STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WHFT LL WORKFORCE, LTD., and WHFT LL WORKFORCE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BDG FERN GROVE PHASE TWO, LP, and RPV PARCEL D, LP,

Intervenors.

DOAH Case No. 25-1110BID
FHFC Case No. 2025-006BP

MHP PASCO III, LLC

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HORIZONS OWNER, LLC,

Intervenor.

DOAH Case No. 25-1112BID
FHFC Case No. 2025-009BP

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
DATE: 6/13/2025

CARVER THEATER, LTD.,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HELM'S BAY LANDING WORKFORCE, LTD.,
and HORIZONS OWNER, LLC,

Intervenors.
_____/

DOAH Case No. 25-1114BID
FHFC Case No. 2025-012BP

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on June 13, 2025. Petitioners, WHFT LL Workforce, Ltd., and WHFT LL Workforce Developer, LLC ("WHFT" also known as "Catchlight"), MHP Pasco III, LLC ("MHP"), and Carver Theater, Ltd. ("Carver") (collectively, "Petitioners"), and Intervenors, BDG Fern Grove Phase Two, LP ("Fern Grove"), RPV Parcel D, LP ("RPV"), Horizons Owner, LLC ("Horizons"), and Helm's Bay Landing Workforce, Ltd. ("Helm's Bay") (collectively, "Intervenors") were applicants under Request for Applications 2024-213 SAIL Funding for Live Local Mixed Income, Mixed-Use, and Urban Infill Developments (the "RFA"). The matter for consideration before this Board is a

Recommended Order issued pursuant to Sections 120.57(1) and 120.57(3), F.S., the exceptions to the Recommended Order, and the responses thereto.

On January 24, 2025, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to ten applicants, including Fern Grove and RPV. WHFT, MHP, Carver, Horizons, and Helm's Bay were all deemed eligible for funding but were not selected for funding according to the funding selection process outlined in the RFA. The Petitioners timely filed notices of intent to protest, followed by formal written protests, and the Intervenors timely intervened.

Florida Housing referred the matters to the Division of Administrative Hearings ("DOAH"), where the matters were consolidated into a single hearing. Administrative Law Judge ("ALJ") James H. Peterson, III, was assigned to conduct the final hearing. Prior to the final hearing, the parties stipulated that Horizons, Helm's Bay, and Uptown Toho Partners, Ltd. ("Toho") were ineligible to receive funding.

The hearing was conducted as scheduled on March 25, 2025, and March 26, 2025. The contested issues are briefly summarized below:

a) WHFT challenged Fern Grove's eligibility, claiming Fern Grove failed to meet the RFA's developer and management company experience requirements.

b) Fern Grove challenged WHFT's eligibility, claiming WHFT i) failed to provide an eligible cost pro forma; and/or ii) failed to demonstrate site control.

After consideration of the oral and documentary evidence presented at the hearing, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 9, 2025. The ALJ found

1) Fern Grove is ineligible for funding under the RFA due to its failure to meet the RFA's developer and management experience requirements;

2) WHFT remained eligible for funding under the RFA; and

3) Based upon the prior stipulations between the parties, Horizons, Helm's Bay, and Toho are ineligible to receive funding.

The ALJ recommended that Florida Housing enter a final order finding: (i) the applications of Fern Grove, Horizons, Helms Bay, and Toho are ineligible for funding under the RFA; and (ii) WHFT's application is eligible to receive funding under the RFA. A true and correct copy of the Recommended Order is attached as "**Exhibit A.**"

On May 19, 2025, Fern Grove filed exceptions to the ALJ's Recommended Order, a copy of which is attached as **"Exhibit B."** Florida Housing and WHFT filed responses to Fern Grove's exceptions on May 29, 2025, copies of which are attached as "**Exhibit C**" and "**Exhibit D,**" respectively.

Ruling on Fern Grove's Exception No. 1

1. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 35, 44, 57, 99, 108, 109, 110, and 111 of the Recommended Order.

2. The Board finds that it has substantive jurisdiction over any conclusions of law presented in the referenced paragraphs within the Recommended Order.

3. After a review of the record, the Board finds that the Findings of Fact in the referenced paragraphs are supported by competent substantial evidence and the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

4. The Board rejects Fern Grove's Exception No. 1.

Ruling on Fern Grove's Exception No. 2

5. Fern Grove filed an exception to the Findings of Fact in paragraph 42 of the Recommended Order.

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

7. The Board rejects Fern Grove's Exception No. 2.

Ruling on Fern Grove's Exception No. 3

8. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 43, 44, 45, 46, 53, 54, 56, 99, 108, 109, 110, 111, 112, 113, 114, 115, and 118 of the Recommended Order.

9. The Board finds that it has substantive jurisdiction over any conclusions of law presented in the referenced paragraphs within the Recommended Order.

10. After a review of the record, the Board finds that the Findings of Fact in the referenced paragraphs are supported by competent substantial evidence and the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

11. The Board rejects Fern Grove's Exception No. 3.

Ruling on Fern Grove's Exception No. 4

12. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 56, 57, and 115 of the Recommended Order.

13. The Board finds that it has substantive jurisdiction over the conclusions of law presented in the referenced paragraphs within the Recommended Order.

14. After a review of the record, the Board finds that the Findings of Fact in the referenced paragraphs are supported by competent substantial evidence and the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

15. The Board rejects Fern Grove's Exception No. 4.

Ruling on Fern Grove's Exception No. 5

16. Fern Grove filed an exception to the Findings of Fact in paragraph 58 of the Recommended Order.

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

18. The Board rejects Fern Grove's Exception No. 5.

Ruling on Fern Grove's Exception No. 6

19. Fern Grove filed exceptions to Findings of Fact in paragraph 59.

20. The Board finds that it has substantive jurisdiction over any conclusions of law presented within the referenced paragraph within the Recommended Order.

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

22. The Board rejects Fern Grove's Exception No. 6.

Ruling on Fern Grove's Exception No. 7

23. Fern Grove filed exceptions to the Conclusions of Law in paragraph 118.

24. The Board finds that it has substantive jurisdiction over the conclusions of law presented in the referenced paragraph within the Recommended Order.

25. After a review of the record, the Board finds that the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

26. The Board rejects Fern Grove's Exception No. 7.

Ruling on Fern Grove's Exception No. 8

27. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 71, 119, 120, 121, 122, 123, and 124 of the Recommended Order.

28. The Board finds that it has substantive jurisdiction over the conclusions of law presented in the referenced paragraphs within the Recommended Order.

29. After a review of the record, the Board finds that the Findings of Fact in the referenced paragraphs are supported by competent substantial evidence and the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

30. The Board rejects Fern Grove's Exception No. 8.

Ruling on Fern Grove's Exception No. 9

31. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 77 and 127 of the Recommended Order.

32. The Board finds that it has substantive jurisdiction over the conclusions of law presented in the referenced paragraphs within the Recommended Order.

33. After a review of the record, the Board finds that the Findings of Fact in the referenced paragraphs are supported by competent substantial evidence and the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

34. The Board rejects Fern Grove's Exception No. 9.

Ruling on Fern Grove's Exception No. 10

35. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 78, 79, 128, and 129 of the Recommended Order and requests Florida Housing remand the matter back to DOAH for further findings and conclusions.

36. The Board finds that it has substantive jurisdiction over the conclusions of law presented in the referenced paragraphs within the Recommended Order.

37. After a review of the record, the Board finds that the Findings of Fact in the referenced paragraphs are supported by competent substantial evidence and the Conclusions of Law in the referenced paragraphs are reasonable and supported by competent substantial evidence.

38. The Board rejects Fern Grove's Exception No. 10 and declines to remand the matter back to DOAH.

Ruling on Fern Grove's Exception No. 11

39. Fern Grove filed exceptions to the Findings of Fact and Conclusions of Law in paragraphs 83, 84, 130, 131, 132, 133, 134, and 135 of the Recommended Order.

40. The Board finds that it has substantive jurisdiction over the conclusions of law presented in the referenced paragraphs within the Recommended Order.

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

42. The Board rejects Fern Grove's Exception No. 11.

Ruling on the Recommended Order

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

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

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

ORDER

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

Fern Grove's Exceptions Nos. 1 through 11 are hereby rejected for the reasons set forth above. The Board adopts the Findings of Fact, Conclusions of Law, and Recommendations of the Recommended Order as Florida Housing's and incorporates them by reference as though fully set forth in this Order.

It is further **ORDERED** as to funding selection in RFA 2024-213:

A. Fern Grove's application number 2025-317BS is ineligible to receive funding under the RFA;

B. Horizons' application number 2025-303BS is ineligible to receive funding under the RFA;

C. Helm's Bay's application number 2025-333BS is ineligible to receive funding under the RFA;

D. Toho's application number 2025-355BS is ineligible to receive funding under the RFA; and,

E. WHFT's application number 2025-345BS is eligible for funding under the RFA.

DONE and ORDERED this 13th day of June, 2025.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chairperson

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

WHFT LL WORKFORCE, LTD. AND WHFT LL WORKFORCE DEVELOPER, LLC,

Petitioners,

vs. Case No. 25-1110BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BDG FERN GROVE PHASE TWO, LP, D/B/A FERN GROVE PHASE TWO, AND RPV PARCEL D, LP,

Intervenors.
_____/

MHP PASCO III, LLC,

Petitioner,

vs. Case No. 25-1112BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HORIZONS OWNER, LLC, AND RPV PARCEL D, LP,

Intervenors.
_____/

CARVER THEATER, LTD.,

Petitioner,

vs. Case No. 25-1114BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HELM'S BAY LANDING WORKFORCE, LTD., HORIZONS OWNER, LLC, AND RPV PARCEL D, LP,

Intervenors.
_____/

RECOMMENDED ORDER

An administrative hearing was held in the above-styled consolidated cases on March 25 and 26, 2025, via Zoom conference before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioners WHFT Workforce Ltd. and WHFT Workforce Developer, LLC (Catchlight or WHFT) (Case No. 25-1110BID) and Intervenor Helm's Bay Landing Workforce, Ltd. (Helm's Bay) (Case No. 25-1114BID):

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For Respondent Florida Housing Finance Corporation (Florida Housing):

Ethan Katz, Esquire
Rhonda DiVagno Morris, Esquire
Florida Housing Finance Corporation
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Tallahassee, Florida 32301

For Intervenor BDG Fern Grove Phase Two, LP d/b/a Fern Grove Phase Two (Fern Grove) (Case No. 25-1110BID) and Petitioner MHP Pasco III, LLC (MHP) (Case No. 25-1112BID):

Michael J. Glazer, Esquire
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Ausley McMullen
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For Petitioner Carver Theater, Ltd. (Carver) (Case No. 25-1114BID):

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Tallahassee, Florida 32301

For Intervenor RPV Parcel D, LP (RPV) (Case No. 25-1110BID):

Michael P. Donaldson, Esquire
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For Intervenor Horizons Owner, LLC (Horizon) (Case No. 25-1112BID):

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Tallahassee, Florida 32312

STATEMENT OF THE ISSUE

Whether Florida Housing's Notice of Intent to award funding pursuant to Request for Applications 2024-213, SAIL Funding for Live Local Mixed Income, Mixed-Use, and Urban Infill Developments (RFA), is contrary to its governing statutes, rules, or the RFA specifications.

PRELIMINARY STATEMENT

On November 20, 2024, Florida Housing issued the RFA. The RFA was modified on December 10, 2024. Applications were submitted in response to the RFA and received by December 20, 2024. Among 65 others, Catchlight[1] and Fern Grove timely submitted applications.

A Florida Housing review committee (Review Committee) reviewed the applications and made recommendations. On January 24, 2025, Florida Housing's Board of Directors (Board) adopted the Review Committee's recommendations and Florida Housing posted notice of its intended decisions to award funding to eight proposed affordable housing developments, including Fern Grove. Originally, there were seven Notices of Intent to Protest and Formal Written Protests and Petitions for Administrative Hearing (the Petitions) challenging the intended decisions. On February 25, 2025, Florida Housing referred the Petitions to DOAH where they were assigned DOAH Case Nos. 25-1109BID through 25-1115BID, consolidated, and scheduled for hearing. Among the filings, Fern Grove timely filed a Notice of Intervention and Appearance by a Specifically Named Person in Case No. 25-1110BID. RPV was also allowed to intervene in Case No. 25-1110BID, but took no position during the hearing.

[1] The applicant under the RFA is WHFT. However, throughout this proceeding, and in the Transcript, the parties referred to the applicant by the name of the proposed development, Catchlight. Therefore, for ease of reference, the applicant for Application 2025-345BS will be identified as Catchlight.

DOAH Case Nos. 25-1109BID, 25-1111BID, 25-1113BID, and 25-1115 were subsequently voluntarily dismissed, leaving the Petitions filed by Catchlight (Case No. 25-1110BID), MHP (Case No. 25-1112BID), and Carver (Case No. 1114BID) at issue. Because of stipulations between the parties, the claims in Case Nos. 25-1112BID and 25-1114BID were not actively litigated during the hearing, leaving the issues raised in Case No. 25-1110BID as the main focus of the hearing.

At the hearing, each of the parties presented the testimony of Melissa Levy, in her capacity as Director of Multifamily Development for Florida Housing. The parties also offered nine joint exhibits which were received into evidence as JT1 through JT9.

Catchlight offered the testimony of Lindsay Brooke Sammons (via deposition testimony), Ambar Velazquez (via deposition testimony), and Paula Rhodes (via deposition testimony, with deposition exhibits 1, 2, 3, 8, and 9 only). Catchlight's Exhibits 1 through 9 were received into evidence.

Fern Grove offered the testimony of Scott Zimmerman and Robert Von, some of each was proffered subject to objection by Catchlight and Florida Housing. Fern Grove also relied on the deposition testimonies of Paula Rhodes, Ambar Velazquez, and Lindsay Brooke Sammons. Fern Grove Exhibits 1, 5 through 9, 13, 16, and 17 were received into evidence. Fern Grove proffered Exhibits 2 through 4 and 10 through 12, subject to objections by Catchlight and Florida Housing. The parties each provided arguments within or attached to their respective proposed recommended orders addressing the objections to those exhibits and portions of Mr. Zimmerman and Mr. Von's testimonies.

The proceedings were recorded and a transcript was ordered. The parties were given 10 days from the filing of the transcript within which to file proposed recommended orders. The Transcripts of the hearing were filed on April 10, 2025, consisting of two Transcripts: the March 25, 2025, Transcript and the March 26, 2025, Transcript. Catchlight, Florida Housing, and Fern Grove timely submitted Proposed Recommended Orders on April 21, 2025, all three of which have been considered in preparing this Recommended Order.

FINDINGS OF FACT[2]

1. Petitioner, Catchlight, is an applicant under the RFA and was assigned application number 2025-345BS. Catchlight was deemed preliminarily eligible for consideration for funding, but was not selected for funding under the terms of the RFA.

2. Intervenor, Fern Grove, is an applicant in the RFA and was assigned application number 2025-317BS. Fern Grove was deemed eligible for funding and was preliminarily selected for funding under the terms of the RFA.

3. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes.[3] Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to section 420.5099, Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits.

4. Florida Housing is authorized to allocate state resources, such as State Apartment Incentive Loan (SAIL) funding, and low-income housing tax

[2] Where appropriate, stipulated facts from the parties' Joint Prehearing Stipulation have been incorporated into this Recommended Order.

[3] Unless the context of citations indicates otherwise, all references to Florida Statutes, the Florida Administrative Code, and federal law are to current versions.

credits by means of a request for proposal or other competitive solicitation under section 420.507(48). Florida Administrative Code Chapter 67-60 provides for challenges to the allocation of Florida Housing's competitive funding through the bid protest provisions of section 120.57(3), Florida Statutes.

5. The competitive application process commences with the issuance of a Request for Applications. As provided in rule 67-60.009(4), a Request for Applications is equivalent to a "request for proposal."

6. The RFA was issued on November 20, 2024, and modified on December 10, 2024, with responses due on or before 3:00 p.m., Eastern Time, on December 20, 2024 (the Application Deadline). No challenges were made to the terms or specifications of the RFA.

7. Through the RFA, Florida Housing expects to award an estimated $100,389,979 in SAIL funding and $1,629,260 in competitive housing tax credits.

8. Subsequent to issuance of the RFA but prior to submission of applications, Florida Housing published "Questions and Answers for RFA 2024-213."

9. Florida Housing received 65 applications in response to the RFA.

10. The Review Committee reviewed the applications and made recommendations to the Board. Each application was scored eligible or ineligible based upon certain enumerated eligibility items within the RFA. Only applications that were preliminarily determined to meet all of the eligibility items were deemed eligible for funding and considered for funding selection. A summary of the eligibility items is in section 5.A.1, beginning on page 76 of the RFA.

11. For most questions of eligibility, the information existing as of the Application Deadline is the snapshot in time that Florida Housing considers when ranking and scoring applications. During application review, the

Review Committee scored the applications based only on the information provided within the application.

12. All of the applications received were processed, preliminarily deemed eligible or ineligible, scored, ranked, and preliminarily selected for funding according to the terms of the RFA, chapters 67-48 and 67-60, and all applicable federal regulations.

13. The Review Committee found 57 applications eligible and eight applications ineligible for consideration for funding. The Review Committee developed charts listing its eligibility and funding recommendations to be presented to the Board.

14. On January 24, 2025, the Board met and considered the recommendations of the Review Committee. That same day, all applicants, including Petitioners and Intervenors, received notice that the Board had made its determinations regarding applicant eligibility and that certain eligible applicants were preliminarily selected for funding, subject to satisfactory completion of the credit underwriting process.

15. The January 24, 2025, notice was provided by posting two spreadsheets, one listing the Board-approved scoring results, and one identifying the applications Florida Housing proposed to fund, on the Florida Housing website, www.floridahousing.org. That posting announced Florida Housing's intention to preliminarily award funding to ten applicants, one of which was Fern Grove.

16. Petitioners timely filed Notices of Intent to Protest and Intervenors timely intervened.

17. Prior to the hearing, the parties stipulated to the ineligibility of three applications, i) Helm's Bay's application number 2025-333BS; ii) Horizons' application number 2025-303BS; and iii) Uptown Toho Partners, Ltd., application number 2025-355BS. The agreements by which each applicant conceded their eligibility were attached to the pre-hearing stipulation. The undersigned accepts those stipulations.

Fern Grove's Application

18. Fern Grove timely submitted a Priority I application for a new 129-unit mid-rise Mixed-Use Development named Fern Grove Phase Two, located in Orange County.

19. The Review Committee deemed the Fern Grove application eligible for funding and recommended to the Board that Fern Grove be selected for funding under the terms of the RFA. The Board preliminarily selected Fern Grove's application for funding, subject to successful completion of credit underwriting.

20. Catchlight challenges Fern Grove's eligibility to receive funding under the RFA. Specifically, Catchlight challenges whether Fern Grove satisfied the RFA's Developer and Management experience requirements, alleging that: i) neither of the two developments Fern Grove relies on for its Management Company experience, Providence Reserve Senior d/b/a Banyon Reserve Senior Apartments (Banyon Reserve) and Banyon Cove, meet the definition of a Mixed-Use Development; and ii) Parramore Oaks (Parramore), marked as a Mixed-Use Development in the Developer Experience section of Fern Groves application, does not meet the RFA's definition of a Mixed-Use Development.

21. After its review of Catchlight's petition and the evidence provided in this case, Florida Housing has come to agree with the allegations within Catchlight's petition that Florida Housing's decision to preliminarily award funding to Fern Grove was clearly erroneous and contrary to the terms of the RFA. Florida Housing's position in this proceeding is that Fern Grove should be deemed ineligible for funding.

22. To be eligible to receive funding under the terms of the RFA, an applicant must show, among other things, that the "Developer Experience Requirement[s are] met" and "Prior Management Company Experience requirement[s are] met." RFA at 77.

23. The RFA allows applicants to apply for funding as either a Mixed-Use Development, an Urban Infill Development, or both. Fern Grove applied for RFA funding as a Mixed-Use Development utilizing Mixed-Use Institutional Space as its nonresidential component.

24. The concept of a "Mixed-Use Development" is a creature of the Live Local Act enacted in 2023. §§ 420.50871 and 420.50872, Fla. Stat.

25. The RFA defines a "Mixed-Use Development" as

> A Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space non-residential component. The Mixed-Use Commercial Space and/or Mixed-Use Institutional Space must be Corporation-approved and cannot be used by an entity that is an Affiliate of any Principal of the Applicant or Developer, unless the entity meets the definition of Non-Profit and, as demonstrated by the IRS determination letter, has been in existence at least three years prior to the Application Deadline of this RFA.

RFA at 104-105.

26. The RFA further defines the term "Mixed Use Institutional Space" as

> Charitable, educational, healthcare services, civic (local government/state) *within a Development that is in operation at least 5 days a week.*

RFA at 105 (emphasis added).

27. The RFA defines the term "Mixed-Use Commercial Space" as

> Retail and/or office space within a Development that produces income for the Development that exceeds the operating expenses for the space.

RFA at 105.

28. Florida Housing takes the position that the intent behind these definitions is that there be "dedicated" space physically located in the development for commercial or institutional uses.

29. Melissa Levy, Florida Housing's Managing Director of Multifamily Development, explained, when applying as a Mixed-Use Development, the applicant must provide a letter of intent or memorandum of understanding (MOU) with its future service provider committing to a partnership that will incorporate the nonresidential use. Ms. Levy further explained that, in order to qualify for the subcategory of Mixed-Use Institutional Space, the MOU must include the proposed square footage of the space that the service provider will occupy and confirm that the Mixed-Use Institutional Space will be in operation at least five days a week.

30. Fern Grove argues that the requirement for "dedicated" space is not in the RFA although other places in the RFA call for "dedicated" spaces for other uses. Nevertheless, as part of its application, Fern Grove provided a Memorandum of Agreement leasing 1,000 square feet of its proposed development to Jewish Family Services for operation at least five days a week.

31. Consistent with Ms. Levy's explanation with regard to dedicated space, the RFA requires applicants to provide a written description providing:

> A description of the intended service(s) and the benefit to the intended residents or community through either employment opportunities or services offered must also be provided in the Application. Although *the Mixed-Use Commercial or Institutional Space must be located on the Development site*, the commercial or institutional component can be on a separate site that may or may not include residential units. In this event, the written description must state this and must also confirm that the distance between the site with the most units and the site with the commercial or institutional component is no more than 1/16 mile.
>
> NOTE: The Applicant understands that the Corporation will review the Mixed-Use Commercial Space and Mixed-Use Institutional Space to confirm that it meets the statutory and RFA requirements. If it does not meet the requirements, it may result in a consequence, including, but not limited to, de-

> obligation of award or limitation on future funding opportunities.
>
> There is a goal to fund at least one Mixed-Use Development.

RFA at 75 (emphasis added).

32. With regard to Developer Experience for a Mixed-Use Development applicant, the RFA specifically requires:

> If applying as a Mixed-Use Development, *at least one of the developments must meet the definition of a Mixed-Use Development*, and at least 50% of the total residential units in the development must be income and rent restricted at 80% AMI or below, which must be memorialized by a recorded Land Use Restriction Agreement, Extended Use Agreement, or other equivalent document.

RFA at 12 (emphasis added).

33. Similarly, to show Management Experience for Mixed-Use Development applicants, "one of the Developments that demonstrate the Management Company experience must also have met the definition of Mixed-Use Development." RFA at 19.

34. The RFA's definition of a Mixed-Use Development makes a distinction between the residential component and the nonresidential component of the Mixed-Use Development, stating, in relevant part, that a Mixed-Use Development is "[a] Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space, non-residential component… ." RFA at 104.

35. The residential component anticipated under the RFA consists of the residential units themselves and the supporting uses for those units, including the clubhouse, leasing offices, and common areas or other amenities. The nonresidential component is a separate space for the

Commercial or Institutional Use Space, apart from the residential component.

36. The RFA further defines two subcategories of Mixed-Use Developments: i) those with Mixed-Use Institutional Space and ii) Mixed-Use Commercial Space. Of particular relevance is the definition of "Mixed-Use Institutional Space" as "Charitable, educational, healthcare services, civic (local government/state) within a Development that is in operation at least 5 days a week." RFA at 104-105.

37. For its Management Experience requirement, Fern Grove identified two developments: i) Banyon Reserve; and ii) Banyon Cove. At both developments, the Treehouse Foundation, Inc. (Tree House), is the main service provider, providing some services to residents themselves and coordinating with outside organizations to bring in others.

38. Tree House is a nonprofit 501(c)(3) organization providing support to affordable housing communities across Florida. Tree House provides programming services and resources, but according to the deposition of Lindsay Sammons, the Executive Director of Tree House, these services are provided onsite sporadically and at varying intervals.

39. Ms. Sammons further testified that Treehouse is not in operation within the development at least five days a week. Ms. Sammons testified that Tree House operates primarily at its main office and provides services to Banyon Cove and Banyon Reserve primarily via website or telephone. When services are offered in person, the services are offered in the community's common spaces.

40. Scott Zimmerman, managing member of Banyon Development Group, confirmed in his testimony that Tree House Foundation is "[n]ot on site five days a week."

41. Tree House does not lease any space from either development, nor does it have a consistent or designated space for it to operate five days a week. Rather, any in-person services would be provided to residents in

Banyon Cove's or Banyon Reserve's general amenity spaces, like the computer room, kitchen, or clubhouse.

42. The services provided by Tree House are the types of institutional services contemplated by the RFA. However, the RFA already requires, as a condition to funding, that applicants provide certain services to its residents like financial management classes, employment assistance programs, health and wellness services, computer training classes, onsite daily activities and assistance with light housekeeping, grocery shopping, and laundry. None of the programs from Tree House for purposes of showing a Mixed-Use experience appear to go beyond those already required by the RFA.

43. Simply having services available online or at an off-site location does not rise to the level of meeting the RFA's experience requirements.

44. In addition, the evidence shows that when offered on-site, the Banyon Cove and Banyon Reserve services were not offered five days a week or in their own space within the development. Rather than provided in dedicated spaces, the services are provided in the community room/clubhouse (amenity) spaces. Both Banyon Cove and Banyon Reserve are senior communities required to have a community room/clubhouse (amongst other amenities) as a condition to their funding, and are considered part of the residential component of the developments. Those amenities do not meet the Mixed-Use requirement of "dedicated space."

45. In sum, Banyon Cove and Banyon Reserve fail to meet the Management Experience requirements of the RFA for a Mixed-Use Development. Under the terms of the RFA, this alone would be enough to render Fern Grove's application ineligible.

46. Similarly, Parramore, the only Development marked as a Mixed-Use Development in the Developer Experience section of Fern Groves' application, does not meet the definition of a Mixed-Use Development.

47. Paula Rhodes, CEO of Invictus Development, the Parramore Developer, testified in her deposition that Orlando Neighborhood

Improvement Corporation (ONIC) is the service provider for housing stability services at Parramore, and began providing services to the development around the 2021 timeframe.

48. According to Ambar Velazquez, Special Programs Manager of ONIC, ONIC offers two programs at Parramore: i) the housing stability program; and ii) the prodigy cultural arts program.

49. The housing stability program was offered from October of 2021 to February of 2023, 14 months or roughly 60 weeks. During that time, ONIC met with roughly 47 households. ONIC took most of those appointments at ONIC's main office, not at Parramore. When they were on-site, they met with residents in the community room or computer lab. Staff were generally available at ONIC's main office but not at the development. ONIC staff were not on-site 5 days a week for that program.

50. With regard to the prodigy cultural arts program, the program began in December 2023. The classes consist of an eight-week series that met only two days a week. There has been one block of 8-week classes since 2023 with several enrichment classes that would meet one day a week, the same day as the prodigy class. The classes meet in the development's community room, which is a common residential space.

51. Based on the dates provided by Ms. Velazquez, the housing stability program and the prodigy classes did not overlap.

52. Ms. Velazquez also mentioned a VITA tax service program, noting that it is advertised to Parramore residents, but the services are wholly provided off-site.

53. Similar to Banyon Cove and Banyon Reserve, the evidence shows that the Parramore services, when offered on-site, were not five days a week and not offered in their own space within the development, but merely in the common (amenity) space.

54. Simply having services available online or at an off-site location does not rise to the level of meeting the RFA's experience requirements. As the

Parramore services, when offered on-site, were never offered five days a week and were not offered in their own space within the development, the ONIC services cannot be considered a Mixed-Use Institutional Space, nonresidential component in compliance with the Mixed-Use Developer Experience requirement.

55. Fern Grove points out that the RFA provides:

> For purposes of this provision, completed development means (i) that the temporary or final certificate of occupancy has been issued for at least one unit in one of the residential apartment buildings and, *if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the nonresidential use, within the development*…

RFA at 15 (emphasis added).

56. However, none of the three developments offered as examples by Fern Grove -- Banyon Cove, Banyon Reserve, or Parramore Oaks -- has a space devoted to institutional use. Therefore, none of those developments has a certificate of occupancy specifically for the nonresidential use required of Mixed-Use Developments.

57. Ms. Levy credibly and persuasively testified that the referenced certificate of occupancy must be issued for the nonresidential use within the development, or under the Mixed-Use Development definition, the Mixed-Use Commercial Space and/or Mixed-Use Institutional Space nonresidential component. The common spaces, such as the clubhouse, leasing offices, and other amenities, are considered part of the residential uses. Therefore, certificates of occupancy issued for common community spaces would not count toward meeting this requirement.

