

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

MADISON LANDING, II, LLC and
ARC 2020, LLC, and NEW SOUTH
RESIDENTIAL, LLC,

FHFC Case No. 2020-072BP
DOAH Case No. 21-0146BID

Petitioners,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

HTG MADISON PARK, LTD

Petitioner,

FHFC Case No. 2020-073BP
DOAH Case No:21-0147BID

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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 30, 2021. Petitioners Madison Landing II, LLC (“Madison Landing”) and HTG Madison Park, LTD (“Madison Park”) were Applicants under Request for Applications 2020-202,

Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the “RFA”). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On December 4, 2020, Florida Housing posted notice of its intended decision to award funding to eight applicants, including WRDG T4 Phase Two, LP (“WRDG”). The Board found that Madison Landing and Madison Park satisfied all mandatory and eligibility requirements but were not awarded funding based upon the ranking criteria in the RFA. Madison Landing timely filed a notice of intent to protest and a formal written protest challenging the eligibility of WRDG. Madison Park timely filed a notice of intent to protest and a formal written protest challenging the eligibility of WRDG and Madison Landing. The petitions were referred to the Division of Administrative Hearings and consolidated. Prior to the hearing, WRDG conceded that its application should have been found ineligible.

The hearing was conducted on February 9, 2021 before Administrative Law Judge (“ALJ”) Brittany O. Finkbeiner at the Division of Administrative Hearings via Zoom technology. The only disputed issue at hearing was Madison Park’s contention that Madison Landing should have been found ineligible because one of the Principals of the Applicant had not been a legally formed entity as of the

Application Deadline. After the hearing, the parties filed Proposed Recommended Orders. After reviewing the Proposed Recommended Orders, the ALJ issued a Recommended Order on March 29, 2021. A copy of the Recommended Order is attached as Exhibit “A.” The ALJ recommended that Florida Housing enter a final order finding that WRDG was ineligible for funding, finding that Madison Landing was eligible for funding, and dismissing the petition of Madison Park.

On April 8, 2021, Madison Park filed eight Exceptions to the Administrative Law Judge’s Recommendations Order. On April 15, 2021, Florida Housing and Madison Landing jointly filed Responses to these Exceptions. Copies of the Exceptions and Joint Response to Exceptions are attached as Exhibits “B” and “C,” respectively.

RULING ON EXCEPTIONS

Ruling on Exception #1

Petitioner takes exception to Finding of Fact #21. After a review of the record, the Board finds that Finding of Fact #21 is supported by competent substantial evidence, and therefore rejects Exception #1.

Ruling on Exception #2

Petitioner takes exception to Finding of Fact #29. After a review of the record, the Board finds that Finding of Fact #29 is supported by competent substantial evidence, and therefore rejects Exception #2.

Ruling on Exception #3

Petitioner takes exception to Finding of Fact #31. After a review of the record, the Board finds that Finding of Fact #31 is supported by competent substantial evidence, and therefore rejects Exception #3.

Ruling on Exception #4

Petitioner takes exception to Finding of Fact #35. After a review of the record, the Board finds that Finding of Fact #35 is supported by competent substantial evidence, and therefore rejects Exception #4.

Ruling on Exception #5

Petitioner takes exception to Conclusion of Law #51. After a review of the record, the Board finds that Conclusion of Law #51 reasonable and is supported by competent substantial evidence, and therefore rejects Exception #5.

Ruling on Exception #6

Petitioner takes exception to Conclusion of Law #52. After a review of the record, the Board finds that Conclusion of Law #52 is reasonable and supported by competent substantial evidence, and therefore rejects Exception #6.

Ruling on Exception #7

Petitioner takes exception to Conclusion of Law #53. After a review of the record, the Board finds that Conclusion of Law #53 is reasonable and is supported by competent substantial evidence, and therefore rejects Exception #7.

Ruling on Exception #8

Petitioner takes exception to Conclusion of Law #56. After a review of the record, the Board finds that Conclusion of Law #56 is reasonable and is supported by competent substantial evidence, and therefore rejects Exception #8.

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 Exceptions 1 through 9 are hereby rejected and 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 2020-202:

- 1) The application of WRDG is ineligible for funding;
- 2) The application of Madison Landing is eligible for funding; and

3) The protest filed by Madison Park is dismissed.

DONE and ORDERED this 30th 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**

MADISON LANDING II, LLC AND ARC 2020,
LLC AND NEW SOUTH RESIDENTIAL, LLC,

Petitioners,

vs.

Case No. 21-0146BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

HTG MADISON PARK, LTD

Petitioner,

vs.

Case No. 21-0147BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

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 February 9, 2021, via Zoom conference.

APPEARANCES

For Petitioners, Madison Landing II, LLC; ARC 2020, LLC; and New South Residential, LLC (collectively, "Madison Landing"):

J. Timothy Schulte, Esquire
Zimmerman, Kiser & Sutcliffe, P.A.
315 East Robinson Street
Post Office Box 3000 (32802)
Orlando, Florida 32801

For Petitioner, HTG Madison Park, LTD ("Madison Park"):

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
Suite 3-231
1400 Village Square Boulevard
Tallahassee, Florida 32312

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

Christopher Dale McGuire, Esquire
Florida Housing Finance Corporation
Suite 5000
227 North Bronough Street
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue in this case is whether Florida Housing's proposed action to deem Madison Landing eligible for an award of housing tax credit funds, as contemplated under Request for Applications 2020-202 Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach and Pinellas Counties ("the 2020 RFA"), is contrary to governing statutes, rules or policies, or the 2020 RFA specifications. The standard of proof is whether Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On August 26, 2020, Florida Housing issued the 2020 RFA to solicit applications for housing tax credits. Applications were due by October 20, 2020. There were 35 applications submitted in response to the 2020 RFA, including those of WRDG T4 Phase Two, L.P. ("WRDG"), Madison Landing, and Madison Park. Eight applications were recommended for funding, including WRDG. Petitioner Madison Park, filed its petition challenging the eligibility of funded applicant, WRDG, and eligible, but unfunded applicant,

Madison Landing. Madison Landing filed a petition challenging the eligibility of WRDG. Upon motion, Petitioners' cases were consolidated into the present case. On January 12, 2021, the parties filed a Stipulation for Entry of Findings of Fact, which explained that WRDG agreed to the designation of its application as ineligible for funding under the 2020 RFA. As a result, Madison Landing would be selected for funding in place of WRDG by operation of having the next-highest ranking, unless deemed ineligible. The only remaining issue in this case is whether Madison Landing should be found ineligible for funding, which would result in Madison Park being selected in place of Madison Landing. No other Applicants selected for funding will be impacted by the outcome of this case.

