STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

DOUGLAS GARDENS V, LTD.,
Petitioner,
v.

DOAH CASE NO. 16-0418
FHFC CASE NO.: 2016-177BS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,
and

LA JOYA ESTATES, LTD.,

Intervenor.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on March 18, 2016. Petitioner Douglas Gardens V, LTD, ("Douglas Gardens") timely submitted Application for funding ("Application") in response to Request for Applications 2015-112: For SAIL Financing of Affordable Multifamily Housing Developments To Be Used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits (the "RFA"). The matter for consideration before this Board is a Recommended Order pursuant to §§120.57(2) and (3)(e), Fla. Stat. (2015), and Fla. Admin. Code R. 67-60.009(3)(b) (Rev. 10-18-14).

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
/DATE 3-18-16

Petitioner timely filed a Petition for an Informal Administrative Hearing pursuant to §§120.569, 120.57(2) and (3), Fla. Stat. (2015), (the "Petition") challenging the preliminary agency action of Florida Housing Finance Corporation ("Florida Housing") regarding the scoring of the Applications. La Joya Estates, LTD, ("La Joya") intervened by filing a Notice of Appearance.

An informal hearing took place on February 9, 2016, in Tallahassee, Florida, before the Honorable Administrative Law Judge Lawrence P. Stevenson ("Hearing Officer"). Petitioner, Respondent and Intervenor timely filed Proposed Recommended Orders on February 15, 2016.

After consideration of the evidence and arguments presented at hearing, and the Proposed Recommended Orders, the Hearing Officer issued a Recommended Order on February 29, 2016. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The Hearing Officer recommended that Florida Housing issue a Final Order affirming La Joya for tentative funding under RFA 2015-112.

On March 7, 2016, Petitioner and Respondent filed Joint Objections/Exceptions to Recommended Order attached hereto as Exhibit B ("Joint Exceptions"). On March 10, 2016, La Joya filed Intervenor's Response to Joint Exceptions to Recommended Order attached hereto as "Exhibit C."

RULING ON JOINT EXCEPTIONS

Exception ¶40

1. Petitioner and Respondent take exception to Conclusion of Law set forth in Paragraph 40 on Page 19 of the Recommended Order in which the Hearing Officer concluded:

> La Joya deviated from a mandatory provision of the RFA. However, under all the facts of the case, that deviation cannot be considered as anything but a minor irregularity. La Joya achieved no competitive advantage over the other applicants by virtue of its submission of a 2014 Surveyor Certification form that was in all relevant particulars identical to the mandated 2015 form. The information submitted by La Joya on the 2014 form was the same as that required by the 2015 form. The deviation was so slight that two experienced Florida Housing reviewers did not notice it until Douglas Gardens pointed it out in its Petition.

2. The Board finds that it has substantive jurisdiction over the issues presented in ¶40 of the Recommended Order.

3. After a review of the record, the Board finds that the legal reasoning set forth in the Joint Exception to ¶40 of the Recommended Order is more reasonable than that offered by the Hearing Officer, and accepts the Joint Exception to ¶40.

4. Accordingly, the Board substitutes the following Conclusion of Law for that set forth in ¶40 of the Recommended Order:

> ¶40. La Joya deviated from a mandatory provision of the RFA. Under all the facts of the case, that deviation cannot be considered a minor irregularity. The Terms of the RFA explicitly provide a remedy for failure to submit the correct version of the Surveyor Certification Form.

Exception ¶41

5. Petitioner and Respondent take exception to Conclusion of Law set forth in ¶41 on Page 20 of the Recommended Order in which the Hearing Officer concluded:

> None of the policy considerations cited by Mr. Reecy would be transgressed by an award of funding to La Joya under the specific circumstances of this case. La Joya's application was in all relevant respects consistent with the other RFA applications. While the Surveyor Certification form submitted by La Joya was not the one specified in the RFA, its contents were the same for purposes of scoring this RFA. Waiving the minor irregularity in this case would not be inconsistent with Florida Housing's overall concern with maintaining consistency and predictability in the competitive procurement process.

6. After a review of the record, the Board finds that the legal reasoning set forth in the Joint Exception to ¶41 of the Recommended Order is more reasonable than the legal reasoning offered by the Hearing Officer, and accepts the Joint Exception to ¶41.

7. Accordingly, the Board substitutes the following Conclusion of Law for that set forth in ¶41 of the Recommended Order:

> ¶41. The Surveyor Certification form submitted by La Joya was not the one specified in the RFA. Waiving this as a minor irregularity in this case would be inconsistent with Florida Housing's overall concern with maintaining consistency and predictability in the competitive procurement process.

Exception ¶42

8. Petitioner and Respondent take exception to Conclusion of Law set forth in ¶42 on Page 20 of the Recommended Order in which the Hearing Officer:

> There is in this case no element of collusion, favoritism, fraud, or unfair competition. Florida Housing was able to make an exact comparison of the applications. An award of funding to La Joya in this case is a reasonable exercise of the agency's authority to waive minor irregularities and is neither arbitrary nor capricious.

9. After a review of the record, the Board finds that the legal reasoning set forth in the Joint Exception is more reasonable than the legal reasoning offered by the Hearing Officer.

10. Accordingly, the Board substitutes the following Conclusion of Law for that set forth in ¶42 of the Recommended Order:

> ¶42. An award of funding to La Joya in this case is not a reasonable exercise of the agency's authority to waive minor irregularities under these circumstances due to the plain language of the RFA.

Exception ¶43

11. Petitioner and Respondent take exception to Conclusion of Law set forth in ¶43 on Page 20 of the Recommended Order in which the Hearing Officer concluded:

> It is concluded that Douglas Gardens has failed to carry its burden of proving that Florida Housing's decision to award funding to La Joya's application was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

12. After a review of the record, the Board finds that the legal reasoning set forth in the Joint Exception adopted by Petitioner and Respondent is more reasonable than the legal reasoning offered by the Hearing Officer.13. Accordingly, the Board substitutes the following Conclusion of Law for that set forth in ¶43 of the Recommended Order:

> ¶43. It is concluded that Douglas Gardens has carried its burden of proving that Florida Housing's decision to award funding to La Joya's application was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

Exception to Recommendation

14. Based on the foregoing, the Board rejects the Recommendation of the Recommended Order and orders the disposition set forth below.

RULING ON THE RECOMMENDED ORDER

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

16. The arguments presented in Petitioner and Respondent's Joint Objections/Exceptions to the Recommended Order are accepted.

17. Conclusions of Law 40, 41, 42 and 43 and the Recommendation of the Recommended Order are rejected.

ORDER

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

18. 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.

19. The Conclusions of Law in the Recommended Order are rejected and substituted as specified above and the substituted Conclusions of Law are incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that Florida Housing's recommendation to award tentative funding to La Joya is **DENIED** and the relief requested in the Petition is **AFFIRMED.**

DONE and ORDERED this 18th day of March, 2016.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

Michael Donaldson
Florida Bar No. 0802761
Carlton Fields, P.A.
P.O. Drawer 190
Tallahassee, Fl 32302
Telephone: (850) 224-1585

Facsimile: (850) 222-0398
mdonaldson@carltonfields.com

DONNA E. BLANTON
Florida Bar No. 948500
dblanton@radeylaw.com
Radey Law Firm
301 S. Bronough Street, Suite 200
Tallahassee, Florida 32301
Tel: 850-425-6654/ Fax: 850-425-6694

Hugh R. Brown, General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

Ken Reecy
Director of Multifamily Programs
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

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, 300 MARTIN LUTHER KING, JR., BLVD., TALLAHASSEE, FLORIDA 32399-1850, 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

DOUGLAS GARDENS V, LTD.,

Petitioner,

vs. Case No. 16-0418BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

LA JOYA ESTATES, LTD.,

Intervenor.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on February 9, 2016, 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

For Petitioner: Donna Elizabeth Blanton, Esquire
Radey Law Firm, P.A.
Suite 200
301 South Bronough Street
Tallahassee, Florida 32301

For Respondent: Eric Sonderling, Assistant General Counsel
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

For Intervenor: Michael P. Donaldson, Esquire
Carlton Fields Jorden Burt, P.A.
Post Office Drawer 190
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

At issue in this proceeding is whether the decision of the Florida Housing Finance Corporation ("Florida Housing") to award State Apartment Incentive Loan ("SAIL") funding to Intervenor, La Joya Estates, Ltd. ("La Joya"), pursuant to Request for Applications 2015-112 (the "RFA") was contrary to the agency's governing statutes, rules, policies, or the RFA specifications.

