STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

AMBAR TRAIL, LTD.

Petitioner,

DOAH Case No.: 20-1138BID
FHFC Case No. 2020-005BP

v.

NARANJA LAKES HOUSING PARTNERS, LP,
SLATE MIAMI APARTMETNS, LTD., AND
FLORIDA HOUSING FINANCE CORPORATION,

Respondents.
_____/

SIERRA MEADOWS APARTMENTS, LTD.

Petitioner,

DOAH Case No.: 20-1139BID
FHFC Case No. 2020-006BP

v.

NARANJA LAKES HOUSING PARTNERS, LP,
SLATE MIAMI APARTMETNS, LTD., AND
FLORIDA HOUSING FINANCE CORPORATION,

Respondents.
_____/

QUAIL ROOST TRANSIT VILLAGE IV, LTD.,

Petitioner,

DOAH Case No.: 20-1140BID
FHFC Case No. 2020-007BP

v.

NARANJA LAKES HOUSING PARTNERS, LP,
SLATE MIAMI APARTMETNS, LTD., AND
FLORIDA HOUSING FINANCE CORPORATION,

Respondents.
_____/

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
Ann McManus DATE: 6/11/2020

PARC GROVE, LLC

Petitioner,

DOAH Case No.: 20-1141BID
FHFC Case No. 2020-009BP

v.

NARANJA LAKES HOUSING PARTNERS, LP,
SLATE MIAMI APARTMETNS, LTD., AND
FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on May 28, 2020. Petitioners Ambar Trail, Ltd., ("Ambar Trail"), Sierra Meadows Apartments, Ltd., ("Sierra Meadows"), Quail Roost Transit Village IV, Ltd, ("Quail Roost"), and Parc Grove, LLC ("Parc Grove"), as well as Respondents Naranja Lakes Housing Partners, LP ("Naranja"), Slate Miami Apartments, Ltd., ("Slate Miami"), and Harbour Springs, LLC ("Harbour Springs") were Applicants under Request for Applications 2019-112, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA"). The matter for consideration before the Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On January 24, 2020, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to Naranja, Slate Miami and Harbour Springs. Parc Grove challenged the eligibility of Harbour Springs; no other party challenged the eligibility of any of these applications. Petitioners timely filed notices of intent to protest followed by formal written protests challenging the scoring process in the RFA. The petitions were referred to the Division of Administrative Hearings ("DOAH") and consolidated. Naranja, Slate Miami, and Harbour Springs filed notices of appearance as specifically named persons.

Naranja and Slate Miami filed a Joint Motion to Dismiss the petitions filed by Ambar Trail, Sierra Meadows, and Quail Roost based on a lack of standing. Florida Housing joined in the Motion to Dismiss. Ambar Trail, Sierra Meadows, and Quail Roost filed a Response to the Joint Motion to Dismiss.

On March 23, 2020, a telephonic hearing on the Joint Motion to Dismiss was conducted before James H. Peterson, III, Administrative Law Judge ("ALJ") with DOAH. At hearing Ambar Trail, Sierra Meadows, and Quail Roost argued that the entire RFA 2019-112 and the preliminary funding award decisions issued for the RFA should be rescinded. In reviewing a motion to dismiss, the ALJ is required to accept the factual allegations in the Petition as true and consider only those factual matters contained with the Petitions. The ALJ therefore did not conduct an

independent fact-finding hearing, and the factual allegations set forth in the Petitions must be considered as competent substantial evidence.

At the hearing, the Joint Motion to Dismiss, the Response to the Motion to Dismiss, the Petitions filed by Petitioners, and arguments of counsel were considered and discussed. At the end of those discussions, the ALJ orally announced that the Joint Motion to Dismiss was well taken and that a written order to that effect would be entered. On March 24, 2020, Parc Grove filed a notice of voluntary dismissal dismissing its petition. On April 3, 2020, the ALJ issued a Recommended Order of Dismissal, attached as Exhibit A, recommending that Florida Housing enter a Final Order finding that Petitioners Ambar Trail, Sierra Meadows, and Quail Roost lack standing and dismissing the Petitions with prejudice.

On April 13, 2020, Ambar Trail, Sierra Meadows, and Quail Roost filed nine Exceptions to the Administrative Law Judge's Recommended Order of Dismissal. On April 23, 2020, Florida Housing filed its Response to Petitioners' Exceptions, Naranja and Slate Miami filed a Joint Response to Exceptions, and Harbour Springs filed a Joinder to the Responses filed by Florida Housing and Naranja and Slate Miami. Copies of the Exceptions and Responses are attached as Exhibits B, C and D.

Ruling on Exception #1

Petitioners take exception to Finding of Fact #15, alleging that it is incomplete and lacks context. After a review of the record, the Board finds that Finding of Fact #15 is consistent with the allegations in the Petitions and is supported by competent substantial evidence, and therefore rejects Exception #1.

Ruling on Exception #2

Petitioners take exception to Findings of Fact #17 and 28, alleging that they are incomplete and inaccurate. After a review of the record, the Board finds that Findings of Fact #17 and #28 are consistent with the allegations in the Petitions and are supported by competent substantial evidence, and therefore rejects Exception #2.

Ruling on Exception #3

Petitioners take exception to Findings of Fact #18 and 23, alleging that they are incomplete. After a review of the record, the Board finds that Findings of Fact #18 and #23 are consistent with the allegations in the Petitions and are supported by competent substantial evidence, and therefore rejects Exception #3.

Ruling on Exception #4

Petitioners take exception to Conclusions of Law #36, 44, 46, 47, 48, 50, 51 and 52, alleging that they are incomplete and inaccurate because they do not address other possible remedies or accept Petitioners legal arguments. To the extent that these Conclusions relate to the legal concept of standing in an administrative

proceeding, the Board lacks substantive jurisdiction to modify or reject these Conclusions. To the extent, if any, that these Conclusions address issues within the Board's substantive jurisdiction, the Board finds that these Conclusions are reasonable, consistent with the allegations in the Petitions, and supported by competent substantial evidence. For these reasons, Exception #4 is rejected.

Ruling on Exception #5

Petitioners take exception to Conclusion of Law #37, alleging that it misstates the legal criteria for standing. This Conclusion relates to the legal concept of standing in an administrative proceeding, and the Board therefore lacks substantive jurisdiction to modify or reject this Conclusion. For this reason, Exception #5 is rejected.

Ruling on Exception #6

Petitioners take exception to the last sentence of Conclusion of Law #43, apparently disagreeing that any negative impact on Petitioners was "mere speculation." After a review of the record, the Board finds that Conclusion of Law #43 is reasonable, consistent with the allegations in the Petitions, and supported by competent substantial evidence. For this reason, Exception #6 is rejected.

Ruling on Exception #7

Petitioners take exception to Conclusion of Law #45, alleging that it misstates one of Petitioners' arguments. After a review of the record, the Board finds that

Finding of Fact #15 is consistent with the allegations in the Petitions and is supported by competent substantial evidence, and therefore rejects Exception #7.

Ruling on Exception #8

Petitioners take exception to Conclusion of Law #49, alleging that the ALJ's discussion of a particular case, while accurate, stood for some undiscussed proposition. This Conclusion relates to the legal concept of standing in an administrative proceeding, and the Board therefore lacks substantive jurisdiction to modify or reject this Conclusion. For this reason, Exception #8 is rejected.

Ruling on Exception #9

Petitioners take exception to the ALJ's recommendation that the Petitions be dismissed. After a review of the record, the Board finds that the ALJ's recommendation is based on Findings of Fact that are consistent with the allegations in the Petitions and supported by competent substantial evidence. The Board also finds that the ALJ's Conclusions of Law are either reasonable and supported by competent substantial evidence or are not within the substantive jurisdiction of the Board. For these reasons, Exception #9 is rejected.

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 or are not within the substantive jurisdiction of the Board.

The Recommendation of the Recommended Order is reasonable and supported by competent substantial evidence and is based on Conclusions that are not within the substantive jurisdiction of the Board.

ORDER

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

A. Petitioner's Exceptions #1-9 are **REJECTED**;

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

IT IS HEREBY ORDERED that the Petitions of Ambar Trail, Sierra Meadows, and Quail Roost are dismissed.

DONE and ORDERED this 11th day of June, 2020.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS

ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329, AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, 2000 DRAYTON DRIVE, TALLAHASSEE, FLORIDA 32399-0950, OR IN THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AMBAR TRAIL, LTD,

Petitioner,

vs. Case No. 20-1138BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND SLATE MIAMI APARTMENTS, LTD.,

Intervenors.
_____/

SIERRA MEADOWS APARTMENTS, LTD.,

Petitioner,

vs. Case No. 20-1139BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND SLATE MIAMI APARTMENTS, LTD.,

Intervenors.
_____/

QUAIL ROOST TRANSIT VILLAGE IV, LTD.,

Petitioner,

vs. Case No. 20-1140BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND SLATE MIAMI APARTMENTS, LTD.,

Intervenors.
_____/

PARC GROVE, LLC,

Petitioner,

vs. Case No. 20-1141BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondents,

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND HARBOUR SPRINGS, LLC.,

Intervenors.
_____/

RECOMMENDED ORDER OF DISMISSAL

A telephonic hearing was conducted in this case on March 23, 2020, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings (DOAH). The telephonic hearing was convened to consider the Joint Motion to Dismiss, filed on March 13, 2020, by Naranja

Lakes Housing Partners, LP, and Slate Miami Apartments, Ltd., joined by Florida Housing Finance Corporation (Florida Housing). By agreement of the parties, the telephonic hearing constituted the first day of the final hearing in this case. As this Recommended Order recommends the dismissal of Case Numbers 20-1138BID, 20-1139BID, and 20-1140BID in the above-styled consolidated cases, and given the fact that the Petitioner in the remaining consolidated case, Case Number 20-1141BID, filed a Notice of Voluntary Dismissal on March 24, 2020, no further days of final hearing before DOAH are anticipated in this case.

APPEARANCES

For Petitioners Ambar Trail, Ltd.; Sierra Meadows Apartments, Ltd.; and Quail Roost Transit Village IV, Ltd.:

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STATEMENT OF THE ISSUE

Whether the Petitions filed by Ambar Trail, Ltd.; Sierra Meadows Apartments, Ltd.; and Quail Roost Transit Village IV, Ltd., should be dismissed for lack of standing.

PRELIMINARY STATEMENT

In February 2020, Petitioners Ambar Trail, Ltd. (Ambar Trail); Sierra Meadows Apartments, Ltd. (Sierra Meadows); and Quail Roost Transit Village IV, Ltd. (Quail Roost) filed separate formal written protests and petitions for administrative hearings, alleging that the entire Request for Applications (RFA) 2019-112 and the preliminary funding award decisions issued for that RFA by the Florida Housing should be rescinded. On March 2,

2020, Florida Housing forwarded the petitions, together with another petition filed by Parc Grove, LLC (Parc Grove),[1] to DOAH.

Following assignment of the cases to the undersigned to conduct the requested administrative hearings, on March 5, 2020, based on an Unopposed Motion to Consolidate, an Order of Consolidation was entered consolidating the four petitions. The style of the Order of Consolidation, and filings thereafter, erroneously identify the preliminarily awarded bidders, who are technically intervenors, as respondents. Therefore, the style of this case is corrected as reflected above, to properly show that the preliminarily awarded bidders are "Intervenors," aligned with Florida Housing in each case, as opposed to "Respondents."

After a telephonic scheduling conference with the parties, an Order on Telephonic Scheduling Status Conference (Scheduling Order) was entered on March 6, 2020, together with a Notice of Hearing and Prehearing Instructions with provisions for expedited discovery. In accordance with the Scheduling Order, a Joint Motion to Dismiss was filed on March 13, 2020, by Naranja Lakes Housing Partners, LP (Naranja Lakes), and Slate Miami Apartments, Ltd. (Slate Miami), joined by Florida Housing, challenging the standing of Ambar Trail, Sierra Meadows, and Quail Roost (collectively the Petitioners). Thereafter, on March 20, 2020, a Response to the Joint Motion to Dismiss was filed.

On March 23, 2020, a telephonic hearing was held during which the Joint Motion to Dismiss, the Response to the Motion to Dismiss, the Petitions filed by the Petitioners, and arguments of counsel were considered and discussed. At the end of those discussions, the undersigned announced that the Joint

[1] The Petition filed by Parc Grove challenged Florida Housing's preliminary funding awards, but did not seek to rescind the RFA.

Motion to Dismiss was well taken and that a favorable written Order thereon would be entered.

In accordance with the Scheduling Order and agreement of the parties, the telephonic hearing held March 23, 2020, constituted the first day of the administrative hearing in the consolidated cases. The proceedings were recorded. At the time of that telephonic hearing, because the Petition filed by Parc Grove was still pending and not subject to the Joint Motion to Dismiss, it was anticipated that a second day of hearing, as scheduled in the Notice of Hearing in this case, would be held on April 13, 2020. However, on March 24, 2020, Parc Grove filed a Notice of Voluntary Dismissal of its Petition. Therefore, because this Recommended Order of Dismissal recommends the dismissal of the remaining Petitions filed by the Petitioners, no further dates for the administrative hearing before DOAH in these cases have been scheduled.

FINDINGS OF FACT[2]

1. Florida Housing is a public corporation created under Florida law to administer the governmental function of financing or refinancing affordable housing and related facilities in Florida.

2. Florida Housing administers a competitive solicitation process to implement the provisions of the housing credit program, under which developers apply and compete for funding for projects in response to RFAs developed by Florida Housing.

3. The RFA in this case was specifically targeted to provide affordable housing in Miami-Dade County, Florida. The RFA introduction provides:

[2] As this Recommended Order of Dismissal is based upon a motion to dismiss, the factual allegations of the three Petitions filed by the Petitioners in this consolidate case are accepted as true, and the Findings of Fact are derived from the four corners of those Petitions, see *Madison Highlands. LLC v. Florida Housing Finance Corp.,* 220 So. 3d 467, 473 (Fla. 5th DCA 2017), and facts that are not otherwise in dispute.

> This Request for Applications (RFA) is open to Applicants proposing the development of affordable, multifamily housing located in Miami-Dade County.
>
> Under this RFA, Florida Housing Finance Corporation (the Corporation) expects to have up to an estimated $7,195,917 of Housing Credits available for award to proposed Developments located in Miami-Dade County.

4. After Florida Housing announced its preliminary funding award decisions for RFA 2019-112 for Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County, each of the Petitioners filed Petitions challenging the decisions.

5. Petitioners do not allege that Florida Housing improperly scored or evaluated the applications selected for funding, nor do they contend that Petitioners' applications should be funded. Instead, Petitioners allege that the evaluation was fundamentally unfair and seeks to have the entire RFA rescinded based on alleged improprieties of one responding entity and its affiliates.

6. Petitioners claim that the evaluation process was fundamentally unfair is based entirely on allegations that several entities associated with Housing Trust Group, LLC (HTG), combined to submit 15 Priority I applications in contravention of the limitation in the RFA on the number of Priority I applications that could be submitted. Even assuming Petitioners' assertions are correct, there is no scenario in which Petitioners can reach the funding range for this RFA.