The final hearing took place on February 9, 2021. The parties offered joint exhibits 1 through 8, all of which were admitted into evidence. Petitioners presented the testimony of Marissa Button, in her capacity as the corporate representative of Florida Housing. Madison Landing's Exhibits 1 through 4 were also admitted into evidence. Madison Park presented the testimony of Matthew Reiger, and offered its exhibits 1 through 8 and 13, all of which were admitted into evidence.

The one-volume Transcript was filed with DOAH on February 25, 2021. The parties' proposed recommended orders were timely filed and were duly considered in the preparation of this Recommended Order. The stipulated facts that were filed by the parties on January 26, 2021, and the Joint Pre-hearing Stipulation filed February 5, 2021, have been incorporated into the Findings of Fact. Unless otherwise indicated, references to the Florida Statutes are to the 2020 version.

FINDINGS OF FACT

1. Florida Housing is a public corporation organized pursuant to Chapter 420, Part V, Florida Statutes, whose address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, and for the purposes of these proceedings, an agency of the State of Florida.

2. Madison Landing is an Applicant requesting an allocation of \$1,950,000 in competitive housing credits in in the 2020 RFA. Its application, 2021-021C, was deemed eligible, but was not selected for funding by Florida Housing.

3. Madison Park is an Applicant requesting an allocation of \$2,881,960 in competitive housing credits in the 2020 RFA. Its application, 2021-004C, was deemed eligible, but was not selected for funding by Florida Housing.

4. WRDG is an Applicant requesting an allocation of \$2,375,000 in competitive housing credits in the 2020 RFA. Its application, 2021-025C, was deemed eligible and was preliminarily selected for funding by Florida Housing.

5. Florida Housing administers various affordable housing programs, including the Housing Credit Program, pursuant to Section 42 of the Internal Revenue Code (the "IRC" or "the Code") and section 420.5099, under which Florida Housing is designated as the Housing Credit agency for the State of Florida within the meaning of Section 42(h)(7)(A) of the IRC, and Florida Administrative Code Chapters 67-48 and 67-60.

6. Florida Housing has established, by rule, a competitive solicitation process known as the Request for Applications ("RFA") to assess the relative merits of proposed developments, pursuant to chapters 67-48 and 67-60.

7. An RFA sets forth the information required to be provided by an Applicant, which includes a general description of the type of projects that will be considered eligible for funding and delineates the submission requirements. While there are numerous references to Florida Housing's rules throughout the RFA, RFAs themselves are not adopted or incorporated by rule.

8. Florida Housing issues many RFAs each year. Although an issued RFA may be similar to these issued in previous years, each RFA is unique. The RFA process begins when Florida Housing requests the Florida Housing Board of Directors ("the Board") to approve Florida Housing's plan for allocating its resources through the various RFAs. If the plan is approved by the Board, Florida Housing begins working on each individual RFA. Florida Housing posts draft documents to its website for public review, such as a draft of the RFA, and holds a workshop in which the RFA is discussed in detail, highlighting language that changed from the previous year. The public is given the opportunity to ask questions and submit written comments for further suggestions and/or additional edits prior to the RFA's issuance.

9. Marisa Button, Director of Multifamily Programs for Florida Housing, credibly and persuasively testified that Questions and Answers are provided as guidance, but do not provide new requirements to override the terms of an RFA. In the event of an inconsistency between Questions and Answers and another form of guidance for applicants, Florida Housing has maintained the position that the least restrictive guidance controls.

10. Rule 67-60.006 provides, in pertinent part, that "[t]he failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of non-responsiveness with respect to its Application."

11. By applying, each Applicant certifies that:

Proposed Developments funded under this RFA will be subject to the requirements of the RFA, inclusive of all Exhibits, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the requirements outlined in Rule Chapter 67-48, F.A.C. and the Compliance requirements of Rule Chapter 67-53, F.A.C.

12. On August 26, 2020, Florida Housing issued the 2020 RFA, proposing to provide an estimated \$18,669,520 of Housing Credit Financing for

Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties. Modifications to the 2020 RFA were made on September 11 and October 12, 2020. The Application Deadline for the 2020 RFA was October 20, 2020.

13. On or about October 20, 2020, 35 applications were submitted in response to the 2020 RFA.

14. A Review Committee was appointed to review the applications and make recommendations to the Board. The Review Committee found 34 applications eligible and one application ineligible. Through the ranking and selection process outlined in the 2020 RFA, eight applications were recommended for funding. In accordance with the funding selection process set forth in the 2020 RFA, one application was selected from each of Duval, Palm Beach, Pinellas, Hillsborough, and Orange counties; two applications were selected from Broward County; and one application (WRDG) was selected from any of these counties. On December 4, 2020, the Board approved these recommendations.

15. On December 17, 2020, Madison Landing timely filed a Petition for Formal Administrative Proceedings, which was referred to DOAH and assigned Case No. 21-0146BID. This petition challenged the eligibility of both WRDG and MHP FL II, LLC. On January 13, 2021, Madison Landing dismissed all of its allegations against MHP FL II, LLC.

16. On December 17, 2020, Madison Park timely filed a Petition for Formal Administrative Proceedings, which was referred to DOAH and assigned Case No. 21-0147BID. An amended petition was filed on January 13, 2021. This petition challenged the eligibility of both WRDG and Madison Landing.

17. On January 26, 2021, all parties entered into a Stipulation for Entry of Findings of Fact in which WRDG conceded that its application should have been found ineligible.

18. WRDG is ineligible for funding under the 2020 RFA.

19. With WRDG ineligible for funding, Madison Landing would be selected for funding in place of WRDG. If both WRDG and Madison Landing were found to be ineligible for funding, Madison Park would be selected for funding in place of WRDG and Madison Landing. No other Applicant selected for funding will be impacted regardless of the outcome of this case.

20. No challenges were made to the terms of the 2020 RFA.

21. Madison Landing's application includes an executed Applicant Certification and Acknowledgment Form, which provides, "The Applicant, the Developer and all Principals are in good standing among all other state agencies and have not been prohibited from applying for funding." The phrase "good standing among all other state agencies" is not defined; and no evidence was presented as to the definitive meaning of the phrase. No evidence was presented that Madison Landing's Principals are not in good standing with any state agency or have been prohibited from applying for funding.

