

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

ABILITY VNA, LLC,

Petitioner,

vs.

FHFC Case No. 2021-104BP
DOAH Case No. 22-0080BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

MADISON GROVE, LLC; HTG HIDDEN
LAKE, LTD.; AND THE VERANDAS OF
PUNTA GORDA III, LLLP,

Intervenors.

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on April 29, 2022. Petitioner Ability VNA, LLC (“Ability”), and Intervenors Madison Grove, LLC (“Madison Grove”), HTG Hidden Lake, Ltd., (“Hidden Lake”), and The Verandas of Punta Gorda III, LLLP (“Verandas”) were Applicants under Request for Applications 2021-201, Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the “RFA”). The matter for

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

ATM:alamo / DATE: 5/2/2022

consideration before the Board is a Recommended Order issued pursuant to sections 120.57(3), Florida Statutes.

On December 10, 2021, Florida Housing Finance Corporation (“Florida Housing”) posted notice of its intended decision to award funding to twelve of the seventy-eight (78) applicants, including Intervenors Madison Grove, Verandas, and Hidden Lake. Petitioner timely filed a notice of intent to protest followed by a formal written protest challenging the scoring of Madison Grove. Madison Grove entered a Notice of Appearance as a Specifically Named Party. On January 10, 2022, Florida Housing referred the matter to the Division of Administrative Hearings (“DOAH”).

After conducting a telephonic status conference, Administrative Law Judge (the “ALJ”) Robert J. Telfer III set the case for Zoom teleconference hearing on February 9, 2022, on which date it commenced and concluded. Prior to hearing, Hidden Lake and Verandas filed Motions to Intervene, which were granted. Also prior to hearing, the parties submitted a Joint Pre-hearing Stipulation.

The two-volume final hearing transcript was filed with DOAH on March 1, 2022. The parties timely filed Proposed Recommended Orders. The Recommended Order of the ALJ was entered on March 31, 2022, recommending that Florida Housing enter a final order finding 1) Madison Grove is ineligible for the 2019 and

2020 Prior Submission Preference; and 2) Ability's application is eligible for funding and meets the 2019 and 2020 Prior Submission Preference.

No exceptions to the Recommended Order were filed.

Ruling on the Recommended Order

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

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

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

ORDER

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

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

IT IS HEREBY ORDERED that as to funding in RFA 2021-201:

1) Madison Grove is ineligible for the 2019 and 2020 Prior Submission Preference; and

2) Ability's application is eligible for funding and is eligible for the 2019 and 2020 Prior Submission Preference.

DONE and ORDERED this 29th day of April, 2021.



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**

ABILITY VNA, LLC,

Petitioner,

vs.

Case No. 22-0080BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

MADISON GROVE, LLC; HTG HIDDEN
LAKE, LTD.; AND THE VERANDAS OF
PUNTA GORDA III, LLLP,

Intervenors.

RECOMMENDED ORDER

On February 9, 2022, Administrative Law Judge Robert J. Telfer III, of the Florida Division of Administrative Hearings (DOAH), conducted a final hearing pursuant to section 120.57(3), Florida Statutes (2021), via the Zoom platform.

APPEARANCES

For Petitioner Ability VNA, LLC:

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For Respondent Florida Housing Finance Corporation:

Betty C. Zachem, Esquire
Florida Housing Finance Corporation
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For Intervenor Madison Grove, LLC:

J. Timothy Schulte, Esquire
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315 East Robinson Street, Suite 600
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Orlando, Florida 32802

For Intervenor Verandas of Punta Gorda III, LLLP:

Michael P. Donaldson, Esquire
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Tallahassee, Florida 32302

For Intervenor HTG Hidden Lake, Ltd.:

J. Stephen Menton, Esquire
Tana D. Storey, Esquire
Rutledge Ecenia, P.A.
119 South Monroe Street, Suite 202
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent Florida Housing Finance Corporation's (Florida Housing) intended award of funding under Request for Applications 2021-201 (RFA) was contrary to its governing statutes, rules, and policies, or the terms, conditions, and specifications of the RFA.

PRELIMINARY STATEMENT

On July 20, 2021, Florida Housing issued the RFA through which it expected to award up to \$14,971,500 of housing credits to proposed

developments in medium-size counties, and up to \$1,573,250 of housing credits to proposed developments in small counties. The RFA established an August 26, 2021, deadline for applications. On December 10, 2021, Florida Housing announced its intent to award funding to 12 of the 78 applicants, including Intervenors Madison Grove, LLC (Madison Grove); Verandas of Punta Gorda III, LLLP (Verandas); and HTG Hidden Lake, Ltd. (Hidden Lake).

On December 15, 2021, Petitioner, Ability VNA, LLC (Ability), filed a Notice of Intent to Protest, and on December 28, 2021, filed a Formal Written Protest and Petition for Administrative Proceedings (Petition). Florida Housing forwarded the Petition to DOAH on January 10, 2022, which was subsequently assigned to the undersigned and docketed as Case No. 22-0080BID.¹ After conducting a telephonic status conference, the undersigned noticed this matter for final hearing on February 9, 2022, via the Zoom platform.

Madison Grove entered a Notice of Appearance as a Specifically Named Party prior to Florida Housing forwarding the Petition to DOAH. On January 24, 2022, Hidden Lake filed a Motion to Intervene, which the undersigned granted that same day. On January 27, 2022, Verandas filed a Motion to Intervene, which the undersigned granted on January 28, 2022.

¹ Florida Housing also forwarded to DOAH, on January 10, 2022, the Formal Written Protest and Petition for Administrative Hearing filed by Autumn Palms Pondella, LLC, filed on December 28, 2021. This matter was assigned to the undersigned, and docketed as Case No. 22-0081BID. On January 12, 2022, the undersigned entered an Order Granting Unopposed Motion to Consolidate Cases, consolidating Case Nos. 22-0080BID and 22-0081BID. However, on February 3, 2022, Autumn Palms Pondella, LLC, filed a Notice of Voluntary Dismissal in Case No. 22-0081BID, and on February 4, 2022, the undersigned entered an Order Closing File and Relinquishing Jurisdiction.

The undersigned conducted the final hearing, as scheduled, on February 9, 2022. The previous afternoon, on February 8, 2022, Hidden Lake filed a Motion to Compel, which the undersigned considered and denied at the conclusion of the final hearing; the undersigned entered a written Order Denying Intervenor HTG Hidden Lake, Ltd.'s Motion to Compel on February 11, 2022. Florida Housing presented the testimony of Marissa Button, its Director of Multifamily Allocations. The undersigned admitted Joint Exhibits 1 through 3, 5 through 7, 9, 11, and 12 into evidence. Ability presented the testimony of Shannon Nezworth, President and CEO of Ability Housing. The undersigned admitted Exhibits VNA-1 through VNA-3 into evidence. Madison Grove presented the testimony of Stach Banach, a self-employed affordable housing developer. The undersigned admitted into evidence Exhibits MG-1 through MG-6 into evidence. Additionally, the undersigned admitted into evidence Hidden Lakes's Exhibits HTG-1 and HTG-2.