PRELIMINARY STATEMENT

On October 29, 2015, Florida Housing issued the RFA, requesting applications for awards of SAIL financing of "Affordable Multifamily Housing Developments to be Used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits." On December 11, 2015, Florida Housing's Board of Directors (the "Board") met to consider the recommendations of the staff review committee regarding the RFA, and posted its Notice of Intended Decision. The Notice set forth the scoring and ranking of the applications, in which both La Joya and Petitioner, Douglas Gardens V, Ltd. ("Douglas Gardens"), were found eligible for funding. La Joya was selected to receive funding due to the RFA preference for a housing development to be located in Miami-Dade County.

Douglas Gardens timely filed with Florida Housing its notice of protest, followed by a Formal Written Protest and Petition for Administrative Hearing ("Petition"), pursuant to section 120.57(3) and Florida Administrative Code Rules 67-60.009 and 28-110.004.

On January 22, 2016, La Joya filed with Florida Housing a Notice of Appearance/Motion to Intervene, pursuant to Florida Administrative Code Rule 28-106.205. Without objection, the Motion to Intervene was granted at the outset of the final hearing.

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. Consequently, Florida Housing contracted with the Division of Administrative Hearings to provide an Administrative Law Judge ("ALJ") to act as the informal hearing officer in this matter, pursuant to sections 120.57(2) & (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 February 9, 2016. At the hearing, Joint Exhibits 1 through 10 were admitted into evidence. Douglas Gardens' Exhibits 1 through 4 were admitted into evidence. Florida Housing presented brief testimony by

Ken Reecy, its Director of Multifamily Programs. No other party called witnesses. All three parties presented oral argument.

The one-volume Transcript of the final hearing was filed at DOAH on February 18, 2016. All three parties timely submitted Proposed Recommended Orders on February 15, 2016, as agreed at the conclusion of the final hearing. 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 2015 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. Douglas Gardens is a Florida limited partnership based in Coconut Grove, Florida, that is in the business of providing affordable housing.

2. Florida Housing is a public corporation organized pursuant to chapter 420, Part V, Florida Statutes. For the purposes of this proceeding, Florida Housing is an agency of the State of Florida. Florida Housing has the responsibility and authority to establish procedures for allocating and distributing various types of funding for affordable housing.

One of the programs administered by Florida Housing is the SAIL program, created in section 420.5087, Florida Statutes.

3. Florida Housing has adopted Chapter 67-60, Florida Administrative Code, which governs the competitive solicitation process for several programs, including the SAIL program. Other administrative rule chapters relevant to the selection process are chapter 67-48, F.A.C., which governs competitive affordable multifamily rental housing programs; chapter 67-21, Florida Administrative Code, which governs multifamily mortgage revenue bonds ("MMRB") and non-competitive housing credits; and chapter 67-53, Florida Administrative Code, governing compliance procedures. Applicants for funding, pursuant to the RFA, are required to comply with provisions of the RFA and the applicable rule chapters.

4. La Joya is a Florida limited partnership based in Miami, Florida, and is also in the business of providing affordable housing.

5. On October 9, 2015, Florida Housing issued the RFA, seeking applications from developers proposing to construct multifamily housing for families and for the elderly. The RFA outlined a process for the selection of developments to share the estimated $49 million in funding for eligible applicants.

6. Among the stated goals of the RFA is to fund one new construction development serving the elderly in a large county,

with priority given to the highest ranked eligible new construction application for the elderly that is located in Miami-Dade County. The RFA provides that if there are no eligible Miami-Dade County applications that qualify, then the highest ranking eligible new construction development serving the elderly in Broward County will be selected.

7. A total of 23 applications were filed in response to the RFA. On November 9, 2015, Douglas Gardens timely submitted its Application, numbered 2016-177BS, seeking $5,781,900 in SAIL funding to assist in the development of a proposed new construction development for the elderly in Broward County. Douglas Gardens' was the only "new construction" application submitted for Broward County. Also on November 9, 2015, La Joya timely filed its Application, numbered 2016-178S, seeking $5,778,100 in SAIL funding to assist in the development of a proposed new construction development for the elderly in Miami-Dade County. La Joya's was the only application submitted for Miami-Dade County in any development category.

8. The executive director of Florida Housing selected a review committee to review and score the applications. The review committee issued a recommendation of preliminary rankings and allocations. Florida Housing's Board of Directors approved these recommendations on December 11, 2015. The Board of Directors found both La Joya and Douglas Gardens eligible for

funding, but awarded funding to La Joya on the basis that it was the highest ranked, eligible, elderly, new construction application located in Miami-Dade County.

9. On December 16, 2015, Douglas Gardens timely filed a notice of intent to protest. On December 28, 2015, Douglas Gardens timely submitted a Formal Written Protest and Petition for Administrative Hearing.

10. The RFA awarded up to 18 "proximity points" to an applicant based on its project's location in relation to transit and community services such as grocery stores, medical facilities, and pharmacies. The RFA required each applicant to submit a "Surveyor Certification" form, which included longitude and latitude coordinates corresponding to the location of the proposed development site and the site's proximity to listed services that would presumably serve the proposed development.

11. Each applicant was required to retain a Florida licensed surveyor to prepare and submit the Surveyor Certification form and to sign the form attesting, under penalty of perjury, that the information on the form is true and correct. In the bottom left hand corner of each page of the form is a blank line on which the applicant or surveyor was to indicate the RFA number for which the form was being submitted. Beneath the blank line is a parenthetical indicating the identification number of the form, e.g., (Form Rev. 07-15).

12. Section Four A.6.a.(1) of the RFA provided the following regarding the Surveyor Certification form:

> In order to meet the Mandatory requirement and be eligible for proximity points, all Applicants must provide an acceptable Surveyor Certification form, (Form Rev. 07-15), as Attachment 14 to Exhibit A, reflecting the information outlined below. The Surveyor Certification form (Form Rev. 07-15) is provided in Exhibit B of this RFA and on the Corporation's website.... Note: The Applicant may include the Florida Housing Surveyor Certification form that was included in a previous RFA submission for the same proposed Development, provided (i) the form used for this RFA is labeled Form Rev. 07-15, (ii) other than the RFA reference number on the form, none of the information entered on the form and certified to by the signatory has changed in any way, and (iii) the requirements outlined in this RFA are met. The previous RFA number should be crossed through and RFA 2015-112 inserted. If the Applicant provides any prior version of the Surveyor Certification form, the form will not be considered. (Emphasis added).

13. Section Three C.1. of the RFA provided that Florida Housing reserved the right to waive "Minor Irregularities" in the applications.

14. Florida Administrative Code Rule 67-002(6) defines "Minor Irregularity" as

> [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.

15. Florida Administrative Code Rule 67-60.008 titled "Right to Waive Minor Irregularities," provides as follows:

> 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 mistake.

16. La Joya submitted a Surveyor Certification form as Attachment 14 of its Application. The identification number in the parenthetical in the bottom left hand corner was "(Form Rev. 10-14)" rather than the specified "(Form Rev. 07-15)." Form Rev. 10-14 was the Surveyor Certification form used for 2014 applications. The only difference between Form Rev. 10-14 and Form Rev. 07-15 is that the latter contains a revised list of location coordinates for several Sun Rail stations in the Orlando area. This difference was of no matter to the RFA under discussion. For the substantive purposes of this RFA, the forms were identical.

17. If La Joya's Surveyor Certification form had not been considered and not scored, La Joya would have been ineligible for funding and Douglas Gardens would have been selected as the applicant meeting Florida Housing's goal of funding one new construction development for elderly residents in a large county.

18. Heather Boyd, multifamily loan manager for Florida Housing, sat on the review committee and was assigned to score the proximity portion of the applications. Based on the distances provided in the Surveyor Certification form, Ms. Boyd awarded La Joya a total of 11.5 proximity points as follows: 5.5 points for proximity for Public School Bus Rapid Transit Stop, 3 points for proximity to a Grocery Store, and 3 points for proximity to a Medical Facility. (La Joya also included coordinates for a Public School, but the proposed elderly development was not eligible for Public School proximity points.) To be considered eligible for funding, an applicant needed to receive at least 10.25 proximity points, including at a minimum 2 points for Transit Services.