22. The 2020 RFA at Section Four A.3.a. provides that Applicants must disclose the name of the Applicant entity and provide evidence that it is legally formed:

(2) The Applicant must be a legally formed entity [i.e., limited partnership, limited liability company, etc.] qualified to do business in the state of Florida as of the Application Deadline. Include, as Attachment 2 to Exhibit A, evidence from the Florida Department of State, Division of Corporations, that the Applicant satisfies the foregoing requirements. Such evidence may be in the form of a certificate of status or other reasonably reliable information or documentation issued, published or made available by the Florida Department of State, Division of Corporations.

23. Rule 67-48.002(9) (6/23/2020), defines "Applicant" as follows:

(9) "Applicant" means any person or legal entity of the type and with the management and ownership structure described herein that is seeking a loan or

funding from the Corporation by submitting an Application or responding to a competitive solicitation pursuant to rule Chapter 67-60, F.A.C., for one or more of the Corporation's programs. For purposes of Rules 67-48.0105, 67-48.0205 and 67-48.031, F.A.C., Applicant also includes any assigns or successors in interest of the Applicant. Unless otherwise stated in a competitive solicitation, as used herein, a 'legal entity' means a legally formed corporation, limited partnership or limited liability company.

24. The 2020 RFA at Section Four A.3.c. provides that Applicants must disclose Principals of both the Applicant and Developer entities. The 2020 RFA provides in pertinent part:

c. Principals Disclosure for the Applicant and for each Developer (5 points)

(1) Eligibility Requirements

To meet the submission requirements, upload the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 05-2019) ("Principals Disclosure Form") as outlined in Section Three above. Prior versions of the Principal Disclosure Form will not be accepted.

To meet eligibility requirements, 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. A Principals Disclosure Form should not include, for any organizational structure, any type of entity that is not specifically included in the Rule definition of Principals.

For Housing Credits, the investor limited partner of an Applicant limited partnership or the investor member of an Applicant limited liability company must be identified on the Principal Disclosure Form.

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

(94) "Principal" means:

(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. Page 10 of 22.

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

26. The requirement to provide evidence that the Applicant is a legally formed entity, as well as the requirement to provide a Principals for Applicant and Developer(s) Disclosure Form, are identified as "Eligibility Items." Section Five A.1. of the 2020 RFA states that "only Applications that meet all of the following Eligibility Items will be eligible for funding and considered for funding selection."

27. Madison Landing submitted Principals of the Applicant and Developer(s) Disclosure Form(s) with its application. Both forms were approved during the Advance Review Process. On the Principals of the Applicant form, Madison Landing II, LLC, was identified as the Applicant entity. The Principals of the Applicant entity were identified as Patrick E. Law, Manager; Madison Landing II Apartments, LLC, Non-Investor Member; and Patrick E. Law, Investor Member.

28. Madison Landing II Apartments, LLC, filed Articles of Organization for Florida Limited Liability Company with the Florida Division of Corporations on January 5, 2021, with an effective date of December 31, 2020.

29. The 2020 RFA requires that the Applicant demonstrate that it is a legally formed entity as of the Application Deadline; however, there is no explicit requirement in the 2020 RFA that each Principal of the Applicant demonstrate that it is a legally formed entity as of the Application Deadline.

30. Ms. Button testified that her initial view was that the failure of Madison Landing's Principal, Madison Landing II Apartments, LLC, to incorporate by the application deadline should render the application ineligible. However, upon further research, she changed her position, believing that Florida Housing was precedentially bound by a previous final order, which found that an application was eligible under similar legal and factual circumstances.

31. The previous case, on which Florida Housing relied, was decided before Florida Housing adopted the current RFA procedures for awarding funding. Ms. Button testified, however, that while some of the processes followed during the Universal Cycle, in place at that time, were different than the RFA process, the requirements for disclosure of Principals were essentially the same.

32. Florida Housing allows interested parties to submit written questions to be answered by Florida Housing staff for each RFA that is issued. The Question-Answer period is referenced specifically within each RFA.

33. The following Question and Answer are posted on Florida Housing's website for RFA 2018-111:

Question 12:

Do the entities listed on the Principal Disclosure Form have to be active as of the stamped "Approved" date or as of the Application Deadline?

Answer:

As of the Application Deadline. The Applicant may upload a Principals Disclosure Form stamped "Approved" during the Advance Review Process provided (a) it is still correct as of the Application Deadline, (b) it was approved for the type of funding being requested (i.e., Housing Credits or Non-Housing Credits)

34. The same Question and Answer above are on Florida Housing's website for RFA 2018-110; RFA 2018-112; and RFA 2018-113. The same Question and Answer, however, do not appear in Questions and Answers for the 2020 RFA at issue in this case.

35. Although Questions and Answers from past RFAs remain on the Florida Housing website, they are discrete to the specific RFA for which they were issued.

36. Rule 67-48.002(9) (7/2018) defines Applicant as follows:

(9) "Applicant" means any person or legal entity of the type and with the management and ownership structure described herein that is seeking a loan or funding from the Corporation by submitting an Application or responding to a competitive solicitation pursuant to rule chapter 67-60, F.A.C., for one or more of the Corporations programs. For purposes of rules 67-48.0105, 67-48.0205 and 67-48.031, F.A.C., Applicant also includes any assigns or successors in interest of the Applicant. Unless otherwise stated in a competitive solicitation, as used herein, a legal entity means a legally formed corporation, limited partnership or limited liability company with a management and ownership structure that consists exclusively of all natural persons by the third principal disclosure level. For Applicants seeking Housing Credits, the Housing Credits Syndicator/Housing Credit investor need only be disclosed at the first principal level and no other disclosure is required. The terms "first principal disclosure level" and "third principal

disclosure level" have the meanings attributed to them in the definition of "Principal."

37. Rule 67-48.002(9) (11/2011) defines Applicant as follows:

(9) "Applicant" means any person or legally formed entity that is seeking a loan or funding from the Corporation by submitting an Application or responding to a request for proposal for one or more of the Corporation's programs. For purposes of Rules 67-48.0105, 67-48.0205 and 67-48031, F.A.C., Applicants also includes any assigns or successors in interest of the Applicant.

