STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BERKELEY LANDING, LTD. AND BERKELEY LANDING DEVELOPER, LLC

DOAH Case No. 20-0140BID
FHFC Case No. 2019-102BP

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO GRANDE III ASSOCIATES, LTD., NORTHSIDE PROPERTY III, LTD., HTG BELLA VISTA, LLC, and BRISAS DEL ESTE APARTMENTS LLC,

Intervenors.

_____/

BRISAS DEL ESTE APARTMENTS, LLC

DOAH Case No. 20-0141BID
FHFC Case No. 2019-104BP

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION

/DATE: 4/22/2020

and

SOLARIS APARTMENTS, LTD., METRO GRANDE III ASSOCIATES, LTD., and SIERRA BAY PARTNERS, LTD.,

Intervenors.

_____/

NORTHSIDE PROPERTY III, LTD.,

Petitioner,

DOAH Case No. 20-0142BID
FHFC Case No. 2019-106BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD., and SOLARIS APARTMENTS, LTD.,

Intervenors.

_____/

HOMESTEAD 26115, LLC,

Petitioner,

DOAH Case No. 20-0143BID
FHFC Case No. 2019-107BP

vs.

FLORIDA HOUSING FINANCE

CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.,

Intervenor.

_____/

HTG BELLA VISTA, LLC,

Petitioner,

DOAH Case No. 20-0145BID
FHFC Case No. 2019-109BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

and

SIERRA BAY PARTNERS, LTD., SOLARIS APARTMENTS, LTD., and MHP BEMBRIDGE, LLC.,

Intervenors.

_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on April 17, 2020. Petitioners Berkeley Landing, Ltd ("Berkeley"), Brisas del Este Apartments, LLC

("Brisas"), Northside Property III, Ltd ("Northside"), Homestead 26115, LLC ("Beacon Place"), and HTG Bella Vista, LLC ("Bella Vista") and Intervenors Solaris Apartments, Ltd ("Solaris"), Metro Grande III Associates, Ltd ("Metro Grande"), Sierra Bay Partners, Ltd ("Sierra Bay"), MHP Bembridge, LLC ("Bembridge"), and East Pointe Phase II, LLC ("East Pointe") were Applicants under Request for Applications 2019-102, "Community Development Block Grant Disaster Recovery ("CDBG-DR") to be Used in Conjunction with Tax-Exempt MMRB and Non-Competitive Housing Credits in Counties Deemed Hurricane Recovery Priorities" ("the RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On December 13, 2019, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to several applicants, including Sierra Bay, Solaris, Metro Grande III, East Pointe, and Bembridge. The Board found that Brisas, Northside, Beacon Place and Bella Vista satisfied all mandatory and eligibility requirements but were not awarded funding based upon the ranking criteria in the RFA. The Board found that Berkeley was ineligible for funding for failure to include its Authorized Principal Representative in its Principal Disclosure Form and because two certification forms were not signed by its Authorized Principal Representative. Petitioners timely filed their notices of

intent to protest followed by formal written protests. Intervenors each filed a Notice of Appearance. The protests were referred to the Division of Administrative Hearings ("DOAH"). All formal written protests filed by Petitioners were consolidated.

Berkeley Landing

The RFA requires that the applicant identify an Authorized Principal Representative who must also be listed on the Principal Disclosure form. Berkeley identified Jennie Lagmay as the Authorized Principal Representative but did not list her as a Principal of the Applicant. The RFA also requires that the Application Certification and Acknowledgement form and the Site Control Certification form be signed by the Authorized Principal Representative. These forms were signed by Jonathan Wolf, who was not identified as the Authorized Principal Representative. Berkeley agreed that these were errors but contended that they should have been waived as minor irregularities. Florida Housing took the position that Berkeley should remain ineligible.

Sierra Bay

The RFA requires that if an eligible contract is included to demonstrate site control, that contract must include a statement that the buyer's remedy for default on the part of the seller includes specific performance. Sierra Bay concedes that its

site control documentation did not meet this requirement and that it should be considered ineligible. Florida Housing agreed with this position.

Solaris

The RFA requires that under certain conditions which are applicable to Solaris, the applicant must demonstrate that a Community Land Trust (CLT) is the land owner, and must provide documentation to show that the CLT has existed since June 28, 2018, that its articles of incorporation or bylaws must demonstrate that a purpose of the CLT is to provide or preserve affordable housing, and that the CLT must demonstrate ownership of certain property. Solaris provided the required documentation in its application, but Petitioner challenged whether the named CLT, Residential Options of Florida, was actually a CLT as defined in the RFA as of June 28, 2018. If Residential Options did not meet the definition of a CLT, Solaris would have been ineligible for funding. Florida Housing took the position that Solaris met the RFA requirements and should remain eligible.

Metro Grande III

The RFA requires that as part of its demonstration of site control an applicant must include a "deed or certificate of title" showing who the landowner was. Metro Grande did not include a deed or certificate of title with its application. The parties stipulated that the landowner was Miami-Dade County, and that the County had acquired the land through eminent domain and thus no deed or certificate of title

existed. The application also included a lease and a landowner certification form that demonstrated that Miami-Dade County was the landowner, and Metro Grande argued that the failure to include a deed or certificate of title should be waived as a minor irregularity. Florida Housing agreed and took the position that Metro Grande should remain eligible.

Beacon Place

The RFA requires that applicants in large counties receive at least two points for Transit Services. Beacon Place, an applicant from a large county, listed a Public Bus Rapid Transit Stop as its Transit Service. The RFA defines a Public Bus Rapid Transit Stop as a stop that includes, among other things, one route that has scheduled stops "at least every 20 minutes" between the hours of 7 am and 9 am. It was stipulated that the stop listed by Beacon Place had no scheduled stops between 7:01 am and 7:36 am. Beacon Place argued that if the phrase "every 20 minutes" were interpreted to mean one stop between 7:00 and 7:20, one stop between 7:20 and 7:40, and one stop between 7:40 and 8:00 its listed stop would meet that requirement. Florida Housing did not interpret the RFA that way and changed its initial position to agree that Beacon Place should have been found ineligible.

East Pointe

The RFA allows an applicant to receive a Proximity Funding Preference if it receives a certain number of proximity points. East Pointe claimed points for several

community services, including proximity to a medical facility. Petitioners alleged that the listed medical facility did not meet the definition in the RFA because it did not provide medical services by appointment to persons under 19 years old. East Pointe argued that the definition required only that the facility provide services "by walk-in or by appointment" and that the listed facility did provide such services to any physically sick or injured person. Florida Housing agreed with East Pointe and took the position that it should remain eligible.

Bembridge

The RFA allows applicants to claim Proximity Points for grocery stores, pharmacies, public schools, and medical facilities, but also states that they will receive Proximity Points for "up to 3 services." Bembridge claimed Proximity Points for four services. During its application scoring, Florida Housing awarded Proximity Points for the three services nearest the Development and ignored the fourth service. Petitioners argued that Bembridge should have been awarded no Proximity Points and thus been found ineligible. Petitioners also argued that the Public Bus Stops listed by Bembridge did not meet the RFA definition but offered no evidence to support this contention. Florida Housing's position was that its initial scoring decision was correct and that Bembridge should remain eligible.

Recommended Order

A hearing was conducted on February 12, 2020, before Administrative Law Judge Lawrence P. Stevenson. All parties filed Proposed Recommended Orders. After consideration of the Proposed Recommended Orders, the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the Administrative Law Judge issued a Recommended Order on April 6, 2020. The Recommended Order made the following recommendations:

1. The Berkeley Application is ineligible for funding;
2. The Sierra Bay Application is ineligible for funding;
3. The Solaris Application is ineligible for funding;
4. The Metro Grande III Application is eligible for funding;
5. The Beacon Place Application is ineligible for funding;
6. The East Pointe Application is eligible for funding and entitled to the Proximity Funding Preference; and
7. The Bembridge Application is eligible for funding.

A copy of the Recommended Order is attached as Exhibit A. On April 9, Solaris and Florida Housing filed Exceptions to the Administrative Law Judge's recommendations regarding the Solaris Application. On April 13, Northside filed a Response to these Exceptions. Copies of the Exceptions and Response to Exceptions are attached as Exhibits B, C and D respectively.

RULING ON EXCEPTIONS

Florida Housing's Exception Number One

1. Florida Housing filed exceptions to Findings of Fact 76, 79, and 81 and Conclusions of Law 169 and 171 in the Recommended Order.

2. After a review of the record, the Board finds Findings of Fact 76, 79 and 80 and Conclusions of Law 169 and 171 are not supported by competent substantial evidence and that the modifications below are as or more reasonable than the Conclusions of Law 169 and 171 in the Recommended Order.

3. The Board modifies Finding of Fact 76 as follows:

~~76. However, the undersigned is less persuaded by the implications as to the intentions of Residential Options than by the contradictions between Florida Housing's statements of intent and its reading of the RFA in relation to the Solaris Application. The decision to find the Solaris Application eligible for funding founders on the first issue stated above: whether the RFA requires only that the Community Land Trust have been in existence in some form as of June 28, 2018, or whether it had to exist as a Community Land Trust as of that date.~~

4. The Board modifies Finding of Fact 79 as follows:

79. Ms. Button's statement of intent is accepted as consistent with the plain language of the RFA: the date of June 28, 2018, excludes Community Land Trusts created subsequently. ~~It is inconsistent for Florida Housing to also read the RFA language to say that the qualifying entity need not have existed as a Community Land Trust prior to June 28, 2018. It would be arbitrary for Florida Housing to set a date for the creation of Community Land Trusts then turn around and find that the date does not apply to this particular Community Land Trust.~~

5. The Board modifies Finding of Fact 81 as follows:

81. ~~It was contrary to the provisions of the RFA for Florida Housing to find that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Ms. Button's own testimony demonstrated that Florida Housing intended to exclude Community Land Trusts created after June 28, 2018. ROOF Housing Trust existed as a Community Land Trust in 2017, but ROOF Housing Trust was not the Community Land Trust named in the Solaris Application. Ms. Soukup's explanation of the circumstances showed that Residential Options was well intentioned in its actions, but her explanation was not a part of the Solaris Application that was before Florida Housing's Review Committee.~~ While the Articles of Incorporation submitted with the Solaris Application were not sufficient to demonstrate that Residential Options was a Community Land Trust as of June 28, 2018, this was not a specific requirement of the RFA. Both Ms. Soukup and Ms. Button offered credible testimony that Residential Options did meet the definition of a Community Land Trust in the RFA as of June 28, 2018. Petitioners have failed to demonstrate that Florida Housing's determination that the Solaris application should be found eligible for funding was contrary to Florida Housing's governing statutes, rules or policies, or the solicitation specifications.

6. The Board modifies Conclusion of Law 169 as follows:

169. ~~Florida Housing and Solaris both contended that the RFA requirement could be satisfied by a demonstration that Residential Options existed in some form as of June 28, 2018. This reading contorts the plain language of the RFA quoted above and contradicts the testimony of Florida Housing's own witness Marisa Button.~~ Ms. Button testified that the purpose of the date restriction was intended to confine participation in this RFA to Community Land Trusts that were in existence on June 28, 2018. Residential Options met ~~did not meet~~ this requirement, or at least there was insufficient evidence to demonstrate that it did not.

7. The Board modifies Conclusion of Law 171 as follows:

171. ~~Florida Housing acted contrary to the provisions of the RFA in finding that Residential Options's mere existence as a legal entity~~

~~prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Deviating from the plain language of the RFA to find an application eligible for funding is contrary to competition. Other applicants presumably complied with the Community Land Trust provision and potential applicants may not have submitted applications because they could not know that Florida Housing did not intend to apply the Community Land Trust definition as written.~~ Florida Housing's interpretation of the language of the RFA was clearly articulated to require an Applicant listing a Community Land Trust to include with the application evidence that the entity was in existence as of June 28, 2018; that its Articles of Incorporation or Bylaws demonstrate that its purpose is currently to provide or preserve affordable housing; and that it currently owns at least two parcels of land. Florida Housing also interprets the RFA to mean that the entity that was in existence as of June 28, 2018 had to be a Community Land Trust as of that date, but that there is no specific requirement in the RFA that the Applicant submit evidence in the application to prove this. While certainly not the only possible way to interpret the RFA, this is at least a reasonable interpretation, and as such it is inappropriate for an ALJ to overturn it or substitute his or her own interpretation. The evidence is sufficient to demonstrate that Residential Options met the definition of a Community Land Trust as of June 28, 2018, and no credible contrary evidence was received. Petitioners have failed to demonstrate that Florida Housing's initial determination of eligibility is contrary to statute, rule, policy, or the specifications of the RFA. Petitioners have also failed to demonstrate that Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

8. Accordingly, the Board accepts Florida Housing's exception number one.

Florida Housing's Exception Number Two

9. Florida Housing filed exceptions to Findings of Fact 80 and Conclusions of Law 170 in the Recommended Order.

10. After a review of the record, the Board finds Findings of Fact 80 and Conclusions of Law 170 are not supported by competent substantial evidence and that the modifications below are as or more reasonable than the Conclusions of Law 170 in the Recommended Order.

11. The Board modifies Finding of Fact 80 as follows:

> 80. Ms. Soukup's testimony was that Residential Options and ROOF Housing Trust were effectively a single entity and that Residential Options was in fact operating as a community land trust prior to the September 10, 2019, merger. ~~However, Ms. Soukup's explanation was not before the Review Committee, which was limited to one means of ascertaining whether an entity was a Community Land Trust prior to June 28, 2018: the Articles of Incorporation or Bylaws.~~ Residential Options's Original Articles included no language demonstrating that it was a Community Land Trust prior to the September 10, 2019, merger with ROOF Housing Trust and the filing of the 26 Amended Articles on September 20, 2019.[3] ~~As set forth in the discussion of the Berkley Application above, Florida Housing is required to limit its inquiry to the four corners of an application.~~

12. Accordingly, the Board accepts Florida Housing's exception number two.

Florida Housing's Exception Number Three

13. Florida Housing filed exceptions to Findings of Fact 60, 75, 78, 80 and 81 in the Recommended Order.

14. After a review of the record, the Board finds Findings of Fact 60, 75, 78, 80 and 81 are not supported by competent substantial evidence.

15. The Board modifies Finding of Fact 60 as follows:

60. The second issue is whether the June 28, 2018, date applies only to the existence of the Community Land Trust or whether the RFA requires that the Community Land Trust have been in existence and have had a stated purpose to provide or preserve affordable housing and have met the ownership experience criteria as of June 28, 2018. ~~It is questionable whether Solaris would be eligible for funding if the RFA required the latter, because Residential Options did not have a stated purpose of providing or preserving affordable housing prior to its merger with ROOF Housing Trust, at least no such purpose as could be gleaned from the four corners of the Solaris Application.~~

16. The Board modifies Finding of Fact 75 as follows:

75. ~~The problem is that Ms. Soukup's explanation was not before the Review Committee when it evaluated the Solaris Application. The only information about Residential Options that the Review Committee possessed was Attachment 2 of the Solaris Application.~~ The dates of the merger documents and Amended Articles certainly give some credence to the suspicions voiced by Northside.

17. The Board modifies Finding of Fact 78 as follows:

The RFA states: "The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating that it has existed since June 28, 2018 or earlier…" The Solaris Application shows that Residential Options existed prior to June 28, 2018, although the Articles attached to the Application did not demonstrate that it was not ~~but *not* as~~ a Community Land Trust as of that date. The Articles did not demonstrate that Residential Options was ~~did not become~~ a Community Land Trust until it completed its merger with ROOF Housing Trust and filed the Amended Articles on September 20, 2019.

18. The Board modifies Findings of Fact 80 and 81 as stated herein.

19. Accordingly, the Board accepts Florida Housing's exception number three.

Florida Housing's Exception Number Four

20. Florida Housing filed exceptions to Findings of Fact 59 and 78 and Conclusions of Law 168 in the Recommended Order.

21. After a review of the record, the Board finds Findings of Fact 60, 75, 78, 80 and 81 are not supported by competent substantial evidence and that the modifications below are as or more reasonable than the Conclusions of Law 168 in the Recommended Order.

22. The Board modifies Finding of Fact 59 as follows:

> 59. The petitioners contesting the Solaris Application raise several issues. The first issue is whether the RFA requires only that the entity named as the Community Land Trust have been in existence in some form as of June 28, 2018, or whether the entity had to exist as a Community Land Trust as of that date. The Community Land Trust named in the Solaris Application, Residential Options, existed prior to June 28, 2018, ~~but not~~ as a Community Land Trust.

23. The Board modifies Findings of Fact 78 as stated herein.

24. The Board modifies Conclusion of Law 168 as follows:

> 168. Solaris identified Residential Options as the Community Land Trust owner in its Priority I application. The facts adduced at hearing demonstrated that Residential Options did ~~not~~ meet the requirement that it existed as a Community Land Trust as of June 28, 2018.

25. Accordingly, the Board accepts Florida Housing's exception number four.

Solaris' Exception Number One

26. Solaris filed exceptions to Findings of Fact 76, 79, and 81 and Conclusions of Law 168 through 171 in the Recommended Order.

27. After a review of the record, the Board finds Findings of Fact 76, 79, and 81 and Conclusions of Law 168 through 171 are not supported by competent substantial evidence and that the modifications are as or more reasonable than the Conclusions of Law 168 through 171 in the Recommended Order.

28. The Board modifies Findings of Fact 76, 79, and 81 and Conclusions of Law 168 through 171 as stated herein.

29. Accordingly, the Board accepts Solaris' exception number one.

Solaris' Exception Number Two

30. Solaris filed exceptions to Findings of Fact 75 and 80 and Conclusions of Law 170 and 171 in the Recommended Order.

31. After a review of the record, the Board finds Findings of Fact 75 and 80 and Conclusions of Law 170 and 171 are not supported by competent substantial evidence and that the modifications are as or more reasonable than the Conclusions of Law 170 and 171 in the Recommended Order.

32. The Board modifies Findings of Fact 75 and 80 and Conclusions of Law 170 and 171 as stated herein.

33. Accordingly, the Board accepts Solaris' exception number two.

Ruling on the Recommended Order

34. The Findings of Fact set forth in the Recommended Order are supported by competent substantial evidence with the exception of Findings of Fact 59, 60, 75, 78, 79, 80, and 81, which are modified as stated herein.

35. The Conclusions of Law set out in the Recommended Order are reasonable and supported by competent substantial evidence with the exception of Conclusions of Law 168, 169, 170, and 171, which are modified as stated herein.