19. No issue was raised as to the accuracy of the information submitted by La Joya or of Ms. Boyd's calculation. If it was permissible to consider La Joya's Surveyor Certification form, then La Joya satisfied the proximity requirements in the RFA and was properly awarded funding. If La Joya's Surveyor Certification form had been rejected, La Joya would not have been awarded funding and Douglas Gardens would have been awarded funding. Florida Housing's decision to award funding to La Joya was based in part on Ms. Boyd's scoring of the Surveyor Certification form and reflected the agency's support of Ms. Boyd's action.

20. However, during the pendency of Douglas Gardens' protest, Florida Housing changed its position and determined that La Joya's Surveyor Certification form should not have been considered, based on the mandatory language of section Four A.6.a.(1) of the RFA.

21. Ms. Boyd testified that she did not notice that La Joya's Surveyor Certification form was a prior version and that she scored it as if it were the current version. She testified that she should not have scored the form "[b]ecause it specifically says in the RFA, if they do not have the correct form, they will not be considered."

22. Jean Salmonsen, housing development manager, acted as a backup to Ms. Boyd in reviewing the Surveyor Identification forms and verifying the award of proximity points. Ms. Salmonsen testified that she, too, missed the fact that La Joya had filed the wrong version of the form and that she would have rejected the form had she correctly recognized it. Evidence presented at the hearing indicated that in January 2016, Ms. Salmonsen had in fact disqualified an application in a different RFA for submitting the 2014 version of the Surveyor Identification form.

23. Several valid policy reasons were cited for the RFA's requirement that applicants use only the current version of the Surveyor Identification form. Ken Reecy, Florida Housing's

Director of Multifamily Programs, testified that it is important to apply the rules and RFA criteria in a consistent manner because of the tremendous volume of applications the agency receives. Mr. Reecy stated, "For like criteria, yes, consistency. We live and die by consistency, frankly."

24. As to the Surveyor Certification form specifically, Mr. Reecy explained that over the years Florida Housing had used a number of different forms with different contents. Allowing applicants to submit different forms would add to the difficulty of scoring the hundreds of applications received from around the state. Uniformity and consistency as to applicant submissions allow Florida Housing to process all of these applications in a cost efficient manner.

25. Though he expressed his concern with consistency of review and ensuring that all applicants provide the same information as reasons for rejecting La Joya's submission of the 2014 Surveyor Certification form, Mr. Reecy conceded that one of the reasons Florida Housing moved away from the previous rigid Universal Application Cycle allocation process was to allow for flexibility in determining that insignificant scoring errors need not be the basis for disqualifying an otherwise acceptable application. Florida Housing's recent adoption in 2013 of the "Minor Irregularity" rule is further indication of its intent to

employ more flexible evaluation criteria than it has in the past. See Findings of Fact 14 and 15, supra.

26. Mr. Reecy acknowledged that in the instant case, the substance of the 2014 and 2015 Surveyor Certification forms was identical, and that the information provided by La Joya using the 2014 form was the same information required by the 2015 form.

CONCLUSIONS OF LAW

27. Florida Housing has jurisdiction over this matter, pursuant to sections 120.569 and 120.57(2)&(3), Florida Statutes. Florida Housing has contracted with DOAH to provide an Administrative Law Judge to conduct the informal hearing in this case.

28. All parties have standing to participate in this proceeding. §§ 120.52(13) & 120.569(1), Fla. Stat. The "substantial interests" of La Joya, as the proposed recipient of funding pursuant to the RFA, are affected because Douglas Gardens has alleged that Florida Housing made a mistake in considering La Joya's Surveyor Certification form. The substantial interests of Douglas Gardens are affected because it is next in line for a funding award under the RFA's criteria, and Douglas Gardens would be the proposed recipient of funding if La Joya is deemed ineligible. See, e.g., Preston Carroll Co. v. Fla. Keys Aqueduct Auth., 400 So. 2d 524 (Fla. 3d DCA

1981)(second lowest bid establishes substantial interest in bid protest).

29. 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. . . .

30. Pursuant to section 120.57(3)(f), the burden of proof rests with Douglas Gardens as the party opposing the proposed agency action to prove "a ground for invalidating the award." See State Contracting and Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Douglas Gardens must prove by a preponderance of the evidence that Florida Housing's proposed award of SAIL funding to La Joya is arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency.[1/] 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.

31. 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)[2/] 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.

32. 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, Douglas Gardens also must establish that the Department's violation was either

clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

33. 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.")

34. 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)).

35. 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).

36. 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 Enterprises v. Dep't of Envtl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

37. 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. Dravco Basic Materials Co. v. Dep't of Transp., 602 So. 2d 632, n.3 (Fla. 2d DCA 1992).

38. In the instant case, Douglas Gardens contends that the plain language of Section Four A.6.a.(1) of the RFA mandates that La Joya's Surveyor Certification form be rejected. The cited provision expressly states: "If the Applicant provides

any prior version of the Surveyor Certification form, the form will not be considered." La Joya concedes that its submission did not comply with the literal terms of the RFA, but argues that its deviation was no more than a "minor irregularity" which Florida Housing retained the authority to waive.

39. In Lockheed Martin Information Systems v. Department of Children & Family Services., Case No. 98-2570BID (DOAH Dec. 21, 1998), ALJ Ella Jane P. Davis wrote the following language that provides guidance as to the instant proceeding:

> 76. This case hangs on what the words "shall, will, and must" mean in this particular RFP, what constitutes a material deviation from the specifications of the RFP, and how waiver of such terms affect cost and competitive bidding.
>
> 77. Courts favor an interpretation of bid contract provisions using the plain meaning of the words. Quesada v. Director, Federal Emergency Management Agency, 577 F.Supp. 695 (S.D. Fla. 1983), and Tropabest Foods, Inc. v. State, Department of General Services, 493 So. 2d 50 (Fla. 1st DCA 1986). Common sense suggests that a straight-forward analysis of bid language is always best, but not every failure of a proposer to adhere to "shall, will, and must" language is a fatal deviation. . . .
>
> 78. A variance is material only when it gives the bidder a substantial advantage over other bidders and restricts or stifles competition. See Tropabest Foods, Inc. v. State of Florida, Department of General Services, supra. A bid containing a material variance is unacceptable. The courts have applied two criteria to

> determine whether a variance is substantial and hence cannot be waived.
>
> > [F]irst, whether the affect [sic] of a waiver would be to deprive the municipality of its assurance that the contract would be entered into, performed and guaranteed according to its specified requirements, and second, whether it is of such a nature that its waiver would adversely affect competitive bidding by placing a bidder in a position of advantage over other bidders or by otherwise undermining the necessary common standard of competition.
>
> See Robinson Electrical Company, Inc. v. Dade County, 417 So. 2d 1032, 1034 (Fla. 3d DCA 1982) and Harry Pepper and Associates, Inc. v. City of Cape Coral, [352 So. 2d 1190 (Fla. 2nd DCA 1977)].

40. La Joya deviated from a mandatory provision of the RFA. However, under all the facts of the case, that deviation cannot be considered as anything but a minor irregularity. La Joya achieved no competitive advantage over the other applicants by virtue of its submission of a 2014 Surveyor Certification form that was in all relevant particulars identical to the mandated 2015 form. The information submitted by La Joya on the 2014 form was the same as that required by the 2015 form. The deviation was so slight that two experienced Florida Housing reviewers did not notice it until Douglas Gardens pointed it out in its Petition.

41. None of the policy considerations cited by Mr. Reecy would be transgressed by an award of funding to La Joya under the specific circumstances of this case. La Joya's application was in all relevant respects consistent with the other RFA applications. While the Surveyor Certification form submitted by La Joya was not the one specified in the RFA, its contents were the same for purposes of scoring this RFA. Waiving the minor irregularity in this case would not be inconsistent with Florida Housing's overall concern with maintaining consistency and predictability in the competitive procurement process.

42. There is in this case no element of collusion, favoritism, fraud, or unfair competition. Florida Housing was able to make an exact comparison of the applications. An award of funding to La Joya in this case is a reasonable exercise of the agency's authority to waive minor irregularities and is neither arbitrary nor capricious.