At the conclusion of the final hearing, in addition to considering Hidden Lakes's Motion to Compel, the undersigned considered additional argument concerning a Joint Pre-hearing Stipulation, Recommended Order, and Final Order in a previous bid protest concerning a different RFA that included some of the parties in the instant proceeding in DOAH Case Nos. 21-0515BID, 21-0516BID, 21-0517BID, 21-0518BID, and 21-0519BID. After some discussion, the parties agreed to submit a Joint Post Hearing Stipulation, which was filed on February 11, 2022.

The two-volume Transcript was filed with DOAH on March 1, 2022. The parties timely submitted Proposed Recommended Orders, which the undersigned has considered in preparing this Recommended Order.²

All statutory references are to the 2021 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes. Its purpose is to promote the public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to section 420.5099, Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code, and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits.

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

² Verandas filed a Notice of Joinder in Proposed Recommended Order, stating that it “hereby adopts, joins in and incorporates by reference the Proposed Recommended Orders submitted by Florida Housing and Ability.”

3. The demand for housing credits provided by the federal government exceeds the supply.

The Competitive Application Process

4. Section 420.507(48) authorizes Florida Housing to allocate housing credits and other funding through requests for proposals or other competitive solicitations, and Florida Housing has adopted Florida Administrative Code Chapter 67-60 to prescribe the competitive solicitation process. Chapter 67-60 provides that Florida Housing allocate its competitive funding through the bid protest provisions of section 120.57(3).

5. Applicants for funding request, in their applications, a specific dollar amount of housing credits to be given to the applicant each year for a period of ten years. Applicants normally will sell the rights to the future stream of income housing credits (through the sale of almost all of the ownership interest in the applicant entity) to an investor to generate the amount of capital needed to build the development. The amount an applicant can receive depends on 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. These are just examples of the factors considered, and this is by no means an exhaustive list.

6. Housing credits are made available through a competitive application process that starts with the issuance of an RFA. Rule 67-60.009(4) provides that an RFA “shall be considered a ‘request for proposal.’”

7. Florida Housing issued the RFA in this case on July 20, 2021, with responses due August 26, 2021.

8. Through the RFA, Florida Housing expects to award up to an estimated \$14,971,500 of housing credits to proposed developments in medium-sized

counties, and up to an estimated \$1,573,250 of housing credits to proposed developments in small counties.

9. Florida Housing received 78 applications in response to RFA 2021-201.

10. Florida Housing appointed a Review Committee to review the applications and make recommendations to Florida Housing's Board of Directors (Board). The Review Committee found 74 applications eligible and four applications ineligible. Through the ranking and selection process outlined in the RFA, the Review Committee recommended ten applications for preliminary funding. The Review Committee developed charts listing its eligibility and funding recommendations to be presented to the Board. After the Review Committee's recommendation of preliminary funding of the ten applications, \$567,850 in housing credits remained.

11. Two housing credits from RFAs issued in 2018 in 2019 were returned to Florida Housing. Ms. Button recommended to the Board to combine this returned funding—which was \$3,378,000—with the \$567,850 in remaining credits, for the overall funding amount of RFA 2021-201, for a total amount of \$3,954,850. With that additional funding, Ms. Button recommended that the Board preliminarily fund two additional applications in the RFA: 2022-203C Hibiscus Apartments Phase 2; and 2022-075C Bristol Manor.

12. On December 10, 2021, the Board met and considered the recommendations of the Review Committee and Ms. Button for RFA 2021-201. At approximately 9:51 a.m. that day, all of the applicants in RFA 2021-201 received notice that the Board determined whether applications were eligible or ineligible for consideration for funding, and that certain eligible applications were preliminarily selected for funding, subject to satisfactory completion of the credit underwriting process. Florida Housing provided notice through the posting of two spreadsheets, one listing the Board-approved scoring results in RFA 2021-201, and one identifying the applications which Florida Housing proposed to fund, on Florida Housing's website.

13. In the December 10, 2021, posting, Florida Housing announced its intention to award funding to 12 applicants, including Madison Grove, Hidden Lake, and Verandas.

14. Petitioner timely filed its Petition, and Intervenors timely intervened.

RFA 2021-201 Ranking and Selection Process

15. The RFA contemplates a structure in which an applicant is scored on eligibility items and obtains points for other items. A summary of the eligibility items is available in Section 5.A.1 of the RFA, beginning at page 71. Only applications that meet all of the eligibility requirements will be eligible for funding and considered for funding selection.

16. The instant challenge does not raise any issues with respect to the total points awarded to the applicants.

17. The RFA sets forth the following funding goals:

a. The Corporation has a goal to fund six Medium County Developments that qualify for the Local Government Areas of Opportunity Funding Goal outlined in Section Four A.11.a. of the RFA, with the following preferences:

(1) Two Applications that qualify for the Developments that were Previously Submitted in RFA 2019-113 and RFA 2020-201 but were not Awarded Preference described in Section Four, A.11.b.(1) of the RFA; and

(2) Two Applications that qualify for the Developments that were Previously Submitted in RFA 2020-201 but not Awarded Preference described in Section Four, A.11.b.(2) of the RFA; and

(3) Two additional Applications that qualify for the Local Government Area of Opportunity Goal, regardless of whether the Applications were previously submitted, as described in Section Four, A.11.b.(3) of the RFA.

b. The Corporation has a goal to fund one Development that qualifies for the SunRail Goal outlined in Section Four, A.5.e.(5) of the RFA.

c. The Corporation has a goal to fund one Development that qualifies for the Local Revitalization Initiative Goal outlined in Section Four A.5.h. of the RFA.

d. The Corporation has a goal to fund two Developments with a Demographic commitment of Family that select and qualify for the Geographic Areas of Opportunity / SADDA Goal outlined in Section Four, A.10.a.(1)(d) of the RFA.

*Note: During the Funding Selection Process outlined below, an Applicant that is selected for funding may meet more than one goal. For instance, if an Application that was selected to meet the Local Government Areas of Opportunity Goal also qualifies for the Local Revitalization Initiative Goal, the Local Revitalization Initiative Goal will also be considered met. If an Application that was selected to meet the Local Government Areas of Opportunity Goal and/or SunRail Goal also qualifies for the Revitalization Goal, the Revitalization Goal will also be considered met. There is one exception to this. Applications selected to meet the Local Government Areas of Opportunity Goal, SunRail Goal, or Local Revitalization Initiative Goal will not count towards meeting the Geographic Areas of Opportunity / SADDA Goal, even if the Application also qualifies for the Geographic Areas of Opportunity / SADDA Goal.

