

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

AMBAR RIVERVIEW, LTD.,

Petitioner,

FHFC Case No. 2019-014BP
DOAH Case No. 19-1261BID

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

LAS BRISAS TRACE, LP,

Intervenor.

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on June 21, 2019. Petitioner Ambar Riverview, Ltd (“Ambar” or “Petitioner”) and Intervenor Las Brisas Trace, LP (“Las Brisas”) were Applicants under Request for Applications 2018-111, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (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 September 6, 2018, Florida Housing Finance Corporation (“Florida Housing”) issued the RFA, which solicited applications to compete for an allocation of low income housing credit funding. On November 9, 2018, 67 applications were submitted in response to the RFA, including applications from Ambar and Las Brisas. On February 1, 2019, Florida Housing posted notice of its intended decision to award funding to three applicants, including Las Brisas. Ambar was eligible, but not recommended for funding.

Ambar, Whaler’s Cove Apartments, LLC and Landmark Development, Corp. (“Whaler’s Cove”), AMC HTG 3, LLC (“AMC HTG 3”), and HTG Rock Ridge, Ltd. (“HTG Rock Ridge”) timely filed formal written protests and petitions for administrative proceedings. Several other applicants filed notices of appearances in the challenges. Ultimately, HTG Rock Ridge, Whaler’s Cove, and AMC HTG 3 voluntarily dismissed their respective petitions.

A formal hearing commenced as scheduled on April 10, 2019 in Tallahassee, Florida, before Administrative Law Judge Darren A. Schwartz (the “ALJ”) at the Division of Administrative Hearings (“DOAH”). At the outset of the hearing, Ambar announced that it would no longer litigate several issues raised in its petition. Thereafter, the hearing proceeded on issues regarding: 1) Las Brisas’ failure to identify the multiple roles of its principals on the Principals Disclosure Form; and 2) Las Brisas’ failure to answer Question 10 of the Public Housing Authority Question

of the RFA. Florida Housing maintained its initial position that Las Brisas' application was properly deemed eligible and selected for funding. After the hearing, all parties timely filed Proposed Recommended Orders.

After consideration of the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 21, 2019. A true and correct copy of the Recommended Order is attached hereto as Exhibit A. The ALJ determined that Florida Housing's proposed action in awarding housing tax credits to Las Brisas, and not Ambar, is not contrary to the governing statutes, rules, or the RFA specifications, and was not clearly erroneous, contrary to competition, arbitrary, or capricious. The ALJ recommended that Florida Housing dismiss the protest of Ambar and award housing tax credits to Las Brisas.

On May 31, 2019, Ambar filed Exceptions to the Recommended Order. Florida Housing and Las Brisas filed a Joint Response to Ambar's Exceptions. The Exceptions and Joint Response are attached hereto as Exhibits B and C, respectively.

RULING ON EXCEPTION #1

1. Ambar filed an exception to Finding of Fact 14 of the Recommended Order. After a review of the record, the Board finds that this Finding of Fact is supported by competent substantial evidence and the Board rejects Exception #1.

RULING ON EXCEPTION #2

2. Ambar filed an exception to Findings of Fact 34, 35, and 36 of the Recommended Order. After a review of the record, the Board finds that these Findings of Fact are supported by competent substantial evidence and the Board rejects Exception #2.

RULING ON EXCEPTION #3

3. Ambar filed an exception to Findings of Fact 46 and 47 of the Recommended Order. After a review of the record, the Board finds that these Findings of Fact are supported by competent substantial evidence and the Board rejects Exception #3.

RULING ON EXCEPTION #4

4. Ambar filed an exception to the Conclusions of Law 67 and 68 of the Recommended Order. After a review of the record, the Board finds that Conclusions of Law in Paragraphs 67 and 68 are supported by competent substantial evidence and reasonable interpretations of applicable law and the Board rejects Exception #4.

RULING ON THE RECOMMENDED ORDER

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

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

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

ORDER

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

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

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

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

IT IS HEREBY ORDERED that Florida Housing's scoring and ranking of RFA 2018-111 is **AFFIRMED** and the relief requested in the Petition is **DENIED**.

DONE and ORDERED this 21st day of June, 2019.

FLORIDA HOUSING FINANCE
CORPORATION



By: *Ray Duboyne*
Chair

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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

AMBAR RIVERVIEW, LTD.,

Petitioner,

vs.

Case No. 19-1261BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

LAS BRISAS TRACE, LP,

Intervenor.

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz of the Division of Administrative Hearings for final hearing on April 10, 2019, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Michael P. Donaldson, Esquire
Carlton Fields Jordan Burt, P.A.
215 South Monroe Street, Suite 500
Post Office Drawer 190
Tallahassee, Florida 32302-0190

For Respondent: Betty Zachem, Esquire
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenor: Seann M. Frazier, Esquire
Parker Hudson Rainer & Dobbs, LLP
215 South Monroe Street, Suite 750
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent, Florida Housing Finance Corporation's ("Florida Housing"), intended action to award housing tax credit funding to Intervenor, Las Brisas Trace, LP ("Las Brisas"), under Request for Applications 2018-111 Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA"), is contrary to governing statutes, rules, the RFA specifications, and clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

On September 6, 2018, Florida Housing issued the RFA, soliciting applications to compete for an allocation of Federal Low-Income Housing Tax Credit funding ("housing tax credits") for the construction of affordable housing developments in Miami-Dade County, Florida. Modifications to the RFA were issued on September 25, 2018, October 4, 2018, and October 18, 2018. On November 9, 2018, 67 applications were submitted in response to the RFA, including applications from Petitioner, Ambar Riverview, Ltd. ("Ambar"), and Las Brisas.

On February 1, 2019, Florida Housing posted notice of its intended decision to award funding to three applicants,

including Las Brisas. Ambar was eligible, but not recommended for funding.

Ambar timely filed a Formal Written Protest and Petition for Administrative Proceeding. On March 11, 2019, Florida Housing referred the matter to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing.

Florida Housing filed a motion to consolidate this matter with other matters filed by Whaler's Cove Apartments, LLC, and Landmark Development, Corp. (DOAH Case No. 19-1258BID); AMC HTG 3, LLC (DOAH Case No. 19-1262BID); and HTG Rock Ridge, Ltd. (DOAH Case No. 19-1263BID). Lucida Apartments, Ltd., and HTG Berkeley, LLC, filed notices of appearance as named parties in DOAH Case No. 19-1258BID. Las Brisas, Ambar, and Cannery Row at Redlands Crossing, LLLP, filed notices of appearance as named parties in DOAH Case No. 19-1262BID. On March 14, 2019, HTG Rock Ridge, Ltd., filed a voluntary dismissal of its petition and the undersigned entered an Order closing DOAH Case No. 19-1263BID and relinquishing jurisdiction to Florida Housing. Florida Housing closed its file as well.

On March 15, 2019, a telephonic hearing was held on Las Brisas' motions to intervene and to dismiss the petition. On March 18, 2019, the undersigned entered an Order granting the motion to intervene and denying the motion to dismiss. On

March 18, 2019, the undersigned entered an Order setting the final hearing for April 10, 2019. On March 19, 2019, the undersigned entered an Order consolidating the instant case with DOAH Case Nos. 19-1258BID and 19-1262BID. Subsequently, Whaler's Cove Apartments, LLC; Landmark Development, Corp.; and AMC HTG 3, LLC filed voluntary dismissals of their petitions in DOAH Case Nos. 19-1258BID and 19-1262BID, and on March 25 and March 26, 2019, the undersigned entered an Order severing and closing these two cases and relinquishing jurisdiction to Florida Housing. Florida Housing closed its files as well.

On April 8, 2019, the parties filed their Joint Pre-hearing Statement. The final hearing commenced as scheduled and concluded on April 10, 2019, with all parties present. At the outset of the hearing, Ambar announced that it would no longer litigate several issues raised in its petition. Thereafter, the hearing proceeded on issues regarding: (1) Las Brisas' Principals Disclosure Form's failure to identify the multiple roles of its principals; and (2) Las Brisas' failure to answer Question 10f. of the Public Housing Authority Question of the RFA.

At the hearing, Ambar presented the testimony of Elena Adames. All parties presented the testimony of Marisa Button. Ambar's Exhibits 1 and 6 were received in evidence. Las Brisas'

Exhibit 2 was received in evidence. Joint Exhibits 1 through 10 were received in evidence.

The one-volume final hearing Transcript was filed on May 1, 2019. The parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order. The stipulated facts in the parties' Joint Pre-hearing Statement have been incorporated herein as indicated below. Unless otherwise indicated, references to the Florida Statutes are to the 2018 version.

FINDINGS OF FACT

1. Ambar is an applicant requesting an allocation of \$2,700,000.00 in competitive housing tax credits. Ambar's application, assigned number 2019-035C, was deemed eligible for consideration, but was not preliminarily selected for funding.

2. Las Brisas is an applicant requesting an allocation of \$2,635,850.00 in housing tax credits. Las Brisas' application, assigned number 2019-073C, was deemed eligible for consideration and was preliminarily selected for funding.

3. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes, whose address is 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, and for the purposes of this proceeding, an agency of the State of Florida.

4. Florida Housing's purpose is to promote 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.

5. The low income housing tax credit program (commonly referred to as "housing tax credits") was enacted to incentivize the private market to invest in affordable rental housing. These housing tax credits are awarded competitively to housing developers in Florida for rental housing projects that qualify. These credits are then normally sold by developers for cash to raise capital for their projects. The effect is that the credits reduce the amount that the developer would otherwise have to borrow. Because the total debt is lower, a housing tax 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 tax credits. The demand for housing tax credits provided by the federal government exceeds the supply.

