In summary, Petitioners have failed to prove the specifications are contrary to Florida Housing's governing statutes, rules, or policies or that they are unreasonable, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

Petitioners' arguments in their Exception are essentially a reiteration of arguments that they made previously in these Exceptions and in their Proposed Recommended Order, which are that Florida Housing had no authority to withhold funding for certain types of developments, and that the criteria of the RFA violate IRC Section 42. As noted above, the ALJ's findings and conclusions in this regard are based upon substantial competent evidence and a correct interpretation of relevant statutory language. Petitioners also argue that criteria that would make some projects ineligible for funding "does not advance the objective of competition." Petitioners offer no explanation or justification for this statement, nor do they show how it is relevant to the ALJ's conclusion that Petitioners failed to carry their burden of showing that the specifications are contrary to Florida Housing's governing statutes.

Petitioners have failed to demonstrate that any of the findings or conclusions which were the subject of this Exception were not supported by competent substantial evidence or were based on an incorrect interpretation of law over which Florida Housing has substantive jurisdiction. For these reasons, Petitioners' First Exception should be rejected.

Response to Second Exception

Petitioners take Exception to Findings of Fact 22, 23, and 24 and to Conclusions of Law 29, 30, and 32, in which the Administrative Law Judge (ALJ) made several findings and conclusions concerning whether Florida Housing was improperly delegating authority to local governments. Because the criteria by which an agency evaluates findings of fact and conclusions of law are different, exceptions to findings of fact and conclusions of law will be addressed separately.

Findings of Fact 22, 23, and 24

In FOF 22, the ALJ found that:

> For many years, Florida Housing has considered local government input in the selection process by giving applicants points for local government contributions and requiring forms signed by the local government officials certifying compliance with zoning, site plan, and infrastructure requirements. Thus, reliance on local government input is not a new concept in the solicitation process.

Petitioners do not actually argue that any part of this finding is not supported by competent substantial evidence, but instead argue that somehow the ALJ has misconstrued the relevance of the finding. Petitioners also note that "allowing local government funding to be a deciding factor in the selection process from among all eligible projects has not been in place for many years." Whether or not this is an accurate statement by Petitioners is not relevant, because it is not what the ALJ found and therefore cannot form the basis for an Exception.

In FOF 23, the ALJ found that:

> Florida Housing relies on local governments to evaluate such things as the location of the proposed housing project, the relative need in the area for low-income housing, the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project. This is because without local input, it would be difficult, if not impossible, for Florida Housing to evaluate these factors for every applicant for every RFA. Florida Housing also takes into account a local government's revitalization plan in making its funding selection, a requirement in the QAP. See Jt. Ex. 3, p. 1, § I.B. 12 (in

> allocating credits, the agency must consider the "project's characteristics including housing as part of a community revitalization plan").

Petitioners argue that there is no support in the Joint Stipulation for this finding. However, there is competent substantial evidence in the record (Deposition of Steve Auger, pp. 61-67) to support this finding. Petitioners make several argumentative statements that have no basis in the record, and ultimately suggest that this finding is clearly erroneous because "basing the award of housing credits on whether there is a local government contribution is improper." Not only did the ALJ not make a finding to that effect, there is no record evidence to suggest that the sole basis for an award of housing credits is whether there is a local government contribution.

In FOF 24 the ALJ found that:

> Other than establishing the minimum amount and type of funding by a local government, Florida Housing does not direct local governments how to evaluate or select projects to receive local approvals or funding. Attempting to provide specific criteria for local governments would be impractical, as there are hundreds of local jurisdictions in the State, and Florida Housing believes that local governments, and not someone in Tallahassee, can best evaluate local concerns for revitalizing those communities. Notably, local governments do not have a final say over which projects get funded and which do not, and local funding does not guarantee an applicant will be awarded tax credits.

Petitioners do not actually argue that any parts of this finding are not supported by competent substantial evidence, but instead suggest that the ALJ should have made additional or different findings. Their argument is essentially that by giving additional points to those projects that receive a certain level of local funding, Florida Housing is delegating its authority to determine which applicants to select for funding to the local government, thus making the local government the "state housing credit agency." This argument, which is without any support in the record, cannot form the basis for an Exception to a finding that is supported by competent substantial evidence.

Conclusions of Law 29, 30, and 32

In COL 29, the ALJ concluded in relevant part that:

> Similarly, reliance on local government input was shown to be necessary, as the local governments provide essential insight and information on how tax credits can best be used to revitalize their communities. The specifications are neither unreasonable nor arbitrary or capricious.

Petitioners' sole argument in this Exception seems to be that since Florida Housing has delegated the entirety of its authority to select applicants for funding to local governments, then this conclusion must be incorrect. Since there is no support in the record for this proposition, and since the ALJ's conclusion is supported by competent substantial evidence, there is no basis for overturning this conclusion of law.

