STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC, and AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2966BID
FHFC Case No. 2018-039BP

STERLING TERRACE, LTD., and STERLING TERRACE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

DOAH Case No. 18-2967BID
FHFC Case No. 2018-040BP

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.

_____/

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation ("Board") for consideration and final agency action on September 14, 2018. Petitioners Madison Oaks, LLC ("Madison Oaks") and Sterling Terrace, Ltd., ("Sterling") were Applicants under Request for Applications 2017-111, Housing Credit Financing for Affordable Housing Developments Located in Small and Medium Counties (the "RFA"). American Residential Communities, LLC was the developer entity for Madison Oaks, and Sterling Terrace Developer, LLC was the developer entity for Sterling Terrace. The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.57(1) and (3), Fla. Stat. and the Exceptions to the Recommended Order.

On May 4, 2018, Florida Housing Finance Corporation ("Florida Housing") posted notice of its intended decision to award funding to several applicants, including Intervenors HTG Creekside, LLC ("HTG Creekside"), HTG Sunset, LLC ("HTG Sunset"), and Harper's Pointe, L.P. ("Harper's Pointe"). The Board found that Madison Oaks and Sterling Terrace satisfied all mandatory and eligibility

requirements for funding but awarded funding to Intervenors based upon the ranking criteria in the RFA. Petitioners timely filed their notice of intent to protest followed by a formal written protest. HTG Creekside, HTG Sunset, and Harper's Pointe each filed a Notice of Appearance. Arbours at Hester Lake, LLC, Blue Sunbelt, LLC, and Colonnade Park, Ltd. also each filed a Notice of Appearance, but all of the challenges to those applicants were dropped before the administrative hearing. The two formal written protests filed by Petitioners were consolidated.

The protests were referred to the Division of Administrative Hearings ("DOAH"). A formal hearing took place on July 11, 2018, in Tallahassee, Florida, before Administrative Law Judge Suzanne Van Wyk (the "ALJ"). Prior to hearing, Florida Housing changed its initial position regarding HTG Creekside and HTG Sunset, and agreed with Petitioners that each of these Applicants had incorrectly been awarded points for their proximity to public schools. Based upon evidence acquired during discovery, Florida Housing agreed that neither the magnet school listed by HTG Sunset nor the charter school listed by HTG Creekside met the definition of a "public school" because neither used geographic proximity as a principal admission criterion. After the hearing, all parties timely filed Proposed Recommended Orders.

The central issue here is whether Florida Housing's decisions to award funding under the RFA are contrary to the agency's governing statutes, the agency's

rules or policies, or the solicitation specifications. More specifically, the issue is whether Florida Housing's determination that the applications of HTG Creekside, HTG Sunset, and Harper's Pointe were eligible was within the bounds described above. If one of these applicants had been deemed ineligible, then Clermont Ridge would have been selected for funding instead. If two of these applicants had been deemed ineligible, Sterling Terrace would have also been selected for funding. If all three of these applicants had been deemed ineligible, then Madison Oaks would also have been selected for funding.

After consideration of the oral and documentary evidence presented at hearing, and the entire record in the proceeding, the ALJ issued a Recommended Order on August 23, 2018. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ determined that Petitioners failed to meet their burden to establish that Florida Housing's initial determination regarding HTG Creekside and Harper's Pointe was contrary to the terms of the RFA or was clearly erroneous. The ALJ also determined that Petitioners met the burden to establish that Florida Housing's initial determination regarding HTC Sunset was clearly erroneous. The ALJ ultimately recommended that Florida Housing find HTG Sunset ineligible for funding, and award funding to HTG Creekside and Blue Sunbelt.

Florida Housing, Madison Oaks, Sterling Terrace, Blue Sunbelt, Clermont Ridge and HTG Sunset timely filed Exceptions to the Recommended Order, attached

as Exhibits "B" through "F." Florida Housing, Sterling Terrace, Harper's Pointe, and HTG Creekside timely filed Responses to the Exceptions, attached as Exhibits "G" through "K." In addition, Sterling Terrace filed a Notice of Joinder in Florida Housing's Response to Exceptions, attached as "Exhibit L."

