STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WOODLAND PARK II, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

THE ENCLAVE AT NORTHSHORE, LP,

Intervenor.
_____/

FHFC Case No. 2023-005BP
DOAH Case No. 23-000685BID

JIC PALATKA APARTMENTS, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PARC WEST, LLC,

Intervenor.
_____/

FHFC Case No. 2023-008BP
DOAH Case No. 23-000686BID

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Ann McGlamory /DATE: 6/12/2023

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on June 9, 2023. Petitioners Woodland Park II, LLC ("Woodland Park") and JIC Palatka Apartments, LLC ("JIC Palatka"), and Intervenors The Enclave at Northshore, LP ("Enclave") and Parc West, LLC ("Park West"), were applicants under Request for Applications 2022-201 Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and 102.57(3), Florida Statutes, the exceptions to the Recommended Order, and the responses thereto.

On January 27, 2023, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to eight applicants, including Enclave and Parc West. Woodland Park was preliminarily deemed ineligible under the terms of the RFA for failing to meet submission requirements. JIC Palatka was deemed eligible for funding but was not selected for funding according to the funding selection process outlined in the RFA. Petitioners timely filed notices of intent to protest, followed by formal written protests, and Intervenors timely intervened.

Florida Housing referred the matters to the Division of Administrative Hearings ("DOAH") and Administrative Law Judge ("ALJ") Brittany O. Finkbeiner was assigned to conduct the final hearing. The ALJ consolidated these matters with other petitions filed by Cardinal Oaks, LLC ("Cardinal Oaks") and Flagler Pointe Apartments, LP ("Flagler Pointe"). Before the final hearing, Cardinal Oaks and Flagler Pointe voluntarily dismissed their respective petitions, and Parc West entered into a stipulation agreeing that its application should be deemed ineligible.

The hearing was conducted as scheduled on March 21, 2023. Only one contested issue, Woodland Park's ineligibility, was heard. After consideration of the oral and documentary evidence presented, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 17, 2023. The ALJ found that Woodland Park failed to meet its burden of proof to demonstrate that Florida Housing's action deeming Woodland Park ineligible was contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications. The ALJ recommended that Florida Housing enter a final order 1) finding Woodland Park ineligible for funding; and 2) finding Parc West ineligible for funding. A true and correct copy of the Recommended Order is attached as "Exhibit A."

On May 25, 2023, Woodland Park filed exceptions to the Recommended Order, a copy of which is attached as "Exhibit B." On May 31, 2023, Florida

Housing filed a response to those exceptions, a copy of which is attached as "Exhibit C." On June 1, 2023, Enclave filed a Notice of Joinder in Florida Housing's Response to Woodland Park's exceptions, a copy of which is attached as "Exhibit D."

Woodland Park's Exception No. 1 to Paragraph 32

1. Woodland Park filed an exception to Conclusion of Law paragraph 32 of the Recommended Order.

2. After a review of the record, the Board finds that Conclusion of Law paragraph 32 is a recitation of case law, dicta, reasonable, and/or the Board lacks substantive jurisdiction to modify the conclusions of law in paragraph 32.

3. The Board rejects the exceptions to the Conclusions of Law in paragraph 32 of the Recommended Order.

Woodland Park's Exception No. 2 to Paragraph 16

4. Woodland Park filed an exception to Finding of Fact paragraph 16 of the Recommended Order.

5. After a review of the record, the Board finds that the Findings of Fact in paragraph 16 are supported by competent substantial evidence.

6. The Board rejects the exceptions to the Findings of Fact in that paragraph.

Woodland Park's Exception No. 3 to Paragraphs 23 and 36

7. Woodland Park filed an exception to Finding of Fact paragraph 23 and Conclusion of Law paragraph 36 of the Recommended Order.

8. The Board finds that it has substantive jurisdicaiton over the issues presented in paragraph 36 of the Recommended Order.

9. After a review of the record, the Board finds that the Findings of Fact in paragraph 23 are supported by competent substantial evidence and the Conclusions of Law in paragraph 36 are reasonable and supported by competent substantial evidence.

10. The Board rejects the exceptions to the Findings of Fact and Conclusions of Law in that paragraphs 23 and 36.

Woodland Park's Exception No. 4 to Paragraphs 22, and 39-41

11. Woodland Park filed an exception to Finding of Fact paragraph 22 and Conclusion of Law paragraphs 39 - 41 of the Recommended Order.

12. The Board finds that it has substantive jurisdiction over the issues presented in paragraphs 39-41 of the Recommended Order.

13. After a review of the record, the Board finds that the Findings of Fact in paragraph 22 are supported by competent substantial evidence and the Conclusions of Law in paragraphs 39-41 are reasonable and supported by competent substantial evidence.

Ruling on the Recommended Order

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

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

16. The Recommendations of the Recommended Order are reasonable and supported by competent substantial evidence.

ORDER

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

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

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

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

IT IS HEREBY ORDERED that a) Woodland Park is ineligible for funding under the RFA; and b) Parc West is ineligible for funding under the RFA.

DONE and ORDERED this 9th day of June, 2023.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WOODLAND PARK II, LLC,

Petitioner,

vs. Case No. 23-0685BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ENCLAVE AT NORTHSHORE,

Intervenor.
_____/

JIC PALATKA APARTMENTS, LLC,

Petitioner,

vs. Case No. 23-0686BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PARC WEST, LLC,

Intervenor.
_____/

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Brittany O. Finkbeiner of the Division of Administrative Hearings ("DOAH"), on March 21, 2023, via Zoom conference.

APPEARANCES

For Petitioner, Woodland Park II, LLC ("Woodland Park"):

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Kristen Bond Dobson, Esquire
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215 South Monroe Street, Suite 750
Tallahassee, Florida 32301

For Petitioner, JIC Palatka Apartment, LLC ("JIC Palatka"):

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Oertel, Fernandez, Bryant & Atkinson, P.A.
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Tallahassee, Florida 32302-1110

For Respondent, Florida Housing Finance Corporation ("Florida Housing"):

Ethan Katz, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor, Enclave at Northshore, LP ("Enclave"):

James A. Boyd, Jr., Esquire
Royal American Development, Inc.
1022 West 23rd Street, Suite 300
Panama City, Florida 32405

For Intervenor, Parc West, LLC ("Parc West"):

Michael P. Donaldson, Esquire
Carlton Fields, P.A.
Post Office Drawer 190
Tallahassee, Florida 32302

STATEMENT OF THE ISSUE

The issue in this case is whether Florida Housing's proposed action to deem Woodland Park ineligible for housing credit funding under Request for Applications 2022-201 Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties ("RFA") is contrary to governing statutes, rules or policies, or the RFA specifications.[1] The standard of proof is whether Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On November 14, 2022, Florida Housing issued the RFA to solicit applications for housing tax credits. Under the RFA, applications, and their respective application fees, were due at or before 3:00 p.m. on December 28, 2022. Fifty-two applications were received in response to the RFA, including those of Woodland Park, JIC Palatka, Enclave, and Parc West. Eight applications were preliminarily recommended for funding.

On January 27, 2023, Florida Housing posted its Notice of Intent ("Notice") to award funding to eight applicants. In the Notice, Florida Housing also provided its initial determination regarding the eligibility or ineligibility of the applications submitted. Woodland Park's application was deemed ineligible and not selected for funding. Although JIC Palatka was

[1] As detailed herein, Petitioner JIC Palatka and Intervenor Parc West resolved the issues in DOAH Case No. 23-0686BID, and they are no longer in dispute.

determined to be eligible, Parc West received funding on a determination that its application was higher scoring.

Petitioners timely filed Notices of Protest followed by Petitions for Formal Administrative Hearing. Intervenors timely intervened. The petitions were referred to DOAH and consolidated.

On March 17, 2023, the parties timely filed a Joint Pre-hearing Stipulation ("Stipulation") in which they agreed to a number of material facts. Parc West stipulated to the designation of its application as ineligible for funding under the terms of the RFA. As a result, by operation of the RFA selection criteria, JIC Palatka will be selected for funding in place of Parc West. After the Stipulation, the only remaining factual issue was whether Woodland Park should be found eligible for funding, which would result in Woodland Park being selected in place of Enclave. The outcome of these proceedings will not impact any other applicants selected for funding.