18. The RFA sets forth the sorting order to be used when selecting applications to meet the Local Government Areas of Opportunity Funding Goal, as follows:

The highest scoring Applications will be determined by first sorting together all eligible Priority I Medium County Applications that qualify for the Local Government Area of Opportunity Goal

from highest score to lowest score, with any scores that are tied separated in the following order. This will then be repeated for Priority II Applications:

(1) First, Applications that submit a Local Government Verification of Contribution – Loan Form or Local Government Verification of Contribution – Grant Form executed by any of the following Local Governments will receive lower preference, as further described in Section Four, 11.c. of the RFA: Bradenton; Cape Coral; Clay County; Cocoa; Lakeland; Milton; New Smyrna Beach; Panama City; City of Sarasota; St. Lucie. The remaining Local Governments will receive higher preference.

(2) Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four, A.10.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(3) Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four, A.4.b.(4) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(4) Next, by the Application's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification A listed above Applications having the Classification B);

(5) Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(6) And finally, by lottery number, resulting in the lowest lottery number preference.

19. The RFA next sets forth the sorting order to be used when selecting applications to meet the SunRail Goal:

The highest scoring Priority I Applications will be determined by first sorting together all eligible Applications from highest score to lowest score, with any scores that are tied separated in the following order. This will then be repeated for Priority II Applications.

(1) First, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four, A.10.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(2) Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four, A.4.b.(4) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(3) Next, by the Application's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification of A listed above Applications having the Classification of B);

(4) Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(5) And finally, by lottery number, resulting in the lowest lottery number receiving preference.

20. The RFA then sets forth the sorting order to be used when selecting applications to meet the Local Revitalization Initiative Goal:

The highest scoring Priority I Applications will be determined by first sorting together all eligible Applications from highest score to lowest score, with any scores that are tied separated in the following order. This will then be repeated for Priority II Applications.

(1) First, Applications that submit a Local Government Verification That Development Is Part Of A Local Revitalization Plan form executed by any of the following Local Governments will receive lower preference, as further described in Section Four, 5.h. of the RFA: Bradenton; Cape Coral; New Smyrna Beach; City of Sarasota; Newtown; City of Tallahassee; Escambia County; Pasco County; and Sanford. The remaining counties will receive higher preference;

(2) Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.10.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(3) Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four, A.4.b.(4) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(4) Next, by the Application's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification of A listed above Applications having the Classification of B);

(5) Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with

Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(6) And finally, by lottery number, resulting in the lowest lottery number receiving preference.

21. Next, the RFA sets forth the sorting order to be used after selecting Applications to meet the Local Government Areas of Opportunity Funding Goal, SunRail Goal, and Local Revitalization Initiative Goal as follows:

The highest scoring Priority I Applications will be determined by first sorting together all eligible Applications from highest score to lowest score, with any scores that are tied separated in the following order. This will then be repeated for Priority II Applications:

(1) First, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four, A.10.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(2) Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four, A.4.b.(4) of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(3) Next, by the Application's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification of A listed above Applications having the Classification of B);

(4) Next, by the Application's eligibility for the Proximity Funding Preference (which is outlined in Section Four, A.5.e. of the RFA) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;

(5) Next, by the Application's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

(6) And, finally, by lottery number, resulting in the lowest lottery number having preference.

22. The RFA includes a Funding Test where (a) Small County Applications will be selected for funding only if there is enough Small County funding (\$1,573,250) available to fully fund the Eligible Housing Credit Request Amount, and (b) Medium County Applications will be selected for funding only if there is enough Medium County funding (\$14,971,500) available to fully fund the Eligible Housing Credit Request Amount.

23. The RFA outlines a specific County Award Tally as follows:

As each application is selected for tentative funding, the county where the proposed Development is located will have an Application credited towards the County Award Tally.

Throughout the selection process, the Corporation will prioritize eligible unfunded Priority I Applications that meet the Funding Test and are located within counties that have the lowest County Award Tally above other eligible unfunded Priority I Applications with a higher County Award Tally that also meet the Funding Test, even if the Priority I Applications with a higher County Award Tally are higher ranked, and above all Priority II Applications.

The Corporation will prioritize eligible unfunded Priority II Applications that meet the Funding Test and are located within counties that have the lowest County Award Tally above other eligible unfunded Priority II Applications with a higher County Award Tally that also meet the Funding Test, even if the Priority I Applications with a higher County Award Tally are higher ranked.

24. The RFA outlines the selection process as follows:

- a. Six Applications that qualify for the Local Government Areas of Opportunity Funding Goal
 - (1) Preference for Two Developments that were Previously Submitted in RFA 2019-113 and RFA 2020-201 but not Awarded.

The first two Applications that will be selected for funding will be the highest ranking eligible Medium County Priority I Applications that qualify for the Preference for Developments that were Previously Submitted in RFA 2019-113 and RFA 2020-201 but not Awarded as described in Section Four, A.11.b.(1) of the RFA, subject to the Funding Test and the County Award Tally.

Priority I Applications will continue to be selected until this preference is met. If there are no remaining eligible unfunded Priority I Applications that qualify for this preference, then the process will continue using Priority II Applications until this preference is met.

- (2) Preference for Two Developments that were Previously Submitted in RFA 2020-201 but not Awarded.

The first two Applications that will be selected for funding will be the highest ranking eligible Medium County Priority I Applications that qualify for the Preference for Developments that were Previously Submitted in RFA 2020-201 but not Awarded as described in Section Four, A.11.b.(2) of the RFA, subject to the Funding Test and the County Award Tally.

Priority I Applications will continue to be selected until this preference is met. If there are no remaining eligible unfunded Priority I Applications that qualify for this preference, then the process will continue using Priority II Applications until this preference is met.

(3) Preference for additional Applications that qualify for the Local Government Area of Opportunity Goal, regardless of whether the Applications were previously submitted

The next Applications that will be considered for funding will be the highest ranking eligible Medium County Priority I Applications that qualify for the Local Government Areas of Opportunity Funding Goal, regardless of whether the Applications were previously submitted, subject to the Funding Test and the County Award Tally.

Priority I Applications will continue to be selected until this Goal is met. If there are no remaining eligible unfunded Priority I Applications that qualify for this Goal, then the process will continue using Priority II Applications until this Goal is met or until it is determined that there are no eligible unfunded Applications that can meet this Goal.

b. One Application that qualifies for the SunRail Goal.