7. In order to break ties for those applicants that achieve the maximum number of points and meet the mandatory eligibility requirements, the RFA sets forth a series of tie-breakers to determine which applications will be awarded funding. The instant RFA included specific goals to fund certain types of developments and sets forth sorting order tie-breakers to

distinguish between applicants. The relevant RFA provisions are as follows:

> **1. Goals**
>
> a. The Corporation has a goal to fund one (1) proposed Development that (a) selected the Demographic Commitment of Family at questions 2.a. of Exhibit A and (b) qualifies for the Geographic Areas of Opportunity/SADDA Goal as outlined in Section Four A. 11. a.
> b. The Corporation has a goal to fund one (1) proposed Development that selected the Demographic Commitment of Elderly (Non-ALF) at question 2.a. of Exhibit A.
>
> *Note: During the Funding Selection Process outlined below, Developments selected for these goals will only count toward one goal.
>
> **2. Applicant Sorting Order**
>
> All eligible Priority I Applications will be ranked by sorting the Applications as follows, followed by Priority II Applications.
>
> a. First, from highest score to lowest score;
> b. Next, by the Application's eligibility for the Proximity Funding Preference (which is outlined in Section Four A.5.e. of the RFA) with Applications that qualify for the preference listed above Applications that do not qualify for the preference;
> c. Next, by the Application's eligibility for the Per Unit Construction Funding Preference which is outlined in Section Four A.lO.e. of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference);
> d. Next, by the Application's eligibility for the Development Category Funding Preference which is outlined in Section Four A.4.(b)(4) of the RFA (with Applications that qualify for the preference

> listed above Applications that do not qualify for the preference);
> e. Next, by the Applicant's Leveraging Classification, applying the multipliers outlined in Item 3 of Exhibit C of the RFA (with Applications having the Classification of A listed above Applications having the Classification of B);
> f. Next, by the Applicant's eligibility for the Florida Job Creation Funding Preference which is outlined in Item 4 of Exhibit C of the RFA (with Applications that qualify for the preference listed above Applications that do not qualify for the preference); and
> g. And finally, by lotterv number, resulting in the lowest lottery number receiving preference.

8. This RFA was similar to previous RFAs issued by Florida Housing, but included some new provisions limiting the number of Priority I applications that could be submitted.

9. Specifically, the RFA provided:

> Priority Designation of Applications
>
> Applicants may submit no more than three (3) Priority I Applications. There is no limit to the number of Priority II Applications that can be submitted; however, no Principal can be a Principal, as defined in Rule Chapter 67-48.002(94), F.A.C., of more than three (3) Priority 1 Applications.
>
> For purposes of scoring, Florida Housing will rely on the Principals of the Applicant and Developer(s) Disclosure Form (Rev. 05-2019) outlined below in order to determine if a Principal is a Principal on more than three (3) Priority 1 Applications. If during scoring it is determined that a Principal is disclosed as a Principal on more than three (3) Priority I Applications, all such Priority I Applications will be deemed Priority II.

> If it is later determined that a Principal, as defined in Rule Chapter 67-48.002(94), F.A.C., was not disclosed as a Principal and the undisclosed Principal causes the maximum set forth above to be exceeded, the award(s) for the affected Application(s) will be rescinded and all Principals of the affected Applications may be subject to material misrepresentation, even if Applications were not selected for funding, were deemed ineligible, or were withdrawn.

10. The Petitioners all timely submitted applications in response to the RFA.

11. Lottery numbers were assigned by Florida Housing, at random, to all applications shortly after the applications were received and before any scoring began.

12. Lottery numbers were assigned to the applications without regard to whether the application was a Priority I or Priority II.

13. The RFA did not limit the number of Priority II Applications that could be submitted.

14. Review of the applications to determine if a principal was a principal on more than three Priority 1 Applications occurred during the scoring process, well after lottery numbers were assigned.

15. The leveraging line, which would have divided the Priority I Applications into Group A and Group B, was established after the eligibility determinations were made. All applications were included in Group A. There were no Group B applications. Thus, all applications were treated equally with respect to this preference.

16. The applications were ultimately ranked according to lottery number and funding goal.

17. If Florida Housing had determined that an entity or entities submitted more than three Priority I Applications with related principals, the relief set forth in the RFA was to move those applications to Priority II.

18. Florida Housing did not affirmatively conclude that any of the 15 challenged applications included undisclosed principals so as to cause a violation of the maximum number of Priority I Applications that could be submitted.

19. All of the applications that were deemed eligible for funding, including the Priority II Applications, scored equally, and met all of the funding preferences.

20. After the applications were evaluated by the Review Committee appointed by Florida Housing, the scores were finalized and preliminary award recommendations were presented and approved by Florida Housing's Board. Consistent with the procedures set forth in the RFA, Florida Housing staff reviewed the Principal Disclosure Forms to determine the number of Priority I Applications that had been filed by each applicant. This review did not result in a determination that any applicant had exceeded the allowable number of Priority I Applications that included the same principal.

21. One of the HTG Applications (Orchid Pointe, App. No. 2020-148C) was initially selected to satisfy the Elderly Development goal. Subsequently, three applications, including Slate Miami, that had initially been deemed ineligible due to financial arrearages were later determined to be in full compliance and, thus, eligible as of the close of business on January 8, 2020. The Review Committee reconvened on January 21, 2020, to reinstate those three applications. Slate Miami was then recommended for funding.

22. The Review Committee ultimately recommended to the Board the following applications for funding: Harbour Springs (App. No. 2020-101C), which met the Geographic Areas of Opportunity/SADDA Goal; Slate Miami (App. No. 2020-122C), which met the Elderly (non-ALF) Goal; and Naranja Lakes (App. No. 2020-117C), which was the next highest-ranked eligible Priority I Application.

23. The Board approved the Committee's recommendations at its meeting on January 23, 2020, and approved the preliminary selection of Harbour Springs, Slate Miami, and Naranja Lakes for funding.

24. The applications selected for funding held Lottery numbers 1 (Harbour Springs), 2 (Naranja Lakes), and 4 (Slate Miami).

25. Petitioners' lottery numbers were 16 (Quail Roost), 59 (Sierra Meadows) and 24 (Ambar Trail).

26. The three applications selected for funding have no affiliation or association with HTG, or any of the entities that may have filed applications in contravention of the limitation in the RFA for Priority I applications.

27. The applications alleged in the Petitions as being affiliated with HTG received a wide range of lottery numbers in the random selection, including numbers: 3, 6, 14, 19, 30, 38, 40, 42, 44, 45, 49, 52 through 54, and 58.

28. If Petitioners prevailed in demonstrating an improper principal relationship between the HTG applications, the relief specified in the RFA (the specifications of which were not challenged) would have been the conversion of the offending HTG applications to Priority II applications. The relief would not have been the removal of those applications from the pool of applications, nor would it have affected the assignment of lottery numbers to any of the applicants, including HTG.

29. The Petitions do not allege any error in scoring or ineligibility with respect to the three applications preliminarily approved for funding.

CONCLUSIONS OF LAW

30. Florida Housing is a public corporation organized pursuant to chapter 420, Part F, Florida Statutes, to administer the financing of affordable housing in Florida. Florida Housing is designated as the housing credit agency for Florida and has the responsibility to competitively allocate and distribute low income housing tax credits to help fund affordable housing

developments.[3] Because the demand for tax credits provided by the federal government far exceeds the available supply, qualified affordable housing developments must compete for this funding. *See Ybor III. Ltd. v. Florida Housing Finance Corp*, 843 So. 2d 344, 345 (Fla. 1st DCA 2003).

31. Section 420.507(48) authorizes Florida Housing to allocate tax credits and other funding by means of a request for proposal or other competitive solicitation. Florida Housing has adopted Florida Administrative Code Rule Chapter 67-60 to govern the competitive solicitation process for tax credits and other programs administered by Florida Housing. The adopted rules incorporate the bid protest provisions of section 120.57(3), Florida Statutes, for resolving disputes related to the allocation of tax credits. *See* Fla. Admin. Code rule 67-60.001.

32. The competitive process begins with Florida Housing issuing an RFA. *See* Florida Administrative Code Rule 67-60.003.

33. In an administrative proceeding, standing is a jurisdictional threshold issue equivalent to assessing subject matter jurisdiction. *See Abbott Lab. v. Mylan Pharm., Inc.,* 15 So. 3d 642 (Fla. 1st DCA 2009); *Grande Dunes. Ltd. v. Walton Cty.*, 714 So. 2d 473, 475 (Fla. 1st DCA 1998). DOAH lacks jurisdiction to consider the merits of a petition unless and until a petitioner affirmatively establishes standing. *Westinghouse Elec. Corp. v. Jacksonville Transp. Auth.*, 491 So. 2d 1238, 1240-41 (Fla. 1st DCA 1986).

34. Pursuant to section 120.57(3), to have standing for a bid protest, a petitioner must establish that the agency's intended decision "adversely affected" the petitioner's substantial interests. *See Madison Highlands. LLC v. Fla. Hous. Fin. Corp.*, 220 So. 3d 467, 473 (Fla. 5th DCA 2017)(citing *Preston Carroll Co., v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981)). To establish a substantial interest, the protesting

[3] Unless otherwise indicated, all references to Florida Statutes or the Florida Administrative Code are to current versions.

entity must meet the two-prong "substantial interest" test forth in *Agrico Chemical Company v. Department of Environmental Regulation,* 406 So. 2d 478 (Fla. 2d DCA 1981). *See Madison Highlands, LLC,* at 473 (Fla. 5th DCA 2017); *Ybor III. Ltd.. supra*, at 346.

35. *Agrico* requires a challenging party to show: "(1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect." *Agrico*, 406 So. 2d at 482. "The first aspect of the test deals with the degree of injury. The second deals with the nature of the injury." *Id*.

36. An injury-in-fact must result from the challenged agency action and be real and immediate, not conjectural or hypothetical. Abstract injury is insufficient to establish standing. *See Florida Dep't of Rehab. v. Jerry,* 353 So. 2d 1230 (Fla. 1st DCA 1978); *Madison Highlands* at 473 ("Under the first prong of *Agrico*, the injury must be actual and immediate, and not based on a hypothetical scenario."). In this case, the Petitioners fail to allege sufficient facts to establish that Florida Housing's preliminary funding awards will cause Petitioners' injury-in-fact that satisfies the first prong of the *Agrico* test. Even if Petitioners can prove their allegations regarding HTG and its affiliates, the RFA expressly provides a remedy that does not alter or rescind the preliminary funding awards.

37. A lower-ranked bidder only meets the substantial interest test if it demonstrates that it would be funded if a higher-ranked bidder is disqualified. Even a fifth-place bidder can establish standing if they "establish that the four higher-ranked applications must all be rejected or re-evaluated, resulting in the protesting filer being ranked the highest." *Madison Highlands* at 474; *Preston Carroll* at 525.

38. Here, as apparent from the Petitions, Petitioners have no chance of achieving funding through this RFA because all of their applications are behind the applications selected for funding.

39. While there were three HTG-related applications with better lottery numbers (i.e., 3, 6 and 14) than Quail Roost, even if the three HTG-related applications were deemed ineligible or were relegated to Priority II status, Quail Roost would still only be the 12th-ranked application and would not advance to the funding range.

40. The inability to advance to the funding range is also true for Ambar Trail and Sierra Meadows. Ambar Trail held lottery number 24, making it the 23rd-ranked eligible Priority I application by lottery number. There were four HTG-related applications with better lottery numbers than Ambar Trail. Even if all the HTG-related applications with better lottery numbers were deemed ineligible or relegated to Priority II, Ambar Trail would only advance to the 18th highest lottery number among eligible Priority I applicants, far behind all three of the preliminarily awarded applicants.

41. Similarly, Sierra Meadows, with its lottery number of 59, would only move to the ranking of 37th, after the elimination of any ineligible applications, Priority II applications, and all HTG-related applications with better lottery numbers.

42. Instead of challenging Florida Housing's scoring or evaluation of the applications selected for funding, Petitioners assert that:

> Florida Housing's failure to take any action with respect to the 15 affiliated Priority I applications placed other Applicants, including Petitioner – Applicants who followed the RFA's limitations regarding submission of the Priority I Applications, and who did not act to eliminate competition . . . at a competitive disadvantage and rendered the entire RFA's scoring and selection process fundamentally unfair.
>
> * * *
>
> By manipulating the Leveraging Classification calculations to ensure that all of its Applications

> were in Group A, the HTG entities effectively rendered the Levering Classification procedures meaningless and placed greater emphasis on lottery numbers in determining which Applicants would be funded. Because HTG entities submitted 15 Priority I Applications instead of the three Priority I Applications other Developers were allowed, the HTG entities increased their changes of obtaining lower (better) lottery numbers. Had HTG submitted only three Applications, there would have been 51 total Applicants instead of 63. The mathematical chances of a rule-abiding Developer obtaining a more favorable lottery number are far more when one Developer is allowed to submit five times the number of applications as the rule-abiding developer.

43. During the hearing on the Joint Motion to Dismiss, Petitioners' counsel conceded that even if all of the HTG applications were taken out of the process, none of the Petitioners would be moved into the funding range. It is otherwise mere speculation that that the purported manipulation of the leveraging had a negative impact on Petitioners or any other applicant or gave any applicant a better lottery number.

44. All applications received a randomly generated lottery number from the same batch of numbers. Moreover, under the terms of the RFA, a developer could submit as many Priority II applications as it wished, without limitation. Improperly submitted Priority I applications are, pursuant to the terms of the RFA, converted to Priority II applications. They are not removed from the pool of applications. Thus, whether the HTG-related applications were labeled as Priority I or Priority II is irrelevant to the assignment of lottery numbers, which was done through a random number generator when the applications were received.

45. Further, Petitioners' argument presupposes that the number of applications submitted by HTG and related entities would somehow have been different if Florida Housing deemed HTG and related entities to be in

violation of the limitation on the number of Priority 1 applications. However, under the terms of the RFA, such a determination by Florida Housing would always come after lottery numbers were assigned. Therefore, there is no support for the argument that Petitioners would receive a better number because the numbers were already issued.

46. Petitioners try to avoid their standing problems by alleging that the process was so fundamentally unfair that the entire RFA should be thrown out. However, the remedy established in the unchallenged RFA specifications is clear--applications exceeding the Priority I limit would be converted to Priority II. They would not be removed from the pool, and they would not be assigned different lottery numbers. If Petitioners had an issue with the "fairness" of the process, they could have challenged the specification. They did not. As the preliminary awards would not change, whether or not the HTG applications are considered, is contrary to the Petitioners' assertion that the alleged improprieties of HTG somehow subverted the process or made it fundamentally unfair.

47. While certainly, everything would change if all of the applications were thrown out and everyone was allowed to resubmit applications, whether Petitioners would receive an award or a more favorable lottery number with respect to any subsequent RFA is pure conjecture and speculation. Moreover, to throw out all applications on such speculation would be fundamentally unfair to applicants like Naranja Lakes, Slate Miami, and Harbour Springs who are entitled to funding based on the terms of the RFA. The alleged improprieties of HTG should not be used to unjustifiably penalize them.