38. Madison Park argues that Madison Landing's Principal, Madison Landing II Apartments, LLC, did not demonstrate that it was a legally-formed entity as of the Application Deadline, and therefore, Madison Landing's Principal Disclosure Form did not satisfy the 2020 RFA's requirements. Madison Park argues that Madison Landing's application should be deemed ineligible for funding as a result.

39. Based on the weight of the credible evidence and the language of the 2020 RFA and the governing law, the undersigned finds that Florida Housing did not contravene the 2020 RFA, or any other applicable authority, through the process by which it determined that Madison Landing's application was eligible for the award.

CONCLUSIONS OF LAW

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

41. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioner, Madison 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). Madison 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).

42. 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.

43. "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).

44. Madison Park challenges Florida Housing's intent to find Madison Landing's application eligible for an award of housing credit funds. Thus, Madison Park has the burden to prove, by a preponderance, of the evidence that the 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.

45. 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.*

46. 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); *See also 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.").

47. "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, 38-39 (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 Emtl. Reg.*, 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 Cty. Bd. of Cty. 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).

48. 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 Cty. 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 Cty. Water Auth.*, 870 So. 2d 930, 932 (Fla. 2d DCA 2004).

49. Florida Housing's intent to find Madison Landing's application eligible for funding was not clearly erroneous, contrary to competition, arbitrary, or capricious. Marisa Button testified that, in determining Madison Landing's eligibility for funding, Florida Housing relied heavily on the precedent of a similar case, *Heritage Village Commons, Ltd v. Florida Housing Finance Corporation*, FHFC Case No. 2012-013-UC (Fla. FHFC RO May 23, 2012; FO June 8, 2012). *Heritage Village* was decided by a duly designated Hearing Officer pursuant to section 120.57(2). In *Heritage Village*, the issue was whether the Applicant had failed to meet threshold requirements because the identified Developer entity had not been a legally formed entity as of the application deadline. The hearing officer concluded that because neither the Universal Application package nor the rules in place at the time required the Developer to be a legally formed entity, Florida Housing could not penalize

the applicant "for failure to comply with a nonexistent rule." *Heritage Village* RO at 7.

50. Florida Housing is statutorily required to follow its own stated policy or prior practice, pursuant to section 120.68(7)(e)3. An agency's failure to follow its own precedent which contains similar facts is "contrary to established administrative principles and sound public policy." *Villa Capri Assoc. v. Fla. Hous. Fin. Corp.*, 23 So. 3d 795, 798 (Fla. 1st DCA 2009) (quoting *Brookwood-Walton Cty. Convalescent Ctr. v. Ag. for Health Care Admin.*, 845 So. 2d 223, 229 (Fla. 1st DCA 2009)). Marisa Button credibly and persuasively testified that Florida Housing came to the determination that Madison Landing was eligible for funding under the reasonable belief that such a result was compelled by the precedent of *Heritage Village*.

51. Madison Park argues that *Heritage Village* is distinguishable from the present case because the Universal Cycle process in place at the time was different than the present RFA process, but does not identify any procedural differences that render *Heritage Village* inapplicable. Madison Park also interprets the requirement in the 2020 RFA that Applicants certify that all Principals are "in good standing among all other state agencies" as being tantamount to an explicit requirement of incorporation. Finally, Madison Park points to changes in the definition of "Applicant" in Rule 67-48.002, subsequent to *Heritage Village*, as a basis for discarding its holding in application to the 2020 RFA. In the present case, as in *Heritage Village*, deeming Madison Landing ineligible or funding for the reasons advanced by Madison Park would require the enforcement of a nonexistent rule.

52. Madison Park's arguments are simply too attenuated to meet the burden in this case. Consistent with rule 67-48.002(9), the 2020 RFA specifically requires that an Applicant be a legally formed entity qualified to do business in the State of Florida as of the Application Deadline. There is no similar requirement in the 2020 RFA, or anywhere else, with respect to Principals of the Applicant. To conflate the phrase "in good standing among

all other state agencies" with "legally formed entity" would negate the drafters' decision to use different phrases in different parts of the RFA. Use of the words "in good standing with all other state agencies," with respect to Principals, signals that the language means something different.

53. Florida Housing's reliance on *Heritage Village* remains valid despite changes in the process and governing law, which do not disturb the central holding.

54. Madison Park asserts that a Questions and Answers document issued by Florida Housing in 2018, in relation to RFAs that were issued in 2018, has the effect of changing the terms of the 2020 RFA. The Questions and Answers documents from 2018 do not have the force of changing the RFA. The Questions and Answers document for the 2020 RFA does not require Principals of the Applicant to be legally formed. Marisa Button testified credibly and persuasively that the Questions and Answers do not have the effect of changing the terms of the RFA.

55. Finally, not every deviation from the RFA is material. A 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). Madison Park did not prove that the purported deviation, i.e., not legally forming the Principal, Madison Landing II Apartments, LLC, was a substantial competitive advantage over other bidders.

56. Florida Housing's finding that Madison Landing II Apartments, LLC, was not required to be legally formed by the Application Deadline cannot be invalidated, because upon review of the evidence, there is no definite and firm conviction that a mistake has been committed. Florida Housing's conclusion falls within the permissible range of interpretations, and, therefore, cannot be deemed clearly erroneous. The undersigned cannot find that Florida Housing's intended award is contrary to competition because there is no evidence in the record that Florida Housing stifled fair

and open competition. Florida Housing's action was not arbitrary and capricious because the evidence does not lead to the conclusion that its determination was unsupported by logic or fact, or adopted without thought or reason.

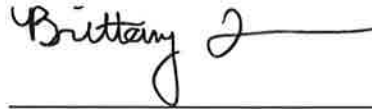
57. It is clear that Florida Housing's intended action to find Madison Landing's application eligible for funding was grounded in an honest and reasonable exercise of discretion.

58. Overall, Madison Park failed to demonstrate that Florida Housing's proposed action finding Madison Landing's application eligible is contrary to governing statutes, rules, the 2020 RFA specifications, or clearly erroneous, contrary to competition, arbitrary, or capricious. In conclusion, Madison Landing's application is eligible for funding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order: (1) finding the application of WRDG ineligible for funding; (2) finding the application of Madison Landing eligible for funding; and (3) dismissing the protest of Madison Park.

DONE AND ENTERED this 29th day of March, 2021, 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 29th day of March, 2021.