RULING ON EXCEPTIONS TO FINDING OF FACT 10

1. Florida Housing, Blue Sunbelt, LLC, Clermont Ridge, and Madison Oaks filed an exception to Finding of Fact Paragraph 10 of the Recommended Order.

2. After a review of the record, the Board finds that Finding of Fact Paragraph 10 of the Recommended Order is supported by competent substantial evidence and the Board rejects the exception to Finding of Fact set forth in Paragraph 10 of the Recommended Order.

RULING ON EXCEPTION TO FINDING OF FACT 16

3. HTG Sunset filed an exception to Finding of Fact Paragraph 16 of the Recommended Order.

4. After a review of the record, the Board finds that Finding of Fact Paragraph 16 of the Recommended Order is supported by competent substantial evidence and the Board rejects the exception to Finding of Fact set forth in Paragraph 16 of the Recommended Order.

RULING ON EXCEPTION TO FINDING OF FACT 17

5. HTG Sunset filed an exception to Finding of Fact Paragraph 17 of the Recommended Order.

6. After a review of the record, the Board finds that Finding of Fact Paragraph 17 of the Recommended Order is reasonable and supported by competent substantial evidence and the Board rejects the exception to Finding of Fact set forth in Paragraph 17 of the Recommended Order.

RULING ON EXCEPTIONS TO FINDINGS OF FACT 31, 33, and 34

7. Madison Oaks filed an exception to Findings of Fact Paragraphs 31, 33, and 34 of the Recommended Order. Sterling Terrace also filed exceptions to Findings of Fact Paragraphs 31 and 33.

8. After a review of the record, the Board finds that Findings of Fact Paragraphs 31, 33, and 34 of the Recommended Order are supported by competent substantial evidence and the Board rejects the exceptions to Findings of Fact set forth in Paragraphs 31, 33, and 34 of the Recommended Order.

RULING ON EXCEPTION TO FINDING OF FACT 45

9. Madison Oaks filed an exception to Finding of Fact Paragraph 45 of the Recommended Order.

10. After a review of the record, the Board finds that Finding of Fact Paragraph 45 is supported by competent substantial evidence and the Board rejects the exception to Finding of Fact in Paragraph 45 of the Recommended Order.

RULING ON EXCEPTION TO FINDINGS OF FACT 54 AND 55

11. Madison Oaks filed an exception to Findings of Fact Paragraphs 54 and 55 of the Recommended Order.

12. After a review of the record, the Board finds that Findings of Fact Paragraphs 54 and 55 are reasonable and supported by competent substantial evidence and the Board rejects the exception to Finding of Fact in Paragraphs 54 and 55 of the Recommended Order.

RULING ON EXCEPTIONS TO CONCLUSIONS OF LAW 63-65

13. Florida Housing, Sterling Terrace, and Madison Oaks filed exceptions to Conclusions of Law Paragraphs 63, 64, and 65 in the Recommended Order.

14. The Board finds that it has substantive jurisdiction over the issues presented in Paragraphs 63, 64, and 65 of the Recommended Order.

15. After a review of the record, the Board finds that the Conclusions of Law in Paragraphs 63, 64, and 65 are reasonable and supported by competent substantial evidence.

16. The Board rejects the exceptions to Conclusions of Law Paragraphs 63, 64, and 65 of the Recommended Order.

RULING ON EXCEPTION TO CONCLUSIONS OF LAW 67

17. Madison Oaks filed an exception to Conclusion of Law Paragraph 67 of the Recommended Order.

18. The Board finds that is has substantive jurisdiction over the issues presented in Paragraph 67 of the Recommended Order.

19. After a review of the record, the Board finds that the Conclusion of Law in Paragraph 67 is reasonable and supported by competent substantial evidence.

20. The Board rejects the exception to Conclusion of Law Paragraph 67 of the Recommended Order.

RULING ON THE RECOMMENDED ORDER

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

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

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

ORDER

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

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

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

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

IT IS HEREBY ORDERED that the preliminary award to HTG Sunset Lake (Application 2018-207C) is rescinded; and Clermont Ridge (Application 2018-112C) is awarded funding.

DONE and ORDERED this 24th day of September, 2018.