48. In sum, Petitioners do not meet the *Agrico* test because they failed to demonstrate that their substantial interests are adversely affected by Florida Housing's preliminary awards. Petitioners do not cite to any binding authority, nor could the undersigned locate any such authority, that would support the assertion that, even if an applicant has no chance

of getting an award for that applicant, that applicant has standing to challenge the "fundamental fairness" of the process. A mere assertion that the fundamental fairness of the procurement process was flawed does not relieve the Petitioners of the requirement to establish standing by meeting both prongs of the *Agrico* test and demonstrating a substantial interest that is adversely affected by the intended agency action. *See Madison Highlands, supra at 474.*

49. *Fairbanks v. Department of Transportation*, 635 So. 2d 58 (Fla. 1st DCA 1984), cited by Petitioners in support of the argument that one does not have to be an eligible bidder in line for an award to have standing, "does not involve a bid protest pursuant to [section 120.57(3)]. Rather, it involves the denial of a request for a formal hearing pursuant to section 120.57[(1)]." *See Id.* at 61. The dispute in *Fairbanks* was over the specifications in a construction contract that had been awarded. The awarded contractor submitted plans to the Department that included Fairbanks' equipment. The Department rejected the submitted plans because the contract specifications specifically called for the use of Fairbanks' competitor's product. Fairbanks requested a formal section 120.57(1) hearing to challenge the contract specifications. The Department challenged Fairbanks' standing since it was not a bidder for the construction contract. The Department argued that chapter 337, Florida Statutes, which controls construction contracts, was intended to protect only the interest of bidders, not suppliers like Fairbanks. *Id* at. 59. The First District Court of Appeal disagreed, finding that Fairbanks' substantial interests were adversely affected. *Id.* at 61.

50. Unlike the appellant in *Fairbanks*, the Petitioners have failed to show that their substantial interests were affected by the agency's actions. Florida Housing's alleged inaction regarding the HTG applications has no bearing on the propriety of Florida Housing's scoring and intended selection of Naranja Lakes, Slate Miami, and Harbour Springs for funding.

51. Petitioners cannot establish that, but for an error on the part of Florida Housing, Petitioners' applications would have been selected for funding, or that Petitioners' applications would have received a higher lottery number. Here, Petitioners were not prevented from competing for funding nor were any of Petitioners' applications rejected during the process. The Petitioners' failure to make the funding range was not due to any error by Florida Housing or any actions by the applicants selected for funding. In fact, Petitioners' failure to obtain funding cannot be directly tied to any HTG-related action.

52. In sum, the Petitioners failed to demonstrate that the assignment of lottery numbers or treatment of HTG applications failed to comply with the express terms of the RFA, or was otherwise "fundamentally unfair," and did not demonstrate that the outcome could have changed such that their interests are substantially affected in order to meet the standing requirements to challenge the preliminary awards or maintain the Petitions filed in this case. Therefore, for the reasons set forth above and in the Joint Motion to Dismiss, the Petitioners and Petitions should be dismissed for lack of standing.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Petitioners lack standing and dismissing the Petitions with prejudice.

DONE AND ENTERED this 3rd day of April, 2020, in Tallahassee, Leon County, Florida.

JAMES H. PETERSON, III
Administrative Law Judge
Division of Administrative Hearings
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit exceptions within 10 days from the date of the Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

AMBAR TRAIL, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent, Case No. 20-1138BID

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND SLATE MIAMI APARTMENTS, LTD.,
Intervenors.

_____/

SIERRA MEADOWS APARTMENTS, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent, Case No. 20-1139BID

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND SLATE MIAMI APARTMENTS, LTD.,
Intervenors.

_____/

QUAIL ROOST TRANSIT VILLAGE IV, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent, Case No. 20-1140BID

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND SLATE MIAMI APARTMENTS, LTD.,
Intervenors.

_____/

PARC GROVE, LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondents, Case No. 20-1141BID

and

NARANJA LAKES HOUSING PARTNERS, LP,
AND HARBOUR SPRINGS, LLC.,
Intervenors.

_____/

PETITIONERS' OBJECTIONS/EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S RECOMMENDED ORDER OF DISMISSAL

Pursuant to section 120.57(3)(e), Florida Statutes, and rule 28-106.217, Florida Administrative Code, Petitioners Ambar Trail, Ltd. ("Ambar"), Sierra Meadows Apartments, Ltd. ("Sierra Meadows"), and Quail Roost Transit Village IV, Ltd. ("Quail Roost") (collectively the "Petitioners") file these Exceptions to the Administrative Law Judge's Recommended Order of Dismissal that was entered on April 3, 2020. Specifically, Petitioners object to Paragraphs 15, 17, 18, 23, and 28 of the Findings of Fact. Petitioners also object to Paragraphs 36, 37, 43, 44, 45, 46,

47, 48, 49, 50, 51, and 52 of the Conclusions of Law and to the ensuing Recommendation on page 19 of the Recommended Order.

I. Introduction

Petitioners challenged the fundamental fairness of the procurement process related to Florida Housing Finance Corporation's ("FHFC" or "Florida Housing") Request for Applications 2019-112, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA"). As explained in the Petitions, Florida Housing became concerned during the scoring process that one Developer (Housing Trust Group, LLC) submitted five times the number of Applications that the RFA allowed. During the Review Committee meeting to score the Applications, Florida Housing's Director of Multifamily Programs, Marisa Button, read a statement outlining the "organizational commonalities" among the 15 Applications submitted by entities connected to Housing Trust Group ("HTG") and essentially announced the agency's concern that the Developer appeared to be attempting to circumvent the requirements of the RFA. Yet despite this unusual announcement in the midst of a public scoring meeting, Florida Housing's staff did nothing about this Developer's attempt to "game the system" and did not even share the concerns with the FHFC Board of Directors (the "Board"), the collegial body that serves as the agency head and that ultimately approved the scores and preliminary awards associated with the RFA. Because Florida Housing's scoring and selection process was fundamentally flawed, Petitioners sought a rejection of all Applications and the issuance of a new RFA.

On March 13, 2020, Intervenors Naranja Lakes Housing Partners, LP ("Naranja") and Slate Miami Apartments, Ltd. ("Slate Miami") filed a motion to dismiss the petitions. Florida Housing ultimately joined in that motion. Petitioners timely filed a response on March 20, 2020, and the Administrative Law Judge ("ALJ") held a telephonic hearing on the motion on March 23, 2020.

On April 3, 2020, the ALJ entered a Recommended Order of Dismissal, concluding that Petitioners lacked standing to bring their claims and recommending that the Board enter a Final Order dismissing the petitions.

Florida Housing's review of exceptions is governed by section 120.57(1)(k) and (l), Florida Statutes, which provide in relevant part:

> (k) . . . The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.
>
> (l) 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. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

In this case, no evidentiary hearing was conducted, as the ALJ summarily concluded after a telephonic motion hearing that Petitioners lacked standing to challenge the fundamental fairness of the scoring and selection process. Thus, there is no evidentiary "record" for Florida Housing to review to determine whether the ALJ erred in making his factual findings. Moreover, the ALJ's conclusions of law were based on his reading of the legal principles of standing in administrative law proceedings, which arguably are not matters over which Florida Housing has substantive jurisdiction. *HTG Village View, LLC v. Fla. Housing Fin. Corp.*, DOAH Case No. 18-2156BID,

Exception 5 (FHFC Final Order Sept. 18, 2018).[1] Nonetheless, Florida Housing has the independent authority to consider the issues raised in this proceeding and determine whether the RFA should be rescinded and a new RFA should be issued. That authority is discussed below.

II. The ALJ's Factual Findings

The ALJ states as follows in footnote 2 on page 6 of his Recommended Order:

> As this Recommended Order of Dismissal is based upon a motion to dismiss, the factual allegations of the three Petitions filed by the Petitioners in this consolidate[d] case are accepted as true, and the Findings of Fact are derived from the four corners of those Petitions, see *Madison Highlands, LLC v. Florida Housing Finance Corp.*, 220 So. 3d 467, 473 (Fla. 5th DCA 2017), and facts that are not otherwise in dispute.

(Emphasis supplied).

Despite his recitation of this black-letter law, the ALJ then proceeded to set forth just those selected findings of fact that support his ultimate conclusion, many of which appear to have been cut and pasted or otherwise derived from the Intervenors' Motion to Dismiss. He ignored many statements of fact that were set forth in the Petitions, though he was legally required to accept them as true. Consequently, a more thorough discussion of the facts is required.

As explained in the Petitions, the position of Ambar Trail, Sierra Meadows, and Quail Roost is that Florida Housing erred by failing to take any action regarding 15 Priority I Applications submitted by entities associated with HTG, which openly avoided and defied the RFA provisions that (1) were intended to limit the number of competitive Applications submitted by each Developer to no more than "three (3) Priority 1 Applications" and (2) were intended to foster fair competition based on Corporation Funding Per Set Aside Unit. Florida Housing's failure

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[1] As discussed below, Petitioners believe the ALJ erred in his analysis of standing, and that all parties would have been better served by an administrative hearing fleshing out the issues raised in the petition.

to take any action with respect to the 15 affiliated Priority I Applications placed other Applicants, including Petitioners – Applicants who followed the RFA's limitations regarding submission of Priority I Applications, and who did not act to eliminate competition on the basis of Corporation Funding Per Set Aside Unit – at a competitive disadvantage and rendered the entire RFA's scoring and selection process fundamentally unfair. Consequently, in accordance with longstanding procurement law requiring fairness in competitive bidding, the RFA must be withdrawn and all preliminary awards and scores must be rescinded. Florida Housing must issue a new RFA for Housing Credit financing in Miami-Dade County that treats all Applicants fairly.

As noted in the Introduction, Ms. Button made an unusual statement at the Review Committee meeting on January 9, 2020, when the 63 Applications submitted in response to the RFA were scored, and preliminary awards were recommended to the Board. Ms. Button read a detailed statement into the record noting many of the "organizational commonalities" among the 15 HTG Applications. Ms. Button first read the provision in Section Four A. of the RFA relating to Priority Designation of Applications. Then she read the following:

> The following Priority I designated Applications contain Principals of the Applicant and Developer(s) Disclosure Forms with separate designations:

Authorized Principal Representative: Mathew Rieger	Authorized Principal Representative: Randy Rieger	Authorized Principal Representative: Cara Balogh	Authorized Principal Representative: Orli Teitelbaum	Authorized Principal Representative: Robert Balogh
2020-097C	2020-102C	2020-091C	2020-132C	2020-095C
2020-109C	2020-115C	2020-lOOC	2020-148C	2020-103C
2020-146C	2020-105C	2020-130C	2020-149C	2020-133C

> The Principals of the Applicant and Developer(s) Disclosure Forms for these Applications do not reflect a Principal designated on more than 3 Priority 1 Applications. However, the designated Priority I Applications share the following organizational commonalities, including:

- Under Section Three A.4.b., of the RFA, all 15 Applications submitted an Application Fee provided by HTG United, LLC from the same account number.
- Under Section Three A.4.a., of the RFA, all 15 Applications were submitted with hard copy binders under the cover sheet of Housing Trust Group, with the address of Aviation Avenue, Coconut Grove, Florida.
- Under Section Four A.3.c.2., of the RFA, all 15 of the Advance Review of Principal Disclosure Form requests for the Applications were submitted from individuals associated with Housing Trust Group, LLC at the address 3225 Aviation Avenue, Coconut Grove, Florida.
- Under Section Four A.3.e.2., of then RFA, all of the Applications share the same operational Contact Person, Scott Osman, associated with Housing Trust Group, LLC, at 3225 Aviation Avenue, Coconut Grove, Florida.
- With the exception of Application 2020-109C, under Exhibit C Section 3 of the RFA, all of the Applications share the exact same Corporation Funding Per Set Aside Amount.

See Petitions and attached Exhibits A (transcript of the Review Committee meeting) and E (full text of Ms. Button's statement).

Ms. Button then made a statement putting HTG on notice that "if it is determined at a later point that a principal was not disclosed on any of the applications" then "the affected applications will be *rescinded*, and all principals of the affected applications may be subject to material misrepresentation consequences." *See* Petitions, Exhibit A, pp. 23-24 (emphasis supplied). As noted earlier, the Board apparently was not informed of Ms. Button's concerns, and all HTG Applications were scored and determined to be eligible.

The most serious of the commonalities identified by Ms. Button is the manipulation of the Leveraging Classification, which is explained in detail on pages 98-100 of the RFA. In essence, eligible Applicants are sorted into Group A or Group B based on the amount of total Corporation funding per set-aside unit that each Applicant requests. Applicants assigned to Group A are those requesting a lower amount of total Corporation funding per set-aside unit. Generally, the Leveraging Classification results in approximately 80 percent of the Applicants being assigned to Group A and 20 percent of Applicants being assigned to Group B. Group A Applicants are funded

before Group B Applicants, which means that Applicants have an incentive to be efficient in estimating their costs to ensure that their requested funding places them in Group A. In separating the Group A Applicants from the Group B Applicants, the RFA provides:

> The total number of Applications on the New Construction List will be multiplied by 80 percent and the resulting figure will be rounded up to the next whole number (the resulting figure after rounding will be referred to as the "New Construction A/B Cut-Off"). A line will be drawn below the Application whose place on the list is equal to the New Construction A/B Cut-Off. If any Application(s) below the line has the same total Corporation funding request per set-aside unit as the Application immediately above the line, the line will be moved to a place immediately below that Application(s). Applications above the New Construction A/B Cut-Off will be classified as Group A and Applications below the New Construction A/B Cut-Off will be classified as Group B.

The amount of Corporation Funding Per Set Aside Unit requested by 14 of the 15 HTG-related Applications was $158,961.60, the highest requested Corporation Funding Per Set Aside Unit amount identified by any eligible Applicant. When the Review Committee did the math to compute the A/B Cut-Off line, the line fell below the first of the 14 HTG Applications with the same requested funding per set-aside unit. Because all other Applications below that line had requested the exact same Corporation Funding Per Set Aside Unit, $158,961.60, the Group A line was extended to the end of the eligible Applications. Thus, all of the Priority I Applications that had previously been determined to be eligible for funding were all in Group A, and there were no Group B Applicants. A total of 63 Applications were submitted in response to RFA 2019-112. The 14 related HTG applications with the same requested funding per set-aside unit represented 22.22% of total submitted Applications. This volume of Priority I Applications from one Developer, while other Developers' Priority I Applications were capped, had the effect of manipulating and rendering meaningless Florida Housing's Leveraging Classification process. Put simply, the process was designed to eliminate the 20% highest request amounts per unit, but was manipulated when Florida Housing permitted one Developer to submit more than 20% of the

Priority I Applications as a unified blocking piece.

It defies belief that each of the five HTG-related entities independently arrived at the same funding request per set-aside unit. It is not unusual for Applications submitted by the same Developer to have the same Corporation funding request per set-aside unit, assuming the proposed Developments are of a similar type, as the Developer has presumably done its best to efficiently estimate the project costs and is aiming to be in Group A. The Developer does not want to disadvantage any one of its Applications over another, so the requested funding per set-aside unit is sometimes made the same so that the A/B Cut-Off line does not fall between two of the Developer's Applications. However, it defies logic and statistics for five allegedly unrelated Applicants to have the exact same total Corporation Funding Per Set-Aside Unit.

By manipulating the Leveraging Classification calculations to ensure that all of its Applications were in Group A, the HTG entities effectively rendered the Leveraging Classification procedures meaningless and placed greater emphasis on lottery numbers in determining which Applicants would be funded. Because HTG entities submitted 15 Priority I Applications instead of the three Priority I Applications other Developers were allowed, the HTG entities increased their chances of obtaining lower (better) lottery numbers. Had HTG entities submitted only three Applications, there would have been 51 total Applicants instead of 63. The mathematical chances of a rule-abiding Developer obtaining a more favorable lottery number are far worse when one Developer is allowed to submit five times the number of Applications as the rule-abiding developer.[2]

The ALJ also states repeatedly in his Recommended Order that the only remedy Florida

[2] Lottery numbers are assigned, at random, by Florida Housing shortly after the Applications are received and before any scoring has begun.