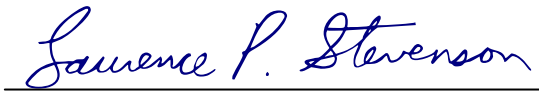
43. It is concluded that Douglas Gardens has failed to carry its burden of proving that Florida Housing's decision to award funding to La Joya's application was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

RECOMMENDATION

Based on the foregoing, it is

RECOMMENDED that a final order be entered by the Florida Housing Finance Corporation dismissing the Formal Written Protest and Petition for Administrative Hearing filed by Douglas Gardens V, Ltd., and finding that La Joya, Ltd. is eligible for funding under Request for Applications 2015-112.

DONE AND ENTERED this 29th day of February, 2016, 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 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of February, 2016.

ENDNOTES

[1/] Despite Florida Housing's reversal of position at the time of the hearing, the decision under review in this proceeding remains the initial award of funding to La Joya. The burden remains with Douglas Gardens.

[2/] 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).

COPIES FURNISHED:

Michael P. Donaldson, Esquire
Carlton Fields Jorden Burt, P.A.
Post Office Drawer 190
215 South Monroe Street, Suite 500
Tallahassee, Florida 32302
(eServed)

Donna Elizabeth Blanton, Esquire
Radey Law Firm, P.A.
Suite 200
301 South Bronough Street
Tallahassee, Florida 32301
(eServed)

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

Eric Sonderling, Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
(eServed)

Kate Flemming, Corporation Clerk
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
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

DOUGLAS GARDENS V, LTD.,

Petitioner,

v.

DOAH CASE NO. 16-0418
FHFC CASE NO.: 2016-177BS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

LA JOYA ESTATES, LTD.,

Intervenor.

_____/

RECEIVED
16 MAR -7 PM 4:25
FLORIDA HOUSING FINANCE CORPORATION

PETITIONER'S AND RESPONDENT'S JOINT OBJECTIONS/EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to section 120.57(3)(e), Florida Statutes, and rule 67-60.009(3)(b), Florida Administrative Code, Petitioner Douglas Gardens V., Ltd. ("Douglas Gardens") and Respondent Florida Housing Finance Corporation ("Florida Housing") file these joint objections/exceptions to certain Conclusions of Law in the Recommended Order dated February 29, 2016. Specifically, Douglas Gardens and Florida Housing object to Paragraphs 40, 41, 42, and 43 of the Conclusions of Law and the ensuing Recommendation on page 21 of the Recommended Order.

I. Introduction

As set forth below, adoption of the Recommended Order by Florida Housing would result in an award of funding to Intervenor La Joya Estates, Ltd. ("La Joya Estates"). That result would be contrary not only to the legal arguments of Douglas Gardens, but also to the legal arguments asserted by Florida Housing both at the final hearing and in its Proposed Recommended Order. The Administrative Law Judge ("ALJ") essentially ignored Florida Housing's admission at the final hearing that the agency made a mistake in its original scoring of La Joya Estates' application

and that the agency had since determined that La Joya should not be awarded funding. More significantly, the ALJ gave no deference to Florida Housing's interpretation of its own rules, which the Corporation maintained would allow La Joya Estates' application to remain eligible.

Adopting the ALJ's Conclusions of Law would establish a dangerous precedent that expands the definition of "minor irregularity" and removes Florida Housing's discretion – especially in the context of a clear mistake – to determine what constitutes a "minor irregularity" as defined in rule 67-60.002(6) and whether any such "minor irregularity" should be waived in accordance with rule 67-60.008. Instead, such decisions would be made by ALJs, who lack Florida Housing's expertise, without any deference to the Corporation's interpretation of its own rules. Such a result is contrary to law and would create inconsistency from RFA to RFA, which is what Florida Housing has tried to prevent. Additionally, accepting the challenged Conclusions of Law would drastically limit the discretion of the Corporation in administering its competitive solicitation programs.

Section 120.57(1)(l), Florida Statutes, restricts an agency's authority to reject or modify Findings of Facts in a Recommended Order. In this proceeding, the parties agreed that no disputed issues of material fact exist, and the hearing was conducted pursuant to sections 120.57(2) and (3), Florida Statutes. Consistent with the position of all parties, the Administrative Law Judge ("ALJ") relied primarily on the parties' Prehearing Stipulation in his Findings of Fact. Douglas Gardens and Florida Housing take no issue with the factual findings in Paragraphs 1-25 of the Recommended Order.

State agencies have much more flexibility to change Conclusions of Law in a Recommended Order. Section 120.57(1)(l), Florida Statutes, provides in relevant part:

> 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 conclusions 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 supplied).

In this case, for the reasons discussed below, Florida Housing should exercise its discretion to reject the ALJ's Conclusions of Law in Paragraphs 40, 41, 42, and 43 and the ALJ's ultimate Recommendation that La Joya Estates be awarded funding.

II. Background

On October 9, 2015, Florida Housing issued RFA 2015-112. It sought applicants interested in State Apartment Incentive Loan ("SAIL") funding that would be used in conjunction with tax-exempt bond financing and non-competitive housing credits. On December 11, 2015, Florida Housing's Board of Directors met to consider the recommendations of the staff review committee regarding the RFA, and posted its Notice of Intended Decision. The Notice set forth the scoring and ranking of the applications, in which both La Joya Estates and Douglas Gardens were found eligible for funding. La Joya Estates was selected to receive funding due to the RFA preference for a housing development to be located in Miami-Dade County. R.O., p. 2.[1] Had La Joya Estates' application been deemed ineligible, Douglas Gardens would have been recommended for funding. R.O., ¶ 28.

Douglas Gardens timely filed with Florida Housing its notice of protest and a formal written protest. *Id.* at p. 3. La Joya Estates intervened in the proceeding. *Id.* After all parties agreed that the case raised no disputed issues of material fact, Florida Housing contracted with the

---

[1] The Recommended Order will be referred to as "R.O."

Division of Administrative Hearings ("DOAH") to assign an ALJ to act as an informal hearing officer in the matter. *Id.* The informal hearing was held on February 9, 2016, with all parties presenting oral argument. *Id.* The only witness to testify was Ken Reecy, Florida Housing's Director of Multifamily Programs. *Id.* at p. 4. All parties timely submitted Proposed Recommended Orders, and the Recommended Order was issued on February 29, 2016. *Id.*

III. This Case Involves a Single Legal Issue

The sole legal issue presented in this case is whether La Joya Estates should have been found ineligible for funding because it failed to submit the Surveyor Certification Form mandated by the RFA.[2] Section Four A.6.a.(1) of RFA plainly provides:

> a. Surveyor Certification Form:
> (1) In order to meet the Mandatory requirement and be eligible for proximity points, all Applicants must provide an acceptable Surveyor Certification form, (Form Rev. 07-15), as **Attachment 14** to Exhibit A, reflecting the information outlined below. The Surveyor Certification form (Form Rev. 07-15) is provided in Exhibit B of this RFA and on the Corporation's Website . . . . Note: The Applicant may include the Florida Housing Surveyor Certification form that was included in a previous RFA submission for the same proposed Development, provided (i) the form used for this RFA is labeled Form Rev. 07-15, (ii) other than the RFA reference number on the form, none of the information entered on the form and certified to by the signatory has changed in any way, and (iii) the requirements outlined in this RFA are met. The previous RFA number should be crossed through and RFA 2015-112 inserted. If the Applicant provides any prior version of the Surveyor Certification form, the form will not be considered.

Stip., R.O., ¶ 12 (emphasis supplied).

---

[2] Douglas Gardens and Florida Housing argued that Florida Housing's initial decision to award funding to La Joya Estates was "contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications." § 120.57(3)(f), Fla. Stat. Additionally, Douglas Gardens and Florida Housing argued that Florida Housing's decision was either "clearly erroneous, contrary to competition, arbitrary, or capricious." *Id.* Both parties argued that the violation of these statutory standards was triggered by the agency's original erroneous scoring of La Joya Estates' Surveyor Certification Form. *See* Douglas Gardens' PRO, ¶¶ 20-22; Florida Housing's PRO, ¶¶ 10-13; 14-18.

La Joya Estates submitted an incorrect Surveyor Certification form as Attachment 4 of its Application. The identification number in the parenthetical in the bottom left hand corner was "(Form Rev. 10-14)" rather than the required "(Form Rev. 07-15)." R.O., ¶ 16. When this issue was first called to Florida Housing's attention by Douglas Gardens in its petition, Florida Housing realized its mistake, and all of its witnesses testifying in this case said that La Joya Estates' Surveyor Certification Form should never have been scored and its Application should have been found ineligible for funding. R.O., ¶¶ 21, 22, 23, 24.