FLORIDA HOUSING FINANCE CORPORATION

By: _____
Chair

Copies to:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

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

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON OAKS, LLC; AND AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

vs. Case No. 18-2966BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBORS AT HESTER LAKE, LLC; COLONNADE PARK, LTD; HTG CREEKSIDE, LLC; HTG SUNSET, LLC; HARPER'S POINTE, LP; AND BLUE SUNBELT, LLC,

Intervenors.
_____/

STERLING TERRACE, LTD; AND STERLING TERRACE DEVELOPER, LLC,

Petitioners,

vs. Case No. 18-2967BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBORS AT HESTER LAKE, LLC; COLONNADE PARK, LTD; HARPER'S POINTE, LP; HTG CREEKSIDE, LLC; HTG SUNSET, LLC; BLUE SUNBELT, LLC; AND CLERMONT RIDGE, LTD,

Intervenors.
_____/

RECOMMENDED ORDER

A duly-noticed final hearing was conducted in this case on July 11, 2018, in Tallahassee, Florida, by Administrative Law Judge Suzanne Van Wyk.

APPEARANCES

For Petitioners: Douglas Manson, Esquire
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For Respondent Florida Housing Finance Corporation:

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Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

For Intervenors HTG Sunset, LLC; and HTG Creekside, LLC:

Maureen McCarthy Daughton, Esquire
Maureen McCarthy Daughton, LLC
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Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

Whether Respondent, Florida Housing Finance Corporation's ("Florida Housing"), decision to award funding, pursuant to Request for Applications 2017-111 ("the RFA"), to HTG Sunset,

LLC ("Sunset Lake"); HTG Creekside, LLC ("Oaks at Creekside"); and Harper's Pointe, LP ("Harper's Pointe"), is contrary to its governing statutes, rules, or the RFA specifications; and, if so, whether the decision is clearly erroneous, contrary to competition, arbitrary, or capricious.

PRELIMINARY STATEMENT

Florida Housing initially issued the RFA on October 6, 2017, and, after two modifications, established an application deadline of December 20, 2017. Petitioners and Intervenors submitted timely applications in response to the RFA. On May 4, 2018, Florida Housing published "RFA 2017-111 Board Approved Preliminary Awards" ("Corporation's Notice"), tentatively awarding funding to Sunset Lake, Oaks at Creekside, and Harper's Pointe, among others.

On May 9, 2018, Petitioners, Madison Oaks, LLC ("Madison Oaks"); and American Residential Communities, LLC ("American Residential"), filed their notices of protest challenging the selection of the applications set forth in the Corporation's Notice. Petitioners timely filed a Formal Written Protest of Award and Petition for Administrative Hearing, which was forwarded to the Division of Administrative Hearings ("Division") on June 8, 2018,[1/] for assignment of an Administrative Law Judge ("ALJ") to conduct a final hearing. The Petition was assigned DOAH Case No. 18-2966BID.

On May 9, 2018, Petitioners, Sterling Terrace, LTD; and Sterling Terrace Developer, LLC (collectively, "Sterling Terrace"), filed their Notice of Protest challenging the selection of the applications set forth in the Corporation's Notice. Sterling Terrace timely filed a Formal Written Protest of Award and Petition for Administrative Hearing, which was forwarded to the Division on June 8, 2018, for assignment of an ALJ to conduct a final hearing. The Petition was assigned DOAH Case No. 18-2967BID. The cases were consolidated on June 14, 2018.[2/]

Intervenors, Harper's Pointe, HTG Creekside, and HTG Sunset gained Intervenor status on June 12 and 14, 2018, respectively.[3/]

The final hearing was scheduled for July 11 and 12, 2018, in Tallahassee, Florida, and commenced as scheduled.

The parties introduced Joint Exhibits J1 through J8, which were admitted in evidence. The parties jointly offered the testimony of Marisa Button, Florida Housing's Director of Multifamily Allocations.

Madison Oaks introduced Petitioner's Exhibits P1, P2, P5 through P9, P9a, P10, P12 through P15, P19, P26, and P27, which were admitted in evidence. Madison Oaks offered the testimony of Richard Creech.

Intervenor Oaks at Creekside introduced Intervenor's Exhibits IO2 and IO9, which were admitted in evidence.