If an Application that was selected to meet the Local Government Areas of Opportunity Goal described in a. above also qualifies for the SunRail Goal, this Goal will be considered met without selecting an additional Application.

If none of the Applications selected to meet the Local Government Areas of Opportunity Goal also qualify for the SunRail Goal, the next Application selected for funding will be the highest ranking eligible unfunded Priority I Application that qualifies for the SunRail Goal, subject to the Funding Test and the County Award Tally.

If there are no eligible unfunded Priority I Applications that qualify for this Goal, then the highest ranking eligible unfunded Priority II Application that qualifies for the SunRail Goal will be selected, subject to the Funding Test and the County Award Tally.

c. One Application that qualifies for the Local Revitalization Initiative Goal.

If an Application that was selected to meet the Local Government Areas of Opportunity Goal described in a. above or SunRail Goal described in b. above also qualifies for the Local Revitalization Initiative Goal, this Goal will be considered met without selecting an additional Application.

If none of the Applications selected to meet the Local Government Areas of Opportunity Goal or SunRail Goal, also qualify for the Local Revitalization Initiative Goal, the next Application selected for funding will be the highest ranking eligible unfunded Priority I Application that qualifies for the Local Revitalization Initiative Goal, subject to the Funding Test and the County Award Tally.

If there are no eligible unfunded Priority I Applications that qualify for this Goal, then the highest ranking eligible unfunded Priority II Application that qualifies for the Local Revitalization Initiative Goal will be selected, subject to the Funding Test and the County Award Tally.

d. Two Family Applications that qualify for the Geographic Areas of Opportunity/HUD-designated SADDA Goal.

The next two Applications selected for funding will be the highest ranking eligible unfunded Priority I Family Applications that qualify for the Geographic Areas of Opportunity/HUD-designated SADDA Goal, subject to the Funding Test and the County Award Tally.

Priority I Applications will continue to be selected until this Goal is met. If there are no remaining eligible unfunded Priority I Applications that qualify for this Goal, then the process will continue using Priority II Applications until this Goal is met

or until it is determined that there are no eligible unfunded Applications that can meet this Goal.

e. The next Applications selected for funding will be the highest ranking eligible unfunded Priority I Small County Applications that (i) can meet the Small County Funding Test and (ii) have a County Award Tally that is less than or equal to any other eligible unfunded Small County Priority I Applications. If Small County funding remains and no unfunded eligible Small County Priority I Application can meet the Small County Funding Test, then the process will continue using Priority II Applications until this Goal is met or until no unfunded eligible Small County Priority II Application can meet the Small County Funding Test.

If Small County funding remains and no unfunded eligible Small County Application can meet the Small County Funding Test, no further Small County Applications will be selected, and the remaining Small County funding will be added to the Medium County funding amount.

f. The next Applications selected for funding will be the highest ranking eligible unfunded Priority I Medium County Applications that (i) can meet the Medium County Funding Test and (ii) have a County Award Tally that is less than or equal to any other eligible unfunded Medium County Priority I Applications. If Medium County funding remains and no unfunded eligible Medium County Priority I Application can meet the Medium County Funding Test, then the process will continue using Priority II Applications until this Goal is met or until no unfunded eligible Medium County Priority II Application can meet the Small County Funding Test.

If Medium County funding remains and no unfunded eligible Medium County Application can meet the Medium County Funding Test, no further Applications will be selected and the remaining

funding will be distributed as approved by the Board.

25. After the description of the sorting process, the RFA specifies:

Funding that becomes available after the Board takes action on the Committee's recommendation(s), due to an Applicant withdrawing, an Applicant declining its invitation to enter credit underwriting or the Applicant's inability to satisfy a requirement outlined in this RFA, and/or provisions outlined in Rule Chapter 67-48, F.A.C., will be distributed as approved by the Board.

26. All 78 applications for RFA 2021-201 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.

Madison Grove Application

27. During the scoring process, Florida Housing determined that the Madison Grove application was eligible for funding and preliminarily selected Madison Grove for funding under the goal to fund two applications that qualify for the Local Government Areas of Opportunity (LGAO) funding for developments that were previously submitted in RFA 2019-113 and RFA 2020-201, but not awarded (2019 and 2020 Prior Submission Preference). As will be discussed below, Ability challenges this determination, and Florida Housing has, during the course of this proceeding, changed its position on Madison Grove's eligibility under this particular funding goal. Madison Grove and Hidden Lake, on the other hand, both contend that Madison Grove satisfied this funding goal. Hidden Lake offers additional challenges to the Madison Grove application.

28. An applicant must meet the following criteria to qualify for the 2019 and 2020 Prior Submission Preference:

- The question at 11.b.(1) of Exhibit A must reflect confirmation that the development was previously submitted in RFA 2019-113 and RFA 2020-201, but not awarded;
- The application in RFA 2019-113 and RFA 2020-201 must have provided a Local Government Verification of Contribution – Loan or Grant form demonstrating the minimum LGAO funding amount outlined in that RFA;
- The application in RFA 2020-201 was submitted as a Priority I application;
- The application number in RFA 2019-113 and RFA 2020-201 must be provided;
- The Demographic Commitment of the proposed development must be identical to the Demographic Commitment as the application submitted in RFA 2019-113 and RFA 2020-201;
- The number of units of the proposed development must be equal to at least 90 percent of the number of units as the application previously submitted in RFA 2019-113 and RFA 2020-201. Note: if an application was submitted in both RFAs 2019-113 and 2020-201 but consisted of a different number of units in each submission, the proposed development must be equal to at least 90 percent of the number of units of the previously submitted application with the lesser number of units;
- The Development Location Point and latitude and longitude coordinates for all Scattered Sites of the application submitted in RFA 2019-113 and RFA 2020-201 must be located on the same site(s) as the proposed development. These coordinates do not need to be identical. Additionally, the size of the site(s) of the proposed development does not need to be identical to the application previously submitted

in RFA 2019-113 or RFA 2020-201. The proposed development site may be larger or smaller than the previously submitted application if other requirements are also met (Location Criteria);

- At least one of the entities that is a principal for the applicant disclosed on the Principal Disclosure Form submitted for the proposed development must also have been a principal for the applicant disclosed on the Principal Disclosure Form in RFA 2019-113 and RFA 2020-201; and
- The application submitted in RFA 2019-113 and RFA 2020-201 was not invited to enter credit underwriting.

29. Ability challenges Madison Grove's entitlement to the 2019 and 2020 Prior Submission Preference, alleging that Madison Grove failed to meet the seventh bullet point criteria – the Location Criteria.