58. Fern Grove also argues that Parramore contains a space that may become a future daycare. Parramore received its certificate of occupancy for that space along with the rest of the development in 2019, roughly 6 years ago, and has never leased the space. Furthermore, Fern Grove does not

attempt to rely on this space as Mixed-Use Commercial or Institutional Space to satisfy its Developer Experience requirement.

59. The competent substantial evidence shows that Fern Grove failed to meet the experience requirements of the RFA. As Florida Housing has now come to agree, based upon the evidence, Florida Housing's scoring decision that Fern Grove was eligible to receive funding was clearly erroneous and contrary to the terms of the RFA.

Catchlight's Application

60. Catchlight timely submitted a Priority I application for a new 84-unit mid-rise urban infill development named Catchlight Crossing Live Local Workforce, located in Orange County.

61. The Review Committee deemed Catchlight's application eligible for funding and determined Catchlight's application was a Tier 1 application. However, the Review Committee did not recommend to the Board that Catchlight be selected for funding.

62. As the Fern Grove application is ineligible, if the Catchlight application remains eligible as a Tier 1 application, the Catchlight application should be funded in accordance with the RFA's terms.

63. Fern Grove challenges Catchlight's eligibility as an applicant by alleging that Catchlight cannot rely on two funding sources listed in Catchlight's cost proforma (the Loan Financing Proposal from J.P. Morgan Chase, N.A. (Chase), and a commitment of self-sourced funding in its Self-Source Letter), and attacking the completeness of Catchlight's site control documentation.

Catchlight's Loan Financing Proposal and Self-Source Letter

64. In order to be eligible under the terms of the RFA, an applicant must show, among other things, a "Development Cost Pro Forma . . . showing sources that equal or exceed uses." RFA at 77.

65. As part of its Development Cost Proforma, Catchlight included $15,000,000 in First Mortgage Financing from a Regulated Mortgage Lender,

Chase, and a $7,630,256 self-funding loan as set forth in its Self-Source Letter.

66. With Regard to the Cost Pro Forma, the RFA states that an applicant must list all of its anticipated costs and its anticipated sources. Those sources must equal or exceed the uses (anticipated costs). In that regard, the RFA states:

> *All Applicants must complete the Development Cost Pro Forma listing the anticipated costs,* the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis *listing the anticipated sources* (both Corporation and non-Corporation funding). The sources must equal or exceed the uses. If a funding source is not considered, if the Applicant's funding Request Amount is adjusted downward, and/or if the anticipated costs or uses are adjusted upward, this may result in a funding shortfall. If the Application has a funding shortfall in either the Construction/Rehab and/or the Permanent Analysis of the Applicant's Development Cost Pro Forma, the amount of the adjustment(s), to the extent needed and possible, will be offset by increasing the deferred Developer Fee up to the maximum eligible amount as provided below. If it is demonstrated that an Applicant failed to disclose anticipated costs, the Applicant will be deemed ineligible if those undisclosed costs cause a funding shortfall.

RFA at 68-69 (emphasis added).

67. The RFA further provides that, "to be counted as a source on the Development Cost Pro Forma, provide documentation of all financing proposals from both the construction and the permanent lender(s)… " RFA at 65.

68. For Financing Proposals in particular, the RFA provides, whether the documentation is in the form of a commitment, proposal, term sheet, or letter of intent, each financing proposal shall contain:

> • Amount of the construction loan, if applicable;
> • Amount of the permanent loan, if applicable;
> • Specific reference to the Applicant as the borrower or direct recipient; and
> • Signature of lender.

RFA at 66.

69. As part of attachment 10 to its application, Catchlight provided a financing proposal in the form of a letter from Chase (Chase Letter). The parties stipulated, and there was no further dispute at hearing, that the Chase Letter meets the basic requirements of an eligible financing proposal under the RFA. The parties agree that the Chase Letter contains: 1) the amount of the proposed construction loan; 2) a specific reference to the Applicant as the borrower or direct recipient; and 3) the signature of the lender.

70. With regard to conditions found within financing proposals, the RFA contemplates and allows the financing proposals to contain certain conditions, i.e.:

> (e) The loan amount may be conditioned upon an appraisal or debt service coverage ratio or any other typical due diligence required during credit underwriting.
>
> (f) Financing proposals may be conditioned upon the Applicant receiving the funding from the Corporation for which it is applying.

RFA at 68.

71. As parties to the Chase letter, Catchlight and Chase are in the best position to determine the validity of the terms of the letter, and the anticipated amount of the loan. Under the terms of the Chase Letter, Catchlight will receive a $15,000,000 loan from Chase. There is no evidence that the Chase Letter has been invalidated by Chase or Catchlight.

72. Fern Grove also challenges Catchlight's cost pro forma relating to the $7,630,256 self-funding loan.

73. Under certain conditions, the RFA allows an applicant to self-source a portion of its development costs. For self-funding, the RFA specifically requires applicants to submit an executed Live Local Self-Sourced Financing Commitment Verification form as part of its application. The RFA lists the Live Local Self-Source Support Qualifications as follows:

> - The Application must be a Priority 1 Application.
> - The Application must be deemed a Tier 1 Application.
> - The Application must select New Construction as the Development Category.
> - The executed Live Local Self-Sourced Financing Commitment Verification form must be submitted as Attachment 10.
> - The funding must be from a Principal of the Applicant Entity and listed on the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 05-2019) provided in the Application.
> - During the credit underwriting process, the Applicant must demonstrate and maintain the Live Local self-sourced financial support in an amount equal to or greater than the minimum qualifying amount in the form of permanent financing.
> - The amount of the contribution must be at least 50% of the Applicant's eligible Live Local SAIL Base request amount or $1,000,000, whichever is greater.
> - During the credit underwriting process, Applicants must demonstrate self-sourced permanent financing in an amount that is at least half of the Applicant's eligible SAIL Base Request Amount or $1,000,000, whichever is greater. The SAIL Base Request Amount does not include the ELI Funding Request Amount.
> - The self-sourced financing must be subordinate to the Live Local SAIL Loan.
> - The interest rate is capped at 6%.

RFA at 73-74.

74. The Live Local Self-Sourced Financing Commitment Verification Form, provided to applicants by Florida Housing and submitted by Catchlight, echoes the language of the RFA recited above, and speaks directly to the evidence of ability to fund requirements. The Form requires a representative of the applicant to certify, among other things, the following:

> If the above-mentioned Development is selected for funding, I understand the following:
>
> During the credit underwriting process, the designated self-sourced Principals of the Applicant must provide evidence of ability to fund self-sourced financing in an amount that is at least half of the Applicant's eligible Live Local SAIL Request Amount or $1,000,000, whichever is greater;
>
> Evidence of ability to fund includes: (i) a copy of the Principal's most current audited financial statements, or bank statements, no more than 17 months old; or (ii) if the loan has already been funded, a copy of the note and recorded mortgage; …

75. To document its self-funding loan, Catchlight provided a Live Local Self-Sourced Financing Commitment Verification Form as Attachment 10 to its application.

76. Fern Grove points out that the RFA also provides, under the non-corporation funding section, that "If the financing proposal is not from a Regulated Mortgage Lender in the business of making loans or a governmental entity, evidence of ability to fund must be provided." RFA at 67.

77. However, the RFA contemplates that Florida Housing may modify the general provisions provided within that section, as it has clearly done through the Live Local Self-Sourced Financing Commitment Verification Form and associated RFA requirements. Indeed, it is evident that the RFA language was clear to those applicants applying with self-sourced financing,

as none of the nine other applicants applying with Live Local Self-Sourced Financing provided evidence of ability to fund within their application.

78. Fern Grove claims that certain conditions present within the Chase Letter and Catchlight's Self-Source Funding should either render them ineligible for use as a source within the cost proforma, or that the amounts should be reduced based on Fern Grove's own experts' testimony, one of which is Fern Grove's corporate representative, Scott Zimmerman.[4]

79. As Catchlight properly included the full value of both its anticipated Chase Loan and its self-sourced funds in its cost proforma, Fern Grove's challenges to Catchlight's Loan Financing Proposal and self-funding must fail.

Catchlight's Site Control

80. In order to be eligible, an applicant also must show "Evidence of Site Control [is] provided." RFA at 77. The RFA requires that an applicant must:

> Demonstrate site control by providing, as Attachment 6 to Exhibit A, the documentation required in Items (1), (2), and/or (3), as indicated below, demonstrating that it is a party to an eligible contract or lease, or is the owner of the subject property. *Such documentation must include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases. If the proposed Development*

[4] In its attempt to question the validity of Catchlight's application funding sources (the Chase Letter and Self-Source Letter), Fern Grove proffered, subject to Catchlight and Florida Housing's objection, the testimonies of Mr. Zimmerman and Robert Von, together with independently prepared pro formas and related documents (proffered as proffered exhibits 2 through 4 and 10 through 12). Upon consideration of the objections and responses, the proffered testimonies and evidence are rejected as unpersuasive and irrelevant to this proceeding. At issue in this proceeding is Florida Housing's preliminary agency action regarding eligibility determinations, not a challenge to the RFA's terms or credit underwriting. Credit underwriting occurs after the application review and scoring process at issue in this proceeding. Credit underwriting "is a de novo review of all information supplied, received or discovered during or after any competitive solicitation scoring and funding preference process, prior to the closing on funding, including the issuance of IRS Forms 8609 for Housing Credits." Fla. Admin. Code R. 67-48.0072.

> *consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites.*
>
> Note: The Corporation has no authority to, and will not, evaluate the validity or enforceability of any site control documentation.

RFA at 44 (emphasis added).

81. Catchlight's application provided a series of Lease and Sublease Agreements as evidence of its site control. For applicants providing lease agreements as evidence of site control, the RFA requires:

> (a) If providing a lease, the lease must have an unexpired term of at least 50 years after the Application Deadline and the lessee must be the Applicant. The owner of the subject property must be a party to the lease, or a party to one or more intermediate leases, subleases, agreements, or assignments, between or among the owner, the Applicant, or other parties, that have the effect of assigning the owner's right to lease the property for at least 50 years to the lessee.

Id.

82. Catchlight's leases provided with its application meet the requirements of the RFA with respect to the lease agreements. The owner of the subject property is a party to the Ground Lease agreement between Housing for Tomorrow Corporation and Wendover Housing for Today, LLC. The Applicant is the lessee of the sublease between Wendover Housing for Today, LLC, and WHFT LL Workforce, Ltd., and the lease has a 99-year term beginning November 29, 2021, subject to several conditions.

83. Fern Grove claims that a Master Development Agreement (MDA) referenced within the lease agreement is a "relevant" intermediate contract, agreement, assignment, option, conveyance, intermediate lease, [or] sublease required by the RFA. Fern Grove primarily points to the project schedule referenced within the lease that is contained within the MDA.

84. However, as the leases and documentation provided by Catchlight met the RFA's requirements, it is found that Catchlight provided the required site control documentation with its application.

85. In sum, Florida Housing's scoring decision that Catchlight was eligible to receive funding was not clearly erroneous, arbitrary, capricious, nor contrary to competition, and Petitioner has failed to meet its burden to show that Florida Housing acted contrary to the governing statutes, rules, or the terms of the RFA when it found the Catchlight's application eligible for funding.

CONCLUSIONS OF LAW

86. DOAH has jurisdiction over the subject matter and the parties to this competitive procurement protest pursuant to sections 120.569, 120.57(1), and 120.57(3). *See also*, Fla. Admin. Code R. 67-60.009(2).

87. Petitioners and Intervenors challenge Florida Housing's preliminary funding and eligibility selections under the RFA. Pursuant to section 120.57(3)(f), the burden of proof in this matter rests with the party protesting the proposed agency action. *See State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998).

88. Section 120.57(3)(f) provides, in pertinent part, that in a competitive-procurement protest:

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

89. Although competitive procurement protest proceedings are described in section 120.57(3)(f) as de novo, courts acknowledge that a different kind of de novo review is contemplated than for other substantial-interest proceedings under section 120.57. Competitive-procurement protest hearings are a "form of intra-agency review[,]" in which the object is to evaluate the action taken by the agency. *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998); *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132 (Fla. 1st DCA 2013).

90. Here, a de novo proceeding "simply means that there was an evidentiary hearing ... for administrative review purposes" and does not mean that the ALJ "sits as a substitute for the [agency] and makes a determination whether to award the bid de novo." *J.D.*, 114 So. 3d at 1133; *Intercontinental Props., Inc. v. Dep't of HRS*, 606 So. 2d 380, 386 (Fla. 3d DCA 1992). "The judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting*, 709 So. 2d at 609.

91. Accordingly, the party protesting Florida Housing's intended award must prove by a preponderance of the evidence that Florida Housing's proposed action is either: (a) contrary to its governing statutes; (b) contrary to its rules or policies; or (c) contrary to the specifications of the RFA. The standard of proof is whether Florida Housing's decision was: (a) clearly erroneous; (b) contrary to competition; or (c) arbitrary or capricious. §§ 120.57(3)(f) and 120.57(1)(j), Fla. Stat.

92. The "clearly erroneous" standard has been defined to mean "the interpretation 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); *see also Holland v. Gross*, 89 So. 2d 255, 258 (Fla. 1956) (when a finding of fact by the trial court "is without support of any substantial evidence, is clearly against the weight of the evidence or . . . the trial court has misapplied the law to the established facts, then the decision

is 'clearly erroneous.'"). However, if "the agency's interpretation conflicts with the plain and ordinary intent of the law, judicial deference need not be given to it." *Colbert*, 809 So. 2d at 1166.

93. An agency action is "contrary to competition" if it unreasonably interferes with the purpose of competitive procurement. As described in *Wester v. Belote*, 138 So. 721, 722 (Fla. 1931):

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

94. In other words, the "contrary to competition" test forbids agency actions that: (a) create the appearance and opportunity for favoritism; (b) reduce public confidence that contracts are awarded equitably and economically; (c) cause the procurement process to be genuinely unfair or unreasonably exclusive; or (d) are abuses, i.e., dishonest, fraudulent, illegal, or unethical. *See* § 287.001, Fla.Stat.; and *Harry Pepper & Assoc., Inc. v. City of Cape Coral,* 352 So. 2d 1190, 1192 (Fla. 2d DCA 1977).

95. Finally, section 120.57(3)(f) requires an agency action be set aside if it is "arbitrary or capricious." An "arbitrary" decision is one that is "not supported by facts or logic or is despotic." *Agrico Chemical Co. v. Dep't of Env't Regul.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978), cert. denied, 376 So. 2d 74 (Fla. 1979). A "capricious" action is one which is "taken without thought or reason or irrationally." *Id.*

96. The inquiry to be made in determining whether an agency has acted in an arbitrary or capricious manner involves consideration of "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 Enter. v. Dep't of Env't Regul.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). The standard has also been formulated by the court in *Dravo Basic Materials Co. v. Department of Transportation*, 602 So. 2d 632, 634 n.3 (Fla. 2d DCA 1992), as follows: "If an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

97. In sum, the party raising a claim has the burden to show, by a preponderance of the evidence, that Florida Housing's actions were contrary to its governing statutes, rules, policies, or to the solicitation specifications. *State Contracting*, 709 So. 2d at 609; *see also* § 120.57(3)(f), Fla. Stat. In order to prevail, the party must also show by a preponderance of the evidence that any violation of statute, rule, policy, or specification was also clearly erroneous, contrary to competition, arbitrary, or capricious.

98. Florida Housing is statutorily required to follow its own stated policy or prior practice, pursuant to section 120.68(7)(e). "An agency's failure to follow its own precedent, which contains similar facts, is 'contrary to established administrative principles and sound public policy.'" *Villa Capri Assoc. v. Fla. Hous. Fin. Corp.*, 23 So. 3d 795, 798 (Fla. 1st DCA 2009). "Florida Housing is 'required to interpret the RFA consistently with its plain and unambiguous language.'" *Heritage Oaks, LLP v. Madison Pointe, LLC*, 277 So. 3d 215, 218 (Fla. 1st DCA 2019). "An agency may not adopt implausible or unreasonable interpretations of an RFA." *Id.*

Fern Grove's Experience Requirements

99. The RFA contains clear requirements related to Developer and Management Company Experience. Florida Housing includes experience requirements within the RFA so applicants can demonstrate a history of developing projects of comparable complexity and familiarity with the related funding sources.

100. A bid protest is the proper place to determine whether Fern Grove's experience eligibility requirements have been met. *See, e.g.*, *Blue Broadway v. Fla. Hous. Fin. Corp.,* Case No. 17-3273BID (Fla. DOAH Aug. 29, 2017; Fla. FHFC Sept. 22, 2017). Florida Housing's Rules and RFA terms may change over time, "that does not give Intervenor a pass as it relates to satisfying the RFA requirements at issue in the instant case." *Blue Broadway*, RO at ¶52.

101. Indeed, the precise purpose of such a hearing is to provide a formal evidentiary record upon which to base final agency action. Following a challenge to an agency's decision to accept a proposal, the agency's final decision must be supported by the evidence adduced at hearing, including evidence unavailable to the agency earlier. *Gtech Corp. v. Dep't of Lottery*, 737 So. 2d 615, 619 (Fla. 1st DCA 1999). *Pinnacle Rio, LLC v. Fla. Hous. Fin. Corp.*, Case No. 14-1398BID, RO at ¶111 (Fla. DOAH June 4, 2014; Fla. FHFC June 13, 2014).

102. As Fern Grove points out, the RFA contains a relatively new experience requirement for applicants applying as Mixed-Use Developments. While the individual experience requirements may be tailored and modified to the specific RFA, the general requirement that applicants must meet certain experience requirements to be eligible for funding has been in place for decades. *See, e.g., Fla. Low Income Hous. Assoc., Inc. v. Fla. Hous. Fin. Corp.,* Case No. 02-4137BID (Fla. DOAH May, 14, 2003; Fla. FHFC June 18, 2003) (Petitioner failed to prove that its development experience met RFA requirements.); *Duval Park Ltd. v. Fla. Hous. Fin. Corp.,* Case No. 13-2898BID (Fla. DOAH Nov. 25, 2013; Fla. FHFC Dec. 13, 2013) (regarding both development and management experience).

103. Though the experience requirements of requests for applications have changed over the last 20 years, Florida Housing has been consistent in its policy and interpretation regarding requests for applications' experience requirements. To illustrate, the *Florida Low Income Housing Associates, Inc.,*

DOAH Case No. 02-4137BID, RFA required the applicant had "developed and completed at least two affordable housing developments similar in magnitude to the Development proposed."

104. The experience issue in this case primarily revolves around a reading of the RFA's definition of Mixed-Use Development. Mixed-Use Development is defined, in relevant part, as "A Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space non-residential component…."

105. "Component" is not a defined term within the RFA. Where a term used in a statute or rule is not defined, it should be given its plain and ordinary meaning. *SAS Fountains at Pershing Park, LTD. v. Fla. Hous. Fin. Corp.,* Case No. 10-8219 (Fla. DOAH Sept. 30, 2010; Fla. FHFC June 24, 2011), citing *Nehme v. Smithkline Beecham Clinical Labs*, 863 So. 2d 201, 204 (Fla. 2003). "When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary." *Nehme*, 863 So. 2d at 205.

106. Merriam-Webster Online Dictionary defines component as "a constituent part." Constituent meaning "serving to form, compose, or make up a unit or whole." https://www.merriam-webster.com/dictionary/component/constituent (last visited May 9, 2025).

107. Development means a "Project" under section 420.503, referencing the work or improvement and any other real and personal property, designed and intended for the primary purpose of residential housing. In other words, the Development is the building, the personal property therein, and the land it sits upon. Each component of the Development must necessarily be a definable unit.

108. Florida Housing's interpretation of its Mixed-Use Development definition is both reasonable and well-reasoned. The plain meaning of the definition requires the two components, the residential and nonresidential, to make up the whole of the development.

109. This is also consistent with a plain reading of the enabling statute for this RFA, section 420.50871, which requires Florida Housing to use these funds to "Provide for mixed use of the location, incorporating nonresidential uses, such as retail, office, institutional, or other appropriate commercial or nonresidential uses."

110. A preponderance of the evidence demonstrated that none of the three developments that Fern Grove relied upon for its developer and management company experience has a space within the development that could be considered a nonresidential component.

111. The RFA further defines two subcategories of acceptable nonresidential components within a Mixed-Use Development, Mixed-Use Institutional Space and Mixed-Use Commercial Space. All three developments that Fern Grove has relied upon for its developer and management company experience purport to have Mixed-Use Institutional Space.

112. Mixed-Use Institutional Space is defined as "Charitable, educational, healthcare services, civic (local government/state) *within a Development that is in operation at least 5 days a week."* RFA at 104-105 (emphasis added).

113. Again, a plain reading of this provision requires that the services be provided within the Development and in operation at least 5 days a week. The competent substantial evidence demonstrated that the services may be available off-site to the residents for at least 5 days, but those services are not operating within the developments for at least 5 days a week.

114. "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole." *Progressive Express Ins. Co. v. SimonMed Imaging*, 363 So. 3d 1196, 1200 (Fla. 6th DCA 2023), citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Thus, read together, a Mixed-Use Development must have a nonresidential component, in this case a Mixed-Use Institutional Space, within the Development that is operational at least five days a week. The

competent substantial evidence shows that the developments Fern Grove relies upon in its application do not meet this definition.

115. The RFA requires that, for space to count toward the Mixed-Use Development Experience, the temporary or final certificate of occupancy must have also been issued for the nonresidential use within the development. A preponderance of the evidence demonstrated that none of the three developments at issue has received a certificate of occupancy for their proposed mixed-use development, nonresidential component, but rather only for community residential amenity space, where the services are just occasionally offered on site.

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

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

117. Fern Grove's lack of the requisite developer experience and lack of management company experience for a Mixed-Use Development contemplated by the RFA are not minor irregularities under rule 67-60.008.

118. In sum, the competent substantial evidence shows that Florida Housing's determination of Fern Grove's eligibility was clearly erroneous, contrary to competition, and/or arbitrary or capricious. Florida Housing's proposed action to award funding to Fern Grove was contrary to governing statutes, Florida Housing's rules or policies, and/or the RFA's specifications.

Catchlight's Cost Proforma

119. With regard to Catchlight's Chase Letter, the evidence demonstrated that the Chase Letter meets the RFA's requirements. As reflected in the Catchlight Application, the Chase letter identifies Catchlight as the borrower, identifies the amounts of the construction and permanent loan, and is signed by the lender.

120. Fern Grove maintains the Chase letter contains a material ambiguity which allows it to challenge the debt service ratios or other conditional provisions. To support this position, it relies on *MJHS FL South Parcel, Ltd., et al. v. Florida Housing Finance Corporation,* Case No. 23-0903BID (Fla. DOAH May 31, 2023; Fla. FHFC July 21, 2023)(*MJHS*); and *The Vistas at Fountainhead v. Florida Housing Finance Corporation, et. al.*, Case No. 19-2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part (Fla. FHFC Aug. 2, 2019)(*Vistas*).

121. Fern Grove's reliance on *MJHS* is misplaced for multiple reasons. *MJHS* was a consolidated, multipart case with several Petitioners. *MJHS's* application contained a Tax Credit Equity Proposal as a source of funding. Tax Credit Equity Proposals are governed by separate RFA requirements, distinct from those required of Financing Proposals. One of the express RFA requirements of a Tax Credit Equity Proposal is that it must state the amount of "proposed equity to be paid prior to construction competition." RFA, p. 64; *MJHS*, RO at ¶134. "An Equity Proposal is responsive only to the extent that the amount of equity to be paid prior to construction completion is clearly stated." *MJHS*, RO at ¶134, citing *Vistas*. To that particular end, "[i]f material ambiguity exists, the funds may not be considered as equity to be paid before construction completion." *Id.* This particular caselaw is inapplicable to the present situation, where the financing proposal clearly indicated that the funds will be available prior to construction completion.

122. To the extent that Fern Grove may rely on *Vistas*, the equity proposal at issue in *Vistas* included a pay-in schedule that created an internal conflict

with the total amount of equity to be paid prior to construction completion. *Vistas*, RO at ¶11. There, the ALJ found that the equity proposal failed to clearly state the amount of equity to be paid prior to construction completion and excluded that equity installment from the construction financing analysis. Again, no claims have been raised in the instant matter regarding the timing of the loan distributions.

123. *MJHS* is further distinguishable because it also challenged the eligibility of LDG's application on the grounds it failed to include all *anticipated* costs. *MJHS*, RO at ¶122. There, ALJ Livingstone found, based upon the testimony of LDG's corporate representative,

> 42. It is clear that LDG anticipated that there would be impact fees associated with its proposed development, but it was not sure what the amount would be.
>
> 43. As set forth above, all applicants are required to complete a Cost Pro Forma, and when completing the Cost Pro Forma, the applicant "must include all *anticipated* costs of the Development."
>
> 44. By failing to include an anticipated impact fee, LDG failed to meet an essential requirement of the RFA.

MJHS at ¶¶42-44.

124. While Judge Livingstone found that anticipated impact fees should have been disclosed (*MJHS*, RO at ¶124), Judge Livingstone did not, as Fern Grove claims, open the door to attacking the *reasonableness* of an applicant's anticipated costs or sources. While Fern Grove is correct that evidence and testimony of the Local Municipalities' impact fee schedule was presented in *MJHS*, the case turned upon LDG's admission that it knew it would owe impact fees, but was unsure of the amount and left the section of the Cost Pro Forma blank. In contrast, there is no competent evidence in this case to controvert Catchlight's anticipated sources of funding.

125. In order to meet its burden in its challenge, Fern Grove must show that the funding sources anticipated by Catchlight do not exceed the costs anticipated by Catchlight. With regard to the Chase Letter, the best source of whether Catchlight anticipated receiving the funds is the parties to the letter: either Catchlight or Chase. Fern Grove did not present evidence from any party to the letter.

126. Fern Grove also failed to prove that Florida Housing's eligibility determination related to the Catchlight Application's Live Local Self-Sourced Financing Commitment Verification Form should be overturned. The competent evidence demonstrates Catchlight's self-sourced financing commitment form complied with the requisite RFA criteria. Catchlight is a Priority 1, Tier 1, new construction application that included a Live Local Self-Sourced Financing Commitment Verification Form executed by a Principal of the applicant.

127. Fern Grove's claim that Catchlight is required to provide evidence of the ability to fund as part of the application is misplaced. The competent evidence, including the testimony of Ms. Levy and the Live Local Self-Sourced Financing Commitment Verification Form itself, plainly establish that Catchlight is not required to provide evidence of the self-sourced financing until credit underwriting. *Id.*

128. As noted by ALJ Culpepper in *Durham Place v. Florida Housing Finance Corporation*, Case No. 19-1396BID (Fla. DOAH June 7, 2019; Fla. FHFC June 21, 2019), Florida Housing must accept an application that has complied with the plain and unambiguous terms of the RFA. Judge Culpepper explains:

> As Florida Housing should not have found Brownsville's application ineligible "if the configuration of a proposed development would be fleshed out in the final site plan approval process, which occurs after the application stage during the credit underwriting." *Brownsville Manor, LP v. Redding Dev. Partners, LLC, and Fla. Hous. Fin.*

> *Corp.*, 224 So. 3d 891, 894 (Fla. 1st DCA 2017). Consequently, even though the true configuration of Brownsville's development was "unknown at the application stage," because Brownsville "complied with all that was required of it at the application stage under the plain and unambiguous terms of the RFA," the appellate court ordered Florida Housing to reinstate Brownsville's eligibility for funding.

129. Fern Grove has failed to meet its burden to show that Florida Housing's acceptance of the Chase Letter or Self-Source Letter as anticipated sources within Catchlight's cost pro forma was clearly erroneous, arbitrary or capricious, or contrary to competition.

Catchlight's Site Control

130. Lastly, Fern Grove failed to prove that Florida Housing's eligibility determination related to Catchlight's site control documentation should be overturned. To support its position that the MDA is relevant, Fern Grove relies on *HTG Addison II, LLC v. Florida Housing Finance Corporation,* Case No. 20-1770BID (Fla. DOAH June 19, 2020; Fla. FHFC July 17, 2020). But Fern Grove's reliance is misplaced, and the case is distinguishable. Therein, the missing intermediate contract was relevant because it was related to site control criteria within the RFA, specifically, who was the owner of the subject property. In *HTG Addison,* the successful applicant included a Purchase and Sale Agreement (PSA) as part of its site control documentation. *Id.* However, the PSA stated that the City of Ocala owned the property in question and the seller had a separate agreement with the local government to acquire fee simple interest in the property. *Id.*

131. At the final hearing in *HTG Addison*, Florida Housing agreed with the petitioner and argued the successful applicant failed to demonstrate site control. *Id.* The ALJ ultimately concluded the successful applicant deviated from the RFA requirements and was ineligible for failing to include the missing agreement between the seller and the City of Ocala. *Id.* Here, however, the MDA is not related to any site control criteria in the RFA.