The Competitive Application Process

6. Florida Housing is authorized to allocate housing tax credits, State Apartment Incentive Loan ("SAIL") funding, and other funding by means of requests for applications or other competitive solicitation in section 420.507(48), and Florida Administrative Code Chapter 67-60, which govern the competitive solicitation process for several different programs, including the program for housing tax credits. Chapter 67-60 provides that Florida Housing allocate its housing tax credits, which are made available to Florida Housing on an annual basis by the U.S. Treasury, through the bid protest provisions of section 120.57(3).

7. In their applications, applicants request a specific dollar amount of housing tax credits to be given to the applicant each year for a period of ten years. Applicants normally sell the rights to that future stream of income housing tax 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 which can be received depends upon the accomplishment of several factors, such as a certain percentage of the projected Total Development Cost; a maximum funding amount per development based on the county in which the development will be located; and whether the development is located within certain designated

areas of some counties. This, however, is not an exhaustive list of the factors considered.

8. The RFA was issued on September 6, 2018, and responses were initially due October 25, 2018. The RFA was modified on September 25, 2018, October 4, 2018, and October 18, 2018. The application deadline was extended to November 9, 2018. No challenges were made to the terms of the RFA.

9. Through the RFA, Florida Housing seeks to award up to an estimated \$6,881,821.00 of housing tax credits to applicants that propose developments located in Miami-Dade County, Florida. Florida Housing received 67 applications in response to the RFA.

10. A review committee was appointed to review the applications and make recommendations to Florida Housing's Board of Directors (the "Board"). The review committee found 61 applications eligible and six applications ineligible. Through the ranking and selection process outlined in the RFA, three applications were recommended for funding, including Las Brisas. To reflect its scoring decisions, the review committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

11. On February 1, 2019, the Board met and considered the recommendations of the review committee. Also, on February 1, 2019, at approximately 9:20 a.m., Ambar and all other applicants received notice that the Board had determined whether

applications were eligible or ineligible for consideration for funding, and that certain eligible applicants were selected for award of housing credits, subject to satisfactory completion of the credit underwriting process. Such notice was provided by the posting of two spreadsheets on the Florida Housing website, www.floridahousing.org, one listing the "eligible" applications in the RFA and one identifying the applications which Florida Housing proposed to fund.

12. In the February 1, 2019, posting, Florida Housing announced its intention to award funding to three applicants, including Las Brisas. Ambar and Las Brisas applied for funding to develop proposed developments in Miami-Dade County with the demographic commitment of Elderly, Non-ALF. Ambar was eligible, but not recommended for funding. Ambar timely filed a Notice of Protest and Petition for Formal Administrative Proceedings and Las Brisas timely intervened.

THE RFA Ranking and Selection Process

13. The RFA contemplates a structure in which the applicant is scored on eligibility items and obtains points for other items. A list of the eligibility items is available in section 5.A.1, beginning on page 65 of the RFA. Only applications that meet all the eligibility items will be eligible for funding and considered for funding selection. The eligibility items also include Submission Requirements,

Financial Arrearage Requirements, and the Total Development Cost Per Unit Limitation requirement.

14. Applicants can earn points for each of the following items (for a total of 15 points): Submission of Principals Disclosure Form stamped by the Corporation as "Pre-Approved" (5 points), Development Experience Withdrawal Disincentive (5 points), and Local Government Contribution Points (5 points).

15. All 67 applications for the RFA 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.

16. On page 69, the RFA outlines its three goals:

a. The Corporation has a goal to fund one (1) proposed Development that
(a) selected the Demographic Commitment of Family at question 2.a of Exhibit A and
(b) qualifies for the Geographic Areas of Opportunity/SADDA Goal as outlined in Section Four A.10.

b. The Corporation has a goal to fund one (1) proposed Development that selected the Demographic Commitment of Elderly (ALF or Non-ALF) at question 2.a. of Exhibit A. ["Elderly Demographic Goal"].

c. The Corporation has a goal to fund one (1) proposed Development wherein the Applicant applied and qualified as a Non-Profit Applicant.

*Note: During the Funding Selection Process outlined below, Developments selected for these goals will only count toward one goal. For example, if a Development is selected

for the Elderly Demographic goal but also qualifies for the Non-Profit goal, the Development will only count towards the Elderly Demographic goal and another Development will be considered for the Non-Profit goal.

17. As part of the funding selection process, the RFA starts with the application sorting order. The highest scoring applications are determined by first sorting together all eligible applications from the highest score to lowest score, with any scores that are tied separated as follows:

a. First, 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;

b. Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.11.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);

c. 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);

d. 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);

e. 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); and

f. And finally, by lottery number, resulting in the lowest lottery number receiving preference.

18. Beginning on page 70, the RFA outlines the funding selection process:

(1) The first Application selected for funding will be the highest ranking eligible Family Application that qualifies for the Geographic Areas of Opportunity/SADDA Goal.

(2) The next Application selected for funding will be the highest ranking eligible Application that qualifies as an Elderly (ALF or Non-ALF) Development.

(3) The next Application selected for funding will be the highest ranking Application wherein the Applicant applied and qualified as a Non Profit Applicant.

(4) If there are less than three (3) Applications selected for funding in (1), (2), and (3) above, the next Application(s) selected for funding will be the highest ranking unfunded Application(s), regardless of Demographic Category until no more than three (3) total Applications are selected for funding. If the third Application cannot be fully funded, it will be entitled to receive a Binding Commitment for the unfunded balance.

(5) If funding remains after selecting the three (3) highest ranking eligible unfunded Applications as outlined above, or if funding remains because there are not

three (3) eligible Applications that can be funded as outlined above, then no further Applications will be considered for funding and any remaining funding will be distributed as approved by the Board.

19. According to the terms of the RFA:

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

Las Brisas' Application

20. In response to the RFA, Las Brisas timely submitted its application to develop a 119-unit affordable, elderly development in Miami-Dade County.

21. Florida Housing determined that the Las Brisas application was eligible for an award of housing tax credits and preliminarily selected the Las Brisas application for an award of housing tax credits. Las Brisas was selected to meet the Elderly Demographic Goal.

22. Ambar contests Florida Housing's preliminary selection of Las Brisas for an award of housing tax credits. If the Las Brisas application is either ineligible or remains eligible but loses five points, then according to the ranking and selection

process in the RFA, Ambar's application will be selected for funding as the next highest ranking eligible application.

Principals Disclosure Form

23. In its challenge, Ambar argues that Las Brisas failed to correctly complete its Principals Disclosure Form by not identifying the multiple roles of its disclosed principals. Specifically, Ambar argues that Las Brisas failed to list Steve Protulis, who is disclosed as executive director, as an officer as well. Additionally, Ambar argues that Las Brisas' disclosure of Christopher M. Shelton, Morton Bahr, Edward L. Romero, Leo W. Gerard, Maria C. Cordone, and Erica Schmelzer as officers is insufficient because they were also not listed as directors. Accordingly, Ambar contends Las Brisas is not eligible or should lose five points. Significantly, Ambar does not argue that Las Brisas failed to disclose a principal.

24. As an eligibility item, the RFA requires that applicants identify their "Principals" by completing and submitting with their applications a Principals Disclosure Form as follows:

Eligibility Requirements

To meet the submission requirements, the Applicant must upload the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 08-16) ("Principals Disclosure Form") with the Application and Development Cost Pro Forma, as outlined in Section Three above.

The Principals Disclosure Form must identify the Principals of the Applicant and Developer(s) as of the Application Deadline and should include, for each applicable organizational structure, only the types of Principals required by Subsection 67-48.002, F.A.C. 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.

25. The RFA states that unless otherwise defined, capitalized terms within the RFA have the meaning as set forth in Exhibit B, in chapters 67-48 and 67-60, or in applicable federal regulations.

26. Rule 67-48.002(94) defines the term "Principal." The rule is organized first by the applicant or developer entity, then by the organizational structure of those specific entities. According to rule 67-48.002(94)(a)2., with respect to any applicant that is a limited partnership, any general partner or limited partner must be disclosed.

27. Because the general partner of Las Brisas is a corporation, additional disclosures are required. Principals at the second disclosure level pursuant to rule 67-48.002(94)(a)2. include "any officer, director, executive director, or shareholder of the corporation." Ms. Button, Director of Multifamily Programs for Florida Housing, testified that Florida Housing defined the term principals this way so that it could know the individuals that have control and oversight over the

entities themselves in order to determine whether any individuals associated with a proposed development are in arrears or indebted to Florida Housing in connection with other developments.

28. The RFA also enabled an applicant to obtain points by participating in Florida Housing's Advance Review Process as follows:

Point Item

Applicants will receive 5 points if the uploaded Principal Disclosure Form was stamped "Approved" during the Advance Review Process provided (a) it is still correct as of Application Deadline, and (b) it was approved for the type of funding being requested (i.e., Housing Credits or Non-Housing Credits). The Advance Review Process for Disclosure of Applicant and Developer Principals is available on the Corporation's Website <http://www.floridahousing.org/programs/developers-multifamily-programs/competititve/2018/2018-111> (also accessible by clicking here) and also includes samples which may assist the Applicant in completing the required Principals Disclosure Form.