At the final hearing, Joint Exhibits J-1 through J-10; Woodland Park Exhibits WP-3 through WP-13 and WP-20; and page 1 of Enclave Exhibit EN-1 were admitted into evidence. Woodland Park presented the testimony of Malcolm Kiner, Chief Operating Officer of Gainesville Housing Authority; Brian Evjen, President of Newstar Development ("Newstar"); Jean Salmonsen, Director of Multi-Family Program Allocations at Florida Housing; and Marisa Button, Managing Director of Multi-Family Programs at Florida Housing. No other party presented additional witnesses. The one-volume hearing Transcript was filed on April 21, 2023. The parties timely filed proposed recommended orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

Parties and Application Process

1. Petitioners, Woodland Park and JIC Palatka, and Intervenors, Enclave and Parc West, are RFA applicants. The developers for Woodland Park's application are Newstar; Norstar Development, a partner in Newstar; and the Gainesville Housing Authority.

2. Florida Housing is a public corporation created under section 420.504, Florida Statutes. Its purpose is to promote public welfare by financing affordable housing in Florida. Pursuant to section 420.5099, Florida Housing is designated as the housing credit agency for Florida and has the authority to establish procedures for allocating and distributing low-income housing tax credits.

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

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

5. Housing credits are made available through a competitive application process commenced by issuing a Request for Applications. A Request for Applications is equivalent to a "request for proposal," as indicated in rule 67-60.009(4).

6. The RFA was issued on November 14, 2022. The RFA deadline was 3:00 p.m. on December 28, 2022 ("Application Deadline").

7. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors ("the Board"). The review committee found 47 applications eligible and five ineligible for funding. Through the ranking and selection process outlined in the RFA, eight applications were preliminarily recommended for funding. The review committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

8. On January 27, 2023, the Board met and considered the review committee recommendations for the RFA. All applicants in the RFA (including Petitioners) received notice that the Board had adopted the review committee's recommendations and that certain eligible applicants were preliminarily selected for funding, subject to the satisfactory completion of the credit underwriting process. Such notice was provided by posting two spreadsheets, one listing the Board approved scoring results in the RFA and one identifying the applications Florida Housing proposed to fund on the Florida Housing website, www.floridahousing.org.

9. No challenges were made to the terms of the RFA.

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

JIC Palatka Application

11. JIC Palatka, Florida Housing, and Parc West have entered into a Settlement Stipulation, under which Parc West agrees to the designation of

its application number 2023-058C as ineligible; and Florida Housing agrees that the JIC Palatka application is the highest-ranked remaining small county application.

Woodland Park Application

12. The RFA requires, in pertinent part: "To be eligible for funding, the following submission requirements must have been met: (i) the Application must be submitted online by the Application Deadline; and (ii) the required Application fee must be submitted as of the Application Deadline."

13. The RFA includes detailed instructions as to how and where to submit the application fee:

> a. Application Fee
>
> By the Application Deadline, provide to the Corporation the required nonrefundable $3,000 Application fee, payable to Florida Housing Finance Corporation via check, money order, ACH, or wire transfer.
>
> To ensure that the Application Fee is processed for the correct online Application, the following is strongly recommended: (i) provide the Application Fee at least 48 hours prior to the Application Deadline; (ii) whether paying by check, money order, ACH or wire transfer, include the Development Name, RFA number with the payment; and (iii) if paying by wire, include the Federal Reference Number, or if paying by ACH, include the Trace Number at question B.1 of Exhibit A.
>
> Note: In the event that the online submission is not received, the payment will be refunded.
>
> ACH Instructions:
>
> BANK NAME: Wells Fargo
> One Independent Drive, 8th Floor
> Jacksonville, Florida 32202

ABA #: 121000248

ACCOUNT NAME: FHFC

ACCOUNT #: 4967822909

Wire Transfer Instructions:

BANK NAME: WELLS FARGO BANK, N.A.
420 MONTGOMERY STREET
SAN FRANCISCO 94104
United States of America (US)

ABA #: 121000248

ACCOUNT NAME: FHFC

ACCOUNT #: 4967822909

14. On December 22, 2022, Woodland Park initiated a wire transfer of $3,000 for its application fee ("Wire Transfer"). In the instructions to its bank, Bank of America, Woodland Park identified Florida Housing as the beneficiary of the Wire Transfer but listed an incorrect beneficiary account number ending in "2209," rather than the account number listed in the RFA, which ended in "2909." Later that same day, Woodland Park's application fee was returned by Wells Fargo to Woodland Park's Bank of America account, minus $50.

15. On December 27, 2022, Woodland Park submitted its application in response to the RFA. The application deadline was 3:00 p.m. on December 28, 2022.

16. There have been occasions, including with respect to the RFA, when Florida Housing received applications, but could not immediately locate the corresponding application fees. When this occurs, it is Florida Housing's practice to reach out to the applicants' representatives after the application deadline to confirm how fees were submitted. The record is clear that Florida Housing regularly makes efforts to reconcile misplaced application fees with

their respective applications if such fees were timely provided before the application deadline. However, it is a critical distinction in the present case that the record is devoid of any evidence that Florida Housing has ever accepted an application fee that was provided after the application deadline.

17. On December 29, 2022, the day after the Application Deadline, Florida Housing notified Woodland Park that Florida Housing had received Woodland Park's application but had not received Woodland Park's application fee. Woodland Park responded by providing Florida Housing with a copy of the Wire Transfer confirmation.

18. Shortly afterward, Florida Housing noted to Woodland Park that the account number on the Wire Transfer confirmation was incorrect.

19. On December 30, 2022, Woodland Park submitted a late application fee payment by wire transfer to Florida Housing's Wells Fargo account after the Application Deadline.

20. On January 3, 2023, Jean Salmonsen of Florida Housing emailed Woodland Park indicating that the December 30, 2022, payment received after the Application Deadline would be refunded.

21. On January 17, 2023, Florida Housing's review committee met and recommended that Woodland Park's application be deemed ineligible for failing to meet the submission requirements.

22. Florida Housing did not perform a minor irregularity analysis on the issue at the time that Florida Housing scored the applications. However, such an analysis was unnecessary given that it is clear, on its face, that Woodland Park's failure to timely provide its application fee to Florida Housing does not constitute a minor irregularity.

23. Wells Fargo was not presented in the RFA as being an agent of Florida Housing.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the parties and subject matter of this case. §§ 120.569 and 120.57(1) and (3), Fla. Stat.

25. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioner, Woodland Park, as the party opposing the proposed agency action. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Woodland Park must sustain its burden of proof by a preponderance of the evidence. *See Fla. Dep't of Transp. v. J.W.C. Co.,* 396 So. 2d 778, 787 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

26. In this bid protest, the following standards apply:

> [T]he 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 all 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.

§ 120.57(3)(f), Fla. Stat.

27. "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." *State Contracting & Eng'g Corp.*, 709 So. 2d at 609. The judge neither "sits as a substitute" for the agency nor "makes a determination whether to award the bid *de novo*." *Intercontinental Props., Inc. v. State Dep't of HRS*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992).

28. Woodland Park has the burden to prove, by a preponderance of the evidence, that Florida Housing's determination was clearly erroneous, contrary to competition, arbitrary, or capricious. *AT&T Corp. v. State, Dep't of Mgmt. Servs.*, 201 So. 3d 852, 854 (Fla. 1st DCA 2016); § 120.57(3)(f), Fla. Stat.

29. An agency's award is "clearly erroneous" if it "conflicts with the plain and ordinary intent of the law." *Colbert v. Dep't of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004). However, if the award "falls within the permissible range of interpretations," it cannot be deemed clearly erroneous. *Id.*

30. The "contrary to competition" standard is not defined by statute or rule, but generally means an award that contravenes the following purposes of competitive procurement:

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

Wester v. Belote, 138 So. 721, 723-24 (Fla. 1931); *AT&T Corp.*, 201 So. 3d at 855 ("Public procurement is intended to protect the public by promoting 'fair and open competition,' thereby reducing the appearance and opportunity for favoritism and misconduct.").

31. "An action is arbitrary if it is not supported by logic or the necessary facts, and capricious if it is adopted without thought or reason or is irrational." *Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 38-9 (Fla. 1st DCA 2006) (internal quotations omitted). Generally, the inquiry focuses on "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 Enters., Inc. v. State Dep't of Env't Regul.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). In a bid protest, deciding whether a decision is arbitrary is "generally controlled by a determination of whether the [agency] complied with its own proposal criteria." *Emerald Corr. Mgmt. v. Bay Cnty. Bd. of Cnty. Comm'rs*, 955 So. 2d 647, 653 (Fla. 1st DCA 2007). Thus, an agency's decision that "is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance ... is

neither arbitrary nor capricious." *Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992).