132. This case is more aligned with *Madison Trace, LLC, et. al. v. Florida Housing Finance Corporation,* Case No. 22-0004BID (Fla. DOAH Apr. 1, 2022; Fla. FHFC May 2, 2022). In *Madison Trace,* the petitioner argued the successful applicant failed to include a Purchase Option Agreement and Master Development Agreement which were relevant documents to determine site control. Both agreements were generally referenced within the materials the successful applicant had submitted as part of the application. *Id.* However, Florida Housing maintained that these documents were not relevant because the agreements did not have any bearing on whether the successful application met the express terms of the RFA. *Id.* The ALJ agreed with Florida Housing and concluded the petitioner did not demonstrate that the agreements were relevant or required to be included as part of the successful applicant's site control documentation. *Id.*

133. Here, Fern Grove failed to show how the MDA will assist Florida Housing in determining if the Catchlight Application meets the RFA's site control criteria.

134. Catchlight provided a Ground Lease, a Memorandum of Ground Lease, First Amendment to Ground Lease, Sublease, and Memorandum of Sublease to demonstrate site control. While some of these agreements refer to an MDA, the provided leases and amendments satisfy all the requisite RFA criteria by identifying the subject property owner and confirming that the applicant maintains a sublease with an unexpired lease term of more than 50 years after the Application Deadline. Nothing further is required to demonstrate evidence of site control.

135. Overall, Fern Grove failed to meet its burden to demonstrate by a preponderance of the evidence that a determination that Catchlight is eligible for funding under the RFA would be clearly erroneous, contrary to competition, arbitrary or capricious, or that it would be contrary to Florida Housing's governing statutes, rules, or the terms of the RFA. Catchlight is eligible to receive funding under the terms of the RFA.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law as set forth herein, it is RECOMMENDED that Florida Housing enter a Final Order finding that:

1. Fern Grove's application number 2025-317BS is ineligible to receive funding under the RFA.

2. Horizons' application number 2025-303BS is ineligible to receive funding under the RFA;

3. Helm's Bay's application number 2025-333BS is ineligible to receive funding under the RFA;

4. Uptown Toho Partners, Ltd.'s, application number 2025-355BS is ineligible to receive funding under the RFS, and,

5. Catchlight's application number 2025-345BS is ELIGIBLE for funding under the RFA.

DONE AND ENTERED this 9th day of May, 2025, in Tallahassee, Leon County, Florida.

Case No. 25-1110BID

JAMES H. PETERSON, III
Administrative Law Judge
DOAH Tallahassee Office

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Filed with the Clerk of the
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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

WHFT LL WORKFORCE, LTD. AND
WHFT LL WORKFORCE DEVELOPER,
LLC,

Petitioner,

v.

DOAH Case Nos: 25-1110BID
25-1112BID
25-1114BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BDG FERN GROVE PHASE TWO, LP, D/B/A
FERN GROVE PHASE TWO,

Intervenor.
_____/

BDG FERN GROVE PHASE TWO, LP'S
EXCEPTIONS TO RECOMMENDED ORDER

BDG Fern Grove Phase Two, LP, by and through its undersigned attorneys, hereby files the following Exceptions to the Recommended Order issued May 9, 2025, in the above-styled cause. For the reasons set forth below, these Exceptions should be granted and a Final Order entered determining that Fern Grove's application number 2025-317BS is eligible for funding and that WHFT LL Workforce, Ltd. d/b/a Catchlight Crossings Live Local Workforce's application number 2025-345BS is ineligible for funding.

ABBREVIATIONS

Citations to the transcript of the final hearing will be made as follows: "T1" for March 25, 2025, hearing and "T2" for March 26, 2026, hearing followed by the page number(s).

Citations to Joint Exhibits admitted at the final hearing will be made as follows: "J-[number] at [page(s)]";

"WHFT-[number] at [page(s)]" for exhibits introduced by WHFT; and

"FG-[number] at [page(s)]" for exhibits introduced by Fern Grove.

Petitioners, WHFT LL Workforce, Ltd. and WHFT LL Workforce Developer, LLC will be referred to as "Catchlight."

Respondent, Florida Housing Finance Corporation will be referred to as "Florida Housing."

Intervenor, BDG Fern Grove Phase Two, LP will be referred to as "Fern Grove."

"RFA" refers to Request for Applications 2024-213 entitled "SAIL Funding for Live Local Mixed Income, Mixed-Use, and Urban Infill Developments."

STANDARD OF REVIEW APPLICABLE TO EXCEPTIONS

These Exceptions are filed with the understanding that, at this stage, Florida Housing is not free to re-weigh the evidence or to reject findings of fact unless there is no competent, substantial evidence to support them. *Heifetz v. Dep't of Bus. & Prof'l Reg.*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985); *Schumacker v. Dep't of Bus. & Prof'l Reg.*, 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 how it is characterized in the Recommended Order. Rather, it is determined by the true nature and substance of the determination or ruling. *J.J. Taylor Cos. v. Dep't of Bus. & Prof'l Reg.*, 724 So. 2d 192, 193 (Fla. 1st DCA 1999); *Battaglia Prop. v. Land & Water Adj. Comm'n*, 629 So. 2d 161, 168 (Fla. 5th DCA 1994).

Findings of fact may include "ultimate 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 Trs.*, 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 Env't. Consulting Serv., Inc. v. Dep't of Transp., DOAH Case Nos. 16-0769 and 16-3530, 2017 WL 392830 *1 (Final Order dated 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 Florida Housing is being asked to adopt. § 120.57(1)(l), Fla. Stat. "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 Advert., Inc. v. Dep't of Transp.*, 974 So. 2d 548, 550-51 (Fla. 1st DCA 2008) (internal citations and quotations omitted).

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. § 120.57(1)(1), Fla. Stat. If 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* §120.57(1)(l), Fla. Stat.; *see also MILA ALF, LLC v. Ag. for Health Care Admin.*, 273 So. 3d 272, 275 (Fla. 1st DCA 2019). Issues regarding the proper interpretation and application of the

specifications of a request for application are within the purview of Florida Housing, and deference to the ALJ in these areas is not required. *See Winters v. Fla. Bd. of Regents*, 834 So. 2d 243, 250 (Fla. 2d DCA 2003) ("On issues of law, an agency is not required to defer to the administrative law judge. Thus, where the matter under review 'is infused with overriding policy considerations, the issue should be left to the agency.'" (internal citations omitted)).

EXCEPTIONS

Exception No. 1

Fern Grove takes Exception to Finding of Fact 35, portions of Findings of Fact 44 and 57 and Conclusions of Law 99 and 108-111 of the Recommended Order. Paragraph 35 states:

> 35. The residential component anticipated under the RFA consists of the residential units themselves and the supporting uses for those units, including the clubhouse, leasing offices, and common areas or other amenities. The nonresidential component is a separate space for the Commercial or Institutional Use Space, apart from the residential component.

This Exception also includes that part of paragraphs 44 and 57 finding that the Banyan Cove, Banyan Reserve and Parramore Oaks community room and clubhouse areas are part of the residential component of those developments and the related Conclusions of Law referenced above.

These are mixed findings of fact and conclusions of law because the ALJ has created definitions of the terms "residential" and "non-residential" not otherwise defined in rule or in the RFA. Florida Housing asserted and the ALJ found the term "residential" includes the clubhouse, leasing offices and common areas although no one "resides" in those spaces.

As noted by the ALJ, terms that are not defined should be given their plain, ordinary meaning. *SAS Fountains at Pershing Park, LTD. v. Fla. Hous. Fin. Corp.,* Case No. 10-8219 (Fla.

DOAH Sept. 30, 2010; Fla. FHFC June 24, 2011), citing *Nehme v. Smithkline Beecham Clinical Labs*, 863 So. 2d 201, 204 (Fla. 2003). "When necessary, the plain and ordinary meaning of words can be ascertained by reference to a dictionary." *Nehme*, 863 So. 2d at 205.

Merriam-Webster Online Dictionary defines "residential" by referencing the term "residence." RESIDENTIAL Definition & Meaning - Merriam-Webster (last visited May 13, 2025). "Residence" includes "the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn" and "a building used as a home." RESIDENCE Definition & Meaning - Merriam-Webster (last visited May 13, 2025).

No resident would be allowed to live in a clubhouse or leasing office. Yet this definition would provide otherwise.

If this definition is adopted in the Final Order, it also begs the question of whether a building in a development that contains nothing other than accessory uses such as a leasing office, clubhouses, meeting rooms, etc., must be counted as a residential building when listing the number of such buildings in an application. Further, certificates of occupancy included in the record referenced some buildings as "commercial" or "clubhouse." FG 6, 8. This would be inconsistent with these never-before-seen definitions.

Paragraph 35 should therefore be stricken.

Exception No. 2

Fern Grove takes exception to Finding of Fact 42 to the extent it states that services provided by the Tree House Foundation, Inc., go beyond those services already required by the RFA.

In this same paragraph, the ALJ finds that the services provided by Tree House are the types of "institutional services contemplated by the RFA." Florida Housing agreed with this fact.

T2, 113-114. There is no requirement in the RFA or otherwise required that any or all the "mixed-use institutional" services be different from those required in the RFA.

Paragraph 42 is internally inconsistent, contrary to the evidence and RFA and everything after the first sentence should be stricken.

Exception No. 3

Fern Grove takes exception to Findings of Fact 43, 44, 45, 46, 53, 54, 56 and Conclusions of Law 99, 108-115 and 118 to the extent they conclude that community room/clubhouse space cannot jointly be used as Mixed Use Institutional Space and that "dedicated" or "devoted" space is required by the RFA to count as mixed use.

The concept of a "Mixed-Use Development" is a creature of the Live Local Act enacted in 2023. Sections 420.50871 & 420.50872, Florida Statutes.

The RFA defines a "Mixed-Use Development" as

> A Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space non-residential component. The Mixed-Use Commercial Space and/or Mixed-Use Institutional Space must be Corporation-approved and cannot be used by an entity that is an Affiliate of any Principal of the Applicant or Developer, unless the entity meets the definition of Non-Profit and, as demonstrated by the IRS determination letter, has been in existence at least three years prior to the Application Deadline of this RFA.

J-1, p. 104.

The RFA further defines the term "Mixed Use Institutional Space" as

> Charitable, educational, healthcare services, civic (local government/state) within a Development that is in operation at least 5 days a week.

J-1, p. 105.

The RFA defines the term "Mixed-Use Commercial Space as

> Retail and/or office space within a Development that produces income for the Development that exceeds the operating expenses for the space.

J-1, p. 104.

These definitions did not exist until 2023. The "Commercial" definition focuses on the physical "space" by using that word twice whereas the definition of "Institutional" places its focus on the services provided to residents by not using that word at all.

Florida Housing insisted and the ALJ concluded that the intent behind these definitions is that there be "dedicated" space physically located in the development for the commercial or institutional uses. T2, 97, 108. But the requirement for "dedicated" space is not in the RFA although other places in the RFA call for "dedicated" spaces for other uses.[1] J-1, pp. 50, 56; T2, 109.

Between this RFA and its predecessor in 2023, there have been approximately sixty mixed use applications deemed eligible for funding and approximately ten selected for funding. J-4, J-5, FG-16, FG-17; T2, 121. All those applications would have made similar certifications regarding developer and management company experience. But in none of those would Florida Housing have known the nature or extent of that experience. T 121-122.

This case is the first one in which anyone has attempted to look behind an application to examine the nature and scope of the developer and management company experience. T2, 118. While this is a case of first impression, the evidence showed that Florida Housing made no attempt to determine how others interpreted these requirements or to determine if Fern Grove is being treated differently from other applicants.[2] T2, 122.

[1] The RFA requires dedicated space for emergency operations in elderly developments and computer training classes "in a dedicated space on site."

[2] Fern Grove explains the evidence and its legal position in more detail in paragraphs 72 through 102 and 151 through 156 of its Proposed Recommended Order, a copy of which is attached hereto and incorporated by reference.

When the requirement for "dedicated" or "devoted" space is stricken because it is not part of the RFA, what is left is that Fern Grove demonstrated both management company and developer experience through unrefuted evidence of mixed use institutional services available 5 days a week. This met the requirements of the RFA and means that Fern Grove is eligible.[3] This Exception should be granted.

Exception No. 4

Fern Grove takes exception to Findings of Fact 56 and 57 and Conclusion of Law 115 to the extent they find and conclude that the existence of a certificate of occupancy for devoted nonresidential commercial or institutional space was required and that a certificate of occupancy for community spaces that could be used for such purposes was insufficient.

During the application process, there was an opportunity for the submission of questions to Florida Housing. The following relevant Q&A was posted by Florida Housing:

> 15. If the proposed Development will be a Mixed-Use Development, there is a Mixed-Use Developer Experience requirement. We have constructed a development that includes a Mixed-Use component, but the Mixed-Use portion is not yet occupied. Will this qualify as Mixed-Use experience?
>
> Answer:
> As stated in Section Four, A.3.b.(3)(a) of the RFA, the natural person Principal(s) must have, since January 1, 2004, completed at least three multifamily rental housing developments, but may include information for up to four multifamily rental housing developments...completed development means (i) that the temporary or final certificate of occupancy has been issued for at least one unit in one of the residential apartment buildings and, if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the non-residential use, within the development, or (ii) that at least one IRS Form 8609 has been issued for one of the residential apartment buildings and, if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the non-residential use, within the development. As used in this section, a Housing Credit development

[3] If Fern Grove is deemed ineligible, it will likely unleash a new avenue for application litigation in future cycles.

> that contains multiple buildings is a single development regardless of the number of buildings within the development for which an IRS Form 8609 has been issued. If no certificate of occupancy has been issued, the property should not be submitted for experience. (Emphasis in original)

J-9, p.7.

Through this Q&A, Florida Housing made it clear that all that is necessary to satisfy the experience requirements is the issuance of a certificate of occupancy for nonresidential space in the development.

The unrefuted evidence was that the developments submitted by Fern Grove to demonstrate management company and developer experience had nonresidential spaces in the development that had received certificates of occupancy. certificates of occupancy included in the record referenced some buildings as "commercial" or "clubhouse." WHFT-2, pp. 15-17, FG 5, 6, 7, 8; T1, 86-88.

While Florida Housing may not have intended to allow a certificate of occupancy for any type of nonresidential space by itself to be sufficient, that is an issue that can be addressed in a subsequent RFA. But Fern Grove meets the requirements set forth in this RFA.

Findings of Fact 56 and 57 and Conclusion of Law 115 should be revised to state that the certificates of occupancy for Banyan Cove, Banyan Reserve and Parramore Oaks mean that the Fern Grove application satisfies the experience requirements of the RFA.

Exception No. 5

Fern Grove takes exception to the last sentence of paragraph 58 of the Findings of Fact. It is incorrect and there is no competent, substantial evidence in the record to support a finding that Fern Grove did not rely on the future daycare space as part of its demonstration of developer experience. To the contrary, for the reasons set forth in Exception 4 above, this space has a

certificate of occupancy, is intended for use as a daycare and is part of Fern Grove's demonstration of developer experience. There is no requirement in the RFA that the space actually be used so long as it exists and has a certificate of occupancy.

Exception No. 6

Fern Grove takes exception to Finding of Fact 59. For the reasons set forth in Exceptions 1-5, this paragraph should be stricken. Instead, it should read as follows:

> 59. The competent substantial evidence shows that Fern Grove ~~failed to~~ me~~e~~t the experience requirements of the RFA. ~~As Florida Housing has now come to agree, based~~ Based upon the evidence, ~~Florida Housing's scoring decision that~~ Fern Grove ~~was~~ is eligible to receive funding ~~was clearly erroneous and contrary to the terms of the RFA~~.

Exception No. 7

Fern Grove takes exception to Conclusion of Law 118. For the reasons set forth in Exceptions 1-6, this paragraph should be stricken. Instead, it should read as follows:

> 118. In sum, the competent substantial evidence shows that Florida Housing's determination of Fern Grove's eligibility was not clearly erroneous, contrary to competition, and/or arbitrary or capricious. Florida Housing's proposed action to award funding to Fern Grove was not contrary to governing statutes, Florida Housing's rules or policies, and/or the RFA's specifications.

Exception No. 8

Fern Grove takes exception to Finding of Fact 71 which reads as follows:

> 71. As parties to the Chase letter, Catchlight and Chase are in the best position to determine the validity of the terms of the letter, and the anticipated amount of the loan. Under the terms of the Chase Letter, Catchlight will receive a $15,000,000 loan from Chase. There is no evidence that the Chase Letter has been invalidated by Chase or Catchlight.

This Exception also includes Conclusions of Law 119 through 124.

There was extensive evidence that under the terms of the Chase letter, Catchlight will not receive the $15,000,000 loan from Chase. Further, the Chase letter was materially ambiguous and could not be used as a funding source.

Each application is required to include a Development Cost Pro Forma. The RFA states, in pertinent part:

> c. Development Cost Pro Forma
>
> All Applicants must complete the Development Cost Pro Forma listing the anticipated costs, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation funding). The sources must equal or exceed the uses. If a funding source is not considered, if the Applicant's funding Request Amount is adjusted downward, and/or if the anticipated costs or uses are adjusted upward, this may result in a funding shortfall. (Emphasis added)

J-1, pp. 68-69.

In other words, the applicant must demonstrate adequate sources for both construction and permanent financing for the project.

The total Development Cost (a/k/a "uses") of the Catchlight project is $34,815,777. Catchlight identified three buckets of funds that make up its sources:

1- SAIL + ELI[4] = $12,185,521
2- JP Morgan Chase loan = up to $15,000,000
3- Self-Funded loan = $7,630,256

J-7, pp. 25-29.

This totals $34,815,777 meaning Catchlight's "sources" exactly equal its "uses." The SAIL and ELI funds are provided through Florida Housing. The JP Morgan Chase ("Chase") and self-funded loans would be considered non-corporation funding. T2, 140-141.

[4] ELI is "Extremely Low Income."

Catchlight submitted a letter from Chase regarding construction and permanent loans, each of $15,000,000. Regarding the construction loan, that letter provides the following:

> Loan to Value — Up to 80% including the value of the real estate and low income housing tax credits.

J-7, p. 172.

At the end, the letter also states:

> The letter of interest is for you, and the local government agency as well as the tax credit allocation agency's information and use only, and is not to be relied upon by other parties.

J-7, p. 173.

There is a fundamental inconsistency between this funding letter and the application. The funding letter clearly contemplates the deal using low income housing tax credits as a factor in the loan to value calculation that is a condition of the construction financing. The funding letter also clearly contemplates involvement with a local government agency.

Yet the Catchlight project has neither of those attributes. It does not rely on low income housing tax credits or on any local government form of support. J-7, pp. 28-29; T1, 62-63, 114; T2, 136.

There is a prior Florida Housing decision that holds that material ambiguities in a funding source mean that the source cannot be counted. In *MJHS South Parcel, Ltd. v. Florida Housing Finance Corp.*, DOAH Case No. 23-0903BID, et al., two of the applications at issue were found to be ineligible because the equity proposal letters were ambiguous because they did not clearly indicate that payments would be made in the time frame required by the RFA. *MJHS* FOF 45-65. The ALJ made the following Conclusions as to both applications:

> 134. In order to count an Equity Proposal as a source of funding, it must comply with certain RFA requirements, one of which is to state the amount of proposed equity to be paid prior to construction

> completion. An Equity Proposal is responsive only to the extent that the amount of equity to be paid prior to construction completion is clearly stated. *Vistas at Fountainhead LP v. Fla. Hous. Fin. Corp.*, Case No. 19-2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part, FHFC No. 2019-030BP (FHFC August 2, 2019). If material ambiguity exists, the funds may not be considered as equity to be paid before construction completion. Id.
>
> 135. MHP's and MJHS's Equity Proposals are ambiguous—it is not clear when the second installment of both equity proposals will be paid. MHP's Equity Proposal contains a date which, if construction is completed before that date, then equity would be paid after construction completion. MJHS's Equity Proposal contains seven conditions that must be completed before the release of the equity payment.
>
> 136. MHP's Capital Contribution #2 and MJHS's Second Installment must be excluded from the construction financing analysis because both create a material ambiguity in their respective applications as to when they will be paid. The exclusion of those funds results in construction funding shortfalls in both applications, causing both to be ineligible.

See also, The Vistas at Fountainhead Ltd. Ptp. v. Florida Housing Finance Corp., DOAH Case No. 19-2328BID and *HTG Oak Valley v. Florida Housing Finance Corp., et al.*, DOAH Case No. 19-2275BID (holding that the absence of sufficient funding rendered the applications ineligible).

In this case, the ALJ incorrectly distinguished these cases on the basis that they related to when funds would be available. However, the point of those cases is that material ambiguities that make it unclear whether the funds will be available means those funds cannot be used as a source. The Chase letter clearly contemplates a project that includes tax credits which is not what Catchlight proposes.

Finding of Fact 71 and Conclusions of Law 119-124 should be stricken and revised to indicate that the Catchlight application has a funding shortfall because there is a material ambiguity between the project and the Chase letter that renders the letter invalid as a source of funding.

Exception No. 9

Fern Grove takes exception to Finding of Fact 77 and Conclusion of Law 127 that finds and concludes that the RFA did not require evidence of ability to fund a self-sourced loan with the application.

Section 10.b. of the RFA provides additional requirements regarding funding that is not provided by Florida Housing. Section 10.b.(1)(c) on page 65-68 of the RFA provides, in pertinent part:

> b. Non-Corporation Funding
>
> ****
>
> (c) If the financing proposal is not from a Regulated Mortgage Lender in the business of making loans or a governmental entity, evidence of ability to fund must be provided. Evidence of ability to fund includes: (i) a copy of the lender's most current audited financial statements no more than 17 months old; or (ii) if the loan has already been funded, a copy of the note and recorded mortgage…. Financing proposals from lenders who cannot demonstrate ability to fund will not count as a source of financing. Financial statements must be included in the Application. Note: This provision does not apply to deferred Developer Fee. (Emphasis added).

J-1, pp. 67-68.[5]

The ALJ found and concluded that the Live Local Self-Sourced Financing Commitment Verification Form modified this requirement and only requires this evidence in credit underwriting. However, there is no evidence in the RFA or otherwise to support that conclusion. The Form requires evidence at credit underwriting, but nowhere does it modify or eliminate the requirement to also provide it in the application.

[5] "Regulated Mortgage Lenders" are institutions such as banks like Chase. J-1, p. 107. Catchlight is not a Regulated Mortgage Lender. T2, 142.

The ALJ notes that there were nine applications that included self-sourced funding commitments and none of them provided evidence of ability to fund in their applications. But the fact that others may not have properly completed the application, and that Florida Housing did not deem them ineligible, does not negate the plain language requirement in the RFA.

This Finding and Conclusion should be rejected and modified to indicate that Catchlight has a funding shortfall and is ineligible for failure to provide the required evidence of ability to fund.

Exception No. 10

Fern Grove takes exception to Findings of Fact 78 (including footnote 4) and 79 and Conclusions of Law 128 and 129.

Fern Grove provided extensive evidence that, based on the stated terms of the Chase letter, the Catchlight project cannot meet the debt service coverage ratio requirements imposed by Chase and the project cannot support anything close to the $15 million loan required for the project to have sufficient sources to satisfy its uses. That evidence is summarized in Fern Grove's Proposed Recommended Order in paragraphs 26 through 50 and 133 through 139. Those paragraphs, and the evidence referenced therein, are hereby incorporated by reference.

However, the ALJ deemed this to be irrelevant and did not make findings or conclusions as to the evidence that was presented stating that these are issues for credit underwriting. That is error. This administrative hearing is the only place in the process for Fern Grove to question the application submitted by Catchlight. To not consider this evidence would be a denial of Fern Grove's right to administrative due process since Fern Grove does not have a point of entry to demonstrate in credit underwriting that the Catchlight application cannot meet the requirements imposed by Chase for funding.

Interestingly, the ALJ made the following conclusions as it related to Fern Grove:

> 100. A bid protest is the proper place to determine whether Fern Grove's experience eligibility requirements have been met. *See, e.g.*, *Blue Broadway v. Fla. Hous. Fin. Corp.,* Case No. 17-3273BID (Fla. DOAH Aug. 29, 2017; Fla. FHFC Sept. 22, 2017). Florida Housing's Rules and RFA terms may change over time, "that does not give Intervenor a pass as it relates to satisfying the RFA requirements at issue in the instant case." *Blue Broadway*, RO at ¶52.
>
> 101. Indeed, the precise purpose of such a hearing is to provide a formal evidentiary record upon which to base final agency action. Following a challenge to an agency's decision to accept a proposal, the agency's final decision must be supported by the evidence adduced at hearing, including evidence unavailable to the agency earlier. *Gtech Corp. v. Dep't of Lottery*, 737 So. 2d 615, 619 (Fla. 1st DCA 1999). *Pinnacle Rio, LLC v. Fla. Hous. Fin. Corp.*, Case No. 14-1398BID, RO at ¶111 (Fla. DOAH June 4, 2014; Fla. FHFC June 13, 2014).

If a bid protest is the proper place to test whether Fern Grove's application met the experience requirements, it must also be the place where the requirement for Catchlight's sources to equal or exceed uses can be tested. Just as evidence was presented regarding Fern Grove, including information previously unavailable to the agency, concepts of fairness and due process dictate that the same be done as to the Catchlight application. Yet the ALJ did not do so and ignored extensive evidence proving that Catchlight's sources will not exceed its uses.

ALJs are required to make factual findings on substantial issues raised by the parties. *Memorial Healthcare Group, Inc. v. State, Agency for Health Care Administration*, 879 So. 2d 72, 74 (Fla. 1st DCA 2004).

Because the ALJ erroneously rejected this evidence, these Findings and Conclusions should be rejected and this matter remanded to the ALJ for specific findings and conclusions based on this evidence which can then be subject to later exceptions and review by this Board.

Exception No. 11

Fern Grove takes exception to Findings of Fact 83 and 84 and Conclusions of Law 130 through 135 relating the Catchlight's demonstration of site control.

Fern Grove's arguments regarding Catchlight's site control are contained in its Proposed Recommended Order in paragraphs 59 through 69 and 145 through 150, which are hereby incorporated by reference. The Master Development Agreement ("MDA") referenced multiple times throughout the Catchlight site control documents gives termination rights to the owner of the property and further show that events that could result in termination may have occurred. However, without the MDA, it cannot be determined if the applicant still had site control as of the date the application was filed.

These Findings and Conclusions should be rejected, and a determination made that Catchlight failed to demonstrate site control.

WHEREFORE, BDG Fern Grove Phase Two, LP, respectfully requests that a Final Order be entered determining:

A. That its Exceptions be granted;

B. That Fern Grove's application is eligible for funding;

C. That Catchlight's application is not eligible for funding; and

D. That Fern Grove be granted such other and further relief as is deemed just and proper.

DATED this 19th day of May 2025.

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Attorneys for Intervenor BDG Fern Grove Phase Two, LP d/b/a Fern Grove Phase Two

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been filed by email with the Corporation Clerk (CorporationClerk@floridahousing.org), Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329 and has been furnished by electronic mail to the following on this 19th day of May 2025.

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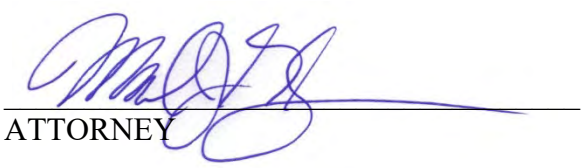

ATTORNEY

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WHFT LL WORKFORCE, LTD. AND
WHFT LL WORKFORCE DEVELOPER,
LLC,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BDG FERN GROVE PHASE TWO, LP, d/b/a
FERN GROVE PHASE TWO,

Intervenor.
_____/

DOAH Case Nos: 25-1110BID
25-1112BID
25-1114BID

BDG FERN GROVE PHASE TWO, LP'S
PROPOSED RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its designated Administrative Law Judge, James H. Peterson, III, held the final hearing in this case on March 25 and 26, 2025, by Zoom.

APPEARANCES

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ABBREVIATIONS

Citations to the Parties' Joint Prehearing Stipulation (and its stipulated findings of fact) will be "Stip at [page(s)]".

Citations to the transcript of the final hearing will be made as follows: "T1" for March 25, 2025, hearing and "T2" for March 26, 2026, hearing followed by the page number(s).

Citations to Joint Exhibits admitted at the final hearing will be made as follows: "J-[number] at [page(s)]";

"WHFT-[number] at [page(s)]" for exhibits introduced by WHFT; and

"FG-[number] at [page(s)]" for exhibits introduced by Fern Grove.

Petitioners, WHFT LL Workforce, Ltd. and WHFT LL Workforce Developer, LLC will be referred to as "WHFT."

Respondent, Florida Housing Finance Corporation will be referred to as "Florida Housing."

Intervenor, BDG Fern Grove Phase Two, LP will be referred to as "Fern Grove."

"RFA" refers to Request for Applications 2024-213 entitled "SAIL Funding for Live Local Mixed Income, Mixed-Use, and Urban Infill Developments."

STATEMENT OF THE ISSUE

The issues to be determined are whether, with respect to each application filed and at issue in this case, Florida Housing's review and decision-making process in response to Request for Applications 2024-213 was contrary to its governing statutes, rules or policies, or the RFA's specifications.

PRELIMINARY STATEMENT

On November 20, 2024, Florida Housing issued the RFA. The RFA was modified on December 10, 2024. Among others, WHFT and Fern Grove timely submitted applications.