30. Neither the RFA, the Florida Statutes, nor any rule promulgated by Florida Housing defines the terms "development site" or "site."

31. Rule 67-48.002(34) defines Development Location Point (DLP) as:

a single point selected by the Applicant on the proposed Development site that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development. For a Development which consists of Scattered Sites, this means a single point on the site with the most units that is located within 100 feet of a residential building existing or to be constructed as part of the proposed Development.

32. Rule 67-48.002(106) defines Scattered Sites as:

unless otherwise stated in a competitive solicitation, as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a

“Scattered Site”). For purposes of this definition “contiguous” means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement, provided the easement is not a roadway or a street. All of the Scattered Sites must be located in the same county.

33. Madison Grove did not propose a Scattered Sites Development in its Application.

34. For RFA 2019-113, the development site in Madison Grove’s application was located on tracts five and six of a parcel of land known as the Stevens Plantation Corporate Campus Replat (Stevens Plantation). Madison Grove placed the DLP on tract six.

35. For RFA 2020-201, the development site in Madison Grove’s application was located on tracts four and five. Madison Grove placed the DLP on tract five.

36. And, for RFA 2021-201, the development site in Madison Grove’s application was located on tracts four and five, and did not include tract six. Madison Grove placed the DLP on tract five.

37. The DLP in Madison Grove’s application for RFA 2019-113 is not located on the same development site as it proposed in its application for RFA 2021-201. According to Ability (and Florida Housing during the course of this proceeding), because the DLP in RFA 2019-113 is not the same as the DLP in RFA 2021-201, Madison Grove is ineligible for the 2019 and 2020 Prior Submission Preference because it does not meet the requirements of the Location Criteria.

38. Madison Grove and Hidden Lakes contend that the Location Criteria for the 2019 and 2020 Prior Submission Preference (a) by its plain language, only applies to “all Scattered Sites” and, because Madison Grove did not propose a Scattered Sites development, the Location Criteria’s requirement that a DLP be located on the same site as the development site is

inapplicable, or (b) is ambiguous, and should be resolved in Madison Grove's favor under controlling precedent. Alternatively, Madison Grove and Hidden Lakes contend that any non-conformance to this requirement in the RFA should be waived as a minor irregularity.

39. The Location Criteria states, in part:

The Development Location Point and latitude and longitude coordinates for all Scattered Sites of the application submitted in RFA 2019-113 and RFA 2020-201 must be located on the same site(s) as the proposed development.

Madison Grove's contentions that the Location Criteria only applies to Scattered Sites, or that the Location Criteria language is ambiguous, are not reasonable. The phrase "for all Scattered Sites" applies to the immediately preceding phrase of "latitude and longitude coordinates[,]," not to the DLP. Additionally, as Ms. Button testified, the parenthesis around the "s" in the next sentence—"must be located on the same site(s)"—provides clear, unambiguous intent that Florida Housing intended for the Location Criteria to apply to single and Scattered Sites developments.

40. Ms. Button's testimony provided additional clarity on this issue. She testified that a policy objective in including the 2019 and 2020 Prior Submission Preference in the RFA was "to make sure that the submissions for the prior submission preference were substantially similar to the proposed developments that were presented in this RFA."

41. Madison Grove and Hidden Lake's contention that the Location Criteria language is either inapplicable or unambiguous is unreasonable for an additional reason: such a reading of this RFA provision—where the Location Criteria only applies to Scattered Sites—would mean that Florida Housing could not consider location criteria of non-Scattered Sites developments in determining whether an applicant would qualify for the 2019 and 2020 Prior Submission Preference. Such an interpretation is

contrary to the plain language of the RFA, and the policy objective of Florida Housing.

42. Madison Grove presented evidence that Mr. Banach sent an email to Ms. Button on August 19, 2020, which inquired about the criteria in RFA 2020-201:

We submitted a LGAO application last year in RFA 2019-113 and are anticipating submitting it again this year for RFA 2020-201. We would like to get clarification from FHFC as to whether the application would be considered a “previously submitted” application or a “new” application.

We know the application will meet all the (5) criteria items in the RFA for a “previously submitted” application except for the 3rd bullet point. The city has asked us to switch lots, which are all adjacent. This changes the legal description and the DLP lat/long.... We are swapping Tracts 5&6 for Tracts 4&5.

The 3rd bullet point on page 68 of the RFA reads: “The Development Location Point and latitude and longitude for all Scattered Sites stated at question 5 ... of Exhibit A of the proposed Development and the Application submitted in RFA 2019-113 must be identical.”

If we don't have a scattered site, does this 3rd bullet item still apply?

43. Ms. Button responded to Mr. Banach's email the next day, stating, “[w]e have an updated draft coming out today that should answer your question.” The next draft of RFA 2020-201 contained the same language in the above-quoted “third bullet point.”

44. Madison Grove contends that this email exchange was evidence of Florida Housing's agreement with its position that the DLP is required only for Scattered Sites, and that it relied on this email exchange, at least in part, in submitting its application under RFA 2020-201. Putting aside the fact that

that exchange was related to a previous RFA that is not the subject of this proceeding, with substantively different language than the Location Criteria in RFA 2021-201, both RFAs explicitly provided for a question-and-answer time period where any interested party could submit written inquiries regarding the respective RFAs and Florida Housing would provide a written response. Both RFAs also state that “[n]o other means of communication, whether oral or written, shall be construed as an official response or statement from the Corporation.” Madison Grove did not submit a question through this prescribed question-and-answer process for this RFA, and the undersigned finds that the email communication between Mr. Banach and Ms. Button from a previous RFA was not an official response from Florida Housing in RFA 2021-201 that would evidence Florida Housing’s agreement with Madison Grove’s position in the instant matter.

45. Madison Grove and Hidden Lake also argue that because Madison Grove met the preference for a prior submission from RFA 2019-113 in RFA 2020-201 (the 2019-113 Preference), the undersigned should find that Madison Grove qualifies for the 2019 and 2020 Prior Submission Preference in RFA 2021-201.³

46. With respect to RFA 2020-201, Florida Housing initially determined that Madison Grove did not qualify for the prior submission preference because it failed to meet certain criteria regarding the identity of its principals. In *Fletcher Black II, LLC v. Florida Housing Finance Corporation*, DOAH Case No. 21-0515BID (Fla. DOAH Apr. 14, 2021; Fla. FHFC Apr. 30, 2021), which contested Florida Housing’s determination in RFA 2020-201, all

³ Among the requirements to qualify for the 2019-113 Preference, RFA 2020-201 required the following:

The Development Location Point and latitude and longitude coordinates for all Scattered Sites stated at question 5. of Exhibit A for the proposed Development must be located on the same site(s) as the Application submitted in RFA 2019-113. These coordinates do not need to be identical to the Application submitted in RFA 2019-113[.]

of the parties entered into a Joint Pre-hearing Stipulation that, *inter alia*, agreed that Madison Grove met the requirements for the 2019-113 Preference. The Recommended Order, following the Joint Pre-hearing Stipulation, found that, under the plain language of RFA 2021-201, Madison Grove (and other applicants) met the requirements regarding the identity of its principals and, thus was eligible for the 2019-113 Preference. The Recommended Order made no findings concerning the location criteria for the 2019-113 Preference because that was not an issue in that litigation.⁴

47. The undersigned notes that Madison Grove appears to meet the 2020-201 Preference in RFA 2021-201. Its DLP for its proposed development in 2020 was located on tract five, which was the same site as the application it submitted in RFA 2021-201.