Jean Salmonsen, a Housing Development Manager for Florida Housing, even testified that she disqualified a different applicant in connection with RFA 2015-107 in January of this year for the exact same reason. R.O., ¶ 22. In that case, Ms. Salmonsen disqualified an application known as Seminole Parc for submitting the same version of the Surveyor Certification Form that La Joya Estates submitted. R.O., ¶ 22; Pet. Exhs. 2, 3, 4; Jt. Exh. 9, pp. 10-12. RFA 2015-107 included the same language as is in RFA 2015-112 stating that submission of an improper version of the Surveyor Certification form will result in the form not being considered. Pet. Exh. 3, p. 18. Ms. Salmonsen testified that she should have treated La Joya Estates in the same manner she treated Seminole Parc:

> Q. Would you have had occasion to notice that La Joya used the wrong form?
>
> A. Yes. Unfortunately I did look over the forms, and I did not notice that they had used the wrong form.
>
> Q. Had you caught it, what would you have done?
>
> A. The same as I had done in 2015-107. I would have said, wait a second; this one – we can't use this form. The form cannot be considered.

Jt. Exh. 9, p. 14.

Ken Reecy, Florida Housing's Director of Multifamily Programs, testified as to the need for Florida Housing to apply its rules and RFA provisions in a consistent manner because of the tremendous volume of applications the agency receives. R.O., ¶ 23. Mr. Reecy stated, "For like criteria, yes, consistency. We live and die by consistency, frankly." *Id.* Mr. Reecy also presented what the ALJ called "[s]everal valid policy reasons" for the requirement in the RFA that Applicants use only the current version of the Surveyor Identification Form. R.O., ¶ 23. The ALJ summarized Mr. Reecy's testimony as follows: "[I]t is important to apply the rules and RFA criteria in a consistent manner because of the tremendous volume of applications the agency receives." *Id.*

Although the ALJ quoted Mr. Reecy's testimony concerning consistency and referenced Ms. Salmonsen's disqualification of another applicant for use of the exact same form La Joya Estates submitted in his Findings of Fact, he apparently gave this goal of consistency little or no weight, as it was not referenced at all in his Conclusions of Law. R.O., ¶¶ 27-43. Although the ALJ gave little weight to the importance of treating all applicants the same under identical circumstances, Florida Housing and Douglas Gardens believe fundamental fairness requires such consistency. Put simply, La Joya Estates and Seminole Parc should be treated the same way.

La Joya Estates argued that its failure to use the required Surveyor Certification Form was a "minor irregularity" that Florida Housing "retained the authority" to waive. R.O., ¶ 38. The phrase "Minor Irregularity" is defined in rule 67-60.002 as "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." (Emphasis supplied).

Rule 67-60.008, Florida Administrative Code, 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.

(Emphasis supplied).

Florida Housing's witnesses testified at the final hearing that La Joya Estates' failure to use the proper Surveyor Certification Form did not meet the definition of "minor irregularity" because the Corporation's interests were adversely impacted by the Applicant's failure to comply with the provisions of the RFA, which specifically called for the use of the (07-15) Surveyor Certification Form. Tr., p. 43-44.

Moreover, Florida Housing rejected the notion that it would use its authority pursuant to rule 67-60.008 to "waive" La Joya Estates' failure to submit a form mandated by the RFA. As stated in Florida Housing's Proposed Recommended Order: "Here the issue with the Surveyor Certification Form is not a computation or typographical error but an actual omission of a required form." Florida Housing's PRO, p. 14, ¶ 24. Despite the testimony from Florida Housing's witnesses and the legal arguments put forth in its PRO, the ALJ entered a Recommended Order holding that Florida Housing was required to treat La Joya's submission of the incorrect form as a minor irregularity that must be waived. R.O., ¶¶ 40-43. Such Conclusions of Law ignore both the definition of "minor irregularity" in rule 67-60.002(6) and the discretion afforded Florida Housing in rule 67-60.008, which plainly provides that while Florida Housing "may" waive what it determines to be minor irregularities, "the Corporation shall have no duty or obligation to correct any such mistakes." The legal flaws in the ALJ's determinations are discussed below.

IV. Exceptions to the ALJ's Conclusions of Law in Paragraphs 40-43 of the Recommended Order

The ALJ, in Paragraph 39 of his Recommended Order, cites long-established case law stating that not every deviation from a bid's specifications is "material." Douglas Gardens agrees

with the concepts expressed in the cited cases and acknowledges that agencies have the ability to waive "minor irregularities" when they reserve the right to do so either in their rules or in the procurement specifications. Here, Florida Housing has a rule defining "minor irregularity" and a different rule giving the agency the discretion to waive minor irregularities, though the rule makes clear that Florida Housing has no obligation to do so. Rr. 67-60.002(6); 67-60.008. Rather than apply any case law to Florida Housing's specific rules or discuss any deference due to the agency's determination of whether or not La Joya Estates' failure to use a mandatory form was a minor irregularly, the ALJ concludes as follows in Paragraphs 40-43:

> 40. La Joya deviated from a mandatory provision of the RFA. However, under all the facts of the case, that deviation cannot be considered as anything but a minor irregularity. La Joya achieved no competitive advantage over the other applicants by virtue of its submission of a 2014 Surveyor Certification form that was in all relevant particulars identical to the mandated 2015 form. The information submitted by La Joya on the 2014 form was the same as that required by the 2015 form. The deviation was so slight that two experienced Florida Housing reviewers did not notice it until Douglas Gardens pointed it out in its Petition.
> 41. None of the policy considerations cited by Mr. Reecy would be transgressed by an award of funding to La Joya under the specific circumstances of this case. La Joya's application was in all relevant respects consistent with the other RFA applications. While the Surveyor Certification form submitted by La Joya was not the one specified in the RFA, its contents were the same for purposes of scoring this RFA. Waiving the minor irregularity in this case would not be inconsistent with Florida Housing's overall concern with maintaining consistency and predictability in the competitive procurement process.
> 42. There is in this case no element of collusion, favoritism, fraud, or unfair competition. Florida Housing was able to make an exact comparison of the applications. An award of funding to La Joya in this case is a reasonable exercise of the agency's authority to waive minor irregularities and is neither arbitrary nor capricious.
> 43. It is concluded that Douglas Gardens has failed to carry its burden of proving that Florida Housing's decision to award funding to La Joya's application was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

Douglas Gardens and Florida Housing agree that Douglas Gardens had the burden of proof to establish that Florida Housing's decision is "contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications." § 120.57(3)(f), Fla. Stat. (Emphasis

supplied). The standard of proof is "whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious." *Id.* (Emphasis supplied).

The undisputed testimony from Florida Housing's witnesses was that use of the 2014 version of the Surveyor Certification Form was contrary to the plain language of the RFA. R.O., ¶¶ 20-23.

A decision is clearly erroneous when, although there is evidence to support it, after review of the entire record the tribunal is left with the definite and firm conviction that a mistake has been committed. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948) (emphasis supplied). *See also Floridian Constr. & Dev. Co. v. Dep't of Envtl. Prot.*, Case No. 09-0858BID, (DOAH May 1, 2009; Final Order June 1, 2009) ("A decision is clearly erroneous when unsupported by substantial evidence or contrary to the clear weight of the evidence or is induced by an erroneous view of the law.").

Florida Housing's employees consistently testified that review of La Joya Estates' Surveyor Certification form was a mistake and that the use of such form was not a minor irregularity that would have been waived. R.O., ¶¶ 21-22.

In determining whether a decision is clearly erroneous, a reviewing court (or administrative law judge) is required to give deference to an agency's ultimate factual determinations. These include determinations as to whether or not a deviation from a solicitation is material or a minor irregularity. For example, in *Phil's Expert Tree Service v. Broward County School Board*, DOAH Case No. 06-4499BID (March 19, 2007), ALJ John G. Van Laningham stated at Paragraph 28:

> If . . . the challenged agency action involves an ultimate factual determination – for example, an agency's conclusion that a proposal's departure from the project specifications was a minor irregularity as opposed to a material deviation – then some deference is in order, according to the clearly erroneous standard of review.

(Emphasis supplied).