32. It is well-established that an agency "has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988) (quoting *Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982)). The administrative law judge should not "second guess the members of [the] evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result." *Scientific Games, Inc. v. Dittler Bros.*, 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991). Indeed, if an agency "makes an erroneous decision about which reasonable people may disagree," its decision should not be overturned "absent a showing of dishonesty, illegality, fraud, oppression or misconduct." *Sutron Corp. v. Lake Cnty. Water Auth.*, 870 So. 2d 930, 932 (Fla. 2d DCA 2004).

Parc West

33. The parties' joint determination that Parc West's application is ineligible was not clearly erroneous, contrary to competition, arbitrary, or capricious. Florida Housing's action in determining JIC Palatka's application to be the highest ranked eligible small county application was not contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications.

Woodland Park

34. The plain and unambiguous language of the RFA requires, for an application to be eligible for funding selection, an applicant must provide its application fee to Florida Housing before the Application Deadline. *See Brownsville Manor, LP v. Redding Dev. Partners, LLC, and Fla. Hous. Fin. Corp.*, 224 So. 3d 891, 894 (Fla. 1st DCA 2017) (Florida Housing is required

to interpret the RFA consistent with its plain and unambiguous language.). In the context of the RFA, there is no ambiguity as to the meaning of the word "provide."

35. Woodland Park did not send the application fee to the account number required by the RFA instructions. Instead, Woodland Park made a typographical error that resulted in Woodland Park's application fee being returned to Woodland Park's bank account. Accordingly, Florida Housing correctly determined that Woodland Park's application was ineligible for funding.

36. Woodland Park's argument that Florida Housing had an obligation to investigate, discover, and correct Woodland Park's unilateral typographical error is without merit. No such obligation exists within the RFA or under Florida law. Woodland Park argues that a similar obligation rests with Wells Fargo, and repeatedly refers to Wells Fargo as the "agent" of Florida Housing without any supporting legal argument. Wells Fargo is not Florida Housing's agent with respect to the RFA.

37. Woodland Park argues that the typographical error on its Wire Transfer should be waived as a minor irregularity.

38. Florida Housing has adopted a Right to Waive Minor Irregularities under rule 67-60.008, which states:

> Minor irregularities are those irregularities *in an Application*, such as computation, typographical, or other errors, that do not result in the omission of any material information; do not create any uncertainty that the terms and requirements of the competitive solicitation have been met; do not provide a competitive advantage or benefit not enjoyed by other Applicants; and do not adversely impact the interests of the Corporation or the public. Minor irregularities may be waived or corrected by the Corporation.

(emphasis added)

39. A plain reading of rule 67-60.008 states that, to be a waived as a minor irregularity, the basis of the minor irregularity must reside within the four corners of the application.

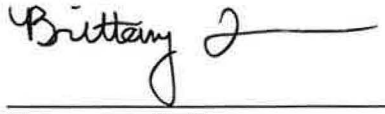
40. Even if the typographical error at issue in this case were within the application, it still could not be considered a minor irregularity as the term is defined. Although the typographical error could not be considered a minor irregularity if even one of the enumerated rule-based factors were present, Woodland Park's typographical error fails with respect to all of the factors. Woodland Park's typographical error resulted in the omission of material information; created uncertainty that the terms and requirements of the RFA were met; if waived would have provided a competitive advantage for Woodland Park over other applicants who were required to provide timely payment to earn their eligibility for funding; and would adversely impact Florida Housing by creating a burden to correct applicants' unilateral mistakes.

41. Florida Housing's determination that Woodland Park's application was ineligible was not clearly erroneous, contrary to competition, arbitrary, or capricious. Woodland Park fails to meet its burden of proof under section 120.57(3)(f) by failing to demonstrate that Florida Housing's action was contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing enter a final order finding that Woodland Park II, LLC, is ineligible for funding under the RFA; and Parc West, LLC, is ineligible for funding under the RFA.

DONE AND ENTERED this 17th day of May, 2023, in Tallahassee, Leon County, Florida.



BRITTANY O. FINKBEINER
Administrative Law Judge
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2023.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 10 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WOODLAND PARK II, LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

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DOAH Case No. 23-0685BID

JIC PALATKA APARTMENTS, LLC,

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PARC WEST, LLC,

Intervenor.

DOAH Case No. 23-0686BID

WOODLAND PARK II, LLC'S
EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to section 120.57(1)(k), Florida Statutes, and Florida Administrative Code Rule 28-106.217, Woodland Park II, LLC ("Woodland Park") files the following exceptions to the Recommended Order issued in this proceeding. This proceeding involves an application for housing tax credits filed by Woodland Park. For the reasons set forth below, Woodland Park urges

Florida Housing Finance Corporation ("Florida Housing") to reject findings of fact in the Recommended Order that are not supported by competent, substantial evidence and that are inconsistent with other findings of fact. Woodland Park also urges Florida Housing to reject conclusions of law in the Recommended Order that are not reasonable and not supported by the record evidence. A proper application of the Agency's own rules should result in the funding of Woodland Park's Application.

I. BACKGROUND

This case concerns the eligibility of Woodland Park's Application to receive funding from Florida Housing pursuant to RFA No. 2022-201. If Woodland Park was deemed eligible, it would have been scored highly enough to receive funding under the terms of the RFA. However, Florida Housing rejected Woodland Park's Application as ineligible, asserting that Woodland Park failed to provide a required $3,000 application fee.

There is no dispute that Woodland Park provided an application payment of $3,000 to the bank identified in the RFA for fee payments, Wells Fargo. In fact, the application fee was provided six days in advance of the application deadline. Unfortunately, the wire transfer contained a typographical error. Though Woodland Park identified Florida Housing as the recipient and identified the RFA within the payment sent to Wells Fargo, the bank account number on the transfer was off by one digit. The wire transfer identified an account number in "2209" rather than ending in "2909," as listed in the RFA.

After receiving the payment, and without informing anyone at Florida Housing or Woodland Park, Wells Fargo subtracted $50 and sent $2,950 back to the Woodland Park account that originally provided the payment. This return was not discovered until the application window

had closed. Subsequently, Florida Housing refused to accept the re-submitted application fee, citing the deadline.

In the proceeding below, Woodland Park filed a Proposed Recommended Order consisting of 37 pages and 69 proposed findings of fact. In a brief, truncated 14-page Recommended Order, the Administrative Law Judge ("ALJ") assigned to this dispute summarily rejected Woodland Park's protest, concluding simply that the account number error was a material defect that should not be waived as a minor irregularity. As noted in the exceptions below, the ALJ simply ignored proven facts that did not support the recommendation, and applied an incorrect, highly deferential legal standard to the proceedings. These errors require correction. Woodland Park urges Florida Housing to review the record in the proceeding below, approve these Exceptions, and fund Woodland Parks' worthwhile affordable housing proposal.

II. STANDARD OF REVIEW

A. Standard Applicable to Exceptions

Woodland Park does not seek to have Florida Housing re-weigh the evidence presented at the final hearing, nor does it seek to substitute new findings for those factual matters decided by the administrative law judge. Woodland Park files these Exceptions with the full understanding that, at this stage of review, Florida Housing is not free to re-weigh the evidence or to reject findings of fact unless there is no competent, substantial evidence to support them. *See Health Care & Retirement Corp. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987); *Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Schumacker v. Dep't of Prof'l Regulation,* 611 So. 2d 75 (Fla. 4th DCA 1982). However, Woodland Park takes exception to the conclusions of law contained in the Order, including conclusions of law that have been mislabeled as findings of fact.

Florida Housing is free to reject or modify erroneous conclusions of law over which it has substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat. Florida law is clear that Florida Housing is not bound by the judge's conclusions of law. § 120.57(1)(l), Fla. Stat.; *B.J. v. Dep't of Children & Family Servs.*, 983 So. 2d 11 (Fla. 1st DCA 2008) (explaining that an agency may disregard an ALJ's conclusions of law without limitation). Florida Housing is also free to interpret administrative rules over which it has substantive jurisdiction. *See id.* Additionally, Florida Housing has no duty to accept conclusions of law that have been mis-labeled as findings of fact. An agency is free to reject conclusions of law even when they are characterized as factual findings. *See Harloff v. City of Sarasota*, 575 So. 2d 1324 (Fla. 2nd DCA 1991); *McPherson v. Sch. Bd. of Monroe Cty.*, 505 So. 2d 682 (Fla. 3rd DCA 1987). The distinction between findings of fact and conclusions of law does not depend upon how such findings and conclusions are labeled in the Recommended Order. *See Kinney v. Dep't of State, Div. of Licensing,* 501 So. 2d 129, 132 (Fla. 5th DCA 1987) (holding that erroneously labeling a factual finding as a conclusion of law does not make it so). To the extent a finding of fact is mislabeled as a conclusion of law, the finding should be considered a part of the "conclusion of law" section, and vice versa. *See Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs.*, 500 So. 2d 620, 623 (Fla. 1st DCA 1986) ("The label affixed to a particular finding by the hearing officer or the agency is not necessarily determinative of its nature.").