In COL 30, the ALJ concluded that:

> Throughout their PRO, Petitioners argue that Florida Housing has violated section 42 by excluding certain developments from funding and illegally delegating authority to local governments. But federal law does not govern this proceeding, and there is no evidence that the Department of Housing and Urban Development or the Internal Revenue Service has mandated that Florida Housing comply with section 42, word for word, as a condition precedent to serving as the state's housing credit agency. Absent a statutory requirement that Florida Housing seek pre-approval from the federal government or adopt procedures that are identical to federal procedures, allegations concerning a deviation from federal standards cannot be adjudicated in this forum.

Petitioners argue that the case of Lakesmart Associates, Ltd. v. Florida Housing Finance Corp., DOAH Case No. 00-4287RU (R.O. Feb. 7, 2001) somehow contradicts this conclusion because it mentions the undisputed fact that the state is required by federal law to adopt a QAP. But there is nothing in the Lakesmart decision supporting a proposition that federal law does govern this proceeding, or that some federal agency has mandated that Florida Housing comply with IRC Section 42, word for word, as a condition precedent to serving as the state's housing credit agency, or that Florida Housing must seek pre-approval from the federal government. Petitioners suggest that the conclusions concerning HUD were somehow improper because they relied on evidence that was not found in the Joint Stipulation (a point addressed below), and then ironically and ireelevantly cite to a

HUD letter that was not found in the Joint Stipulation or in fact in any part of the record for the proposition that HUD has oversight authority over Fair Housing laws.

Petitioners take exception to COL 32 wherein the ALJ concluded that Petitioners had failed to carry their burden of proving that Florida Housing's proposed action was contrary to statute, rule, or policy, but offer no explanation or justification for this Exception.

For these reasons, Petitioners' Second Exception should be rejected.

Response to Third Exception

Petitioners take Exception not to any Finding of Fact or Conclusion of Law, but to the ALJ's procedural ruling that the deposition of former Executive Director Steve Auger, which was not part of the Joint Stipulation, was admitted into evidence. Florida Housing does not have the authority to overturn any of the ALJ's conclusions of law except those over which it has substantive jurisdiction, and thus does not have the authority to overturn this procedural ruling. Nonetheless, because it may call into question the validity of several findings of fact, the Exception should be rejected for the following additional reasons.

In the Recommended Order at p. 3, the ALJ states:

> All parties agreed to waive a final hearing and submit a stipulated record. The record consists of Joint Exhibits 1 through 3: RFA-113, as modified; 26 U.S.C.S. § 42 of the Internal Revenue Code (IRC); and Florida Housing's 2016 Qualified Allocation Plan (QAP). Also, Florida Housing offered Exhibit 1, which is the deposition of former Executive Director Steve Auger. Although Petitioners do not stipulate to any parts of the deposition, all exhibits are accepted in evidence.

Petitioners suggest that the Deposition was improperly considered by the ALJ because Petitioners had not stipulated to any parts of it. Petitioners, however, never objected to the deposition being accepted into evidence. The fact that Petitioners did not stipulate that any parts of the deposition were true is not material to the question of whether it should have been admitted into evidence. Thus, under Section 120.57(1)(f)(2), Fla. Stat., it was proper for the ALJ to consider

the deposition along with any other evidence admitted.

Petitioners also argue that it was fundamental error for the ALJ to consider any evidence that had not been stipulated to by all parties. Had this been a proceeding conducted under Section 120.57(2), Fla. Stat., in which all parties agree that there are no issues of material fact in dispute, this argument might have had merit. In this case, however, the hearing was conducted under Section 120.57(3), Fla. Stat., and there was no indication or pleading that there were no disputed issues of material fact. The ALJ, in fact, described this as a "formal" hearing (Recommended Order, p. 3), by which he presumably meant a hearing in which there were disputed issues of material fact. The cases cited to by Petitioners in support of their argument are irrelevant because they relate to hearings conducted under Section 120.57(2), Fla. Stat., which did not involve disputed issues of material fact.

For these reasons, Petitioners' Third Exception should be rejected.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors reject the arguments presented in Petitioners' Exceptions, 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 15th day of February, 2017.

/s Chris McGuire
Chris McGuire
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Ste. 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Fax: (850) 414-6548
Chris.mcguire@floridahousing.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by electronic mail this 15th day of February, 2017 to the following:

Craig D. Varn, Esq.
Manson Bolves Donaldson Varn, P.A.
204 South Monroe Street, Suite 201
Tallahassee, Florida 32301
cvarn@mansonbolves.com

Maureen M. Daughton, Esq.
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE, Suite 304
Tallahassee, Florida 32308
mdaughton@mmd-lawfirm.com

Michael Donaldson, Esq.
Carlton Fields Jorden Burt, PA
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302
mdonaldson@carltonfields.com
rcbrown@carltonfields.com

/s/ Chris McGuire
Chris McGuire