The ALJ also emphasized that an agency is entitled to deference when interpreting its own rules:

> There is another species of agency action that also is entitled to review under the clearly erroneous standard: interpretations of statutes for whose administration the agency is responsible, and interpretations of the agency's own rules. *See State Contracting and Engineering Corp. v. Department of Transp.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1988). In deference to the agency's expertise, such interpretations will not be overturned unless clearly erroneous. *Id.*

Id. at ¶ 29. In a footnote to this paragraph, the ALJ went on to say that "[f]rom the general principle of deference follows the more specific rule that an agency's interpretation need not be the sole possible interpretation or even the most desirable one; it need only be within the range of permissible interpretations." *Id.*, ¶ 28, n.5. *See also Miles v. Florida A and M University*, 813 So. 2d 242, 245 (Fla. 1st DCA 2002) ("A reviewing court should defer to an agency's interpretation of its own rules unless the interpretation is clearly erroneous"); *Golfcrest Nursing Home v. State, Agency for Health Care Admin.*, 662 So. 2d 1330, 1333 (Fla. 1st DCA 1995) ("An agency's interpretation of its own rules and regulations is entitled to great weight, and shall not be overturned unless the interpretation is clearly erroneous."); *State v. Sun Gardens Citrus, LLP*, 780 So. 2d 922, 925 (2001) ("Trial courts must afford great deference to an agency's or department's interpretation of a rule it promulgated concerning matters that are administered by that agency or department.").

Here, the ALJ gave no deference to Florida Housing's testimony at hearing that it made a mistake in originally scoring La Joya Estates' Surveyor Certification Form. Nor did the ALJ even discuss the issue of deference to Florida Housing's interpretation of rules 67-60.002(6) and 67-60.008. Instead, the ALJ treated Florida Housing as if it were not the agency, but just another party

litigant. While that may be appropriate when an agency changes a previous legal position,[3] the undisputed testimony here was that the reviewers of La Joya Estates' Surveyor Certification Form did not realize that the Applicant had submitted an improper form. R.O., ¶¶ 21-22. Had they realized it, they would not have scored the form. *Id.* Once that mistake became apparent from Douglas Gardens' protest petition, the agency immediately conceded error, consistent with its longstanding position that the form should not have been scored. *See* Prehearing Stipulation (statement of Respondent).

Notably, Florida Housing has changed its position before in disputes involving its competitive solicitations, and other ALJs have acknowledged that change and agreed with the Corporation's new position. *See, e.g., Houston Street Manor Limited Partnership v. Florida Housing Finance Corp.*, DOAH Case No. 15-3302BID (August 18, 2015); *Pinnacle Heights, LLC v. Florida Housing Finance Corp.*, DOAH Case No. 15-3304BID (August 31, 2015). In both of these cases, which involved scoring decisions concerning proximity to transportation services, the ALJs also expressed the views that Florida Housing would have no authority to waive as a minor irregularity the mandatory specifications in its RFA. For example, in *Pinnacle Heights*, ALJ D.R. Alexander wrote:

> [T]he proximity scoring for Rio upon which the preliminary allocation was based is clearly erroneous and contrary to the RFA specifications. The deviation from specifications is not a minor irregularity. To allow the initial scoring for Rio to

[3] This situation is different from that outlined in *Phil's Tree Service*, where the ALJ stated: "When an agency asserts for the first time as a party litigant in a bid protest that an irregularity was immaterial, the contention must be treated, not with deference as a presumptively neutral finding of ultimate fact, but with fair impartiality as a legal argument; in other words, the agency is entitled to nothing more or less than to be heard on an equal footing with the protester." *Id.* at ¶ 56, n.13. Here the opposite is true. The Corporation realized it had made an unintentional mistake in its original scoring decision and acknowledged the mistake in a *de novo* proceeding. *See* § 120.57(3)(f); *State Contracting and Eng'g Corp.*, 709 So. 2d at 609 ("The judge may receive evidence, as with any formal hearing under section 120.57(1)) . . . ." Given the nature of the proceeding, the ALJ should have taken into account Florida Housing's position at hearing.

> stand would only be contrary to the RFA, it would be contrary to competition and give Rio a competitive advantage. The agency itself agrees that the preliminary scoring of Rio's application was incorrect.

Case No. 15-3304BID, at ¶ 22.

Here, the ALJ stated that La Joya Estates gained no competitive advantage by its failure to use a form required by the RFA. However, the testimony at hearing from Mr. Reecy was contrary to that assertion. He stated that allowing an otherwise ineligible application to remain eligible would provide a competitive advantage. Tr., p. 50. As Florida Housing stated in its Proposed Recommended Order: "It is without question that the proximity requirements of the RFA are mandatory. Moreover, ignoring this admitted error on the part of La Joya, where its competitor Douglas Gardens committed no such error, would provide La Joya with an advantage not enjoyed by its competitors . . . ." Florida Housing's PRO, p. 14, ¶ 22.

As noted in the previous section, Mr. Reecy also testified that allowing applicants to use different versions of the Surveyor Certification form would adversely affect Florida Housing, which scores many applications in connection with numerous RFAs every year. R.O., ¶¶ 23-24. Because the Surveyor Certification forms regularly change, the possibility that applicants for funding in a particular RFA would not be scored on a level playing field would increase if everyone is not required to use the most current version of the form. *Id.*[4] Put simply, Florida Housing could

---

[4] A review of Florida Housing's website shows that 10 RFAs were issued by Florida Housing in 2013; 17 were issued in 2014; 15 were issued in 2015; and five have been issued so far in 2016. http://www.floridahousing.org/Developers/MultiFamilyPrograms/Competitive/. These RFAs typically include many forms that developers must complete, all of which are reviewed and scored by Florida Housing employees. For example, RFA 2015-112 identified 22 attachments, many of which were adopted Florida Housing forms that were evaluated to determine whether the applicant had site control, appropriate zoning, availability of electricity, water, sewer, and roads, as well as proximity to services. Mr. Reecy testified that requiring applicants to use the most current version of the Surveyor Certification form is essential to ensure that reviewers are evaluating all applicants on the same criteria. R.O., ¶ 24. Such testimony is credible, given the number and complexity of Florida Housing's solicitations.

not consider La Joya Estates' failure to follow the explicit, mandatory requirements of the RFA to be a "minor irregularity" because to do so would hurt the interests of the Corporation. *See* R. 67-60.002(6) (definition of "minor irregularity," which includes a variation that "does not adversely impact the interests of the Corporation or the public.").

Even if a mistake by an applicant could be construed as meeting the definition of "minor irregularity" in rule 67-60.002(6), rule 67-60.008 neither compels nor requires Florida Housing to waive minor irregularities. Rather, the rule vests such discretion in the agency, as evidenced by the last clause of the rule: "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." (Emphasis supplied). Use of a prior version of the Surveyor Certification form, which is prohibited by the plain and unambiguous language of the RFA, is not akin to "computation and typographical errors," and Florida Housing certainly has the discretion to determine that La Joya Estates' error is not a "minor irregularity" that can be waived. Further, even if Florida Housing determined that La Joya Estates' failure to follow requirements of the RFA to be a minor irregularity, the Corporation has no duty or obligation to correct the mistake.

Rule Chapter 67-60 was adopted pursuant to authority conferred on Florida Housing by the Legislature in Chapter 420, Florida Statutes. Rules 67-60.002(6) and 67-60.008 implement sections 420.507(48), 420.5087, 420.5089(2), and 420.5099, Florida Statutes. Each of these statutory provisions governs programs through which Florida Housing awards funds through competitive solicitations. For the same reasons that deference is given to agency rules, deference also is given to agency interpretations of statutes the agency is charged with administering.

Lakeland Reg'l Med. Ctr., Inc. v. Agency for Health Care Admin., 917 So. 2d 1024, 1029 (Fla. 1st DCA 2006); Level 3 Comm'ns v. Jacobs, 841 So. 2d 447, 450 (Fla. 2003); *Verizon Fla., Inc. v. Jacobs*, 810 So. 2d 906, 908 (Fla. 2002). The reason for such deference has been described as follows:

> Agencies generally have more expertise in a specific area they are charged with overseeing. Thus, in deferring to an agency's interpretation, courts benefit from the agency's technical and/or practical experience in its field.

Rizov v. Bd. of Prof'l Eng'rs, 979 So. 2d 979, 980-81 (Fla. 3d DCA 2008).