Intervenor Sunset Lake introduced Exhibit IS6, which was admitted in evidence. Intervenor Oaks at Creekside offered the testimony of Matthew Rieger, CEO of Housing Trust Group, the parent company of HTG Creekside.

Intervenor Harper's Pointe introduced Intervenor's Exhibits IH1 through IH8 and IH10 through IH12, which were admitted in evidence, and introduced no additional witnesses.

A one-volume Transcript of the proceedings was filed on July 18, 2018. The parties timely filed Proposed Recommended Orders ("PROs"), which the undersigned has considered in preparing this Recommended Order. On August 3, 2018, Intervenors Clermont Ridge and Blue Sunbelt filed a Notice of Joinder in portions of both Petitioners' and Respondent's PROs.

Except as otherwise provided, all references to the Florida Statutes are to the 2017 version.

FINDINGS OF FACT

1. Petitioner Madison Oaks is the Applicant entity for a proposed affordable housing development to be located in Osceola County, Florida.

2. Petitioner Sterling Terrace is the Applicant entity for a proposed affordable housing development to be located in Hernando County, Florida.

3. American Residential and Sterling Terrace are Developer entities as defined by Florida Housing in Florida Administrative Code Rule 67-48.002(28).

4. Sunset Lake, Oaks at Creekside, and Harper's Pointe are all properly registered business entities in Florida in the business of providing affordable housing.

5. Florida Housing is a public corporation organized pursuant to chapter 420, Part V, Florida Statutes, and, for the purposes of these proceedings, an agency of the State of Florida.

6. Through the RFA, Florida Housing proposes to award an estimated $10,978,942 in Housing Credit Financing for Affordable Housing Developments located in medium and small counties ("affordable housing tax credits").

7. The RFA outlines a process for selecting developments for funding. Section Five B. outlines the Selection Process, and subsection 2. is the Application Sorting Order.

8. On November 5, 2017, Florida Housing received 167 applications in response to the RFA. Madison Oaks, Sterling Terrace, Sunset Lake, Oaks at Creekside, and Harper's Pointe timely submitted applications seeking funding to assist in the development of multi-family housing in medium counties.

9. Florida Housing selected a review committee to score all submitted applications. The review committee issued a recommendation of preliminary rankings and allocations, and the

Board of Directors of Florida Housing approved these recommendations on May 4, 2018. The Board found that the parties to this proceeding all satisfied the mandatory and eligibility requirements for funding, but awarded funding to Intervenors based upon the ranking criteria in the RFA.

10. If Sterling Terrace can demonstrate that any two of the three Intervenors should not have been recommended for funding, it and Blue Sunbelt, LLC, will displace them as applications selected for funding. If Madison Oaks can demonstrate that all three Intervenors should not have been recommended for funding, Sterling Terrace and Blue Sunbelt, LLC, will displace them as applications selected for funding.

Sunset Lake

11. Section Four A.5.e.(3) of the RFA allows applicants to receive up to four points for proximity to certain community services. The RFA provides that applicants in medium counties must receive at least seven points to be eligible for funding, and at least nine points to be eligible for a Proximity Funding Preference.

12. One of those community services is public schools, which are defined as follows:

> A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school. This may include a charter school, if the charter school is open to

> appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.
>
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline. (emphasis added).

13. Sunset Lake identified the Jewett School of the Arts ("Jewett School") as a public school, received four points for proximity, and as a result, was eligible for the Proximity Funding Preference.

14. The Jewett School is a magnet school within the Polk County Florida School District. The Jewett School was in existence and available for use by the general public as of the application deadline.

15. Petitioners maintain the Jewett School does not meet the definition of "public school."[4/] If the Jewett School does not meet the definition of a "public school," Sunset Lake would not be entitled to four points for proximity to community services. As a result, it would have a total of seven points for proximity, and while it would remain eligible, it would lose the Proximity Funding Preference. As a result, Sunset Lake would not have been ranked as highly and would not have been recommended for funding.

16. The Jewett School does not meet the RFA definition of "public school" because geographic proximity to the school is not the principal admission criterion. Although a student must live in Polk County Schools' Magnet Zone B to apply for admission to the Jewett School, the principal admission criteria is a random lottery process. Geographic location within the Polk County magnet school zones is a threshold issue which qualifies a student to apply for admission. However, the magnet school decision-making process entails a subsequent elaborate demographic diversity analysis, sorting based on the outcome of that analysis, and, ultimately, a random lottery drawing which determines final admission.