36. The Recommendation of the Recommended Order is reasonable and supported by competent substantial evidence with the exception to the recommendation regarding Solaris. The Recommendation is modified as follows:

> Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order as to RFA 2019-102 finding that:
>
> 1. The Berkeley Application is ineligible for funding;
> 2. The Sierra Bay Application is ineligible for funding;
> 3. The Solaris Application is ~~in~~eligible for funding;
> 4. The Metro Grande Application is eligible for funding;
> 5. The Beacon Place Application is ineligible for funding;
> 6. The East Pointe Application is eligible for funding and entitled to the Proximity Funding Preference; and
> 7. The Bembridge Application is eligible for funding.

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 with the exception of Findings of Fact 59, 60, 75, 78, 79, 80, and 81, which are modified as stated herein.

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 with the exception of Conclusions of Law 168, 169, 170, and 171 which are modified as stated herein.

C. The Recommendation of the Recommended Order as modified herein is adopted as Florida Housing's Recommendation.

IT IS HEREBY ORDERED that a) The Berkeley and Sierra Bay Applications are ineligible for funding; b) The Solaris, Metro Grande, Beacon Place, East Pointe, and Bembridge Applications are eligible for funding; and c) East Point is entitled to the Proximity Funding Preference.

DONE and ORDERED this 17th day of April, 2020.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BERKELEY LANDING, LTD.; AND
BERKELEY LANDING DEVELOPER, LLC,

Petitioners,

vs. Case No. 20-0140BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD.; METRO
GRANDE III ASSOCIATES, LTD.;
NORTHSIDE PROPERTY III, LTD.; HTG
BELLA VISTA, LLC; AND BRISAS DEL
ESTE APARTMENTS LLC,

Intervenors.
_____/

BRISAS DEL ESTE APARTMENTS, LLC,

Petitioner,

vs. Case No. 20-0141BID

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.,

Intervenor.
_____/

NORTHSIDE PROPERTY III, LTD.,

Petitioner,

vs. Case No. 20-0142BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.; AND SOLARIS APARTMENTS, LTD.,

Intervenors.
_____/

HOMESTEAD 26115, LLC,

Petitioner,

vs. Case No. 20-0143BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.,

Intervenor.
_____/

HTG BELLA VISTA, LLC,

Petitioner,

vs. Case No. 20-0145BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.; SOLARIS APARTMENTS, LTD.; PINE ISLAND CAPE, LLC; EAST POINTE PHASE TWO, LLC; AND MHP BEMBRIDGE, LLC,

Intervenors.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in these cases on February 12, 2020, in Tallahassee, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners Berkeley Landing, Ltd. and Berkeley Landing Developer, LLC (collectively, "Berkeley"):

Craig D. Varn, Esquire
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Amy Wells Brennan, Esquire
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For Petitioner/Intervenor Brisas Del Este Apartments, LLC ("Brisas") and Intervenor East Pointe Phase Two, LLC ("East Pointe"):

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Tallahassee, Florida 32302-0190

For Petitioner/Intervenor Northside Property III, Ltd. ("Northside") and Intervenor MHP Bembridge, LLC ("Bembridge"):

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Tallahassee, Florida 32301

For Petitioners/Intervenors Homestead 26115, LLC ("Beacon Place") and HTG Bella Vista, LLC ("Bella Vista"):

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For Respondent Florida Housing Finance Corporation ("Florida Housing" or "the Corporation"):

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For Intervenors Sierra Bay Partners, Ltd. ("Sierra Bay"), Solaris Apartments, Ltd. ("Solaris"), and Metro Grande III Associates, Ltd. ("Metro Grande"):

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Ausley & McMullen, P.A.
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STATEMENT OF THE ISSUE

The issue is whether the actions of Florida Housing concerning the review and scoring of the responses to Request for Applications 2019-102 ("RFA"), titled "Community Development Block Grant--Disaster Recovery ('CDBG-DR') to be Used in Conjunction with Tax-Exempt MMRB and Non-Competitive Housing Credits in Counties Deemed Hurricane Recovery Priorities," were contrary to the agency's governing statutes, rules, policies, or the RFA specifications.

PRELIMINARY STATEMENT

On July 30, 2019, Florida Housing issued the RFA, requesting applications proposing the construction of new affordable rental housing in areas impacted by Hurricane Irma, and in areas that experienced population influx because of migration from Puerto Rico and the U.S. Virgin Islands due to Hurricane Irma. Florida Housing expected to award up to $66,000,000 for construction of new affordable rental housing ("CDBG Development funding") and an additional $10,000,000 for acquiring land that will be held in perpetuity ("CDBG Land Acquisition Program funding"). The application deadline for the RFA was September 24, 2019.

On December 13, 2019, Florida Housing posted its Notice of Intent to Award ("Notice of Intent") funding pursuant to the RFA, entitled "RFA 2019-

102 Board Approved Scoring Results." The Notice of Intent stated Florida Housing's intention to award funding to 12 applicants, including Sierra Bay, Solaris, Metro Grande, East Pointe, and Bembridge.

Six protests of the Notice of Intent were filed, followed by Formal Written Protest petitions. The petition filed by Berkeley, DOAH Case No. 20-0140BID, challenges Florida Housing's determination that it was ineligible for funding. The petition filed by Brisas, DOAH Case No. 20-0141BID, challenges Florida Housing's determination that Sierra Bay, Solaris, Metro Grande, and Beacon Place were eligible for funding. The petition filed by Northside, DOAH Case No. 20-0142BID, challenges Florida Housing's determination that Sierra Bay, Solaris, and Beacon Place were eligible for funding. The petition filed by Beacon Place, DOAH Case No. 20-0143BID, challenges Florida Housing's determination that Sierra Bay was eligible for funding. The petition filed by Bella Vista, DOAH Case No. 20-0145BID challenges Florida Housing's determination that East Pointe, Bembridge, Sierra Bay, and Solaris were eligible for funding. The sixth challenge, filed by Twin Lakes III, Ltd., and given DOAH Case No, 20-0144BID, was voluntarily dismissed by the petitioner.

On January 14, 2020, Florida Housing referred the cases to DOAH for the assignment of an ALJ and the conduct of a formal hearing. The cases were assigned to ALJ Garnett W. Chisenhall, who consolidated them for hearing by Order dated January 16, 2020. The consolidated cases were set for hearing on February 12 through 14, 2020. The cases were reassigned to the undersigned on February 10, 2020. The hearing was convened and completed on February 12, 2020.

On February 11, 2020, the parties submitted a Joint Pre-hearing Stipulation that has been used in the preparation of this Recommended

Order. At the hearing, Florida Housing presented the testimony of Marissa Button, Florida Housing's Director of Multifamily Allocations. Berkeley presented the testimony of Ryan Von Weller, a principal of Wendover Housing Partners.

Joint Exhibits 1 through 17 were admitted into evidence. Joint Exhibit 15 was the deposition testimony of Ms. Button. Joint Exhibit 16 was the deposition testimony of Solaris's witness Sheryl Soukup, Executive Director of Residential Options of Florida. Joint Exhibit 17 was the deposition testimony of East Pointe witness Robert Johns, Executive Director of Lee Community Healthcare.

Berkeley's Exhibits 3 through 18, 22, 23, and 26 were admitted into evidence. Brisa's Exhibits 1 through 3 and 5 through 7 were admitted into evidence. Northside's Exhibits 1 through 6 were admitted into evidence. Bella Vista's Exhibits 1 and 3 through 5 were admitted into evidence. Solaris's Exhibit 1 was admitted into evidence. Metro Grande's Exhibits 1 and 2 were admitted into evidence. Bembridge's Exhibit 1 was admitted into evidence.

The two-volume Transcript of the final hearing was filed with DOAH on March 2, 2020. The parties timely filed their Proposed Recommended Orders on March 12, 2020. The Proposed Recommended Orders have been duly considered in the writing of this Recommended Order.

On March 13, 2020, Berkeley filed an Unopposed Motion to Amend Proposed Recommended Order, seeking leave to correct typographical errors in its filing. Berkeley's motion is hereby granted. Berkeley's Amended Proposed Recommended Order has been duly considered in the writing of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

THE PARTIES

1. Berkeley is an applicant in the RFA that requested an allocation of $6,500,000 in CDBG Development funding; $2,500,000 in CDBG Land Acquisition funding; and $844,699 in non-competitive housing credits. The Berkeley Application, assigned number 2020-017D, was preliminarily deemed ineligible for consideration for funding.

2. Brisas is an applicant in the RFA that requested an allocation of $5,000,000 in CDBG Development funding and $1,674,839 in non-competitive housing credits. The Brisas Application, assigned number 2020-056D, was preliminarily deemed eligible but was not selected for funding under the terms of the RFA.

3. Northside is an applicant in the RFA that requested an allocation of $7,300,000 in CDBG Development funding; $1,588,014 in non-competitive housing credits; and $24,000,000 in Multifamily Mortgage Revenue Bonds ("MMRB"). The Northside Application, assigned number 2020-024D, was preliminarily deemed eligible but was not selected for funding under the terms of the RFA.

4. Beacon Place is an applicant in the RFA that requested an allocation of $6,925,500 in CDBG Development funding; $4,320,000 in CDBG Land Acquisition funding; $1,764,203 in non-competitive housing credits; and $24,000,000 in MMRB. The Beacon Place Application, assigned number 2020-045DB, was preliminarily deemed eligible but was not selected for funding under the terms of the RFA.

5. Bella Vista is an applicant in the RFA that requested an allocation of $8,000,000 in CDBG Development funding; $1,450,000 in CDBG Land Acquisition funding; $609,629 in non-competitive housing credits; and

$13,000,000 in MMRB. The Bella Vista Application, assigned number 2020-038DB, was preliminarily deemed eligible but was not selected for funding under the terms of the RFA.

6. Solaris is an applicant in the RFA that requested an allocation of $3,420,000 in CDBG Development funding; $4,500,000 in CDBG Land Acquisition funding; and $937,232 in non-competitive housing credits. The Solaris Application, assigned number 2020-039D, was deemed eligible and preliminarily selected for funding under the terms of the RFA.

7. Metro Grande is an applicant in the RFA that requested an allocation of $3,175,000 in CDBG Development funding and $1,041,930 in non-competitive housing credits. The Metro Grande Application, assigned number 2020-041D, was deemed eligible and preliminarily selected for funding under the terms of the RFA.

8. Sierra Bay is an applicant in the RFA that requested an allocation of $3,650,000 in CDBG Development funding; $3,300,000 in CDBG Land Acquisition funding; $1,074,173 in non-competitive housing credits; and $16,000,000 in MMRB. The Sierra Bay Application, assigned number 2020-040DB, was deemed eligible and preliminarily selected for funding under the terms of the RFA.

9. Bembridge is an applicant in the RFA that requested an allocation of $7,800,000 in CDBG Development funding; $564,122 in non-competitive housing credits; and $10,100,000 in MMRB. The Bembridge Application, assigned number 2020-046DB, was deemed eligible and preliminarily selected for funding under the terms of the RFA.

10. East Pointe is an applicant in the RFA that requested an allocation of $4,680,000 in CDBG Development funding and $690,979 in non-competitive housing credits. The East Pointe Application, assigned number 2020-053D, was deemed eligible and preliminarily selected for funding under the terms of the RFA.

11. Florida Housing is a public corporation organized pursuant to Chapter 420, Part V, Florida Statutes, and, for purposes of these consolidated cases, is an agency of the State of Florida. Florida Housing is tasked with distributing a portion of the CDBG-DR funding allocated by the U.S. Department of Housing and Urban Development ("HUD"), pursuant to the State of Florida Action Plan for Disaster Recovery.

THE COMPETITIVE APPLICATION PROCESS AND RFA 2019-102

12. Florida Housing is authorized to allocate low-income housing tax credits and other named funding by section 420.507(48). Florida Housing has adopted Florida Administrative Code Chapter 67-60 to govern the competitive solicitation process. Rule 67-60.009(1) provides that parties wishing to protest any aspect of a Florida Housing competitive solicitation must do so pursuant to section 120.57(3), Florida Statutes.

13. Funding is made available through a competitive application process commenced by the issuance of a request for applications. Rule 67-60.009(4) provides that a request for application is considered a "request for proposal" for purposes of section 120.57(3)(f).

14. The RFA was issued on July 30, 2019, with responses due on August 27, 2019. The RFA was modified four times and the application deadline was extended to September 24, 2019. No challenges were made to the terms and specifications of the RFA.

15. Section Five of the RFA included a list of 48 "eligibility items" that an applicant was required to satisfy to be eligible for funding and considered for funding selection. Applications that met the eligibility standards would then be awarded points for satisfying RFA criteria, with the highest scoring applications being selected for funding.

16. No total point items are in dispute. Proximity Point items are contested as to the Beacon Place, East Pointe, and Bembridge Applications. Applicants could select whether they would be evaluated as Priority I, II,

or III applications. All of the parties to these consolidated cases identified themselves as Priority I applications.

17. Through the RFA, Florida Housing seeks to award an estimated $76,000,000 of CDBG Land Acquisition Program funding to areas impacted by Hurricane Irma, and in areas that experienced a population influx because of migration from Puerto Rico and the U.S. Virgin Islands due to Hurricane Irma. Florida Housing will award up to $66,000,000 for CDBG Development funding and an additional $10,000,000 for CDBG Land Acquisition Program funding. Applicants were not required to request CDBG Land Acquisition Program funding.

18. Forty-four applications were submitted in response to the RFA.

19. 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 34 applications eligible for funding. The Review Committee found 8 applications ineligible, including that of Berkeley. Two applications were withdrawn. The Review Committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

20. On December 13, 2019, the Board met and accepted the recommendations of the Review Committee. The Board preliminarily awarded funding to 12 applications, including those of Sierra Bay, Solaris, Metro Grande, East Pointe, and Bembridge.

21. Petitioners Berkeley, Brisas, Northside, Beacon Place, and Bella Vista timely filed Notices of Protest and Petitions for Formal Administrative Hearing.

THE BERKELEY APPLICATION

22. As an eligibility item, the RFA required applicants to identify an Authorized Principal Representative. According to the RFA, the Authorized Principal Representative:

> (a) must be a natural person Principal of the Applicant listed on the Principal Disclosure Form; (b) must have signature authority to bind the Applicant entity; (c) must sign the Applicant Certification and Acknowledgement form submitted in this Application; (d) must sign the Site Control Certification form submitted in this Application; and (e) if funded, will be the recipient of all future documentation that requires a signature.

23. As an eligibility item, the RFA required applicants to submit an Applicant Certification and Acknowledgment form executed by the Authorized Principal Representative. As an eligibility item, the RFA also required applicants to submit a Site Control Certification form executed by the Authorized Principal Representative.

24. In section 3.e.(1) of Exhibit A of the RFA, the applicant is directed to enter the contact information of its Authorized Principal Representative. Berkeley entered the name, organization, and contact information for Jennie D. Lagmay as its Authorized Principal Representative, in response to section 3.e.(1).

25. The name of Jennie D. Lagmay was not disclosed on the Principal Disclosure form required by the RFA.

26. The Applicant Certification and Acknowledgment form and the Site Control Certification form were executed by Jonathan L. Wolf, not Jennie D. Lagmay, the designated Authorized Principal Representative. On both forms, Mr. Wolf is identified as "Manager of Berkeley Landing GP, LLC; General Partner of Berkeley Landing, Ltd."

27. Jonathan L. Wolf is listed on the Principal Disclosure Form.

28. Aside from section 3.e.(1) of Exhibit A, Jennie D. Lagmay's name is not found in the Berkeley Application.

29. Florida Housing determined that the Berkeley Application was ineligible for an award of funding for three reasons: 1) the Authorized

Principal Representative listed was not disclosed on the Principal Disclosure form; 2) the Applicant Certification and Acknowledgement form was not signed by the Authorized Principal Representative; and 3) the Site Control Certification was not signed by the Authorized Principal Representative.

30. Two other applications for this RFA were found ineligible for identical reasons: Thornton Place, Application No. 2020-020D; and Berkshire Square, Application No. 2020-034D. In these, as in the Berkeley Application, Jennie D. Lagmay was named as the Authorized Principal Representative in section 3.e.(1) of Exhibit A, but Jonathan L. Wolf executed the Applicant Certification and Acknowledgement form and the Site Control Certification form as the Authorized Principal Representative.

31. Berkeley concedes it made an error in placing the name of Ms. Lagmay in section 3.e.(1), but argues that this constituted a minor irregularity that should have been waived by Florida Housing. Berkeley contends that the entirety of its Application makes plain that Jonathan D. Wolf is in fact its Authorized Principal Representative. Berkeley argues that Florida Housing should waive the minor irregularity and determine that the Berkeley Application is eligible for funding.

32. Berkeley points out that only two members of the Review Committee, Rachel Grice and Heather Strickland, scored the portions of the Berkeley Application that led to the ineligibility recommendation. Ms. Grice determined that the Authorized Principal Representative listed in the Berkeley Application was not disclosed on the Principal Disclosure form. Ms. Strickland determined that neither the Applicant Certification and Acknowledgement form nor the Site Control Certification form was executed by the Authorized Principal Representative. Neither Ms. Grice nor Ms. Strickland conducted a minor irregularity analysis for the Berkeley Application.

33. Rule 67-60.008, titled "Right to Waive Minor Irregularities," provides as follows:

> 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.

34. Berkeley contends that because a minor irregularity analysis was not conducted by the Review Committee members, the Board was deprived of a necessary explanation for the preliminary recommendations of Ms. Grice and Ms. Strickland.

35. Marisa Button, Florida Housing's Director of Multifamily Allocations, agreed that the Review Committee members did not perform a minor irregularity analysis but testified that none was required given the nature of the discrepancy in the Berkeley Application. Ms. Button performed a minor irregularity analysis as Florida Housing's corporate representative in this proceeding and concluded that the error could not be waived or corrected without providing an unfair competitive advantage to Berkeley.

36. Ms. Button testified that the fact that the person identified as the Authorized Principal Representative was not the same person who signed the certification forms could not be considered a minor irregularity because the application demonstrated conflicting and contradictory information, creating uncertainty as to the applicant's intentions. She stated that Florida Housing is required to limit its inquiry to the four corners of the application. Ms. Button stated that Florida Housing cannot take it upon itself to decide what the applicant intended when the information provided in the application is contradictory.