A Florida Housing review committee reviewed applications and made recommendations about which applications should be found eligible and those that should be selected for funding. On January 24, 2025, Florida Housing's Board of Directors ("Board") adopted the review committee's recommendations. WHFT timely filed its petition. Fern Grove timely filed a Notice of Intervention and Appearance by a Specifically Named Person. On February 25, 2025, Florida Housing referred the petition and Notice to DOAH and on March 25-26, a final hearing was held.

At the hearing, each of the parties presented the testimony of Melissa Levy, in her capacity as Director of Multifamily Development for Florida Housing. The parties also offered joint exhibits 1 through 9 which were received into evidence.

Florida Housing did not offer any other evidence.

WHFT exhibits 1 through 9 were admitted into evidence. The exhibits offered by WHFT included the deposition testimony of Paula Rhodes with deposition exhibits 1, 2, 3, 8 and 9 only, Amber Velazuez and Lindsay Brooke Sammons.

Fern Grove offered exhibits 1, 5 through 9, 13, 16 and 17 and each of the exhibits was admitted into evidence. Fern Grove proffered exhibits 2 through 4 and 10 through 12. Fern Grove presented the testimony of Scott Zimmerman and Robert Von. Fern Grove also relies on the Rhodes, Velazquez and Sammons depositions.

FINDINGS OF FACT

The Parties

1. Petitioner, WHFT, was assigned application number 2025-345BS. WHFT did not apply as a Mixed Use Development. J-7; T 99. WHFT was deemed preliminarily eligible but was not selected for funding under the terms of the RFA.

2. Florida Housing is a public corporation organized pursuant to Chapter 420, Part V, Fla. Stat., and for the purposes of these proceedings, an agency of the State of Florida. Stip at 10.

3. Intervenor, Fern Grove was assigned application number 2025-317BS. Fern Grove applied as a Mixed-Use Development. J-8, p. 33. Fern Grove was deemed eligible for funding and was preliminarily selected for funding under the terms of the RFA.

The Competitive Application Process

4. Florida Housing is a public corporation created pursuant to section 420.504, Fla. Stat. Its purpose is to promote public welfare by administering the governmental function of financing affordable housing in Florida. Pursuant to Section

420.5099, Fla. Stat., Florida Housing is designated as the housing credit agency for Florida within the meaning of section 42(h)(7)(A) of the Internal Revenue Code and has the responsibility and authority to establish procedures for allocating and distributing low-income housing tax credits, and State Apartment Incentive Loan (SAIL) funding or grants. Stip at 10.

5. Florida Housing is authorized to allocate its funding resources by means of a request for proposal or other competitive solicitation under Section 420.507(48), Fla. Stat. Chapter 67-60, Fla. Admin. Code governs the competitive solicitation process and provides for the use of the bid protest provisions of Section 120.57(3), Fla. Stat. Stip at 10.

6. The competitive application process commences with the issuance of a Request for Applications. A Request for Application is equivalent to a "request for proposal" as indicated in Rule 67-60.009(4), Fla. Admin. Code. Stip at 10.

7. The RFA was issued on November 20, 2024, and responses were due on December 20, 2024 (the "Application Deadline"). No challenges were made to the terms or specifications of the RFA. Stip at 12.

8. Subsequent to issuance of the RFA but prior to submission of applications, Florida Housing published "Questions and Answers for RFA 2024-213." Stip at 10; J-9.

9. Through the RFA, Florida Housing is expected to award an estimated $100,389,979 in SAIL funding, and $1,629,260 of competitive housing tax credits. Stip at 11.

10. Florida Housing received 65 applications in response to the RFA. Stip at 11.

11. At its January 16, 2025 meeting, the Review Committee found 57 applications eligible and 8 applications ineligible for funding. Ten applications were preliminarily recommended for funding. J-2, 3; Stip at 11.

12. On January 24, 2025, the Florida Housing Board met and considered the recommendations of the Review Committee for the RFA. Also on January 24, 2025, all applicants in the RFA, including the Petitioners and Intervenors, received notice that the Board had made its determinations regarding applicant eligibility and that certain eligible applicants were preliminarily selected for funding subject to satisfactory completion of the credit underwriting process. J-4, 5; Stip at 11.

13. In that January 24, 2025 posting, Florida Housing announced its intention to preliminarily award funding to ten applicants, one of which was Fern Grove. Stip at 12.

The RFA Ranking and Selection Process

14. The RFA provides that each applicant is scored eligible or ineligible based upon certain enumerated eligibility items and is scored based on points for other items. Only applications that meet all the eligibility items are eligible for funding and considered for funding selection. Stip at 12; J-1, pp. 76-79.

The WHFT Application

15. WHFT submitted an application for an 84-unit mid-rise development named Catchlight Crossings Live Local Workforce, located in Orange County. Stip at 18; J-7.

16. There are three separate fatal flaws in the WHFT funding sources.

Ambiguity in the WHFT Funding Letter

17. Each application is required to include a Development Cost Pro Forma. The RFA states, in pertinent part:

> c. Development Cost Pro Forma
>
> All Applicants must complete the Development Cost Pro Forma listing the anticipated costs, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the anticipated sources (both Corporation and non-Corporation funding). The sources must equal or exceed the uses. If a funding source is not considered, if the Applicant's funding Request Amount is adjusted downward, and/or if the anticipated costs or uses are adjusted upward, this may result in a funding shortfall. (Emphasis added)

J-1, pp. 68-69.

18. In other words, the applicant has to demonstrate adequate sources for both construction and permanent financing for the project.

19. The total Development Cost (a/k/a "uses") of the WHFT project is $34,815,777. WHFT identified three buckets of funds that make up its sources:

1- SAIL + ELI[1] = $12,185,521
2- JP Morgan Chase loan = up to $15,000,000
3- Self-Funded loan = $7,630,256

[1] ELI is "Extremely Low Income."

J-7, pp. 25-29.

20. This totals $34,815,777 meaning WHFT's "sources" exactly equal its "uses." The SAIL and ELI funds are provided through Florida Housing. The JP Morgan Chase ("Chase") and self-funded loans would be considered non-corporation funding. T2, 140-141.

21. There are two documents WHFT included in Attachment 10 evidencing its non-corporation funding. One is a form verifying that the applicant made a "self-sourced funding commitment" of $7,630,256. J-7, p. 170.

22. The other is a letter from Chase regarding construction and permanent loans, each of $15,000,000. Regarding the construction loan, that letter provides the following:

> Loan to Value — Up to 80% including the value of the real estate and low income housing tax credits.

J-7, p. 172.

23. At the end, the letter also states:

> The letter of interest is for you, and the local government agency as well as the tax credit allocation agency's information and use only, and is not to be relied upon by other parties.

J-7, p. 173.

24. There is a fundamental inconsistency between this funding letter and the application. The funding letter clearly contemplates the deal using low income housing tax credits as a factor in the loan to value calculation that is a condition of

the construction financing. The funding letter also clearly contemplates involvement with a local government agency.

25. Yet the WHFT project has neither of those attributes. The WHFT application does not rely on low income housing tax credits or on any local government form of support. J-7, pp. 28-29; T1, 62-63, 114; T2, 136.

The WHFT Application Doesn't Support the Anticipated Permanent Financing

26. The second flaw in the funding sources relates to the permanent financing for the WHFT project.

27. As noted above, Florida Housing requires applicants to demonstrate adequate sources at both the construction and permanent phases of the project. T1, 57. Typically, the funding sources for the construction and permanent phases of a project are different. T1, 57-58. In the case of the WHFT project, the Chase letter contains the funding sources for both phases.

28. The Chase letter provides for the specific terms of the construction and permanent loans of $15,00,000, including the requirements to convert the construction loan to a permanent loan. J-7, pp. 171-174.

29. To convert the $15 million construction loan to a $15 million permanent loan, the Chase letter requires:

> Conversion Requirements: At least three consecutive calendar months of not less than:
>
> - 1.20x debt service coverage ratio (DSCR); 1.15x all-in DSCR including all loans requiring debt service payment, and
> - 90% economic and physical occupancy

> And the pro-forma forecast shows DSCR (based on annual revenue growth of 2% and annual expense growth of 3%) of not less than 1.00x in the Permanent Period.

J-7, pg. 173.

30. A 1.20x debt service coverage ratio ("DSCR") means WHFT must have a 20% higher net operating income, or "cushion," to cover its annual debt service obligations. T2, 29.

31. Fern Grove contends the WHFT project cannot support a 1.20x DSCR or a 1.15x all-in DSCR including all loans requiring debt service payment and, therefore, cannot realistically convert the $15 million construction loan to the permanent loan. T1, 47-52, 58.

32. To demonstrate the shortfall, Fern Grove presented two Pro Formas to illustrate the funding shortfall. Scott Zimmerman, a principal with the applicant and an experienced affordable housing developer and manager explained the analysis. FG-2, 3; T1, 65.

33. The first Pro Forma models the $15 million permanent loan. FG-2.

34. On the revenue side:

a. The Pro Forma takes the information in WHFT's application showing the total 84 units multiplied by the maximum rents that could be charged. T1, 65-66, 74-75. The maximum rents are annual rent limits published by Florida Housing each year by county. This publication allows for an accurate assessment of project income. FG-4; T1, 75-76.

b. Next, the Pro Forma uses a reasonable utility allowance and subtracts that from the maximum allowable rent to determine the total rent that can be charged for the units to get the total rent revenue. T1, 76-77.

c. Then, the Pro Forma factors in a 5% vacancy loss which is the lowest percentage typically used by lenders as well as by Florida Housing and a $25 per unit "other income," which is industry standard. T1, 76.

35. In total, the projected income, or revenue, for year one of the WHFT project is $1,405,686. FG 2, 3.

36. On the operating expense side, the Pro Forma uses recent appraisals of similar projects, in conjunction with Fern Grove's own experience in management, to calculate a per unit operating expense of $6,112, for a total projected year one operating expense of $513,384. T1, 78.

37. This results in total year one Projected Operating Income of $892,301. FG 2, 3; T1, 78.

38. Mr. Zimmerman then calculated the debt service using Chase's specific terms which is $15 million amortized over 35 years at a rate of 7.39%, for an annual debt service of $1,213,179. J-7, pp. 172-173; T1, 79-80.

39. Finally, to calculate the DSCR, Mr. Zimmerman divided the projected operating income ($892,301) by the debt service ($1,213,179) to arrive at a debt service coverage ratio of 0.74x. T1, 80.

40. This is significantly below the terms of the Chase letter which requires a DSCR of 1.20x. J-7, p. 173; T1, 80.

41. In an effort to determine how much debt WHFT's proposed project could support, Mr. Zimmerman presented a second Pro Forma which assumes the same total projected income and expenses, and calculates that the maximum loan amount that could attain the debt service coverage ratio required by the Chase letter (even generously assuming Chase would accept only the 1.15x DSCR) is less than $9.5 million. FG-3; T1, 80-81.

42. A $9.5 million permanent loan would not be enough source to cover the uses for the WHFT project, resulting in a significant funding shortfall. T1, 81.

43. Per the terms of the RFA, if an application has a funding shortfall in the Permanent Analysis of the Applicant's Development Cost Pro Forma, the amount of the adjustment(s), to the extent needed and possible, will be offset by increasing the deferred Developer Fee up to the maximum eligible amount. J-1, pp. 68-69.

44. WHFT's Development Pro Forma does provide for a deferred developer fee of $2.3 million. J-7, p. 28. However, this deferred developer fee is not enough to offset the funding shortfall. T1, 82-83.

45. Expert witness Robert Von validated the reasonableness of the calculations in the Fern Grove Pro Formas. T2, 23.

46. Mr. Von testified that to perform the validation, he recreated the cash flows and determined the projected income was calculated correctly. T2, 23.

47. Mr. Von tested the reasonableness of the operating expenses against three recent affordable housing project appraisals in Orange County that he completed and found the projected expenses to be reasonable. T2, 23.

48. In fact, the per unit operating expenses of the three recent affordable housing project appraisals are higher than the projection of $6,112 per unit used by Mr. Zimmerman. T2, 24-27. Specifically, for Village of Pine Hills in Orlando, the projected per unit expenses were $6,564; for Ivey Apartments in Orlando, the projected per unit expenses were $6,168; and for Cardinal Point in Orlando, the projected per unit expenses were $6,182. FG-10, p. 225; FG-11, p. 208; FG-12, p. 209.

49. Mr. Von credibly testified that the utilities estimates used by Fern Grove, in his experience of appraising such projects in Orange County, was somewhat low, meaning the maximum rents that WHFT was projected to receive were overstated and, in turn, the projected income was overstated. T2, 28-29.

50. Mr. Von agreed that the WHFT project, as presented, would not meet the DSCR requirements in the Chase letter. T2, 30.

The Self-Source Financing Information Does Not Satisfy the RFA Requirements

51. There is a third deficiency in the WHFT sources.

52. As noted above, WHFT has included $7,630,256 as "self-sourced financing by the applicant. J-7, p. 170.

53. Section 10.b. of the RFA provides additional requirements regarding funding that is not provided by Florida Housing. Section 10.b.(1)(c) on page 65-68 of the RFA provides, in pertinent part:

> b. Non-Corporation Funding
>
> Non-Corporation Funding Proposals
>
> Unless stated otherwise within this RFA, for funding, other than Corporation funding and deferred Developer Fee, to

> be counted as a source on the Development Cost Pro Forma, provide documentation of all financing proposals from both the construction and the permanent lender(s), equity proposals from the syndicator, and other sources of funding. The financing proposals must state whether they are for construction financing, permanent financing, or both, and all attachments and/or exhibits referenced in the proposal must be provided as **Attachment 10*** to Exhibit A.
>
> ****
>
> (c) If the financing proposal is not from a Regulated Mortgage Lender in the business of making loans or a governmental entity, evidence of ability to fund must be provided. Evidence of ability to fund includes: (i) a copy of the lender's most current audited financial statements no more than 17 months old; or (ii) if the loan has already been funded, a copy of the note and recorded mortgage…. Financing proposals from lenders who cannot demonstrate ability to fund will not count as a source of financing. Financial statements must be included in the Application. Note: This provision does not apply to deferred Developer Fee. (Emphasis added).

J-1, pp. 67-68.[2]

54. WHFT and Florida Housing contend that, despite the language in the RFA, WHFT did not have to provide evidence of ability to fund in the application. T2, 79-80, 141-142.

55. Florida Housing points to language in the Self-Sourced Financing Commitment Verification Form in the WHFT application that states:

> During the credit underwriting process, the designated self-sourced Principals of the Applicant must provide evidence of ability to fund self-sourced financing in an amount that is at least half of the Applicant's eligible Live Local SAIL Request Amount or $1,000,000, whichever is greater:

[2] "Regulated Mortgage Lenders" are institutions such as banks like Chase. J-1, p. 107. WHFT is not a Regulated Mortgage Lender. T2, 142.

> - Evidence of ability to fund includes: (i) a copy of the Principal's most current audited financial statements, or bank statements, no more than 17 months old; or (ii) if the loan has already been funded, a copy of the note and recorded mortgage.

J-7, p. 170.

56. The fact that evidence of ability to fund is required during credit underwriting does not mean that it is not also required in the application. There are numerous items that are required in both phases. These include information about number of units, new construction versus renovation, set-asides, mid-rise versus garden apartments, etc. T2, 142-144.

57. There is no stated exception for self-sourced funders that would excuse them from the application requirement to provide evidence of ability to fund.

58. Florida Housing notes that there were nine applications that included self-sourced funding commitment and none of them provided evidence of ability to fund in their applications. T2, 84. But the fact that others may not have properly completed the application, and that Florida Housing did not deem them ineligible, does not negate the plain language requirement in the RFA.

WHFT's Site Control Evidence

59. Subsection A.7.a. Site Control, of Section Four of the RFA, requires an applicant to demonstrate site control such that it is a party to an eligible contract or lease, or is the owner of the subject property. Such demonstration requires documentation including **all relevant** intermediate contracts, agreements,

assignments, options, conveyances, intermediate leases, and subleases. J-1, pp. 44-45 (emphasis added).

60. WHFT's Application includes a Ground Lease from Housing For Tomorrow Corp, ("HFT") as Landlord to Wendover Housing for Today, LLC ("Wendover") as Tenant. J-6, p. 51 *et seq*.

61. The Ground Lease between HFT and Wendover references a Master Development Agreement ("MDA") which, "sets forth, among other things, certain obligations of the Tenant related to the development, timing and construction of the Project." J-7, p. 51.

62. The Ground Lease, including all exhibits, memoranda, and amendments, references the MDA no fewer than 19 times.

63. WHFT's premises control of the subject property is pursuant to a Sublease between Wendover and WHFT LL Workforce, Ltd. dated as of December 17, 2024. J-7, p. 135 *et. seq*. The Sublease provides that Wendover and HFT "have entered into a certain MDA…which sets forth obligations of the parties thereto with respect to the development, construction and financing" of the development and that WHFT's right to develop the project in question is subject to the terms and obligations of Wendover under the MDA. J-7, pp. 135, 136.

64. The Sublease references the MDA no fewer than eight times, including Paragraph 25 which expressly provides that if any provision of the Sublease directly or indirectly conflicts with any provision in the Ground Lease or MDA, the Ground Lease and MDA control. J-7, p. 148.

65. The MDA is not included in the WHFT Application.

66. The Landlord has certain termination rights pursuant to the MDA. Section 2.03(b) provides that prior to any construction of any phase, Tenant shall provide Landlord with written confirmation from Lender, that Tenant has sufficient equity and financing commitments to complete any and all improvements for such phase; if Tenant fails to provide a financing confirmation by the date set forth in the Project Schedule, which is defined in the MDA, for commencement of construction of a Phase, as the same may be modified or extended in accordance with the MDA, the Landlord may terminate the Ground Lease as to such Phase and any future Phase. J-7, p. 54.

67. Furthermore, pursuant to section 2.03(g) of the Ground Lease, in the event that the Tenant shall not complete construction of each or any Phase of the Improvements within the time required under the MDA and in compliance with the plans and specifications as described in the MDA, the Landlord shall have the right to terminate the portion of the Ground Lease corresponding to the sublease subject to a Phase Default. If the Landlord chooses to exercise such right, all right, title, and interest shall automatically vest in Landlord. J-7, p. 55.

68. The sketch and legal description attached to the Sublease, and the corresponding memorandum of lease, shows that the area subleased includes a portion which is already under construction. J-7, p. 162.

69. The application materials do not contain any confirmation by the Landlord that the requirements for commencement of construction or completion of construction as to the application property have been met.

The Fern Grove Application

70. Fern Grove timely submitted an application for a new 129-unit mid-rise Mixed-Use development named Fern Grove Phase Two, located in Orange County. Stip at 12; J-8.

71. To be eligible to receive funding under the terms of the RFA, an applicant must show, among other things, the "Developer Experience Requirement[s are] met" and "Prior Management Company Experience requirement[s are] met." Stip at 13; J-1, p. 77.

Mixed-Use Development Definitions

72. The concept of a "Mixed-Use Development" is a creature of the Live Local Act enacted in 2023. Sections 420.50871 & 420.50872, Florida Statutes.

73. The RFA defines a "Mixed-Use Development" as

> A Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space non-residential component. The Mixed-Use Commercial Space and/or Mixed-Use Institutional Space must be Corporation-approved and cannot be used by an entity that is an Affiliate of any Principal of the Applicant or Developer, unless the entity meets the definition of Non-Profit and, as demonstrated by the IRS determination letter, has been in existence at least three years prior to the Application Deadline of this RFA.

J-1, p. 104.

74. The RFA further defines the term "Mixed Use Institutional Space" as

> Charitable, educational, healthcare services, civic (local government/state) within a Development that is in operation at least 5 days a week.

J-1, p. 105.

75. The RFA defines the term "Mixed-Use Commercial Space as

> Retail and/or office space within a Development that produces income for the Development that exceeds the operating expenses for the space.

J-1, p. 104.

76. These definitions did not exist until 2023. The "Commercial" definition focuses on the "space" by using that word twice whereas the definition of "Institutional" places its focus on the services provided to residents by not using that word at all. The Institutional definition says nothing about how many "5 day" weeks of service must occur nor for how long each day. There is likewise no requirement that any resident use any such service. T2, 106.

77. Florida Housing insisted that the intent behind these definitions is that there be "dedicated" space physically located in the development for the commercial or institutional uses. T2, 97, 108. But the requirement for "dedicated" space is not in the RFA although other places in the RFA call for "dedicated" spaces for other uses.[3] J-1, pp. 50, 56; T2, 109.

78. Between this RFA and its predecessor in 2023, there have been approximately sixty mixed use applications deemed eligible for funding and

[3] The RFA requires dedicated space for emergency operations in elderly developments and computer training classes "in a dedicated space on site."

approximately ten selected for funding. J-4, J-5, FG-16, FG-17; T2, 121. All those applications would have made similar certifications regarding developer and management company experience. But in none of those would Florida Housing have known the nature or extent of that experience. T 121-122.

79. This case is the first one in which anyone has attempted to look behind an application to examine the nature and scope of the developer and management company experience. T2, 118. While this is a case of first impression, Florida Housing made no attempt to determine how others interpreted these requirements or to determine if Fern Grove is being treated differently from other applicants. T2, 122.

Fern Grove's Developer Experience

80. The "Developer" of Fern Grove is "BDG Fern Grove Phase Two Developer, LLC." As listed in Fern Grove's application, two of the Principals of the Developer are Scott Zimmerman and Jeffrey Kiss. J-8.

81. The RFA contains the following Developer Experience requirements:

> If the Applicant is requesting Live Local SAIL with either 9% Housing Credits or tax-exempt bonds with 4% Housing Credits, the Applicant must meet all applicable requirements as outlined in (a) below….
>
> General Requirements available to all Applicants
>
> The natural person Principal(s) must have, since January 1, 2004, completed at least three multifamily rental housing developments, but may include information for up to four multifamily rental housing developments in order to meet the following requirements:
>
> * * * *
>
> • Mixed-Use Development Experience, if applicable

> If applying as a Mixed-Use Development, at least one of the developments must meet the definition of a Mixed-Use Development, and at least 50% of the total residential units in the development must be income and rent restricted at 80% AMI or below, which must be memorialized by a recorded Land Use Restriction Agreement, Extended Use Agreement, or other equivalent document.
>
> * * * *
>
> For purposes of this provision, completed development means (i) that the temporary or final certificate of occupancy has been issued for at least one unit in one of the residential apartment buildings and, if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the nonresidential use, within the development, or (ii) that at least one IRS Form 8609 Complete RFA as modified on 12-10-24 Page 15 of 163 RFA 2024-213 has been issued for one of the residential apartment buildings and, if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the non-residential use, within the development.

J-1, pp. 12-15.

82. Fern Grove identified Parramore Oaks, a 120-unit affordable housing development in Orlando, Florida as a Mixed-Use Development in the Developer Experience section of its application. J-8, p. 5.

83. The mixed-use institutional services at Parramore Oaks were provided by the Orlando Neighborhood Improvement Corporation ("ONIC") and were described by Ambar Velazquez, ONIC's Special Programs Manager. WHFT-5, p. 7.

84. ONIC is a nonprofit affordable housing developer in the Orlando area. ONIC also operates a resident service program that partners with local agencies to offer services to the affordable housing community. WHFT-5, pp. 9-11, depo ex. 1.

85. ONIC has had a relationship with Parramore Oaks since it opened. WHFT-5, p. 12.

86. Pertinent to this case, ONIC provided a federally funded housing stability program starting in late 2021 and concluding in February 2023. The program connected renters to HUD-trained housing counselors that helped residents facing challenges such as eviction, loss of income, etc. The program was marketed to the residents. The ONIC counselors would meet with Parramore Oaks residents both onsite or in other locations. If onsite, they would typically use the community room. The program ended when the grant funds ran out. The program was in operation five days a week during its existence. WHFT-5, pp. 12-15, 22-30, 42-43.

87. ONIC also offers a prodigy cultural arts program for at-risk youth ages 5-17 funded by the Department of Juvenile Justice. It is provided two days a week in the Parramore Oaks community room. WHFT-5, pp. 15-17, 31-38.

88. Paula Rhodes with Invictus Development testified regarding Parramore Oaks. The first phase of Parramore Oaks opened in November 2019 with the second phase opening in 2024. WHFT-1, pp. 10-11.

89. Invictus was a co-developer of Parramore Oaks along with Kiss and Company. Jeffrey Kiss, a principal with Kiss and Company, is listed in the Fern Grove application. WHFT-1, pp. 10-12.

90. Ms. Rhodes confirmed that ONIC had provided services to the residents of Parramore Oaks. WHFT-1, pp. 12-15.

91. Florida Housing concedes that the types of services provided by ONIC to the residents of Parramore Oaks met the "Institutional" definition but now

disputes that they met the location requirement that Florida Housing asserts is in that definition. T2, 113-114.

Fern Grove's Management Experience

92. Under the terms of the RFA, if an applicant is applying for RFA funding as a Mixed-Use Development, "One of the Developments that demonstrate the Management Company experience must also have met the definition of Mixed-Use Development." J-1, p. 19.

93. Fern Grove identified Providence Reserve Senior dba Banyan Reserve Senior Apartments, a 139-unit affordable housing development in Lakeland, Florida and Banyan Cove, a 100-unit affordable housing development in Deland, Florida in the Management Company section of its application. J-8, pp. 2-3.

94. The residents of Banyan Cove and Banyan Reserve are provided services by The Tree House Foundation, an Orlando-based nonprofit organization established in 2012. It provides services to 32 affordable housing communities in Florida as well as in communities in eight other states. WHFT-6, p. 9.

95. Tree House provides online and in-person workshops as well as a help line for residents of affordable housing communities. These programs assist with housing stability, utilities, food insecurity, etc. WHFT-6, p. 10.

96. Its services are funded by the developers of the affordable housing communities. There is no cost to the residents. WHFT-6, p. 11.

97. Tree House's services have been provided to residents of Banyan Cove and Banyan Reserve since each development opened. Residents are provided with

information about these services in their new resident welcome packets. WHFT-6, p. 12-13 and depo. ex. 4. Programs include classes on subjects such as English for speakers of other languages; computer training; employment 101; and others. WHFT-6, pp. 14-15, 22-25.

98. Tree House also operates a helpline available Monday through Friday that provides guidance on different services needed by those living in affordable communities. Tree House has partnerships with other organizations like Catholic Charities, Second Harvest Food Bank, Blue Cross, Adult Literacy League and Truist Bank. WHFT-6, pp. 15, 21, 28, 31, 34-35.

99. When on site in both developments, there are community, nonresidential spaces that are used. WHFT-6, pp. 34, 37-38.

100. Tree House also provides a resource for the staff of the communities it serves. WHFT-6, p. 16.

101. Florida Housing concedes that the types of services provided by The Tree House Foundation to the residents of Banyan Cove and Banyan Reserve met the "Institutional" definition but now disputes that they met the location requirement that Florida Housing asserts is in that definition. T2, 113-114.

102. Banyan Cove, Banyan Reserve and Parramore Oaks all demonstrate experience within the definition of Mixed-Use Institutional Space.

Certificates of Occupancy

103. There is another basis on which Banyan Cove, Banyan Reserve and Parramore Oaks meet the threshold set in the RFA for developer and management company experience.

104. During the application process, there was an opportunity for the submission of questions to Florida Housing. The following relevant Q&A was posted by Florida Housing:

> 15. If the proposed Development will be a Mixed-Use Development, there is a Mixed-Use Developer Experience requirement. We have constructed a development that includes a Mixed-Use component, but the Mixed-Use portion is not yet occupied. Will this qualify as Mixed-Use experience?
> Answer:
> As stated in Section Four, A.3.b.(3)(a) of the RFA, the natural person Principal(s) must have, since January 1, 2004, completed at least three multifamily rental housing developments, but may include information for up to four multifamily rental housing developments...completed development means (i) that the temporary or final certificate of occupancy has been issued for at least one unit in one of the residential apartment buildings and, if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the non-residential use, within the development, or (ii) that at least one IRS Form 8609 has been issued for one of the residential apartment buildings and, if a Mixed-Use Development, the temporary or final certificate of occupancy has also been issued for the non-residential use, within the development. As used in this section, a Housing Credit development that contains multiple buildings is a single development regardless of the number of buildings within the development for which an IRS Form 8609 has been issued. If no certificate of occupancy has been issued, the property should not be submitted for experience. (Emphasis in original)

J-9, p.7.

105. Through this Q&A, Florida Housing made it clear that all that is necessary to satisfy the experience requirements is the issuance of a certificate of occupancy for nonresidential space in the development.

106. Parramore Oaks has nonresidential spaces in the development. It includes a community room, a kids' activity room, reading area and a training and computer room. These nonresidential spaces have a certificate of occupancy from the City of Orlando. WHFT-2. pp. 15-17.

107. Parramore Oaks has communicated with several companies to bring day care services into these spaces although that has not yet come to fruition. WHFT-2, pp. 17-20. However, the Q&A makes clear that actual use of nonresidential space is not required.

108. Banyan Cove and Banyan Reserve also have certificates of occupancy for nonresidential spaces. FG 5, 6, 7, 8; T1, 86-88.

109. While Florida Housing may not have intended to allow a certificate of occupancy for any type of nonresidential space to be sufficient, that is an issue that can be addressed in a subsequent RFA. But Fern Grove meets the requirements set forth in this RFA.

Minor Irregularity

110. If it is ultimately concluded by Florida Housing that the requisite experience is demonstrated by Banyan Cove and/or Banyan Reserve but not by Parramore Oaks, these additional findings are made.