Florida Housing's competitive solicitation processes involve many policy considerations relating to the need for certain types of affordable housing and the appropriate means of selecting applicants for funding awards. Most litigation involving Florida Housing's recommendations in these cases turns on the question of whether a variation in an application is a minor irregularity or a material deviation. *See, e.g., Heritage at Pompano Housing Partners, Ltd. v. Florida Housing Finance Corp.*, DOAH Case No. 14-1361BID (June 10, 2014); *Pinnacle Rio, LLC v. Florida Housing Finance Corp.*, DOAH Case No. 14-1398BID (June 4, 2104). If the precedent in this case is allowed to stand, Florida Housing's flexibility in making these determinations will be limited, and ALJs will decide both whether an error is a minor irregularity and whether Florida Housing is required to waive a deviation as a minor irregularity, as the ALJ did here.

Given the number of solicitations conducted each year and the complexity of the scoring processes Florida Housing employs, deferring to Florida Housing's interpretation of whether a particular error by an applicant is a material deviation from the RFA or a minor irregularity is both reasonable and appropriate. This is a policy consideration best left to the discretion of the agency. *Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs.*, 500 So. 2d 620, 623 (Fla. 1st DCA 1986) ("Matters that are susceptible of ordinary methods of proof, such as determining the

credibility of witnesses or the weight to accord evidence, are factual matters to be considered by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion."); *see also Pillsbury v. State, Dep't of Health & Rehab. Servs.*, 744 So. 2d 1040, 1042 (Fla. 1st DCA 1999).

For the reasons expressed, Florida Housing should change the ALJ's Conclusions of Law in Paragraphs 40-43 of his Recommended Order and reverse the ultimate Recommendation that a Final Order be entered dismissing the Formal Written Protest and Petition for Administrative Hearing filed by Douglas Gardens and finding that La Joya Estates is eligible for funding pursuant to RFA 2015-112.

Respectfully submitted,

/s/ Donna E. Blanton
DONNA E. BLANTON
Florida Bar No. 948500
dblanton@radeylaw.com
Radey Law Firm
301 S. Bronough Street, Suite 200
Tallahassee, Florida 32301
Tel: 850-425-6654/ Fax: 850-425-6694
COUNSEL FOR DOUGLAS GARDENS V, LTD

/s/ Eric Sonderling
HUGH BROWN
Florida Bar No. 0003484
General Counsel
ERIC SONDERLING
Florida Bar No. 0085425
Assistant General Counsel
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329
Telephone: (850) 488-4197
Facsimile: (850) 414-6548
hugh.brown@floridahousing.org
eric.sonderling@floridahousing.org

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

I certify that a true copy of the foregoing was served this 7th day of March, 2016, by email to the following:

Michael Donaldson
Florida Bar No. 0802761
Carlton Fields, P.A.
P.O. Drawer 190
Tallahassee, Fl 32302
Telephone: (850) 224-1585
Facsimile: (850) 222-0398
mdonaldson@carltonfields.com

Attorney for Intervenor

s/ Donna E. Blanton
DONNA E. BLANTON

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

DOUGLAS GARDENS V LTD.,

Petitioner,

v.

DOAH CASE NO. 16-0418
FHFC CASE NO.: 2016-177BS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

LA JOYA ESTATES, LTD.,

Intervenor.
_____/

INTERVENOR'S RESPONSE TO
JOINT EXCEPTIONS TO RECOMMENDED ORDER

La Joya Estates, Ltd. ("La Joya"), responds to the Joint Exceptions to Recommended Order filed by Douglas Gardens V Ltd ("Douglas Gardens") and Florida Housing Finance Corporation ("Florida Housing") as follows:

I. Introduction

Following an informal hearing where there were no disputed issues of fact, a Recommended Order was issued in this case by the Administrative Law Judge ("ALJ") on February 29, 2016, recommending that a final order be entered dismissing the protest filed by Douglas Gardens. The ALJ also recommended that

La Joya be found eligible for funding under RFA 2015-112. On March 7, 2016, Douglas Gardens and Florida Housing not satisfied with the ALJ's findings, conclusions and recommendation, jointly filed exceptions to the ALJ's Recommended Order. The Joint Exceptions specifically challenge the ALJ's Conclusions of Law 40, 41, 42 and 43. The Joint Exceptions also call into question the ALJ's Findings of Fact 21-24. The ALJ's Findings of Fact are supported by competent substantial evidence and the conclusions of law are consistent with Florida Law and both Florida Housing Rules and its policies concerning the scoring of applications submitted in response to RFAs. The Joint Exceptions should be denied by this Board and the Recommended Order adopted in toto.

II. Standard of Review

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

> . . . a de novo proceeding to determine whether the **agency's proposed action is c**ontrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceeding shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

Florida Housing's proposed agency action under review in this proceeding is the decision rendered by this Board on December 11, 2015, which found La Joya

eligible and awarded funding to La Joya in the amount requested in its application.

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

Florida Housing may not modify or reject an a ALJ's finding of fact unless it determines from a review of the entire record - and states with particularity in the final order - that the finding of fact was not based on competent substantial evidence, or that the proceedings on which the finding was based did not comply with the essential requirements of law. *Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs.*, 500 So. 2d 620, 623 (Fla. 1st DCA 1986) ("It is well settled that an agency may not reject a hearing officer's factual findings on the conclusionary ground that they are not supported by competent substantial evidence, without offering specific reasons for such rejection.") "Competent" evidence is evidence that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached. *Schrimsher v. Sch. Bd. of Palm Beach Cnty.*, 694 So. 2d 856, 860 (Fla. 4th DCA 1997) (citing

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

As part of this analysis, Florida Housing may not reweigh the evidence. Similarly, Florida Housing may not substitute its findings simply because it would have determined factual questions differently. *F.U.S.A., FTP-NEA v. Hillsborough Cnty. Coli.,* 440 So. 2d 593, 595-96 Fla. 1st DCA 1983); *see also Resnick v. Flagler Cnty. Sch. Bd.*, 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010) (agency may not reject findings of fact supported by competent substantial evidence even if alternate findings were also supported by competent substantial evidence); *Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Bevs. & Tobacco,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to

decide the issue one way or the other."). "Factual inferences are to be drawn by the [ALJ] as a trier of fact." *Id.* at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of facts. §120.57(1)(1), Fla. Stat. Therefore, if the record contains any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing its Final Order. *See, e.g., Walker v. Bd. of Prof Eng'rs*, 946 So. 2d 604 (Fla. 1st DCA 2006); Fla. *Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals*, 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("The agency's scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence. The agency makes no factual findings in reviewing the recommended order.") (emphasis added, citations omitted).

Florida Housing may modify or reject conclusions of law where it has substantive jurisdiction. § 120.57(1)(1), Fla. Stat.; *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998) (affirming final order in which Florida Housing rejected ALJ's interpretation of Florida Housing's rule); *see generally Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 2001).

When modifying or rejecting conclusions of law, Florida Housing must state with particularity the reasons for the modification or rejection, and must make a finding that its substituted conclusion of law is as or more reasonable then the conclusion modified or rejected. § 120.57(1)(1)

Additionally, the labeling of a legal conclusion as a "finding of fact" does not convert the conclusion into a factual finding. *See Pillsbury v. Dep't of Health and Rehab. Servs.*, 744 So. 2d 1040, 1041-42 (Fla. 2d DCA 1999) Rather, the true nature and substance of the ALJ's statement controls. *JJ Taylor Cos. v. Dep't of Bus. & Prof'l Regulation,* 724 So. 2d 192 (Fla. 1st DCA 1999); *see also Baptist Hosp.,* 500 So. 2d 623; *Holmes v. Turlington,* 480 So. 2d 150, 153 (Fla. 1st DCA 1985). Matters that are susceptible of ordinary methods of proof – such as weighing the evidence or determining a witness's credibility – are factual maters to be determined by the ALJ. *See Baptist Hosp.,* 500 So. 2d at 623; *Homes,* 480 So. 2d at 153.