37. Berkeley points to the fact that the Application Certification and Acknowledgement form, signed by Mr. Wolf, includes the following language:

"The undersigned is authorized to bind the Applicant entity to this certification and warranty of truthfulness and completeness of the Application." Berkeley argues that it should have been clear to Florida Housing that Mr. Wolf is the person authorized to bind the company and that the inclusion of Ms. Lagmay's name in section 3.e.(1) was in the nature of a typographical error.

38. Florida Housing points out that the Application Certification and Acknowledgement form also includes the following language below the signature line: "NOTE: Provide this form as Attachment 1 to the RFA. The Applicant Certification and Acknowledgement form must be signed by the Authorized Principal Representative stated in Exhibit A."

39. Florida Housing notes that the Site Control Certification form includes similar language: "This form must be signed by the Authorized Principal Representative stated in Exhibit A."

40. Berkeley contends that Florida Housing was well aware that Jonathan L. Wolf has been the named Authorized Principal Representative on multiple applications filed under the umbrella of Wendover Housing Partners, the general developer behind Berkeley. In at least one of those previous applications, Ms. Lagmay, an employee of Wendover Housing Partners, was identified as the "contact person."

41. Ms. Button responded that Review Committee members are specifically prohibited from using personal knowledge of a general development entity in a specific application submitted by a single purpose entity. She further testified that if Florida Housing employees were to use their personal knowledge of an experienced developer to waive errors in a specific application, applicants who had not previously submitted applications would be at a competitive disadvantage.

42. Ms. Button testified that Berkeley was established as a single purpose entity in accordance with the RFA's requirements. She testified that she has known general developers to structure these single purpose entities in

different ways, depending on the requirements of an RFA. An applicant might designate an employee, such as Ms. Lagmay, as a principal to give her experience as a developer. Again, Ms. Button emphasized that Florida Housing is not in a position to decide what the applicant "really meant" when there is a discrepancy in the information provided.

43. Ms. Button testified that Florida Housing has determined in prior RFAs that an applicant was ineligible because the person identified as the Authorized Principal Representative was not the same person who signed the certification forms.

44. Florida Housing rightly concluded that there are only two possible ways to interpret the Berkeley Application. If Ms. Lagmay was the Authorized Principal Representative, then the application is nonresponsive because she was not listed on the Principal Disclosure form and she did not sign the required certification forms. If Ms. Lagmay was not the Authorized Principal Representative, the application is nonresponsive because no Authorized Principal Representative was identified. There is no way to tell from the four corners of the application which of these alternatives is the correct one. Florida Housing cannot step in and cure the defect in the application by making its own educated guess as to the intended identity of the Authorized Principal Representative.

45. Berkeley has failed to demonstrate that Florida Housing's preliminary determination of ineligibility was contrary to the applicable rules, statutes, policies, or specifications of the RFA, or was clearly erroneous, contrary to competition, arbitrary, or capricious.

THE SIERRA BAY APPLICATION

46. The parties stipulated to the facts regarding the Sierra Bay Application, which are incorporated into this Recommended Order.

47. Florida Housing deemed the Sierra Bay Application eligible and, pursuant to the terms of the RFA, preliminarily selected Sierra Bay for funding.

48. In order to demonstrate site control, the RFA required execution of the Site Control Certification form. Site control documentation had to be included in the application. One way to demonstrate site control was to include an "eligible contract." The RFA required that certain conditions be met in order to be considered an "eligible contract." One of those requirements was that the contract "must specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance."

49. Sierra Bay acknowledged that the site control documentation included within its application did not meet the "eligible contract" requirement because it failed to include language regarding specific performance as a remedy for the seller's default. Sierra Bay agreed that the omission of the specific performance language was not a minor irregularity and that Sierra Bay's Application is ineligible for funding under the terms of the RFA.

THE SOLARIS APPLICATION

50. The RFA specified that a Local Government, Public Housing Authority, Land Authority, or Community Land Trust must hold 100 percent ownership in the land of any qualifying Priority I application.

51. The RFA defined "Community Land Trust" as:

> A 501(c)(3) which acquires or develops parcels of land for the primary purpose of providing or preserving affordable housing in perpetuity through conveyance of the structural improvement subject to a long term ground lease which retains a preemptive option to purchase any such structural improvement at a price determined by a formula designed to ensure the improvement remains affordable in perpetuity.

52. The RFA provided that if a Community Land Trust is the Land Owner, the Community Land Trust must provide the following documentation as Attachment 2 to the application to demonstrate that it qualifies as a Community Land Trust:

> - The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating it has existed since June 28, 2018 or earlier and that a purpose of the Community Land Trust is to provide or preserve affordable housing; and
>
> - The Community Land Trust must provide a list that meets one of the following criteria to demonstrate experience of the Community Land Trust with owning property: (i) at least two parcels of land that the Community Land Trust currently owns; or (ii) one parcel of land that the Community Land Trust owns, consisting of a number of units that equals or exceeds at least 25 percent of the units in the proposed Development.

53. The RFA required that the proposed development must be affordable in perpetuity. For purposes of the RFA, "perpetuity" means 99 years or more.

54. Solaris identified Residential Options of Florida, Inc. ("Residential Options"), as the Community Land Trust owner in its Priority 1 Application.

55. Attachment 2 of the Solaris Application included the Articles of Incorporation of Residential Options ("Original Articles"), filed with the Division of Corporations on July 30, 2014. The purpose of the corporation as stated in the Original Articles was as follows:

> Said corporation is organized exclusively for charitable, religious, educational, and scientific purposes, including for such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

56. Attachment 2 of the Solaris Application also included Amended and Restated Articles of Incorporation of Residential Options ("Amended Articles"), filed with the Division of Corporations on September 20, 2019. The Amended Articles retained the boilerplate statement of purpose of the Original Articles, but added the following paragraph:

> This shall include the purpose of empowering individuals with intellectual and developmental disabilities to successfully obtain and maintain affordable and inclusive housing of their choice and to provide affordable housing and preserve the affordability of housing for low- income or moderate income people, including people with disabilities, in perpetuity.

57. Attachment 2 of the Solaris Application also included the Articles of Incorporation of ROOF Housing Trust, Inc. ("ROOF Housing Trust") filed with the Division of Corporations on July 17, 2017. The purpose of the corporation as stated in these Articles includes the following: "to acquire land to be held in perpetuity for the primary purpose of providing affordable housing for people with developmental disabilities."

58. Finally, Attachment 2 of the Solaris Application included Articles of Merger, which were filed with the Division of Corporations on September 10, 2019. The Articles of Merger indicated that the Residential Options and ROOF Housing Trust had merged, with Residential Options standing as the surviving corporation.

59. The petitioners contesting the Solaris Application raise several issues. The first issue is whether the RFA requires only that the entity named as the Community Land Trust have been in existence in some form as of June 28, 2018, or whether the entity had to exist as a Community Land Trust as of that date. The Community Land Trust named in the Solaris Application, Residential Options, existed prior to June 28, 2018, but not as a Community Land Trust.

60. The second issue is whether the June 28, 2018, date applies only to the existence of the Community Land Trust or whether the RFA requires that the Community Land Trust have been in existence *and* have had a stated purpose to provide or preserve affordable housing *and* have met the ownership experience criteria as of June 28, 2018. It is questionable whether Solaris would be eligible for funding if the RFA required the latter, because Residential Options did not have a stated purpose of providing or preserving affordable housing prior to its merger with ROOF Housing Trust, at least no such purpose as could be gleaned from the four corners of the Solaris Application.

61. The third issue is whether the RFA's definition of "Community Land Trust" requires the qualifying entity to have existing ground leases at the time of the application. Florida Housing and Solaris concede that Residential Options did not have operative ground leases at the time Solaris submitted its application.

62. Hurricane Irma struck Puerto Rico and Florida in September 2017. Ms. Button testified that in creating this RFA, Florida Housing wanted to weed out opportunistic community land trusts created only for the purpose of obtaining this funding. Florida Housing initially proposed an RFA requirement that the community land trust have existed as of September 2017, but discovered through workshops with interested parties that the early date would exclude legitimate Community Land Trusts that had been established in response to the storm. Ms. Button testified that Florida Housing's intent was to make this RFA as inclusive as practicable. Florida Housing therefore selected June 28, 2018, as a date that would exclude opportunists without penalizing the genuine responders to the natural disaster.

63. Both Florida Housing and Solaris point to the text of the RFA requirement to demonstrate that the date of June 28, 2018, should be read to apply *only* to whether the Community Land Trust existed as of that date.

Solaris argues that the RFA states three independent criteria for eligibility: 1) that the Community Land Trust "has existed since June 28, 2018 or earlier"; 2) that a purpose of the Community Land Trust is[1] to provide or preserve affordable housing; and 3) the Community Land Trust must demonstrate its property ownership experience, one means of doing which is to name at least two parcels of land that the Community Land Trust currently owns.

64. Florida Housing argues that Solaris met the first criterion by providing its Articles of Incorporation showing it has existed since July 30, 2014. Florida Housing argues that Solaris met the second criterion by providing its Amended and Restated Articles of Incorporation, which stated the purpose of providing or preserving affordable housing in perpetuity. Florida Housing argues that Solaris met the third criterion by identifying two properties in Immokalee, Independence Place, and Liberty Place as parcels that it currently owns.

65. Florida Housing thus reached the conclusion that Residential Options met the definition of a Community Land Trust in the RFA as of June 28, 2018. Florida Housing argues that, according to the definition in the RFA, a Community Land Trust must be a 501(c)(3) corporation, which Residential Options clearly is. It must acquire or develop parcels of land, which it has done. Finally, it must have the "primary purpose of providing or preserving affordable housing in perpetuity through conveyance of the structural improvement subject to a long term ground lease."

66. Ms. Button testified that Florida Housing's interpretation of the RFA's Community Land Trust definition was that if Residential Options had the primary purpose of providing affordable housing in perpetuity through the use of long term ground leases, the definition has been met even if Residential Options had not actually entered into any ground leases at the

[1] Both Florida Housing and Solaris emphasize that the second criterion is stated in the present tense, which suggests that it does not intend a backward look to June 28, 2018.

time it submitted its application. This is not the only way to read the RFA's definition, but it is not an unreasonable reading, particularly in light of Florida Housing's stated intent to make the RFA as inclusive as possible in terms of the participation of legitimate community land trusts.

67. Sheryl Soukup, the Executive Director of Residential Options, testified via deposition. Ms. Soukup testified that in 2017, Residential Options realized there was a need for housing for people with disabilities and decided to become a nonprofit housing developer of properties that would be kept affordable in perpetuity. To that end, ROOF Housing Trust was created to act as the community land trust for the properties developed by Residential Options. The two companies had identical Boards of Directors and Ms. Soukup served as Executive Director of both entities.

68. In its application to the IRS for 501(c)(3) status, ROOF Housing Trust included the following:

> The organization does not own any property yet. ROOF Housing Trust intends to own vacant land, single family homes, and multi-family units. Some of the units will be provided as rental units. ROOF Housing Trust will sell some of the houses for homeownership, while retaining the land on which they are located. The land will be leased to homeowners at a nominal fee to make the purchase price affordable, using the community land trust model. Ground leases and warranty deeds not been developed yet [sic], but will be based on the sample documents provided by the Florida Community Land Trust Institute.[2]

69. Ms. Soukup described ROOF Housing Trust as "a vehicle by which Residential Options of Florida could act as a community land trust…. [I]t was always the intention of Residential Options of Florida to develop and put into

[2] The ROOF Housing Trust 501(c)(3) application was not a part of the Solaris Application. It was included as an exhibit to Ms. Soukup's deposition.

a community land trust property so that it would remain affordable in perpetuity for use by people of intellectual and development [sic] disabilities."

70. Residential Options acquired the aforementioned Independence Place and Liberty Place properties but never conveyed ownership to ROOF Housing Trust. Residential Options acted as a de facto community land trust. No ground leases have yet been entered into because the properties are at present rented directly by Residential Options to persons with developmental disabilities.

71. Ms. Soukup testified that at the time ROOF Housing Trust was created, the Board of Residential Options was undecided whether to create a separate entity to act as a community land trust or to incorporate that function into the existing entity. The decision to incorporate ROOF Housing Trust was based on the Board's intuition that a separate corporation would "allow us the most flexibility in the future." In any event, Residential Options and ROOF Housing Trust were functionally the same entity.

72. Ms. Soukup testified that plans to merge the two companies emerged from a situation in which Collier County refused to allow Residential Options to convey its two properties to ROOF Housing Trust. The Board that controlled both companies decided that there was no point in maintaining separate legal entities if ROOF Housing Trust could not perform its main function. As noted above, Articles of Merger were filed on September 10, 2019.

73. Northside points to minutes from Residential Options's Board meetings in August and September 2019, as indicating that the Board itself did not believe that Residential Options was a community land trust prior to the merger with ROOF Housing Trust. Northside contends that the September 2019 merger was initiated and completed mainly because Residential Options had been approached about serving as the Community Land Trust for the applications of Solaris and Sierra Bay in this RFA. Northside points to the "frenzied activity" by Residential Options to create an

entity meeting the definition of Community Land Trust in the days just before the September 24, 2019, application deadline. Northside argues that Residential Options is the very kind of opportunistic community land trust that the June 28, 2018, date of creation was intended to weed out.

74. Northside's argument is not persuasive of itself, but it does point the way to an ultimate finding as to the Solaris Application. Both Florida Housing and Solaris gave great emphasis to Ms. Soukup's testimony to refute the suggestion that Residential Options acted opportunistically. Ms. Soukup was a credible witness. Her explanation of the process by which Residential Options first created then merged with ROOF Housing Trust dispelled any suggestion that Residential Options was a community land trust created solely to cash in on this RFA.

75. The problem is that Ms. Soukup's explanation was not before the Review Committee when it evaluated the Solaris Application. The only information about Residential Options that the Review Committee possessed was Attachment 2 of the Solaris Application. The dates of the merger documents and Amended Articles certainly give some credence to the suspicions voiced by Northside.

76. However, the undersigned is less persuaded by the implications as to the intentions of Residential Options than by the contradictions between Florida Housing's statements of intent and its reading of the RFA in relation to the Solaris Application. The decision to find the Solaris Application eligible for funding founders on the first issue stated above: whether the RFA requires only that the Community Land Trust have been in existence in some form as of June 28, 2018, or whether it had to exist as a Community Land Trust as of that date.

77. Ms. Button testified that the June 28, 2018, date was settled upon as a way of including community land trusts created in the wake of Hurricane Irma, while excluding those created to cash in on this RFA. During cross-examination by counsel for Northside, Ms. Button broadened her statement

to say that Florida Housing's intention was to exclude entities that had not been involved in affordable housing at all prior to June 28, 2018. Nonetheless, the RFA language is limited to Community Land Trusts.

78. The RFA states: "The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating that it has existed since June 28, 2018 or earlier…" The Solaris Application shows that Residential Options existed prior to June 28, 2018, but *not* as a Community Land Trust. Residential Options did not become a Community Land Trust until it completed its merger with ROOF Housing Trust and filed the Amended Articles on September 20, 2019.

79. Ms. Button's statement of intent is accepted as consistent with the plain language of the RFA: the date of June 28, 2018, excludes Community Land Trusts created subsequently. It is inconsistent for Florida Housing to also read the RFA language to say that the qualifying entity need not have existed as a Community Land Trust prior to June 28, 2018. It would be arbitrary for Florida Housing to set a date for the creation of Community Land Trusts then turn around and find that the date does not apply to this particular Community Land Trust.

80. Ms. Soukup's testimony was that Residential Options and ROOF Housing Trust were effectively a single entity and that Residential Options was in fact operating as a community land trust prior to the September 10, 2019, merger. However, Ms. Soukup's explanation was not before the Review Committee, which was limited to one means of ascertaining whether an entity was a Community Land Trust prior to June 28, 2018: the Articles of Incorporation or Bylaws. Residential Options's Original Articles included no language demonstrating that it was a Community Land Trust prior to the September 10, 2019, merger with ROOF Housing Trust and the filing of the

Amended Articles on September 20, 2019.[3] As set forth in the discussion of the Berkley Application above, Florida Housing is required to limit its inquiry to the four corners of an application.

81. It was contrary to the provisions of the RFA for Florida Housing to find that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the *Community Land Trust* must demonstrate that it existed prior to June 28, 2018. Ms. Button's own testimony demonstrated that Florida Housing intended to exclude Community Land Trusts created after June 28, 2018. ROOF Housing Trust existed as a Community Land Trust in 2017, but ROOF Housing Trust was not the Community Land Trust named in the Solaris Application. Ms. Soukup's explanation of the circumstances showed that Residential Options was well intentioned in its actions, but her explanation was not a part of the Solaris Application that was before Florida Housing's Review Committee.

THE METRO GRANDE APPLICATION

82. Florida Housing deemed the Metro Grande Application eligible. Pursuant to the terms of the RFA, the Metro Grande Application was preliminarily selected for funding. Petitioner Brisas contends that the Metro Grande Application should have been found ineligible for failure to include mandatory site control documentation.

83. Metro Grande submitted a Priority I application that was not seeking Land Acquisition Program funding. The site control requirements for such applicants are as follows:

[3] This finding also disposes of Solaris's arguments regarding the legal effect of corporate mergers. The RFA provided one simple way of demonstrating whether an entity was a Community Land Trust as of June 28, 2018. Florida Housing's Review Committee could not be expected to delve into the complexities of corporate mergers to answer this uncomplicated question.

> The Local Government, Public Housing Authority, Land Authority, or Community Land Trust must already own the land as the sole grantee and, if funded, the land must be affordable into Perpetuity.[4] Applicants must demonstrate site control as of Application Deadline by providing the properly executed Site Control Certification form (Form Rev. 08-18). Attached to the form must be the following documents:
> (1) A Deed or Certificate of Title. The deed or certificate of title (in the event the property was acquired through foreclosure) must be recorded in the applicable county and show the Land Owner as the sole Grantee. There are no restrictions on when the land was acquired; and
> (2) A lease between the Land Owner and the Applicant entity. The lease must have an unexpired term of at least 50 years after the Application Deadline.

84. Metro Grande did not include a deed or certificate of title in its application. In fact, no deed or certificate of title for the Metro Grande site exists.

85. Miami-Dade County owns the Metro Grande site. Miami-Dade County acquired ownership of the Metro Grande site by eminent domain. The eminent domain process culminated in the entry of four Final Judgments for individual parcels which collectively compose the Metro Grande site.

86. The Final Judgments were not attached to Metro Grande's Application. There was no requirement in the RFA that Metro Grande include these Final Judgments in its application. The Final Judgments were produced during discovery in this proceeding.