Frequently, an administrative agency is in a far better position than the ALJ to rule on such matters, particularly as they relate to the interpretation and intent of rules, opinions, and other written documents prepared and issued by the agency. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1998) (courts must defer to the expertise of

an agency in interpreting its own rules); *Harloff v. City of Sarasota*, 575 So. 2d 1324 (Fla. 1st DCA 1991) (court gave great weight to the agency's interpretations of the statutes).

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

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

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

Agencies have more discretion in their treatment of conclusions of law if those conclusions fall within the areas of the law or relate to the interpretation of rules over which the agency has

[1] *See* Art. V, § 21, Fla. Const.

substantive jurisdiction. Within those areas, an agency may reject or modify conclusions of law as long as it states its reasons and finds that its substituted conclusions are at least as reasonable as those of the ALJ. As the funding agency, Florida Housing has substantive jurisdiction over the legal conclusions relating to its process for awarding funding including the implementation of the RFA.

Woodland Park takes exception to the findings of fact and conclusions of law described below.

III. EXCEPTIONS TO THE RECOMMENDED ORDER

Exception No. 1

Conclusion of Law – Challenging Paragraph 32 and the Legal Standard of Review Applied

The Administrative Law Judge erred by applying an outdated, exceedingly deferential standard of review. The Recommended Order makes it clear that the judge presiding over the final hearing would never support any bid protest unless the challenger proved that Florida Housing staff acted in a fraudulent, illegal, or dishonest manner. The judge simply applied the wrong standard. Since 1999, Florida law has made it clear that the burden in a bid protest proceeding like this one is to demonstrate that an agency violated a law, rule of specification in a manner that was clearly erroneous, contrary to competition, arbitrary or capricious. In her Recommended Order, the judge applied a far more deferential standard. The judge's ruling concludes that a challenger must make a showing of "dishonesty, illegality, fraud, oppression or misconduct" That highly deferential standard doomed consideration of Woodland Park's protest from the start. It is also a standard that the legislature made inapplicable more than twenty years ago.

Case law which suggested that an agency may avoid reversal of its preliminary bid decisions by simply arguing that it provided an "honest exercise" of discretion has long been

superseded by statute. *See, e.g., Liberty Cnty. v. Baxter's Asphault & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982) (finding that an honest exercise was enough to pass scrutiny); *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931) ("Public procurement is intended to protect the public by promoting 'fair and open competition,' thereby reducing the appearance and opportunity for favoritism and misconduct."). In *Department of Transportation v. Groves-Watkins Constructors*, 530 So. 2d 912 (Fla. 1988), the Florida Supreme Court was asked to provide the correct standard of review for challenges to bid decisions. The Court noted the "strong judicial deference accorded to an agency's decision in competitive bidding situations," and recited prior rulings which held that "a public body has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if reasonable persons may disagree." *Id.* at 913 (*quoting Liberty County*, 421 So. 2d at 507). The *Groves-Watkins* Court applied a highly deferential standard, finding that an agency's "decision based upon an honest exercise of this discretion cannot be overturned absent a finding of 'illegality, fraud, oppression or misconduct." *Id.* Thus, the Court clarified that the standard for administrative challenge to agency bid decisions was simply "to ascertain whether the agency acted fraudulently, arbitrarily, illegally, or dishonestly."

However, in 1996, the Florida Legislature re-wrote Florida's Administrative Procedure Act, and created a new standard of review for public procurements in section 120.57(3)(f). The prior *Groves-Watkins* standard which previously applied to all bid protests, was now relegated to only apply in challenges to agency decisions to reject all bids. *See* § 19, ch. 96-159, Laws of Fla., creating § 120.57(3)(f), Fla. Stat. ("In any bid-protest proceeding contesting an intended agency action to reject all bids, proposals, or replies, the standard of review by an administrative law judge shall be whether the agency's intended action is illegal, arbitrary, dishonest, or fraudulent."). That

remains the standard for challenging an agency rejection of all bids today. *See* § 120.57(3)(f), Fla. Stat. That highly deferential standard was *not* made applicable to protests challenging bid decisions that were not outright rejections of all bids. In the same statutory amendment, the 1996 Florida Legislature created the less deferential standard of proof for general challenges to preliminary contract awards, requiring inquiry as to whether the agency's procurement decision was "clearly erroneous, contrary to competition, arbitrary or capricious." *See id.* That is the standard still in place today. *See* § 120.57(3)(f).

Thus, it is incorrect to say that Florida Housing's decision should be sustained if it was merely based upon an honest exercise of discretion. Proof of dishonesty has not been required to reverse an agency's preliminary bid decisions since 1996. After amendment to Florida's Constitution in 2018, it may be more proper to say that an agency's preliminary decision, based upon interpretation of applicable statutes and rules, is entitled to no discretion at all.

In the only other bid protest decided by Administrative Law Judge Finkbeiner, the Recommended Order contained the same outdated reliance on the *Groves-Watkins* standard in a bid decision protest. In *Madison Landing II, et al. v. Florida Housing Finance Corporation*, Case No. 21-0146 et al (DOAH Mar. 29, 2021; FHFC Apr. 30, 2021), Judge Finkbeiner applied the deferential *Groves-Watkins* standard to a challenge of a Florida Housing bid decision, concluding that the position of Florida Housing should be sustained because it was grounded in an honest and reasonable exercise of discretion. *See* Rec. Ord., ¶¶ 48, 57.

Because an incorrect standard was applied in that earlier ruling, Woodland Park took pains in its Proposed Recommended Order to confirm that the *Groves-Watkins* standard was inapplicable, and had been superseded by statute for more than twenty years. Judge Finkbeiner ignored this citation to the proper standard of review, and instead repeated the *Groves-Watkins*

standard that she applied in the case below. Absent proof of fraud, dishonesty, illegality, oppression or misconduct, no protest would ever succeed, as the court would always defer to Florida Housing staff.

In Paragraph 32 of the Recommended Order, the administrative law judge found:

> 32. It is well-established that an agency "has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988) (quoting *Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982)). The administrative law judge should not "second guess the members of [the] evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result." *Scientific Games, Inc. v. Dittler Bros.*, 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991). Indeed, if an agency "makes an erroneous decision about which reasonable people may disagree," its decision should not be overturned "absent a showing of dishonesty, illegality, fraud, oppression or misconduct." *Sutron Corp. v. Lake Cnty. Water Auth.*, 870 So. 2d 930, 932 (Fla. 2d DCA 2004).

In other portions of the Recommended Order, the correct standard of section 120.57(3)(f) is repeated. However, the conscious decision to include the *Groves-Watkins* standard provides clear evidence that the judge applied that highly deferential standard, while merely reciting the correct legal standard. There can be no other explanation for why the ALJ insisted on citation to an inapplicable standard other than to conclude that the judge intentionally applied that standard.

Woodland Park respectfully suggests that the citations to the *Groves-Watkins* standard in Paragraph 32 of the Recommended Order must be stricken as they reflect a standard that was abandoned by the Florida Legislature more than twenty years ago. Because this overly deferential standard infects the entire decision, Woodland Park also urges that the Recommendation to find Woodland Park ineligible be reversed, and Woodland Park awarded funding.

Exception No. 2

Finding of Fact – Paragraph 16, containing findings of fact that are not supported by competent, substantial evidence

Paragraph 16 of the Recommended Order is labeled a Finding of Fact and provides as follows:

> 16. There have been occasions, including with respect to the RFA, when Florida Housing received applications, but could not immediately locate the corresponding application fees. When this occurs, it is Florida Housing's practice to reach out to the applicants' representatives after the application deadline to confirm how fees were submitted. The record is clear that Florida Housing regularly makes efforts to reconcile misplaced application fees with their respective applications if such fees were timely provided before the application deadline. However, it is a critical distinction in the present case that the record is devoid of any evidence that Florida Housing has ever accepted an application fee that was provided after the application deadline.

(R.O., pp. 8-9). Woodland Park takes exception to the findings in this paragraph because they are not supported by competent, substantial record evidence and ignore undisputed evidence to achieve a desired outcome.