Note: It is the sole responsibility of the Applicant to review the Advance Review Process procedures and to submit any Principals Disclosure Form for review in a timely manner in order to meet the Application Deadline.

29. In order to assist applicants with identifying the correct types of principals that should be identified for each entity, Florida Housing offers applicants the opportunity to

have the Principals Disclosures Form reviewed by staff in the Advance Review Process. The Advance Review Process is a continuous, ongoing process that is not specific to any RFA. The RFA provides a link that directs applicants to information regarding the Advance Review Process including instructions, rule definitions, terms and conditions, sample charts and examples, the Principals Disclosure Form, and Frequently Asked Questions ("FAQ"). The RFA states that the information contained within the link "includes samples which may assist the Applicant in completing the required Principals Disclosure Form."

30. Part of the information about the Advance Review Process that is linked in the RFA is a Principals of the Applicant and Developer(s) Disclosure Form Frequently Asked Questions document that was updated on September 4, 2018 (the "2018 FAQ").

31. Question 6 of the 2018 FAQ provides:

Q: If a person has multiple roles within the organizational structure, must they be listed multiple times--once for each role?

A: For a Corporation, if a person serves multiple roles they may be listed once with the other role(s) identified next to the name of the individual. For example, John Smith serves as both an officer and director for ABC, Inc. You may choose the option of "director" in the drop-down menu and enter "officer" after his name as follows: Smith, John (officer).

32. A prior version of the FAQ was updated on November 10, 2016 (the "2016 FAQ") and was replaced by the 2018 FAQ. The 2016 FAQ was not linked within the RFA.

33. Question 8 of the 2016 FAQ provided:

Q: If a person has multiple roles within the organizational structure, must they be listed multiple times--once for each role?

A: Yes.

34. Ms. Button persuasively and credibly testified that the purpose of the frequently asked questions is to help applicants understand what information Florida Housing is seeking from the applicants, and that the update to the 2016 FAQ was made because requesting applicants to list multiple roles of its principals did not further Florida Housing's goals. Thus, the intent of Question 6 of the 2018 FAQ and Florida Housing's answer was to communicate to applicants that they may, but were not required to, list the multiple roles of a principal of a corporation. Ms. Button persuasively and credibly testified that Florida Housing intentionally changed its position in Question 6 of the 2018 FAQ from the "hard-and-fast requirement" of Question 6 of the 2016 FAQ.

35. The 2018 FAQ was not the only resource linked within the RFA for applicants to reference when completing the Principals Disclosure Form. Also linked within the RFA was the Continuous Advance Review Process for Disclosure of Applicant

and Developer Principals, which includes disclosure instructions, rule definitions, and sample charts and examples. These resources included guidance and examples of Principals Disclosure Forms where principals, who held multiple roles, were listed twice. However, both of these resources pre-date the 2018 FAQ, which was last updated September 4, 2018, approximately two months before the applications in response to the RFA were due.

36. At hearing, Ms. Button acknowledged the discrepancy between the instructions and guidance to the Principals Disclosure Form and the 2018 FAQ. Ms. Button explained that when the FAQ was updated in 2018, the other documents were not updated to reflect Florida Housing's change of position. Ms. Button persuasively and credibly testified that Florida Housing considers the most updated guidance to control, and where there is a conflict with Florida Housing's guidance, the least restrictive guidance controls.

37. Las Brisas participated in the Advance Review Process, and on or about October 17, 2018, Florida Housing approved the Principals Disclosure Form submitted by Las Brisas during the Advance Review Process for an award of housing credits.

38. Florida Housing, by approving the Las Brisas Principals Disclosure Form, relied on the information provided, and concluded that Las Brisas identified the appropriate type of

principals for an award of housing tax credits and the appropriate type of principals for the corresponding type of entities as provided in rule 67-48.002(94).

39. Florida Housing's approval of Las Brisas' Principals Disclosure Form during the Advance Review Process did not verify the accuracy of the information contained within the Principals Disclosure Form, but rather, verified that the appropriate type entities were disclosed for the organizational structures listed.

40. The Principals Disclosure Form submitted with Las Brisas' application was the same document in all respects that was approved by Florida Housing during the Advance Review Process.

41. Las Brisas' Principals Disclosure Form for the applicant lists Las Brisas Trace, LP, as the applicant entity that is a limited partnership. EHDOD Las Brisas Trace Charitable Corporation is listed as the general partner of the applicant at the first principal disclosure level. Las Brisas also lists two limited partners at the first disclosure level that are not at issue in this proceeding.

42. At the second principal disclosure level for principals of the applicant, EHDOD Las Brisas Charitable Corporation identified 18 natural persons as principals. Steve Protulis is listed as the executive director.

Christopher M. Shelton, Morton Bahr, Edward L. Romero, Leo W. Gerard, Maria C. Cordone, and Erica Schmelzer are identified as officers. Mary Anderson, Maxine Carter, Eric Dean, Ellen Feingold, Tony Fransetta, Robert Martinez, Lou Moret, John Olsen, Cecil Roberts, Roger Smith, and Thomas P. Villanova are identified as directors.

43. Because Las Brisas applied as a non-profit, it had to include additional information with its application that other applicants did not. This information was included in Attachment 3 to Las Brisas' application. Among the information included was a list of the names and addresses of the members of the governing board of the non-profit entity.

44. This list of names and addresses of the governing board of the non-profit entity, EHDOC Las Brisas Trace Charitable Corporation, shows that Steve Protulis, Christopher M. Shelton, Morton Bahr, Edward L. Romero, Leo W. Gerard, Maria C. Cordone, and Erica Schmelzer are also directors.

45. Thus, within the four corners of the application, Florida Housing could determine with whom it was doing business and what roles those individuals held.

46. Ms. Button persuasively and credibly testified that Las Brisas' Principals Disclosure Form did not contain any errors and was complete.

47. As further testified to by Ms. Button, even if Las Brisas' failure to list the multiple roles of its disclosed principals on the Principals Disclosure Form is an error, it is so minor as to constitute a waivable, minor irregularity because Florida Housing has the required information in the application, and there was no competitive advantage to Las Brisas.

Public Housing Authority Question

48. Question 10 of Exhibit A to the RFA states the following ("the Public Housing Authority Question"):

f. Public Housing Authority as a Principal of the Applicant Entity

Is a Principal of the Applicant Entity a Public Housing Authority and/or an instrumentality of a Public Housing Authority?

Choose an item.

If the Principal of the Applicant Entity is an instrumentality of a Public Housing Authority, state the name of the Public Housing Authority:

[Click here to enter text.](#)

49. In its application, Las Brisas did not provide an answer to the Public Housing Authority Question.

50. The Public Housing Authority Question is not an eligibility item of the RFA.

51. The purpose of the Public Housing Authority Question is to cross-reference if applicants are requesting an add-on

bonus ("boost") to the Total Development Cost limit that is available to public housing authorities or instrumentalities of public housing authorities.

52. Las Brisas clearly indicated in the Development Cost Pro Forma, which was part of its application, that it was not seeking the boost. Although Las Brisas did not answer the Public Housing Authority Question, it did not request a boost to the Total Development Cost Per Unit Limitation for being a public housing authority or an instrumentality of a public housing authority.

53. Accordingly, the Public Housing Authority Question was simply not applicable to Las Brisas' application.

54. Las Brisas' failure to answer the Public Housing Authority Question did not result in the omission of any material information or create any competitive advantage.

55. The persuasive and credible testimony of Ms. Button demonstrates that Las Brisas' failure to answer the Public Housing Authority Question is a waivable, minor irregularity.

CONCLUSIONS OF LAW

56. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, 120.57(1), and 120.57(3), Florida Statutes.

57. Pursuant to section 120.57(3)(f), the burden of proof rests with Ambar as the party opposing the proposed agency

action. State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Ambar must sustain its burden of proof by a preponderance of the evidence. See Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981).

58. Section 120.57(3)(f) provides, in part, as follows:

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.

59. The phrase "de novo proceeding," as used in section 120.57(3)(f), describes 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, 709 So. 2d at 609.

60. A bid protest proceeding is not simply a record review of the information that was before the agency. Rather, a new evidentiary record based upon the facts established at DOAH is

developed. J.D. v. Fla. Dep't of Child. & Fams., 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

61. After determining the relevant facts based on the evidence presented at hearing, Florida Housing's intended action will be upheld unless it is contrary to the governing statutes, the corporation's rules, or the bid specifications. The agency's intended action must also remain undisturbed unless it is clearly erroneous, contrary to competition, arbitrary, or capricious.

62. The Florida Supreme Court explained the clearly erroneous standard as follows:

A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. This standard plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently. Such a mistake will be found to have occurred where findings are not supported by substantial evidence, are contrary to the clear weight of the evidence, or are based on an erroneous view of the law. Similarly, it has been held that a finding is clearly erroneous where it bears no rational relationship to the supporting evidentiary data, where it is based on a mistake as to the effect of the evidence, or where, although there is evidence which if credible would be substantial, the force and effect of the testimony considered as a whole convinces the court that the finding is so against the great preponderance of the

credible testimony that it does not reflect or represent the truth and right of the case.

Dorsey v. State, 868 So. 2d 1192, 1209 n.16 (Fla. 2003).