"Ultimate facts" are "those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other and are the final resulting effects which are reached by the process of logical reasoning from the evidentiary facts." *Feldman v. Dep't of Transp.*, 389 So. 2d 696, 694 (Fla. 4th DCA 1980). The question whether the facts establish a

violation of a rule or statute, for example, involves a question of ultimate fact that Florida Housing may not reject without adequate explanation. *See Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

III. Response

The Joint Exceptions include introductory sections titled "Introduction" "Background" and "This case involves a single issue". These sections purport to provide information for the Board to consider in ruling on the Joint Exceptions. These sections include a recitation of some of the facts of the case (in light most favorable to Douglas Gardens and Florida Housing), along with legal arguments made at hearing and addressed in the proposed recommended orders filed by both Douglas Gardens and Florida Housing. In essence both Florida Housing and Douglas Gardens in these sections are simply rearguing their case made to the ALJ in the hopes that the Board will overturn the well-reasoned findings and conclusions found in the Recommended Order. This Board should only consider these sections as legal argument in its consideration of any specific exceptions made and not as an opportunity to simply reargue the case.

While the Joint Exceptions do not directly challenge any of the ALJ's Findings of Fact they nonetheless call into question the weight afforded by the ALJ in reaching his Findings of Fact at paragraphs 21-24 which provide as follows:

21. Ms. Boyd testified that she did not notice that La Joya's Surveyor Certification form was a prior version and that she scored it as if it were the current version. She testified that she should not have scored the form "[b]ecause it specifically says in the RFA, if they do not have the correct form, they will not be considered.

22. Jean Salmonsen, housing development manager, acted as a back up to Ms. Boyd in reviewing the Surveyor Identification forms and verifying the award of proximity points. Ms. Salmonsen testified that she, too, missed the fact that La Joya had filed the wrong version of the form and that she would have rejected the form had she correctly recognized it. Evidence presented at the hearing indicated that in January 2016, Ms. Samonsen had in fact disqualified an application in different RFA for submitting the 2014 version of the Surveyor Identification form.

23. Several valid policy reasons were cited for the RFA's requirement that applicants use only the current version of the Surveyor Identification Form. Ken Reecy, Florida Housing's Director of Multifamily Programs, testified that it is important to apply the rules and RFA criteria in a consistent manner because of the tremendous volume of applications the agency receives. Mr. Reecy stated, "For like criteria, yes, consistency. We live and die by consistency, frankly."

24. As to the Surveyor Certification form specifically, Mr. Reecy explained that over the years Florida Housing had used a number of different forms with different contents. Allowing applicants to submit different forms would add to the difficulty of scoring the hundreds of applications received from around the state. Uniformity and consistency as to applicant submissions allow Florida Housing to process all of these applications in a cost efficient manner.

As provided earlier the job of the Board at this juncture of the proceeding is not one of reweighing the evidence or testimony but is instead limited to determining whether the questioned Findings of Fact are supported by competent substantial evidence. These findings are all supported in the record by competent substantial evidence and neither Florida Housing nor Douglas Gardens can argue

otherwise. Moreover in the Recommended Order contrary to the allegations of the Joint Exceptions the ALJ did in fact consider all information provided by Florida Housing. Indeed over the objections of La Joya the ALJ allowed live testimony in an informal proceeding. Typically, because there are no disputed issues of fact in informal hearings, there is no live testimony. Not only did the ALJ allow the testimony of Mr. Reecy, but he also specifically cites to it and relies on it in the Recommended Order. The ALJ also considered the testimony of all Florida Housing staff who testified that La Joya gained no advantage by using the Surveyor Form it used. (Jt. Ex. 8 at 16-18, Jt. Ex. 9 at 18) Even Mr. Reecy conceded that the information provided by La Joya using (Form Rev. 10-14) is the same information requested by (Form Rev. 07-15). (T. 49-50) The questioned Findings of Fact as well as every Finding of Fact in the Recommended Order are supported by competent substantial evidence and should not be disturbed.

The Joint Exceptions take exception to the ALJ's Conclusions of Law 40-43 which provide as follows:

> 40. La Joya deviated from a mandatory provision of the RFA. However, under all the facts of the case, that deviation cannot be considered as anything but a minor irregularity. La Joya achieved no competitive advantage over the other applicants by virtue of its submission of a 2014 Surveyor Certification form that was in all relevant particulars identical to the mandated 2015 form. The information submitted by La Joya on the 2014 form was the same as that required by the 2015 form. The deviation was so slight that two experienced Florida Housing reviewers did not notice

it until Douglas Gardens pointed it out in its Petition.

41. None of the policy considerations cited by Mr. Reecy would be transgressed by an award of funding to La Joya under the specific circumstances of this case. La Joya's application was in all relevant respects consistent with the other RFA applications. While the Surveyor Certification form submitted by La Joya was not the one specified in the RFA, its contents were the same for purposes of scoring this RFA. Waiving the minor irregularity in this case would not be inconsistent with Florida Housing's overall concern with maintaining consistency and predictability in the competitive procurement process.

42. There is in this case no element of collusion, favoritism, fraud, or unfair competition. Florida Housing was able to make an exact comparison of the applications. An award of funding to La Joya in this case is a reasonable exercise of the agency's authority to waive minor irregularities and is neither arbitrary nor capricious.

43. It is concluded that Douglas Gardens has failed to carry its burden of providing that Florida Housing's decision to award funding to La Joya's application was clearly erroneous, arbitrary, or capricious, contrary to the governing statutes, rules, or RFA specifications, or was contrary to competition.

In essence the ALJ in Conclusions of Law 40-43 reaches the ultimate fact that while a deviation from the requirements of the RFA had indeed occurred, that deviation cannot be considered as anything but a minor irregularity. Both Florida Housing and Douglas Gardens take the position that more deference should have been attached to Florida Housing's change of position in the case that the deviation could not be called a minor irregularity. Apparently both Douglas Gardens and Florida Housing believe that an ALJ must defer to or yield to any decision that Florida Housing makes during a proceeding even if the position

actually changes from the initial scoring decision made. Even the case law cited in the Joint Exceptions fail to support this position. The mere fact that an ALJ independently reaches a conclusion that is the same as Florida Housing's does not necessarily mean the Judge has deferred to Florida Housing's position on that issues.

An agency's **ultimate factual determination** may be entitled to deference. In the instant case Florida Housing's ultimate factual determination and agency action challenged by Douglas Gardens was the factual determination made by the Board on December 11, 2015, which was that La Joya was eligible and should be awarded its requested funding. The ALJ makes this clear in his Recommended Order at foot note (1). The change in position made by Florida Housing at hearing is a change in "litigating position" and did not change the intended agency action under review contrary to Douglas Gardens and Florida Housing's position otherwise. This issue was specifically addressed in *Houston Street Manor Limited Partnership v. Florida Housing Finance Corporation*, DOAH Case No. 15-3302BID (August 18, 2015). Florida Housing's change in position should be afforded and is entitled no more deference than any other party litigating the issues in this proceeding. As reflected in the Findings of Fact and Conclusions of Law the ALJ considered the evidence of Florida Housing as well as its change of

position. (See Findings of Fact 20). Indeed as the Joint Exceptions point out the ALJ acknowledged Mr. Reecy's policy reasons for an applicant using only the current version of the Surveyor Identification Form. (See Finding of Fact 23) Nonetheless the ALJ based on that same testimony and the stated rules and policies of Florida Housing in moving away from the previous rigid Universal Application Cycle allocation process concluded that the award to La Joya should be upheld and was not inconsistent with the RFA or the rules and policies of Florida Housing. The argument that adopting the Recommended Order would somehow impact on Florida Housing's ability to determine what a minor irregularity is has no merit here. The challenged Conclusions of Law are well reasoned and based on competent and substantial evidence and should not be overturned or changed. The Recommended Order should be adopted in toto.

Respectfully submitted this 10th day of March, 2016.

/s/ Michael P. Donaldson
Michael P. Donaldson
Florida Bar Number 802761
CARLTON FIELDS JORDEN BURT, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302
Email: mdonaldson@carltonfields.con
Telephone: (850) 224-1585
Facsimile: (850) 222-0398

Attorneys for the Intervenor,
La Joya Estates, Ltd

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing as well as the Intervenor's Response to Exceptions to Recommended Order, has been served, this 10th day of March, 2016, via electronic transmission to the following:

For the Respondent, Florida Housing Finance Corporation,

Hugh Brown, General Counsel
Eric Sonderling, Esquire
Florida Housing and Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

For the Petitioner, Douglas Gardens V, Ltd.

Donna E. Blanton
Radey Law Firm
301 South Bronough, Suite 200
Tallahassee, FL 32301

/s/ Michael P. Donaldson
Attorney