87. In its application, Metro Grande included a Land Owner Certification and Acknowledgement Form executed by Maurice L. Kemp, as the Deputy Mayor of Miami-Dade County, stating that the county holds or will hold 100 percent ownership of the land where Metro Grande's proposed

[4] The RFA defined "Perpetuity" as "at least 99 years from the loan closing."

development is located. Additionally, in its application, Metro Grande stated that Miami-Dade County owned the property.

88. The RFA expressly states that Florida Housing "will not review the site control documentation that is submitted with the Site Control Certification form during the scoring process unless there is a reason to believe that the form has been improperly executed, nor will it in any case evaluate the validity or enforceability of any such documentation." Florida Housing reserves the right to rescind an award to any applicant whose site control documents are shown to be insufficient during the credit underwriting process. Thus, the fact that no deed or certificate of title was included with Metro Grande's site control documents was not considered by Florida Housing during the scoring process.

89. Ms. Button testified that while this was an error in the application, it should be waived as a minor irregularity. The purpose of the documentation requirements was to demonstrate ownership and control of the applicant's proposed site. There was no question or ambiguity as to the fact that Miami-Dade County owned the Metro Grande site.

90. Florida Housing was not required to resort to information extraneous to the Metro Grande Application to confirm ownership of the site. The Land Owner Certification and Acknowledgement form, executed by the Deputy Mayor as the Authorized Land Owner Representative, confirmed ownership of the parcels.

91. Metro Grande's failure to include a deed or certificate of title, therefore, created no confusion as to who owned the property or whether Miami-Dade County had the authority to lease the property to the applicant. There was no evidence presented that the failure to include a deed or certificate of title resulted in the omission of any material information or provided a competitive advantage over other applicants.

92. Brisas contends that the RFA was clear as to the documents that must be included to satisfy the site control requirements. Metro Grande failed to

provide those documents or even an explanation why those documents were not provided. Florida Housing ignored the fact that no deed or certificate of title was provided, instead relying on information found elsewhere in the application.

93. It is found that Metro Grande failed to comply with an eligibility item of the RFA, but that Florida Housing was correct to waive that failure as a minor irregularity that provided Metro Grande no competitive advantage, created no uncertainty as to whether the requirements of the RFA were met, and did not adversely affect the interests of Florida Housing or the public.

94. Brisas has failed to demonstrate that Florida Housing's preliminary determination of eligibility and selection for funding was contrary to the applicable rules, statutes, policies, or specifications of the RFA or was clearly erroneous, contrary to competition, arbitrary, or capricious.

THE BEACON PLACE APPLICATION

95. Florida Housing deemed the Beacon Place Application eligible. Pursuant to the terms of the RFA, Beacon Place was not preliminarily selected for funding.

96. The RFA provides that an application may earn proximity points based on the distance between its Development Location Point and the selected Transit or Community Service. Proximity points are used to determine whether the Applicant meets the required minimum proximity eligibility requirements and the Proximity Funding Preference.

97. Beacon Place is a Large County Application that is not eligible for the "Public Housing Authority Proximity Point Boost." As such, the Beacon Place Application was required to achieve a minimum Transit Point score of 2 to be eligible for funding. Beacon Place must also achieve a total Proximity Point score of 10.5 in order to be eligible for funding. Beacon Place must achieve a total Proximity Point score of 12.5 or more in order to receive the RFA's Proximity Funding Preference. Based on the information in its Application,

Beacon Place received a Total Proximity Point score of 18 and was deemed eligible for funding and for the Proximity Point Funding Preference.

98. The Beacon Place Application listed a Public Bus Rapid Transit Stop as its Transit Service. Applying the Transit Service Scoring Charts in Exhibit C of the RFA, Florida Housing awarded Beacon Place 6 Proximity Points for its Transit Service.

99. The Beacon Place Application listed a Grocery Store, a Pharmacy, and a Public School in its Community Services Chart in order to obtain Proximity Points for Community Services. Using the Community Services Scoring Charts in Exhibit C of the RFA, Florida Housing awarded Beacon Place 4 Proximity Points for each service listed, for a total of 12 Proximity Points for Community Services.

100. Beacon Place has stipulated, however, that the Public School listed in its application does not meet the definition of "Public School" in the RFA and Beacon Place should not receive the 4 Proximity Points for listing a public school.

101. The RFA defines a "Public Bus Rapid Transit Stop" as:

> [a] fixed location at which passengers may access public transportation via bus. The Public Bus Rapid Transit Stop must service at least one bus that travels at some point during the route in either a lane or corridor that is exclusively used by buses, and the Public Bus Rapid Transit Stop must service at least one route that has scheduled stops at the Public Bus Rapid Transit Stop at least every 20 minutes during the times of 7am to 9am and also during the times of 4pm to 6pm Monday through Friday, excluding holidays, on a year-round basis.
>
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

102. The Beacon Place Application included Metrobus Route 38 ("Route 38") as a Public Bus Rapid Transit Stop. Route 38 has scheduled stops at the location identified in the Beacon Place Application at the following times during the period of 7 a.m. and 9 a.m. Monday through Friday: 7:01, 7:36, 7:56, 8:11, 8:26, 8:41, and 8:56.

103. Brisas and Northside contend that Route 38 does not meet the definition of a Public Bus Rapid Transit Stop because there is a gap of more than 20 minutes between the 7:01 a.m. bus and the 7:36 a.m. bus.

104. Applicants are not required to include bus schedules in the application. Florida Housing does not attempt to determine whether an identified stop meets the RFA definitions during the scoring process. During discovery in this litigation, Florida Housing changed its position and now agrees that Route 38 does not satisfy the definition. Nonetheless, the standard of review set forth in section 120.57(3) is applicable to Florida Housing's initial eligibility determination, not its revised position.

105. All parties stipulated that Route 38 meets the definition of a Public Bus Rapid Transit Stop as to scheduled stops during the hours of 4 p.m. to 6 p.m. Monday through Friday.

106. If the bus stop listed by Beacon Place does not also meet the definition of a Public Bus Rapid Transit Stop as to scheduled stops during the hours of 7 a.m. to 9 a.m., Beacon Place would not be entitled to any Transit Service Proximity Points and would be ineligible for funding.

107. Beacon Place cannot contest the fact that there is a 35 minute gap between the 7:01 and the 7:36 buses. Beacon Place has attempted to salvage its situation by comparing the language used in the RFA definition of a Public Bus Stop with that used in the definition of a Public Bus Rapid Transit Stop. The RFA defines Public Bus Stop in relevant part as

> [a] fixed location at which passengers may access one or two routes of public transportation via buses. The Public Bus Stop must service at least one bus route with scheduled stops at least hourly

> during the times of 7am to 9am and also during the times of 4pm and 6pm Monday through Friday, excluding holidays, on a year round basis….

108. Florida Housing has interpreted the "hourly" requirement of the Public Bus Stop definition to mean that a bus must stop at least once between 7:00 a.m. and 8:00 a.m., and at least once between 8:00 a.m. and 9:00 a.m. Beacon Place suggests that Florida Housing should interpret the "every 20 minutes" requirement for a Public Bus Rapid Transit Stop similarly, so that a bus must stop at least once between 7:00 a.m. and 7:20 a.m., once between 7:20 a.m. and 7:40 a.m., and once between 7:40 a.m. and 8:00 a.m. Florida Housing has rejected this interpretation, however, noting that the language in the two definitions is explicitly different.

109. Ms. Button testified that if Florida Housing had intended these two distinct definitions to be interpreted similarly, it could easily have worded them differently. It could have required a Public Bus Stop to have stops "at least every 60 minutes," rather than "hourly." It could have required a Public Bus Rapid Transit Stop to have "three stops per hour" rather than "every 20 minutes."

110. Ms. Button observed that the purpose of the Public Bus Rapid Transit Stop definition is to award points for serving the potential residents with frequent and regular stops. The idea was to be sure residents had access to the bus during the hours when most people are going to and from work. Florida Housing's interpretation of "every 20 minutes" is consonant with the plain language of the phrase and reasonably serves the purpose of the definition.

111. Florida Housing also rejected the idea that the failure of the identified stop to meet the definition of a Public Bus Rapid Transit Stop in the RFA should be waived as a minor irregularity. Ms. Button testified that allowing one applicant to get points for a stop that did not meet the definition

would give it a competitive advantage over other applicants, including some potential applicants who did not apply because they could not satisfy the terms of the definition.

112. Because the bus stop listed by Beacon Place does not meet the definition of a Public Bus Rapid Transit Stop, Beacon Place is not entitled to any Transit Service Proximity Points and is thus ineligible for funding. Brisas and Northside have demonstrated that Florida Housing's preliminary determination of eligibility for Beacon Place was contrary to the specifications of the RFA. Florida Housing's original recommendation would have been contrary to the terms of the RFA.

THE EAST POINTE APPLICATION

113. Florida Housing deemed the East Pointe Application eligible. Pursuant to the terms of the RFA, East Pointe was preliminarily selected for funding. Bella Vista challenged Florida Housing's action alleging that the Medical Facility selected by East Pointe did not meet the definition found in the RFA.

114. East Pointe proposed a Development in Lee County, a Medium County according to the terms of the RFA. Applicants from Medium Counties are not required to attain a minimum number of Transit Service Points to be considered eligible for funding. However, such applicants must achieve at least 7 total Proximity Points to be eligible for funding and at least 9 Proximity Points to receive the Proximity Funding Preference.

115. The East Pointe Application identified three Public Bus Stops and was awarded 5.5 Proximity Points based on the Transit Service Scoring Chart in Exhibit C to the RFA. However, East Pointe has stipulated that Public Bus Stop 1 listed in its application does not meet the definition of a Public Bus Stop because it does not have the required scheduled stops. Based on the Transit Service Scoring Chart, East Pointe should receive a total of 3.0 Proximity Points for Transit Services for Public Bus Stops 2 and 3.

116. East Pointe listed a Grocery Store, a Medical Facility, and a Public School in its Community Services Chart. Based on the Community Services Scoring Charts in Exhibit C to the RFA, East Pointe received 1 Proximity Point for its Grocery Store, 4 Proximity Points for its Medical Facility, and 3 Proximity Points for its Public School, for a total of 8 Proximity Points for Community Services.

117. East Pointe listed Lee Memorial Health System at 3511 Dr. Martin Luther King Jr. Boulevard, Ft. Myers, Florida, as its Medical Facility.

118. The RFA defines "Medical Facility" as follows:

> A medically licensed facility that (i) employs or has under contractual obligation at least one physician licensed under Chapter 458 or 459, F.S. available to treat patients by walk-in or by appointment; and (ii) provides general medical treatment to any physically sick or injured person. Facilities that specialize in treating specific classes of medical conditions or specific classes of patients, including emergency rooms affiliated with specialty or Class II hospitals and clinics affiliated with specialty or Class II hospitals, will not be accepted.
>
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

119. If East Pointe's selected Medical Facility does not meet the definition of "Medical Facility" in the RFA, East Pointe will lose 4 Proximity Points, reducing its total Proximity Points to 7. The East Pointe Application would still be eligible but would not receive the Proximity Funding Preference and, therefore, would fall out of the funding range of the RFA.

120. Bella Vista alleged that East Pointe should not have received Proximity Points for a Medical Facility because the Lee Community Healthcare location specified in its application "only serves adults and therefore only treats a specific group of patients." Lee Community HealthCare operates nine locations in Lee County, including the "Dunbar"

location that East Pointe named in its application. Lee Community Healthcare's own promotional materials label the Dunbar location as "adults only."

121. Robert Johns, Executive Director for Lee Community Healthcare, testified by deposition. Mr. Johns testified that as of the RFA application date of September 24, 2019, the Dunbar office provided services primarily to adults 19 years of age or over, by walk-in or by appointment. A parent who walked into the Dunbar office with a sick or injured child could obtain treatment for that child. A parent seeking medical services for his or her child by appointment would be referred to a Lee Community HealthCare office that provided pediatric services.

122. Mr. Johns testified that the Dunbar office would provide general medical treatment to any physically sick or injured person who presented at the facility, including children. Children would not be seen by appointment at the Dunbar facility, but they would be treated on a walk-in basis.

123. The RFA requires a Medical Facility to treat patients "by walk-in or by appointment." Ms. Button testified that Florida Housing reads this requirement in the disjunctive. A Medical Facility is not required to see any and all patients by walk-in *and* to see any and all patients by appointment. Florida Housing finds it sufficient for the Medical Facility to see some or all patients by walk-in *or* by appointment. Ms. Button opined that the Dunbar office met the definition of a Medical Facility because it treated adults by walk-in or appointment and treated children on a walk-in basis.

124. Florida Housing's reading is consistent with the literal language of the RFA definition. While it would obviously be preferable for the Dunbar facility to see pediatric patients by appointment, the fact that it sees them on a walk-in basis satisfies the letter of the RFA provision.

125. Bella Vista has failed to demonstrate that Florida Housing's preliminary determination of eligibility and selection for funding was contrary to the applicable rules, statutes, policies, or specifications of the

RFA or was clearly erroneous, contrary to competition, arbitrary, or capricious.

THE BEMBRIDGE APPLICATION

126. Florida Housing deemed the Bembridge Application eligible. Pursuant to the terms of the RFA, Bembridge was preliminarily selected for funding.

127. Bembridge proposed a development in Collier County, a Medium County in RFA terms. As an applicant from a Medium County, Bembridge was required to achieve at least 7 total Proximity Points to be eligible for funding and at least 9 Proximity Points to receive the Proximity Funding Preference. Medium County applicants are allowed, but not required, to claim both Transit Service points and Community Service points.

128. As to Community Services, the RFA provides that an applicant may receive a "maximum 4 Points for each service, up to 3 services." The RFA goes on to state:

> Applicants may provide the location information and distances for three of the following four Community Services on which to base the Application's Community Services Score.[5] The Community Service Scoring Charts, which reflect the methodology for calculating the points awarded based on the distances, are outlined in Exhibit C.

129. In its Application, Bembridge listed four, not three, Community Services. Bembridge was one of six Applicants that mistakenly submitted four Community Services instead of three. The Review Committee scorer reviewing Community Services in the applications stated on her scoring sheet: "After removing points for the service with the least amount of points, all still met the eligibility requirement."

[5] The four listed Community Services were Grocery Store, Public School, Medical Facility, and Pharmacy.

130. Florida Housing interpreted the RFA as not specifically prohibiting an applicant from listing four Community Services, but as providing that the applicant could receive points for no more than three of them. As to the six applicants who submitted four Community Services, Florida Housing awarded points only for the three Community Services that were nearest the proposed development.[6] Bembridge received 3 Proximity points for its Grocery Store, 3.5 Proximity Points for its Pharmacy, and 4 Proximity Points for its Public School, for a total of 10.5 Proximity Points for Community Services. Thus, as originally scored, Bembridge met the Proximity Funding Preference.

131. Florida Housing did not score the Medical Facility listed by Bembridge, which was the farthest Community Service from the proposed development. Ms. Button testified that this fourth Community Service was treated as surplus information, and because it did not conflict with any other information in the application or cause uncertainty about any other information, it was simply not considered.

132. Ms. Button likened this situation to prior RFAs in which applicants included pharmacies as Community Services even though they were not eligible in proposed family developments. Florida Housing disregarded the information as to pharmacies as surplus information. It did not consider disqualifying the applicants for providing extraneous information.

133. Ms. Button also made it clear that if one of the three Community Services nearest the proposed development was found ineligible for some reason, the fourth Community Service submitted by the applicant would not be considered. The fourth Community Service was in all instances to be disregarded as surplusage in evaluating the application.

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[6] When queried as to whether the fourth Community Service was removed because it was worth the fewest points, as the reviewer's notes stated, or because it was farthest away from the proposed development, Ms. Button replied that the distinction made no difference because the service that is farthest away is invariably the one that receives the fewest points.

134. Florida Housing did not consider disqualifying Bembridge and the other five Applicants that mistakenly listed an extra Community Service in their applications. Ms. Button stated, "They provided in all of them, Bembridge and the others that were listed in this, they did provide three Community Services. And so I don't think it is reasonable to throw out those applications for providing a fourth that we would just not consider nor give benefit to for those point values."

135. Bella Vista contends that Florida Housing should have rejected the Bembridge application rather than award points for the three nearest Community Services. Ms. Button testified that this was not a reasonable approach if only because there was nothing in the RFA stating that an application would be rejected if it identified more Community Services than were required.

136. Ms. Button also noted that this was one of the first RFAs to allow applicants to select among four Community Services. She believed the novelty of this three-out-of-four selection process led to six applications incorrectly listing four Community Services. She implied that the Community Services language would have to be tweaked in future RFAs to prevent a recurrence of this situation, but she did not believe it fair to disqualify these six applicants for their harmless error.

137. The Review Committee scorer did not perform a minor irregularity analysis relating to the fourth Community Service provided by Bembridge and the other applicants. Ms. Button opined that the addition of an extra Community Service amounts to no more than a minor irregularity because it provided no competitive advantage to the applicant and created no uncertainty that the terms and requirements of the RFA have been met.

138. The RFA allows up to six proximity points for Transit Services. It specifically provides:

> Up to three Public Bus Stops may be selected with a maximum of 2 points awarded for each one. Each

> Public Bus Stop must meet the definition of Public Bus Stop as defined in Exhibit B, using at least one unique bus route. Up to two of the selected Public Bus Stops may be Sister Stops that serves the same route, as defined in Exhibit B.

139. The RFA defines "Sister Stop" as:

> two bus stops that (i) individually, each meet the definition of Public Bus Stop, (ii) are separated by a street or intersection from each other, (iii) are within 0.2 miles of each other, (iv) serve at least one of the same bus routes, and (v) the buses travel in different directions.

140. The Bembridge Application listed two Public Bus Stops, the definition of which is set forth at Finding of Fact 107 above. Based on the Transit Service Scoring Chart, Bembridge received a total of 1.0 Proximity Point for Transit Services for its two Public Bus Stops.

141. Numerous questions were asked at the hearing about whether Bembridge's identified bus stops were "Sister Stops" as defined in the RFA, and the evidence on that point was not definitive. However, whether they are Sister Stops is irrelevant because each stop identified by Bembridge independently met the definition of "Public Bus Stop" in the RFA and was therefore eligible for Transit Proximity Points.

142. Bella Vista has failed to demonstrate that Florida Housing's preliminary determination of eligibility and selection for funding was contrary to the applicable rules, statutes, policies, or specifications of the RFA or was clearly erroneous, contrary to competition, arbitrary, or capricious.