The bulk of the final hearing in this case was spent on how Florida Housing processes application fees, including how those processes have changed in the last several years, why they changed, and how staff matches application fees to applications received. For example, the undisputed record evidence establishes that Florida Housing only recently began using an electronic submission process for its applications, requiring applications and application fees to be provided by applicants separately. (T. 90-91, Salmonsen). Prior to 2020, Florida Housing did not allow application fee payments via ACH or wire transfer. (T. 65-66, Salmonsen; WP-16). When it began allowing application fee payments via ACH or wire transfer in 2020, Florida Housing amended its RFAs to "strongly recommend" to applicants to provide the application fee at least 48 hours prior to the application deadline. (J-1, p. 4 of 155; T. 65-67, Salmonsen; Jt. Stip. ¶ 32; WP-

16). This language understandably led some applicants to believe that Florida Housing might exercise some discretion to verify whether application fees had been received in its account prior to the application deadline to avoid the kind of typographical error that occurred in this case. (T. 43-44, Evjen). Prior to the application deadline, Florida Housing sent an email to its Multifamily Programs listserv, reminding applicants of this "strong recommendation" to provide the application fee 48 hours prior to the application deadline. (WP-05; T. 40-41, Evjen). Despite this, Florida Housing witnesses admitted at the final hearing that the account number was not a required element under the RFA, but rather a "strong recommendation." (T. 101-02, Button; T. 67, Salmonsen).

The undisputed record evidence further establishes that Florida Housing uses a bank account with Wells Fargo to receive application fee payments. (T. 68, Salmonsen). However, the evidence was clear that Florida Housing has not provided Wells Fargo any instructions as to how to process application fee payments and that Florida Housing did not even have a current contact at Wells Fargo at the time of the application deadline in this case. (T. 69, Salmonsen; WP-07). Additionally, despite the RFA's strong recommendation to provide application fees early, Florida Housing officials admitted that neither it nor its bank made any efforts prior to the application deadline to locate a wire transfer from Woodland Park, or any applicant. (T. 103-04, Button).

The undisputed record evidence further establishes that Ms. Salmonsen, on behalf of Florida Housing, routinely contacts applicants after the application deadline to obtain additional information from applicants to track down application fee payments and to allow applicants the opportunity to demonstrate if there was an error. (T. 71-72, 92-93, Salmonsen; T. 109, 118-19, Button). As it relates to this RFA cycle, there were at least four applications submitted to Florida Housing for which Salmonsen could not readily verify payment of the application fee causing Ms.

Salmonsen to contact the applicants after the application deadline. (T. 72-74, 78, 81-82, Salmonsen; WP-6; WP-09, p. 14; WP-10, p. 58). For one of those applications, Ms. Salmonsen learned that the applicant had paid via check. (T. 72-73, Salmonsen). While working to locate the check, Ms. Salmonsen advised others that there may not be any identifying information on the check. (T. 78-79, Salmonsen). Thus, the evidence clearly established that Florida Housing accepted at least one payment which did not reflect the applicant's identification. (T. 79, Salmonsen). In other words, the record clearly established that the information that was "strongly recommended" for applicants to provide, including an account number, was not a mandatory, material requirement of the RFA. (T. 101-02, Button; T. 67, Salmonsen). Some applicants provided no identifying information with their payments and were deemed eligible, while Woodland Park's payment was deemed ineligible. The disparate treatment of similarly situated applicants demonstrated an agency action that was clearly contrary to competition.

Reading the Recommended Order in this case, one would have no idea of the undisputed facts set forth above. Indeed, the Recommended Order makes no mention of the undisputed fact that Florida Housing's acceptance of application fees via wire transfer is a new option for applicants. The Recommended likewise makes no mention of the strong recommendation language that is repeated throughout the RFA and was even sent out by Florida Housing officials in the weeks leading up to the RFA deadline as a reminder to applicants. The Recommended Order additionally makes no mention of the fact that, going forward, Florida Housing has changed its processes and will now allow applicants in future RFA cycles to upload confirmation or payment information with their respective applications to eliminate Florida Housing having to contact applicants after the application deadline. (T. 86, Salmonsen). Unless one were to read Woodland Park's Proposed Recommended Order, one would be left with the belief that there was no repeated

48-hour strong recommendation in the RFA or that Florida Housing does not require the same level of detail when application fee payments are made via check rather than wire transfer.

A cursory Recommended Order such as the one issued by the ALJ in this case violates the APA's requirement that the "presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact..." § 120.57(1)(k), Fla. Stat.; *see also* Fla. Admin. Code R. 28-106.216 (requiring recommended orders to include, among other things, "statement of the issues, findings of fact and conclusions of law, separately stated..."). Implicit in these provisions is that the presiding officer must make findings of fact on the issues presented by the parties. While the Recommended Order in this case does contain findings of fact, it fails to include findings on critical, undisputed evidence presented at the final hearing and painstakingly detailed in Woodland Park's Proposed Recommended Order.[2] Although an ALJ does not need to rule on every single proposed finding of fact, she cannot ignore critical and undisputed facts that form the basis of the aggrieved party's challenge to the proposed agency action. Otherwise, the aggrieved party is left without the ability to meaningfully challenge what is merely a recommendation. Such a result is wholly inconsistent with the APA.

The issue of cursory recommended orders has been addressed by the Third District Court of Appeal. In *Borges v. Department of Health*, 143 So. 3d 1185 (Fla. 3d DCA 2014), the Third District concluded that an ALJ's recommended order did "not sufficiently comply with the requirement to make express findings of fact" because it relied on a purported concession that did "not constitute a sufficient factual foundation to resolve the crucial factual and legal issue" upon which the Board's preliminary decision was made. *Id.* at 1187. In reaching this conclusion, the

[2] A comparison of the Recommended Order and the Joint Pre-Hearing Stipulation filed by the Parties demonstrates just how cursory the Recommended Order is as the bulk of the ALJ's findings are merely recitations of the facts to which the Parties stipulated.

Third District reasoned that the "statutory and regulatory provisions' requirement of factual findings is ultimately based on principles of due process." *Id.* The court explained further that the deficient recommended order left the reviewing court "to guess whether the administrative law judge disbelieved all or some of the testimony or simply found the testimony irrelevant to his recommended disposition." *Id.*; *see also A.C. v. Agency for Health Care Admin.*, 322 So. 3d 1182, 1188 (Fla. 3d DCA 2019) (concluding that the hearing officer's final order "lack[ed] specific findings of fact to enable us to properly review the legal conclusion reached by the hearing officer"); *State v. Murciano*, 163 So. 3d 662 (Fla. 1st DCA 2015). The same is true here.

Woodland Park takes exception to the findings of fact in Paragraph 16 of the Recommended Order because they are not supported by competent, substantial record evidence and ignore critical, undisputed facts in the record. Woodland Park urges Florida Housing to reject the findings in this paragraph.

Exception No. 3

Finding of Fact – Paragraph 23, containing findings of fact that are not supported by competent, substantial evidence and

Conclusion of Law – Paragraph 36, containing conclusions of law that are not supported by competent, substantial evidence and are not reasonable

Paragraph 23 is labeled a Finding of Fact and provides as follows:

23. Wells Fargo was not presented in the RFA as being an agent of Florida Housing.

(R.O., p. 9).

Paragraph 36 is labeled a Conclusion of Law and provides as follows:

> 36. Woodland Park's argument that Florida Housing had an obligation to investigate, discover, and correct Woodland Park's unilateral typographical error is without merit. No such obligation exists within the RFA or under Florida law. Woodland Park argues that a similar obligation rests with Wells Fargo, and

> repeatedly refers to Wells Fargo as the "agent" of Florida Housing without any supporting legal argument. Wells Fargo is not Florida Housing's agent with respect to the RFA.

(R.O., p. 13). Woodland Park takes exception to these paragraphs because they are not supported by competent, substantial evidence and are not reasonable.

The record is clear that the RFA specifications identified Wells Fargo as the bank which was to receive any application fee payments transmitted by wire transfer. (J-1, p. 4). The RFA provided apparent authority for Wells Fargo to act as the agent of Florida Housing by receiving payments. Apparent authority is created when the principal, in this case Florida Housing, creates the appearance of an agency relationship. *Fla. State Oriental Med. Ass'n v. Slepin*, 971 So. 2d 141, 145 (Fla. 1st DCA 2007); *Parsley Bros. Const. Co. v. Humphrey*, 136 So. 2d 257 (Fla. 2d DCA 1962). The written pronouncement that payment of application fees could be accomplished by providing payment to Wells Fargo established that bank as Florida Housing's agent with respect to payment of the fee.