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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

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MADISON LANDING II, LLC, AND ARC 2020,
LLC AND NEW SOUTH RESIDENTIAL, LLC

Petitioners,

vs.

Case No. 21-0146 BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

HTG MADISON PARK, LTD

Petitioners,

vs.

Case No. 21-0147BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**PETITIONER HTG MADISON PARK, LTD.
EXCEPTIONS TO RECOMMENDED ORDER**

Petitioner, HTG Madison Park, LTD. ("Madison Park"), by and through undersigned counsel, and pursuant to Section 120.57(3) (e), Florida Statutes and Rule 28-106.217 (1), Florida Administrative Code ("F.A.C."), hereby files these exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge on March 29, 2021.

Introduction

Following a formal hearing a Recommended Order was issued in this case by Administrative Law Judge ("ALJ") Finkbeiner on March 29, 2021, recommending that a final order be entered finding that Florida Housing's initial scoring decision deeming Madison Landing

II, LLC and Arc 2020, LLC and New South Residential, LLC (collectively Madison Landing”) eligible for funding was correct. For the reasons stated herein, Florida Housing should reject and/or modify several Findings of Fact and Conclusions of Law contained in the Recommended Order and enter a Final Order determining that Madison Landing should be deemed ineligible and awarding funding to Madison Park.

Standard of Review

Section 120.57 (1), Florida Statutes, addresses an agency’s authority to modify Findings of Fact and Conclusions of Law in a Recommended Order. Section 120.57(1)(l) provides in pertinent part:

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

Section 120.57(1)(l) “Competent, substantial evidence has been defined as such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred...” *G.C. v. Dep’t of Children & families, 791 So. 2d 17, 19 (Fla. 5th DCA 2001)*

With respect to conclusions of law, an agency may reject or modify an ALJ’s conclusions of law and application of agency policy. When doing so, the agency must make a finding that its substituted conclusion of law is as reasonable or more reasonable than that which was rejected or

modified. *Charlotte Cnty v. IMC Phosphates Co.*, 18 So. 3d at 1092; see also *Goin v. Comm'n on Ethics*, 658 So. 2d. 1131, 1138 (Fla. 1st DCA 1995).

Lastly, an agency is not bound by labels affixed by the ALJ to findings of fact and conclusions of law; if the item is improperly labeled, “the label is disregarded, and the item is treated as though it had been properly labeled.” *Battaglia Properties, Ltd., v. Fla. Land & Water Adjudicatory Comm'n.*, 629 So. 2d. 161, 168 (Fla 1st DCA 1993) (citing *Kinney v. Dep't of State*, 501 So. 2d 129, 132 (Fla 5th DCA 1987)

Madison Park must file exceptions to preserve its right to seek appellate review of these issues. *Kantor v. School Bd. Of Monroe County.*, 648 So. 2d 1266, 1267 (Fla. 3d DCA 1995) (appellant cannot argue on appeal matters that were not properly excepted to or challenged before the agency); *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212,1213 (Fla. 1st DCA 1991).

Exception No. 1 to Findings of Fact 21

Madison Park takes exception to portions of Findings of Fact 21 which provides in its entirety,

- 21 *Madison Landing's application includes an executed Applicant Certification and Acknowledgement Form, which provides, "The Applicant, the Developer and all Principals are in good standing among all other state agencies and have not been prohibited from applying for funding." The phrase "good standing among all other state agencies" is not defined; and no evidence was presented as to the definitive meaning of the phrase. No evidence was presented that Madison Landing's Principals are not in good standing with any state agency or have been prohibited from applying for funding.*

Paragraph 13 of the Applicant Certification Form¹ of RFA 2020-202 which the Authorized Principal Representative executes under penalty of perjury provides,

¹ The Applicant Certification and Acknowledgement Form is an Eligibility item. Only Applications that meet all Eligibility items are eligible for funding.

13. *The Applicant, the Developer and all Principals are in good standing among all other state agencies and have not been prohibited from applying for funding.*

(Emphasis supplied) With regard to the ALJ's findings that "the phrase 'good standing among all other state agencies' is not defined; and no evidence was presented as to the definitive meaning of the phrase", Florida Housing's Corporate Representative, Ms. Button's testimony at the Final hearing, indicated otherwise,

Q. And so if—if the Principals of the Applicant—under Florida Housing's current position, if the Principals of the Applicant entity don't have to be legally formed, how are they complying with number 13 on this certification, Ms. Button?

A.... It is in essence why our initial position was it would not meet the eligibility terms. And, again, I recognize that's a difficult reconciliation. We don't have the specific terms that they're required to be legally formed entities. But throughout the requirements of the RFA, and essentially the essence of disclosure itself of corporate entities such as a limited liability company, you know, we would infer that that is a – that's an active entity for which we can go back and, you know, make sure those representations are correct.

However—put that language in the RFA and we've been presented with our—you know, realizing our previous position that we've adopted on this is that it – without that language in the RFA requiring legal—that—the legal entity language, that we evolved into the position we are in which was the original position that the applicants eligible.

Sorry, that was a long, involved answer. **But that there is no—there is no—if the Principal has not been legally formed, I don't know how we comply with number 13. Or that they comply, I should say, It's their requirement to comply with the applicant principal – or the applicant certification, acknowledgement form.**

(Emphasis Supplied) (T. at p. 94:14-25; 95:1-24)

Ms. Button unequivocally equates "being in good standing" in paragraph 13 of the Applicant Certification and Acknowledgement Form with being "legally formed".² With regard to the ALJ's

² Ms. Button testified that "the evidence of being legally formed is the confirmation from Florida Department of State, Division of Corporations that they have legally formed that business entity status, and that to Florida Housing demonstrates that they are legally formed, they have incorporated and done so with the Florida Department of State, Division of Corporations...." And that same evidence indicates the business is qualified to engage in business in the State. (Madison Park Exhibit 1, p. 10: 2-16)

findings that “No evidence was presented that Madison Landing’s principals are not in good standing with any state agency or have been prohibited from applying for funding”, Ms. Button further testified at the Final hearing that,

- Q. And according to the facts that have been stipulated to in this case, and I’m referring to Paragraph in the pretrial stipulation, we’ve stipulated that Madison landing has filed articles of organization with the Florida Division of Corporations on January 5, 2021 with an effective date of December 30, 2020. Is that-considering those facts, has Madison Landing- were they legally formed by the application deadline?
- A. I don’t believe- they were not legally formed with the department of State, no. That date is after the deadline for the RFA.