63. The contrary to competition standard precludes actions which, at a minimum: (a) create the appearance of and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent. GEO Reentry Servs., LLC v. Dep't of Corr., Case No. 18-0613BID, 2018 Fla. Div. Admin. Hear. LEXIS 253, at *40 (Fla. DOAH April 20, 2018); Care Access PSN, LLC v. Ag. for Health Care Admin., Case No. 13-4113BID, 2014 Fla. Div. Admin. Hear. LEXIS 3, at *54 (Fla. DOAH Jan. 2, 2014); Phil's Expert Tree Serv., Inc. v. Broward Cnty. Sch. Bd., Case No. 06-4499BID, 2007 Fla. Div. Admin. Hear. LEXIS 161, at *23 (Fla. DOAH Mar. 19, 2007).

64. 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. Lib. Behavioral Health Corp., 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious.

J.D., 114 So. 3d at 1130. Thus, under the arbitrary or capricious standard, "an agency is to be subjected only to the most rudimentary command of rationality. The reviewing court is not authorized to examine whether the agency's empirical conclusions have support in substantial evidence." Adam Smith Enters., Inc. v. Dep't of Env'tl. Reg., 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). Nevertheless,

the reviewing court must consider 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 each of these factors to its final decision.

Id.

65. Moreover, it has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It 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. State Dep't of Gen. Servs., 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

66. Pursuant to rule 67-60.008, Florida Housing has reserved the right to waive minor irregularities in an application. Under this rule, minor irregularities are those 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."

67. Turning to the merits of the instant case, Florida Housing's proposed action in awarding the housing tax credits to Las Brisas, and not Ambar, is not contrary to the governing statutes, rules, the RFA specifications, clearly erroneous, contrary to competition, arbitrary, or capricious. As detailed above, Las Brisas identified all of the principals on its Principals Disclosure Form and the form was correct and complete. There was no requirement to include the multiple roles of each principal in the Principals Disclosure Form. In any event, Attachment 3 to the application included the multiple roles of each principal. Accordingly, Florida Housing had within the four corners of the application the information to determine what roles each principal held. At most, Las Brisas' failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity. Likewise, Las Brisas' failure to answer the Public Housing Authority Question was irrelevant and a waivable minor irregularity because Las Brisas was not seeking any boost. In sum, Las Brisas is eligible for funding and should not lose any points.

68. Finally, Ambar's reliance on HTG Village View, LLC v. Florida Housing Finance Corporation, Case No. 18-2156BID, 2018 Fla. Div. Adm. Hear. LEXIS 936 (Fla. DOAH July 27, 2018) (Final Order entered September 18, 2018), and Blue Broadway, LLC v. Florida Housing Finance Corporation, Case No. 17-3273BID, 2017 Fla. Div. Adm. Hear. LEXIS 528 (Fla. DOAH August 29, 2017) (Final Order entered September 22, 2017) are misplaced. Neither of these cases involved the particular situation presented in the instant case, where all principals were, in fact, disclosed.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order dismissing the protest of Ambar Riverview, Ltd., and award housing tax credits to Las Brisas Trace, LP.

DONE AND ENTERED this 21st day of May, 2019, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 21st day of May, 2019.

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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**

AMBAR RIVERVIEW, LTD.,

Petitioner,

v.

FHFC CASE NO. 2019-014BP
DOAH CASE NO. 19-1261BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

LAS BRISAS TRACE, LP,

Intervenor.

**AMBAR RIVERVIEW, LTD.'S
EXCEPTIONS TO RECOMMENDED ORDER**

Pursuant to section 120.57(3)(e), Florida Statutes, ("F.S.") and Rule 28-106.217, Florida Administrative Code ("F.A.C."), Petitioner Ambar Riverview, Ltd. ("Ambar"), hereby files its exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") on May 21, 2019, as follows:

Introduction

In this proceeding, Ambar challenged (i) the scoring of the Las Brisas Trace, LP ("Las Brisas") Application, specifically the five (5) points awarded to Las Brisas for submitting a Principal Disclosure Form stamped "Approved" by FHFC with its Application even though the Principal Disclosure Form was neither correct nor complete as of the Application Deadline and (ii) the eligibility of the Las Brisas Application for failing to provide a complete Application by answering all the questions requiring a response pursuant to the RFA instructions.

Ambar showed by competent substantial evidence that (i) Las Brisas failed to provide a correct and complete Principal Disclosure Form consistent with the specific requirements and guidance provided in the RFA and (ii) that Las Brisas failed to submit a complete Application. Despite the evidence presented, the ALJ concluded in his Recommended Order that Las Brisas' Principal Disclosure Form was consistent with Florida Housing's intent for requiring the form as part of the Application. The ALJ went on to state that even if the Principal Disclosure Form was not correct, it was appropriate to waive the deviation as a minor irregularity without any impact on the Applications scoring. The ALJ also found that the failure to submit a complete Application was a minor irregularity that could be waived.

The legal and factual issues presented in these exceptions involve whether Las Brisas' Application was consistent with the RFA regarding its Principal Disclosure Form and, if incorrect, whether it should be waived as a minor irregularity. Ambar objects to the ultimate conclusion that this deviation could or should be completely disregarded, both for purposes of determining responsiveness and scoring. Concluding these deviations are a minor irregularity is inconsistent not only with the clear language of the RFA but also with good public policy.

Standard of Review

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

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

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

Ambar is required by controlling case law to raise these issues by exception, or risk waiving the issue for subsequent judicial review. When a party to an administrative proceeding does not file exceptions to a recommended order, it waives objections and those matters are not preserved for possible subsequent appellate review. *Kantor v. School Board of Monroe County*, 648 So. 2d 1266, 1267 (Fla. 3rd DCA 1995), citing *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991). Ambar takes exception to the findings of fact and conclusions of law described below.

Exception No. 1

Ambar takes exception to Finding of Fact Number 14 which provide as follows:

Finding of Fact 14

14. Applicants can earn points for each of the following items (for a total of 15 points): Submission of Principals Disclosure Form stamped by the Corporation as "Pre-Approved" (5 points), Development Experience Withdrawal Disincentive (5 points), and Local Government Contribution Points (5 points).

In Paragraph 14 the ALJ states that an Applicant receives 5 points for "Submission of Principals Disclosure Form stamped by the Corporation as "Pre-Approved". As stated in Paragraph 28 the ALJ however finds that applicants only receive the 5 points if the Principal Disclosure Form is stamped "Approved" **AND it is still correct as of Application Deadline.** (Jt. Ex. 1 at pg. 11, Stip. at Fact 33)

To the extent Paragraph 14 suggests that an applicant is entitled to 5 points by simply submitting a "Pre Approved" Form, that finding is not based on competent substantial evidence.

Exception No. 2

Ambar takes exception to Findings of Fact Number 34, 35, 36 which provide as follows:

Findings of Fact 34, 35, and 36

34. Ms. Button persuasively and credibly testified that the purpose of the frequently asked questions is to help applicants understand what information Florida Housing is seeking from the applicants, and that the update to the 2016 FAQ was made because requesting applicants to list multiple roles of its principals did not further Florida Housing's goals. Thus, the intent of Question 6 of the 2018 FAQ and Florida Housing's answer was to communicate to applicants that they may, but were not required to, list the multiple roles of a principal of a corporation. Ms. Button persuasively and credibly testified that Florida Housing intentionally changed its position in Question 6 of the 2018 FAQ from the "hard-and-fast requirement" of Question 6 of the 2016 FAQ.

35. The 2018 FAQ was not the only resource linked within the RFA for applicants to reference when completing the Principals Disclosure Form. Also linked within the RFA was the Continuous Advance Review Process for Disclosure of Applicant 19 and Developer Principals, which includes disclosure instructions, rule definitions, and sample charts and examples. These resources included guidance and examples of Principals Disclosure Forms where principals, who held multiple roles, were listed twice. However, both of these resources pre-date the 2018 FAQ, which was last updated September 4, 2018, approximately two months before the applications in response to the RFA were due.

36. At hearing, Ms. Button acknowledged the discrepancy between the instructions and guidance to the Principals Disclosure Form and the 2018 FAQ. Ms. Button explained that when the FAQ was updated in 2018, the other documents were not updated to reflect Florida Housing's change of position. Ms. Button persuasively and credibly testified that Florida Housing considers the most updated guidance to control, and where there is a conflict with Florida Housing's guidance, the least restrictive guidance controls.

In these findings, the ALJ discusses an alleged conflict with Florida Housing's guidance with the "least restrictive guidance" controlling. In finding these facts, the ALJ clearly recognizes that both the RFA guidance and instructions required that Principals with multiple roles must be listed multiple times. Indeed, the competent substantial evidence and a fair reading of the RFA and more than 30 pages of instruction and guidance shows that the Principal Disclosure Form must list all principals and identify each role each Principal has within the organization identified. Contrary to what Florida Housing argued and the ALJ finds, there is in fact no conflict between the language found in the RFA guidance, instructions, and FAQ. (Jt. Ex. 1 at pg. 11, Jt. Ex. 9, Jt. Ex. 10, Ambar Ex. 1 and 6)

A clear and fair reading of the RFA and guidance requires that an Applicant either; 1) list a person multiple times in each capacity that he or she served, or 2) list a person in one capacity and list other roles in parentheses by his or her name. There is no "least restrictive requirement", an applicant either lists the Principal multiple times or lists them in one capacity with any other roles identified in parentheses. There is no evidence, written or oral, that notifies applicants that Florida Housing would not require Principals be listed in every capacity that he or she served. If Florida Housing intended that each Principals capacity not be identified, they could have simply answered the FAQ "No" and deleted or modified the extensive amount of instructions and examples to remove the requirement. To resort to Florida Housing's intent rather than the actual language and guidance is inappropriate in determining whether the Principal Disclosure Form was correct when submitted for Advance Review and at the time of the Application Deadline. Jt. Ex. 1 at pg. 11, Jt. Ex. 9, Jt. Ex. 10, Ambar Ex. 1 and 6)

Neither the ALJ nor Florida Housing can simply ignore the language of the RFA. Florida Housing must interpret its RFA and the guidance and information consistent with its plain and

unambiguous language. *Brownsville Manor, LP v. Florida Housing Finance Corporation*, (224 So.3d 891 Fla. 1st DCA 2017). An agency construction that conflicts with the plain language of a statute or rule is clearly erroneous. *Arbor Health Care Company v. State Agency for Healthcare Administration*, 654 So.2d 1020, 1021 (Fla. 1st DCA 1995) Legislative history and “extraneous matters” such as intent are only properly considered when construction of the statute results in a doubtful meaning. *See Dep’t of Rev. v. Lockheed Martin Corp.*, 905 So.2d 1017, 1019 (Fla. 1st DCA 2005) (citing *Fajardo v. State*, 805 So.2d 961, 963-64 (Fla. 2d. DCA 2001)).