Housing had concerning the HTG Applications – assuming a violation of the Priority Designation of Applications was found – was to deem those Applications as Priority II. While that certainly was an option that Florida Housing had, it was not the only one. As Ms. Button noted in her statement at the Review Committee meeting, Florida Housing could have "rescinded" the HTG Applications if a violation of the RFA was found. Moreover, the RFA allowed the staff to recommend that the Board reject all Applications based on the manipulation of the Application process by the HTG-related entities.

Moreover, the RFA specifically allows FHFC to reject all Applications if there is a flaw in the procurement. Section Three C.2. of the RFA provides:

> C. Florida Housing reserves the right to:
>
> 1. Waive Minor Irregularities; and
>
> **2. Accept or reject any or all Applications received as a result of this RFA.**

RFA, p. 5, § Three C.2. (Emphasis supplied). Further, Section Six provides:

> The Board may use the Applications, the Committee's scoring, any other information or recommendation provided by the Committee or staff, and any other information the Board deems relevant in its selection of Applicants to whom to award funding. Notwithstanding an award by the Board pursuant to this RFA, funding will be subject to a positive recommendation from the Credit Underwriter based on criteria outlined in the credit underwriting provisions in Rule Chapter 67-48, F.A.C.

RFA, p. 69, § Six (emphasis supplied).

These provisions plainly permit the remedy Petitioners seek here: a rejection of all Applications. Moreover, the Board has the authority to use any information to determine who does or does not receive funding. The remedy requested is contemplated and authorized by the RFA. Given Florida Housing staff's concerns about the commonalities among the HTG-related entity Applications, staff could have asked the Board following the Review Committee meetings to reject all Applications. Staff chose not to do so, instead submitting funding recommendations to the

Board and sharing no information with the Board about the HTG-entity "organizational commonalities."

Given this additional factual background, which was included in the Petitions but not discussed in the Recommended Order, the Petitioners object and take exception to the following Findings of Fact in the Recommended Order:

> 15. The leveraging line, which would have divided the Priority I Applications into Group A and Group B, was established after the eligibility determinations were made. All applications were included in Group A. There were no Group B applications. Thus, all applications were treated equally with respect to this preference.
>
> . . . .
>
> 17. If Florida Housing had determined that an entity or entities submitted more than three Priority I Applications with related principals, the relief set forth in the RFA was to move those applications to Priority II.
>
> 18. Florida Housing did not affirmatively conclude that any of the 15 challenged applications included undisclosed principals so as to cause a violation of the maximum number of Priority I Applications that could be submitted.
>
> . . . .
>
> 23. The Board approved the Committee's recommendations at its meeting on January 23, 2020, and approved the preliminary selection of Harbour Springs, Slate Miami, and Naranja Lakes for funding.
>
> . . . .
>
> 28. If Petitioners prevailed in demonstrating an improper principal relationship between the HTG applications, the relief specified in the RFA (the specifications of which were not challenged) would have been the conversion of the offending HTG applications to Priority II applications. The relief would not have been the removal of those applications from the pool of applications, nor would it have affected the assignment of lottery numbers to any of the applicants, including HTG.

Recommended Order, pp. 10-12.

Exception One:

These Findings of Fact are incomplete and lack context. Paragraph 15, for example, states that all Applicants were treated equally as to the Leveraging Classification because they were all in Group A. That statement ignores the intent of the RFA, which is that approximately 20 percent

of the Applications be in Group B. The manipulation of the Leveraging Classification by the HTG-related entities also increased the relevance of the lottery numbers, as one of the tie-breakers was rendered a nullity. The omission of this information, which the ALJ was required to take as true, renders Paragraph 15 inaccurate and unsupported by any evidence.

Exception Two:

Paragraphs 17 and 28 omit and ignore other remedies that the RFA provided, as discussed above. Ms. Button stated at the Review Committee meeting that the HTG Applications could be rescinded if an RFA violation was found, and the staff could have recommended that the Board reject all Applications. Thus, Paragraphs 17 and 28 are inaccurate and not supported by any evidence.

Exception Three:

Paragraphs 18 and 23 (and all other paragraphs) fail to mention Ms. Button's concerns that were expressed at the Review Committee meeting. While the language of these paragraphs in the Recommended Order is technically accurate, by leaving out the significant fact of Ms. Button's concerns about the HTG-related Applications, the ALJ has omitted relevant facts that he was required to accept as true.

III. The ALJ's Conclusions of Law

As previously noted, Florida Housing arguably lacks substantive jurisdiction over the ALJ's Conclusions of Law, which are related to legal concepts of standing in administrative law proceedings. Nonetheless, a discussion of standing is provided here, as the ALJ ignored most of the controlling authority that Petitioners cited in their response to the Motion to Dismiss. He made no effort even to distinguish the cases that he presumably found unpersuasive. As Petitioners have repeatedly emphasized, they are not seeking to be awarded funding through their protest petitions,

a point that appears to have escaped the ALJ. Rather, Petitioners have challenged the fundamental fairness of the process, which has been recognized by courts and in orders entered by other ALJs.

Pursuant to rule 67-60.009(2), Florida Administrative Code, the procedures in section 120.57(3). Florida Statutes, and chapter 28-110, Florida Administrative Code, apply to FHFC's preliminary funding decisions in connection with a Request for Applications. Case law concerning standing in bid protests is directly applicable, including those cases explaining that an entity that has submitted a bid has standing to challenge the fundamental fairness of the procurement or the process as a whole.

Petitioners do not dispute the applicability of the general rules of standing in bid protests, i.e., Petitioners must show that they will suffer injury in fact that is of sufficient immediacy to entitle them to a section 120.57 hearing and that the substantial injury is of a type or nature which the proceeding is designed to protect. *See Agrico Chem. Co. v. Dep't of Envtl. Regulation*, 406 So. 2d 478, 482 (Fla. 2d DCA 1981). In other words, a party must show a substantial interest in the case to prove standing. *Madison Highlands, LLC v. Fla. Housing Fin. Corp.*, 220 So. 3d 467, 473 (Fla. 1st DCA 2017); *Preston Carroll Co., Inc. v. Fla. Keys Aqueduct Auth.*, 400 So. 2d 524, 525 (Fla. 3d DCA 1981). In any bid protest, the second lowest bidder has a substantial interest because if the lowest bid is disqualified, the second lowest bidder may receive the award. *Madison Highlands*, 220 So. 3d at 473.

However, an award of the contract (or in this case, an allocation of funding from FHFC) is not the only substantial interest that is recognized in solicitation protest proceedings. A bidder has a substantial interest in the fundamental fairness of the solicitation process and a substantial interest in having the agency reject all bids. Contrary to the legal conclusions of the ALJ, even if a participant has no chance of getting the contract, a bidder has standing to challenge the

fundamental fairness of the process. *See Fairbanks, Inc. v. State, Dep't of Transp.*, 635 So. 2d 58, 61 (Fla. 1st DCA 1994) (explaining that even nonbidders can establish standing when the fundamental fairness of the public contracting process is challenged). While *Fairbanks* was in a different posture than this case (as the ALJ points out in Paragraph 49 of the Recommended Order), the case still stands for the proposition that even a non-bidder, in certain circumstances, can challenge the award of a contract. 635 So. 2d at 61. Here, all of the Petitioners submitted Applications in response to the RFA, and their Applications were deemed eligible by Florida Housing.

The ALJ finds that caselaw only allows a lower-ranked bidder to challenge the fairness of the process when the bidder alleges that all of the higher-ranked bidders would be disqualified. Recommended Order, ¶ 37. However, as another ALJ has explained, a "Petitioner has an independent basis for standing because of its challenge to the fundamental fairness of the RFP process." *NCS Pearson, Inc. v. Dep't of Educ.*, No. 04-3976BID, ¶ 87 (Fla. DOAH Feb. 8, 2005) (Recommended Order) (emphasis added). The ALJ explained the reason for this independent standing:

> Both Petitioner, the protestor, and Harcourt, an Intervenor, have challenged the fundamental fairness of Respondent's procurement process. Both vendors argue that the evaluation committee's review of supplemental material after proposals were opened and the evaluation committee's failure to consider proposal alternatives during the evaluation process were contrary to Respondent's governing statutes and the RFP. These challenges to the propriety of the evaluation process provide a basis for standing of both vendors. They argue that under a fair procurement process that followed the requirements of section 120.57(3), Florida Statutes (2004), and the RFP, Harcourt or Petitioner may have received a higher score and been awarded the contract instead of CTB. They argue, further, that every vendor that participated in this flawed procurement is entitled to a rebidding under a fair process, which may result in an award to any of the bidders. . . . Both Petitioner and Harcourt were "adversely affected" by the alleged flawed process that led to Respondent's proposed agency action.

Id. at ¶ 85 (Emphasis supplied).

In fact, ALJs consistently find that a party has standing to challenge the fundamental fairness or overall process even when they cannot win the contract and instead seek a rejection of all proposals. *See Fluor-Astaldi-MCM, Joint Venture v. Dep't of Transp.*, No. 17-5800BID, ¶¶ 255-265 (Fla. DOAH Apr. 10, 2018) (Recommended Order) (finding that the petitioner had standing when it challenged the "fundamental fairness of the procurement process," and explaining that the petitioner "has standing to bring this protest because it has asserted the Department's procurement process was so fundamentally flawed that . . . a rejection of all bids would be required"). *See also Ranger Constr. Industries, Inc. v. Dep't of Transp.*, No. 15-5535BID, ¶ 66 (Fla. DOAH Nov. 20, 2015) (Recommended Order) (finding that a third-ranked bidder's standing was limited to arguing "that the process was fundamentally flawed such that all bids should be rejected"); *Barton Protective Servs., LLC v. Dep't of Transp.*, No. 06-1541BID, p. 4 (Fla. DOAH July 20, 2006) (Recommended Order) (finding that the third-ranked bidder had standing because of its challenge to the fundamental fairness of the RFP process); *Transp. Mgmt. Servs. of Broward, Inc. v. Comm'n for the Transp. Disadvantaged*, No. 05-0920BID, ¶ 71 (Fla. DOAH May 20, 2005) (Recommended Order) ("Petitioner has challenged the fundamental fairness of Respondent's procurement process and was 'adversely affected' by the alleged flawed process that led to Respondent's proposed agency action and, thus, has standing to file this protest."); *Bozell, Inc. v. State of Fla., Dep't of the Lottery,* No. 91-3165BID, ¶ 80 (Fla. DOAH July 25, 1991) (Recommended Order) (explaining that the fourth-ranked bidder had standing not only to protect its position but to challenge "the propriety of the evaluation process").

Even when a bidder submits a proposal that is <u>not responsive</u>, the bidder still has standing to challenge the fundamental fairness of the process. *See Fluor-Astaldi-MCM,* at ¶¶ 262-264. *See also CTS America v. Dep't of Highway Safety & Motor Vehicles*, No. 11-3372BID, ¶ 32 (Fla.

DOAH Oct. 19, 2011) (Recommended Order) ("If the CTS proposal is not responsive, its standing will be limited to proving that the other responses are likewise non-responsive, or to proving that the process was contrary to competition, either of which would require the Department to reject all proposals and reissue the ITN."); *The NTI Group, Inc. v. Dep't of Education*, No. 06-4449BID, ¶ 23 (Fla. DOAH Jan. 9, 2007) (Recommended Order) (finding that a non-responsive bidder did not have standing to seek award of the contract, but had standing to "bring a protest in which it is seeking the rejection of all proposals"); *Vertex Standard v. Dep't of Transp.*, No. 07-0488BID, ¶ 26 (Fla. DOAH Apr. 30, 2007) (Recommended Order) (finding that although Vertex submitted a non-responsive bid, it had standing because the relief Vertex sought was the rejection of all other nonresponsive proposals).

Here, there is no assertion that Petitioners were not responsive to the RFA, only that their lottery numbers were too low for them to be in the funding range. But Petitioners are not seeking awards in their Petitions; instead, each of the Petitioners is seeking the rejection of all Applications due to the fundamental flaws in the procurement process created by HTG's violation of the RFA requirements and FHFC's failure to correct the violation. The type of relief sought in the Petitions is common in bid protest proceedings, and the cases cited above clearly provide that Petitioners have standing for this purpose.

Allowing parties to challenge the fundamental fairness of a procurement process is grounded in the undisputed purpose of competitive procurements, i.e., that a fair process be provided to all participants. In determining that parties have standing in a particular procurement, courts and ALJs have often focused on the intent behind public procurement statutes. In *Fairbanks,* the First District Court of Appeal noted:

> The courts of this state have held on numerous occasions that the legislative intent behind such statutes is protection of the public. . . . Given such an intent, such

> statutes 'should be construed to advance their purpose and to avoid their being circumvented.' *Marriot Corp. v. Metropolitan Dade County*, 383 So. 2d 662, 665 (Fla. 3d DCA 1980).
>
> . . . .
>
> [In] *Groves Watkins* . . . the court concluded that, notwithstanding the broad discretion invested in the Department by the legislature, because of the manifest overriding concern for the integrity of the bidding process, bidders are entitled to some administrative review of the Department's decisions.

635 So. 2d at 60.

The First District Court of Appeal also has commented on the need for fairness, honesty, and consistency in FHFC's scoring and selection process of Applicants, stating:

> Common sense and logic dictate that if such a program of economic incentives to private investors to commit to low-income housing is to succeed, the process of determining who is qualified for loans and/or tax credits must be administered fairly, honestly, and consistently according to the rules that Appellee [Florida Housing] is charged with implementing. The allegations in the petition, taken as true for purposes of appellate review, indicate that the scoring and ranking process used by Appellee to evaluate Appellant's and Windsong II's applications was not carried out in a manner consistent with the agency's mandate to create and administer investment incentives. Once it became aware of perceived irregularities or improprieties in the application evaluation procedures employed by Appellee, Appellant was denied any meaningful opportunity to be heard. Were Appellee's interpretation of its rules to be approved by this court, then an unsuccessful, simultaneous applicant for a finite, limited benefit who questions the integrity of the evaluation process itself would not have an adequate forum to be heard. An agency could act fraudulently, illegally, arbitrarily, dishonestly, or inconsistently with impunity. The administrative need for decisional finality is a nullity if the road toward closure does not permit a reasonable point of entry for an aggrieved applicant to speak and be heard.

Ybor III, Ltd. v. Florida Housing Finance Corp., 843 So. 2d 344, 346 (Fla. 1st DCA 2003).

Florida courts have long held that competitive bidding requirements are intended 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 various forms; to secure the best values at the lowest possible expense; and to afford an equal advantage to all desiring to do business with the [government], by affording an opportunity for an exact comparison of bids." *Wester v. Belote*,

138 So. 721, 723-24 (Fla. 1931); *Finley Method Co. v. Standard Asphalt Co. of Fla.*, 139 So. 795, 796-97 (Fla. 1932) ("What the public has to be on guard against . . . [is] the suave and insidiously evasive arrangements which, operating in secret understandings between contractors and their privies, tend to produce an effect as harmful in result as the most direct misconduct or malfeasance.").