48. However, the location criteria in RFA 2019-113 differs from the Location Criteria in RFA 2021-201. RFA 2020-201 required the DLP listed in the application to be located on the same development “site(s)” submitted in RFA 2019-113. RFA 2021-201 required the DLPs listed in RFAs 2019-113 and 2020-201 to be located on the same development “site(s)” proposed in RFA 2021-201. As Madison Grove’s DLP for RFA 2019-113 was located on tract six, it did not meet the requirements for the Location Criteria.

49. Madison Grove and Hidden Lake also contend that the undersigned should find that any failure by Madison Grove to comply with the Location Criteria for the 2019 and 2020 Prior Submission Preference is a minor irregularity and, thus, should be waived.

50. The undersigned has considered the locations of tracts four, five, and six. The undersigned has also considered the testimony of Mr. Banach, who testified that the City of St. Cloud requested that Madison Grove move development sites from tracts five and six to tracts four and five so that the City could sell a portion of the Stevens Plantation to a prospective buyer. Mr. Banach testified that in moving the location of development sites, the

⁴ Hidden Lake was not a party to the bid protest in DOAH Case No. 21-0515BID.

DLP moved by approximately 180 feet from the application submitted in RFA 2019-113 to the application submitted in RFA 2020-201.

51. Mr. Banach also testified that, for RFA 2019-113, Madison Grove could have located the DLP on tract five, but did not do so.

52. Ms. Button testified why Florida Housing did not consider Madison Grove's failure to comply with the Location Criteria for the 2019 and 2020 Prior Submission Preference a waivable minor irregularity:

So the material – there is that they did not meet the criteria for the preference because the 2019 DLP was not on the 2021 development site. And when we look at the rule for what we define as minor irregularities and what can be considered a waivable minor irregularity, we look at deviations in the RFA requirements, but they can't – there is a number of things of criteria within that minor irregularity analysis we look at to determine whether or not we could consider it a minor irregularity.

And the one that sticks out to me regarding this particular error is that ... the error can't provide a competitive advantage that the beneficiary would receive that other similarly situated applicants wouldn't be able to receive. And the irregularity can't be contrary to the interest of Florida Housing or the public.

And so when ... Florida Housing looks at an error – and particularly when you've asked me about the error here on the application for Madison Grove – I don't think it meets the threshold to be a minor irregularity because, for us to agree to that, it would provide a competitive advantage to Madison Grove because they would be receiving a funding preference that any other similarly situated applicant would not receive.

And so if there were other applicants within this RFA that had a similar circumstance where they had a DLP ... from the 2019 or 2020 applications that were not on the 2020 site ... Madison Grove []

would be getting an advantage in waiving this that potentially another applicant didn't receive.

And also there is an impact because other applicants that may not have – decided not to apply because of that reason, as they will compete for that preference, are also not able to receive that preference.

The undersigned finds Ms. Button's testimony credible and agrees that Madison Grove's failure to comply with the Location Criteria for the 2019 and 2020 Prior Submission Preference is not a waivable minor irregularity.⁵

53. Hidden Lake also contends that if the undersigned were to find that Madison Grove is ineligible for the 2019 and 2020 Prior Submission Preference, and if the undersigned were to find that the corresponding documents provided in its application in RFA 2021-201 to support Madison Grove's eligibility for the 2019 and 2020 Prior Submission were not accurate, then Madison Grove would not meet the requirements for its Applicant Certification and Acknowledgment Form, and its application in RFA 2021-201 would thus be ineligible.

54. As an eligibility item, the RFA requires applicants to include an Applicant Certification and Acknowledgment Form that is specific to the RFA and which is executed by the Authorized Principal Representative of the Applicant.

55. As Attachment 1 to its application to the RFA, Madison Grove submitted an Applicant Certification and Acknowledgment Form, executed by its Authorized Principal Representative, Patrick E. Law.

56. The Applicant Certification and Acknowledgment Form, in relevant part, includes the following provisions:

⁵ The parties at hearing stated, and Florida Housing in its Proposed Recommended Order states, that the RFA also contains a separate preference for developments that were previously submitted in RFA 2020-201 but not awarded (2020 Prior Submission Preference), which Madison Grove also selected in its application for the RFA. Florida Housing admits that Madison Grove meets the 2020 Prior Submission Preference because its DLPs for the development site in RFAs 2020-201 and 2021-201 are the same.

15. In eliciting information from third parties required by and/or included in this Application, the Applicant has provided such parties information that accurately describes the Development as proposed in this Application. The Applicant has reviewed the third-party information included in this Application and/or provided during the credit underwriting process and the information provided by any such party is based upon, and accurate with respect to, the Development as proposed in this Application.

* * *

21. The undersigned is authorized to bind the Applicant entity to this certification and warranty of truthfulness and completeness of the Application.

Under the penalties of perjury, I declare and certify that I have read the foregoing and that the information is true, correct and complete.

57. Mr. Banach testified that Madison Grove did not elicit information from third parties to determine whether it met the Location Criteria. The undersigned finds that there was no competent, substantial evidence in the record to demonstrate that Madison Grove violated a provision of the Applicant Certification and Acknowledgment Form when it selected, in its application, that it qualified for the 2019 and 2020 Prior Submission Preference.

58. The undersigned finds that Madison Grove does not qualify for the 2019 and 2020 Prior Submission Preference.⁶

⁶ Florida Housing notes in its Proposed Recommended Order that if Madison Grove is not entitled to the 2019 and 2020 Prior Submission Preference, Ability would then be selected for funding under the 2019 and 2020 Prior Submission Preference. Florida Housing also notes in its Proposed Recommended Order that under this scenario, Madison Grove will be selected for funding under the 2020 Prior Submission Preference, and Ability will be selected for funding, but Hidden Lake will then not be selected for funding.