The record clearly established that payment provided by Woodland Parks arrived at Wells Fargo and was then partially returned. The provision of payment to Florida Housing's agent was equivalent to payment to Florida Housing itself. There is no competent substantial evidence that would support a finding, like the one in Paragraph 23, that Wells Fargo was not authorized in the RFA to accept application fee payments on behalf of Florida Housing. In addition to the express authority provided in the RFA, Florida Housing witnesses acknowledged that payments made to Wells Fargo before the application deadline were considered as timely received by Florida Housing. (T. 68, Salmonsen). Thus, there is no competent, substantial evidence which might indicate that Wells Fargo was not an agent, as the only evidence on this point confirms that Wells

Fargo was authorized by RFA specifications to receive application fee payments. When Woodland Park provided its payment to Wells Fargo, it effectively provided payment to Florida Housing. For the same reasons Woodland Park takes exception paragraph 23, it also takes exception to this conclusion of law because it is not reasonable.

Accordingly, Woodland Park urges that Paragraphs 23 and 36 be modified as follows:

23. Wells Fargo was ~~not~~ presented in the RFA as being an agent of Florida Housing.

36. ~~Woodland Park's argument that Florida Housing had an obligation to investigate, discover, and correct Woodland Park's unilateral typographical error is without merit. No such obligation exists within the RFA or under Florida law. Woodland Park argues that a similar obligation rests with Wells Fargo, and repeatedly refers to Wells Fargo as the "agent" of Florida Housing without any supporting legal argument. Wells Fargo is not Florida Housing's agent with respect to the RFA.~~ The RFA and Florida Housing witnesses made clear that application fee payments could be received by Wells Fargo and considered timely filed by Florida Housing. Thus, payments to Wells Fargo constituted payments to Florida Housing.

Exception No. 4

Finding of Fact – Paragraph 22, containing findings of fact that are not supported by competent, substantial evidence and

Conclusion of Law – Paragraphs 39, 40 and 41, containing mislabeled findings of fact not supported by competent, substantial evidence and conclusions of law that are not reasonable

Paragraph 22 is labeled a Finding of Fact and provides as follows:

> 22. Florida Housing did not perform a minor irregularity analysis on the issue at the time that Florida Housing scored the applications. However, such an analysis was unnecessary given that it is clear, on its face, that Woodland Park's failure to timely provide its application fee to Florida Housing does not constitute a minor irregularity.

(R.O., p. 9). Paragraphs 39, 40, and 41, which are related to the findings in Paragraph 22, are labeled Conclusions of Law and provide as follows:

> 39. A plain reading of rule 67-60.008 states that, to be a [sic] waived as a minor irregularity, the basis of the minor irregularity must reside within the four corners of the application.
>
> 40. Even if the typographical error at issue in this case were within the application, it still could not be considered a minor irregularity as the term is defined. Although the typographical error could not be considered a minor irregularity if even one of the enumerated rule-based factors were present, Woodland Park's typographical error fails with respect to all of the factors. Woodland Park's typographical error resulted in the omission of material information; created uncertainty that the terms and requirements of the RFA were met; if waived would have provided a competitive advantage for Woodland Park over other applicants who were required to provide timely payment to earn their eligibility for funding; and would adversely impact Florida Housing by creating a burden to correct applicants' unilateral mistakes.
>
> 41. Florida Housing's determination that Woodland Park's application was ineligible was not clearly erroneous, contrary to competition, arbitrary, or capricious. Woodland Park fails to meet its burden of proof under section 120.57(3)(f) by failing to demonstrate that Florida Housing's action was contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications.

(R.O., p. 14). Woodland Park takes exception to the findings of fact in the second sentence in Paragraph 22 because it is not supported by competent, substantial evidence. To the extent the second sentence in Paragraph 22 also contains conclusions of law, Woodland Park takes exception to those conclusions because they are not reasonable. Woodland Park further takes exception to the findings of fact in Paragraphs 39, 40, and 41 that are mislabeled as conclusions of law because they are not supported by competent, substantial record evidence and ignore undisputed evidence to achieve a desired outcome. Additionally, to the extent portions of these paragraphs contain conclusions of law, they are not reasonable.

The ALJ's conclusion in Paragraph 39 that Florida Housing's minor irregularity can apply only to irregularities in applications is not reasonable. As an initial matter, when Ms. Button was asked why she declined to perform a minor irregularity analysis, none of the reasons she offered had anything to do with the fact that the irregularity occurred with respect to an application fee,

and not an application. Additionally, nothing within the minor irregularity rule itself requires that the irregularity "reside within the four corners of the application." It would be nonsensical to limit the minor irregularity rule to an application when the RFA requires, *as part of the application*, the provision of an application fee. Indeed, it was Woodland Park's application that was rendered ineligible because of the typographical error in its application fee. Thus, Woodland Park urges Florida Housing to reject this Paragraph because it is not supported by competent, substantial evidence and is not reasonable.

In Paragraph 40, the ALJ found that, even if the minor irregularity rule applied to application fees, it would not apply in this instance because the typographical error did not satisfy the criteria in the minor irregularity rule. However, in making this finding, the ALJ offered no rationale as to why these criteria were not met. In a conclusory fashion, the ALJ simply states that Woodland Park's typographical error fails each criterion of the rule. Such a conclusory statement violates section 120.57(1)(k) and section 120.569(2)(m), which provides that "[f]indings of fact, if set forth in a manner which is no more than mere tracking of the statutory language, must be accompanied by a concise and explicit statement of the underlying facts of record which support the findings." § 120.57(1)(k), Fla. Stat. Under this provision, if an ALJ's finding is based on "mere tracking of the statutory [or rule] language," the ALJ must state "underlying facts of record" to support the findings. *Id.* Thus, this conclusory finding is not supported by competent, substantial evidence and should be rejected.

To the extent Paragraph 40 contains conclusions of law, those conclusions are not reasonable. The typographical error did not result in the omission of material information because Florida Housing witnesses testified that the account number was not a required element under the RFA, but rather a "strong recommendation." (T. 101-02, Button; T. 67, Salmonsen). It did not

create uncertainty that the terms and requirements of the RFA were met because Woodland Park's Application included the FEDR number and Fed Wire Transfer Number associated with the wire transfer so Florida Housing could know from reviewing the Woodland Park Application that the wire transfer occurred. It would not have provided a competitive advantage over other applicants "who were required to provide timely payment" because Woodland Park initiated the wire transfer 6 days before the deadline and received confirmation that it was received. It is not as if Woodland Park was trying to evade and avoid having to pay the application fee. Lastly, it would not adversely impact Florida Housing because the highest ranked applicant would have been funded, in accordance with the RFA, furthering Florida Housing's mission. Woodland Park urges Florida Housing to reject Paragraph 40 of the Recommended Order.

In Paragraph 41, the ALJ found that Florida Housing's determination that Woodland Park's application was ineligible was not clearly erroneous, contrary to competition, arbitrary, or capricious. In its Protest, Woodland Park specifically alleged that Florida Housing's initial determination was clearly erroneous, contrary to competition, arbitrary, and capricious. At the final hearing, Woodland Park presented undisputed evidence obtained through discovery to support its allegations and recited that evidence in its detailed Proposed Recommended Order. Rather than acknowledging and rejecting the evidence, the Recommended Order wholly ignores it, making no findings as to why the decision was not contrary to competition, arbitrary, or capricious.

As with Paragraph 40, the findings of act in Paragraph 41 are conclusory findings that are not supported by any record evidence and violate sections 120.57(1)(k) and 120.569(2)(m). *See Borges*, 143 So. 3d at 1187 (concluding that a recommended order is deficient where it fails to make sufficient findings to resolve the issues raised by the challenging party). Because they are not supported by competent substantial evidence, Florida Housing should reject them.

To the extent Paragraph 41 was accurately labeled a conclusion of law, Florida Housing should reject those conclusions because they are not reasonable. As Florida Housing witnesses acknowledged at the final hearing, checks with missing identifying information are treated differently than a typographical error in a wire transfer. (T. 107-08, Button). Requiring more information of an applicant that submits the application fee via wire transfer versus a competing applicant that submits the fee via check is inherently contrary to competition because it does not allow for "fair competition upon equal terms to all bidders. *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931). To conclude that such disparate treatment is not contrary to competition defies logic. Additionally, Florida Housing's action was clearly contrary to Florida Housing's minor irregularity rule for the reasons set forth above. Florida Housing should reject Paragraph 41 of the Recommended Order.