111. The Management Company experience section of the RFA requires the listing of two developments managed by the designated company but does not require either to be specifically identified as having the mixed use experience.

112. Fern Grove identified AGPM, LLC as the management company and listed Scott Zimmerman as its contact. J-8, p. 2.

113. Mr. Zimmerman is a natural person principal with both the developer and management company for both Banyan Cove and Banyan Reserve. T1, 48.

114. Mr. Zimmerman is also a principal with the applicant and developer of Fern Grove. J-8, pp. 3, 38-39

115. While the "Mixed-Use Development" box in the Developer Experience section of the Fern Grove application was only checked for Parramore Oaks, both Banyan Cove and Banyan Reserve were listed in that same section of the application.

CONCLUSIONS OF LAW

116. DOAH has jurisdiction over the parties and the subject matter of this cause pursuant to sections 120.569, 120.57(1), and 120.57(3).

117. Pursuant to section 120.57(3)(f), the burden of proof rests with the Petitioner as the party opposing the proposed agency action. *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 609 (Fla. 1st DCA 1998). Since Florida Housing originally recommended approval of the Fern Grove application and has reversed its position in this process, Florida Housing shares in WHFT's burden.

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

> Unless otherwise provided by statute, the burden of proof shall rest with the party protesting the proposed agency

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

119. "De novo proceeding," as used in section 120.57(3)(f), describes a form of intra-agency review. In such proceedings, "[t]he judge may receive evidence, as with any formal hearing under section 120.57(1), but the object of the proceeding is to evaluate the action taken by the agency." *State Contracting*, 709 So. 2d at 609.

120. A bid protest proceeding is not simply a record review of the information that was before the agency. A new evidentiary record based upon the facts established at DOAH is developed. *J.D. v. Fla. Dep't of Child. & Fams.*, 114 So. 3d 1127, 1132-33 (Fla. 1st DCA 2013).

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

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

> A finding of fact is clearly erroneous when, although there is evidence to support such finding, the reviewing court upon reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed.

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

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

123. An action is contrary to competition if it interferes with the purposes of competitive procurement. The purpose of the competitive bidding process is described in *Wester v. Belote*, 138 So. 721, 723-24 (Fla. 1931), as:

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

124. An action is "arbitrary if it is not supported by logic or the necessary facts," and "capricious if it is adopted without thought or reason or is irrational." *Hadi v. Lib. Behav. Health Corp.*, 927 So. 2d 34, 38-39 (Fla. 1st DCA 2006). If an agency action is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, the decision is neither arbitrary nor capricious. *J.D.*,

114 So. 3d at 1130. Nevertheless, the reviewing court must consider whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of each of these factors to its final decision. *Adam Smith Enters., Inc. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989)

125. It has long been recognized that "[a]lthough a bid containing a material variance is unacceptable, not every deviation from the invitation to bid is material. It is only material if it gives the bidder a substantial advantage over the other bidders and thereby restricts or stifles competition." *Tropabest Foods, Inc. v. State Dep't of Gen. Servs.*, 493 So. 2d 50, 52 (Fla. 1st DCA 1986).

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

127. To have standing in a case involving the award of a public contract, the challenger must show that it will receive an award if its challenge is successful. *Madison Highlands, LLC v. Florida Housing Finance Corp.*, 220 So. 3d, 467, 473 (Fla. 5th DCA 2017).

The WHFT Application Is Ineligible for Funding

128. As noted above, there is a disconnect between the Chase letter and the WHFT project. On its face, the Chase letter assumes the WHFT project has both low income housing tax credits and local government agency involvement support—neither of which are present in the WHFT application. Additionally, the Chase letter contemplates a permanent loan amount that is inconsistent with the information and commitments in the application.

129. In *MJHS South Parcel, Ltd. v. Florida Housing Finance Corp.*, DOAH Case No. 23-0903BID, et al., one of the applicants initially selected for funding was MHP FL IX, LLLP ("MHP"). MHP submitted an equity proposal letter with information regarding a portion of its funding sources. The equity letter contained a capital contribution schedule that called for the disbursement of funds in four installments. However, the letter did not make clear that the payment date of Capital Contribution #2 would occur prior to the completion of construction and that payment prior to construction was necessary for the MHP construction sources to be sufficient. This ambiguity was enough to render the MHP application ineligible for funding. MJHS FOF 45-56.

130. A second application in this same case had a similar issue. The MJHS application was initially deemed eligible but was not selected for funding. MJHS also had a funding schedule with four installments. Again, there was a question about whether the second installment would be paid before the completion of construction. As to MJHS, the anticipated date of the payment of this second contribution was prior

to the construction completion date. However, there were other conditions to the payment of this second contribution and it was not clear that those would occur in time. This uncertainty meant the equity contribution could not be counted thereby causing a funding shortfall that made the MJHS application ineligible. MJHS FOF 57-65.

131. The ALJ made the following Conclusions as to both applications:

> 134. In order to count an Equity Proposal as a source of funding, it must comply with certain RFA requirements, one of which is to state the amount of proposed equity to be paid prior to construction completion. An Equity Proposal is responsive only to the extent that the amount of equity to be paid prior to construction completion is clearly stated. *Vistas at Fountainhead LP v. Fla. Hous. Fin. Corp*., Case No. 19-2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part, FHFC No. 2019-030BP (FHFC August 2, 2019). If material ambiguity exists, the funds may not be considered as equity to be paid before construction completion. Id.
>
> 135. MHP's and MJHS's Equity Proposals are ambiguous—it is not clear when the second installment of both equity proposals will be paid. MHP's Equity Proposal contains a date which, if construction is completed before that date, then equity would be paid after construction completion. MJHS's Equity Proposal contains seven conditions that must be completed before the release of the equity payment.
>
> 136. MHP's Capital Contribution #2 and MJHS's Second Installment must be excluded from the construction financing analysis because both create a material ambiguity in their respective applications as to when they will be paid. The exclusion of those funds results in construction funding shortfalls in both applications, causing both to be ineligible.

132. *See also, The Vistas at Fountainhead Ltd. Ptp. v. Florida Housing Finance Corp.*, DOAH Case No. 19-2328BID and *HTG Oak Valley v. Florida Housing Finance Corp., et al.*, DOAH Case No. 19-2275BID (holding that the absence of sufficient funding rendered the applications ineligible).

133. Fern Grove also challenges WHFT's application on the grounds that it should be deemed ineligible for funding because the funding proposal underlying and supporting WHFT's Development Cost Pro Forma, using its own stated terms, shows that the sources do not meet or exceed the uses as required by the RFA.

134. The Development Cost Pro Forma is necessary for applicants to "ensur[e] that they have enough sources of funding to equal or exceed the total uses or cost of the project." T2, 87; J-1 pp. 68-69.

135. This is Fern Grove's only point of entry to challenge WHFT's application on the basis that its Development Cost Pro Forma has a funding shortfall. There is no point of entry for Fern Grove to raise this challenge during credit underwriting which Florida Housing and WHFT argue is the only point at which this information is relevant. T2, 63-65, 138-139, 145-146.

136. The effective result of Florida Housing and WHFT's position is that, if Fern Grove is precluded from challenging WHFT's eligibility on the basis of its sources not equaling or exceeding its uses here, and having no point of entry to challenge WHFT's application during credit underwriting, WHFT's application, while likely ineligible on the basis of its Development Cost Pro Forma, is not subject to challenge on this issue at any point in the process. This raises the question of why

Florida Housing requires the sources to meet or exceed the uses in the Development Cost Pro Forma in the first place if any deficiencies can be wholly remedied during underwriting. Simply providing a point of entry is not enough if the point of entry is so remote from the agency action as to be ineffectual as a vehicle for affording a party whose substantial interests are or will be affected by agency action a prompt opportunity to challenge disputed issues of material fact in a 120.57 hearing. *Florida League of Cities, Inc. v. Admin. Com'n*, 586 So. 2d 397, 413 (Fla. 1st DCA 1991). There is no logical reason WHFT should be allowed to remedy its deficiencies in credit underwriting while not allowing Fern Grove the same opportunity to demonstrate its experience in credit underwriting as well.

137. Accordingly, the information and exhibits proffered by Fern Grove are relevant and are admitted into evidence.

138. *MJHS South Parcel* is again instructive because the parties and the ALJ did look behind the funding documents in the application, which is precisely what Fern Grove has done in this case. Likewise, just as WHFT seeks to look behind the representations in the Fern Grove application, it is equally appropriate to test the representations in the WHFT application to see if they satisfy the requirements of the RFA.

139. It was demonstrated that using the terms of WHFT's own funding proposal, the project cannot sustain a 1.20x DSCR or an all-in 1.15x DSCR for a $15 million loan. Indeed, it was shown that it cannot even support a loan of $9.5 million. Thus, there is a funding shortfall rendering the WHFT application ineligible.

140. WHFT's reliance on *Brownsville Manor, LP v. Redding Dev. Partners, LLC,* 224 So. 3d 891, 892 (Fla. 1st DCA 2017) is misplaced. *Brownsville* involved a challenge to proximity points awarded to an applicant when its site configuration had not yet been determined. The challenged applicant argued, and the First District Court of Appeal agreed, that for scattered site developments, the RFA language required the applicant to demonstrate that the development met the requirements of the RFA during the credit underwriting process and "nothing in the RFA required Brownsville to begin the clustering process or guarantee approval as of the application stage." *Id.* at 895.

141. However, in this RFA, for non-corporation funding proposals, applicants are required to provide documentation of all financing proposals from both the construction and the permanent lender, in order to show, at the application stage, that the applicant's sources meet or exceed their uses. *Brownsville* is, therefore, inapposite.

142. The plain language of the RFA also required WHFT to include evidence of ability to fund as part of the application. The RFA unambiguously states that for Non-Corporation funding sources other than "regulated mortgage lenders," "Financial statements must be included in the Application." J-1, p. 68. There is no exception for self-sourced funding proposals. *Banknote Corp. of America, Inc. v. United States*, 365 F. 3d 1345, 1353 (Fed. Cir. 2004) ("If the provisions of the solicitation are clear and unambiguous, they must be given their plain and ordinary meaning; we may not resort to extrinsic evidence to interpret them").

143. Florida Housing's failure to enforce this requirement was contrary to the bid specifications and was arbitrary and capricious.

144. The absence of that evidence of ability to fund means the self-sourced funds in the amount of $7,630,256 cannot be counted as a source of funds leading to a funding shortfall. This is another reason why the WHFT application is ineligible for funding.

WHFT Failed to Demonstrate Site Control

145. WHFT has substantially deviated from the requirements of the RFA and is ineligible by failing to submit the Master Development Agreement, which is a relevant, intermediate agreement to be included within the site control documents.

146. *HTG Addison II, LLC. v. Fla. Housing. Fin. Corp*., DOAH Case No. 20-1770BID is controlling precedent on this issue. In that case, Madison Oaks's application was initially deemed eligible, but by the time the case came to hearing, Florida Housing had determined that Madison Oaks failed to demonstrate site control. Madison Oaks attached a purchase and sale agreement which identified a purchaser and seller, but the owner of the property was the City of Ocala. The ALJ determined that failure to include a relevant intermediate agreement, the Redevelopment Agreement between the City and the identified "seller," which, much like here, made it unclear whether or not a certain provision in the intermediate agreement had been met at the time of the application.

147. In the instant case, the Ground Lease expressly provides that if the Tenant fails to provide the financing commitments by the date set forth in the Project

Schedule defined in the MDA for commencement of construction the Landlord may terminate the Ground Lease as to that Phase or future Phases; and does not complete construction of any Phase within *the time required under the MDA* and in compliance with the plans and specifications *as described in the MDA*, the Landlord has the right to terminate the portion of the Ground Lease corresponding to that Phase.

148. Per WHFT's own documents, at least part of the subleased property is already under construction. Yet there is no confirmation in the application documents that WHFT provided the Landlord with written confirmation that it had sufficient equity and financing commitments to complete the improvements for such phase.

149. Furthermore, the failure to include the MDA makes it impossible to determine whether WHFT is in compliance with the time requirements under the MDA to provide the financing confirmation and/or complete construction. If it is not in compliance, the Landlord has the right to terminate the Ground Lease and, by extension, the Sublease is also subject to termination.

150. Because WHFT is not eligible for funding, its Petition should be dismissed and there is no reason to determine whether the Fern Grove application is eligible. However, in the event it is determined that the eligibility of Fern Grove remains at issue because of Florida Housing's change of position or otherwise, the following Conclusions are made.

Fern Grove is Eligible for Funding

151. As noted above, despite the fact that there have been approximately sixty mixed-use applications filed since this concept originated in 2023, this is the

first case in which there has been a challenge to the eligibility of an application based on the representations by applicants—without further proof in the application—that they had the requisite developer and management company experience.

152. There is a material difference in the definitions of "Mixed-Use Commercial Space" and "Mixed-Use Institutional Space" in the RFA. The "Commercial" definition uses the word "space" twice whereas the "Institutional" definition does not use the word "space" at all.

153. The plain reading of the definitions makes clear that the "Commercial" definition is focused on a physical space. The definition of "Institutional" is focused on the services that are provided to the residents of the development.

154. It is evident that the definitions have not been fully thought through or are logical given that the "Institutional" definition does not require services to continue beyond a single week nor does it require services that any residents actually use. In addition, despite a large number of applications in both the 2024 and 2023 SAIL cycles that claimed to have the requisite experience, Florida Housing did nothing to inquire as to how others may have interpreted or applied these experiential requirements.

155. Florida Housing also attempts to insert a "designated space" requirement into a definition that is not in the RFA.

156. What is unrefuted is that through The Tree House Foundation and ONIC, the residents of Banyan Cove, Banyan Reserve and Parramore Oaks received "Institutional" services that meet the definition in the RFA.

157. In addition, the unrefuted evidence is that Banyan Cove, Banyan Reserve and Parramore Oaks all hold certificates of occupancy for nonresidential space.

158. When specifically asked during the Q&A period if the mixed-use space had to be "occupied" to meet the experience requirements, Florida Housing responded by stating that the space only needed the certificate of occupancy.

159. While that may not have been what the agency intended by that answer, that is the answer that was provided.

160. This may be something Florida Housing wants to address in a future RFA. However, Fern Grove met the requirements as stated and to deem its application ineligible would be contrary to the bid specifications.

161. Finally, given that Banyan Cove and Banyan Reserve were listed in the Developer Experience section of the application and given that Mr. Zimmerman's role with that development was clear, even if Parramore Oaks did not satisfy the experience requirement, the failure to check the "Mixed-Use Development" box for one or both of those developments is a classic "minor irregularity." The failure to check that box did not provide a competitive advantage or benefit to Fern Grove not enjoyed by other applicants and does not adversely impact the interests of Florida Housing or the public.

162. WHFT and Florida Housing have failed to demonstrate that the decision to deem Fern Grove eligible was contrary to the bid specification or competition,

arbitrary or capricious. To the contrary, any decision to deem Fern Grove ineligible would be contrary to the bid specification or competition, arbitrary or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it RECOMMENDED that Florida Housing issue a Final Order finding that:

A. WHFT's application is ineligible for funding under the RFA; and

B. Fern Grove's application is eligible for funding under the RFA.

DATED this 21st day of April 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been filed through the Division of Administrative Hearings eALJ filing portal and has been furnished by electronic mail to the following on this 21st day of April 2025.

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WHFT LL WORKFORCE, LTD., and WHFT LL WORKFORCE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

BDG FERN GROVE PHASE TWO, LP, and RPV PARCEL D, LP,

Intervenors.

DOAH Case No. 25-1110BID
FHFC Case No. 2025-006BP

MHP PASCO III, LLC

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HORIZONS OWNER, LLC,

Intervenor.

DOAH Case No. 25-1112BID
FHFC Case No. 2025-009BP

CARVER THEATER, LTD.,

Petitioner,

v.

DOAH Case No. 25-1114BID
FHFC Case No. 2025-012BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HELM'S BAY LANDING WORKFORCE, LTD.,
and HORIZONS OWNER, LLC,

Intervenors.
_____/

FLORIDA HOUSING FINANCE CORPORATION'S RESPONSE TO BDG FERN GROVE PHASE TWO, LP'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Florida Administrative Code Rule 28-106.217, Respondent, Florida Housing Finance Corporation ("Florida Housing"), hereby responds to BDG Fern Grove Phase Two, LP's ("Fern Grove") Exceptions to Recommended Order. Fern Grove's Exceptions were filed on May 19, 2025, and challenge the Recommended Order entered on May 9, 2025 by Administrative Law Judge James H. Peterson, III (the "ALJ"). In sum, Fern Grove's exceptions challenge 20 Findings of Fact and 32 Conclusions of Law within the Recommended Order. Florida Housing responds to each of these many exceptions and requests that all be denied.

Introduction

This case involves a protest of the Notice of Intent to Award issued by Florida Housing to allocate funding pursuant to the RFA 2024-213 SAIL Funding for Live Local Mixed Income, Mixed-Use, and Urban Infill Developments (the "RFA"). On November 20, 2024, Florida Housing issued the RFA. Responses were due on December 20, 2024 (the "Application Deadline"). Florida Housing received 65 Applications in response to the RFA.

On January 24, 2025, Florida Housing's Board of Directors (the "Board") met and considered the recommendations made by the Review Committee for the RFA. On the same day,

all Applicants were notified that the Board had preliminarily selected ten Applicants for funding, including Fern Grove, and were notified of their right to protest. Thereafter, Petitioners timely filed their Notices of Protest and Petition for Formal Administrative Proceedings, and the Intervenors timely intervened.

The parties to this case prepared and submitted a detailed Joint Pre-Hearing Stipulation ("Stipulation") with information about each party, the RFA funding process, and disputed issues remaining to be resolved by the ALJ. Prior to the Hearing, the parties stipulated to the ineligibility of three applications[1] which have been incorporated into the Recommended Order.

At the hearing, Joint Exhibits 1 through 9 were admitted into evidence, as were WHFT LL Workforce, LTD.'s ("WHFT" or "Catchlight") Exhibits 1 through 9 and Fern Grove's Exhibits 1, 5, through 9, 13, 16, and 17. Each party presented the testimony of Melissa Levy, Florida Housing's Managing Director of Multifamily Programs. WHFT offered the testimony of Lindsay Brooke Sammons (via deposition testimony), Ambar Velazquez (via deposition testimony), and Paula Rhodes (via deposition testimony, with deposition exhibits 1, 2, 3, 8, and 9 only). Fern Grove offered the testimony of Scott Zimmerman and Robert Von.

A transcript of the hearing was filed on April 10, 2025. The parties timely submitted Proposed Recommended Orders on April 21, 2025. The ALJ issued a Recommended Order on May 9, 2023. The ALJ recommended, amongst other things, that Fern Grove's Application is ineligible for funding and that WHFT's application remain eligible for funding.

Fern Grove filed Exceptions to the Findings of Fact and Conclusions of Law contained in the ALJ's Recommended Order on May 19, 2025.

[1] The three applications are i) Helm's Bay's application number 2025-333BS; ii) Horizons' application number 2025-303BS; and iii) Uptown Toho Partners, Ltd., application number 2025-355BS

As shown herein, the Board should adopt the Recommended Order in its entirety, without exception. The ALJ's Findings of Fact are all supported by competent, substantial evidence, and the Conclusions of Law are reasonable and consistent with the RFA, Florida Housing's policies, Florida Administrative Code, Florida Statutes, and prior orders adopted by this Board. Accordingly, the Board should reject all of Fern Grove's eleven exceptions and adopt the Recommended Order as its own.

Standard of Review

The rules of decision applicable in bid protests are set forth in section 120.57(3)(f), F.S., 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 proceedings shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary, or capricious.

Section 120.57, F.S., establishes the specific and limited parameters for Florida Housing and the Board's 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)(l), F.S. Florida Housing's Final Order must include an explicit ruling on each exception. § 120.57(1)(k), F.S.

Section 120.57(1)(l), F.S., 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.

At this stage of review, Florida Housing is not free to reweigh the evidence or to reject factual findings unless there is no competent substantial evidence to support them. *See Health Care & Ret. Corp. of Am. v. Dep't of Health & Rehab. Servs.*, 516 So. 2d 292, 296 (Fla. 1st DCA 1987); *Schumacher v. Dep't of Prof. Regul.*, 611 So. 2d 75, 76 (Fla. 4th DCA 1992); *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).

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 Cmty. Coll.*, 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. Regul., 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 hearing officer as trier of fact." *Id.* at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of fact. § 120.57(1)(1), F.S. 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 Pro. Eng'rs*, 946 So. 2d 604, 605 (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., City of N. Port, Fla. v. Consol. Minerals, Inc.*, 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.") (citations omitted). Florida Housing may not attempt to resolve evidentiary conflicts or judge the credibility of witnesses. *See Belleau v. Dep't of Envt'l Prot.*, 695 So. 2d 1305, 1306-07 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894, 896 (Fla. 2d DCA 1995).

Florida Housing may modify or reject conclusions of law over which it has substantive jurisdiction. § 120.57(1)(1), F.S.; *see generally Barfield v. Dep't of Health*, 805 So. 2d 1008, 1010-11 (Fla. 1st DCA 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 than the conclusion modified or rejected. § 120.57(1)(1), F.S.

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., Inc. v. Dep't of Bus. & Pro. Regul*., 724 So. 2d 192, 193 (Fla. 1st DCA 1999); *see also Baptist Hosp., Inc.*, 500 So. 2d at 623; *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 1st DCA 1985). Matters that are susceptible to ordinary methods of proof – such as weighing the evidence or determining a witness's credibility – are factual matters to be determined by the ALJ. *See id.*

"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).

Response to Exception Number One

In Exception No. 1, Fern Grove takes exception to the ALJ's finding of fact in paragraph 35, portions of the ALJ's findings of fact in paragraphs 44 and 57, and the ALJ's conclusions of law in paragraphs 99 and 108 through 111. Fern Grove specifically takes exception to the ALJ's consideration of the community room and clubhouse areas as part of a development's residential component for the purposes of determining mixed-use experience.

For background, in order to be considered eligible for funding, the RFA requires,

> If applying as a Mixed-Use Development, **at least one of the developments must meet the definition of a Mixed-Use Development,** and at least 50% of the total residential units in the development must be income and rent restricted at 80% AMI or below, which must be memorialized by a recorded Land Use Restriction Agreement, Extended Use Agreement, or other equivalent document.

Stip. at 32; Jt. Ex. 1 at 12. (emphasis added). Similarly, "one of the Developments that demonstrate the Management Company experience must also have met the definition of Mixed-Use Development." Jt. Ex. 1 at 19. A "Mixed-Use Development" is defined, in relevant part, as "[a] Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space, non-residential component…" Jt. Ex. 1 at 104; Stip. at 28.

Findings of fact, paragraphs 35, 44, and 57, state:

> 35. The residential component anticipated under the RFA consists of the residential units themselves and the supporting uses for those units, including the clubhouse, leasing offices, and common areas or other amenities. The nonresidential component is a separate space for the Commercial or Institutional Use Space, apart from the residential component.
>
> ***
>
> 44. In addition, the evidence shows that when offered on-site, the Banyon Cove and Banyon Reserve services were not offered five days a week or in their own space within the development. Rather than provided in dedicated spaces, the services are provided in the community room/clubhouse (amenity) spaces. Both Banyon Cove and Banyon Reserve are senior communities required to have a community room/clubhouse (amongst other amenities) as a condition to their funding, and are considered part of the residential component of the developments. Those amenities do not meet the Mixed-Use requirement of "dedicated space."
>
> ***
>
> 57. Ms. Levy credibly and persuasively testified that the referenced certificate of occupancy must be issued for the nonresidential use within the development, or under the Mixed-Use Development definition, the Mixed-Use Commercial Space and/or Mixed-Use Institutional Space nonresidential component. The common spaces, such as the clubhouse, leasing offices, and other amenities, are considered part of the residential uses. Therefore, certificates of occupancy issued for common community spaces would not count toward meeting this requirement.

Conclusions of law, paragraphs 99 and 108 through 11, state:

> 99. The RFA contains clear requirements related to Developer and Management Company Experience. Florida Housing includes experience requirements within the RFA so applicants can demonstrate a history of developing projects of comparable complexity and familiarity with the related funding sources.
>
> ***
>
> 108. Florida Housing's interpretation of its Mixed-Use Development definition is both reasonable and well-reasoned. The plain meaning of the definition requires the two components, the residential and nonresidential, to make up the whole of the development.
>
> 109. This is also consistent with a plain reading of the enabling statute for this RFA, section 420.50871, which requires Florida Housing to use these funds to "Provide for mixed use of the location, incorporating nonresidential uses, such as retail, office, institutional, or other appropriate commercial or nonresidential uses."
>
> 110. A preponderance of the evidence demonstrated that none of the three developments that Fern Grove relied upon for its developer and management company experience has a space within the development that could be considered a nonresidential component.
>
> 111. The RFA further defines two subcategories of acceptable nonresidential components within a Mixed-Use Development, Mixed-Use Institutional Space and Mixed-Use Commercial Space. All three developments that Fern Grove has relied upon for its developer and management company experience purport to have Mixed-Use Institutional Space.

The ALJ determined that the RFA has clear experience requirements and the term Mixed-Use Development requires a qualifying development to contain two distinct components, one residential and one nonresidential. The ALJ further determined that, of the three developments relied upon by Fern Grove to meet its mixed-use experience requirements, none of the developments has spaces that could be considered a nonresidential component.

The ALJ's findings of fact are amply rooted in competent, substantial evidence received at the final hearing, and his conclusions of law are reasonable. As Melissa Levy, Florida

Housing's Managing Director of Multifamily Programs, testified[2], the RFA's definition of a Mixed-Use Development (noted above) makes a distinction between the residential component and the non-residential component of the Mixed-Use Development. Mar. 26 T. at 95-96. The competent substantial evidence shows the residential component consists of the residential units themselves and the supporting uses for those units, including the clubhouse, common areas or other amenities. Mar. 26 T. at 95, 126-127, 149. Whereas the non-residential component is a separate space allocated for either commercial or institutional use, separate from the residential component. Mar. 26 T. at 96.

Within its exception, Fern Grove raises a new argument relating to the definition of "residential" and provides a deceptively narrow paraphrased definition of the term. Merriam-Webster Online Dictionary[3] defines the adjective "residential" as "used as a residence *or by residents*" https://www.merriam-webster.com/dictionary/residents (last visited May 28, 2025) (emphasis added). The dictionary definition of residential is wholly consistent with the ALJ's finding that the residential component includes a development's common spaces, such as the clubhouse and other amenities; all of which are areas "used…by residents." The ALJ's conclusions of law, in that regard, are reasonable and well-reasoned.

There is ample competent substantial evidence to support all the ALJ's factual findings disputed in Fern Grove's Exception No. 1, and the conclusions of law are reasonable, well-reasoned and based upon the competent substantial evidence in the record.

For these reasons, Fern Grove's Exception No. 1 should be rejected.

Response to Exception Number Two

[2] The ALJ found Ms. Levy's testimony to be both credible and persuasive. RO at 57.
[3] The same source was relied upon by Fern Grove.

In Exception No. 2, Fern Grove takes exception to the ALJ's finding of fact in paragraph 42 to the extent it states that services provided by the Tree House Foundation, Inc. ("Tree House") go beyond those services already required by the RFA, claiming that the paragraph is internally inconsistent.

Finding of fact, paragraph 42, states:

> 42. The services provided by Tree House are the types of institutional services contemplated by the RFA. However, the RFA already requires, as a condition to funding, that applicants provide certain services to its residents like financial management classes, employment assistance programs, health and wellness services, computer training classes, onsite daily activities and assistance with light housekeeping, grocery shopping, and laundry. None of the programs from Tree House for purposes of showing a Mixed-Use experience appear to go beyond those already required by the RFA.

The factual findings within this paragraph are supported by competent substantial evidence, and there is no internal inconsistency. The RFA defines "Mixed-Use Institutional Space" as "Charitable, educational, healthcare services, civic (local government/state) within a Development that is in operation at least 5 days a week." Jt. Ex. 1 at 104-105; Stip. at 29-30. Ms. Levy testified at hearing that the services provided by Tree House could meet the institutional services requirement, had they met the remainder of the requirements of the definition. Mar. 26 T. at 113. Through the testimony of Brooke Sammons, Tree House's Executive Director, the competent substantial evidence showed that Tree House offers financial literacy, computer training, mental health, nutrition, and general education classes. WHFT Ex. 6 at 25-34. The ALJ noted that all of those services appear to be already required to meet other requirements of the RFA. *See* Jt. Ex. 1 at 52-57. A fact conceded by Fern Grove's authorized principal, Scott Zimmermann:

> Q: How often are financial services provided to the residents of Banyan Cove?
> A: They're – I can't tell you that off the top of my head but whatever is required by the LURA, that's the minimum amount that are provided.

***

> Q: And are those [services] connected to request for funding and Florida Housing RFA requirements?
> A: Typically.

Mar. 25 T. at 103-104.

The competent substantial evidence supports the ALJ's factual findings, the paragraph contains no internal inconsistency, and Fern Grove has shown no erroneous interpretation of law.

For these reasons, Fern Grove's Exception No. 2 should be rejected.