Finding of Fact 21 should be rejected because it is not supported by competent substantial evidence.

Exception No. 2 to Findings of Fact 29

Madison Park takes exception to Finding of Fact 29 which provides,

29. *The 2020 RFA requires that the Applicant demonstrate that it is a legally formed entity as of the Application deadline; however, there is no explicit requirement in the 2020 RFA that each Principal of the Applicant demonstrate that it is a legally formed entity as of the Application Deadline.*

The Applicant Certification and Acknowledgement Form of RFA 2020-202, explicitly requires the Authorized Principal Representative to certify under oath that,

13. *The Applicant, the Developer and all Principals are in good standing among all other state agencies and have not been prohibited from applying for funding.*

As stated above in response to Findings of Fact 21, clearly Ms. Button equates the language in Paragraph 13 of the Applicant Certification Form with being legally formed. Findings of Fact 29 should be rejected because it is not supported by competent substantial evidence.

Exception No. 3 to Finding of Fact 31

Madison Park takes issue with a portion of Finding of Fact 31 which provides,

31. *The previous case, on which Florida Housing relied, was decided before Florida Housing adopted the current RFA procedures for awarding funding. Ms. Button testified, however, that while some of the processes followed during the Universal Cycle, in place at that time, were different than the RFA process, the requirements for disclosure of principals were essentially the same.*

In Findings of Fact # 31, the ALJ incorrectly labels her legal conclusion that “the requirements for disclosure of principals were essentially the same” when comparing RFA 2020-202 and the Universal Cycle as a factual finding. This finding ignores the fact that the RFA at issue, explicitly requires, that the Applicant certify that the *Applicant, the Developer, and all Principals are in good standing among all other state agencies and have not been prohibited from applying for funding.*

Up until this litigation commenced, Florida Housing has interpreted the RFA as requiring that all Principals of the Applicant be legally formed as of the Application Deadline as is evidenced by Florida Housing’s answers to numerous Question and Answers for different Requests for Applications and Ms. Button’s confirmation of the same,

Q. ...So the way the corporation answered this, it was the corporation’s position that principals of the applicant had to be legally formed as of the application deadline; is that correct?

A. Yes, because those are entities listed on the principal Disclosure Form.³

In changing their position, Florida Housing relies exclusively on *Heritage Village Commons LTD., v. Florida Housing Finance Corporation*, FHFC Case No. 2012-013UC (Final Order June 8, 2012). However, contrary to the ALJ’s findings, the requirements for disclosure of Principals were vastly different. The *2011 Universal Cycle-Applicant Certification and Acknowledgement Form*, which is incorporated in Rule 67-48.004, F.A.C., *did not* similarly

³ Madison Park, Exhibit 1, p. 30:7-12

require the Authorized Principal Representative to certify that the *Applicant, the Developer, and all Principals* are in good standing.

The ALJ's Conclusion of Law in Findings of Fact 31 are clearly erroneous and should be rejected.

Exception No. 4 to Findings of Fact 35

Madison Park, takes issue with Findings of Fact 35 which provides,

35. Although Questions and Answers from past RFA's remain on the Florida Housing Website, they are discrete to the specific RFA for which they were issued.

The following Question and Answer appeared on Florida Housing's website for RFA 2018-110, RFA 2018-111; RFA 2018-112 and RFA 2018-113.⁴

Question

Do the entities listed on the Principal Disclosure Form have to be active as of the stamped "Approved" date or as of the Application Deadline?

Answer

As of the Application Deadline. The Applicant may upload a Principals Disclosure Form stamped "Approved" during the Advance Review Process provided (a) it is still correct as of the Application Deadline (b) it was approved for the type of funding being requested (i.e., Housing Credits or Non-Housing credits.)

(Emphasis Supplied).⁵ The answers provided during the Question-and-Answer period are the *official response* of the Corporation. Ms. Button testified that if the terms of the RFA have not changed it is reasonable for an Applicant to rely on an answer provided by Florida Housing in response to a question in the Question/Answer process of a different RFA. The relevant terms of

⁴ The Question asked in RFA 2018-111 was asked by an employee of Housing Trust Group. Matthew Rieger, President/CEO of Housing Trust group testified that because of this answer Housing Trust Group has legally formed all its Principal entities identified on the Principal Disclosure Form prior to submission of an application to any RFA. (emphasis supplied)

⁵ Ms. Button testified that she interpreted the word "active" to mean "legally formed" and the Corporation's position was that Principals of the Applicant entity had to be legally formed as of the Application Deadline.

the RFA, including the Applicant Certification and Acknowledgement Form, have not changed since these answers were published by Florida Housing and RFA 2020-202 was issued. Thus, Florida Housing's response to this question would not have changed and can be relied upon.

Findings of Fact 35 should be rejected because it is not supported by competent substantial evidence.

Exception No. 5 to Conclusion of Law 51

At paragraph 51, the ALJ states, in part,

51. Madison Park argues that Heritage Village is distinguishable from the present case because the Universal Cycle process in place at the time was different than the present RFA process, but does not identify any procedural differences that render Heritage Village inapplicable.

Madison Park pointed out through the course of the litigation that Heritage Village arose under the Universal Cycle process which Florida Housing has not used as a vehicle for competitive allocation of tax credits since 2013. Under the Universal Cycle its instructions, application and forms were adopted annually by Rule 67-48.004, Florida Administrative Code. Most significantly, the *2011 Universal Cycle-Applicant Certification and Acknowledgement Form*, which was incorporated by Rule 67-48.004, F.A.C., did not similarly require the Applicant to certify that the Applicant, the Developer *and all Principals* are in good standing. This difference alone renders Heritage Village inapplicable and this Conclusion of law clearly erroneous.

Exception No. 6 to Conclusions of Law 52

At paragraph 52, the ALJ states, in part,

52.... Consistent with rule 67-48.002(9), the 2020 RFA specifically requires that an Applicant be a legally formed entity qualified to do business in the State of Florida as of the Application Deadline. There is no similar requirement in the 2020 RFA, or anywhere else, with respect to Principals of the Applicant. To conflate the phrase "in good standing among all other state agencies" with legally formed entity" would negate the drafters' decision to use different phrases in different parts of the RFA. Use of the words "in good standing with all other state agencies," with respect to Principals, signals that the language means something different."