Petitioners each submitted an eligible Application in response to RFA 2019-112. The RFA specifically prohibited Applicants from submitting more than three Priority I Applications, and – as explained in the Petitions – one Developer attempted to get around that requirement by creating a number of obviously related entities that submitted a total of 15 Applications. Petitioners each were placed at a disadvantage by the unfair RFA review, scoring, and preliminary funding process employed by FHFC. All other Applicants in RFA 2019-112 adhered to the requirement in the RFA that only three Priority I Applications may be submitted by the same Principal. Only the HTG entities attempted to "game the system" in a way that made it more likely that one or more of their entities would be selected for funding, both by submitting more Applications than permitted and by estimating their costs in a manner that resulted in 14 of the 15 Applicants achieving the exact same Corporation Funding Per Set-Aside Unit amount. As discussed in detail in the Petitions, the latter action nullified the Leveraging Classification provisions in the RFA that are designed to make it more likely that cost-efficient Applications are selected for funding. Whether the tactics of the HTG entities actually result in one of their Applications being selected for funding is not the point; rather, the corruption of the process created an unlevel playing field. Such gamesmanship is exactly what the Court in *Finley Method* warned about: "suave and insidiously evasive arrangements [that] tend to produce an effect as harmful in result as the most direct misconduct or malfeasance." *Id.*

Petitioners' injuries are not speculative. HTG-related entities submitted 15 Priority I Applications, when they were specifically limited by the RFA to submitting 3. Ms. Button acknowledged the commonalities between the 15 Applications in the public meeting to score the Applications. These 15 Applications were each assigned a lottery number by Florida Housing. That means there were 12 additional Applications in the lottery pool that should not have been there. That automatically lowered the odds of all Applicants, including Petitioners, of receiving a favorable lottery number. This injury has already happened and there is no way at this time to correct it, other than rejecting all bids and creating a level and fair playing field where all Applicants follow the same rules.

Petitioners do not need to show they would receive a better lottery number in the future in order to have standing. In any case where the petitioner seeks a rejection of all bids as a remedy, there is no guarantee that the petitioner is going to be awarded a contract if a new solicitation is issued. Instead, like here, Petitioners are seeking a new procurement that is fair, competitive, transparent, and that subjects all Applicants to the same rules.

The fact that the Intervenors were eligible Applicants and received preliminary awards is not relevant to the issue of Petitioners' standing. If the process is fundamentally flawed, all Applications should be rejected, and all parties should have access to a fair RFA process. This happens regularly after a bid protest when an ALJ finds fundamental errors or when an agency determines on its own that it made mistakes and needs to re-solicit for the goods or services. *See, e.g.*, *Boston Culinary Group, Inc, d/b/a Centerplate v. Univ. of Central Fla.*, Co. 17-4509BID (Fla. DOAH 2017) (Recommended Order) (finding that the University's action were contrary to competition and recommending the University reject all proposals), adopted in full by UCF on Feb. 1, 2018; *Global Tel Link Corp. v. Dep't of Corrs.*, No. 13-3028BID (Fla. DOAH Nov. 1,

2013) (Recommended Order) (upholding the Department's decision to reject all proposals after the Department issued a notice of intent to award and then withdrew it after a protest was filed when the Department discovered errors in the process).

Petitioners assert that the ALJ's Conclusions of Law in Paragraphs 36, 37, 43, 44, 45, 46, 47, 48, 49, 50, 51, and 52 ignore the fundamental fairness arguments put forth by Petitioners, as explained above. Specific objections to each paragraph are as follows:

Exception Four:

- Paragraph 36: Petitioners' objection is to the second sentence of this paragraph, which states that Petitioners did not allege sufficient facts to establish injury. As discussed above, the injury is that the fundamental fairness of the process was compromised. Moreover, the second sentence of Paragraph 36 only identifies one possible remedy if Petitioners prove their case, when multiple remedies are available, as discussed above.
- Paragraph 44: The treatment of HTG Applications as Priority II Applications is not the only remedy available to Florida Housing, as discussed above.
- Paragraph 46: The treatment of HTG Applications as Priority II Applications is not the only remedy available to Florida Housing, as discussed above. Moreover, the ALJ's suggestion that Petitioners could have challenged the specifications if they did not like the RFA's provisions on Priority Designation of Applications is not well-taken. No one could have predicted that one Developer would choose to manipulate the process in an effort to avoid the effect and intent of the RFA.
- Paragraphs 47, 48, 50, and 51, and 52 ignore Petitioners' arguments about the purpose of competitive procurements and the requirement that the process be fundamentally fair, as discussed in the case law cited above.

Exception Five:

- Paragraph 37: Petitioners object to the word "only" in the first sentence of this paragraph. As discussed above, Petitioners have standing to challenge the fundamental fairness of the process.

Exception Six:

- Paragraph 43: Petitioners object to the ALJ's conclusion that it's "mere speculation" that "the purported manipulation of the leveraging had a negative impact on Petitioners or any other applicant or gave any applicant a better lottery number." As discussed above, Petitioners' argument is that the manipulation of the Leveraging Classification nullified one of the tie-breakers in the RFA and resulted in giving more weight to lottery numbers, which constituted the final tie-breaker.

Exception Seven:

- The last sentence of Paragraph 45 misstates Petitioners' argument. Petitioners never argued that they would receive better lottery numbers as a result of the relief requested in the Petitions.

Exception Eight:

- Petitioners do not disagree with the ALJ's discussion of the *Fairbanks* case in Paragraph 49, but they contend that the case stands for the proposition that even a non-bidder can have standing in certain cases when the fairness of the process has been compromised.

Exception Nine:

- The ALJ's Recommendation on page 19 of the Recommended Order that the Petitions be dismissed is not well-founded in the law, given all of the authority he overlooked concerning the fundamental fairness of the RFA process.

IV. Request for Relief

Florida Housing has always had, and continues to have, the inherent authority (as well as the authority authorized in the RFA) to rescind RFA 2019-112 and issue a new RFA that treats all Applicants fairly. For the reasons expressed in theses Exceptions, Petitioners request that the Florida Housing Board direct staff to cancel RFA 2019-112, rescind the preliminary awards made by the Board, and direct staff to issue a new RFA for Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County.

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CERTIFICATE OF SERVICE

I CERTIFY that this Notice was electronically filed with the Florida Housing Finance Corporation on April 13, 2020, and that a copy was provided by eservice to the following:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

AMBAR TRAIL, LTD.,

Petitioner,

v.

DOAH CASE NO.: 20-001138BID
FHFC CASE NO.: 2020-005BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP, AND SLATE MIAMI APARTMENTS, LTD.,

Intervenors.
_____/

SIERRA MEADOWS APARTMENTS, LTD.,

Petitioner,

v.

DOAH CASE NO.: 20-001139BID
FHFC CASE NO.: 2020-006BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP, AND SLATE MIAMI APARTMENTS, LTD.,

Intervenors.
_____/

QUAIL ROOST TRANSIT VILLAGE IV, LTD.,

Petitioner,

v.

DOAH CASE NO.: 20-001140BID
FHFC CASE NO.: 2020-007BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP, AND SLATE MIAMI APARTMENTS, LTD.,

Intervenors.
_____/

PARC GROVE, LLC,

Petitioner,

v.

DOAH CASE NO.: 20-001141BID
FHFC CASE NO.: 2020-009BP

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

NARANJA LAKES HOUSING PARTNERS, LP, AND HARBOUR SPRINGS, LLC

Intervenors.
_____/

FLORIDA HOUSING FINANCE CORPORATION'S RESPONSE TO PETITIONERS' EXCEPTIONS

On April 3, 2020, Administrative Law Judge James H. Peterson, III issued an Order recommending that Florida Housing Finance Corporation ("Florida Housing") enter a Final Order

finding that Petitioners Ambar Trail, Ltd. ("Ambar Trail"), Sierra Meadows Apartments, Ltd., ("Sierra Meadows") and Quail Roost Transit Village IV, Ltd. ("Quail Roost") (collectively, the "Petitioners") lack standing and dismissing the petitions with prejudice[1]. On April 13, 2020, Ambar Trail, Sierra Meadows, and Quail Roost filed Exceptions to the Recommended Order of Dismissal (the "Exceptions").

Florida Housing files this response in opposition to the Exceptions to the Recommended Order of Dismissal. Because competent, substantial evidence supports each finding of fact made by the administrative law judge ("ALJ"), and because Florida Housing lacks jurisdiction to reverse issues that are outside of its substantive jurisdiction, Florida Housing respectfully requests that each of the Exceptions be denied.

Standard of Review

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

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

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

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

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

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

[1]A petition was filed by Parc Grove, LLC, but was voluntarily dismissed on March 24, 2020.

> or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact.

(Emphasis added).

This case is before the Board based on the ALJ concluding that Petitioners lacked standing to challenge the scoring and ranking of the RFA after a hearing on a motion to dismiss. In reviewing a motion to dismiss, the ALJ is required to accept the factual allegations in the Petition as true and consider only those factual matters contained with the Petition(s). *See Madison Highlands, LLC v. Florida Housing Finance Corporation,* 220 So. 3d 467, 474 (Fla. 5th DCA 2017).

Response to Exception Number One

In Exception 1, Petitioners take exception to the ALJ's Finding of Fact in Paragraph 15, which provides as follows:

> 15. The leveraging line, which would have divided the Priority I Applications into Group A and Group B, was established after the eligibility determinations were made. All applications were included in Group A. There were no Group B applications. Thus, all applications were treated equally with respect to this preference.

Petitioners allege that Finding of Fact 15 is incomplete and lacks context. Petitioners do not allege that this finding is untrue or incorrect. Rather, Petitioners allege that is it is inaccurate but do not explain what makes the Finding inaccurate.

It is important to note that Petitioners' Petitions allege essentially the same information as Finding of Fact 15 "…all of the Priority 1 Applications that had previously been determined to be eligible for funding were all in Group A, and there were no Group B Applicants." *See* Quail Roost, Ambar Trail, and Sierra Meadows Petitions, Paragraph 21. The only additional information was

the last line in which the ALJ opined that all applications were treated equally because all were Group A. There is no logical way to dispute the notion that all applicants that were in the same group were treated the same way.

Because the Finding of Fact in Paragraph 15 is supported by information within the four corners of Petitioners Petitions, it should not be disturbed. Accordingly, Petitioners' Exception Number One should be denied.

Response to Exception Number Two

In Exception 2, Petitioners take exception to the ALJ's Findings of Fact in Paragraphs 17 and 28. In these paragraphs, the ALJ found:

> 17. If Florida Housing had determined that an entity or entities submitted more than three Priority I Applications with related principals, the relief set forth in the RFA was to move those applications to Priority II.
>
> . . .
>
> 28. If Petitioners prevailed in demonstrating an improper principal relationship between the HTG applications, the relief specified in the RFA (the specifications of which were not challenged) would have been the conversion of the offending HTG applications to Priority II applications. The relief would not have been the removal of those applications from the pool of applications, nor would it have affected the assignment of lottery numbers to any of the applicants, including HTG.

Petitioners allege that Findings of Fact 17 and 28 are somehow incomplete and that the Findings "omit and ignore other remedies." Again, Petitioners allege that these Findings are "inaccurate" but fail to explain what makes them inaccurate.

Yet, again, the information objected to in Findings of Fact 17 and 28 can be found in Petitioners' Petitions. The RFA section is quoted in paragraph 12 of each Petition. In relevant part, the RFA (and the Petitions) state:

> For purposes of scoring, Florida Housing will rely on the Principals of the Applicant and Developer(s) Disclosure Form (Rev. 05-2019) outlined below in

> order to determine if a Principal is a Principal on more than three (3) Priority I Applications. If during scoring it is determined that a Principal is disclosed as a Principal on more than three (3) Priority I Applications, all such Priority I Applications will be deemed Priority II.
>
> If it is later determined that a Principal, as defined in Rule Chapter 67-48.002(94), F.A.C., was not disclosed as a Principal and the undisclosed Principal causes the maximum set forth above to be exceeded, the award(s) for the affected Application(s) will be rescinded and all Principals of the affected Applications may be subject to material misrepresentation, even if the Applications were not selected for funding, were deemed ineligible, or were withdrawn.

Findings of Fact 17 and 28 essentially restate the language in the RFA.

Because the Findings of Fact in Paragraphs 17 and 28 are supported by information within the four corners of Petitioners' Petitions, those Findings should not be disturbed. Accordingly, Petitioners' Exception Number Two should be denied.

Response to Exception No. 3

In Exception 3, Petitioners' take exception to the ALJ's Findings of Fact in Paragraphs 18 and 23. In these paragraphs, the ALJ found:

> 18. Florida Housing did not affirmatively conclude that any of the 15 challenged applications included undisclosed principals so as to cause a violation of the maximum number of Priority I Applications that could be submitted.
>
> . . .
>
> 23. The Board approved the Committee's recommendations at its meeting on January 23, 2020, and approved the preliminary selection of Harbour Springs, Slate Miami, and Naranja Lakes for funding.

Petitioners allege that Findings of Fact 18 and 23 (and "all other paragraphs") are again incomplete. However, all of the information in Finding of Fact 23 is found in Petitioners' Petitions at Paragraph 17, which states:

> 17. As previously noted, the Review Committee met on January 9 and January 21 to score the Applications and select Applicants for funding. The Committee followed the Funding Selection Process on page 68 of the RFA to recommend the following three Applications for funding: Harbour Springs (App. No. 2020-101C), which met the Geographic Areas of Opportunity/SADDA Goal;

> Slate Miami (App. 2020-122C), which met the Elderly (non-ALF) Goal; and Residences at Naranja Lakes, which was the next highest-ranked eligible Priority I Application. The Board approved the Committee's recommendations at its meeting on January 23, 2020.

Finding of Fact 18 is a summary of the scoring in this RFA as it relates to the challenged applications. The entire basis for Petitioners' challenge is an allegation that Florida Housing somehow erred in scoring the 15 challenged applications. *See* Petitions at Paragraphs 1, (…"Florida Housing erred by failing to take any action regarding 15 Priority I Applications submitted by entities associated with Housing Trust Group, LLC…") 2, 20, 21, and 29. Petitioners cannot rationally object to information that was contained within their Petitions and was accepted as true by the ALJ, as required in a motion to dismiss.

While it is correct that the ALJ was required to accept relevant alleged facts, there is no indication in the record that the ALJ did not accept them as true just because every word was not restated in the Recommended Order of Dismissal. In fact, on page 6 of the Recommended Order of Dismissal the ALJ found:

> On March 23, 2020, a telephonic hearing was held during which the Joint Motion to Dismiss, the Response to Motion to Dismiss, the Petitions filed by the Petitioners, and arguments of counsel were considered and discussed. At the end of those discussions, the undersigned announced that the Joint Motion to Dismiss was well taken and that a favorable written Order thereon would be entered.

See Recommended Order page 6. Additionally, in the Findings of Fact, the ALJ noted that:

> As this Recommended Order of Dismissal is based upon a motion to dismiss, the factual allegations of the three Petitions filed by the Petitioners in this consolidate case are accepted as true, and the Findings of Fact are derived from the four corners of those Petitions, see *Madison Highlands. LLC v. Florida Housing Finance Corp*., 220 So. 3d 467, 473 (Fla. 5th DCA 2017), and facts that are not otherwise in dispute.

Id. The ALJ did accept the factual allegations in the Petitions as true and as well as the facts that are not otherwise in dispute.

Because the Findings of Fact in Paragraphs 18 and 23 are supported by information within the four corners of Petitioners Petitions, those Findings should not be disturbed. Accordingly, Petitioners' Exception Number Three should be denied.