Ability Application

59. Florida Housing deemed Ability's application eligible pursuant to the terms of the RFA, but did not select Ability for preliminary funding.

60. As an eligibility item, the RFA requires that applicants upload a Principals of the Applicant and Developer(s) Disclosure Form (Principals Disclosure Form). The RFA states that "the Principals Disclosure Form must identify, pursuant to subsections 67-48.002(94), 67-48.0075(8) and 67-48.0075(9), F.A.C., the Principals of the Applicant and Developer(s) as of the Application deadline."

61. The application deadline for the RFA was August 26, 2021.

62. Rule 67-48.002(94) defines "Principal" as follows:

(94) "Principal" has the meanings set forth below and any Principal other than a natural person must be a legally formed entity as of the Application deadline:

(a) For a corporation, each officer, director, executive director, and shareholder of the corporation.

(b) For a limited partnership, each general partner and each limited partner of the limited partnership.

(c) For a limited liability company, each manager and each member of the limited liability company.

(d) For a trust, each trustee of the trust and all beneficiaries of majority age (i.e.; 18 years of age) as of the Application deadline.

(e) For a Public Housing Authority, each officer, director, commissioner, and executive director of the Authority.

63. Rule 67-48.0075(8) and (9) provide additional requirements regarding the disclosure of the principals of each applicant.

64. Although Madison Grove and Hidden Lake argued at the final hearing that Ability failed to disclose all of its principals on its Principals Disclosure Form, neither raised this issue in their Proposed Recommended Orders.

65. In its application for the RFA, Ability listed its Manager and Non-Investor Member as Ability VNA NM, LLC. The sole Member and Manager of Ability VNA NM, LLC, is Ability Housing, Inc. Ability's application for the RFA lists the executive director and the officers/directors of Ability Housing, Inc. Ability also disclosed Ability Housing, Inc., as the sole developer of the development—Villages of New Augustine.

66. Ability Housing, Inc., is a Florida nonprofit corporation. It is a nonprofit affordable housing developer that started in Jacksonville, and has expanded to Orlando. The undersigned finds competent, substantial evidence supports that the Board of Directors of Ability Housing, Inc., as of the August 26, 2021, application deadline for the RFA, was accurately reflected in the Principals Disclosure Form.

CONCLUSIONS OF LAW

67. DOAH has jurisdiction over the subject matter and the parties to this proceeding in accordance with sections 120.569 and 120.57(3).

68. Section 420.507 authorizes Florida Housing to allocate low-income housing tax credits by competitive solicitation, stating:

The corporation shall have all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this part, including the following powers which are in addition to all other powers granted by other provisions of this part:

* * *

(49) To award its annual allocation of low-income housing tax credits, nontaxable revenue bonds, and State Apartment Incentive Loan Programs appropriated by the Legislature and available to

allocate by request for proposals or other competitive solicitation.

69. Protests to competitive contract solicitations or awards are governed by section 120.57(3)(f), which provides in part:

(f) In a protest to an invitation to bid or request for proposals procurement, no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered. In a protest to an invitation to negotiate procurement, no submissions made after the agency announces its intent to award a contract, reject all replies, or withdraw the solicitation which amend or supplement the reply shall be considered. Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

70. As the party challenging Florida Housing's proposed award, Ability bears the burden of proof with respect to its challenge.

71. Petitioner and Intervenors have standing. All have established that the agency action affects their substantial interests.

72. Although chapter 120 uses the term "de novo" to describe competitive solicitation proceedings, courts have recognized that a different kind of "de novo" is contemplated for this particular type of agency action. Unlike truly de novo proceedings, bid disputes are a form of intra-agency review in which the purpose of the proceeding is to evaluate the action taken by the agency.

State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

73. However, proceedings to challenge a competitive award are not simply a record review of the information that was before the agency. The proceedings remain “de novo” in that the evidence presented at hearing is not restricted to what was before the agency when it made its preliminary decision. A new evidentiary record based upon the historical, objective facts is developed. *Asphalt Pavers, Inc. v. Dep't of Transp.*, 602 So. 2d 558, 560-61 (Fla. 1st DCA 1992). The new findings of fact must support the final order to be issued by the agency. *Gtech Corp. v. Dep't of Lottery*, 737 So. 2d 615, 619 (Fla. 1st DCA 1999).

74. Facts are determined based upon the evidence presented at hearing. However, applicants are not permitted to submit information that should have been, but was not, included in the application submitted in response to the RFA. Section 120.57(3) expressly prohibits this type of evidence, stating, “no submissions made after the bid or proposal opening which amend or supplement the bid or proposal shall be considered.” The application must stand on its own, as originally submitted, in light of determined facts. § 120.57(3), Fla. Stat.

75. After the administrative law judge determines the relevant facts based upon the evidence presented at hearing, the agency’s intended action must be considered in light of those facts, and the agency’s determinations must remain undisturbed unless they are clearly erroneous, contrary to competition, arbitrary, or capricious. A proposed award will be upheld unless it is contrary to governing statutes, the agency’s rules, or the terms of the RFA.

76. A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948); *Tropical Jewelers, Inc. v.*

Bank of Am., N.A., 19 So. 3d 424, 426 (Fla. 3d DCA 2009). With respect to conclusions of law, the First District has held that the clearly erroneous standard requires that an agency's legal interpretations will be upheld if the agency's construction falls within the permissible range of interpretations, *Colbert v. Department of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), unless the agency's interpretation conflicts with the plain and ordinary meaning of the law. *Fla. Hosp. v. Ag. for Health Care Admin.*, 823 So. 2d 844, 848 (Fla. 1st DCA 2002).

77. An agency's decision is contrary to competition if it unreasonably interferes with the purposes of competitive procurement, which the Supreme Court of Florida describes as protecting the public against collusive contracts and securing fair competition upon equal terms to all bidders. *Wester v. Belote*, 103 Fla. 976, 981-82, 138 So. 721, 723-24 (Fla. 1931); *see also Harry Pepper & Assoc. v. City of Cape Coral*, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

78. Finally, an action is arbitrary if it is not supported by logic or the necessary facts, and is capricious if it is adopted without thought or reason, or if it is irrational. *Hadi v. Liberty Behav. Health Corp.*, 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006); *Agrico Chem. Co. v. Dep't of Env't Regul.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). To determine whether an agency acted in an arbitrary or capricious manner, the undersigned must determine whether an agency has considered all of the relevant factors; has given actual, good faith consideration to those factors; and has used reason rather than whim to progress from considering those factors to reaching a final decision. *Adam Smith Enter. v. Dep't of Env't Regul.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). However, if a decision is justifiable under any analysis that a reasonable person might use to reach a decision of similar importance, the decision is not arbitrary or capricious. *Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632, 635 n.3 (Fla. 2d DCA 1992).