As the First District Court of Appeal, in its decision reversing the Final Order issued by Florida Housing in *Brownsville* concludes Florida Housing was required to interpret the RFA consistently with its plain and unambiguous language. Also see *Creative Choice XXV, Ltd. v. Fla. Hous. Fin. Corp.*, 991 So.2d 899, 901 (Fla. 1st DCA 2008) (Emphasis Supplied). Florida Housing did not apply the language of the RFA, guidance and instructions but instead decided to rely on what Ms. Button testified was its intent. (T. 112-13) Florida Housing’s intent does not provide a basis to ignore the plain and ordinary meaning contained in the strict reading of the RFA.

The ALJ’s findings are not based on competent substantial evidence and in fact ignore the competent substantial evidence. The findings should be rejected or revised to reflect the record.

Exception No. 3

Ambar takes exception to Findings of Fact 45, 46 and 47, which provides as follows:

Findings of Fact 45, 46 and 47

45. Thus, within the four corners of the application, Florida Housing could determine with whom it was doing business and what roles those individuals held.

46. Ms. Button persuasively and credibly testified that Las Brisas' Principals Disclosure Form did not contain any errors and was complete.

47. As further testified to by Ms. Button, even if Las Brisas' failure to list the multiple roles of its disclosed principals on the Principals Disclosure Form is an error, it is so minor as to constitute a waivable, minor irregularity because Florida Housing has the required information in the application, and there was no competitive advantage to Las Brisas.

In these findings, the ALJ finds that there was no error in the Las Brisas Principal Disclosure Form and even if there was an error, Florida Housing could resolve the error by cross-referencing other information found within the Application. Additionally, the ALJ finds that any deviation is a minor irregularity.

As the competent and substantial evidence and testimony indicated, and as detailed in Exception #2, Las Brisas did not provide a Principal Disclosure Form consistent with the RFA guidance, instructions, and FAQ. As Ms. Button conceded, Las Brisas did not list each role of each Principal in the Principal Disclosure Form. (T. 125-32) Accordingly the Principal Disclosure Form was neither correct nor complete. Indeed, Florida Housing included 30 pages of instructions and examples as well as very detailed information on the form itself showing how to complete the form correctly. Florida Housing also assigned 5 points for the "correct" completion of the form in advance of the Application due date. There is no other requirement in the RFA for eligibility or scoring that has more points or more detailed instructions as the Principal Disclosure Form. To say that the information and correct completion of the form is not material is contrary to the actions of Florida Housing to ensure this form is submitted timely and correctly. (Jt. Ex. 1, Jt. Ex. 9, Jt. Ex. 10, Ambar Ex. 1 and 6)

To rely upon the four corners argument in this case is flawed for one important reason, in order for an applicant to receive 5 points, the Principal Disclosure Form had to be stamped

Approved prior to the Application Deadline and the information contained in the Principal Disclosure Form had to still be correct as of the Application Deadline. While the missing information in the Form could indeed be found elsewhere in the Application, that information was not available to Florida Housing during the Advance Review Process, which is used to obtain the 5 points. (T. 52) A good argument can be made that relying on Attachment 3 at this stage in the process to address the deviation gives Las Brisas a competitive advantage not shared by other applicants who did not apply as a non-profit and therefore did not submit the information included at Attachment 3. Simply, Las Brisas failed to submit a correct and complete Principal Disclosure Form during the Advance Review Process, which was a precondition for receipt of 5 points. As such, this deviation cannot be waived for purposes of scoring. (T. 52, 103-08)

Ms. Button in her testimony suggested that there was a discrepancy in Florida Housing's intent related to the required disclosures and the clear and simple reading of the guidance and instructions for this form. (T. 125-32) However, to go with anything other than the clear and simple reading of the guidance, instructions and FAQ would create uncertainty surrounding the terms and requirements of the competitive solicitation. Florida Housing's intent can only be determined by the clear and simple reading of the RFA requirements.

The ALJ's findings are not based on competent substantial evidence and should be rejected or revised to reflect the record.

Exception No. 4

Ambar takes exception to Conclusions of Law 67 and 68 which provides as follows:

Conclusions of Law 67 and 68

67. Turning to the merits of the instant case, Florida Housing's proposed action in awarding the housing tax credits to Las Brisas, and not Ambar, is not contrary to the governing statutes, rules, the

RFA specifications, clearly erroneous, contrary to competition, arbitrary, or capricious. As detailed above, Las Brisas identified all of the principals on its Principals Disclosure Form and the form was correct and complete. There was no requirement to include the multiple roles of each principal in the Principals Disclosure Form. In any event, Attachment 3 to the application included the multiple roles of each principal. Accordingly, Florida Housing had within the four corners of the application the information to determine what roles each principal held. At most, Las Brisas' failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity. Likewise, Las Brisas' failure to answer the Public Housing Authority Question was irrelevant and a waivable minor irregularity because Las Brisas was not seeking any boost. In sum, Las Brisas is eligible for funding and should not lose any points.

68. Finally, Ambar's reliance on HTG Village View, LLC v. Florida Housing Finance Corporation, Case No. 18-2156BID, 2018 Fla. Div. Adm. Hear. LEXIS 936 (Fla. DOAH July 27, 2018)(Final Order entered September 18, 2018), and Blue Broadway, LLC v. Florida Housing Finance Corporation, Case No. 17-3273BID, 2017 Fla. Div. Adm. Hear. LEXIS 528(Fla. DOAH August 29, 2017)(Final Order entered September 22, 2017) are misplaced. Neither of these cases involved the particular situation presented in the instant case, where all principals were, in fact, disclosed.

In these conclusions, the ALJ finds that the error committed by Las Brisas is a minor irregularity because the missing information could be found elsewhere in the Application and waiving the deviation provided no competitive advantage. The ALJ also concludes that two relevant cases are not applicable. These conclusions are erroneous. First, as explained in greater detail at Exceptions 2 and 3, the submission of a Principal Disclosure Form that is not correct is not an error that Florida Housing can overlook by simply looking to other parts of the Application. Indeed the information at Attachment 3 that allegedly provides the missing information was not available to Florida Housing during the Advance Review Process at which time 5 points was awarded. The interest of Florida Housing in maintaining the credibility and integrity of its competitive process requires that it enforce this important requirement especially

given that no prospective applicant has contested its use through a challenge to the RFA specifications.

Here, if Las Brisas is allowed to provide a response to the RFA that is not correct it would lead to a result in which the Principal Disclosure Form requirements in the RFA and all the guidance have no meaning or an ambiguous meaning. Indeed the ambiguity which generated the alleged conflict in the instant case was the result of Florida Housing redefining what is required by the Principal Disclosure Form and what a “correct” Form would look like. Future Applicants will be left not knowing whether they actually must comply with requirements, including the guidance provided or whether they should attempt to determine Florida Housing’s intent. Moreover Florida Housing would be awarding an applicant points even though it was shown that its Form was not correct as of the Application Deadline. Such a result would be erroneous. Indeed, as was the case in *Brownsville Manor, LP v. Florida Housing Finance Corporation*, (224 So. 3d, 891 Fla 1st DCA 2017) Florida Housing must interpret its RFA consistently with its plain and unambiguous language.

As it relates to minor irregularities Rule 67-60.008, F.A.C. (2018) 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 Corporate or the public. Minor irregularities may be waived or corrected by the Corporation.

Florida Housing has waived deviations that did not provide a competitive advantage to the applicant, and that did not adversely impact the interest of Florida Housing or the public. If a deviation however results in a change in points, as it does in the instant case, Florida Housing as

a policy matter will not waive the deviation as minor because it would give an applicant a competitive advantage. *Redding Development Partners, LLC, v. Florida Housing Finance Corporation*, DOAH Case No. 16-1137BID (Final Order entered May 12, 2016) and *Heritage at Pompano Housing Partners, Ltd. v. Florida Housing Finance Corporation*, DOAH Case No. 14-1361BID (Final Order entered June 13, 2014) *Capital Grove Limited Partnership v. Florida Housing Finance Corp.*, DOAH Case No. 15-2386BID (Final Order entered 8-17-15) (Applications containing deviations from the requirements of the RFAs did not impact the scoring results and were accordingly waived.) In the instant case, as a scoring matter, waiving the Las Brisas Principal Disclosure deviation results in 5 points being awarded to Las Brisas. Without those 5 points Las Brisas would only be entitled to 10 out of a possible 15 points and while still eligible would no longer be entitled to funding. As a scoring issue this deviation cannot be waived because it gives Las Brisas a competitive advantage.