The RFA at issue, **explicitly requires**, that the Applicant certify that the Applicant, the Developer **and all Principals** are in good standing among all other state agencies and have not been prohibited from applying for funding. Florida Housing is the drafter of the RFA and has interpreted the RFA in this manner up until this litigation commenced, and even then, Florida Housing confirmed in this litigation that, “I don’t know how we comply with number 13. Or that they comply, I should say. It’s their [Madison Landing’s] requirement to comply with the applicant principal-or the applicant certification, acknowledgement form.”

This Conclusion of law is clearly erroneous.

Exception No. 7 to Conclusions of Law 53

Paragraph 53, provides,

53. Florida Housing's reliance on Heritage Village remains valid despite changes in the process and governing law, which do not disturb the central holding.

The language stated in paragraph 13 of the Applicant Certification and Acknowledgement Form in RFA 2020-202, which expressly requires all Principals to be in good standing among all state agencies, is a material fact which differentiates the instant case from the facts of Heritage Village and requires a determination that Florida Housing’s reliance on the holding in Heritage Village is clearly erroneous and arbitrary given the different requirements of the procurement documents.

This Conclusion of law is clearly erroneous.

Exception No. 8 to Conclusion of Law 56

Paragraph 56 provides, in part,

... The undersigned cannot find that Florida Housing's intended award is contrary to competition because there is no evidence in the record that Florida Housing stifled fair and open competition.

Florida Housing's total repudiation of its prior position is contrary to competition and unfair to applicants like Madison Park that play by the rules. The RFA encourages developers to submit written questions and heralds the written answers that follow as the "official response of the Corporation". Pursuant to the RFA process, Housing Trust Group submitted the question, Florida Housing answered the question multiple times in various RFA's, and Madison Park relied on the answer given as the "official response", as the RFA indicates they should. To disavow the previous answer based on a 2011 Final Order that was issued under a competitive process that is materially and factually different under which this case arose is genuinely unfair and serves to erode the public's confidence in the competitive process.⁶

Conclusion

For the reasons expressed, Florida Housing should reject or modify the Findings of Fact and Conclusions of Law and enter a Final Order determining that Madison Landings is ineligible for funding and awarding funding to HTG Madison Park, Ltd.

Respectfully submitted this 8th day of April 2021.

/s/Maureen McCarthy Daughton
Maureen M. Daughton
FBN: 655805
Maureen McCarthy Daughton, LLC
1400 Village Square Blvd., Ste 3-231
Tallahassee, Florida 32312
Counsel for HTG Madison Park, LTD

⁶ Although not in the Final hearing record, Florida Housing is now seeking to amend its current Rule Chapter 67-48, F.A.C., to amend the definition of "Principal" to *require any Principal, other than a natural person, to be a legally formed entity as of the Application Deadline*. The result of this change would be consistent with the "official response" provided numerous times in 2018 and the position of Florida Housing *up until this litigation*.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 8th day of April 2021, a true and correct copy of the foregoing has been filed with Corporation Clerk, Florida Housing Finance Corporation, 227 North Bronough Street, Ste 5000, Tallahassee, Florida 32310-1329 (CorporationClerk@floridahousing.org) via electronic mail with copies to Chris McGuire (Chris.McGuire@floridahousing.org) Deputy General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Ste 5000, Tallahassee, Florida 32310-1329 and J. Timothy Schulte, Esq., Zimmerman Kiser Sutcliffe PA, 315 East Robinson Street, Ste 600, Orlando, Florida 32801 (Tschulte@zklawfirm.com).

/s/Maureen M. Daughton

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

MADISON LANDING, II, LLC and
ARC 2020, LLC, and NEW SOUTH
RESIDENTIAL, LLC,

DOAH Case No. 21-0146BID

FHFC Case No. 2020-072BP

Petitioners,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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FLORIDA HOUSING
FINANCE CORPORATION

HTG MADISON PARK, LTD

DOAH Case No: 21-0147BID

Petitioner,

FHFC Case No. 2020-073BP

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**RESPONDENT'S AND MADISON LANDING'S JOINT RESPONSE TO
PETITIONER HTG MADISON PARK'S EXCEPTIONS TO RECOMMENDED ORDER**

Respondent, Florida Housing Finance Corporation, and Madison Landing II, LLC, ARC 2020, LLC, and New South Residential, LLC (collectively "Madison Landing") hereby submit their Joint Response to Petitioner HTG Madison Park, LTD's Exceptions, pursuant to Rule 28-106.217, Fla. Admin. Code.

Response to Exception 1

Petitioner takes exception to portions of Finding of Fact #21 in which the Administrative Law Judge (ALJ) found that the phrase "good standing among all other state agencies" is not

defined. The definition is only relevant to these proceedings if the Petitioner could argue that “good standing among all other state agencies” is a requirement in the RFA that Applicants legally form each principal of the Applicant. However, Petitioner confirmed in the Joint Pre-Hearing Stipulation that there is no such requirement: “[T]here is no explicit requirement in this RFA that each principal of the Applicant demonstrate that it is a legally formed entity as of the Application Deadline.” Stip. at p.10, #26. Petitioner Stipulation. See *Manatee County v. Florida Public Employees Relations Commission*, 387 So.2d 446, 449 (1980). Therefore, the Petitioner cannot now argue that the ALJ should have found a different definition of the phrase “good standing among all other state agencies” when Petitioner has already stipulated that there is no explicit requirement to legally form each principal of the Applicant.

Despite the Stipulation, Petitioner argues in Exception #1 that the testimony of Florida Housing’s corporate representative Marisa Button provides a definition of “good standing among all other state agencies.” Ms. Button’s testimony in this regard, however, is at best ambiguous and does not provide a definition. When asked how an Applicant could certify that all of its Principals were “in good standing among all other state agencies and have not been prohibited from applying for funding” (as is required in paragraph 13 of the Applicant Certification and Acknowledgement Form) she simply pointed out that it was the Applicant’s responsibility to comply with the certification form and that “if the Principal has not been legally formed, I don’t know how [they] comply.” Ms. Button also asserted that the specific term “legally formed entity,” which is used elsewhere in the RFA regarding principal disclosure, was not used in paragraph 13 of the Applicant Certification. The ALJ reasonably concluded: “To conflate the phrase ‘in good standing among all other state agencies’ with ‘legally formed entity’ would negate the drafters’ decision to use different phrases in different parts of the RFA. Use of the words ‘in good standing with all other

state agencies,' with respect to Principals, signals that the language means something different.” No other evidence concerning the meaning of paragraph 13 was presented. The ALJ’s finding that “the phrase ‘good standing among all other state agencies’ is not defined; and no evidence was presented as to the definitive meaning of the phrase” is certainly a reasonable interpretation of the very limited testimony regarding this subject.