Response to Exception Number Three

In Exception No. 3, Fern Grove takes exception to the ALJ's findings of fact in paragraphs 43, 44, 45, 46, 53, 54, and 56, and conclusions of law in paragraphs 99, 108 through 115 and 118 to the extent they conclude that community room/clubhouse space cannot jointly be used as Mixed-Use Institutional Space and that "dedicated" or "devoted" space is required by the RFA to count as mixed use.

Findings of fact, paragraphs 43, 44, 45, 46, 53, 54, and 56, state:

> 43. Simply having services available online or at an off-site location does not rise to the level of meeting the RFA's experience requirements.
>
> 44. In addition, the evidence shows that when offered on-site, the Banyon Cove and Banyon Reserve services were not offered five days a week or in their own space within the development. Rather than provided in dedicated spaces, the services are provided in the community room/clubhouse (amenity) spaces. Both Banyon Cove and Banyon Reserve are senior communities required to have a community room/clubhouse (amongst other amenities) as a condition to their funding, and are considered part of the residential component of the developments. Those amenities do not meet the Mixed-Use requirement of "dedicated space."
>
> 45. In sum, Banyon Cove and Banyon Reserve fail to meet the Management Experience requirements of the RFA for a Mixed-Use Development. Under the terms of the RFA, this alone would be enough to render Fern Grove's application ineligible.

46. Similarly, Parramore, the only Development marked as a Mixed-Use Development in the Developer Experience section of Fern Groves' application, does not meet the definition of a Mixed-Use Development.

***

53. Similar to Banyon Cove and Banyon Reserve, the evidence shows that the Parramore services, when offered on-site, were not five days a week and not offered in their own space within the development, but merely in the common (amenity) space.

54. Simply having services available online or at an off-site location does not rise to the level of meeting the RFA's experience requirements. As the Parramore services, when offered on-site, were never offered five days a week and were not offered in their own space within the development, the ONIC services cannot be considered a Mixed-Use Institutional Space, nonresidential component in compliance with the Mixed-Use Developer Experience requirement.

***

56. However, none of the three developments offered as examples by Fern Grove -- Banyon Cove, Banyon Reserve, or Parramore Oaks -- has a space devoted to institutional use. Therefore, none of those developments has a certificate of occupancy specifically for the nonresidential use required of Mixed-Use Developments.

Conclusions of law, paragraphs 99, 108 through 115, and 118, state:

99. The RFA contains clear requirements related to Developer and Management Company Experience. Florida Housing includes experience requirements within the RFA so applicants can demonstrate a history of developing projects of comparable complexity and familiarity with the related funding sources.

***

108. Florida Housing's interpretation of its Mixed-Use Development definition is both reasonable and well-reasoned. The plain meaning of the definition requires the two components, the residential and nonresidential, to make up the whole of the development.

109. This is also consistent with a plain reading of the enabling statute for this RFA, section 420.50871, which requires Florida Housing to use these funds to "Provide for mixed use of the location, incorporating nonresidential uses, such as retail, office, institutional, or other appropriate commercial or nonresidential uses."

110. A preponderance of the evidence demonstrated that none of the three developments that Fern Grove relied upon for its developer and management company experience has a space within the development that could be considered a nonresidential component.

111. The RFA further defines two subcategories of acceptable nonresidential components within a Mixed-Use Development, Mixed-Use Institutional Space and Mixed-Use Commercial Space. All three developments that Fern Grove has relied upon for its developer and management company experience purport to have Mixed-Use Institutional Space.

112. Mixed-Use Institutional Space is defined as "Charitable, educational, healthcare services, civic (local government/state) *within a Development that is in operation at least 5 days a week.*" RFA at 104-105 (emphasis added).

113. Again, a plain reading of this provision requires that the services be provided within the Development and in operation at least 5 days a week. The competent substantial evidence demonstrated that the services may be available off-site to the residents for at least 5 days, but those services are not operating within the developments for at least 5 days a week.

114. "It is axiomatic that all parts of a statute must be read together in order to achieve a consistent whole." *Progressive Express Ins. Co. v. SimonMed Imaging*, 363 So. 3d 1196, 1200 (Fla. 6th DCA 2023), citing *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 455 (Fla. 1992). Thus, read together, a Mixed-Use Development must have a nonresidential component, in this case a Mixed-Use Institutional Space, within the Development that is operational at least five days a week. The 31 competent substantial evidence shows that the developments Fern Grove relies upon in its application do not meet this definition.

115. The RFA requires that, for space to count toward the Mixed-Use Development Experience, the temporary or final certificate of occupancy must have also been issued for the nonresidential use within the development. A preponderance of the evidence demonstrated that none of the three developments at issue has received a certificate of occupancy for their proposed mixed-use development, nonresidential component, but rather only for community residential amenity space, where the services are just occasionally offered on site.

***

118. In sum, the competent substantial evidence shows that Florida Housing's determination of Fern Grove's eligibility was clearly erroneous, contrary to competition, and/or arbitrary or capricious. Florida Housing's proposed action to award funding to Fern Grove was contrary to governing statutes, Florida Housing's rules or policies, and/or the RFA's specifications.

Again, these findings of fact are amply rooted in the competent substantial evidence received at the final hearing, and the conclusions of law are reasonable. A "Mixed-Use Development" is defined within the RFA, in relevant part, as "[a] Development with *a residential component in conjunction with* Mixed-Use Commercial Space and/or Mixed-Use Institutional Space, *non-residential component*…" Jt. Ex. 1 at 104; Stip. at 28. The ALJ reasonably concluded, "The plain meaning of the definition requires the two components, the residential and nonresidential, to make up the whole of the development." As Ms. Levy explained at hearing:

> Q: Why did Florida Housing feel the need to define or recognize the nonresidential component within the definition of a mixed-use development?
>
> A: Yeah. You know, even going back to the workshopping of the RFA and the concepts behind it, it's very clear statutorily that the development that is funded to meet a mixed-use goal that there needs to be a component that is nonresidential, that's not an amenity to the residential use, that is very specific and separate from the residential component that is utilized for commercial and/or institutional spaces.
>
> Q: So when Florida Housing included that nonresidential component within the definition, were they contemplating a clubhouse?
>
> A: No. And in fact, like I said, when we were even workshopping this conceptually, like, I went back and listened to that conceptual workshop in preparation for this. And in that workshop, I said two times this will not be your clubhouse space. This needs to be a separate area. This needs to be a space, a significant commercial or institutional nonresidential space that is not, you know, coexisting or overlapping with your clubhouse.

Mar. 25 T. at 149.

All of the developments Fern Grove relied upon to meet its experience requirements purported to contain "Mixed-Use Institutional Space," which is defined in the RFA as "Charitable, educational, healthcare services, civic (local government/state) *within a Development that is in operation at least 5 days a week."* Jt. Ex. 1 at 104-105. As Ms. Levy explained,

> Q. And for mixed-use institutional space which the RFA defines as charitable, educational, health service, civic within a development that is in operation at least

> five days a week, what does Florida Housing mean by within a development that is in operation at least five days a week?
>
> A. Yeah, if you -- you know, I really think for both mixed-use commercial space and mixed-use institutional space, you can't look at them in a vacuum. You have to look at them within the mixed-use development, because, number 1, the development that meets the mixed-use development experience requirement must meet the definition of mixed-use development, and those two terms are -- mixed-use institutional and mixed- use commercial, are integrated through the mixed-use development term. So you can see that mixed-use institutional space nonresidential components. So there is a component, a dedicated space that is providing charitable, educational, health care, or civic. That space is within the development and it is in operation within the development at least five days a week.
> Q. Ms. Levy, can you give me a few examples of what Florida Housing was expecting to see to meet that requirement for developer and/or management experience?
>
> A. Yeah. You know, going back to that conceptual workshop, like, we had stakeholder examples, and I remember us going back and forth with stakeholders on, like, examples of what we thought. And so I remember YMCA, Salvation Army. I remember someone talking about Public Housing Agency wanting to put their offices in the first floor of a development. So, so things of that nature, an urgent health care center, those types of things.

Mar. 26 T. at 96-98.

Ms. Sammons testified that the Tree House provided services both online and in-person, but in-person trainings were not consistently provided, were subject to availability, and did not have a consistent designated space; rather, they were provided in the community room or clubhouse. WHFT Ex. 6. at 27-38. The services were also not provided five days a week. WHFT Ex. 6 at 24-29, 42. Ambar Velaquez, the Special Program Manager for Orlando Neighborhood Improvement Corporation (ONIC), provided similar testimony regarding the timing and location of services provided by ONIC to the residents of Parramore Oaks:

> Q: And when you did meet with residents of Parramore Oaks on-site, where would you typically meet with them?
>
> A: We generally met with them in the community room. I know that wasn't the only space available. I believe they also have like a computer lab space, but we

> generally met with them in the community room. And we brought our equipment with us.
>
> Q: Does ONIC have staff or volunteers that are physically onsite at Parramore Oaks five days a week?
>
> A: Not five days a week, but we have staff right there that are physically onsite at least two days a week right now.

WHFT Ex. 5 at 14, 40.

The ALJ reasonably concluded that none of the three developments had a nonresidential component or had institutional services operating within the development five days a week. Based upon the competent substantial evidence presented, the ALJ rightly determined that Fern Grove's reliance on these three developments did not meet the RFA experience requirements necessary for an eligible application. The ALJ's determination was not only logical but also reasonable.

Fern Grove improperly implies that Florida Housing should have audited past applications in preparation for the hearing. As Ms. Levy correctly pointed out at hearing:

> Q. Because this was the first challenge ever on this issue, am I correct that the agency did not make any inquiry of any of these other 60 applicants that had eligible mixed-use applications to try and inform itself as to how other people might have interpreted this requirement? Did you?
>
> A. Well, I, I will again go back to the RFA requirements are outlined in the RFA. The -- it is the applicant's responsibility to ensure that they are meeting those RFA requirements at the time of application. They sign an applicant certification knowledge form certifying that all of that information is correct. So we are going to rely on that information that's provided in the application. That's the only thing that we can rely on when we are scoring the application.
>
> Q. I understand that. I just want to confirm for the record that because this is the first challenge -- even though this is the first challenge, the agency did nothing to inquire of any of these as part of this process to see how anybody else might have interpreted these requirements. Did you?
>
> A. You have no reason to believe that other applicants did not meet the RFA requirements.
>
> Q. But you never asked. Did you?

> A. That's not part of the scoring process. We can look at what's in the application. At the time of application, we're scoring the applications based on what's in -- what's provided within the four corners of the application. No one can go and look behind the scenes at what else they're doing. We, we believe what the applicant tells us in the application. If it's challenged through this bid protest process and it's revealed, then we can take that information into consideration. When we're scoring the application, you can only use the information in the application.

Mar 26 T. at 121-123. The merits of other applicants in this RFA and previous ones are wholly irrelevant to these proceedings. At issue here is Fern Grove's compliance with the RFA requirements, nothing more. The method of compliance of other, unprotested applicants has no bearing on Fern Grove's lack of compliance with the terms of this RFA. Regardless, this decision is bound by the evidence in the record. No evidence was proffered regarding the compliance of other applicants.

There is ample competent substantial evidence to support all the ALJ's factual findings disputed in Fern Grove's Exception No. 3, and the conclusions of law are reasonable, well-reasoned and based upon the competent substantial evidence in the record.

For these reasons, Fern Grove's Exception No. 3 should be rejected.

Response to Exception Number Four

In Exception No. 4, Fern Grove takes exception to the ALJ's findings of fact in paragraphs 56 and 57, and conclusion of law in paragraph 115 to the extent those paragraphs find and conclude that the existence of a certificate of occupancy for devoted nonresidential commercial or institutional space was required and that a certificate of occupancy for community spaces that could be used for such purposes was insufficient.

For background, the RFA allows:

> For purposes of this provision, completed development means (i) that the temporary or final certificate of occupancy has been issued for at least one unit in one of the residential apartment buildings and, *if a Mixed-Use Development, the temporary or*

> *final certificate of occupancy has also been issued for the nonresidential use, within the development…*

Jt. Ex. 1 at 15; Stip. at 32. (emphasis added). As the ALJ correctly points out (and as further discussed above), this provision references the Mixed-Use Development, the definition of which distinguishes the residential component of the development from the non-residential component.

Findings of fact, paragraphs 56 and 57, state:

> 56. However, none of the three developments offered as examples by Fern Grove -- Banyon Cove, Banyon Reserve, or Parramore Oaks -- has a space devoted to institutional use. Therefore, none of those developments has a certificate of occupancy specifically for the nonresidential use required of Mixed-Use Developments.
>
> 57. Ms. Levy credibly and persuasively testified that the referenced certificate of occupancy must be issued for the nonresidential use within the development, or under the Mixed-Use Development definition, the Mixed-Use Commercial Space and/or Mixed-Use Institutional Space nonresidential component. The common spaces, such as the clubhouse, leasing offices, and other amenities, are considered part of the residential uses. Therefore, certificates of occupancy issued for common community spaces would not count toward meeting this requirement.

Conclusions of law, paragraph 115, states:

> 115. The RFA requires that, for space to count toward the Mixed-Use Development Experience, the temporary or final certificate of occupancy must have also been issued for the nonresidential use within the development. A preponderance of the evidence demonstrated that none of the three developments at issue has received a certificate of occupancy for their proposed mixed-use development, nonresidential component, but rather only for community residential amenity space, where the services are just occasionally offered on site.

Fern Grove appears to argue in its exception that a certificate of occupancy for any space that is not a residence should satisfy the requirement. This is clearly not supported by the terms of the RFA, nor any other evidence on the record, would be contrary to competition and would lead to an arbitrary scoring result. As Ms. Levy explained at hearing:

> Q: Why did Florida Housing feel the need to define or recognize the nonresidential component within the definition of a mixed-use development?

> A: Yeah. You know, even going back to the workshopping of the RFA and the concepts behind it, it's very clear statutorily that the development that is funded to meet a mixed-use goal that there needs to be a component that is nonresidential, that's not an amenity to the residential use, that is very specific and separate from the residential component that is utilized for commercial and/or institutional spaces.
>
> Q: So when Florida Housing included that nonresidential component within the definition, were they contemplating a clubhouse?
>
> A: No. And in fact, like I said, when we were even workshopping this conceptually, like, I went back and listened to that conceptual workshop in preparation for this. And in that workshop, I said two times this will not be your clubhouse space. This needs to be a separate area. This needs to be a space, a significant commercial or institutional nonresidential space that is not, you know, coexisting or overlapping with your clubhouse.

Mar. 25 T. at 149.

The RFA allows an applicant to meet the mixed-use requirement with a certificate of occupancy for the "nonresidential use." As stated previously, the ALJ reasonably concluded that the "residential component" of a development includes both the residences and any residential amenity spaces such as the clubhouse. Consistent with that finding, the referenced certificate of occupancy must be issued for a separate, non-residential component (the non-residential use) in order to comply with that provision of the RFA.

Addressing Fern Grove's argument regarding the Questions and Answers, this board has confirmed in previous matters that "The Questions and Answers documents…do not have the force of changing the RFA." *Madison Landing II, LLC, et.al. v. Fla. Hous. Fin. Corp.*, DOAH CASE 21-0146BID (DOAH RO March 29, 2021; FHFC April 30, 2021). Regardless, the Q&A response cited by Fern Grove is merely a recitation of the terms of the RFA itself. Mar 26 T. at 117. The Q&A response did not, and could not, modify the clear requirements of the RFA.

There is ample competent substantial evidence presented to support the ALJ's reasonable findings that the certificates of occupancy for the clubhouse spaces were not issued for the Mixed-

Use Development's nonresidential use, as required by the RFA. The Findings of fact are well supported by the competent substantial evidence in the record and the conclusions of law are reasonable.

For these reasons, Fern Grove's Exception No. 4 should be rejected.

Response to Exception Number Five

In Exception No. 5, Fern Grove takes exception to the last sentence of ALJ's finding of fact in paragraph 58.

Findings of fact, paragraph 58, states:

> 58. Fern Grove also argues that Parramore contains a space that may become a future daycare. Parramore received its certificate of occupancy for that space along with the rest of the development in 2019, roughly 6 years ago, and has never leased the space. Furthermore, Fern Grove does not attempt to rely on this space as Mixed-Use Commercial or Institutional Space to satisfy its Developer Experience requirement.

The last sentence of ALJ's finding of fact, paragraph 58, is *judicial dicta*[4] relating to the ALJ's impression of Fern Grove's arguments. Fern Grove points to no specific place in the record that would contradict the ALJ's observation. Further, the unrebutted competent substantial evidence shows the certificate of occupancy for Parramore is for a community space, not a future daycare. WHFT Ex. 1 at 16. As Paula Rhodes, CEO of Invictus Development, the Parramore Developer, testified, further renovation would need to commence prior to the space being acceptable for a future tenant. WHFT Ex. 1 at 19-20. It logically follows that no certificate of occupancy could be issued for a proposed daycare until the required renovation is completed. The ALJ's finding of fact is supported by competent substantial evidence and is a logical determination from the presented evidence.

For these reasons, Fern Grove's Exception No. 5 should be rejected.

[4] An observation made by a judge in an opinion that is not necessary to resolve the case.

Response to Exception Number Six

In Exception No. 6, Fern Grove takes exception to the ALJ's finding of fact in paragraph 59, arguing that certain portions of the finding should be stricken.

Findings of fact, paragraph 59, states in full:

> 59. The competent substantial evidence shows that Fern Grove failed to meet the experience requirements of the RFA. As Florida Housing has now come to agree, based upon the evidence, Florida Housing's scoring decision that Fern Grove was eligible to receive funding was clearly erroneous and contrary to the terms of the RFA.

Fern Grove takes exception to the ultimate finding that it failed to meet the experience requirements of the RFA and therefore should not have been selected for funding. The ALJ's ultimate finding is reasonable and supported by competent, substantial evidence. For all of the reasons addressed above in this Response, finding of fact, paragraph 59, is reasonable, well-founded, based on competent substantial evidence, and supported by the record. Accordingly, Fern Grove's Exception No. 6 should be rejected.

Response to Exception Number Seven

In Exception No. 7, Fern Grove takes exception to the ALJ's conclusion of law in paragraph 118, arguing that certain portions of the conclusion should be stricken.

Conclusions of law, paragraph 118, states:

> 118. In sum, the competent substantial evidence shows that Florida Housing's determination of Fern Grove's eligibility was clearly erroneous, contrary to competition, and/or arbitrary or capricious. Florida Housing's proposed action to award funding to Fern Grove was contrary to governing statutes, Florida Housing's rules or policies, and/or the RFA's specifications.

Fern Grove takes exception to the ultimate finding that Fern Grove's selection for funding was improper. The ALJ's ultimate finding is reasonable and supported by competent, substantial evidence. For all of the reasons addressed above in this Response, conclusion of law, paragraph

118, is reasonable, well-founded, based on competent substantial evidence, and supported by the record. Accordingly, Fern Grove's Exception No. 7 should be rejected.

Response to Exception Number Eight

In Exception No. 8, Fern Grove takes exception to the ALJ's finding of fact in paragraph 71, and conclusions of law in paragraphs 119 through 124, continuing its arguments from the hearing that Catchlight's cost proforma contains a funding shortfall because a financing proposal it identified as a funding source contains a material ambiguity.

Findings of fact, paragraph 71, states:

> 71. As parties to the Chase letter, Catchlight and Chase are in the best position to determine the validity of the terms of the letter, and the anticipated amount of the loan. Under the terms of the Chase Letter, Catchlight will receive a $15,000,000 loan from Chase. There is no evidence that the Chase Letter has been invalidated by Chase or Catchlight.

Conclusions of law, paragraphs 119 through 124, state:

> 119. With regard to Catchlight's Chase Letter, the evidence demonstrated that the Chase Letter meets the RFA's requirements. As reflected in the Catchlight Application, the Chase letter identifies Catchlight as the borrower, identifies the amounts of the construction and permanent loan, and is signed by the lender.
>
> 120. Fern Grove maintains the Chase letter contains a material ambiguity which allows it to challenge the debt service ratios or other conditional provisions. To support this position, it relies on *MJHS FL South Parcel, Ltd., et al. v. Florida Housing Finance Corporation*, Case No. 23-0903BID (Fla. DOAH May 31, 2023; Fla. FHFC July 21, 2023) (*MJHS*); and *The Vistas at Fountainhead v. Florida Housing Finance Corporation, et. al.*, Case No. 19- 2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part (Fla. FHFC Aug. 2, 2019) (*Vistas*).
>
> 121. Fern Grove's reliance on *MJHS* is misplaced for multiple reasons. *MJHS* was a consolidated, multipart case with several Petitioners. *MJHS*'s application contained a Tax Credit Equity Proposal as a source of funding. Tax Credit Equity Proposals are governed by separate RFA requirements, distinct from those required of Financing Proposals. One of the express RFA requirements of a Tax Credit Equity Proposal is that it must state the amount of "proposed equity to be paid prior to construction competition." RFA, p. 64; *MJHS*, RO at ¶134. "An Equity Proposal is responsive only to the extent that the amount of equity to be paid prior to construction completion is clearly stated." *MJHS*, RO at ¶134, citing *Vistas*. To that

particular end, "[i]f material ambiguity exists, the funds may not be considered as equity to be paid before construction completion." *Id.* This particular caselaw is inapplicable to the present situation, where the financing proposal clearly indicated that the funds will be available prior to construction completion.

122. To the extent that Fern Grove may rely on *Vistas*, the equity proposal at issue in *Vistas* included a pay-in schedule that created an internal conflict with the total amount of equity to be paid prior to construction completion. *Vistas*, RO at ¶11. There, the ALJ found that the equity proposal failed to clearly state the amount of equity to be paid prior to construction completion and excluded that equity installment from the construction financing analysis. Again, no claims have been raised in the instant matter regarding the timing of the loan distributions.

123. *MJHS* is further distinguishable because it also challenged the eligibility of LDG's application on the grounds it failed to include all *anticipated* costs. *MJHS*, RO at ¶122. There, ALJ Livingstone found, based upon the testimony of LDG's corporate representative,

> 42. It is clear that LDG anticipated that there would be impact fees associated with its proposed development, but it was not sure what the amount would be.
>
> 43. As set forth above, all applicants are required to complete a Cost Pro Forma, and when completing the Cost Pro Forma, the applicant "must include all anticipated costs of the Development."
>
> 44. By failing to include an anticipated impact fee, LDG failed to meet an essential requirement of the RFA.

MJHS at ¶¶42-44.

124. While Judge Livingstone found that anticipated impact fees should have been disclosed (*MJHS*, RO at ¶124), Judge Livingstone did not, as Fern Grove claims, open the door to attacking the *reasonableness* of an applicant's anticipated costs or sources. While Fern Grove is correct that evidence and testimony of the Local Municipalities' impact fee schedule was presented in *MJHS*, the case turned upon LDG's admission that it knew it would owe impact fees, but was unsure of the amount and left the section of the Cost Pro Forma blank. In contrast, there is no competent evidence in this case to controvert Catchlight's anticipated sources of funding.

Again, these findings of fact are amply rooted in the competent substantial evidence received at the final hearing, and the conclusions of law are reasonable. With Regard to the Cost Pro Forma, the RFA requires

> All Applicants must complete the Development Cost Pro Forma listing the *anticipated* costs, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the *anticipated* sources (both Corporation and non-Corporation funding). The sources must equal or exceed the uses.

There was no dispute that the Chase Letter met the basic requirements of an eligible financing proposal under the RFA. With regard to the conditions found within WHFT's financing proposals, the RFA specifically contemplates and allows the financing proposals to contain certain conditions:

> (e) The loan amount may be conditioned upon an appraisal or debt service coverage ratio or any other typical due diligence required during credit underwriting.
>
> (f) Financing proposals may be conditioned upon the Applicant receiving the funding from the Corporation for which it is applying.

Jt. Ex. 1 at 68; Stip. at 48.

Fern Grove also claims that references to tax credits, and/or involvement with a local government agency create a fatal material ambiguity. As Ms. Levy testified, Florida Housing found the references to be neither material, nor ambiguous:

> Chase has not rescinded the letter, so therefore we would consider it a funding source. If the low-income housing tax goes, if there are none, then it's zero. So then I'm assuming Chase is going to look at the loan to value of the real estate only. But again, those are assumptions that Chase is making in their business decisions…that's not something that we need to analyze at the time of the application. The things that we need to analyze at the time of the application are outlined in the RFA.

Mar. 26 T. at 137. The ALJ agreed and made no finding of material ambiguity based on these claims.

As Ms. Levy testified, the parties to the financing proposal, in this case, WHFT and JP Morgan Chase, are in the best position to determine the validity of the challenged financial proposal and the anticipated amount of the financing:

> A: Well the lender and the applicant are the most knowledgeable about the terms and intent and the commitment. So I would need to hear from Chase that this letter is invalid or … that they would rescind the letter.

Mar. 26 T. at 87. Fern Grove, who holds the burden of proof, chose not to present testimony from either WHFT or JP Morgan Chase, the two parties in the best position to opine on the anticipated source[5]. The ALJ gave little weight to the testimony of Fern Grove's experts, calling the expert testimony "unpersuasive and irrelevant." RO at 78.

Fern Grove's further challenges Conclusions of Law, paragraphs 119–124, raising exceptions to the ALJ's analysis of *MJHS FL South Parcel, Ltd., et. al. v. Fla. Hous. Fin. Corp.,* Case No. 23-0903BID (Fla. DOAH May 31, 2023; Fla. FHFC July 21, 2023) (MJHS) and *The Vistas at Fountainhead v. Fla. Hous. Fin. Corp. et. al.,* Case No. 19-2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part, (Fla. FHFC Aug. 2. 2019).

As correctly determined by the ALJ, Fern Grove's reliance and interpretation of *MJHS* and *Vistas* were misplaced and inapplicable. *MJHS* and *Vistas* both addressed material ambiguities in the timing of payments in Tax Credit Equity Proposals (which are different than financing proposals and governed by separate RFA criteria). Fern Grove asked the ALJ to extend and expand the holdings to include any material ambiguity in any financing proposal. The ALJ reasonably and appropriately declined to do so, holding that these cases are distinguishable, and the holdings are limited in scope.

Accordingly, the findings of fact and conclusions of law are well supported by the record. The referenced conclusions of law are reasonable, and the findings of fact are based on competent substantial evidence. Exception No. 8 should be rejected.

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[5] The application cost proforma consists of the applicant's anticipated sources and uses. *See MJHS South Parcel, LTD. v. Fla. Hous. Fin. Corp.*, DOAH CASE 23-0903BID (DOAH RO May 31, 2023; FHFC July 21, 2023); *HTG Oak Valley, LLC v. Fla. Hous. Fin. Corp.*, DOAH Case No. 19-2275BID (DOAH RO May 31, 2023; FHFC July 29, 2019).

Response to Exception Number Nine

In Exception No. 9, Fern Grove takes exception to the ALJ's finding of fact in paragraph 77, and conclusion of law, paragraph 127, which finds and concludes that the RFA did not require evidence of ability to fund a self-sourced loan with the application.

Findings of Fact, paragraph 77 states:

> 77. However, the RFA contemplates that Florida Housing may modify the general provisions provided within that section, as it has clearly done through the Live Local Self-Sourced Financing Commitment Verification Form and associated RFA requirements. Indeed, it is evident that the RFA language was clear to those applicants applying with self-sourced financing, 22 as none of the nine other applicants applying with Live Local Self-Sourced Financing provided evidence of ability to fund within their application.

Conclusions of law, paragraph 127 states:

> 127. Fern Grove's claim that Catchlight is required to provide evidence of the ability to fund as part of the application is misplaced. The competent evidence, including the testimony of Ms. Levy and the Live Local Self-Sourced Financing Commitment Verification Form itself, plainly establish that Catchlight is not required to provide evidence of the self-sourced financing until credit underwriting. *Id.*

Again, these findings of fact are amply rooted in the competent substantial evidence received at the final hearing, and the conclusions of law are reasonable. The ALJ's determination that WHFT was not required to submit additional documentation with its self-sourced financing commitment verification form was a factual determination well within the ALJ's authority.

The RFA specifically allows an applicant to self-source a portion of its development costs under certain conditions, including that it must provide an executed Live Local Self-Sourced Financing Commitment Verification form as an attachment to its application and "[d]uring the credit underwriting process, the Applicant must demonstrate and maintain the Live Local self-sourced financial support in an amount equal to or greater than the minimum qualifying amount in the form of permanent financing." Jt. Ex. 1 at 74; Stip. at 53. The Live Local Self-Sourced

Financing Commitment Verification Form certification echoes the language found in the Live Local Self-Sourced Support Qualifications section of the RFA:

> If the above-mentioned Development is selected for funding, I understand the following:
>
> > During the credit underwriting process, the designated self-sourced Principals of the Applicant must provide evidence of ability to fund self-sourced financing in an amount that is at least half of the Applicant's eligible Live Local SAIL Request Amount or $1,000,000, whichever is greater;

Jt. Ex. 7 at 170; Stip. at 54.