Next, in *HTG Village View, LLC v. Florida Housing Finance Corp.*, DOAH Case No. 18-2156BID (Final Order entered 9-17-18) *Blue Broadway, LLC v. Florida Housing Finance Corp.*, DOAH Case No. 17-3273BID (Final Order entered 9-22-17) Florida Housing took the position that the failure to provide a correct Principal Disclosure Form could not be waived as a minor irregularity. Florida Housing also took the position in both cases that the Applicants were no longer entitled to the 5 points awarded for participating in the Advance Review Process. In the instant case the RFA, information and guidance do not distinguish between failing to include all Principals and failing to identify their individual roles. As in the *HTG Village* and *Blue Broadway* cases, the Principal Disclosure Form submitted by Las Brisas was not correct and Las Brisas is not entitled to 5 points.

CONCLUSION

Ambar, based on these and exceptions requests that a Final Order be entered which:

A. Rejects the Findings and Conclusions identified herein and the ultimate recommendation section and finds and concludes that there was a deviation as to the Principal Disclosure Form and to the extent there was a deviation it should not be waived as minor irregularity.

B. Finds that Ambar's Application is eligible for funding and as the next eligible Application should be recommended for funding.

Respectfully submitted,

/s/ Michael P. Donaldson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Mail this
31st day of May 2019 to:

/s/ Michael P. Donaldson
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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING FINANCE CORPORATION

AMBAR RIVERVIEW, LTD.,

Petitioner,

vs.

DOAH Case No. 19-1261BID
FHFC Case No. 2019-014BP

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

and

LAS BRISAS TRACE, LP,

Intervenor.

**LAS BRISAS AND FLORIDA HOUSING FINANCE CORPORATION'S JOINT
RESPONSE TO AMBAR'S EXCEPTIONS**

On May 21, 2019, Administrative Law Judge Darren A. Schwartz issued an Order recommending that Florida Housing Finance Corporation ("Florida Housing") enter a Final Order dismissing the protest of Ambar Riverview, Ltd. ("Ambar"), and award housing tax credits to Las Brisas, Trace, LP ("Las Brisas"). On May 31, 2019, Ambar filed Exceptions to the Recommended Order.

Las Brisas and Florida Housing file this joint response in opposition to Ambar's Exceptions to the Recommended Order. Because competent, substantial evidence supports each finding of fact made by the administrative law judge ("ALJ"), and because Florida Housing lacks jurisdiction to reverse issues that are outside of its substantive jurisdiction, Las Brisas and Florida Housing urge that each of Ambar's Exceptions be denied.

Standard of Review

In determining how to rule on Ambar's Exceptions, Florida Housing must follow section 120.57(1)(l), Florida Statutes (2018), which provides:

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

§ 120.57(1)(l), Fla. Stat. (2018). Additionally,

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

§ 120.57(1)(k), Fla. Stat. (2018).

At this stage of review, Florida Housing is not free to re-weigh the evidence or reject findings of fact unless the record contains no competent, substantial evidence to support them. *See Rogers v. Dep't of Health*, 920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages & Tobacco*, 475 So. 2d 1277, 1281-82 (Fla. 1st DCA 1985). Likewise, Florida Housing may not "judge the credibility of the witnesses" or "interpret the evidence to fit its ultimate conclusions." *N.W. v. Dep't of Children & Families*, 981 So. 2d

599, 600 (Fla. 3d DCA 2008) (quoting *Gross v. Dep't of Health*, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002)).

Rather, "[i]t is the hearing officer's function to consider all the evidence, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." *Belleau v. State, Dep't of Env'tl. Protection*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997). Thus, an ALJ's decision to accept testimony of one witness over another is an evidentiary ruling that cannot be altered by a reviewing agency, absent a complete lack of any competent, substantial evidence supporting the decision. See *Collier Med. Ctr., Inc. v. State, Dep't of Health & Rehab. Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

In sum, a reviewing agency has no authority "to reevaluate the quantity and quality of the evidence beyond a determination of whether the evidence is competent and substantial." *Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Thus, findings of fact that are supported by competent, substantial evidence are "binding" on an agency. *Fla. Dep't of Corr. v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). An agency commits reversible error when it rejects or modifies findings of fact that are supported by competent, substantial evidence. See *Gross*, 819 So. 2d at 1005; *Belleau*, 696 So. 2d at 1307.

With respect to conclusions of law, an agency may reject or modify erroneous conclusions of law only if it has substantive jurisdiction over the subject of the conclusion and if its substituted conclusion is as or more reasonable than the one rejected. See § 120.57(1)(l).

Further, the requirement to adopt an ALJ's findings of fact cannot be avoided by relabeling findings of fact as conclusions of law. As the First District Court of Appeal has explained:

Erroneously labeling what is essentially a factual determination a “conclusion of law” whether by the hearing officer or the agency does not make it so, and the obligation of the agency to honor the hearing officer's findings of fact may not be avoided by categorizing a contrary finding as a “conclusion of law.”

Stokes v. State, Bd. of Prof'l Eng'rs, 952 So. 2d 1224, 1225 (Fla. 1st DCA 2007) (quoting *Kinney v. Dep't of State, Div. of Licensing*, 501 So. 2d 129, 132 (Fla. 5th DCA 1987)).

Response to Exception No. 1

In Exception 1, Ambar takes exception to the ALJ's Finding of Fact in Paragraph 14, which provides as follows:

14. Applicants can earn points for each of the following items (for a total of 15 points): Submission of Principals Disclosure Form stamped by the Corporation as "Pre-Approved" (5 points), Development Experience Withdrawal Disincentive (5 points), and Local Government Contribution Points (5 points).

In taking exception to this finding of fact, Ambar does not suggest that this finding is not supported by competent, substantial evidence. Indeed, Ambar could not seriously make such a suggestion, as this finding of fact is directly supported by the parties' Joint Pre-Hearing Stipulation. (See Joint Pre-Hearing Stip. at ¶ 22).¹ The finding is also supported by competent, substantial evidence in the record. As demonstrated by the below chart taken directly from pages 68-69 of RFA 2018-111, this finding is based upon the procurement specifications, as confirmed by Marisa Button, Director of Multifamily Allocations for Florida Housing. (See Joint Exhibit 1 p. 68-69; Button, T. 103-04). The Finding of Fact in Paragraph 14 is based on the RFA's summary of point items available and the associated points for each item:

¹ Parties are bound by their pre-hearing stipulations. See *Palm Beach Polo Holdings, Inc. v. Broward Marine, Inc.*, 174 So. 3d 1037, 1038 (Fla. 4th DCA 2015). Ambar is bound by its stipulation and may not challenge a finding which is based upon a stipulation.

Point Items	Maximum Points
Submission of Principal Disclosure Form stamped by Corporation as "Pre-Approved"	5
Development Experience Withdrawal Disincentive	5
Local Government Contribution Points	5
Total Possible Points	15

Rather, Ambar takes issue with this finding because it does not also state the additional requirement to receive the 5 points for this Point Item. However, as Ambar acknowledges, in Paragraph 28, the ALJ found that, to receive the 5 points, the Principal Disclosure Form must be stamped "Approved" during the Advance Review Process and be "still correct" as of the application deadline. (See R.O. at ¶ 28).

Because the Finding of Fact in Paragraph 14 is supported by competent, substantial evidence, it cannot be disturbed. Accordingly, Ambar's Exception No. 1 should be denied.

Response to Exception No. 2

In Exception 2, Ambar takes exception to the ALJ's Findings of Fact in Paragraphs 34, 35, and 36. In these paragraphs, the ALJ found:

34. Ms. Button persuasively and credibly testified that the purpose of the frequently asked questions is to help applicants understand what information Florida Housing is seeking from the applicants, and that the update to the 2016 FAQ was made because requesting applicants to list multiple roles of its principals did not further Florida Housing's goals. Thus, the intent of Question 6 of the 2018 FAQ and Florida Housing's answer was to communicate to applicants that they may, but were not required to, list the multiple roles of a principal of a corporation. Ms. Button persuasively and credibly testified that Florida Housing intentionally changed its position in Question 6 of the 2018 FAQ from the "hard-and-fast requirement" of Question 6 of the 2016 FAQ.

35. The 2018 FAQ was not the only resource linked within the RFA for applicants to reference when completing the Principals Disclosure Form. Also linked within the RFA was the Continuous Advance Review Process for Disclosure of Applicant and Developer Principals, which includes disclosure instructions, rule definitions, and sample charts and examples. These resources included guidance and examples of Principals Disclosure Forms where principals, who held multiple roles, were listed twice. However, both of these resources pre-

date the 2018 FAQ, which was last updated September 4, 2018, approximately two months before the applications in response to the RFA were due.

36. At hearing, Ms. Button acknowledged the discrepancy between the instructions and guidance to the Principals Disclosure Form and the 2018 FAQ. Ms. Button explained that when the FAQ was updated in 2018, the other documents were not updated to reflect Florida Housing's change of position. Ms. Button persuasively and credibly testified that Florida Housing considers the most updated guidance to control, and where there is a conflict with Florida Housing's guidance, the least restrictive guidance controls.

Because these Findings of Fact are supported by competent, substantial evidence, they cannot be disturbed.