17. The Jewett School admission process is contrary to Florida Housing's primary purpose of awarding proximity points to proposed housing developments--to ensure the intended residents can, in fact, use the services in proximity to the development.

18. Sunset Lake is not entitled to four points for proximity to community services and should not be awarded Proximity Funding Preference. As a result, Sunset Lake should not have been ranked as highly and should not have been recommended for funding.

Oaks at Creekside

19. Oaks at Creekside identified the Manatee Charter School ("Manatee School") as a public school, received three points for proximity, and, as a result, was eligible for funding but not for the Proximity Funding Preference. The Manatee School is a charter school located in Bradenton, Florida.

20. The Manatee School was in existence and available for use by the general public as of the application deadline.

21. Petitioners maintain the Manatee School does not meet the definition of a "public school."[5/] If the Manatee Charter School does not meet that definition, then Oaks at Creekside is not entitled to three points for proximity. As a result, it would have only six total proximity points, and would not be eligible for funding.

22. Florida Housing maintains that a charter school must meet both parts of the definition of a public school in order for a proposed development to receive proximity points based on proximity to that school. That means a charter school must (1) use geographic proximity as the primary admission criteria, and (2) be "open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations."

23. Geographic proximity is not the primary admission criterion for the Manatee School. On the contrary, the Manatee School is open for admission regardless of geographic proximity thereto.

24. The Manatee School operates pursuant to a contract with the Manatee County School Board, and is "open to any student residing in the Manatee County School District, students covered in an interdistrict agreement and students as provided for in Section 1002.33(10), Florida Statutes (2010)."[6/]

25. The Manatee School operates a "controlled open enrollment" process. The application period opens in early January and closes at the end of February, and the School accepts students from any school district in the state whose parent or guardian can provide transportation to the school, if the school has not reached capacity. This process is sometimes referred to as "school choice" and is mandatory pursuant to section 1002.31, Florida Statutes.[7/]

26. The Manatee School has enrolled students throughout Manatee County, as well as from adjoining Sarasota County.

27. Historically, the Manatee School has not reached capacity. Once the School reaches capacity in any one grade level or class, students will be selected by a system-generated, random lottery process.

28. The term "radius area" is not defined in the RFA or in Florida Housing's rules. Florida Housing introduced no evidence regarding the meaning of the term "radius area" within the definition of "public school." When questioned about the meaning, Marisa Button, Florida Housing's Director of Multifamily Allocations, stated she did not know, but "[I] assume it means if the charter school has a radius area. I don't know."[8/]

29. The term "radius" is defined as "a bounded or circumscribed area." Merriam-Webster Online, www.merriam-webster.com (2018).

30. The bounded or circumscribed area for admission to the Manatee School is the Manatee County School District, pursuant to its contract. The Manatee School is open to appropriately-aged children in the radius area who apply.

31. The Manatee School does not apply additional requirements for admission, such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.[9/]

32. The Manatee School does provide admissions preferences to students of active duty military personnel, siblings of a student already enrolled, siblings of an accepted applicant, children of an employee of the School, and children

of a charter board member. Each of these preferences is authorized pursuant to section 1002.33(10)(d).

33. The preferences are not additional requirements for admission to the Manatee School.

34. The Manatee School meets the second part of the definition of "public school" for purpose of qualifying Oaks at Creekside to receive proximity points pursuant to the RFA.

Harper's Pointe

35. Madison Oaks argues Harper's Pointe is ineligible for funding pursuant to the RFA because the Harper's Pointe development site is a "scattered site," and Harper's Pointe did not identify the site as such and comply with the RFA requirement to designate latitude and longitude coordinates for both sites.[10/]

36. Rule 67-48.002(105) defines "scattered sites" as follows:

> (105) "Scattered sites," as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a "Scattered Site"). For purposes of this definition "contiguous" means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement, provided the easement is not a roadway or street. All of the Scattered Sites must be located in the same county.

37. Section Four A.5.c. of the RFA states: "The Applicant must state whether the Development consists of Scattered Sites."