CONCLUSIONS OF LAW

143. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1) and (3), Fla. Stat.

144. All parties have standing to challenge Florida Housing's scoring and review decisions.

145. This is a competitive procurement protest proceeding and as such is governed by section 120.57(3)(f), which provides as follows, in pertinent part:

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency action. In a competitive-procurement protest, other than a rejection of all bids, proposals, or replies, the administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or all solicitation specifications. The standard of proof for such proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious....

146. Pursuant to section 120.57(3)(f), the burden of proof rests with Petitioners as the parties opposing the proposed agency action. *See State Contracting and Eng'g Corp. v. Dep't of Transp*., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Petitioners must prove by a preponderance of the evidence that Florida Housing's proposed actions are arbitrary, capricious, or beyond the scope of Florida Housing's discretion as a state agency. *Dep't of Transp. v. Groves-Watkins Constructors*, 530 So. 2d 912, 913-14 (Fla. 1988); *Dep't of Transp. v. J.W.C. Co*., 396 So. 2d 778, 787 (Fla. 1st DCA 1981). *See also* § 120.57(1)(j), Fla. Stat.

147. The First District Court of Appeal has interpreted the process set forth in section 120.57(3)(f) as follows:

> A bid protest before a state agency is governed by the Administrative Procedure Act. Section 120.57(3), Florida Statutes (Supp. 1996) provides that if a bid protest involves a disputed issue of material fact, the agency shall refer the matter to the Division of Administrative Hearings. The administrative law judge must then conduct a de novo hearing on the protest. *See* § 120.57(3)(f), Fla.

> Stat. (Supp. 1996). In this context, the phrase "de novo hearing" is used to describe a form of intra-agency review. The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency. *See Intercontinental Properties, Inc. v. Department of Health and Rehabilitative Services*, 606 So. 2d 380 (Fla. 3d DCA 1992) (interpreting the phrase "de novo hearing" as it was used in bid protest proceedings before the 1996 revision of the Administrative Procedure Act).

State Contracting and Eng'g Corp., 709 So. 2d at 609.

148. The ultimate issue in this proceeding is "whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or the bid or proposal specifications." In addition to proving that Florida Housing breached this statutory standard of conduct, Petitioners also must establish that Florida Housing's violation was either clearly erroneous, contrary to competition, arbitrary, or capricious. § 120.57(3)(f), Fla. Stat.

149. The First District Court of Appeal has described the "clearly erroneous" standard as meaning that an agency's interpretation of law will be upheld "if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." *Colbert v. Dep't of Health,* 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004) (citations omitted); *see also Anderson v. Bessemer City*, 470 U.S. 564, 573-74, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518, 528 (1985)("Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").

150. An agency decision is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been stated to be:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for the [public] at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

Harry Pepper & Assoc., Inc. v. City of Cape Coral, 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977)(*quoting Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931)).

151. An agency action is capricious if the agency takes the action without thought or reason or irrationally. An agency action is arbitrary if it is not supported by facts or logic. *See Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978).

152. To determine whether an agency acted in an arbitrary or capricious manner, it must be determined "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Ent. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989).

153. However, if a decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *Dravo Basic Materials Co. v. Dep't of Transp.*, 602 So. 2d 632 n.3 (Fla. 2d DCA 1992).

THE BERKELEY APPLICATION

154. Florida Housing determined that the Berkeley Application was ineligible for an award of funding for three reasons: 1) the Authorized Principal Representative listed was not disclosed on the Principal Disclosure form; 2) the Applicant Certification and Acknowledgement form was not

signed by the Authorized Principal Representative; and 3) the Site Control Certification was not signed by the Authorized Principal Representative. The naming of an Authorized Principal Representative, and the signing of the two named forms by the Authorized Principal Representative, were mandatory eligibility items.

155. Berkeley conceded that it erred in naming the wrong person as its Authorized Principal Representative, and that the other errors cascaded from that initial mistake.

156. Berkeley contends that Florida Housing's decision not to waive the error as a minor irregularity was clearly erroneous and an abuse of discretion.

157. Rule 67-60.008, set out in full at Finding of Fact 33 above, gives Florida Housing the discretion to waive minor irregularities. It does not require Florida Housing to waive a minor irregularity.

158. 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. However, if a deviation would result in a change in points, Florida Housing will not waive the deviation as minor because it would give an applicant a competitive advantage. *Redding Development Partners, LLC, v. Fla. Hous. Fin. Corp.,* DOAH Case No. 16-1137BID (Fla. DOAH April 19, 2016; Final Order May 12, 2016); *Heritage at Pompano Hous. Partners, Ltd. v. Fla. Hous. Fin. Corp.,* DOAH Case No. 14-1361 BID (Fla. DOAH June 10, 2014; Final Order June 13, 2014); *Capital Grove Limited Partnership v. Fla. Hous. Fin. Corp.,* DOAH Case No. 15-2386BID (Fla. DOAH Aug. 3, 2015; Final Order Aug. 17, 2015).

159. In *St. Elizabeth Gardens v. Florida Housing Finance Corporation*, DOAH Case No. 16-4133BID (Fla. DOAH Oct. 18, 2016; Final Order Oct. 28, 2016), the petitioners alleged that while certain letters submitted with their applications were outdated, these errors should be waived as minor irregularities. ALJ Chisenhall rejected this argument and discussed the effect

that accepting this argument could have on the integrity of Florida Housing programs:

> 47. Furthermore, [then-Director of Multifamily Programs] Mr. [Kenneth] Reecy testified that excusing Woodcliff, Colonial, and St. Johns' noncompliance could lead to FHFC excusing all deviations from all other date requirements in future RFAs. In other words, applicants could essentially rewrite those portions of the RFA, and that would be an unreasonable result.
> 48. Excusing the noncompliance of Woodcliff, Colonial, and St. Johns could lead to a "slippery slope" in which any shelf-life requirement has no meaning. The letters utilized by Woodcliff, Colonial, and St. Johns were slightly more than six months old. But, exactly when would a letter become too old to satisfy the "shelf life" requirement? If three weeks can be excused today, will four weeks be excused next year?

160. Consistent with this "slippery slope" analysis, ALJ Mary Li Creasy in *Warley Park, Ltd. v. Florida Housing Finance Corporation,* DOAH Case No. 17-3996BID (Fla. DOAH Oct. 19, 2017; Final Order Dec. 8, 2017), pointed out that Florida Housing's precedents demonstrate that it places a high priority on establishing a "bright line" for applicants:

> 72. More importantly, the interest of Florida Housing in maintaining the credibility and integrity of its bidding process requires that it enforce the "Mandatory Item" when no prospective vendor has contested its use via a challenge to the RFA specifications. *See Consultech of Jacksonville, Inc. v. Dep't of Health*, 876 So. 2d 731, 734 (Fla. 1st DCA 2004)(vendor waived right to challenge agency's weighting of cost proposals by failing to timely file a specifications protest); *Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569, 572 (Fla. 4th DCA 1998)(by failing to timely file specifications protest, vendor waived right to challenge evaluation criteria in its award challenge).
> 73. The need for these Mandatory Items is not

> ambiguous. Waiving such a specific Mandatory Item in the RFA would put it on a "slippery slope" in which any mandatory requirement might be considered waivable. *St. Elizabeth Gardens v. Fla. Hous. Fin. Corp*., Case No. 16-4133BID (Fla. DOAH Oct. 18, 2016), adopted in relevant part, Case No. 16-032BP (FHFC Oct. 28, 2016). As noted by the Administrative Law Judge in *JPM Outlook One Ltd. Partnership v. Florida Housing Finance Corp*., Case No. 17-2499BID (Fla. DOAH June 29, 2017)(Recommended Order):
>
> > [a]pplicants would be in doubt as to how strictly Florida Housing intends to interpret mandatory provisions in future RFAs. One bidder would naturally suspect favoritism when the agency waived mandatory specifications for another bidder, thus undermining public confidence in the integrity of the process. It would not be in the interest of Florida Housing or the public to intentionally introduce ambiguity into this clear RFA provision.

161. The application of these principles is obvious in the case of the Berkeley Application. Excusing Berkeley's noncompliance could start Florida Housing down the slippery slope in which "mandatory" requirements in RFAs cease to be mandatory. Applicants for future RFAs would have no idea whether "eligibility items" actually required compliance or whether the failure of their competitors to comply would lead to their ineligibility.

162. Berkeley's application contained conflicting information regarding the identity of its Authorized Principal Representative, which created uncertainty and ambiguity. Berkeley suggests that Florida Housing should resolve this ambiguity by attempting to intuit the applicant's true intention from the clues that Berkeley left in other portions of its application and from applications submitted in response to prior RFAs by the general developer

behind the single purpose Berkeley entity. This exercise would require Florida Housing to ignore the mandatory language of the RFA requiring the certification forms to be signed by the Authorized Principal Representative identified in the application, as well as the language in the RFA requiring that the Authorized Principal Representative identified in the application to be listed on the Principal Disclosure Form. It would also constitute Florida Housing's giving an advantage to a frequent applicant that a first-time applicant could not possibly enjoy. Florida Housing reasonably declines to ignore the plain requirements of the RFA's eligibility items and its own past practices as to restricting review to the four corners of an application.

163. Berkeley contends that waiving its error would be no different than Florida Housing's waiving Bembridge's minor irregularity of submitting four Community Services when the RFA instructed the applicants to submit three. This contention is without merit. The submission of Community Services items was optional for the applicants, not a mandatory eligibility item. The RFA did not instruct the applicants that their applications could be rejected for mistakes in submitting Community Services items.

164. Finally, Florida Housing was able to waive Bembridge's minor irregularity by merely ignoring the surplus information that Bembridge provided. Florida Housing could have chosen other ways of crediting the applicants for three of the four items they submitted, but the important consideration is that the method chosen was reasonable and applied to all the applicants who made the mistake. In order to waive what Berkeley contends was a minor irregularity, Florida Housing would have had to step in and rewrite the Berkeley Application to name the Authorized Principal Representative that Florida Housing could only guess Berkeley intended.

165. Florida Housing articulated several cogent reasons why identification of the Authorized Principal Representative was important to the scoring processes of Florida Housing, and why the noncompliance of Berkeley should not be waived as a minor irregularity. Berkeley has failed to demonstrate

that Florida Housing's proposed action is contrary to statute, rule, policy, or the specifications of the RFA. Berkeley has also failed to demonstrate that Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

THE SIERRA BAY APPLICATION

166. Sierra Bay has stipulated that its application failed to comply with the requirements of the RFA regarding site control. Petitioners have demonstrated that Florida Housing's proposed action finding Sierra Bay eligible was clearly erroneous and contrary to the specifications of the RFA.

THE SOLARIS APPLICATION

167. The RFA set forth explicit requirements for applicants who chose to use Community Land Trusts as the ownership vehicle for their Priority I applications. Among the definitional requirements for a Community Land Trust was that it "must provide its Articles of Incorporation or Bylaws demonstrating it has existed since June 28, 2018 or earlier."

168. Solaris identified Residential Options as the Community Land Trust owner in its Priority I application. The facts adduced at hearing demonstrated that Residential Options did not meet the requirement that it existed as a Community Land Trust as of June 28, 2018.

169. Florida Housing and Solaris both contended that the RFA requirement could be satisfied by a demonstration that Residential Options existed in some form as of June 28, 2018. This reading contorts the plain language of the RFA quoted above and contradicts the testimony of Florida Housing's own witness Marisa Button. Ms. Button testified that the purpose of the date restriction was intended to confine participation in this RFA to Community Land Trusts that were in existence on June 28, 2018. Residential Options did not meet this requirement.

170. As the undersigned was careful to note in the above Findings of Fact, Ms. Soukup's testimony effectively refuted the contention by Northside that the merger of Residential Options and ROOF Housing Trust was purely opportunistic. However, Florida Housing did not have the benefit of Ms. Soukup's explanation at the time it made the eligibility determination. The sole means provided by the RFA for a Community Land Trust to establish its existence on the key date was via its Articles of Incorporation or Bylaws. The Articles of Incorporation submitted by Residential Options did not establish that it was a Community Land Trust as of June 28, 2018.

171. Florida Housing acted contrary to the provisions of the RFA in finding that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Deviating from the plain language of the RFA to find an application eligible for funding is contrary to competition. Other applicants presumably complied with the Community Land Trust provision and potential applicants may not have submitted applications because they could not know that Florida Housing did not intend to apply the Community Land Trust definition as written.

THE METRO GRANDE APPLICATION

172. The Metro Grande Application clearly did not comply with the RFA requirement that a deed or certificate of title be included with its site control documentation. However, the evidence demonstrated that no deed or certificate of title existed. It would have have been impossible for Metro Grande to comply literally with the RFA requirement. However, the evidence also showed that the Land Owner Certification Form submitted by Metro Grande provided the same evidence of ownership as would the deed or certificate of title.

173. Florida Housing determined that Metro Grande's error should be waived as a minor irregularity because it did not result in the omission of any

material information, did not create any uncertainty that the terms and requirements of the RFA have been met, and did not provide a competitive advantage for Metro Grande. This determination is reasonable under the circumstances. The intent of the deed or certificate of title requirement is to verify ownership of the parcel proposed for development. Florida Housing was able to verify the ownership of the property by information conveyed clearly within the four corners of the Metro Grande Application.

174. Petitioner Brisas failed to demonstrate that Florida Housing's proposed action finding the Metro Grande Application eligible is contrary to statute, rule, policy, or the specifications of the RFA. Petitioners have also failed to demonstrate that Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

THE BEACON PLACE APPLICATION

175. Beacon Place was required by the express terms of the RFA to achieve a Transit Point score of at least 2 to be eligible for funding. The Beacon Place Application listed a Public Bus Rapid Transit Stop to attain the required points. The evidence shows, however, that the identified Public Bus Rapid Transit Stop did not meet the RFA's definition because it did not have scheduled stops at least every 20 minutes between the times of 7:00 a.m. and 9:00 a.m. Florida Housing's interpretation of the phrase "every 20 minutes" was a reasonable interpretation of the terms of the RFA. Petitioners Brisas and Northside have demonstrated that Florida Housing's proposed action finding Beacon Place eligible was clearly erroneous and contrary to the specifications of the RFA.

THE EAST POINTE APPLICATION

176. Petitioner Bella Vista alleged that the Medical Facility identified by East Pointe did not meet the RFA's definition because it does not provide general medical treatment to children by both walk-in and appointment. The

evidence shows that Lee Community Healthcare's Dunbar office included in the East Pointe Application provides general medical treatment to any physically sick or injured person, child, or adult. Florida Housing found that the fact the Dunbar office does not treat children by appointment was not disqualifying. The RFA requires that the facility "treat patients by walk-in or by appointment." Florida Housing reasonably interpreted "or" in the disjunctive, meaning it was sufficient that the Dunbar office sees children on a walk-in basis. Bella Vista failed to demonstrate that Florida Housing's proposed action finding that East Pointe should receive the Proximity Funding Preference is contrary to statute, rule, policy, or the specifications of the RFA. Bella Vista also failed to demonstrate that Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

THE BEMBRIDGE APPLICATION

177. The RFA stated that applicants could "provide the location information and distances for three of the following four Community Services on which to base the Application's Community Services Score that for Community Services." Bembridge and several other applicants submitted four Community Services instead of the requested three. Petitioner Bella Vista argued that this error should have disqualified the Bembridge Application.

178. The Community Services portion of the RFA was optional to applicants. The RFA arguably did not specifically prohibit an applicant from listing four services and certainly did not warn applicants that listing more than three services would render the application ineligible. Considering the novelty of the "choose three out of four" format and the fact that several applicants made the same error, it was not unreasonable for Florida Housing to find the applications eligible for funding.

179. Florida Housing decided that the best way to score the applications would be to simply ignore the community service that was farthest from the proposed development. This was a reasonable decision. Scoring the three closest services and treating the farthest service as surplus information did not provide any competitive advantage to Bembridge. It received points for three services, as did the other applicants. Ms. Button made it clear that if one of the three closest services turned out to be problematic and non-scoring, Florida Housing would not then score the fourth, surplus service.

180. Unlike the Berkeley Application, the Bembridge Application presented no ambiguity. Bembridge met the terms of the RFA by submitting three community services. Florida Housing only had to determine what do to with the fourth community service. Florida Housing had ample precedent for disregarding extraneous information submitted by applicants rather than finding such surplus information a ground for disqualification. At worst, the submission of a fourth community service was a minor irregularity that Florida Housing was well within its discretionary authority to waive.

181. Bella Vista also alleged that the Public Bus Stops identified by Bembridge to receive Transit Services points do not meet the definition in the RFA. The evidence showed that both stops have the required number of scheduled buses and meet the definition of a Public Bus Stop. Bella Vista also suggested that these two stops may be Sister Stops as defined in the RFA. Florida Housing has acknowledged that they may be Sister Stops but concluded that it made no difference because each stop independently met the Public Bus Stop definition and was therefore eligible for Transit Proximity Points.

182. Bella Vista failed to demonstrate that Florida Housing's proposed action finding the Bembridge Application eligible is contrary to statute, rule, policy, or the specifications of the RFA. Bella Vista also failed to demonstrate that Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order as to RFA 2019-102 finding that:

1. The Berkeley Application is ineligible for funding;

2. The Sierra Bay Application is ineligible for funding;

3. The Solaris Application is ineligible for funding;

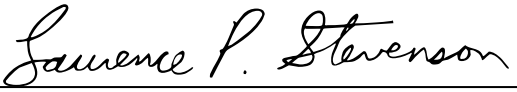
4. The Metro Grande Application is eligible for funding;

5. The Beacon Place Application is ineligible for funding;

6. The East Pointe Application is eligible for funding and entitled to the Proximity Funding Preference; and

7. The Bembridge Application is eligible for funding.

DONE AND ENTERED this 6th day of April, 2020, in Tallahassee, Leon County, Florida.