For the same reasons Paragraphs 39, 40, and 41 should be rejected, the findings of fact in the second sentence of Paragraph 22 are not supported by competent, substantial evidence and should be rejected.

Accordingly, Woodland Park urges Florida Housing to reject the second sentence of Paragraph 22 and replace it with the following:

> 22. Florida Housing did not perform a minor irregularity analysis on the issue at the time that Florida Housing scored the applications. ~~However, such an analysis was unnecessary given that it is clear, on its face, that Woodland Park's failure to timely provide its application fee to Florida Housing does not constitute a minor irregularity~~. For the reasons explained in the Conclusions of Law, Florida Housing should have performed a minor irregularity analysis because the typographical error in Woodland Park's wire transfer is a waivable minor irregularity.

Additionally, as to Paragraphs 39, 40, and 41, Woodland Park urges Florida Housing modify those paragraphs as follows:

> ~~39. A plain reading of rule 67-60.008 states that, to be a [sic] waived as a minor irregularity, the basis of the minor irregularity must reside within the four corners~~

~~of the application.~~ The typographical error in Woodland Park's wire transfer clearly meets the requirements of rule 67-60.008.

40. ~~Even if the typographical error at issue in this case were within the application, it still could not be considered a minor irregularity as the term is defined. Although the typographical error could not be considered a minor irregularity if even one of the enumerated rule-based factors were present, Woodland Park's typographical error fails with respect to all of the factors.~~ Woodland Park's typographical error did not result~~ed~~ in the omission of material information because Florida Housing witnesses testified that the account number was not a required element under the RFA, but rather a "strong recommendation"; did not create~~d~~ uncertainty that the terms and requirements of the RFA were met because Woodland Park's Application included the FEDR number and Fed Wire Transfer Number associated with the wire transfer so Florida Housing could know from reviewing the Woodland Park Application that the wire transfer occurred; ~~if waived~~ would not have provided a competitive advantage for Woodland Park over other applicants because Woodland Park initiated the wire transfer 6 days before the deadline and received confirmation that it was received. It is not as if Woodland Park was trying to evade and avoid having to pay the application fee ~~who were required to provide timely payment to earn their eligibility for funding~~; and would not adversely impact Florida Housing because the highest ranked applicant would have been funded, in accordance with the RFA, furthering Florida Housing's mission ~~by creating a burden to correct applicants' unilateral mistakes~~.

41. Florida Housing's determination that Woodland Park's application was ineligible was ~~not~~ clearly erroneous, contrary to competition, arbitrary, and ~~or~~ capricious. Woodland Park ~~fails to meet~~ met its burden of proof under section 120.57(3)(f) by ~~failing to demonstrate~~ demonstrating that Florida Housing's action was contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications.

IV. CONCLUSION

For these reasons, we urge Florida Housing to grant these exceptions and adopt the modified findings of fact and conclusions of law in its Final Order awarding Woodland Park funding under the RFA.

[SIGNATURE ON NEXT PAGE]

Respectfully submitted this 25th day of May, 2023.

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WOODLAND PARK II, LLC,

Petitioner, DOAH Case No. 23-000685BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

and

THE ENCLAVE AT NORTHSHORE, LP

Intervenor.

_____/

JIC PALATKA APARTMENTS, LLC,

Petitioner, DOAH Case No. 23-000686BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PARC WEST, LLC,

Intervenor.

_____/

RESPONDENT FLORIDA HOUSING'S RESPONSE TO PETITIONER WOODLAND PARK II, LLC'S EXCEPTIONS TO THE RECOMMENDED ORDER

Respondent, Florida Housing Finance Corporation ("Florida Housing"), hereby submits its Response to Petitioner, Woodland Park II, LLC's ("Woodland Park"), exceptions to

Administrative Law Judge ("ALJ") Brittany O. Finkbeiner's May 17, 2023 Recommended Order, pursuant to Florida Administrative Code Rule 28-106.217.

Standard of Review

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

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

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

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

It is the job of the Administrative Law Judge ("the ALJ") to assess the weight of the evidence, and this Board cannot re-weigh the evidence absent a showing that the finding was not based on competent, substantial evidence. *Rogers v. Department of Health*, 920 So.2d 27 9Fla. 1st DCA 2005); *B.J. v. Department of Children and Family Services*, 983 So.2d 11 (Fla. 1st DCA 2008). "If there is competent, substantial evidence in the record to support the ALJ's findings of fact, the agency may not reject them, modify them, substitute its findings, or make new findings." *Bridlewood Grp. Home v. Agency for Persons with Disabilities*, 136 So. 3d 652 (Fla. 2d DCA 2013) "Competent substantial evidence" means: "[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Dept. of Highway Safety and Motor Vehicles v. Wiggins, 151 So.3d 457* (Fla. 1st DCA 2014).

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

> The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or

> modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

Response to Exception #1

Petitioner takes exception to paragraph 32 in the Recommended Order's conclusions of law in which the ALJ cites three cases:

> 32. It is well-established that an agency "has wide discretion in soliciting and accepting bids for public improvements and its decision, when based on an honest exercise of this discretion, will not be overturned by a court even if it may appear erroneous and even if reasonable persons may disagree." *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913 (Fla. 1988) (quoting *Liberty Cnty. v. Baxter's Asphalt & Concrete, Inc.*, 421 So. 2d 505, 507 (Fla. 1982)). The administrative law judge should not "second guess the members of [the] evaluation committee to determine whether he and/or other reasonable and well-informed persons might have reached a contrary result." *Scientific Games, Inc. v. Dittler Bros.*, 586 So. 2d 1128, 1131 (Fla. 1st DCA 1991). Indeed, if an agency "makes an erroneous decision about which reasonable people may disagree," its decision should not be overturned "absent a showing of dishonesty, illegality, fraud, oppression or misconduct." *Sutron Corp. v. Lake Cnty. Water Auth.*, 870 So. 2d 930, 932 (Fla. 2d DCA 2004).

Petitioner requests that this entire paragraph be stricken, alleging that the citations contain an outdated standard of review. However, as Petitioner admits in its filing, throughout the Recommended Order "the correct standard of section 120.57(3)(f) is repeated" several times. In fact, the ALJ never applies the law cited in paragraph 32 to the facts of the case. In her initial 'Statement of the Issues,' the ALJ utilizes the §120.57(3)(f), Fla. Stat., standard of review, "whether Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious." In paragraphs 26 and 28, the ALJ explicitly states that the §120.57(3)(f) standard of review applies to this proceeding, then describes each element of the standard in detail throughout Paragraphs 29-31. In paragraphs 33 and 41, the ALJ applies the §120.57(3)(f) standard of review to the facts of the case. The ALJ included no analysis based upon paragraph 32. The inclusion of paragraph 32 is dicta and irrelevant to the outcome of the ALJ's decision. Striking

paragraph 32 would not change the overall recommendation or reasoning for finding Petitioner's application ineligible.

Petitioner's Exception # 1 should be rejected.

Response to Exception #2

Petitioner takes exception to paragraph 16, in which the ALJ found

> 16. There have been occasions, including with respect to the RFA, when Florida Housing received applications, but could not immediately locate the corresponding application fees. When this occurs, it is Florida Housing's practice to reach out to the applicants' representatives after the application deadline to confirm how fees were submitted. The record is clear that Florida Housing regularly makes efforts to reconcile misplaced application fees with their respective applications if such fees were timely provided before the application deadline. However, it is a critical distinction in the present case that the record is devoid of any evidence that Florida Housing has ever accepted an application fee that was provided after the application deadline.

Petitioner takes exception to the findings in this paragraph, claiming the findings are not supported by competent, substantial record evidence and ignore undisputed evidence. In doing so, Petitioner does not directly dispute the finding of fact in paragraph 16. Instead, Petitioner argues that the ALJ should have included additional findings from the hearing testimony.

A large portion of the final hearing was devoted to testimony regarding Florida Housing's internal application fee process and the history of that process. However, the core issue case turned on whether Florida Housing's determination that Petitioner was ineligible for failing to timely provide its application fee to Florida Housing was clearly erroneous, contrary to competition, arbitrary, or capricious. Florida Housing's internal application fee process and the history of that process did not factor into the ineligible determination and were irrelevant and immaterial to the ALJ's recommendation.