79. While an application containing a material deviation is unacceptable, not every deviation from a competitive solicitation is fatal. A deviation is only fatal if it is material. The deviation is “only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition.” *Tropabest Foods, Inc. v. Fla. Dep’t of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

80. Rule 67-60.008 further provides:

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.

Madison Grove Application

81. Ability has met its burden to prove that Madison Grove materially deviated from the requirements in the RFA for the 2019 and 2020 Prior Submission Preference, and is therefore not entitled to this preference.

82. To qualify for the 2019 and 2020 Prior Submission Preference, the RFA requires that an applicant meet nine criteria. Madison Grove failed to meet the Location Criteria, although it claims that it should still be entitled to the 2019 and 2020 Prior Submission Preference.

83. Madison Grove and Hidden Lake’s interpretation of the RFA’s Location Criteria—that the DLP requirement only applies to Scattered Sites Developments or is ambiguous—is illogical, unreasonable, and contrary to the plain language in the RFA. The phrase “for all Scattered Sites” applies to the immediately preceding phrase of “latitude and longitude coordinates[.]” not to the DLP. The use of parentheses in the word “site(s)” in the Location

Criteria demonstrates that the DLP requirement applies to developments containing single site or contiguous site developments, as well as Scattered Sites developments. Madison Grove and Hidden Lake's contention that the Location Criteria only applies to Scattered Sites would thus mean that Florida Housing could not consider location criteria of non-Scattered Sites developments in determining whether an applicant would qualify for the 2019 and 2020 Prior Submission Preference, which is contrary to the plain language of the RFA, and, as Ms. Button testified, the policy objective of Florida Housing.

84. Madison Grove's and Hidden Lake's contention that Florida Housing must follow the Joint Pre-hearing Stipulation and precedent in *Fletcher Black II, LLC*, which contested Florida Housing's determination in RFA 2020-201 and, according to Madison Grove and Hidden Lake, stipulated that Madison Grove met the requirements for the prior submission preference in RFA 2019-113, is also unavailing. The Recommended Order made no findings concerning the location criteria for the 2019-113 Preference because that was not an issue in that litigation. Additionally, the facts are different in the instant matter. For RFA 2020-201, the DLP listed in the 2020 application had to be located on the development site(s) proposed in the 2019 application. In RFA 2021-201, the DLPs listed in the 2019 and 2020 applications had to be on the development site(s) proposed in the 2021 application.

85. The undersigned has considered the Hidden Lake's contention that Florida Housing is required to follow prior precedent that contains similar facts. See *Villa Capri Assoc. v. Fla. Hous. Fin. Corp.*, 23 So. 3d 795 (Fla. 1st DCA 2009). However, as the facts in the instant matter differ from the facts in the *Fletcher Black II* litigation—as detailed in paragraph 84 above—the undersigned concludes that *Villa Capri's* holding on this point is inapplicable.

86. The undersigned also concludes that Madison Grove's failure to satisfy the Location Criteria is not a waivable, minor irregularity, under rule 67-60.008. As found above, Madison Grove's failure to comply with the Location

Criteria is not a minor irregularity because it provides a competitive advantage not enjoyed by other applicants, and adversely impacts the interest of Florida Housing. *See, e.g., Quail Roost Transit Village 1, Ltd. v. Fla. Hous. Fin. Corp.*, DOAH Case No. 20-3094BID (Fla. DOAH Aug. 12, 2020; Fla. FHFC Oct. 19, 2020)(ALJ Stevenson, concluding in paragraphs 81-82 of the Recommended Order that the applicant's omission of principals form Principals Disclosure Form and providing latitude and longitude coordinates for a Scattered Sites Development that were not located on the proposed development site constituted a "failure to comply with an express term of the RFA [that] cannot be dismissed as a minor irregularity.").

87. Madison Grove materially failed to comply with a requirement in order to achieve the 2019 and 2020 Prior Submission Preference. This is not a minor irregularity. Ability has demonstrated, by a preponderance of the evidence, that Florida Housing's proposed action in finding Madison Grove eligible for the 2019 and 2020 Prior Submission Preference was contrary to the RFA specifications and clearly erroneous.

88. With respect to Hidden Lake's allegation that if Madison Grove is ineligible for the 2019 and 2020 Prior Submission Preference, it would not meet the requirements for its Applicant Certification and Acknowledgment Form, and its application in RFA 2021-201 would thus be ineligible, the undersigned concludes that Hidden Lake has not met its burden. There is no evidence in the record to demonstrate that Madison Grove violated a provision of the Applicant Certification and Acknowledgment Form when it selected, in its application, that it qualified for the 2019 and 2020 Prior Submission Preference.

Ability Application

89. At the final hearing, Madison Grove and Hidden Lake alleged that Ability failed to meet the RFA's requirements for disclosure of its principals

in the Principals Disclosure Form. Neither Madison Grove nor Hidden Lake addressed this contention in their Proposed Recommended Orders.

90. As stated in the Findings of Fact, the Board of Directors of Ability Housing, Inc., as of the August 26, 2021, application deadline for the RFA, was accurately reflected in the Principals Disclosure Form included in Ability's application for the RFA.

91. Madison Grove and Hidden Lake failed to meet their burden to demonstrate that Florida Housing's scoring of Ability's application is contrary to Florida Housing's governing statutes, rules, policies, or the RFA. The undersigned concludes that Florida Housing's scoring decision as it relates to Ability's application is not clearly erroneous, contrary to competition, arbitrary, or capricious.

92. The undersigned is aware that the result of this Recommended Order and, if adopted, Florida Housing's final order, could have a cascading effect on other applicant parties, causing some to possibly become eligible for funding, causing some to possibly become eligible for funding in different preference categories, and causing other parties to possibly become ineligible for funding. Some of the parties have argued that the undersigned should make legal conclusions and recommendations concerning the effect of this Recommended Order on these other parties. The undersigned declines to make such additional conclusions and recommendations, in accordance with section 120.57(3).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned hereby RECOMMENDS that (a) Florida Housing's determination that Madison Grove qualified for the 2019 and 2020 Prior Submission Preference is reversed, and that Madison Grove is ineligible for this preference; and (b) Florida Housing's determination that Ability's application met Florida Housing's governing statutes, rules, policies, or the RFA is

affirmed, and Ability is eligible for the 2019 and 2020 Prior Submission Preference.

DONE AND ENTERED this 31st day of March, 2020, in Tallahassee, Leon County, Florida.



ROBERT J. TELFER III
Administrative Law Judge
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Division of Administrative Hearings
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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.