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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

BERKELEY LANDING, LTD. AND
BERKELEY LANDING DEVELOPER, LLC

Petitioner,

DOAH Case No. 20-0140BID
FHFC Case No. 2019-102BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO GRANDE III ASSOCIATES, LTD., NORTHSIDE PROPERTY II, LTD., HTG BELLA VISTA, LLC, and BRISAS DEL ESTE APARTMENTS LLC,

Intervenors.
_____/

BRISAS DEL ESTE APARTMENTS, LLC

Petitioner,

DOAH Case No. 20-0141BID
FHFC Case No. 2019-104BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO GRANDE III ASSOCIATES, LTD., and SIERRA BAY PARTNERS, LTD.,

Intervenors.
_____/

NORTHSIDE PROPERTY III, LTD.,

Petitioner,

DOAH Case No. 20-0142BID
FHFC Case No. 2019-106BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD., and SOLARIS APARTMENTS, LTD.,

Intervenors.
_____/

HOMESTEAD 26115, LLC,

Petitioner,

DOAH Case No. 20-0143BID
FHFC Case No. 2019-107BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.,

Intervenor.
_____/

HTG BELLA VISTA, LLC,

Petitioner,

DOAH Case No. 20-0145BID
FHFC Case No. 2019-109BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
and

SIERRA BAY PARTNERS, LTD., SOLARIS APARTMENTS, LTD., and MHP BEMBRIDGE, LLC.,

Intervenors.
_____/

SOLARIS APARTMENTS, LTD.
EXCEPTIONS TO RECOMMENDED ORDER

Solaris Apartments, Ltd. ("Solaris"), by and through its undersigned counsel and pursuant to section 120.57(1)(k), Florida Statutes, and rule 28-106.217, Florida Administrative Code, files these Exceptions to the Recommended Order in the above-styled matter, and says:

INTRODUCTION

This is not the typical case in which one applicant discovered a defect in another application that was not apparent to Florida Housing. Instead, this is a case in which, with all due respect, the ALJ overstepped his bounds by substituting his interpretation of the RFA for the perfectly reasonable and appropriate interpretation of the RFA by the Florida Housing staff and as testified to by Marisa Button at hearing based on the documentation in the application. That is not the role of the ALJ.

Through these Exceptions, Solaris is asking the Board to support staff's application of the RFA. As Ms. Button testified, the Solaris application met both the letter and spirit of the RFA as

it related to the community land trust issue discussed below. Staff consistently applied the RFA but that would be upset if this Recommended Order is adopted as written. For the reasons set forth below, Solaris urges the Board to accept Exceptions 1 and 3; 2 and 3; or 1, 2 and 3 and issue a Final Order deeming the Solaris application eligible for funding.

STANDARD OF REVIEW

These Exceptions are filed with the understanding that, at this stage, Florida Housing Finance Corporation ("Corporation" or "Florida Housing") is not free to re-weigh the evidence or to reject findings of fact unless there is no competent, substantial evidence supporting the finding of fact. See Heifetz v. Dep't of Bus. & Prof'l Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); Schumacker v. Dep't of Bus. & Prof'l Regulation, 611 So. 2d 75 (Fla. 4th DCA 1982). However, whether a statement is a finding of fact or conclusion of law is not determined by labels or its characterization in the Recommended Order. Rather, it is determined by the true nature and substance of the determination or ruling. See J.J. Taylor Companies v. Dep't of Bus. & Prof'l Regulation, 724 So. 2d 192, 193 (Fla. 1st DCA 1999); Battaglia Prop. v. Land & Water Adjudicatory Comm'n, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

Findings of fact may include "ultimate facts," "evidentiary facts," or mixed questions of law and fact. "[U]ltimate facts are those 'necessary to determine issues in [a] case' or the 'final facts' derived from the 'evidentiary facts supporting them.'" Costin v. Fla. A&M Univ. Bd. of Trustees, 972 So. 2d 1084, 1086 (Fla. 5th DCA 2008) (citing cases).

> There is a fundamental difference between the deference an agency must accord to findings of evidentiary fact and findings of ultimate fact infused with policy considerations. "Matters which are susceptible of ordinary methods of proof, such as determining the credibility of witnesses or the weight to accord evidence, are factual matters to be determined by the hearing officer. On the other hand, matters infused with overriding policy considerations are left to agency discretion."

Cyriacks Envtl. Consulting Serv., Inc. v. Dep't of Transportation, DOAH Case Nos. 16-0769 and 16-3530, 2017 WL 392830 (F.O. Jan. 24, 2017) (quoting Baptist Hosp., Inc. v. Dep't of Health & Rehab. Serv., 500 So.2d 620, 623 (Fla. 1st DCA 1986)).

In any event, there must be some competent substantial evidence to support each finding of fact that the Corporation is being asked to adopt. See Fla. Stat. § 120.57(1)(l). "Competent, substantial evidence is such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred or such evidence as is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." Bill Salter Advertising, Inc. v. Dep't of Transportation, 974 So. 2d 548, 550-51 (Fla. 1st DCA 2008) (internal citations and quotations omitted).

It is also important to remember that it is the burden of the challengers to satisfy the higher standards applicable to bid protest proceedings. This competitive-procurement protest is governed by rule 67-60.009, Florida Administrative Code, and section 120.57(3)(f), Florida Statutes. Section 120.57(3)(f) provides in pertinent part:

> . . . [T]he burden of proof shall rest with the party protesting the proposed agency action . . . . [T]he administrative law judge shall conduct a de novo proceeding to determine whether the agency's proposed action is contrary to the agency's governing statutes, the agency's rules or policies, or 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.

Fla. Stat. § 120.57(3)(f).

Stated differently, the challengers must prove not only that Florida Housing breached a statutory standard of conduct but also that the breach was clearly erroneous, contrary to competition, arbitrary, or capricious. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). This means an agency's interpretation of law will be

upheld "if the agency's construction falls within the permissible range of interpretations." Colbert v. Dep't of Health, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004) (internal citations omitted); see also Care Access PSN, LLC v. Agency for Health Care Admin., Case No. 13-4113BID, at 16 (DOAH Jan. 2, 2014).

Florida Housing is free to interpret statutes and administrative rules over which it has substantive jurisdiction and to reject or modify erroneous conclusions of law over which it has substantive jurisdiction. See Fla. Stat. § 120.57(1)(1). As long as Florida Housing states with particularity the reasons for rejecting an ALJ's conclusion of law and finds that its substituted conclusion is as reasonable, or more reasonable, Florida Housing is not bound by the ALJ's conclusions of law. See Fla. Stat. § 120.57(1)(l); see also Harloff v. City of Sarasota, 575 So. 2d 1324, 1328 (Fla. 2d DCA 1991), review denied, 583 So. 2d 1035 (Fla. 1991). The interpretation and application of the specifications of the RFA are within the purview of Florida Housing, and Florida Housing is not required to defer to the ALJ in these areas. See Winters v. Fla. Bd. of Regents, 834 So. 2d 243, 250 (Fla. 2d DCA 2003).

EXCEPTIONS

Exception Number One

Solaris takes Exception to Findings of Fact 76, 79 and 81 and Conclusions of Law 168-171. The fundamental error in the Recommended Order is that the ALJ substituted his interpretation of the RFA for that of Marisa Button and the staff of Florida Housing who developed and are charged with the interpretation and application of the RFA. Residential Options of Florida, Inc. was the Community Land Trust identified in the Solaris application.

The RFA provided as follows:

> If the Community Land Trust is the Land Owner, the Community Land Trust must demonstrate that it qualifies as a Community Land Trust by providing the following as **Attachment 2**:
>
> • The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating it has existed since June 28, 2018 or earlier and that a purpose of the Community Land Trust is to provide or preserve affordable housing; and
>
> • The Community Land Trust must provide a list that meets one of the following criteria to demonstrate experience of the Community Land Trust with owning property: (i) at least two parcels of land that the Community Land Trust currently owns; or (ii) one parcel of land that the Community Land Trust owns, consisting of a number of units that equals or exceeds at least 25 percent of the units in the proposed Development.

Although drafted as two "bullet points," Florida Housing reasonably interpreted the specification to require the submission of documents demonstrating three independent criteria. RFA 2019-102 framed criteria one in the past tense but criteria two and three in the present tense.

(a) First, the submission of articles of incorporation or bylaws for the organization identified as a Community Land Trust demonstrating that the organization existed on or before June 28, 2018. T. at 84. It was uncontested that Residential Options satisfied the first requirement—that it existed as of June 28, 2018.

(b) Second, the submission of articles of incorporation or bylaws for the organization identified as a Community Land Trust demonstrating that a purpose of the organization was to provide or preserve affordable housing before the Application Deadline. Ms. Button explained:

> Q. And you now believe that the articles of incorporation did not need to say on June 28, 2018; that a purpose of the organization or entity was to preserve or provide affordable housing; is that correct?
> A. Correct. I think that the -- I interpret this bullet point to say that it had to exist -- the CLT had to exist [before June 28, 2018] . . . .

> Q. But it [the organization's purpose] didn't have to be in the articles of incorporation as of the June 28, 2018, deadline?
> A. Correct."

Joint Ex. 15 at 109; see also T. at 86.

(c) Third, the submission of a list of two or more parcels of land owned by the organization identified as a Community Land Trust before the Application Deadline. While contested, the ALJ was satisfied that this criterion was met based on the interpretation by Florida Housing.

The error by the ALJ was that he conflated the first and second provisions whereas Ms. Button and the staff did not interpret the RFA to be read in that manner.

The uncontroverted evidence was that prior to the Application Deadline, Residential Options had Amended and Restated Articles of Incorporation that included the "magic words" regarding the purpose of the entity to provide affordable housing as follows:

> This shall include the purpose of empowering individuals with intellectual and developmental disabilities to successfully obtain and maintain affordable and inclusive housing of their choice and to provide affordable housing and preserve the affordability of housing for low-income or moderate income people, including people with disabilities, in perpetuity.

Joint Ex. 11 at 37-38 (emphasis added).

After reviewing the Solaris application, Ms. Button testified that the foregoing documents satisfied all submission criteria on page 9 of RFA 2019-102:

> Q. I'd like to talk about the criteria on Page 9 again.
> A. Okay.
> Q. And as I look at them, I actually see three different criteria; is that correct?
> There's two bullet points . . . but the first bullet point requires articles or bylaws demonstrating that it existed by that June 2018 date, and it requires articles and bylaws demonstrating its purpose is to provide affordable housing; is that correct?
> A. Yes.
> Q. Okay. And grammatically that [June 28, 2018] date -- that deadline, does that not modify the first sentence -- the first phrase and not the second phrase?

A. Yes.
* * *
Q. So the original articles filed by Residential Options [in 2014].
A. Okay. I'm with you. Page 19 [page 50 of Joint Exhibit 11], yes.
Q. Okay. Would that satisfy the first criteria or phrase that it [Residential Options of Florida, Inc.] existed before the June 2018 date?
A. Yes.
Q. Okay. Now if you'll -- in that same packet, if you'll look at Page 6 [page 37 of Joint Exhibit 11].
A. Yes, I'm there.
Q. And these are [amended and restated] articles of incorporation of Residential Options of Florida, the same corporation.
And does it specify that a purpose of the Corporation is to provide and preserve affordable housing?
A. Yes.
Q. Okay. And is the date of this amended and restated articles before the application deadline?
A. It is.
* * *
A. I believe what you've shown me demonstrates that the first bullet point is met.
* * *
Q. Okay. So we just went through, and the first bullet point on Page 9, you said there are articles submitted with the application that satisfy it [Residential Options of Florida, Inc.] existed before the specified date, and that it had the requisite language [in its articles of incorporation] before the application deadline, which did not include that earlier June 2018 date?
A. Yes.
Q. Okay. And I believe earlier you also answered questions that the experience to [sic] property identified in the chart in the Solaris application also satisfied the experience requirements of that second prong [bullet point on page 9]?
A. Yes.
Q. Okay. So as I understand it, Page 9, those criteria are no longer an issue, at least not with Florida Housing?
A. Yes, that's correct.

Joint Ex. 15 at 97-100 (emphasis added).[1]

[1] Florida Housing consistently applied its interpretation of requirements related to Community Land Trust during scoring. The application submitted by Berkeley Landing, Ltd. identified a Community Land Trust, submitted articles of incorporation (without the "magic language") demonstrating it existed as of June 28, 2018, and submitted bylaws executed after June 28, 2018 with the RFA's "magic language." See Joint Ex. 6 at 25-26, 45-52. Although the application was ineligible for unrelated reasons discussed in the Recommended Order, Florida Housing determined that the application satisfied the Community Land Trust submission requirements. The Recommended Order would result in an inconsistent application of the RFA if adopted as written.

As noted above, unless the interpretation by Florida Housing of its own RFA is contrary to the RFA or arbitrary or capricious, the ALJ should follow the agency's lead. The ALJ did not do so. The interpretation of the RFA by Ms. Button and Florida Housing staff in a manner that ultimately rendered the Solaris application compliant with all three prongs of the RFA's submission requirement is a reasonable and appropriate interpretation. Florida Housing's interpretation had to be "in the ballpark" and it clearly was. The Board should support Florida Housing's interpretation of its own RFA.

The Recommended Order should be amended as follows:

~~76. However, the undersigned is less persuaded by the implications as to the intentions of Residential Options than by the contradictions between Florida Housing's statements of intent and its reading of the RFA in relation to the Solaris Application. The decision to find the Solaris Application eligible for funding founders on the first issue stated above: whether the RFA requires only that the Community Land Trust have been in existence in some form as of June 28, 2018, or whether it had to exist as a Community Land Trust as of that date.~~

79. Ms. Button's statement of intent is accepted as consistent with the plain language of the RFA: the date of June 28, 2018, excludes Community Land Trusts created subsequently. ~~It is inconsistent for Florida Housing to also read the RFA language to say that the qualifying entity need not have existed as a Community Land Trust prior to June 28, 2018. It would be arbitrary for Florida Housing to set a date for the creation of Community Land Trusts then turn around and find that the date does not apply to this particular Community Land Trust.~~

~~81. It was contrary to the provisions of the RFA for Florida Housing to find that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the *Community Land Trust* must demonstrate that it existed prior to June 28, 2018. Ms. Button's own testimony demonstrated that Florida Housing intended to exclude Community Land Trusts created after June 28, 2018. ROOF Housing Trust existed as a Community Land Trust in 2017, but ROOF Housing Trust was not the Community Land Trust named in the Solaris Application. Ms. Soukup's explanation of the circumstances showed that Residential Options was well intentioned~~

~~in its actions, but her explanation was not a part of the Solaris Application that was before Florida Housing's Review Committee.~~

~~168. Solaris identified Residential Options as the Community Land Trust owner in its Priority I application. The facts adduced at hearing demonstrated that Residential Options did not meet the requirement that it existed as a Community Land Trust as of June 28, 2018.~~

169. Florida Housing and Solaris both contended that the RFA's submission requirement could be satisfied by a demonstration that Residential Options existed in some form as of June 28, 2018 and had a purpose to preserve affordable housing by the application deadline. This reading ~~contorts~~is consistent with the plain language of the RFA quoted above. ~~and contradicts the testimony of Florida Housing's own witness Marisa Button. Ms. Button testified that the purpose of the date restriction was intended to confine participation in this RFA to Community Land Trusts that were in existence on June 28, 2018. Residential Options did not meet this requirement.~~

170. As the undersigned was careful to note in the above Findings of Fact, Ms. Soukup's testimony effectively refuted the contention by Northside that the merger of Residential Options and ROOF Housing Trust was purely opportunistic. ~~However, Florida Housing did not have the benefit of Ms. Soukup's explanation at the time it made the eligibility determination.~~ The sole means provided by the RFA for a Community Land Trust to establish its existence on the key dates was via its Articles of Incorporation or Bylaws. The Articles of Incorporation submitted by Residential Options did ~~not~~ establish that it met the requirements of the RFA. ~~was a Community Land Trust as of June 28, 2018.~~

~~171. Florida Housing acted contrary to the provisions of the RFA in finding that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Deviating from the plain language of the RFA to find an application eligible for funding is contrary to competition. Other applicants presumably complied with the Community Land Trust provision and potential applicants may not have submitted applications because they could not know that Florida Housing did not intend to apply the Community Land Trust definition as written.~~

Exception Number Two

Solaris takes Exception to Findings of Fact 75 and 80 and Conclusion of Law 170 and 171.

The Solaris application also included documents for ROOF Housing Trust, Inc. and its merger into Residential Options of Florida, Inc. Consideration of the merger of ROOF Housing Trust, Inc. into Residential Options of Florida, Inc. is an alternative means for the Solaris application to meet the requirements of the RFA.

The Solaris application included the Articles of Incorporation of ROOF Housing Trust, Inc. filed with the Florida Secretary of State on July 17, 2017 demonstrating that ROOF Housing Trust, Inc. existed before June 28, 2018 and that a purpose of ROOF Housing Trust, Inc. since its creation in 2017 was to provide affordable housing (e.g., the "magic words"):

> Said corporation is organized exclusively for charitable, religious, educational, and scientific purposes, including to acquire land to be held in perpetuity for the primary purpose of providing affordable housing for people with developmental disabilities, and including for other such purposes, the making of distributions to organizations that qualify as exempt organizations under section 501(c)(3) of the Internal Revenue Code, or the corresponding section of any future federal tax code.

Joint Ex. 11 at 52-53 (emphasis added); see also Joint Ex. 16 at 29-30, Depo. Ex. F.

ROOF Housing Trust, Inc. merged in its entirety into and became a part of Residential Options of Florida, Inc. The merger became effective on September 10, 2019. This was before the Application Deadline. The Articles of Merger (and attached Plan of Merger) demonstrated that Residential Options of Florida, Inc. was the surviving corporation of the merger and was included in the Solaris application. Joint Ex. 11 at 41-49.

As a matter of law, ROOF Housing Trust, Inc. ceased to exist as a separate entity because it merged into and became a part of Residential Options of Florida, Inc. See Fla. Stat. § 617.1106; see also Fla. Stat. § 607.1106. The Florida Supreme Court has described mergers as (i) the embodiment of the merged corporation in the surviving corporation, (ii) two rivers uniting and

continuing together but neither being annihilated, and (iii) simply the uniting of two corporations into a single corporate existence. Corp. Express Office Products, Inc. v. Phillips, 847 So 2d 406 (Fla. 2003); Celotex Corp. v. Pickett, 490 So. 2d 35 (Fla. 1986).

Therefore, all attributes of ROOF Housing Trust, Inc. when it existed separately before the merger (e.g. its qualifications as a Community Land Trust and organizational documents demonstrating its existence as of June 28, 2018 and containing the "magic words" required by the RFA) continued and were embodied by Residential Options of Florida, Inc. after the merger. As a matter of law, the two corporations were one and the same as of the Application Deadline, and the relevant documents were all contained in the Solaris application that satisfied the RFA's submission requirement.