The Findings of Fact in Paragraph 34 are supported by the testimony of Ms. Button, (*See* Button, T. 112, 129), as well as the Principals of the Applicant and Developer(s) Disclosure Form – Frequently Asked Questions, updated September 4, 2018, and the Principals of the Applicant and Developer(s) Disclosure Form – Frequently Asked Questions, updated November 10, 2016 ("FAQs"). (*See* Joint Exhibit 10 and Las Brisas' Exhibit 2). Additionally, the Findings of Fact in Paragraph 35 are supported by the testimony of Ms. Button, (*See* Button, T. 110-13, 121-22, 131), as well as the RFA 2018-111, Continuous Advance Review Process for Disclosure of Applicant and Developer Principals – Instructions, rule definitions, terms and conditions, and sample charts and examples. (*See* Joint Exhibit 1 & 9; *see also* Joint Exhibit 10; Las Brisas' Exhibit 2). Lastly, the Findings of Fact in Paragraph 36 are supported by the testimony of Ms. Button. (*See* Button, T. 111-12, 130).

Even though these Findings of Fact are supported by competent, substantial evidence, Ambar argues they should be rejected or modified because, according to Ambar, a "clear and fair" reading of the RFA and the resources linked within the RFA—including the FAQs—indicate that Principals who hold multiple roles must be listed multiple times. (Ambar's Exceptions at 5). Stated another way, Ambar argues that there is no inconsistency between the

RFA and the resources linked within it because Florida Housing's answer to the FAQ did not say "no." (*Id.*). This argument should be rejected.

Florida Housing is not free to reject or modify Findings of Fact that are supported by competent, substantial evidence. An agency commits reversible error when it rejects or modifies findings of fact that are supported by competent, substantial evidence. *See Gross v. Dep't of Health*, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002); *Belleau v. State, Dep't of Env'tl. Protection*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997). Thus, even if Florida Housing were inclined to agree with Ambar's interpretation of what would be "clear and fair," it is bound by these findings because they are supported by competent, substantial evidence. Florida Housing lacks the discretion to grant Ambar's Exception.

In this Exception, Ambar only challenged the findings of fact because they were not, in Ambar's view, clear and fair based on the RFA and the resources linked within the RFA. Ambar did not argue that the findings were not facts, but instead constituted mislabeled conclusions of law over which Florida Housing might have jurisdiction. Because Ambar did not argue that Paragraphs 34 – 36 were mislabeled conclusions of law, this Exception does not invite or allow Florida Housing to substitute a different conclusion of law.

Even if Florida Housing were inclined to entertain a legal argument that there is no inconsistency between the RFA and the resources linked within it, Florida Housing should conclude the argument is without merit. As noted above, Florida Housing's answer to the 2018 FAQ used the word "may" to clearly signify to applicants that they may, but were not required to, list Principals with multiple roles multiple times. (*See* R.O. ¶ 34; Joint Exhibit 8; Button, T. 109-12, 129). Instructions that indicate that an applicant "may" take a certain course cannot form the basis of a finding that an omission was made, let alone that the omission caused a material

deviation from specification requirements. It is well-established that "may" has a significantly different meaning from "shall" or "must." For example, the word "may" is permissive, while the words "shall" or "must" are mandatory. *See The Fla. Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'"). Thus, while Florida Housing's answer to the 2018 FAQ does not say "no," it also does not use the word "shall" or "must."

Additionally, and significantly, Ambar fails to even mention that Florida Housing's answer to the FAQ in 2016 was simply "yes." (*See Las Brisas'* Exhibit 2). This fact cannot be ignored, as Ms. Button credibly testified and the ALJ found, that Florida Housing's answer was intentionally changed in 2018 to reflect Florida Housing's current position regarding the disclosure of Principals. (*See R.O.* ¶ 36; Button, T. 110-12).

Finally, although Ambar insists there is no ambiguity between the RFA and the resources linked within it, Ambar later admits that ambiguity was in fact created by "Florida Housing redefining what is required by the Principal Disclosure Form and what a 'correct' Form would look like." (Ambar's Exceptions at 10). Indeed, this is exactly what the evidence at trial demonstrated—that Florida Housing changed its position regarding what was required on the Principals Disclosure Form and updated some, but not all, of its resources to reflect that change in position. Thus, despite Ambar's insistence that there is no ambiguity between the RFA and the resources linked within it, including the 2018 FAQ, Ambar clearly recognizes and in fact fully admits that the 2018 FAQ reflects a change in Florida Housing's position regarding what is required on the Principals Disclosure Form.

Because the Findings of Fact in Paragraphs 34, 35, and 36 are supported by competent, substantial evidence, they cannot be disturbed. Ambar's Exception No. 2 should be denied.

Response to Exception No. 3

In Exception 3, Ambar takes exception to the ALJ's Findings of Fact in Paragraphs 45, 46, and 47. In these paragraphs, the ALJ found:

45. Thus, within the four corners of the application, Florida Housing could determine with whom it was doing business and what roles those individuals held.

46. Ms. Button persuasively and credibly testified that Las Brisas' Principals Disclosure Form did not contain any errors and was complete.

47. As further testified to by Ms. Button, even if Las Brisas' failure to list the multiple roles of its disclosed principals on the Principals Disclosure Form is an error, it is so minor as to constitute a waivable, minor irregularity because Florida Housing has the required information in the application, and there was no competitive advantage to Las Brisas.

Because these Findings of Fact are supported by competent, substantial evidence, they cannot be disturbed.

The Finding of Fact in Paragraph 45 is supported by Las Brisas' application, as well as the testimony of Ms. Button and the representative for Ambar, Elena Adames. (*See* Joint Exhibit 7; Button, T. 113-15; Adames, T. 85). Additionally, the Findings of Fact in Paragraphs 46 and 47 are supported by the testimony of Ms. Button. (*See* Button T. 113-16, 126).

Although these Findings of Fact are supported by competent, substantial evidence, Ambar argues they should be rejected or modified because, according to Ambar, the evidence shows that Las Brisas' Principals Disclosure Form was not correct or complete. Ambar also argues that relying on the documents contained within Attachment 3 to Las Brisas' application is contrary to competition because for-profit applicants were not required to submit those documents. (*See* Ambar's Exceptions at 7-8). These arguments are without merit.

First, Florida Housing is not free to reject or modify Findings of Fact that are supported by competent, substantial evidence. *See Gross v. Dep't of Health*, 819 So. 2d 997, 1001 (Fla. 5th

DCA 2002); *Belleau v. State, Dep't of Env'tl. Protection*, 695 So. 2d 1305, 1307 (Fla. 1st DCA 1997). Thus, even if Florida Housing were inclined to agree with Ambar's interpretation of the evidence, Florida Housing is bound by these findings because they are supported by competent, substantial evidence.

Additionally, if Ambar intended to challenge these Findings of Fact as improperly labeled conclusions of law, it should have raised that argument. Because Ambar did not argue that Paragraphs 45 – 47 were mislabeled conclusions of law, this Exception does not invite or allow Florida Housing to substitute a different conclusion of law.

However, even if Florida Housing were inclined to entertain Ambar's arguments as relating to mislabeled conclusions of law, it should reject them. Ambar's argument that Las Brisas' Principals Disclosure Form was incorrect and incomplete is without merit because, as explained above, the most updated guidance linked within the RFA instructed applicants that they may, but were not required to, list Principals who have multiple roles multiple times. (*See* R.O. ¶ 31; Joint Exhibit 8; Button, T. 112, 129).

Ambar's argument that considering the information contained in Attachment 3 to Las Brisas' application to find that, if an error it could be waived as a minor irregularity is contrary to competition, is also without merit. Importantly, in advancing this argument, Ambar asserts that Florida Housing awarded Las Brisas 5 points for the correct completion of the Principals Disclosure Form "in advance of the Application due date." (Ambar's Exceptions at 7). Ambar reiterates this assertion in Exception 4, alleging that Las Brisas' application, including the information in Attachment 3, "was not available to Florida Housing during the Advance Review Process at which time 5 points was awarded." (Ambar's Exceptions at 9). These assertions are incorrect. According to the plain language of the RFA, and as corroborated by Ms. Button at

final hearing, the 5 points for participating in the Continuous Advance Review Process are awarded during the scoring process, at which time the scorer has access to the entire application. (See Joint Exhibit 1; Button, T. 104, 107-08). Points are not awarded during Continuous Advance Review, at which time, Florida Housing looks only at the Principals Disclosure Form for the limited purpose of ensuring that the types of entities disclosed are correct. (Button, T. 109).

Ms. Button testified that when looking at a deviation in an application to determine whether it can be waived as a minor irregularity, Florida Housing "look[s] as the totality of the application." (Button, T. 119). Ms. Button's testimony is consistent with Florida Housing's previous application of its minor irregularity rule. See *Rosedale Holdings, LLC, H&H Dev., LLC & Brookestone I, LP v. Fla. Housing Finance Corp.*, FHFC Case No. 2013-038BP (Final Order entered June 13, 2014); see also *Heritage at Pompano Housing Partners, Ltd. v. Fla. Housing Finance Corp.*, DOAH Case No. 14-1361BID (Final Order entered June 13, 2014); *HTG Osprey Pointe, LLC v. Fla. Housing Finance Corp.*, DOAH Case Nos. 18-479, 18-484, and 18-485 (Final Order entered May 4, 2018); *Liberty Square Phase Two, LLC et. al v. Fla. Housing Finance Corp.*, DOAH Case No. 18-0485 (Final Order entered May 4, 2018). In each instance, Florida Housing found deviations in applications but utilized its discretion to not disqualify the applicant for minor irregularities because Florida Housing was able to discern the correct information by looking at the entirety of the application and the deviation did not provide a competitive advantage nor did it adversely impact the interests of Florida Housing or the public. This makes sense given Florida Housing's purpose of the minor irregularity rule, which is to avoid punishing applicants that had an error in their application that did not result in the omission of any required information. (See Button, T. 101).