With regard to the funding proposals for Non-Corporation Funding, the RFA contemplates that Florida Housing may modify the general provisions provided within that section elsewhere within the RFA, stating "*Unless stated otherwise within this RFA*, for funding, other than Corporation funding and deferred Developer Fee, to be counted as a source on the Development Cost Pro Forma, provide documentation of all financing proposals…" Jt. Ex. 1 at 65; Stip. at 55. (emphasis added). This RFA criterion is a general, catch-all, provision and the competent substantial evidence shows that the requirements are not applicable for the more specific self-source funding requirements in this RFA. Ms. Levy further testified to the timing and RFA requirements:

> Q: And when does Florida Housing expect to receive evidence of ability to fund from an applicant who submitted this type of form?
> A: During the credit underwriting process…
> Q: Nowhere in here does it exclude in this Subsection C self-sourced funding amounts. Does it?
> A: No, but I'll retain what I said before, that the self-sourced requirements are located further down after Subsection C. They're not part of Subsection C or B.

Mar. 26 T. at 142. Ms. Levy also noted that eight other self-sourced applicants applied in this RFA and none of the other applicants provided evidence of ability to self-fund at this stage of the application process. Mar. 26 T. at 84.

The competent substantial evidence clearly shows that the applicant was not required to provide evidence of ability to fund a self-sourced loan until credit underwriting and the ALJ's conclusions of law in that respect are reasonable and well-reasoned based upon the clear terms of the RFA and the competent substantial evidence.

For these reasons, Fern Grove's Exception No. 9 should be rejected.

Response to Exception Number Ten

In Exception No. 10, Fern Grove takes exception to the ALJ's findings of fact in paragraphs 78 (including footnote 4) and 79, and Conclusions of Law in paragraphs 128 and 129, claiming that its evidence shows that WHFT's sources will not exceed its uses. Through this exception, Fern Grove requests that the matter be remanded back to DOAH for specific findings and conclusions.

Findings of Fact, paragraphs 78 and 79, state:

> 78. Fern Grove claims that certain conditions present within the Chase Letter and Catchlight's Self-Source Funding should either render them ineligible for use as a source within the cost proforma, or that the amounts should be reduced based on Fern Grove's own experts' testimony, one of which is Fern Grove's corporate representative, Scott Zimmerman.[4]
>
> > *Footnote 4*: In its attempt to question the validity of Catchlight's application funding sources (the Chase Letter and Self-Source Letter), Fern Grove proffered, subject to Catchlight and Florida Housing's objection, the testimonies of Mr. Zimmerman and Robert Von, together with independently prepared pro formas and related documents (proffered as proffered exhibits 2 through 4 and 10 through 12). Upon consideration of the objections and responses, the proffered testimonies and evidence are rejected as unpersuasive and irrelevant to this proceeding. At issue in this proceeding is Florida Housing's preliminary agency action regarding eligibility determinations, not a challenge to the RFA's terms or credit underwriting. Credit underwriting occurs after the application review and scoring process at issue in this proceeding. Credit underwriting "is a de novo review of all information supplied, received or discovered during or after any competitive solicitation scoring and funding preference process, prior to the closing on funding, including the issuance of IRS Forms 8609 for Housing Credits." Fla. Admin. Code R. 67-48.0072.

> 79. As Catchlight properly included the full value of both its anticipated Chase Loan and its self-sourced funds in its cost proforma, Fern Grove's challenges to Catchlight's Loan Financing Proposal and self-funding must fail.

Conclusions of Law, paragraphs 128 and 129, state:

> 128. As noted by ALJ Culpepper in *Durham Place v. Florida Housing Finance Corporation*, Case No. 19-1396BID (Fla. DOAH June 7, 2019; Fla. FHFC June 21, 2019), Florida Housing must accept an application that has complied with the plain and unambiguous terms of the RFA. Judge Culpepper explains:
>
> > As Florida Housing should not have found Brownsville's application ineligible "if the configuration of a proposed development would be fleshed out in the final site plan approval process, which occurs after the application stage during the credit underwriting." *Brownsville Manor, LP v. Redding Dev. Partners, LLC, and Fla. Hous. Fin. 35 Corp.*, 224 So. 3d 891, 894 (Fla. 1st DCA 2017). Consequently, even though the true configuration of Brownsville's development was "unknown at the application stage," because Brownsville "complied with all that was required of it at the application stage under the plain and unambiguous terms of the RFA," the appellate court ordered Florida Housing to reinstate Brownsville's eligibility for funding.
>
> 129. Fern Grove has failed to meet its burden to show that Florida Housing's acceptance of the Chase Letter or Self-Source Letter as anticipated sources within Catchlight's cost pro forma was clearly erroneous, arbitrary or capricious, or contrary to competition.

The preceding findings of fact are amply rooted in the competent substantial evidence received at the final hearing, and the conclusions of law are reasonable and are well within the judge's authority and discretion. With regard to the Cost Pro Forma, the RFA requires:

> All Applicants must complete the Development Cost Pro Forma listing the *anticipated* costs, the Detail/Explanation Sheet, if applicable, and the Construction or Rehab Analysis and Permanent Analysis listing the *anticipated* sources (both Corporation and non-Corporation funding). The sources must equal or exceed the uses.

As concisely explained in *HTG Oak Valley, LLC v. Fla. Hous. Fin. Corp.*, DOAH Case No. 19-2275BID (DOAH RO May 31, 2023; FHFC July 29, 2019) (emphasis added) the RFA requires an applicant to fill out the cost pro forma based on its *anticipated* sources and uses:

> The RFA requires that an applicant must submit, as part of its application, a Development Cost Pro Forma detailing both the *anticipated* costs of the proposed development as well as the *anticipated* funding sources for the proposed development. In order to demonstrate adequate funding, the Total Construction Sources (including equity proceeds/capital contributions and loans*),* as shown in the pro forma, must equal or exceed the Total Development Costs reflected therein. During the scoring process, if a funding source is not considered or is adjusted downward, then Total Development Costs might wind up exceeding Total Construction Sources, in which event the applicant is said to suffer from a construction funding shortfall (deficit). If an applicant has a funding shortfall, it is ineligible for funding.

See also MJHS South Parcel, LTD. v. Fla. Hous. Fin. Corp., DOAH CASE 23-0903BID (DOAH RO May 31, 2023; FHFC July 21, 2023) ("when completing the Cost Pro Forma, the applicant 'must include all anticipated costs of the Development.' By failing to include an anticipated impact fee, LDG failed to meet an essential requirement of the RFA."). As Ms. Levy noted at hearing, and the ALJ agreed, the parties to the Chase letter, Catchlight and JP Morgan Chase, are in the best position to determine the validity of the terms of the letter, and the anticipated amount of the loan. Though Fern Grove had ample opportunity, it chose to provide no testimony from either party.

Further, the ALJ properly reviewed and weighed the proffered evidence and found it to be both "unpersuasive and irrelevant to this proceeding." Fern Grove improperly asks this Board to modify and re-weight the ALJ's credibility determinations of Fern Grove's witnesses, seeking a second bite at the apple in remand. *Prysi v. Dep't of Health,* 823 So. 2d 823, 825 (Fla. 1st DCA 2002) ("An agency is not authorized to weigh evidence, judge credibility or otherwise interpret the evidence to fit its desired conclusion.").

The competent substantial evidence clearly supports the ALJ's findings of fact and the ALJ's conclusions of law are reasonable and based upon the clear terms of the RFA and the competent substantial evidence.

For these reasons, Fern Grove's Exception No. 10 should be rejected.

Response to Exception Number Eleven

In Exception No. 11, Fern Grove takes exception to the ALJ's findings of fact in paragraphs 83 and 84, and conclusions of law in paragraphs 130 through 135, asking the Board to improperly reweigh the evidence based upon the Proposed Recommended Order that Fern Grove had previously submitted to the ALJ.

Findings of fact, paragraphs 83 and 84, state:

> 83. Fern Grove claims that a Master Development Agreement (MDA) referenced within the lease agreement is a "relevant" intermediate contract, agreement, assignment, option, conveyance, intermediate lease, [or] sublease required by the RFA. Fern Grove primarily points to the project schedule referenced within the lease that is contained within the MDA.
>
> 84. However, as the leases and documentation provided by Catchlight met the RFA's requirements, it is found that Catchlight provided the required site control documentation with its application.

Conclusions of law, paragraphs 130 through 135, state:

> 130. Lastly, Fern Grove failed to prove that Florida Housing's eligibility determination related to Catchlight's site control documentation should be overturned. To support its position that the MDA is relevant, Fern Grove relies on *HTG Addison II, LLC v. Florida Housing Finance Corporation*, Case No. 20-1770BID (Fla. DOAH June 19, 2020; Fla. FHFC July 17, 2020). But Fern Grove's reliance is misplaced, and the case is distinguishable. Therein, the missing intermediate contract was relevant because it was related to site control criteria within the RFA, specifically, who was the owner of the subject property. In *HTG Addison*, the successful applicant included a Purchase and Sale Agreement (PSA) as part of its site control documentation. *Id.* However, the PSA stated that the City of Ocala owned the property in question and the seller had a separate agreement with the local government to acquire fee simple interest in the property. *Id.*
>
> 131. At the final hearing in *HTG Addison*, Florida Housing agreed with the petitioner and argued the successful applicant failed to demonstrate site control. *Id.* The ALJ ultimately concluded the successful applicant deviated from the RFA requirements and was ineligible for failing to include the missing agreement between the seller and the City of Ocala. *Id.* Here, however, the MDA is not related to any site control criteria in the RFA.

> 132. This case is more aligned with *Madison Trace, LLC, et. al. v. Florida Housing Finance Corporation*, Case No. 22-0004BID (Fla. DOAH Apr. 1, 2022; Fla. FHFC May 2, 2022). In *Madison Trace*, the petitioner argued the successful applicant failed to include a Purchase Option Agreement and Master Development Agreement which were relevant documents to determine site control. Both agreements were generally referenced within the materials the successful applicant had submitted as part of the application. *Id.* However, Florida Housing maintained that these documents were not relevant because the agreements did not have any bearing on whether the successful application met the express terms of the RFA. *Id.* The ALJ agreed with Florida Housing and concluded the petitioner did not demonstrate that the agreements were relevant or required to be included as part of the successful applicant's site control documentation. *Id.*
>
> 133. Here, Fern Grove failed to show how the MDA will assist Florida Housing in determining if the Catchlight Application meets the RFA's site control criteria.
>
> 134. Catchlight provided a Ground Lease, a Memorandum of Ground Lease, First Amendment to Ground Lease, Sublease, and Memorandum of Sublease to demonstrate site control. While some of these agreements refer to an MDA, the provided leases and amendments satisfy all the requisite RFA criteria by identifying the subject property owner and confirming that the applicant maintains a sublease with an unexpired lease term of more than 50 years after the Application Deadline. Nothing further is required to demonstrate evidence of site control.
>
> 135. Overall, Fern Grove failed to meet its burden to demonstrate by a preponderance of the evidence that a determination that Catchlight is eligible for funding under the RFA would be clearly erroneous, contrary to competition, arbitrary or capricious, or that it would be contrary to Florida Housing's governing statutes, rules, or the terms of the RFA. Catchlight is eligible to receive funding under the terms of the RFA.

There is no dispute that the WHFT leases meet the basic requirements for site control. Stip. at 60. The documents contain references to Master Development Agreement ("MDA"). Consistent with Florida Housing's long-held position on site control documentation, the ALJ found that an intermediate agreement is relevant only if it connects back to the RFA limited criteria for

site control eligibility[6]. Ms. Levy reiterated that position at hearing and further explained that the RFA does not prohibit having conditions within these documents[7]. Mar. 26 T. at 133.

The ALJ correctly relied on the competent substantial evidence in the record and Florida Housing precedent in making a reasonable determination that the Master Development Agreement was irrelevant because it did not affect the eligibility of WHFT's site control documents. The ALJ's findings of fact are supported by competent substantial evidence and its conclusions of law are reasonable, supported by prior Florida Housing cases, and supported by competent, substantial evidence.

Accordingly, Fern Grove's Exception No. 11 should be rejected.

WHEREFORE, Florida Housing Finance Corporation, respectfully request that it's Board of Directors reject all of Fern Grove's exceptions to the Recommended Order, adopt the Findings of Fact, Conclusions of Law, and Recommendation set forth in the Recommended Order as its own and issue a Final Order consistent with the same in this matter.

Respectfully submitted this 29th day of May 2025.

/s/ Ethan S. Katz
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[6] *Madison Trace, LLC et. al. v. Fla. Housing Fin. Corp.,* Case No. 22-0004BID (Fla. DOAH April 1, 2022, FHFC May 2, 2022) ("Regarding its first challenge, whether Beacon Trace failed to submit all "relevant" documents, Madison Trace did not demonstrate that either the POA or the MDA contain "relevant" information that required their inclusion in Beacon's application."); *HTG Addison II, LLC v. Fla. Housing Fin. Corp.,* Case No. 20-1770BID (Fla. DOAH June 19, 2020, FHFC July 17, 2020), ("The Redevelopment Agreement is a relevant, intermediate agreement required to be included within the site control documentation."); *Flagship Manor, LLC v. Fla. Hous. Fin. Corp.,* 199 So. 3d 1093 (Fla. 1st DCA 2016) ("Flagship's omission, or misstatement, in the Contract related to the legal description of the development site, [is] an essential component of the application.");

[7] This is also consistent with Florida Housing president, see *Madison Trace, LLC et. al. v. Fla. Housing Fin. Corp.,* Case No. 22-0004BID (Fla. DOAH April 1, 2022, FHFC May 2, 2022).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-mail this 29th day of May, 2025 to:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WHFT LL WORKFORCE, LTD., and
WHFT LL WORKFORCE DEVELOPER, LLC,

Petitioners,

Case No. 25-001110BID
FHFC Case No.: 2025-006BP
RFA No.: 2024-213

vs.

FLORIDA HOUSING FINANCE CORPORATION

Respondent,

and

BDG FERN GROVE PHASE TWO, LP, d/b/a
FERN GROVE PHASE TWO

Intervenor.

_____/

MHP PASCO III, LLC,

Petitioner,

Case No. 25-001112BID
FHFC Case No.: 2025-009BP
RFA No.: 2024-213

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

_____/

TWIN LAKES III, LTD.,

Petitioner,

Case No. 25-001113BID
FHFC Case No.: 2025-010BP
RFA No.: 2024-213

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

HELM'S BAY LANDING WORKFORCE, LTD.,

Intervenor.

_____/

CARVER THEATER, LTD.,

Petitioner,

Case No. 25-001114BID
FHFC Case No.: 2025-012BP
RFA No.: 2024-213

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

HELM'S BAY LANDING WORKFORCE, LTD.,

Intervenor.

_____/

WHFT LL WORKFORCE, LTD., & WHFT LL WORKFORCE DEVELOPER, LLC's
RESPONSES TO EXCEPTIONS FILED BY BDG FERN GROVE PHASE TWO LP

Petitioners, WHFT LL Workforce, Ltd., and WHFT LL Workforce Developer, LLC, (Catchlight or WHFT) by and through undersigned counsel and pursuant to Sections 120.57(1) and 120.57(3), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, respond to the Exceptions to Recommended Order (Exceptions) filed by Intervenor, BDG Fern Grove Phase Two, LP, d/b/a/ Fern Grove Phase Two (Fern Grove). Fern Grove filed its Exceptions on May 19, 2025 and challenged the Recommended Order issued on May 9, 2025 by Administrative Law Judge James H. Peterson, III (the ALJ). Fern Grove's submittal includes 11 overall exceptions but challenges 17 Findings of Fact in their entirety, portions of three other Findings of Fact, and 25 Conclusions of Law. Catchlight responds to each of these exceptions and requests that all be rejected. The ALJ's Recommended Order should be adopted in its entirety.

Introduction

On November 20, 2024, Respondent, Florida Housing Finance Corporation (Florida Housing) issued Request for Applications 2024-213 SAIL Funding for Live Local Mixed Income, Mixed-Use, and Urban Infill Developments (the RFA). The RFA solicited applications for the allocation of State Apartment Incentive Loan (SAIL) financing appropriated via the Florida Legislature and the Live Local Act. The RFA was open to applicants that qualified as a Mixed-Income Development and either an Urban Infill Development or Mixed-Use Development, or both, for Families or the Elderly. Florida Housing anticipated the award of $100,389,979.00 in funding to be made available through the RFA. Applications were due on or before 3:00 PM, Eastern Time, on December 20, 2024. Florida Housing received 65 applications in response to the RFA. On January 24, 2025, Florida Housing announced its intention to preliminarily award funding to 10 applicants, including Fern Grove.

Catchlight timely filed a Notice of Protest and Petition for Formal Administrative Hearing (Petition). Notices and petitions were also filed by other parties challenging different applicants and other preliminary awards. Fern Grove and other intervenors timely intervened. Following a Settlement Conference, the petitions were referred to the Division of Administrative Hearings (DOAH), assigned to the ALJ, and consolidated. At issue here, Catchlight's Petition challenges Florida Housing's preliminary funding award to Fern Grove. On February 17, 2025, Fern Grove submitted a memorandum to Florida Housing that presented challenges to the eligibility of Catchlight's application.

In accordance with the ALJ's Order of Pre-hearing Instruction, the parties prepared and submitted a Joint Pre-hearing Stipulation, in which they agreed on a number of facts about each party, the RFA, and the disputed issues to be resolved during the final hearing. A final hearing

commenced on March 25, 2025, and was completed on March 26, 2025. At the hearing, all the parties offered the testimony of Melissa Levy, Florida Housing's Managing Director of Multifamily Programs. Catchlight offered the testimony of Lindsay Brooke Sammons (via preserved deposition testimony), Ambar Velazquez (via preserved deposition testimony), and Paula Rhodes (via preserved deposition testimony). Fern Grove offered the testimony of Scott Zimmerman and Robert Von, subject to objection by Catchlight and Florida Housing. The following exhibits were admitted into evidence: Joint Exhibits 1 through 9; WHFT Exhibits 1 through 9; and Fern Grove Exhibits 1, 5-9, 13, 16 and 17. Fern Grove proffered Exhibits 2-4 and 10-12, subject to objections by Catchlight and Florida Housing. A two-volume transcript of the final hearing was filed with DOAH on April 10, 2025.

The parties timely filed Proposed Recommended Orders and the ALJ issued a Recommended Order. Therein the ALJ concluded that Fern Grove failed to demonstrate the requisite Developer Experience and Prior Management Company Experience. The ALJ also determined that Catchlight's application met the RFA criteria related to its noncorporation funding sources, development cost pro forma, and demonstration of site control. Overall, the ALJ recommended the application submitted by Fern Grove is ineligible for funding and the application submitted by Catchlight remains eligible for funding.

Fern Grove filed Exceptions asserting that many of the ALJ's Findings of Fact are not supported by competent, substantial evidence and numerous Conclusions of Law are erroneous and should be reevaluated by Florida Housing. Fern Grove ultimately seeks to reverse the ALJ's recommendation and requests that Florida Housing's Board of Directors (Board) find its application eligible and Catchlight's application ineligible for funding.

Instead, the Board should adopt all of the Recommended Order's factual findings and legal conclusions. Discussed below, the ALJ's Findings of Fact are supported by competent substantial evidence and the Conclusions of Law are reasonable as well as consistent with the RFA, Florida Housing's policies, the Florida Administrative Code, and Florida Statutes. Consequently, the Board should reject all of Fern Grove's exceptions.[1]

Standard of Review

The rules of decision applicable in an administrative bid protest are set forth in Section 120.57(3)(f), Florida Statutes, which states in pertinent part:

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

Section 120.57(1), Florida Statutes, governs the limited framework of the Board's review of a Recommended Order and issuance of a Final Order. The agency is bound by the criteria within Sections 120.57(1) (l) and (k), Florida Statutes, which state in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusions 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

[1] References to the hearing transcript volume 1 are denoted as (T. 1 p. #). References to the hearing transcript volume 2 are denoted as (T. 2 p. #). References to Exhibits are denoted as: (J-#, p. #) for Joint Exhibits; (WHFT-#, p. #) for Catchlight Exhibits; and (FG-#, p. #) for Fern Grove Exhibits. References to the Joint Pre-hearing Stipulation are denoted as (Stip. ¶#).

> law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify 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 proceeding on which the findings were based did not comply with the essential requirements of law. §120.57(1)(l), Fla. Stat.
>
> …

Additionally,

> … [A]n agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record. §120.57(1)(k), Fla. Stat.

During this review, an agency may not reweigh evidence or reject factual fundings unless there is no competent substantial evidence to support them. *Walker v. Bd. of Prof'l Eng'rs.*, 946 So. 2d 604 (Fla. 1st DCA 2006) (an agency cannot modify or substitute new findings of fact if competent substantial evidence exists to support the ALJ's findings of fact.). Stated differently, if the factual findings are supported by competent substantial evidence in the record, an agency is bound by those findings. *Dep't of Corrections v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

Competent substantial evidence does not relate to the quality, character, convincing power, probative value, or weight of the evidence. Rather, "the 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." *Dep't of Highway Safety and Motor Vehicles v. Wiggin*s, 151 So. 3d 457 (Fla. 1st DCA 2014) *quoting DeGroot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957).

A reviewing agency may not reweigh the evidence presented at a final hearing, attempt to resolve conflict therein, or judge the credibility of witnesses. *See e.g., Rogers v. Dep't of Health*,

920 So. 2d 27, 30 (Fla. 1st DCA 2005); *Belleau v. Dep't of Evtl. Prot.*, 695 So. 1305, 1307 (Fla. 1st DCA 1997); *Dunham v. Highlands Cnty. Sch. Bd.*, 652 So. 2d 894 (Fla. 2d DCA 1995). These limitations are further explained in *Walker*, which states:

> It is the hearing officer's function to consider all of the evidence presented, resolve conflicts, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent substantial evidence. If, as 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. The agency may not reject the hearing officer's finding unless there is no competent substantial evidence from which the finding could be reasonably inferred. The agency is not authorized to right the evidence presented, judge the credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. *Walker,* 946 So. 2d at 604.

Accordingly, an ALJ's decision to accept testimony of one witness over another is an evidentiary ruling that cannot be altered by a reviewing agency without a complete lack of any competent substantial evidence supporting the decisions. *See, Collier Med. Ctr., Inc. v. State Dep't of Health & Rehab Servs.*, 462 So. 2d 83, 85 (Fla. 1st DCA 1985).

Additionally, an agency cannot substitute its findings simply because it would have determined factual questions differently. *Resnick v. Flagler Cnty. Sch. Bd.*, 46 So. 3d 1110, 1112-1113 (Fla. 5th DCA 2010) (an agency may not reject findings of fact supported by competent substantial evidence even if alternative findings were also supported by competent substantial evidence). If there is competent substantial evidence to support a finding of fact, it is irrelevant that there may also be competent substantial evidence supporting a contrary finding. *Id.; see also, e.g., Arand Constr. Co. v. Dyer*, 592 So. 2d 276, 280 (Fla. 1st DCA 1991); *Conshor, Inc. v. Roberts*, 498 So. 2d 622 (Fla. 1st DCA 1986). If the final hearing record reveals any competent substantial evidence supporting a challenged finding of fact, the agency is bound by the ALJ's determination in preparing a final order. *See, e.g., Walker*, 946 So. 2d at 604; *Bradley,* 510 So. 2d at 1123. 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 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 & Rehab Servs.,* 744 So. 2d 1040, 1041-1042 (Fla. 2d DCA 1999). Instead, the true nature and substance of an ALJ's statement controls. *JJ Taylor Cos., Inc. v. Dep't of Bus. & Pro. Regulation,* 724 So. 2d 192, 193 (Fla. 1st DCA 1999); *Holmes v. Turlington,* 480 So. 2d 150, 153 (Fla. 1st DCA 1985). Matters that are susceptible to ordinary means of proof, such as weighing the evidence or determining a witness's credibility, are factual matters to be determined by an ALJ. *Id.*

"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 evidentiary facts." *Feldman v. Dep't of Transp.,* 380 So. 2d 692, 694 (Fla. 4th DCA 198). For example, the question of whether the facts establish a violation of a rule or statute involves a question of ultimate fact that an agency may not reject without an adequate explanation. *See Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

Response to Exception Number One

Fern Grove takes exception to the entirety of Finding of Fact 35 and portions of Findings of Fact 44 and 57 along with Conclusions of Law 99 and 108-111. These Findings of Fact state in full:

> 35. The residential component anticipated under the RFA consists of residential units themselves and the supporting uses for those units, including the clubhouse, leasing offices, and common areas of other amenities. The nonresidential component is a separate space for the Commercial or Institutional Use Space apart from the residential component.

> 44. In addition, the evidence shows that when offered on-site, the Banyan Cove and Banyan Reserve services were not offered five days a week or in their own space within the development. Rather than provided in dedicated spaces, the services are provided in the community room/clubhouse (amenity) spaces. Both Banyan Cove and Banyan Reserve are senior communities required to have a community room/clubhouse (amongst other amenities) as a condition of their funding, and are considered part of the residential component of the developments. Those amenities do not meet the Mixed-Use requirement of "dedicated spaces."
>
> 57. Ms. Levy credibly and persuasively testified that the referenced certificate of occupancy must be issued for the nonresidential use within the development, or under the Mixed-Use Development definition, the Mixed-Use Commercial Space and/or Mixed-Use Institutional Space nonresidential component. The common spaces, such as the clubhouse, leasing office, and other amenities, are considered part of the residential uses. Therefore, certificates of occupancy issued for the common community spaces would not count toward meeting this requirement.

Conclusions of Law 99 and 108-111 relate to these factual findings. Therein the ALJ acknowledged the RFA has clear experience requirements, and the term Mixed-Use Development contains two components, residential and nonresidential. The ALJ further determined Fern Grove identified three developments that purport to have a Mixed-Use Institutional Space to meet the RFA's experience requirements, but none of the developments actually have spaces that could be considered a nonresidential component.

In submitting this exception, Fern Grove alleges the ALJ mixed factual findings and legal conclusions to create definitions for residential and nonresidential components. Contrary to Fern Grove's representation, the ALJ did not create definitions for these terms. They were incorporated into the definition of a Mixed-Use Development by Florida Housing and included within the RFA. Florida Housing's statutes and administrative regulations as well as the competent substantial evidence support the ALJ's application of these terms.

As applicants, both Catchlight and Fern Grove certified they reviewed the relevant administrative regulations and will abide by "all commitments, requirements, and due dates outlined in the RFA." J-8 p. 36; J-7 p. 36. Section Two of the RFA acknowledges that all capitalized terms within the RFA have the meaning as set forth within Exhibit B of the RFA or the related administrative regulations. J-1 p. 3. Exhibit B of the RFA defines a Mixed-Use Development. J-1 pp. 104-105. This definition explicitly recognizes both a residential and nonresidential component and states in pertinent part:

> A Development with a residential component in conjunction with Mixed-Use Commercial Space and/or Mixed-Use Institutional Space non-residential component. J-1, p. 104.[2]

The testimony of Melissa Levy highlights why this definition contains both a residential and nonresidential component:

> Q: Why does Florida Housing just generally have experience requirements within the RFA?
> A: Each RFA has developer experience requirements, and they vary depending on the funding source because we're looking for the applicant to provide evidence that they have experience of comparable complexity in terms of what they're proposing to construct and what sources of financing they are proposing to utilize.
>
> …
>
> Now, in this RFA, this funding did not come through the kind of what, what you would say the typical legislative process. It came through a different piece of legislation called the Live Local Act. Now, the Live Local Act, it was really kind of this landmark legislation that had a lot of affordable housing provisions in it, but one of those provisions was the, the appropriation of $150 million in [SAIL] funding to Florida Housing to allocate for mixed income developments.
>
> …

[2] The parties stipulated to this definition as a factual finding in the Joint Pre-hearing Stipulation. Stip. ¶ 28. When the parties stipulate to a factual finding, the ALJ is bound by that stipulation. *See, e.g., Palm Beach Cnty. Coll. v. State of Fla., Dep't of Admin.,* 579 So. 2d 300, 302 (Fla. 4th DCA 1991) ("When the parties agree that a case is to be tried upon stipulated facts, the stipulation is binding not only upon the parties but also upon the trial and reviewing courts. In addition, no other or different facts will be presumed to exist.").

> One of the items is funding developments that are mixed-use in terms of incorporating commercial or institutional space. So that's not something we fund with our other funding sources.
>
> …
>
> We said if you are going to develop a property that is mixed-use, you need to show us that you have experience already developing that type of property, because when you integrate housing credits with a nonresidential component, it opens up a whole another level of complexity because if you have costs for your nonresidential component, those costs can actually taint your housing credit costs, and you could actually risk losing your housing credits.
>
> …
>
> So we said if we're going this route and we have this new concept, then we want to make sure that we are funding developments so applicants that have already worked in this space so that we know that they can navigate all of those complexities and put not only the credits but the transaction at risk if they didn't know how to navigate those complexities. T. 2. pp. 91-93.

She also provided examples of potential commercial or institutional nonresidential components that could meet the definition. Tr. 2. pp. 96-98.

This rationale is bolstered by Florida Housing's own administrative rules and statutes. *See* R. 67-48.002(30), Fla. Admin. Code and §420.503(35), Fla. Stat (Project is defined as "[A]ny work or improvement located or to be located in the state, including real property, buildings, and any other real and personal property … together with such related nonhousing facilities as the corporation determines to be necessary, convenient, or desirable."). It is also consistent with the Legislature's funding directives within the Live Local Act. §420.50871(1)(c), Fla. Stat. ("The corporation shall finance projects that [p]rovide for mixed use of the location, incorporating nonresidential uses, such as, retail, office, institutional, or other appropriate commercial or nonresidential uses."). Ms. Levy also unequivocally confirmed that a nonresidential component is not a clubhouse or other general amenity space, but a designated space that is separate from the residential component of the development:

> THE COURT [Q]: So in the agency's view, a clubhouse is a residential component. It is not a nonresidential component?
> A: Yeah. Those are supporting services.