Response to Exception Number Four

In Exception 4, Petitioners' take exception to the ALJ's Conclusions of Law in Paragraphs 36, 44, 46, 47, 48, 50, 51 and 52 of the Recommended Order. In these paragraphs, the ALJ concluded:

> 36. An injury-in-fact must result from the challenged agency action and be real and immediate, not conjectural or hypothetical. Abstract injury is insufficient to establish standing. See Florida Dep't of Rehab. v. Jerry, 353 So. 2d 1230 (Fla. 1st DCA 1978); Madison Highlands at 473 ("Under the first prong of Agrico, the injury must be actual and immediate, and not based on a hypothetical scenario."). In this case, the Petitioners fail to allege sufficient facts to establish that Florida Housing's preliminary funding awards will cause Petitioners' injury-in-fact that satisfies the first prong of the Agrico test. Even if Petitioners can prove their allegations regarding HTG and its affiliates, the RFA expressly provides a remedy that does not alter or rescind the preliminary funding awards.
>
> . . .
>
> 44. All applications received a randomly generated lottery number from the same batch of numbers. Moreover, under the terms of the RFA, a developer could submit as many Priority II applications as it wished, without limitation. Improperly submitted Priority I applications are, pursuant to the terms of the RFA, converted to Priority II applications. They are not removed from the pool of applications. Thus, whether the HTG-related applications were labeled as Priority I or Priority II is irrelevant to the assignment of lottery numbers, which was done through a random number generator when the applications were received.
>
> . . .
>
> 46. Petitioners try to avoid their standing problems by alleging that the process was so fundamentally unfair that the entire RFA should be thrown out. However, the remedy established in the unchallenged RFA specifications is clear--applications exceeding the Priority I limit would be converted to Priority II. They would not be removed from the pool, and they would not be assigned different lottery numbers. If Petitioners had an issue with the "fairness" of the process, they could have challenged the specification. They did not. As the preliminary awards would not change, whether or not the HTG applications are considered, is contrary to the Petitioners' assertion that the alleged improprieties of HTG somehow subverted the process or made it fundamentally unfair.

47. While certainly, everything would change if all of the applications were thrown out and everyone was allowed to resubmit applications, whether Petitioners would receive an award or a more favorable lottery number with respect to any subsequent RFA is pure conjecture and speculation. Moreover, to throw out all applications on such speculation would be fundamentally unfair to applicants like Naranja Lakes, Slate Miami, and Harbour Springs who are entitled to funding based on the terms of the RFA. The alleged improprieties of HTG should not be used to unjustifiably penalize them.

48. In sum, Petitioners do not meet the Agrico test because they failed to demonstrate that their substantial interests are adversely affected by Florida Housing's preliminary awards. Petitioners do not cite to any binding authority, nor could the undersigned locate any such authority, that would support the assertion that, even if an applicant has no chance of getting an award for that applicant, that applicant has standing to challenge the "fundamental fairness" of the process. A mere assertion that the fundamental fairness of the procurement process was flawed does not relieve the Petitioners of the requirement to establish standing by meeting both prongs of the Agrico test and demonstrating a substantial interest that is adversely affected by the intended agency action. *See Madison Highlands*, supra at 474.

. . .

50. Unlike the appellant in Fairbanks, the Petitioners have failed to show that their substantial interests were affected by the agency's actions. Florida Housing's alleged inaction regarding the HTG applications has no bearing on the propriety of Florida Housing's scoring and intended selection of Naranja Lakes, Slate Miami, and Harbour Springs for funding.

51. Petitioners cannot establish that, but for an error on the part of Florida Housing, Petitioners' applications would have been selected for funding, or that Petitioners' applications would have received a higher lottery number. Here, Petitioners were not prevented from competing for funding nor were any of Petitioners' applications rejected during the process. The Petitioners' failure to make the funding range was not due to any error by Florida Housing or any actions by the applicants selected for funding. In fact, Petitioners' failure to obtain funding cannot be directly tied to any HTG-related action.

52. In sum, the Petitioners failed to demonstrate that the assignment of lottery numbers or treatment of HTG applications failed to comply with the express terms of the RFA, or was otherwise "fundamentally unfair," and did not demonstrate that the outcome could have changed such that their interests are substantially affected in order to meet the standing requirements to challenge the preliminary awards or maintain the Petitions filed in this case. Therefore, for the reasons set forth above and in the Joint Motion to Dismiss, the Petitioners and Petitions should be dismissed for lack of standing.

In Exception Four, Petitioners argue that the ALJ ignored other possible remedies in the RFA and Petitioners' legal arguments. As discussed above, the remedy for violation of the Priority I term

is to deem all Applications Priority II. That remedy is expressly stated in the RFA and recited in Petitioners' Petitions, and, thus, is accepted as true.

In Conclusion of Law 48, the ALJ found:

> Petitioners do not cite to any binding authority, nor could the undersigned locate any such authority, that would support the assertion that, even if an applicant has no chance of getting an award for that applicant, that applicant has standing to challenge the "fundamental fairness" of the process.

The ALJ analyzed the relevant case law, listened to Petitioner's arguments, and ultimately disagreed with Petitioners' assertions regarding standing. The issue is not with the ALJ's reasoning as articulated in these Conclusions. Rather, the issue lies with Petitioners' asserted basis for standing, as Petitioners are unable to articulate any alleged "unfairness" that caused them "injury."

Florida Housing lacks substantive jurisdiction over Conclusions of Law in Paragraphs 36, 44, 46, 47, 48, 50, 51 and 52 of the Recommended Order as those conclusions relate to the legal concept of standing in an administrative proceeding. For the reasons noted above, the ALJ's Conclusions of Law in Paragraphs 36, 44, 46, 47, 48, 50, 51 and 52 are reasonable and correct. Accordingly, Petitioners' Exception Number Four should be denied.

Response to Exception Number Five

In Exception Five, Petitioners' take exception to the ALJ's Conclusions of Law in Paragraph 37 of the Recommended Order. In this paragraph, the ALJ concluded:

> 37. A lower- ranked bidder only meets the substantial interest test if it demonstrates that it would be funded if a higher-ranked bidder is disqualified. Even a fifth-place bidder can establish standing if they "establish that the four higher-ranked applications must all be rejected or reevaluated, resulting in the protesting filer being ranked the highest." *Madison Highlands* at 474; *Preston Carroll* at 525.

Petitioners' object to the ALJ's use of the word "only" in Conclusion of Law 37. As previously discussed, the ALJ could not locate any authority that supports Petitioners' argument that even if

an applicant has no chance at getting an award, that applicant has standing to challenge the fundamental fairness of the process. Additionally, the ALJ noted that Petitioners' did not cite to any binding authority that would support their contention. Thus, "[a] lower- ranked bidder *only* meets the substantial interest test if it demonstrates that it would be funded if a higher-ranked bidder is disqualified." *Emphasis supplied.*

Additionally, in Conclusion of Law 37, the ALJ is discussing the substantial interest test for standing as articulated in *Agrico*. Petitioners' appear to argue that they do not have to meet the *Agrico* test for standing as they have an independent basis if they can show fundamental unfairness in the process. Petitioners' have articulated no reason why the use of the word "only" in this context is incorrect.

Florida Housing does not have substantive jurisdiction over this conclusion as it relates to the legal concept of standing in an administrative proceeding. However, the ALJ's Conclusion of Law as articulated in Paragraph 37 is reasonable and correct. Accordingly, Petitioners' Exception Five should be denied.

Response to Exception Number Six

In Exception Six, Petitioners' take exception to the ALJ's Conclusions of Law in Paragraph 43 of the Recommended Order. In this paragraph, the ALJ concluded:

> 43. During the hearing on the Joint Motion to Dismiss, Petitioners' counsel conceded that even if all of the HTG applications were taken out of the process, none of the Petitioners would be moved into the funding range. It is otherwise mere speculation that that the purported manipulation of the leveraging had a negative impact on Petitioners or any other applicant or gave any applicant a better lottery number.

Petitioners object to the last sentence of Conclusion of Law 43. However, that statement logically flows from the prior statement. Petitioners agreed that even if the HTG applications are taken out of the RFA process, none of the Petitioners would be selected for funding. Thus, there was no

evidence that the alleged manipulation of the leveraging line negatively impacted Petitioners' or any applicants.

As previously noted, Florida Housing does not have substantive jurisdiction over this conclusion as it relates to the legal concept of standing in an administrative proceeding. However, the ALJ's Conclusion of Law as articulated in Paragraph 43 is reasonable and correct. Accordingly, Petitioners' Exception Six should be denied.

Response to Exception Number Seven

In Exception Seven, Petitioners' take exception to the ALJ's Conclusions of Law in Paragraph 45 of the Recommended Order. In this paragraph, the ALJ concluded:

> 45. Further, Petitioners' argument presupposes that the number of applications submitted by HTG and related entities would somehow have been different if Florida Housing deemed HTG and related entities to be in violation of the limitation on the number of Priority 1 applications. However, under the terms of the RFA, such a determination by Florida Housing would always come after lottery numbers were assigned. Therefore, there is no support for the argument that Petitioners would receive a better number because the numbers were already issued.

Petitioners object to Conclusion of Law 45 and argue that it misstates Petitioners' argument. However, Conclusion of Law 45 is about what Petitioners' argument "presupposes." Stated another way, Conclusion of Law 45 is about the implications of Petitioners' arguments regarding the basis for its standing, not Petitioners' stated argument. Conclusion of Law 45 correctly concluded that Petitioners would not receive a better lottery number if the HTG entities were found to be in violation of the Priority I designation because Florida Housing makes eligibility determinations after assigning lottery numbers.

As previously noted, Florida Housing does not have substantive jurisdiction over this conclusion as it relates to the legal concept of standing in an administrative proceeding. However,

the ALJ's Conclusion of Law as articulated in Paragraph 45 is reasonable and correct. Accordingly, Petitioners' Exception Seven should be denied.

Response to Exception Number Eight

In Exception Eight, Petitioners' take exception to the ALJ's Conclusions of Law in Paragraph 49 of the Recommended Order. In this paragraph, the ALJ concluded:

> 49. *Fairbanks v. Department of Transportation*, 635 So. 2d 58 (Fla. 1st DCA 1984), cited by Petitioners in support of the argument that one does not have to be an eligible bidder in line for an award to have standing, "does not involve a bid protest pursuant to [section 120.57(3)]. Rather, it involves the denial of a request for a formal hearing pursuant to section 120.57[(1)]." *See Id*. at 61. The dispute in Fairbanks was over the specifications in a construction contract that had been awarded. The awarded contractor submitted plans to the Department that included Fairbanks' equipment. The Department rejected the submitted plans because the contract specifications specifically called for the use of Fairbanks' competitor's product. Fairbanks requested a formal section 120.57(1) hearing to challenge the contract specifications. The Department challenged Fairbanks' standing since it was not a bidder for the construction contract. The Department argued that chapter 337, Florida Statutes, which controls construction contracts, was intended to protect only the interest of bidders, not suppliers like Fairbanks. *Id* at. 59. The First District Court of Appeal disagreed, finding that Fairbanks' substantial interests were adversely affected. *Id*. at 61.

In Exception Eight, Petitioners' state that they do not disagree with the ALJ's discussion of the *Fairbanks* case, but that Petitioner's wanted the ALJ to go even further in examining the holding in the *Fairbanks* case. However, Conclusion of Law 49 is a fair and accurate recitation of the *Fairbanks* case. Just because Petitioners' wanted the ALJ to discuss more about a case does not make the ALJ's conclusion inaccurate or unreasonable.

As previously noted, Florida Housing does not have substantive jurisdiction over this conclusion as it relates to the legal concept of standing in an administrative proceeding. However, the ALJ's Conclusion of Law as articulated in Paragraph 45 is reasonable and correct. Accordingly, Petitioners' Exception Eight should be denied.

Response to Exception Number Nine

In Exception Nine, Petitioners' take exception to the ALJ's Recommendation in the Recommended Order. In the Recommendation, the ALJ recommended:

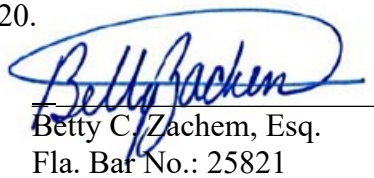
> Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Petitioners lack standing and dismissing the Petitions with prejudice.

The ALJ's Recommendation is based on Findings of Fact supported by information within Petitioners' Petitions and reasonable Conclusions of Law that are not within the substantive jurisdiction of Florida Housing. Accordingly, Petitioners' Exception Nine should be denied.

Conclusion

For the reasons addressed in this Response, the Motion to Dismiss, and in the Recommended Order, each of Petitioners' exceptions should be denied. The Findings of Fact are supported by information within the four corners of Petitioners' Petitions, and no further fact finding is necessary. Florida Housing need not substitute its judgment for the ALJ's thoroughly reasoned conclusions of law. Florida Housing does not have substantive jurisdiction over the Conclusions of Law related to the legal concept of standing in an administrative proceeding. Florida Housing respectfully requests that this Board deny each of Petitioner's exceptions and issue a Final Order adopting the Recommended Order of Dismissal in toto.

Respectfully submitted, this 23rd day of April, 2020.



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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing was electronically filed with the Corporation Clerk for Florida Housing on April 23, 2020, and that a true and correct copy was provided by electronic mail to the following:

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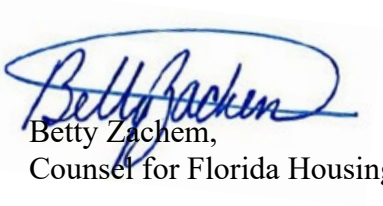

Betty Zachem,
Counsel for Florida Housing Finance

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

AMBAR TRAIL, LTD.,

Petitioner,

v.

DOAH Case No. 20-1138BID
FHFC Case No. 2020-005BP

FLORIDA HOUSING FINANCE CORPORATION, NARANJA LAKES HOUSING PARTNERS, LP, AND SLATE MIAMI APARTMENTS, LTD.,

Respondents.

SIERRA MEADOWS APARTMENTS, LTD.,

Petitioner,

v.

DOAH Case No. 20-1139BID
FHFC Case No. 2020-006BP

FLORIDA HOUSING FINANCE CORPORATION, NARANJA LAKES HOUSING PARTNERS, LP, AND SLATE MIAMI APARTMENTS, LTD.,

Respondent.

QUAIL ROOST TRANSIT VILLAGE IV, LTD.,

Petitioner,

v.

DOAH Case No. 20-1140BID
FHFC Case No. 2020-007BP

FLORIDA HOUSING FINANCE CORPORATION, NARANJA LAKES HOUSING PARTNERS, LP, AND SLATE MIAMI APARTMENTS, LTD.,

Respondents.

PARC GROVE, LLC,

Petitioner,

v.

DOAH Case No. 20-1141BID
FHFC Case No. 2020-009BP

FLORIDA HOUSING FINANCE CORPORATION, NARANJA LAKES HOUSING PARTNERS, LP, AND HARBOUR SPRINGS, LLC,

Respondents.
_____/

JOINT RESPONSE TO EXCEPTIONS

Naranja Lakes Housing Partners, LP ("Naranja"), and Slate Miami Apartments, Ltd. ("Slate Miami, pursuant to Rule 28-106.204, Florida Administrative Code ("F.A.C."), hereby respond to Petitioners' Objections/Exceptions to the Administrative Law Judge's Recommended Order of Dismissal (the "Exceptions.") The Exceptions were filed on April 13, 20230 by Ambar Trail, Ltd. ("Ambar"), Sierra Meadows Apartments, Ltd. ("Sierra Meadows") and Quail Roost Transit Village IV, Ltd. ("Quail Roost") (collectively referred to as "Petitioners") and challenge the Recommended Order of Dismissal ("RO") entered on April 3, 2020 by Administrative Law Judge Pete Peterson (the "ALJ".) For the reasons set forth below, Naranja and Slate Miami oppose the Exceptions and request the Board to enter a Final Order adopting the ALJ's RO in toto.