Further, agency action is contrary to competition only if it unreasonably interferes with the purposes of competitive procurement, which include "protect[ing] the public against collusive contracts" and "secur[ing] fair competition upon equal terms to all bidders." *Wester v. Belote*, 138 So. 721, 723 (Fla. 1931). Thus, actions that are contrary to competition include those that: "(a) create the appearance and opportunity for favoritism; (b) erode public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are unethical, dishonest, illegal, or fraudulent." *Sunshine Towing @ Broward, Inc. v. Dep't of Transp.*, Case No. 10-0134BID ¶ 48 (Fla. Div. Admin. Hrgs. Apr. 6, 2010; Fla. Dep't of Transp. May 7, 2010); *see also E-Builder v. Miami-Dade Cty. Sch. Bd.*, Case No. 03-1581BID ¶ 39 (Fla. Div. Admin. Hrgs. Oct. 10, 2003; Sch. Bd. of Miami-Dade Cty. Nov. 26, 2003). Consideration of information that Las Brisas was **required** to include with its application when assessing the materiality of an alleged deviation is not contrary to competition.

Ambar's Exception No. 3 should be denied.

Response to Exception No. 4

Finally, in Exception 4, Ambar takes exception to the ALJ's Conclusions of Law in Paragraphs 67 and 68 of the Recommended Order. In these paragraphs, the ALJ concluded:

67. Turning to the merits of the instant case, Florida Housing's proposed action in awarding the housing tax credits to Las Brisas, and not Ambar, is not contrary to the governing statutes, rules, the RFA specifications, clearly erroneous, contrary to competition, arbitrary, or capricious. As detailed above, Las Brisas identified all of the principals on its Principals Disclosure Form and the form was correct and complete. There was no requirement to include the multiple roles of each principal in the Principals Disclosure Form. In any event, Attachment 3 to the application included the multiple roles of each principal. Accordingly, Florida Housing had within the four corners of the application the information to determine what roles each principal held. At most, Las Brisas' failure to identify the multiple roles of its disclosed principals in the Principals Disclosure form is a waivable, minor irregularity. Likewise, Las Brisas' failure to

answer the Public Housing Authority Question was irrelevant and a waivable minor irregularity because Las Brisas was not seeking any boost. In sum, Las Brisas is eligible for funding and should not lose any points.

68. Finally, Ambar's reliance on *HTG Village View, LLC v. Florida Housing Finance Corporation*, Case No. 18-2156BID, 2018 Fla. Div. Adm. Hear. LEXIS 936 (Fla. DOAH July 27, 2018)(Final Order entered September 18, 2018), and *Blue Broadway, LLC v. Florida Housing Finance Corporation*, Case No. 17-3273BID, 2017 Fla. Div. Adm. Hear. LEXIS 528(Fla. DOAH August 29, 2017)(Final Order entered September 22, 2017) are misplaced. Neither of these cases involved the particular situation presented in the instant case, where all principals were, in fact, disclosed.

Ambar argues that the ALJ's conclusion of law in Paragraph 67 that, at most Las Brisas' failure to disclose multiple roles of Principals would constitute a minor irregularity, is erroneous because other parts of Las Brisas' application may not be considered and deviations that affect scoring cannot be waived as minor irregularities. This argument should be rejected.

Florida Housing has the right to waive minor irregularities in an application under Florida Administrative Code Rule 67-60.008. This rule 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.

Fla. Admin. Code R. 67-60.008.

Consistent with Rule 67-60.008, Ms. Button testified that even if failing to disclose multiple roles of a Principal on the Principals Disclosure Form was a deviation, it would be a waivable minor irregularity because Las Brisas did not omit any Principals and did not receive a competitive advantage. (See Button, T. 114-15). The ALJ also found that Las Brisas received no competitive advantage. (See R.O. ¶ 47). Additionally, as explained above, Ms. Button testified that Florida Housing views an entire application when considering whether a deviation

can be waived as a minor irregularity, which is consistent with both the language of the rule and its stated purpose. (*See* Button, T. 101, 119-20). Thus, Ambar's argument that the ALJ's conclusion of law in Paragraph 67 is erroneous should be rejected.

Moreover, it should be emphasized that the ALJ's conclusion of law in Paragraph 67 that the failure to disclose multiple roles of a Principal can be waived as a minor irregularity is an alternative conclusion. Indeed, the ALJ first concluded that "there was no requirement to include the multiple roles of each principal in the Principals Disclosure Form." (R.O. ¶ 67). This conclusion is reasonable, correct, and supported by the RFA, the 2016 and 2018 versions of the FAQs, and the testimony of Ms. Button. (*See* Joint Exhibit 1; Joint Exhibit 10; Las Brisas' Exhibit 2; Button, T. at 114). Thus, even if Florida Housing were to agree with Ambar that the ALJ's alternative conclusion of law is erroneous, Florida Housing can still adopt the ALJ's conclusion that failure to disclose the multiple roles of a Principal is not an error, and the ALJ's recommendation to dismiss Ambar's protest and award the tax credits to Las Brisas.

Ambar argues that awarding funding to Las Brisas "would lead to a result in which the Principal Disclosure Form requirements in the RFA and all the guidance have no meaning or an ambiguous meaning." (Ambar's Exceptions at 10). However, if Florida Housing were to agree with Ambar and find Las Brisas ineligible or deny Las Brisas 5 points because Las Brisas did not list the multiple roles of certain Principals, based on the inconsistencies in Florida Housing's guidance, such decision would be arbitrary and capricious.

Finally, Ambar challenges the Conclusion of Law in Paragraph 68, in which the ALJ concluded that Ambar's reliance on two recent cases involving Principals Disclosure Form issue is misplaced. (*See HTG Village View, LLC v. Fla. Housing Fin. Corp.*, Case No. 18-2156BID (Fla. Div. Adm. Hrgs. July 27, 2018; Fla. Housing Fin. Corp. Sep. 18, 2018), and *Blue*

Broadway, LLC v. Fla. Housing Fin. Corp., Case No. 17-3273BID (Fla. Div. Adm. Hrgs. Aug. 29, 2017; Fla. Housing Fin. Corp. Sep. 22, 2017)). This argument should be rejected because the ALJ's conclusion that "neither of these cases involved the particular situation presented in the instant case, where all principals were, in fact, disclosed," is reasonable and correct.

In *HTG Village View*, the applicant Florida Housing preliminarily sought to fund completely failed to disclose a member of the general partner of the applicant entity. That member of the general partner was not disclosed in any portion of the application. *See* Case No. 18-2156BID at ¶¶ 44-45 (Fla. Div. Adm. Hrgs. July 27, 2018). Upon learning this information, Florida Housing changed its position at the final hearing and argued that the failure to disclose this Principal was a non-waivable material deviation that rendered the application ineligible. *Id.* at ¶ 49. The ALJ agreed. *See id.* at ¶¶ 53, 77.

Similarly, in *Blue Broadway*, the applicant Florida Housing preliminarily sought to fund failed to disclose two Principals of the developer entity. *See* Case No. 17-3273BID ¶18 (Fla. Div. Adm. Hrgs. Aug. 29, 2017). There was no other place in the applicant's application where a list of the principals of the developer entity could be found. *Id.* at ¶ 21. Florida Housing's corporate representative testified at the final hearing that while Florida Housing "has waived other failures to submit certain information, it did so only when the missing information could be found elsewhere in the application." *Id.* Accordingly, the ALJ agreed with Florida Housing's position at final hearing that the applicant's application was ineligible. *Id.* at ¶ 50.

The facts and circumstances set forth in both *HTG Village View* and *Blue Broadway* are not analogous to the facts presented in this proceeding, because as explained above, Las Brisas disclosed all Principals on its Principals Disclosure Form. And, even if Las Brisas was required to list the multiple roles held by certain Principals, Las Brisas' failure to do so would constitute a

waivable minor irregularity because the information was located within the four corners of Las Brisas' application. *See Blue Broadway*, Case No. 17-3273BID ¶18 (Fla. Div. Adm. Hrgs. Aug. 29, 2017; Fla. Housing Fin. Corp. Sep. 22, 2017); *Liberty Square Phase Two, LLC v. Fla. Housing Fin. Corp.*, Case No. 18-0485BID ¶ 66 (Fla. Div. Admin. Hrgs. Apr. 19, 2018; Fla. Housing Fin. Corp. Jan. 1, 2019) (concluding that Florida Housing's minor irregularity rule could be applied where required information could be found "within the four corners of an application").

The ALJ's Conclusions of Law in Paragraphs 67 and 68 are reasonable and correct. Accordingly, Ambar's Exception No. 4 should be denied.

Conclusion

Each of Ambar's exceptions should be denied. Competent, substantial evidence supports each finding of fact made by the ALJ, and no further fact finding is necessary. Additionally, Florida Housing need not substitute its judgment for the ALJ's thoroughly reasoned conclusions of law.

Respectfully submitted, this 6th day of June, 2019.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 6, 2019, a copy of the foregoing has been served via e-mail to the following:

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