Petitioner also takes exception to the ALJ’s finding that “no evidence was presented that Madison Landing’s Principals are not in good standing with any state agency or have been prohibited from applying for funding.” The only evidence Petitioner cites to support this exception is the undisputed fact that one of the Principals of Madison Landing was not legally formed in Florida by the application deadline. When asked whether any of the Principals of Madison Landing were in good standing with state agencies, Ms. Button testified “I don’t know the answer to that question.”

Finding of Fact #21 is supported by competent substantial evidence, and Petitioner’s Exception #1 should be rejected.

Response to Exception #2

Petitioner takes exception to Finding of Fact #29, in which the ALJ found that “there is no explicit requirement in the 2020 RFA that each Principal of the Applicant demonstrate that it is a legally formed entity as of the Application Deadline.” This finding was stipulated to almost verbatim by Petitioner and all of the parties in the Joint Pre-Hearing Stipulation: “[T]here is no explicit requirement in this RFA that each principal of the Applicant demonstrate that it is a legally formed entity as of the Application Deadline.” Stip. at p.10, #26. It was also reiterated by Ms. Button throughout her testimony at hearing. (Transcript pp. 17-18, 72, 79) Petitioner’s allegation that “Ms. Button equates the language in Paragraph 13 of the Applicant Certification Form with

being legally formed” is not supported by any testimony or evidence, but is simply an inference that Petitioner wishes to draw. Finding of Fact #29 is supported by competent substantial evidence, and Petitioner’s Exception #2 should be rejected.

Response to Exception #3

Petitioner takes exception to Finding of Fact #31, in which the ALJ found that the requirements for disclosure of principals during the Universal Cycle were “essentially the same” as those during the RFA process. Petitioner argues that the requirements of paragraph 13 of the Applicant Certification and Acknowledgement Form were not in existence during the Universal Cycle. Whether or not this is true, paragraph 13 says nothing at all about principal disclosure requirements. The principal disclosure requirements are contained in pages 7-14 of the RFA. Those requirements are “essentially the same” as the requirements for disclosure of principals during the Universal Cycle. There was also ample competent substantial evidence in the testimony of Marisa Button (e.g., Transcript pp17-23) to support Finding of Fact #31. Therefore, Petitioner’s Exception #3 should be rejected.

Petitioner’s Exception #3 should be rejected.

Response to Exception #4

Petitioner takes exception to Finding of Fact #35, in which the ALJ found that Questions and Answers “are discrete to the specific RFA for which they were issued.” Petitioner argues that some Answers are the same for different RFAs when those RFAs contain identical requirements. While this is true, there was also competent substantial evidence to support Finding of Fact #35 (e.g., Transcript pp 24-25, in which Ms. Button testified that the Questions and Answers are “discrete to each RFA.”) Furthermore, Finding of Fact #35 must be read in context with Finding of Fact #34 wherein the ALJ accurately stated: “The same Question and Answer, however, do not

appear in Questions and Answers for the 2020 RFA at issue in this case.” The ALJ reasonably found that a Q&A that only appeared in 2018 and not in the 2020 RFA was discrete to the specific RFA for which it was issued. Petitioner’s Exception #4 should be rejected.

Response to Exception #5

Petitioner takes exception to Conclusion of Law #51, in which the ALJ concludes that Petitioner did not identify any procedural differences between the Universal Cycle and the RFA process that would render the Heritage Village case inapplicable. Petitioner did not elicit any testimony or present any evidence concerning the procedural requirements in the Universal Cycle, but simply suggests that the inclusion of paragraph 13 of the Applicant Certification and Acknowledgement Form in the RFA process creates some kind of procedural difference. For the reasons discussed in Response to Exception #3, Conclusion of Law #51 is supported by competent substantial evidence and is reasonable, and Petitioner’s Exception #5 should be rejected.

Response to Exception #6

Petitioner takes exception to Conclusion of Law #52, in which the ALJ concluded that the phrase “in good standing among all other state agencies” necessarily meant something different from “legally formed entity” since Florida Housing used the different phrases in different parts of the RFA. Petitioner disagrees with this conclusion but offers little explanation other than to repeat the unsubstantiated inference that Ms. Button equates the two phrases. For the reasons discussed in Response to Exception #1 and #2, Conclusion of Law #52 is supported by competent substantial evidence and is reasonable, and Petitioner’s Exception #6 should be rejected.

Response to Exception #7

Petitioner takes exception to Conclusion of Law #53, in which the ALJ concluded that Florida Housing’s reliance on the Heritage Village case remains valid. Petitioner again argues that

paragraph 13 was not a part of the Universal Cycle. For the reasons discussed in Responses to Exceptions #3 and #5, Conclusion of Law #51 is supported by competent substantial evidence and is reasonable, and Petitioner's Exception #5 should be rejected.

Response to Exception #8

Petitioner takes exception to Conclusion of Law #56, in which the ALJ concluded that Florida Housing's proposed action was not contrary to competition "because there is no evidence in the record that Florida Housing stifled fair and open competition." Petitioner argues that Florida Housing's reliance on the Heritage Village case and the explicit language in the RFA rather than on one interpretation of Questions and Answers from previous RFAs was unfair to applicants like Petitioner who purportedly relied on the Questions and Answers in filling out its own Application. There was no evidence, however, that Madison Landing gained any competitive advantage because one of its Principals was not legally formed as of the application deadline, nor was there any evidence that this action had any affect on any other applicants or prospective applicants. Conclusion of Law #56 is supported by competent substantial evidence and is reasonable, and Petitioner's Exception #8 should be rejected.

WHEREFORE, Florida Housing respectfully request 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 in this matter.

Respectfully submitted on this 15th day of April, 2021.

s/ J. Timothy Schulte

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by electronic mail this 15th day of April, 2021 to:

J. Timothy Schulte
Zimmerman, Kiser & Sutcliffe, P.A.

Maureen McCarthy Daughton
Maureen McCarthy Daughton, LLC

/s/ Chris McGuire
Chris McGuire