I. Introduction

The Petitioners in these consolidated cases challenged the preliminary funding award decisions for Request for Applications 2019-112, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the "RFA"). Naranja and Slate Miami are two of the three applicants preliminarily selected for funding based on the evaluation conducted by Florida Housing staff which has already been approved by the Board. Unlike any other

challenge that has come before this Board, the Petitioners here do not allege that the applications selected for funding contained any errors, or that Florida Housing erred in the scoring or ranking of those applications. Petitioners' do not even contend that their applications should be funded. Instead, Petitioners seek to have the entire RFA thrown out based on Petitioners' allegations of alleged improper conduct by another developer that was not selected for funding. The relief requested is not based on any term or provision of the RFA. Naranja and Slate Miami strenuously object to the relief sought by Petitioners. As respondents to the RFA who participated in good faith in the process, expended considerable efforts and resources in submitting their applications and were preliminarily selected for funding, Naranja and Slate Miami should not be penalized for the alleged improper conduct of a third party that is not even in the funding range. Even if Petitioners could prove all the substantive allegations in their Petitions, there is no basis for Petitioners to expect that they could ever achieve funding for their applications. Moreover, he RFA provided a specific remedy for the alleged bad conduct by the third party that does not necessitate the drastic relief requested. The ALJ's ruling was correct in dismissing the Petitions and there is no legal basis or reason for the Board to reject his recommendation of dismissal.

Petitioners' claim that the evaluation process was unfair is based entirely on allegations that several entities supposedly associated with Housing Trust Group, LLC ("HTG"), combined to submit fifteen Priority I applications in contravention of the limitation in the RFA. (For ease of reference, the 15 applications referenced in the Petitions as being affiliated will be collectively referred to as HTG even though no specific factual findings of affiliation have been made.) Even assuming Petitioners' assertions are correct, there is no scenario in which Petitioners can reach the funding range for this RFA. Their desperate attempt to start the process over is fundamentally unfair to Naranja and Slate Miami which have fully satisfied the RFA requirements, did nothing

wrong and should not be penalized. Irrespective of what HTG might have done, there is no factual or legal basis to overturn the preliminary funding determinations. Moreover, the relief requested by Petitioners could potentially jeopardize the federal allocation of tax credits being allocated through the RFA.

II. **Background**

Section 420.507(48), Florida Statutes, authorizes Florida Housing to allocate tax credits and other funding by means of a request for proposal or other competitive solicitation. Florida Housing has adopted Chapter 67-60, F.A.C., to govern the competitive solicitation process for tax credits and other programs administered by Florida Housing. The adopted rules incorporate the bid protest provisions of Section 120.57(3), Florida Statutes, for resolving disputes related to the allocation of tax credits. See, Rule 67-60.001, F.A.C.

The instant RFA included specific goals to fund certain types of developments and set forth sorting order tie-breakers to distinguish between applicants. This RFA was similar to previous RFAs issued by Florida Housing, but included some new provisions limiting the number of Priority I applications that could be submitted.

Ambar, Sierra Meadows, Quail Roost, Naranja, Slate Miami and Harbour Springs all timely submitted applications in response to the RFA. After the applications were evaluated by the Review Committee appointed by Florida Housing, the scores were finalized and preliminary award recommendations were presented and approved by Florida Housing's Board. See QR Petition @ 9; SM Petition @ 9; Ambar Petition @ 9. [1] Consistent with the procedures set forth in

[1] One of the HTG Applications (Orchid Pointe, App. No. 2020-148C), was preliminarily selected to satisfy the Elderly Development goal. Subsequently, three applications, including Slate Miami, that had initially been deemed ineligible due to financial arrearages were later determined to be in full compliance and thus eligible as of the close of business on January 8, 2020. The Review Committee reconvened on January 21, 2020, to reinstate those three applications. Slate Miami was then recommended for funding. See QR Petition @ 6; SM @ 11; Ambar Petition @ 2

the RFA, after the scoring was completed, Florida Housing staff reviewed the Principal Disclosure Forms to determine whether the number of Priority I applications that had been filed by each applicant. This review did not result in a determination that any applicant had exceeded the allowable number of Priority I applications that included the same Principal.

The Review Committee ultimately recommended to the Board the following applications for funding: Harbour Springs (App. No. 2020-101C), which met the Geographic Areas of Opportunity/SADDA Goal; Slate Miami (App. 2020-122C), which met the Elderly (non-ALF) Goal; and Residences at Naranja Lakes (App. 2020-117C), which was the next highest-ranked eligible Priority I Application. See QR Petition @ 9; SM Petition @ 9; Ambar Petition @ 9. The Board approved the Committee's recommendations at its meeting on January 23, 2020, and approved the preliminary selection of Harbour Springs, Slate Miami and Naranja for funding.

The three applications selected for funding have no affiliation or association with HTG, or any of the entities that may have filed applications in contravention of the limitation in the RFA for Priority I applications. There is nothing in the Petitions that alleges any error in scoring or ineligibility with respect to the three applications preliminarily approved for funding. These three applicants would be unjustifiably punished if the relief requested by Petitioners is granted.

III. **Proceedings before the ALJ**

The challenges filed by the Petitioners were referred to the ALJ for resolution. The cases were consolidated. Naranja and Slate Miami filed a Joint Motion to Dismiss the Petitions on March 13, 2020. Petitioners filed a response to the Motion on March 20, 2020. The parties had an opportunity to conduct discovery prior to the ALJ conducting a telephonic hearing on March 23, 2020 to address the threshold legal issues raised in the Motion to Dismiss. During the March 23 hearing, all parties were given an opportunity to present argument. Florida Housing and Harbour

Springs (the third funded applicant) verbally joined in the Motion to Dismiss. After considering the written submittals and verbal presentations, the ALJ entered the Recommended Order of Dismissal on April 3, 2020. Petitioners filed their Exceptions. This Response is timely submitted in opposition to the Exceptions.

IV. Undisputed Facts Established by the Petition

The allegations in the Petitions confirm the Petitioners lack of standing because there is no scenario that would enable them to reach the funding range for this RFA. Moreover, the RFA provides a specific remedy for the purported violations by HTG. The remedy in the RFA does not provide for cancellation of the RFA and/or revocation of the preliminary funding awards to developers who did nothing wrong and fully satisfied all of the RFA requirements.

The undisputed facts include:

- All of the applications deemed eligible for funding, including the Priority II applications, scored equally and met all of the funding preferences.
- Lottery numbers were assigned by Florida Housing, at random, to all applications shortly after the applications were received and before any scoring began. QR Petition @ 13 n. 4; SM Petition @ 13 n. 4; Ambar Petition @ 13 n. 4
- Lottery numbers were assigned to the applications without regard to whether the application was a Priority I or Priority II.; see RFA, p. 4.
- The RFA did not limit the number of Priority II applications that could be submitted. See QR Petition @ 6; SM Petition @ 5; Ambar Petition @ 5 – all citing to RFA, pp. 6-7 (§ Four A);
- The review of the applications to determine if a Principal was a principal on more than (3) priority I applications took place after Lottery numbers were assigned. See Exhibit A; QR Petition @ 6; SM Petition @ 5 – all citing to RFA, pp. 6-7 (§ Four A.)
- The leveraging line, which would have divided the Priority I applications into Group A and Group B, was established after the eligibility determinations were made. QR Petition @ 8; SM Petition @ 8; Ambar Petition @ 8; see also Exhibit A @ 28. All applications were included in Group A. There were no Group B applications. Thus, all applications were treated equally with respect to this preference.
- The applications were ultimately ranked according to Lottery number and funding goal.
- The applications selected for funding held Lottery numbers 1 (Harbour Springs), 2 (Naranja), and 4 (Slate Miami).

- Petitioners' Lottery numbers were as follows: 16 (Quail Roost), 59 (Sierra Meadows) and 24 (Ambar Trail).
- The Applications alleged in the Petitions as being affiliated with HTG received a wide range of Lottery numbers in the random selection including numbers 3, 6, 14, 19, 30, 38, 40, 42, 44, 45, 49, 52, 53, 54, and 58.
- If Florida Housing determined that an entity or entities submitted more than three Priority I applications with related principals, the relief set forth in the RFA was to move those applications to Priority II. See QR Petition @ 6; SM Petition @ 5-6; Ambar Petition @ 5 – all citing to RFA, pp. 6-7 (§ Four A.).
- Florida Housing did not affirmatively conclude that any of the 15 Challenged applications included undisclosed Principals so as to cause a violation of the maximum number of Priority I applications that could be submitted.

V. The ALJ Correctly Concluded Petitioners Lacked Standing to Bring the Instant Challenges

In an administrative proceeding, standing is a threshold jurisdictional issue. See, Abbott Laboratories v. Mylan Pharmaceuticals, Inc., 15 So.3d 642 (Fla. 1st DCA 2009); Grande Dunes, LTD. V. Walton Cnty., 71 So.2d 473, 475 (Fla. 1st DCA 1998) DOAH has jurisdiction to determine if a petitioner has standing. The legal determination of whether a party has standing is not a substantive law issue within the province of Florida Housing. Instead, it is up to a Petitioner to affirmatively establish its standing at the administrative hearing. Westinghouse Elec. Corp. v. Jacksonville Transp. Auth., 491 So.2d 1238, 1240-41 (Fla. 1st DCA 1986).

The ALJ assigned to these cases correctly recognized that, pursuant to Section 120.57(3), Florida Statutes, in order for the Petitioners to have standing to challenge the preliminary funding determinations, they had to establish that proposed awards "adversely affected" the Petitioners' substantial interests. See RO ¶s 33-35. The ALJ applied the well-established Agrico test which requires a challenging party to show: "(1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a section 120.57 hearing, and (2) that his substantial injury is of a type or nature which the proceeding is designed to protect."

The law is clear that an injury in fact must result from the challenged preliminary action and must be real and immediate, not conjectural or hypothetical. The ALJ correctly recognized that none of the Petitions alleged sufficient facts to establish that Florida Housing's preliminary funding awards caused Petitioners injury in fact that satisfied the first prong of the Agrico test. Moreover, the RFA expressly provided a remedy for the alleged conduct of HTG and the remedy does not necessitate altering or rescinding the preliminary funding awards to entities who did nothing wrong.

Because their lottery numbers are higher (worse) than the selected applicants, Petitioners have no chance of achieving funding through this RFA. Petitioners effectively concede this point in their Petitions which acknowledge all of their applications are inescapably behind the applications selected for funding. See QR Petition @ 13; SM Petition @ 13; Ambar Petition @ 13. It is important to recognize that the remedy expressly set forth in the RFA for HTG's purported violation on the limit on the number of Priority I applications that can be submitted does not result in any of the Petitioners moving into the funding range. More specifically, the unsupported allegations of HTG's purported manipulation of the leveraging classifications cannot elevate Petitioners into the funding range. Furthermore, whether HTG's applications were labeled as Priority I or Priority II is irrelevant to the assignment of lottery numbers, which was done through a random number generator when the applications were received. The lottery numbers ultimately decided which applications got funded for this RFA. Even if Florida Housing staff had identified the alleged impropriety by HTG and moved all the HTG applications to Priority II as required by the RFA, Petitioners' applications would not have received a better lottery number. Likewise rejecting all the HTG applications would not have changed the lottery numbers assigned to Petitioners' applications. The three preliminarily selected applicants all held better Lottery

numbers than Petitioners and would still have been selected. In other words, even if it is assumed all the allegations are true and HTG did in fact "game the system," those action had absolutely no impact on the selection of Harbour Springs, Naranja, or Slate Miami for funding. Throwing out the whole RFA would be fundamentally unfair to applicants like Naranja and Slate Miami who participated in good faith, did nothing wrong and are entitled to funding based on the terms of the RFA. Petitioners attempt to obtain a "do over" in the hope of getting better lottery numbers must be rejected.

The ALJ correctly concluded that Petitioners' have not and cannot establish that Florida Housing's preliminary awards resulted in an injury in fact to Petitioners that is of sufficient immediacy to establish standing to challenge the awards to Naranja and Slate Miami. Petitioners' substantial interests are not affected because Petitioners' lottery numbers were simply not high enough (i.e., closest to number 1) to be selected. The Petitioners have no legal or factual basis to require the withdrawal of the RFA in hope of getting a better lottery number next time. Petitioners failure to make the funding range was not due to any error by Florida Housing or any actions by the applicants selected for funding.

Whether Florida Housing should take action against the 15 applicants alleged to have been impermissibly filed by the HTG entities in contravention of the RFA limitations on Priority I applications does not need to be decided by the Board in these proceedings based on the limited record available. Significantly, there are time parameters imposed by federal law on how and when Florida Housing can allocate tax credits. The issues related to HTG should not be used to jeopardize the availability of those credits or the ability of the funded applicants to proceed to deliver needed affordable housing. There is no basis or need to withdraw the preliminary awards to innocent applicants such as Naranja, Slate Miami and Harbour Springs, which did not engage

in any questionable activity. As noted above, the relief requested is in direct contravention of the relief provided for in the RFA.

The RFA states:

> Priority Designation of Applications
>
> Applicants may submit no more than three (3) Priority I Applications. There is no limit to the number of Priority II Applications that can be submitted; however, no Principal can be a Principal, as defined in Rule Chapter 67048.002(94), F.A.C., of more than three (3) Priority I Applications.
>
> For purposes of scoring, Florida Housing will rely on the Principals of the Applicant and Developer(s) Disclosure Form (Rev. 05-2019) outlined below in order to determine if a Principal is a Principal on more than three (3) Priority I Applications. If during scoring it is determined that a Principal is disclosed as a Principal on more than three (3) Priority I Applications, all such Priority I applications will be deemed Priority II.
>
> If it is later determined that a Principal, as defined in Rule Chapter 67-48.002(94), F.A.C., was not disclosed as a Principal and the undisclosed Principal causes the maximum set forth above to be exceeded, the award(s) for the affected Application(s) will be rescinded and all Principals of the affected Applications my be subject to material misrepresentation, even if Applications were not selected for funding, were deemed ineligible, or were withdrawn. [Emphasis added.]

See QR Petition @ 6; SM @ 5-6; Ambar Petition @ 5 – all citing to RFA, pp. 6-7 (§ Four A.). Even if the HTG related applicants are found to have defied the limitation in the RFA regarding the limitation on the number of Priority I applications that could be submitted, the remedy for such action was to designate all offending applications as Priority II applications or deem them ineligible for consideration for funding.

VI. **Standard of Review**

Section 120.57, Florida Statutes, sets forth the parameters for agency review of a recommended order in the process of issuing a final order. The agency may adopt the recommended order in its entirety or, under certain circumstances, it may modify or reject the

findings of fact and conclusions of law as explained below. See § 120.57(1)(l), Fla. Stat. (2018). A final order must include an explicit ruling on each exception. Id.