Simply put, there is ample competent substantial evidence to support the ALJ's factual findings. Discussed more below, the ALJ also properly determined the RFA's definition of Mixed-Use Development was sound and that Fern Grove's identified developments failed to meet the RFA's experience requirements. With this exception, Fern Grove implicitly asks the Board to reweigh evidence that was considered by the ALJ and adopt a different, less reasonable conclusion. For these reasons, this exception should be wholly rejected.

Response to Exception Number Two

Fern Grove takes exception to Finding of Fact 42 to the extent that it states that services provided by the Tree House Foundation, Inc., (Tree House) go beyond those services already required by the RFA. Fern Gove claims there is internal inconsistency within the paragraph and the first sentence should be stricken. Finding of Fact 42 states in full:

> 42. The services provided by Tree House are the types of institutional services contemplated by the RFA. However, the RFA already requires, as a condition to funding, that applicants provide certain services to its residents like financial management classes, employment assistance programs, health and wellness services, computer training classes, onsite daily activities and assistance with light housekeeping, grocery shopping, and laundry. None of the programs from Tree House for purposes of showing a Mixed-Use experience appear to go beyond those already required within the RFA.

There is no internal inconsistency in this paragraph and all its factual findings are supported by competent substantial evidence. Documentary evidence and the testimony of Lindsay Brooke Sammons, Tree House's Executive Director, reveal that Tree House provides various services to the residents of Banyan Cove and Banyan Reserve such as computer courses, financial literacy classes, wellness services, and employment assistance programs. WHFT-6 pp. 25-26, 28-29, 31-

34; WHFT-7, WHFT-8, WHFT-9. These services are the same or similar services that are identified within the Resident Programs section of the RFA. J-1 pp. 53-57. Fern Grove's authorized principal, Scott Zimmermann, conceded this fact:

> Q: How often are financial services provided to the residents of Banyan Cove?
> A: They're – I can't tell you that off the top of my head but whatever is required by the LURA, that's the minimum amount that are provided.
>
> Q: And, I'm sorry, sir, can you explain what a LURA is?
> A: Land Use Restriction Agreement, which is when you get funding, you're required to provide services typically. And so, Tree House provides those services.
>
> Q: And where are those services recognized within a LURA?
> A: Where are they? I don't – in the LURA somewhere in there.
>
> Q: And are those [services] connected to request for funding and Florida Housing RFA requirements?
> A: Typically.

Resident Program services are general RFA requirements that are required by most Request for Applications, but importantly, they are different from the Mixed-Use Institutional Space requirements within this RFA. *Compare* J-1 pp. 53-57 *to* J-1 p. 75

With competent substantial evidence supporting the ALJ's factual fundings and no internal inconsistency, Exception Number 2 should be rejected.

Response to Exception Number Three

Fern Grove takes exception to Findings of Fact 43-46 and 53-56 as well as Conclusions of Law 99, 108-115, and 118. With these factual findings the ALJ found that: online services or off-site services from a non-profit do not meet the RFA's experience requirements; on-site services were not provided five days a week at Bayan Cove, Banyan Reserve, or Parramore Oaks; when services were provided on site they were not provided in a designated space; the three

developments do not have certificates of occupancy specifically for a nonresidential component, as defined by the RFA; and, these developments do not meet the RFA's definition of Mixed-Use Development.

With this exception, Fern Grove is asking the Board to reweigh evidence from the final hearing and impose an alternative result. But the Board should not accept Fern Grove's invitation because competent substantial evidence supports each of the disputed factual findings. Testimony from Ms. Sammons confirmed that the Tree House provided services both online and in-person. *See, e.g.,* WHFT-6 p. 31. However, in-person trainings were not consistent and subject to availability. *Id.* at 27. (Q: "So how do you make the determination to do those workshops either in-person or online? A: Same thing, it's availability."). Additionally, Ms. Sammons confirmed that when Tree House provides on-site services to Banyan Cove and Banyan Reserve residents they are provided in the community room or club house. WHFT-6 pp. 34, 37-38. These services are also not provided five days a week. WHFT-7; WHFT-6 pp. 24, 27, 29, 42. Ambar Velaquez, the Special Program Manager for Orlando Neighborhood Improvement Corporation (ONIC), provided similar testimony regarding the timing and location of services provided by ONIC to the residents of Parramore Oaks:

> Q: And when you did meet with residents of Parramore Oaks on-site, where would you typically meet with them?
> A: We generally met with them in the community room. I know that wasn't the only space available. I believe they also have like a computer lab space, but we generally met with them in the community room. And we brought our equipment with us.
>
> Q: Does ONIC have staff or volunteers that are physically onsite at Parramore Oaks five days a week?
> A: Not five days a week, but we have staff right there that are physically onsite at least two days a week right now. WHFT-5 pp. 14, 40.

For the remainder of the disputed factual findings, Fern Grove includes more arguments within Exception 1 and Exception 4. Catchlight incorporates its responses, and the competent substantial evidence cited above and below herein.

Each of the challenged legal conclusions relate to the ALJ's factual determinations and application of the related RFA criteria. To meet the Developer Experience and Prior Management Company Experience requirements, the RFA required an applicant to identify a certain number of prior developments that "meet the definition of a Mixed-Use Development." *See, e.g.,* J-1, p. 12. As defined by the RFA, a Mixed-Use Development must include a residential component and a nonresidential component. J-1, p. 104. For a Mixed-Use Development with a Mixed-Use Institutional Space services within the development must be in "operation at least 5 days a week." J-1, p. 105. With this background, in conjunction with the presented evidence, the ALJ reasonably concluded that none of the three developments had a nonresidential component or received services from a non-profit five days a week. Following these factual determinations, the ALJ rightly determined that Fern Grove's reliance on these three developments did not meet the necessary RFA requirements and was ineligible for funding. This determination was not only logical but also reasonable. For these reasons, Exception Number 3 should be rejected.

Response to Exception Number Four

Fern Grove takes exception to the portions of Findings of Fact 56 and 57 and Conclusion of Law 115 to the extent they find and conclude that certificates of occupancy for devoted nonresidential commercial or institutional space were required, and that Fern Grove's certificates of occupancy were insufficient. Findings of Fact 56 and 57 and Conclusion of Law 115 state in full:

> 56. However, none of the three developments offered as examples by Fern Grove – Banyan Cove, Banyan Reserve, or Parramore Oaks

> – has a space devoted to institutional use. Therefore, none of those developments has a certificate of occupancy specifically for the nonresidential use required of Mixed-Use Developments.
>
> 57. Ms. Levy credibly and persuasively testified that the referenced certificate of occupancy must be issued for the nonresidential use within the development, or under the Mixed-Use Development definition, the Mixed-Use Commercial Space and/or Mixed-Use Institutional Space nonresidential component. The common spaces, such as the clubhouse, leasing offices, and other amenities, are considered part of the residential uses. Therefore, certificates of occupancy issued for common community spaces would not count toward meeting this requirement.
>
> 115. The RFA requires that, for space to count toward the Mixed-Use Development Experience, the temporary or final certificate of occupancy must have also been issued for the nonresidential use within the development. A preponderance of the evidence demonstrated that none of the three developments at issue has received a certificate of occupancy for their proposed mixed-use development, non-residential component, but rather only for community residential amenity spaces, where the services are just occasionally offered on site.

With this exception, Fern Grove continues to argue that a clubhouse or common space is a nonresidential component. But Fern Grove's position is belied by the testimony of Ms. Levy who clearly explained Florida Housing's position on residential vs. non-residential components:

> Q: Why did Florida Housing feel the need to define or recognize the nonresidential component within the definition of a mixed-use development?
> A: Yeah. You know, even going back to the workshopping of the RFA and the concepts behind it, it's very clear statutorily that the development that is funded to meet a mixed-use goal that there needs to be a component that is nonresidential, that's not an amenity to the residential use, that is very specific and separate from the residential component that is utilized for commercial and/or institutional spaces.
>
> Q: So when Florida Housing included that nonresidential component within the definition, were they contemplating a clubhouse?
> A: No. And in fact, like I said, when we were even workshopping this conceptually, like, I went back and listened to that conceptual

> workshop in preparation for this. And in that workshop, I said two times this will not be your clubhouse space. This needs to be a separate area. This needs to be a space, a significant commercial or institutional nonresidential space that is not, you know, coexisting or overlapping with your clubhouse. T. 2. p. 149.

The documentary evidence and other testimony from the final hearing confirm that the certificates of occupancy issued to Banyan Cove, Banyan Reserve, and Parramore Oaks are for clubhouses or community spaces, all of which Florida Housing has determined are residential components under the definition of Mixed-Use Development. WHFT-2; FG 5, 6, and 8; T. 1. pp. 86, 88; T. 2. pp. 95-96, 126, 149; J-1 p. 104.

The Board may only reject or modify the ALJ's factual findings if they are not supported by competent substantial evidence. Here there was ample competent substantial evidence presented during the final hearing to support the ALJ's findings that the certificates of occupancy relied upon by Fern Grove were insufficient to be a nonresidential component, as defined by the RFA. Accordingly, the ALJ's factual findings should stand.

Conclusion of Law 115 is an ultimate fact that should not be modified or rejected by the Board. Therein, the ALJ relies on factual findings, all of which are supported by competent substantial evidence, to conclude that the certificates of occupancy presented by Fern Grove fail to meet the RFA criteria. This determination by the ALJ is reasonable, and the Board should not accept Fern Grove's invitation to reweigh the evidence or substitute its own factual findings to support Fern Grove's desired outcome. For these reasons, Exception Number 4 should be rejected.

Response to Exception Number Five

Fern Grove takes exception to the last sentence of Finding of Fact 58. That Finding of Fact states in full:

> 58. Fern Grove also argues that Parramore contains a space that may become a future daycare. Parramore received its certificate of

> occupancy for that space along with the rest of the development in 2019, roughly 6 years ago, and has never leased the space. Furthermore, Fern Grove does not attempt to rely on this space as Mixed-Use Commercial or Institutional Space to satisfy its Developer Experience requirement.

The sentence that is the focus of this exception is an ultimate fact that should not be struck or modified. Discussed above, there is competent substantial evidence that supports the ALJ's determination that a certificate of occupancy for a nonresidential component needs to be provided by Mixed-Use Development applicant. Further there is unrebutted, competent substantial evidence that the certificates of occupancy for Bayan Cove, Banyan Reserve, and Parramore Oaks are for clubhouses or community spaces which are residential components, as defined by the RFA. WHFT-2; FG 5, 6, and 8; J-1, p. 104. Without certificates of occupancy for a nonresidential component, Fern Grove is unable to rely on Parramore Oak's common spaces to meet the Mixed-Use Development requirements. Therefore, the ALJ's finding the last sentence of paragraph 58 is supported by competent substantial evidence and is a logical determination from the presented evidence. For these reasons, this exception should be rejected.

Response to Exception Number Six

Fern Grove takes exception to Finding of Fact 59 and incorporates the arguments presented in Exceptions 1-5 to support striking and replacing certain language within this paragraph. In response, Catchlight incorporates its responses to Exceptions 1-5 herein. For the reasons stated above, this exception should be rejected.

Response to Exception Number Seven

Additionally, Fern Grove takes exception to Conclusion of Law 118 and incorporates the arguments presented in Exceptions 1-6 as a basis to replace the ALJ's overall recommendation regarding Fern Grove's application with Florida Housing's preliminary determination that Fern

Grove's application is eligible for funding. In response, Catchlight incorporates its responses to Exceptions 1-6 herein. For the reasons stated above, this exception should be rejected.

Response to Exception Number Eight

Fern Grove takes exception to Finding of Fact 71 and Conclusions of Law 119 – 124 which address Fern Grove's challenge to Catchlight's financing proposal. With this exception, Fern Grove continues to argue that Catchlight will not receive the identified loan as a funding source because terms within the financing proposal are materially ambiguous. As alleged by Fern Grove, this material ambiguity should negate the financing proposal as an anticipated funding source in Catchlight's development cost pro forma.

The ALJ's factual findings in paragraph 71 are supported by competent substantial evidence. Ms. Levy testified that the parties to the financing proposal, i.e., Catchlight and JP Morgan Chase N.A., are in the best position to determine the validity of the challenged financial proposal. ([A]: "Well the lender and the applicant are the most knowledgeable about the terms and intent and the commitment. So I would need to hear from Chase that this letter is invalid or … that they would rescind the letter.") T. 2. p. 87. Further the testimony and documentary evidence confirm that a financing proposal is permitted to have terms and conditions as long as it meets the requisite RFA criteria. J-1, p. 66, 68; T. 2. pp. 85-86, 135-136. In the Joint Pre-hearing Stipulation, the parties stipulated that Catchlight's financing proposal included the necessary RFA criteria. Stip. ¶ 49. ("The letter from JP Morgan Chase contains 1) the amount of the proposed construction loan; 2) a specific reference to the Applicant as the borrower or direct recipient; and 3) the signature of the lender."); *Palm Bch. Cnty. Coll.,* 579 So. 2d. at 302.

Fern Grove claims extensive evidence was presented during the final hearing challenging Catchlight's financing proposal. But importantly, Fern Grove failed to present testimony from

either Catchlight or JP Morgan Chase N.A. It had the opportunity to present testimony from these parties but decided not to. With competent substantial evidence supporting the ALJ's factual findings, the Board should uphold Finding of Fact 71, even with evidence in the record that could support a different finding. *Resnick,* 46 So. 3d at 1112-1113.

Fern Grove's challenge to Conclusions of Law 119 – 124 raise exceptions to the ALJ's analysis of *MJHS FL South Parcel, Ltd., et. al. v. Fla. Hous. Fin. Corp.,* Case No. 23-0903BID (Fla. DOAH May 31, 2023; Fla. FHFC July 21, 2023) (MJHS) and *The Vistas at Fountainhead v. Fla. Hous. Fin. Corp. et. al.,* Case No. 19-2328BID (Fla. DOAH July 16, 2019), adopted in pertinent part, (Fla. FHFC Aug. 2. 2019) (Vistas). Fern Grove argues the ALJ erred and the *MJHS* case holds that material ambiguities in any funding source means the source cannot be counted.

As correctly determined by the ALJ, Fern Grove's reliance and interpretation of *MJHS* and *Vistas* are misplaced and not applicable. *MJHS* and *Vistas* addressed Tax Credit Equity Proposals which are different than financing proposals and governed by separate RFA criteria. When certain payments are made is required RFA criteria for Tax Credit Equity Proposals. *MJHS,* 23-0903BID at ¶134 ("In order to count an Equity Proposal as a source of funding, it must comply with certain RFA requirements, one of which is to state the amount of proposed equity to be paid prior to construction completion."). The timing of payments was one of the challenged issues in *MJHS* and *Vista* but is not applicable here because the same RFA criteria, and its payment timelines, do not apply to financing proposals. *See, e.g.,* J-1, pp. 63, 66. Because of these distinctions, *MJHS* and *Vistas* should not determine the outcome of this case, and these cases were properly distinguished by the ALJ. Accordingly, Exception Number 8 should be rejected.

Response to Exception Number Nine

Fern Grove takes exception to Finding of Fact 77 and Conclusion of Law 127, which state:

> 77. However, the RFA contemplates that Florida Housing may modify the general provisions provided within that section, as it has clearly done through the Live Local Self-Sourced Financing Commitment Verification Form and associated RFA requirements. Indeed, it is evident that the RFA language was clear to those applicants applying with self-sourced financing, as none of the nine other applicants applying with Live Local Self-Sourced Financing provided evidence of ability to fund within their application.
>
> 127. Fern Grove's claim that Catchlight is required to provide evidence of ability to fund as part of the application is misplaced. The competent evidence, including the testimony of Ms. Levy and the Live Local Self-Sourced Financing Commitment Verification Form itself, plainly establish that Catchlight is not required to provide evidence of the self-sourced financing until credit underwriting.

This exception attempts to obfuscate the applicable RFA criteria and relitigate evidence from the final hearing. Recognized within the Joint Pre-hearing Stipulation, the RFA allows an applicant to self-source a portion of its development costs under certain conditions. J-1, p. 74; Stip. ¶ 53. These certain conditions, which are specific RFA criteria, require:

> • The Application must be a Priority 1 Application.
> • The Application must be deemed a Tier 1 Application.
> • The Application must select New Construction as the Development Category.
> • The executed Live Local Self-Sourced Financing Commitment Verification form must be submitted as Attachment 10.
> • The funding must be from a Principal of the Applicant Entity and listed on the Principals of the Applicant and Developer(s) Disclosure Form (Form Rev. 05-2019) provided in the Application.
> • During the credit underwriting process, the Applicant must demonstrate and maintain the Live Local self-sourced financial support in an amount equal to or greater than the minimum qualifying amount in the form of permanent financing.
> • The amount of the contribution must be at least 50% of the Applicant's eligible Live Local SAIL Base request amount or $1,000,000, whichever is greater.
> • During the credit underwriting process, Applicants must demonstrate self-sourced permanent financing in an amount that is at least half of the Applicant's eligible SAIL Base Request Amount or $1,000,000, whichever is greater. The SAIL Base Request Amount does not include the ELI Funding Request Amount.

> • The self-sourced financing must be subordinate to the Live Local SAIL Loan.
> • The interest rate is capped at 6%. J-1, p. 74.

Stated plainly, the RFA criteria that Fern Grove continues to rely upon is a general provision which does not determine when Catchlight was required to provide documentation to support its self-source funding. After reviewing the evidence, the ALJ agreed and determined that Catchlight met the applicable RFA criteria. This ultimate fact is supported by competent substantial evidence that should not be altered. T. 2. pp. 80, 82, 84, 88-89; J-7 pp. 9, 170. For example, Ms. Levy not only confirmed when self-sourced applicants are required to provide this information, she also explained Fern Grove's error in relying on the more general RFA criteria:

> Q: And when does Florida Housing expect to receive evidence of ability to fund from an applicant who submitted this type of form?
> A: During the credit underwriting process.
> …
> Q: Nowhere in here does it exclude in this Subsection C self-sourced funding amounts. Does it?
> A: No, but I'll retain what I said before, that the self-sourced requirements are located further down after Subsection C. They're not part of Subsection C or B. T. 2. P. 142.

The Board may only reject the ALJ's factual findings if they are not supported by competent substantial evidence in the record. Competent substantial evidence exists to support Finding of Fact 77, and that evidence was relied upon by the ALJ in reaching Conclusion of Law 127. Accordingly, there is no basis for the Board to modify or reject these determinations. Therefore, this exception should be completely rejected.

Response to Exception Number Ten

Fern Grove takes exception to Findings of Fact 78, including footnote 4, and 79 as well as Conclusion of Law 129 and 128, which state:

> 78. Fern Grove claims that certain conditions present within the Chase Letter and Catchlight's Self-Sourced Funding should either

> render them ineligible for use as a source within the cost proforma, or that the amounts should be reduced based on Fern Grove's own experts' testimony, one of which is Fern Grove's corporate representative, Scott Zimmerman.
>
> 79. As Catchlight properly included the full value of both its anticipated Chase Loan and its self-sourced funds in its cost pro forma, Fern Grove's challenges to Catchlight's Loan Financing Proposal and self-funding must fail.
>
> 128. As noted by ALJ Culpepper in *Durham Place v. Florida Housing Finance Corporation,* Case No. 19-1396BID (Fla. DOAH June 7, 2019; Fla. FHFC June 21, 2019), Florida Housing must accept an application that has complied with the plain and unambiguous terms of the RFA. Judge Culpepper explains:
>
> > As Florida Housing should not have found Brownsville's application ineligible "if the configuration of a proposed development would be fleshed out in the final site plan approval proceed, which occurs after the application stage during the credit underwriting." *Brownsville Manor, LP v. Redding Dev. Partners*, *LLC, and Fla. Hous. Fin. Corp*., 224 So. 3d 891, 894 (Fla. 1st DCA 2017). Consequently, even though the true configuration of Brownsville's development was "unknown at the application stage," because Brownsville "compiled with all that was required of it at the application stage under the plain and unambiguous terms of the RFA," the appellate court ordered Florida Housing to reinstate Brownsville's eligibility for funding.
>
> 129. Fern Grove has failed to meet its burden to show that Florida Housing's acceptance of the Chase Letter or Self-Source Letter as anticipated sources within Catchlight's cost pro forma was clearly erroneous, arbitrary or capricious, or contrary to competition.

With this exception Fern Grove points to the extensive evidence presented at the final hearing to support its challenge of the noncorporation funding sources within Catchlight's application. It also claims error and requests that the Board remand this issue back to the ALJ for specific findings. However, this exception is nothing more than an effort to have the Board reweigh evidence and improperly reject or modify the ALJ's credibility determinations of witnesses. It is the ALJ's role to weigh evidence and determine witness credibility, not the Board. *Prysi v. Dep't of Health,* 823

So. 2d 823, 825 (Fla. 1st DCA 2002) ("An agency is not authorized to weigh evidence, judge credibility or otherwise interpret the evidence to fit its desired conclusion.").

There is no question that Fern Grove had the opportunity to present its challenges to Catchlight's application. Noted by Fern Grove, during the final hearing it presented documentary evidence as well as the testimony of two experts to challenge Catchlight's financing proposal, self-source funding, and ultimately its development cost pro forma. FG-2, 4, 10-12. In response, Catchlight presented documentary evidence and testimony that its application met the plain and unambiguous terms of RFA. J-7, pp. 169-174; *see, e.g.,* T. 2. pp. 86-87 ("[Q]: And are you aware of any evidence that supports that Catchlight failed to meet the RFA requirements related to this financing proposal? [A]: No."). The parties also stipulated that the financing proposal within Catchlight's application met certain RFA criteria. Stip. ¶ 49.

After evaluating the evidence and testimony the ALJ determined that Fern Grove's self-serving exhibits as well as their two experts, Mr. Zimmermann and Robert Von, were unpersuasive and not credible. When the evidence presents two inconsistent findings, it is the ALJ's role to decide the outcome. *See Heifetz v. Dep't of Bus. Regul., Div. of Alcoholic Bevs. & Tobacco,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Here the ALJ appropriately accepted the documentary evidence and testimony that confirmed Catchlight's application met the financing proposal, self-source financing, and development cost pro forma RFA requirements. J-7, pp. 25-31, 169-175; T. 2. pp. 85-88, 137.

Fern Grove's claims of error and denial of administrative due process are an attempt to confuse and have the Board overlook its failure to meet its burden of proof. On these issues, Fern Grove carried the burden to demonstrate the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious. And the competent substantial evidence shows

that Fern Grove failed to meet its burden. *See, e.g.,* T. 2. p. 88 ([Q]: And after hearing the evidence and testimony presented by Fern Grove throughout this challenge, does Florida Housing believe Catchlight's development cost pro forma has a funding shortfall? [A]: No.").

Simply put, the ALJ weighed the evidence, determined the credibility of the witnesses' testimony, and concluded that Fern Grove's challenges should fail. Now the Board should reject Fern Grove's invitation to reweigh evidence or draw a different conclusion. Instead, the Board should ratify the ALJ's reasonable factual determinations and legal conclusions. For these reasons, this exception should be wholly rejected.

Response to Exception Number Eleven

Lastly, Fern Grove takes exception to Findings of Fact 83 and 84 and Conclusions of Law 130 – 135, which relate to Catchlight's demonstration of site control. Overall, ample competent substantial evidence supports the ALJ's factual findings, and the Conclusions of Law correctly reflect the applicable law on this topic.

In addressing the factual findings, the RFA clearly states the criteria for an applicant who provides a lease to demonstrate site control:

> [A]s Attachment 6 to Exhibit A, the documentation required in Items (1), (2), and/or (3), as indicated below, demonstrating that it is a party to an eligible contract or lease, or is the owner of the subject property. Such documentation must include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases. If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites.
>
> Note: The Corporation has no authority to, and will not, evaluate the validity or enforceability of any site control documentation.
>
> …
>
> (a) If providing a lease, the lease must have an unexpired term of at least 50 years after the Application Deadline and the lessee must be the Applicant. The owner of the subject property must be a party to the lease, or a party to one or more intermediate leases,

> subleases, agreements, or assignments, between or among the owner, the Applicant, or other parties, that have the effect of assigning the owner's right to lease the property for at least 50 years to the lessee. J-1 p. 44; Stip. ¶ 59.

To demonstrate evidence of site control, Catchlight's application included a Ground Lease, a Memorandum or Ground Lease, First Amendment to Ground Lease, a Sublease, and a Memorandum of Sublease. J-7, pp. 50-162. These various documents identify the owner of the subject property, identify the applicant as a lessee, and include an unexpired lease term for 99-years. J-7, pp. 50-52, 135. The parties stipulated to these facts. Stip. ¶ 60. Ms. Levy's testimony also confirmed these stipulated facts:

> Q: And are you aware of any evidence, Ms. Levy that Catchlight's site control documentation and leases fail to identify the subject property owner?
> A. No.
>
> Q. And are you aware of any evidence that Catchlight's leases fail to demonstrate that the applicant, here Catchlight, maintains more than a 50-year lease term?
> A. No.
>
> Q. So during this challenge, have you received any demonstration from Fern Grove that Catchlight has failed to demonstrate site control?
> A. No. T. 2 pp. 81-82.

The parties' stipulation alone is competent substantial evidence to support the ALJ's findings in paragraphs 83 and 84. *Palm Bch. Cnty. Coll.,* 579 So. 2d. at 302. But these factual stipulations are bolstered not only by the testimony of Ms. Levy but also documentary evidence. T. 2 pp. 81-82; J-7, pp. 50-52, 135. Accordingly, competent substantial evidence formed the basis of the ALJ's factual findings. This exception is simply another invitation for the Board to reweigh the evidence presented at the final hearing.

Fern Grove also takes exception to Conclusions of Law 130 – 135. Therein Fern Grove continues to advance its arguments that the Master Development Agreement referenced within Catchlight's site control documentation is relevant and should have been provided as part of the application. However, the ALJ's correctly rejected this argument during the final hearing, properly evaluating Florida Housing's established precedent to support this determination.

Florida Housing has consistently found that an intermediate agreement is relevant only if it connects back to the RFA criteria for site control. *HTG Addison II, LLC v. Fla. Housing Fin. Corp.,* Case No. 20-1770BID (Fla. DOAH June 19, 2020), FHFC No. 2020-020BP (FHFC July 17, 2020), ¶¶ 40-43, 85 ("The Redevelopment Agreement is a relevant, intermediate agreement required to be included within the site control documentation."); *Flagship Manor, LLC v. Fla. Hous. Fin. Corp.,* 199 So. 3d 1093 (Fla. 1st DCA 2016) ("Flagship's omission, or misstatement, in the Contract related to the legal description of the development site, [is] an essential component of the application."); *Madison Trace, LLC et. al. v. Fla. Housing Fin. Corp.,* Case No. 22-0004BID (Fla. DOAH April 1, 2022), FHFC No. 2021-109BP (FHFC May 2, 2022), ¶¶ 19, 26, 75 ("Regarding its first challenge, whether Beacon Trace failed to submit all "relevant" documents, Madison Trace did not demonstrate that either the POA or the MDA contain "relevant" information that required their inclusion in Beacon's application."). During the final hearing, the documentary evidence and testimony confirmed that Catchlight's site control documentation met the RFA criteria. T. 2 pp. 81-82; J-7, pp. 50-52, 135.[3] Ms. Levy also explained the RFA does not prohibit having conditions within these documents. T. 2. p. 133.

With this competent substantial evidence, the ALJ correctly determined the Master Development Agreement was irrelevant because it was not required to determine if Catchlight

[3] The parties also stipulated to these factual findings. Stip. ¶ 60.

provided the required demonstration of site control, following Florida Housing's policies and precedent. Because the Conclusions of Law correctly address the applicable law, it would not be reasonable for the Board to modify or reject these determinations. *Flagship Manor,* 199 So. 3d at 1094. ("An agency generally must follow its own precedent."). Accordingly, Exception 11 should be rejected.

Conclusion

Overall, Fern Grove's arguments that the Recommended Order's Findings of Fact are not based on competent substantial evidence are inaccurate; instead, Fern Grove repeatedly invites the Board to improperly reweigh evidence and overturn facts that are supported by ample competent substantial evidence. Likewise, Fern Grove's arguments that the Conclusions of Law should be rejected or overturned are incorrect because it would not be as or more reasonable for the Board to substitute its own conclusions for those of the ALJ.

WHEREFORE, WHFT LL Workforce, Ltd., and WHFT LL Workforce Developer, LLC, respectfully request that Florida Housing Finance Corporation's Board of Directors reject all of BDG Fern Grove Phase Two, LP, d/b/a/ Fern Grove Phase Two's Exceptions to Recommended Order, and adopt the Findings of Fact, Conclusions of Law, and Recommendation set forth in the Recommended Order as its own and issue a Final Order consistent with the same in this matter.

Respectfully submitted this 29th day of May, 2025.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been electronically filed with the Division of Administrative Hearings and emailed to counsel of record, reflected on the service list below, on this 29th day of May 2025.

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