Petitioner also cites testimony presenting Petitioner's confusion regarding the strong recommendations relating to application fee submission but made no challenges to the terms of

the RFA. (Recommended Order, ¶9). Testimony at hearing was clear that the strong recommendations within the RFA are not mandatory requirements for application fee submission and were not considered when determining the Petitioner's eligibility. (Transcript pages 67, 79, 93, 102, and 128). Petitioner admitted at hearing that it did not submit any questions or comments to address any confusion about the strong recommendations when this RFA was workshopped (Transcript Page 57-58). Petitioner merely offered its opinion on what it thought the strong recommendations implied about Florida Housing's processes. Since compliance with the "strong recommendations" was not considered in the eligibility determination, they were also irrelevant and immaterial to the ALJ's recommendation.

Timely providing the application fee to Florida Housing before the application deadline is a material eligibility requirement of the RFA. (Transcript, page 105). Noticeably and importantly, Petitioner does not directly address the final sentence of paragraph 16 within its exemption narrative, specifically, "the record is devoid of any evidence that Florida Housing has ever accepted an application fee that was provided after the application deadline." The ALJ finding of fact in the final sentence of paragraph 16 is consistent with the record.

The detailed findings by the ALJ, including paragraph 16, make it clear that, contrary to Petitioner's assertions, the ALJ did not ignore any evidence presented by Petitioner. The ALJ thoughtfully and reasonably evaluated the evidence presented in the context of the relevant and material RFA requirements and the appropriate standard of review. The ALJ reasonably concluded that Petitioner failed to meet the mandatory criteria for eligibility. There is no basis to overturn the well-reasoned findings of the ALJ, which are based on competent substantial evidence.

The recommended order addresses the relevant factual controversy that was the subject of the hearing. The findings of fact in paragraph 16 are supported by competent substantial evidence, and Petitioner's Exception # 2 should be rejected.

Response to Exception #3

Petitioner takes exception to finding of fact paragraph 23 and conclusion of law paragraph 36 in which the ALJ found that Wells Fargo was not acting as an agent of Florida Housing. The ALJ's conclusion of law is reasonable and consistent with the competent substantial evidence presented at hearing. The plain language of the RFA requires an applicant to provide a nonrefundable application fee to Florida Housing by the Application deadline. Applicants may choose from one of four methods to provide the fee to Florida Housing, one of which is by wire transfer to Florida Housing's account at Wells Fargo. The application goes on to provide wire transfer instructions naming the bank and account information for the wire transfer.

Several times at the hearing, Petitioner referred to Wells Fargo as Florida Housing's agent simply because "[t]hey are the holder of Florida Housing's accounts." (Transcript page 62). Ms. Button testified that Wells Fargo does not act as Florida Housing's agent for the receipt of application fees and Florida Housing has no control over Well's Fargos wire transfer routing process. (Transcript page 129). No testimony was offered from Wells Fargo. In Paragraphs 23 and 36, the ALJ weighed the evidence and reasonably concluded that Wells Fargo is not Florida Housing's agent.

In its exception, Petitioner proffers a novel legal theory that Wells Fargo possessed "apparent authority" and argues that the theory should have been considered. Petitioner failed to address this new theory in its petition, position statement, at hearing, or its proposed recommended order, bringing it up for the first time in its exceptions. Petitioner improperly seeks a second bite

at the apple after the ALJ has reasonably concluded that Wells Fargo was not Florida Housing's agent.

Regardless, Petitioner fails to lay out the elements required to establish a common law apparent authority relationship. An agency relationship based on apparent authority can only exist if a party ***reasonably*** believes the alleged agent has authority. *Fla. State Oriental Med. Ass'n v. Slepin*, 971 So. 2d 141, 145 (Fla. 1st DCA 2007) (emphasis added). Petitioner offers no caselaw suggesting that a Bank has *per se* apparent authority just because it holds a party's accounts; indeed, none could be found. There is no dispute that Wells Fargo returned Petitioner's application fee on the same day the fee was submitted due to Petitioner's error. There is no dispute that the Application Fee was not deposited into Florida Housing's account. (Transcript pages 61-62). Petitioner offered no evidence suggesting it *reasonably* thought the application fee did not need to be deposited into Florida Housing's account, but merely given to Wells Fargo. Petitioner only points to things that it felt Wells Fargo could or should have done to route the payment despite Petitioner's error while admitting that Wells Fargo had no obligation to do so. (Transcript page 62). An analogous example makes this a bit clearer: had Petitioner mailed a check to the wrong address (instead of wiring it to the wrong account) that was subsequently returned to Petitioner, it could not be reasonably said that postal service acted as Florida Housings agent, and the check should be considered received. So too, it is unreasonable to say that Wells Fargo is acting as Florida Housing's agent.

The finding of fact presented in paragraphs 23 and 36 are supported by competent substantial evidence and the conclusions of law are reasonable. Petitioner's Exception # 3 should be rejected.

Response to Exception #4

Petitioner takes exception to the finding of fact in the second sentence of paragraph 22, and paragraphs 39, 40, and 41 in full.

In the second sentence of paragraph 22, the ALJ found that a minor irregularity analysis was "unnecessary given that it is clear, on its face, that Woodland Park's failure to timely provide its application fee to Florida Housing does not constitute a minor irregularity." Relatedly, in Paragraph 39 the ALG found that "A plain reading of rule 67-60.008 states that, to be a [sic] waived as a minor irregularity, the basis of the minor irregularity must reside within the four corners of the application."

The ALJ's conclusions are consistent with Florida Housings Rules and hearing testimony. Florida Housing's Minor Irregularity Rule, Florida Administrative Code Rule 67-60.008, begins with "Minor irregularities are those irregularities *in an Application*..." (emphasis added). The clear and unambiguous language of Florida Housing's Rule states that the irregularity must reside in the application to be considered a minor irregularity. It is undisputed that Petitioner made a typographical error in the wire transfer instructions sent to its Bank and that those wire transfer instructions are not in, or part of, Petitioner's application. At hearing, Ms. Button was questioned regarding whether Florida Housing had accepted typographical errors as minor irregularities in the past. Ms. Button's response was consistent with Florida Housing's Rules, "We have done so when we could see from the four corners of the application that was submitted, that information.... [when] we can derive the information that was provided within the application itself." (Transcript page 116).

In paragraph 40, having already found that the minor irregularity rule could not be applied to Petitioner's wire instructions, the ALJ explains in the alternative that, even if the minor

irregularity analysis were applied to these facts, the analysis would fail because the typographical error did not satisfy the criteria in the minor irregularity rule. The ALJ provides her reasoning as to why Petitioner fails to meet each factor within the analysis. Ms. Button was also asked to apply each factor of a minor irregularity analysis to the facts of this case at hearing. The ALJ's recommended order is reasonable and consistent with the competent substantial evidence presented at hearing.

In paragraph 41, the ALJ thoughtfully and reasonably evaluated the evidence presented in the context of the relevant and material RFA requirements and applied the appropriate standard of review. The ALJ reasonably concluded that Florida Housing's determination that Petitioner's application was ineligible was not clearly erroneous, contrary to competition, arbitrary, or capricious. There is no basis to overturn the ALJ's reasonable conclusions of law.

The finding of fact presented in the second sentence of paragraph 22 and paragraphs 39, 40, and 41 are supported by competent substantial evidence, and the conclusions of law are reasonable. Petitioner's Exception #4 should be rejected.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors reject Petitioner's Exceptions, adopt the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order, and issue a Final Order consistent with same.

RESPECTFULLY SUBMITTED this 31st day of May, 2023,

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WOODLAND PARK II, LLC,

Petitioner,

DOAH Case No. 23-000685BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

and

THE ENCLAVE AT NORTHSHORE, LP

Intervenor.

_____/

JIC PALATKA APARTMENTS, LLC,

Petitioner,

DOAH Case No. 23-000686BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

PARC WEST, LLC,

Intervenor.

_____/

INTERVENOR THE ENCLAVE AT NORTHSORE, LP'S NOTICE OF JOINDER IN FLORIDA HOUSING'S RESPONSE TO THE PETITIONER WOODLAND PARK II, LLC'S PROPOSED EXCEPTIONS TO THE RECOMMENDED ORDER

Filed June 1, 2023 10:37 AM Division of Administrative Hearings

The Enclave at Northshore, LP ("The Enclave") by and through its undersigned counsel, hereby files this Notice of Joinder Florida Housing's Response to Petitioner Woodland Park II, LLC's Exceptions to the Recommended Order submitted by Florida Housing Finance Corporation ("Florida Housing"). The Enclave hereby adopts, joins in and incorporates by reference the Response to Exceptions to the Recommended order submitted by Florida Housing to the extent it requests that the Board of Directors reject Petitioner's Exceptions, adopt the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order, and issue a Final Order consistent with same.

RESPECTFULLY SUBMITTED this 1st day of June, 2023,

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