An agency may not modify or reject an administrative law judge's findings of fact unless the agency first determines from a review of the entire record – and states with particularity in the final order – that the findings of fact were not based on competent substantial evidence or that the proceedings did not comply with the essential requirements of law. Id.; Baptist Hosp., Inc. v. State, Dep't of Health & Rehab. Servs., 500 So. 2d 620, 623 (Fla. 1st DCA 1986)

An agency may modify or reject only those conclusions of law over which the agency has substantive jurisdiction. See § 120.57(1)(l); State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607 (Fla. 1st DCA 1998)(affirming final order in which the agency rejected ALJ's interpretation of agency's rule); see also generally Barfield v. Dep't of Health, 805 So. 2d 1008 (Fla. 2001). When modifying or rejecting a conclusion of law, an agency must state with particularity the reasons for such 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. See § 120.57(1)(l).

RESPONSE TO SPECIFIC EXCEPTIONS

In their Exceptions, Petitioners renew the request made in their Petitions that Florida Housing withdraw RFA 2019-112 and all associated preliminary scoring and award decisions and issue a new RFA for affordable housing developments located in Miami-Dade County. Petitioners have excepted specifically to Paragraphs 15, 17, 18, 23 and 28 of the Findings of Fact in the RO. In addition, Petitioners have taken exception to Paragraphs 36, 37 and 43-52 of the Conclusions of Law in the RO.

Response to Exception One – Incomplete Findings – Paragraph 15 of the RO

Petitioners object to the Findings of Fact as being "incomplete and lack[ing] context." An exception based on the absence of findings of fact is not a well-founded exception, as a state agency cannot make additional findings of fact in considering an ALJ's recommended order. See, Rogers v. Department of Health, 920 So. 2d 27 (Fla. 1st DCA 2005); Stokes v. State Board of Professional Engineers, 952 So. 2d 124 (Fla 1st DCA 2007). A party may challenge a finding of fact made by an ALJ but may not object that there were additional findings of fact that should have been made.

The specific example cited by Petitioners of a finding of fact they claim is incomplete is the ALJ's discussion of the Leveraging Classification component of Florida Housing's scoring and ranking process in paragraph 15 of the Finding of Fact in the RO. The leveraging calculation is designed to favor applicants who request less Florida Housing funding per affordable housing unit than other applicants in the same RFA. As correctly described by Petitioners, Florida Housing's goal is to classify the "least expensive" 80% of applicants as Group A and the most expensive 20% as Group B; and Group A applicants are entitled to selection before any Group B applicants.

The ALJ made findings that:

> All applications were included in Group A. There were no Group B applications. Thus, all applications were treated equally with respect to this preference.

Finding of Fact 15. Petitioners argue there were no Group B applicants because of the purported coordinated strategy of HTG-related entities requesting the same amount of funding per affordable housing units. Petitioners' expressed concern that the leveraging system was designed to not treat all applicants equally is irrelevant. Petitioners' Exceptions fail to recognize or acknowledge that having no Group B applicants in this RFA had absolutely no effect on

Petitioners' interests. Even if all 15 HTG-related applicants had been rejected from consideration, the selection of Harbour Springs, Naranja Lakes, and Slate Miami for funding awards would have stood. Those three applicants were Leveraging Group A applicants,and would have remained Leveraging Group A applicants if the HTG-related applicants were eliminated. Petitioners' counsel admitted as much on the record during the motion hearing. The bottom line is the Leveraging classifications were not a deciding factor, and would not have been even in the absence of the fifteen HTG-related applications.

Petitioners' claim that the "manipulation of the Leveraging Classification by the HTG-related entities … increased the relevance of the lottery numbers" is also of no relevance or consequence. While lottery numbers clearly played a key role in the selection of applicants for funding in this RFA, such is the case with virtually every RFA. As much as Florida Housing struggles to find alternatives to the lottery for the ultimate funding selection decisions, the truth is that the lottery still controls in many instances. In this RFA, the inclusion of funding goals to ensure selection of at least one family demographic applicant and at least one elderly demographic applicant accomplished important policy goals before the lottery numbers became a factor. The petitioners desire for another opportunity to try to get a better lottery number is not a basis to abandon the important policy goals that will be achieved by upholding the preliminary awards.

Response to Exception Two – Paragraphs 17 and 28 of the RO

Petitioners contend that two paragraphs of findings "ignore other remedies that the RFA provided" and they are thus "inaccurate and unsupported by any evidence." Those findings are as follows:

> 17. If Florida Housing had determined that an entity or entities submitted more than three Priority I Applications with related principals, the relief set forth in the RFA was to move those applications to Priority II.

* * *

> 28. If Petitioners prevailed in demonstrating an improper principal relationship between the HTG applications, the relief specified in the RFA (the specifications of which were not challenged) would have been the conversion of the offending HTG applications to Priority II applications. The relief would not have been the removal of those applications from the pool of applications, nor would it have affected the assignment of lottery numbers to any of the applicants, including HTG.

The RO accurately reflects the remedy of relegation to Priority II for applications which share principals in common with more than two other applications.

Petitioners rely heavily on a statement Florida Housing's Marisa Button read into the record of the staff review committee meeting for this RFA. The statement is described in part in the Petitioners' Exceptions.

The statement tracked the language of Section Four A of the RFA, and specifically the consequence of an applicant exceeding the number of Priority I applications that share Principals between more than three Priority I Applications. If an applicant exceeds that number but such is only determined later in the process, the RFA states that "the awards for the affected applications will be rescinded and all principals of the affected applications may be subject to material misrepresentation. . .". (Emphasis added).

Later in the same statement, after recounting the "organizational commonalities" of the 15 HTG-related applications, Ms. Button reiterated the consequences of applicants sharing common principals but not disclosing them:

> And if it is determined at a later point that a principal was not disclosed on any of the applications, the terms of section four of the RFA that I referenced earlier will apply and the affected applications will be rescinded, and all principals of the affected applications may be subject to material misrepresentation consequences.

(Emphasis added).

Petitioners misconstrue this latter portion of Ms. Button's statement by suggesting Ms. Button was referencing a rejection of all applications and reissuance of the RFA. That was clearly not the intent of the comment. Florida Housing cannot "rescind" applications; it can only rescind awards to applications, just as Section Four A states. To "rescind" is to revoke, cancel, or repeal. One can only "rescind" something which that person has given.

Since Florida Housing gave no awards of funding to any HTG-related application in this RFA, there was nothing to "rescind." There may be other consequences for the HTG-related applicants, and that may still occur. But any such future actions directed at HTG are of no consequence for this RFA 15 because none of the HTG applications have been selected for funding.[2]

Petitioners rely on a general principle in procurement law that grants discretion to a state agency to reject any or all applications in a competitive solicitation. There is a standard clause in virtually every state agency competitive solicitation that provides this discretion; see, Department of Management Services purchasing form PUR 1001, "General Instructions to Respondents," incorporated by reference in DMS Rule 60A-1.002(7) ("The Buyer reserves the right to accept or reject any and all bids, …"). This argument was presented to the ALJ, but was not accepted. The ALJ correctly recognized the mere ability of the Board to invoke that drastic result was far too speculative to serve as a basis for standing to contest a competitive award process in which Florida Housing made no errors. This conclusion is particularly warranted when the result would be to rescind funding awards from three innocent applicants who participated in the RFA in good faith and had no involvement at all in the alleged misconduct of the HTG-related applicants. The funded applicants fully complied with all the rules and the RFA provisions. The selection of the three

[2] While one HTG-related applicant had initially filed a protest against one of the funded applicants, that challenge was voluntarily dismissed. Thus, none of the 15 HTG related applications can be funded through this RFA.

applicants was not caused, aided, or assisted in any way by the fifteen HTG-related applications having been submitted and Petitioners have not asserted any inappropriate actions by any of the selected applicants.

The ALJ properly summarized the potential consequences for the HTG-related applications in paragraphs 17 and 28. Those findings should stand.

Response to Exception Three – Paragraphs 18 and 23 of the RO

Petitioners take exception to Paragraphs 18 and 23, and "all other [unspecified] paragraphs," because they "fail to mention Ms. Button's concerns that were expressed at the Review Committee meeting." The findings are as follows:

> 18. Florida Housing did not affirmatively conclude that any of the 15 challenged applications included undisclosed principals so as to cause a violation of the maximum number of Priority I Applications that could be submitted.
>
> * * *
>
> 23. The Board approved the Committee's recommendations at its meeting on January 23, 2020, and approved the preliminary selection of Harbour Springs, Slate Miami, and Naranja Lakes for funding.

The Florida Housing Board cannot make additional factual findings. While the Board could theoretically remand the Recommended Order back to the ALJ for additional findings, see, *Iverness Convalescent Center v. DHRS*, 512 So. 2d 1011 (Fla. 1st DCA 1987), there is absolutely no reason to do so and Petitioners have not asked for that relief in their Exceptions.

The ALJ's findings in paragraphs 18 and 23 are accurate, and should not be disturbed.

Responses to Exceptions to Conclusions of Law – General Comments

Petitioners take exception to multiple conclusions of law. Petitioners note that Florida

Housing may lack substantive jurisdiction over conclusions of law regarding standing. Petitioners are correct, and Florida Housing does indeed lack jurisdiction over conclusions related to the standing of Petitioners. The conclusions of law should not be disturbed.

Petitioners fall back on the generic concept that participants in a competitive award process have standing to ensure the fundamental fairness of the competitive process. But Petitioners here simply cannot identify how any perceived "unfairness" injured them. The filing of the fifteen HTG-related applications, and even the funding request strategy of those fifteen applications, did not injure Petitioners. The ALJ understood this and his recommended dismissal of the Petitions was correct as a matter of law. What injured Petitioners was not getting good enough lottery numbers.

Response to Exception Four – Conclusions of Law, Paragraphs 36, 44, 46, 47, 48, 50, 51, and 52 of the RO

> For the reasons just state above, Petitioners' exceptions to these Conclusions of Law should be denied. Despite the arguments about a group of fifteen applicants engaging in actions which Petitioners may find abusive and unfair, those actions simply did not affect the fairness of the selection process. It is the equivalent of challenging a student for cheating on a test, but the student failed the test anyway. There is no basis for throwing out the test and having all the students retake it, especially the students who did not cheat and got an A. Petitioners have not alleged an injury from the actions of the fifteen applicants and the ALJ properly recommends dismissal of the Petitions.

Response to Exception Five – Conclusions of Law, Paragraph 37of the RO

Petitioners object to the ALJ's use of the word "only" in the sentence, "A lower-ranked bidder only meets the substantial interest test if it demonstrates that it would be funded if a higher-ranked bidder is disqualified." Petitioners contend that they have standing to challenge "the fundamental fairness of the process."

The process was not fundamentally unfair. While the actions of the fifteen HTG applications may be viewed by some as an unfair or an abuse of the process, those actions did not

affect the outcome of the RFA. As noted earlier, even if all fifteen HTG applications were disqualified, the three selected applicants would still have been selected, and the Petitioners would not have been. The ALJ was correct that Petitioners could not articulate how they were injured – i.e., how their substantial interests were affected and he properly recommended dismissal of their Petitions.

Response to Exception Six – Conclusions of Law, Paragraph 43 of the RO

Petitioners take exception to the ALJ's conclusion that it is mere speculation that "the purported manipulation of the leveraging had a negative impact on Petitioners or any other applicant," or "gave any applicant a better lottery number." In this Exception, Petitioners reiterate their claim that the manipulation of the Leveraging Classification nullified one of the tie-breakers, and resulted in lottery numbers having more weight.

As addressed previously in this Response, the so-called manipulation of leveraging in fact did not change the outcome. If the fifteen HTG-related applicants were excluded from the leveraging analysis for the Priority I applications, the three selected applicants would still have been in the preferred Leveraging Group A, and would still have been selected, and Petitioners still would not have been selected. So, in fact, it is much worse than "mere speculation" that leveraging manipulation affected the outcome; it is a false statement. The ALJ properly concluded the Petitions should be dismissed.

Response to Exception Seven – Conclusions of Law, Paragraph 45 of the RO

Petitioners object to the last sentence of paragraph 45, which reads: "Therefore, there is no support for the argument that Petitioners would receive a better [lottery] number because the numbers were already issued." Petitioners contend they never argued that they would receive better lottery numbers as a result of the relief they have requested.

In fact, in paragraph 23 of each of the three substantively identical Petitions filed by Petitioners, they made the following assertion:

> Because HTG entities submitted 15 Priority I Applications instead of the three Priority I Applications other Developers were allowed, the HTG entities increased their chances of obtaining better (lower) lottery numbers. Had HTG entities submitted only three Applications, there would have been 51 total Applicants instead of 63. The mathematical chances of a rule-abiding Developer obtaining a more favorable lottery number are far worse when one Developer is allowed to submit five times the number of applications as the rule-abiding developer.

So, clearly, the impact on lottery number assignment, and on the chances of getting "a more favorable lottery number," were among the allegations of injury that Petitioners relied on for their standing. The ALJ was correct to respond to and reject this allegation in his Recommended Order of Dismissal.

Response to Exception Eight – Conclusions of Law, Paragraph 49 of the RO

Petitioners state they do not disagree with the ALJ's discussion of the decision in Fairbanks v. Department of Transportation, 635 So. 2d 58 (Fla. 1st DCA 1984). But they suggest that Fairbanks stands for the proposition that "even a non-bidder can have standing in certain cases when the fairness of the process has been compromised."

If Petitioners' take away from Fairbanks is as they stated it, then it is curious as to why Petitioners even cited it. Petitioners were not "non-bidders"; they were applicants who participated in the RFA and were simply not selected for funding, for reasons completely unrelated to the fifteen HTG-related applicants.

Moreover, Fairbanks is easily factually distinguished. The Petitioner in Fairbanks was not a bidder in that DOT solicitation for truck weight construction. It was a supplier of truck weighing systems whose products were not acceptable under the DOT specifications that required use of

systems that were proprietary to Fairbanks' competitor. So, the "unfairness" there was the existence of bid specifications which were needlessly restrictive and thus anticompetitive.

Petitioners here, on the other hand, were not prohibited from participating in the RFA; they participated and they lost. They did not lose because of any action of the fifteen HTG-related applicants or by the presence of those applicants in the pool of eligible Priority I applications. There is no basis to reject all applications and the ALJ properly concluded this in recommendation to dismiss the Petitions.

Response to Exception Nine – Recommendation of Dismissal

Petitioners take exception to the ultimate recommendation of dismissal of the Petitions, calling it "not well-founded in the law, given all of the authority he overlooked concerning the fundamental fairness of the RFA process." For all of the reasons addressed in above in this Response, and in Narjana's and Slate Miami's Motion to Dismiss, and in the Recommended Order of Dismissal itself, the recommendation is well-founded and should stand.

CONCLUSION

Petitioners are not substantially affected by the preliminary funding decisions and are not substantially affected by the presence of the HTG-related applications in the pool of submitted applications. Petitioners failure to achieve the funding range was the result of their higher (worse) lottery numbers than the selected applicants. The alleged actions of HTG and any affiliated entities did not impact the selection of the Naranja or Slate Miami for funding. As a matter of law, Petitioners failed to demonstrate their interests satisfied the standing requirements to challenge the preliminary awards. Overturning the preliminary funding awards would be unprecedented, unwarranted and fundamentally unfair. A Final Order should be entered dismissing the Petitions with prejudice.

WHEREFORE, Naranja and Slate Miami respectfully requests a Final Order to be entered dismissing the Petitions filed by Ambar Trail, Sierra Meadows and Quail Roost with prejudice.

Respectfully submitted this 23rd day of April, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following parties via email this 23rd day of April, 2020.

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