The Recommended Order should be amended as follows:

> 75. ~~The problem is that~~While Ms. Soukup's explanation was not before the Review Committee when it evaluated the Solaris Application, it explained the documents that were in the application regarding the merger. ~~The only information about Residential Options that the Review Committee possessed was Attachment 2 of the Solaris Application. The dates of the merger documents and Amended Articles certainly give some credence to the suspicions voiced by Northside.~~
>
> 80. Ms. Soukup's testimony was that Residential Options and ROOF Housing Trust were effectively a single entity and that Residential Options was in fact operating as a community land trust prior to the September 10, 2019, merger. ~~However, Ms. Soukup's explanation was not before the Review Committee, which was limited to one means of ascertaining whether an entity was a Community Land Trust prior to June 28, 2018: the Articles of Incorporation or Bylaws. Residential Options's Original Articles included no language demonstrating that it was a Community Land Trust prior to the September 10, 2019, merger with ROOF Housing Trust and the filing of the Amended Articles on September 20, 2019. As set forth in the discussion of the Berkley Application above, Florida Housing is required to limit its inquiry to the four corners of an application.~~

170. As the undersigned was careful to note in the above Findings of Fact, Ms. Soukup's testimony effectively refuted the contention by Northside that the merger of Residential Options and ROOF Housing Trust was purely opportunistic. ~~However,~~ While Florida Housing did not have the benefit of Ms. Soukup's explanation at the time it made the eligibility determination her testimony explained the merger documentation that was included in the application. ~~The sole means provided by the RFA for a Community Land Trust to establish its existence on the key date was via its Articles of Incorporation or Bylaws.~~ The Articles of Incorporation submitted by Residential Options did ~~not~~ establish that it was a Community Land Trust as of June 28, 2018.

~~171. Florida Housing acted contrary to the provisions of the RFA in finding that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Deviating from the plain language of the RFA to find an application eligible for funding is contrary to competition. Other applicants presumably complied with the Community Land Trust provision and potential applicants may not have submitted applications because they could not know that Florida Housing did not intend to apply the Community Land Trust definition as written.~~

Exception Number Three

For the reasons set forth in Exception Number One and Two above, Solaris takes Exception to the Recommendation of the ALJ. That Recommendation should be revised as follows:

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Housing Finance Corporation enter a final order as to RFA 2019-102 finding that:

1. The Berkeley Application is ineligible for funding;

2. The Sierra Bay Application is ineligible for funding;

3. The Solaris Application is ~~in~~eligible for funding;

4. The Metro Grande Application is eligible for funding;

5. The Beacon Place Application is ineligible for funding;

6. The East Pointe Application is eligible for funding and entitled to the Proximity Funding Preference; and

7. The Bembridge Application is eligible for funding.

Dated this 9th day of April, 2020.

/s/ *Anthony L. Bajoczky, Jr.*
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CERTIFICATE OF SERVICE

I CERTIFY that this Notice was electronically filed with Corporation Clerk, Florida Housing Finance Corporation (CorporationClerk@floridahousing.org) on April 9, 2020, and that a copy was provided by eservice to the following:

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ATTORNEY

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BERKELEY LANDING, LTD. AND
BERKELEY LANDING DEVELOPER, LLC

Petitioner,

DOAH Case No. 20-0140BID
FHFC Case No. 2019-102BP

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO
GRANDE III ASSOCIATES, LTD.,
NORTHSIDE PROPERTY II, LTD., HTG
BELLA VISTA, LLC, and BRISAS DEL
ESTE APARTMENTS LLC,

Intervenors.
_____/

BRISAS DEL ESTE APARTMENTS, LLC

Petitioner,

DOAH Case No. 20-0141BID
FHFC Case No. 2019-104BP

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO
GRANDE III ASSOCIATES, LTD., and
SIERRA BAY PARTNERS, LTD.,

Intervenors.
_____/

NORTHSIDE PROPERTY III, LTD.,

Petitioner,

DOAH Case No. 20-0142BID
FHFC Case No. 2019-106BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD., and SOLARIS APARTMENTS, LTD.,

Intervenors.
_____/

HOMESTEAD 26115, LLC,

Petitioner,

DOAH Case No. 20-0143BID
FHFC Case No. 2019-107BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.,

Intervenor.
_____/

HTG BELLA VISTA, LLC,

Petitioner,

DOAH Case No. 20-0145BID
FHFC Case No. 2019-109BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
and

SIERRA BAY PARTNERS, LTD.,
SOLARIS APARTMENTS, LTD., and MHP
BEMBRIDGE, LLC.,

Intervenors.
_____/

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Florida Housing Finance Corporation, hereby submits these Exceptions to Recommended Order, pursuant to Rule 28-106.217(1), Fla. Admin. Code.

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

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

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

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

It is the job of the Administrative Law Judge ("the ALJ") to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. *Rogers v. Department of Health*, 920 So.2d 27 9Fla. 1st DCA 2005). *B.J. v. Department of Children and Family Services*, 983 So.2d 11 (Fla. 1st DCA 2008) "Competent substantial evidence," is defined as: "[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept

it as adequate to support the conclusion reached." *Dept. of Highway Safety and Motor Vehicles v. Wiggins,* 151 So.3d 457 (Fla. 1st DCA 2014), quoting *DeGroot v. Sheffield,* 95 So.2d 912, 916 (Fla.1957)

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

> The agency in its final order may reject or modify the *conclusions of law over which it has substantive jurisdiction* and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. *(Emphasis added)*

The Findings of Fact in the Recommended Order will be referenced as (FOF #). The Conclusions of Law in the Recommended Order will be referenced as (COL #). The transcript of the administrative hearing will be referenced as (T. pg. #).

Respondent's First Exception

Florida Housing takes exception to Findings of Fact 76, 79 and 80, and to Conclusions of Law 169 and 171, in which the ALJ incorrectly described Florida Housing's position regarding whether or not Residential Options was required to be a Community Land Trust as of June 28, 2018. The disputed statements are:

> FOF #76: "However, the undersigned is less persuaded by the implications as to the intentions of Residential Options than by the contradictions between Florida Housing's statements of intent and its reading of the RFA in relation to the Solaris Application. The decision to find the Solaris Application eligible for funding founders on the first issue state above: whether the RFA requires only that the Community Land Trust have been in existence in some form as of June 28, 2018, or whether it had to exist as a Community Land Trust as of that date.
>
> FOF #79: "It is inconsistent for Florida Housing to also read the RFA language to say that the qualifying entity need not have existed as a Community Land Trust prior to June 28, 2018. It would be arbitrary for Florida Housing to set

> a date for the creation of Community Land Trusts then turn around and find that the date does not apply to this particular Community Land Trust."
>
> FOF #81: "It was contrary to the provisions of the RFA for Florida Housing to find that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the *Community Land Trust* must demonstrate that it existed prior to June 28, 2018."
>
> COL #169: "Florida Housing and Solaris both contended that the RFA requirement could be satisfied by a demonstration that Residential Options existed in some form as of June 28, 2018. This reading contorts the plain language of the RFA quoted above and contradicts the testimony of Florida Housing's own witness Marisa Button."
>
> COL #171: "Florida Housing acted contrary to the provisions of the RFA in finding that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018."

RFA 2019-102 includes the following requirement: "The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating it has existed since June 28, 2018. . . ." Florida Housing's interpretation of this language, which was clearly set forth in the testimony of its Corporate Representative Marisa Button, in its position statement in the Joint Pre-Hearing Stipulation, and in its Proposed Recommended Order, is that the business entity must have been in existence as a Community Land Trust since June 28, 2018. The following excerpts demonstrate this position clearly.

> Florida Housing's PRO, at proposed finding of fact #47: "Florida Housing interprets the RFA as requiring that the business entity has been a Community Land Trust since June 28, 2018. (T. pg 84, 86; J-15 pg. 105)"
>
> Florida Housing's PRO at proposed finding of fact #50. "The real issue in this case is whether Residential Options of Florida met the definition of a Community Land Trust in the RFA as of June 28, 2018."
>
> Florida Housing's position statement in the Joint Pre-hearing Stipulation: "The primary issue is whether Residential Options of Florida, Inc., was actually a CLT on June 28, 2018."

> Testimony of Marisa Button, T. pp 85-86: "Q: When you say, 'they had existed,' do you interpret this to mean that whatever business entity it was that existed, had to be a Community Land Trust back as of June 28 of 2018? A: Well, yes."

> Deposition of Marisa Button, Joint Exhibit 15, pg 105. "Q: So it didn't just have to exist, it had to exist and meet the definition of a community land trust as of June 28th of 2018? A: Yes."

The ALJ even acknowledged Florida Housing's position in COL #169, noting that "Ms. Button testified that the purpose of the date restriction was intended to confine participation in this RFA to Community Land Trusts that were in existence on June 28, 2018." He then concluded, however, that the position he ascribes to Florida Housing "contradicts the testimony of Florida Housing's own witness Marisa Button." There is no explanation in the Recommended Order why the ALJ believed that Florida Housing's position was somehow contradictory to the position articulated by the Corporate Representative.

Findings of Fact #79 and #81 are not based upon competent substantial evidence and should therefore be rejected. Conclusions of Law #169 and #171 are actually either findings of fact not based upon competent substantial evidence, or are based solely upon findings of fact for which there is no competent substantial evidence, and should therefore be rejected.

Respondent's Second Exception

Florida Housing takes exception to Finding of Fact #80 and Conclusion of Law #170, in which the ALJ found that the only method authorized in the RFA for Residential Options to prove that it was a Community Land Trust as of June 28, 2018 was through its Articles of Incorporation or Bylaws. This finding is not based on competent substantial evidence, and the ALJ is substituting his interpretation of the RFA for that of Florida Housing. The disputed statements are:

> FOF #80: "However, Ms. Soukup's explanation was not before the Review Committee, which was limited to one means of ascertaining whether an entity was a Community Land Trust prior to June 28, 2018: the Articles of Incorporation or

> Bylaws. . . . As set forth in the discussion of the Berkeley Application above, Florida Housing is required to limit its inquiry to the four corners of the application."

> COL #170: "The sole means provided by the RFA for a Community Land Trust to establish its existence on the key date was via its Articles of Incorporation or Bylaws."

RFA 2109-102 includes the following requirement: "The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating it has existed since June 28, 2018 or earlier and that a purpose of the Community Land Trust is to provide or preserve affordable housing." Florida Housing's interpretation of this language was quite clear in its Proposed Recommended Order and in the testimony of its Corporate Representative: that the Articles or bylaws submitted with the application had to demonstrate existence since 2018, and had to show that the purpose of the Community Land Trust is currently to provide or preserve affordable housing. The following excerpts demonstrate this interpretation clearly:

> Florida Housing's PRO at proposed finding of fact #19: "Florida Housing does not interpret the RFA as requiring that these corporate documents have included language regarding affordable housing since June 28, 2018. (T. pg 86; J-15 pp 107, 109, 116)"

> Testimony of Marisa Button, T. pg. 86: "Q: So do you interpret this to mean that the Community Land Trust had to have in its Articles of Incorporation back in 2018, language demonstrating that its purpose was to provide or preserve affordable housing? A: As of the - - it is not an explicit requirement that the purpose of the Community Land Trust to provide or preserve affordable housing be demonstrated as of June 28th, 2018."

> Deposition of Marisa Button, Joint Exhibit 15, pg. 107: "Q: So it's possible that – well, is it possible that Residential Options, although it didn't address affordable housing in its articles of incorporation, could nonetheless have had its purpose to provide affordable housing back in 2018; and if it did and met the other requirements within the definition of a CLT, then you would consider that it was a community land trust back in 2018? A: Yes, that's correct."

> Deposition of Marisa Button, Joint Exhibit 15, pg. 109: "Q: And you now believe that the articles of incorporation did not need to say on June 28th, 2018, that a

> purpose of the organization or the entity was to preserve or provide affordable housing; is that correct? A: Correct"

It is well established that an agency's interpretation is entitled to great deference. *Dep't of Natural Res. v. Wingfield Dev. Co.*, 581 So. 2d 193 (Fla. 1st DCA 1991) (only upon a determination that an agency's interpretation is clearly erroneous will such an interpretation be overturned); *see also State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998); *Humana, Inc. v. Dep't of Health and Rehab. Serv.*, 492 So. 2d 388, 392 (Fla. 4th DCA 1986); *Colbert v. Dep't of Health*, 890 So. 2d 1165 (Fla. 1st DCA 2004). While Florida Housing's interpretation of the language of the RFA was not the only possible one, it was at least a reasonable interpretation. It was also the only interpretation supported by competent substantial evidence.

Finding of Fact #80 is not based upon competent substantial evidence and should therefore be rejected. Conclusion of Law #170 is unreasonable and is contrary to both the evidence and Florida Housing's clearly enunciated interpretation and should therefore be rejected.

Respondent's Third Exception

Florida Housing takes exception to Findings of Fact #60, #75, #78, #80, and #81, in which the ALJ found that Florida Housing should not have considered the testimony of Ms. Soukup because it was not included in the application filed by Solaris. The disputed statements are:

> FOF #60: "Residential Options did not have a stated purpose of providing or preserving affordable housing prior to its merger with ROOF Housing Trust, at least no such purpose as could be gleaned from the four corners of the Solaris Application."

> FOF #75. "The problem is that Ms. Soukup's explanation was not before the Review Committee when it evaluated the Solaris Application. The only information about Residential Options that the Review Committee possessed was Attachment 2 of the Solaris Application."

> FOF #78. "The Solaris Application shows that Residential Options existed prior to June 28, 2018, but *not* as a Community Land Trust."

> FOF #80. "Ms. Soukup's testimony was that Residential Options and ROOF Housing Trust were effectively a single entity and that Residential Options was in fact operating as a community land trust prior to the September 10, 2019 merger. However, Ms. Soukup's explanation was not before the Review Committee, which was limited to one means of ascertaining whether an entity was a Community Land Trust prior to June 28, 2018: the Articles of Incorporation or Bylaws."
>
> FOF #81. "Ms. Soukup's explanation of the circumstances showed that Residential Options was well intentioned in its actions, but her explanation was not a part of the Solaris Application that was before Florida Housing's Review Committee."

While it is certainly true as a general proposition that an application is reviewed based solely on what is submitted, and that an applicant may not amend or supplement its application after it has been submitted, that applies only when certain information is specifically required by the application. For example, this RFA requires that the applicant include articles of incorporation showing that the Community Land Trust was in existence as of 2018. If an applicant failed to include such articles, it would not be allowed to prove the existence of such articles during an administrative proceeding.

However, in this case the RFA required that Residential Options demonstrate that it had existed since 2018, and that its current purpose is to provide or preserve affordable housing, but it did not specifically require that Solaris prove that Residential Options met the definition of a Community Land Trust as of 2018. That is, while Residential Options had to be a Community Land Trust in 2018 in order to qualify, Solaris did not have to provide evidence in the application that it met the definition of a Community Land Trust. This is similar in concept to how Florida Housing treats many of the requirements in the RFA. For example, an applicant may have to identify a bus stop to be entitled to proximity points, but it is not required to include evidence in the application that the identified bus stop actually meets the relevant definition. If the applicant designates a bus stop, Florida Housing takes this at face value. (*see* transcript of hearing pg. 170).

It is then up to challengers to provide evidence that the identified stop does not meet the definition in the RFA, and applicants are then allowed to present additional evidence to defend the application.

The same is true in this case. Solaris was required to identify a Community Land Trust that had existed since 2018. It did so. The burden was then on the challengers pursuant to §120.57(3)(f), Fla. Stat., to demonstrate that the identified entity did not meet the definition of a Community Land Trust, after which the applicant was allowed to present additional evidence to defend the application.

Although competitive solicitation/bid protest proceedings are described in §120.57(3)(f), Fla. Stat. as *de novo*, courts acknowledge that a different kind of *de novo* is contemplated than for other substantial interest proceedings under this section. Hearings under §120.57(3)(f), Fla. Stat. have been described as a "form of intra-agency review. The judge may receive evidence, as with any formal hearing under §120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting & Engineering Corp. v. Dep't of Transportation*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

Accordingly, competitive bid protest proceedings such as the instant case remain *de novo* in the sense that the Administrative Law Judge is not confined to a record review of the information before Florida Housing. Instead, a new evidentiary record is developed in the informal hearing for the purpose of evaluating the proposed agency action. *See Intercontinental Properties, Inc. v. State Dep't of Health and Rehabilitative Services*, 606 So.2d 380 (Fla. 1st DCA 1992); *Sunshine Towing @ Broward, Inc., v. Department of Transportation*, DOAH Case No. 10-0134BID (Final Order May 7, 2010).

Findings of Fact #60, #75, #78, #80, and #81 are not based upon competent substantial evidence, and are in fact more akin to incorrect interpretations of law. They should therefore be rejected.

Respondent's Fourth Exception

Florida Housing takes exception to Findings of Fact #59 and #78 and Conclusion of Law #168, in which the ALJ concluded that Residential Options was not a Community Land Trust as of June 28, 2018. The disputed statements are:

> FOF #59: "The Community Land Trust named in the Solaris Application, Residential Options, existed prior to June 28, 2018, but not as a Community Land Trust."
>
> FOF #78: "The Solaris Application shows that Residential Options existed prior to June 28, 2018, but *not* as a Community Land Trust. Residential Options did not become a Community Land Trust until it completed its merger with ROOF Housing Trust and filed the Amended Articles on September 20, 2019."
>
> FOF #168: "The facts adduced at hearing demonstrated that Residential Options did not meet the requirement that it existed as a Community Land Trust as of June 28, 2018."

The only apparent basis for these findings is that the ALJ concluded that the testimony of Ms. Soukup and Ms. Button, while credible, could not be considered by Florida Housing, and that Residential Options was not a Community Land Trust because its articles of incorporation from 2017 did not include the necessary language. As noted above, both of these conclusions are incorrect and cannot form the basis for the disputed statements above.

Ms. Button testified repeatedly that after she had considered all of the evidence, exhibits, and arguments, that it was still her opinion that Residential Options of Florida met the definition of a Community Land Trust in the RFA as of June 28, 2018. (T. pp 112, 104, 99, 88) The ALJ found that ROOF Housing Trust was a Community Land Trust in 2017 (FOF #81); that Residential Options and ROOF Housing Trust were effectively and functionally a single entity (FOF #71, 80),

and that Residential Options acted as a de facto Community Land Trust (FOF #70). These statements alone suggest that but for the erroneous interpretations of law and of the RFA noted above, the ALJ would have found that Residential Options met the definition of a Community Land Trust. However, it is not necessary to speculate, because in this case the burden was on the challengers to demonstrate that Residential Options was not a Community Land Trust in 2018, and that Florida Housing's initial determination that the Solaris application was eligible was "contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation specifications." (§120.57(3)(f), Fla. Stat.) No such evidence was presented, and absent such, Solaris was under no obligation to prove that its application was correctly judged eligible.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors accept the arguments presented in Respondent's Exception, reject or amend the ALJ's Findings of Fact #59, #60, #75, #78, #79, #80, and #81 and Conclusions of Law #168, #170, and #171 as summarized below, and issue a Final Order accordingly.

a. Amend the third sentence of FOF #59: The Community Land Trust named in the Solaris Application, Residential Options, existed prior to June 28, 2018 ~~but not~~ as a Community Land Trust.

b. Delete the second sentence of FOF #60.

c. Delete the first two sentences of FOF #75

d. Amend the second sentence of FOF #78: The Solaris Application shows that Residential Options existed prior to June 28, 2018, <u>although the Articles attached to the Application did not demonstrate that it was not</u> ~~but *not* as~~ a Community Land Trust <u>as of that date</u>. <u>The Articles did not demonstrate that</u> Residential Options <u>was</u> ~~did not~~

~~become~~ a Community Land Trust until it completed its merger with ROOF Housing Trust and filed the Amended Articles on September 20, 2019.

e. Delete the second two sentences of FOF #79.

f. Delete the second and fourth sentences of FOF #80.

g. Delete all of FOF #81, replace with: <u>While the Articles of Incorporation submitted with the Solaris Application were not sufficient to demonstrate that Residential Options was a Community Land Trust as of June 28, 2018, this was not a specific requirement of the RFA. Both Ms. Soukup and Ms. Button offered credible testimony that Residential Options did meet the definition of a Community Land Trust in the RFA as of June 28, 2018. Petitioners have failed to demonstrate that Florida Housing's determination that the Solaris application should be found eligible for funding was contrary to Florida Housing's governing statutes, rules or policies, or the solicitation specifications.</u>

h. Amend the second sentence of COL #168: The facts adduced at hearing demonstrated that Residential Options did ~~not~~ meet the requirement that it existed as a Community Land Trust as of June 28, 2018.

i. Amend COL #169: ~~Florida Housing and Solaris both contended that the RFA requirement could be satisfied by a demonstration that Residential Options existed in some form as of June 28, 2018. This reading contorts the plain language of the RFA quoted above and contradicts the testimony of Florida Housing's own witness Marisa Button.~~ Ms. Button testified that the purpose of the date restriction was intended to confine participation in this RFA to Community Land Trusts that were in existence on

June 28, 2018. Residential Options met ~~did not meet~~ this requirement, or at least there was insufficient evidence to demonstrate that it did not.

j. Delete the third sentence of COL #170.

k. Delete COL #171, replace with: Florida Housing's interpretation of the language of the RFA was clearly articulated to require an Applicant listing a Community Land Trust to include with the application evidence that the entity was in existence as of June 28, 2018; that its Articles of Incorporation or Bylaws demonstrate that its purpose is currently to provide or preserve affordable housing; and that it currently owns at least two parcels of land. Florida Housing also interprets the RFA to mean that the entity that was in existence as of June 28, 2018 had to be a Community Land Trust as of that date, but that there is no specific requirement in the RFA that the Applicant submit evidence in the application to prove this. While certainly not the only possible way to interpret the RFA, this is at least a reasonable interpretation, and as such it is inappropriate for an ALJ to overturn it or substitute his or her own interpretation. The evidence is sufficient to demonstrate that Residential Options met the definition of a Community Land Trust as of June 28, 2018, and no credible contrary evidence was received. Petitioners have failed to demonstrate that Florida Housing's initial determination of eligibility is contrary to statute, rule, policy, or the specifications of the RFA. Petitioners have also failed to demonstrate that Florida Housing's proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

Respectfully submitted this 9th day of April, 2020.

/s/ Chris McGuire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail this 9th day of April, 2020 to the following:

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/s/ Chris McGuire
Chris McGuire

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

BERKELEY LANDING, LTD. AND
BERKELEY LANDING DEVELOPER, LLC

Petitioner,

DOAH Case No. 20-0140BID
FHFC Case No. 2019-102BP

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO
GRANDE III ASSOCIATES, LTD.,
NORTHSIDE PROPERTY II, LTD., HTG
BELLA VISTA, LLC, and BRISAS DEL
ESTE APARTMENTS LLC,

Intervenors.
_____/

BRISAS DEL ESTE APARTMENTS, LLC

Petitioner,

DOAH Case No. 20-0141BID
FHFC Case No. 2019-104BP

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

SOLARIS APARTMENTS, LTD., METRO
GRANDE III ASSOCIATES, LTD., and
SIERRA BAY PARTNERS, LTD.,

Intervenors.
_____/

NORTHSIDE PROPERTY III, LTD.,

Petitioner,

DOAH Case No. 20-0142BID
FHFC Case No. 2019-106BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD., and SOLARIS APARTMENTS, LTD.,

Intervenors.
_____/

HOMESTEAD 26115, LLC,

Petitioner,

DOAH Case No. 20-0143BID
FHFC Case No. 2019-107BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

SIERRA BAY PARTNERS, LTD.,

Intervenor.
_____/

HTG BELLA VISTA, LLC,

Petitioner,

DOAH Case No. 20-0145BID
FHFC Case No. 2019-109BP

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
and

SIERRA BAY PARTNERS, LTD.,
SOLARIS APARTMENTS, LTD., and MHP
BEMBRIDGE, LLC.,

Intervenors.
_____/

PETITIONER NORTHSIDE PROPERTY III, LTD.'S RESPONSES TO EXCEPTIONS FILED BY RESPONDENT FLORIDA HOUSING FINANCE CORPORATION AND INTERVENOR SOLARIS APARTMENTS, LTD.

Petitioner Northside Property III, Ltd. ("Northside") responds to the Exceptions to Recommended Order filed by Respondent Florida Housing Finance Corporation ("Florida Housing") and Intervenor Solaris Apartments, Ltd. ("Solaris") as follows:

I. Introduction

Following a formal hearing, a Recommended Order was issued in this case by the Administrative Law Judge ("ALJ") on April 6, 2020, recommending that a Final Order be entered. The ALJ recommended that the Application submitted by Solaris be found ineligible for funding in essence because it failed to include an acceptable Community Land Trust ("CLT") as required by Request for Applications ("RFA") 2019-102. On April 9, 2020, Solaris and Florida Housing filed exceptions to the ALJ's Recommended Order. The Exceptions challenge the ALJ's Findings of Fact numbered 59, 60, 75, 76, and 78-81, and Conclusions of Law numbered 168-171.[1] The ALJ's Findings of Fact are supported by competent substantial evidence, and the Conclusions of Law are consistent with the RFA, Florida law, and both Florida Housing's rules and its policies

[1] Solaris challenges Findings of Fact numbered 75, 76, 79, 80, and 81 and Conclusions of Law numbered 168-171. Florida Housing challenges Findings of Fact numbered 59, 60, 75, 76, 78, 79, 80, and 81 and Conclusions of Law numbered 168-171.

concerning the scoring of Applications submitted in response to RFAs. The Exceptions should be denied by this Board and the Recommended Order adopted in full.

II. Standard of Review

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

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

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

Florida Housing may not modify or reject an a ALJ's finding of fact unless it determines from a review of the entire record - and states with particularity in the Final Order - that the finding of fact was not based on competent substantial evidence, or that the proceedings on which the finding was based did not comply with the essential requirements of law. *Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs.,* 500 So. 2d 620, 623 (Fla. 1st DCA 1986) ("It is well settled that an agency may not reject a hearing officer's factual findings on the conclusionary ground that they are not supported by competent substantial evidence, without offering specific reasons for such rejection.") "Competent" evidence is evidence that is sufficiently relevant and material that

a reasonable mind would accept it as adequate to support the conclusion reached. *Schrimsher v. Sch. Bd. of Palm Beach Cnty.,* 694 So. 2d 856, 861 (Fla. 4th DCA 1997) (citing *DeGroot v. Sheffield,* 95 So. 2d 912, 916 (Fla. 1957)). "Substantial" evidence is evidence from which the fact at issue can be reasonably inferred, and which a reasonable mind would accept as adequate to support a conclusion. *Id.* Thus, the term "substantial evidence" does not relate to the quality, character, convincing power, probative value, or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its admissibility under legal rules of evidence. *Scholastic Book Fair, Inc. v. Unemployment Appeals Comm'n,* 671 So. 2d 287, 289 n.3 (Fla. 5th DCA 1996).

As part of its analysis, Florida Housing may not reweigh the evidence. Similarly, Florida Housing may not substitute its findings simply because it would have determined factual questions differently. *F.U.S.A., FTP-NEA v. Hillsborough Cnty. Coli.,* 440 So. 2d 593, 595-96 (Fla. 1st DCA 1983); *see also Resnick v. Flagler Cnty. Sch. Bd.,* 46 So. 3d 1110, 1112-13 (Fla. 5th DCA 2010) (agency may not reject findings of fact supported by competent substantial evidence even if alternate findings were also supported by competent substantial evidence); *Heifetz v. Dep't of Bus. Regulation, Div. of Alcoholic Bevs. & Tobacco,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other."). "Factual inferences are to be drawn by the [ALJ] as a trier of fact." *Id.* at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of facts. §120.57(1)(1), Fla. Stat. Therefore, if the record contains any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual finding in preparing its Final Order. *See, e.g., Walker v. Bd. of Prof Eng'rs,* 946 So. 2d 604 (Fla. 1st DCA 2006); *Fla. Dep't of Corr. v. Bradley,* 510 So.

2d 1122, 1123 (Fla. 1st DCA 1987). In addition, an agency has no authority to make independent or supplemental findings of fact. *See, e.g., North Port, Fla. v. Consol. Minerals,* 645 So. 2d 485, 487 (Fla. 2d DCA 1994) ("The agency's scope of review of the facts is limited to ascertaining whether the hearing officer's factual findings are supported by competent substantial evidence. The agency makes no factual findings in reviewing the recommended order.") (emphasis added, citations omitted).

Florida Housing may modify or reject conclusions of law over which it has substantive jurisdiction. § 120.57(1)(1), Fla. Stat.; *see generally Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 2001). When modifying or rejecting conclusions of law, Florida Housing must state with particularity the reasons for the modification or rejection, and must make a finding that its substituted conclusion of law is as or more reasonable then the conclusion modified or rejected. § 120.57(1)(1)

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

"Ultimate facts" are "those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other and are the final resulting effects which are reached by the process of logical reasoning from the evidentiary facts." *Feldman v. Dep't of*

Transp., 389 So. 2d 692 , 694 (Fla. 4th DCA 1980). The question whether the facts establish a violation of a rule or statute, for example, involves a question of ultimate fact that Florida Housing may not reject without adequate explanation. *See Goin v. Comm'n on Ethics,* 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

III. Response

The job of the Board at this juncture of the proceeding is not one of reweighing the evidence or testimony, but is instead limited to determining whether the questioned Findings of Fact are supported by competent substantial evidence. The challenged findings here are all supported in the record by competent substantial evidence, and neither Florida Housing nor Solaris can argue otherwise.

In their Exceptions, Solaris and Florida Housing take issue with the ALJ's Finding of Facts numbered 59, 60, 75, 76 and 78-81, which provide as follows:

> 59. The petitioners contesting the Solaris Application raise several issues. The first issue is whether the RFA requires only that the entity named as the Community Land Trust have been in existence in some form as of June 28, 2018, or whether the entity had to exist as a Community Land Trust as of that date. The Community Land Trust named in the Solaris Application, Residential Options, existed prior to June 28, 2018, but not as a Community Land Trust.
>
> 60. Residential Options did not have a stated purpose of providing or preserving affordable housing prior to its merger with ROOF Housing Trust, at least no such purpose as could be gleaned from the four corners of the Solaris Application.
>
> 75. The problem is that Ms. Soukup's explanation was not before the Review Committee when it evaluated the Solaris Application. The only information about Residential Options that the Review Committee possessed was Attachment 2 of the Solaris Application. The dates of the merger documents and Amended Articles certainly give some credence to the suspicions voiced by Northside.
>
> 76. However, the undersigned is less persuaded by the implications as to the intentions of Residential Options than by the contradictions between Florida Housing's statements of intent and its reading of the RFA in relation to the Solaris Application. The decision to find the Solaris Application eligible for funding founders on the first issue stated above: whether

the RFA requires only that the Community Land Trust have been in existence in some form as of June 28, 2018, or whether it had to exist as a Community Land Trust as of that date.

78. The RFA states: "The Community Land Trust must provide its Articles of Incorporation or Bylaws demonstrating that it has existed since June 28, 2018 or earlier…" The Solaris Application shows that Residential Options existed prior to June 28, 2018, but not as a Community Land Trust. Residential Options did not become a Community Land Trust until it completed its merger with ROOF Housing Trust and filed the Amended Articles on September 20, 2019.

79. Ms. Button's statement of intent is accepted as consistent with the plain language of the RFA: the date of June 28, 2018, excludes Community Land Trusts created subsequently. It is inconsistent for Florida Housing to also read the RFA language to say that the qualifying entity need not have existed as a Community Land Trust prior to June 28, 2018. It would be arbitrary for Florida Housing to set a date for the creation of Community Land Trusts then turn around and find that the date does not apply to this particular Community Land Trust.

80. Ms. Soukup's testimony was that Residential Options and ROOF Housing Trust were effectively a single entity and that Residential Options was in fact operating as a community land trust prior to the September 10, 2019, merger. However, Ms. Soukup's explanation was not before the Review Committee, which was limited to one means of ascertaining whether an entity was a Community Land Trust prior to June 28, 2018: the Articles of Incorporation or Bylaws. Residential Options's Original Articles included no language demonstrating that it was a Community Land Trust prior to the September 10, 2019, merger with ROOF Housing Trust and the filing of the 26 Amended Articles on September 20, 2019. As set forth in the discussion of the Berkley Application above, Florida Housing is required to limit its inquiry to the four corners of an application.[2]

81. It was contrary to the provisions of the RFA for Florida Housing to find that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Ms. Button's own testimony demonstrated that Florida Housing intended to exclude

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[2] The ALJ's footnote 3 in Paragraph 80 was not challenged as part of either Solaris' or Florida Housing's Exceptions. Notably, however, that footnote rebuts Solaris' argument in its Exception Number Two relating to the effect of the merger of Residential Options of Florida and ROOF Housing Trust. The footnote provides:

> This finding also disposes of Solaris's arguments regarding the legal effect of corporate mergers. The RFA provided one simple way of demonstrating whether an entity was a Community Land Trust as of June 28, 2018. Florida Housing's Review Committee could not be expected to delve into the complexities of corporate mergers to answer this uncomplicated question.

Recommended Order, ¶ 80, n.3.

> Community Land Trusts created after June 28, 2018. ROOF Housing Trust existed as a Community Land Trust in 2017, but ROOF Housing Trust was not the Community Land Trust named in the Solaris Application. Ms. Soukup's explanation of the circumstances showed that Residential Options was well intentioned in its actions, but her explanation was not a part of the Solaris Application that was before Florida Housing's Review Committee.

In essence, the ALJ in these findings explains his factual determinations as to why the CLT selected by Solaris fails to meet the language of the RFA. In their Exceptions, both Solaris and Florida Housing simply attempt to reargue their case to the Board seeking a different outcome. The ALJ reasonably finds that the CLT identified by Solaris failed to meet the requirements of the RFA because it simply failed to indicate that as of June 28, 2018, its purpose was to "provide or preserve affordable housing." The competent substantial evidence to support these facts includes the documents submitted by Solaris in its Application at Attachment 2. While Solaris and Florida Housing may not like these facts, it is not the Board's job now to substitute these findings simply because Solaris and Florida Housing would have determined the factual issues differently. Thus, Solaris' and Florida Housing's exceptions should be rejected.

Solaris' and Florida Housing's Exceptions next take issue with Conclusions of Law numbers 168-171, which provide:

> 168. Solaris identified Residential Options as the Community Land Trust owner in its Priority I application. The facts adduced at hearing demonstrated that Residential Options did not meet the requirement that it existed as a Community Land Trust as of June 28, 2018.
>
> 169. Florida Housing and Solaris both contended that the RFA requirement could be satisfied by a demonstration that Residential Options existed in some form as of June 28, 2018. This reading contorts the plain language of the RFA quoted above and contradicts the testimony of Florida Housing's own witness Marisa Button. Ms. Button testified that the purpose of the date restriction was intended to confine participation in this RFA to Community Land Trusts that were in existence on June 28, 2018. Residential Options did not meet this requirement.

170. As the undersigned was careful to note in the above Findings of Fact, Ms. Soukup's testimony effectively refuted the contention by Northside that the merger of Residential Options and ROOF Housing Trust was purely opportunistic. However, Florida Housing did not have the benefit of Ms. Soukup's explanation at the time it made the eligibility determination. The sole means provided by the RFA for a Community Land Trust to establish its existence on the key date was via its Articles of Incorporation or Bylaws. The Articles of Incorporation submitted by Residential Options did not establish that it was a Community Land Trust as of June 28, 2018.

171. Florida Housing acted contrary to the provisions of the RFA in finding that Residential Options's mere existence as a legal entity prior to June 28, 2018, satisfied the requirement that the Community Land Trust must demonstrate that it existed prior to June 28, 2018. Deviating from the plain language of the RFA to find an application eligible for funding is contrary to competition. Other applicants presumably complied with the Community Land Trust provision and potential applicants may not have submitted applications because they could not know that Florida Housing did not intend to apply the Community Land Trust definition as written.

In these conclusions of law, the ALJ, based on the plain reading of the RFA, concludes that a CLT must have existed as of June 28, 2018, and must have shown as of that date that its purpose was to provide or preserve affordable housing. As the ALJ points out, there was testimony that may have led to the conclusion that the identified Solaris CLT met this requirement. This additional evidence was not, however, before Florida Housing during the scoring and review process. Simply put, Solaris did not provide documentation in its Application that satisfied the clear requirements of the RFA. The mere fact that Solaris' CLT may have intended to someday meet the requirements, or the fact that Florida Housing may have wanted the identified Solaris CLT to be acceptable, cannot negate the plain language and requirements of the RFA. Solaris' and Florida Housing's Exceptions should be rejected, and a Final Order accepting the Recommended Order in full should be entered.

Respectfully submitted,

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I CERTIFY that the foregoing document was electronically filed with the Corporation Clerk, Florida Housing Finance Corporation, at corporationclerk@floridahousing.com on April 13, 2020, and that a copy was provided by eservice to the following:

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