38. Section Four A.5.d. of the RFA requires that applicants provide latitude and longitude coordinates for the Development Location Point and any scattered sites.

39. Section Five A.1. provides that "only items that meet all of the following Eligibility Items will be eligible for funding and consideration for funding selection." Among the items listed are "Question whether a Scattered Sites Development answered" and "Latitude and Longitude Coordinates for any Scattered Site provided, if applicable."

40. Harper's Pointe did not state in its application that the development consists of scattered sites, and did not provide separate latitude and longitude coordinates for scattered sites.

41. Harper's Pointe's proposed development site, as identified in its Site Control Documents, consists of land located within a platted tract of property. The plat recorded in Alachua County indicates that the site is bisected by a platted 50-foot street easement running east/west through the property.

42. The parties stipulated the street has never been constructed.

43. Although portions of the east/west easement area show signs of having been improved at some time in the past, the

easement area has never been paved, and is currently impassible by car or truck due to vegetation in the easement area.

44. Even if the easement area were improved, there is no roadway to the west of the property to which it would connect. A fence runs along the property line and the property beyond the fence is platted residential lots accessed by Northeast 22nd Street.

45. An existing roadway, Northeast 23rd Avenue, terminates at the eastern property line just south of the east/west easement. The City has placed barriers at that property line prohibiting access to the property from Northeast 23rd Avenue.

46. If the platted street is a "roadway or street" as those terms are used in rule 67-48.002(105), the site would meet the definition of a "scattered site."

47. Ms. Button testified on behalf of Florida Housing that the property meets the definition of a scattered site because "there is an easement that is a road or a street" that bisects the property. Ms. Button first testified that Florida Housing's determination did not depend on whether a roadway or street is actually constructed within the easement, but rather, "it goes back to the easement, whether there is an easement that is a roadway or street."

48. Ms. Button's testimony seemed logical enough. If the easement were a street easement, access between the northern and

southern portions of the development site would be constrained. By contrast, if the easement were a conservation or utility easement, there would be no impairment of access between portions of the development site.

49. However, on cross examination, Ms. Button testified that, in making the determination whether an easement for a road or street existed, Florida Housing would consider a number of other factors, including whether a roadway was actually constructed within the easement, whether there were physical obstructions preventing access to the "prospective" roadway or street, and whether the public had a right to use the "prospective" roadway or street.

50. Ms. Button did not testify with specificity what factors she considered in making the determination that the easement, in this case, was "a roadway or street." Ms. Button's direct-examination testimony was conclusory: "Based on the documentation we received, there is an easement that is a road or street." On direct examination, her determination appeared to be based solely on the plat designation of a street easement. On cross-examination, however, Ms. Button testified that "a street designated . . . on a plat could be evidence of the existence of a scattered site." (emphasis added). Moreover, Ms. Button testified that Florida Housing could consider whether a roadway or street was actually constructed, whether there were

obstructions to its use, and whether the public had a right to use the purported roadway.

51. Ms. Button's testimony that the Harper's Point development site was a scattered site was equivocal, and the undersigned does not accept it as either reliable or persuasive.[11/]

52. There is no physical roadway or street constructed within the easement. While there is some evidence that some portions of the easement area were improved in the past, said improvement was at least 25 years old. The current condition of the property is fairly heavily wooded. To the extent a "path" exists on the property, it is not passable by a standard four-wheeled vehicle. Moreover, there are physical barriers preventing vehicular access to the property from the adjoining street to the east. There is no access to the property from the residential development to the west of the property.

53. There is not an improved area preventing access from the northern to the southern portion of the development site. There is no structure built within the easement which would have to be demolished in order to build the project on the development site as a single parcel.

54. Based on the entirety of the reliable evidence, the Harper's Pointe development site is not a "scattered site" as defined in the RFA.

55. Madison Oaks failed to prove that Florida Housing's initial determination to award tax credits to Harper's Pointe, pursuant to the RFA, was incorrect.

CONCLUSIONS OF LAW

56. The Division has jurisdiction over the subject matter and the parties to this action. §§ 120.569 and 120.57(3), Fla. Stat.

57. Petitioners have the burden to prove, by a preponderance of the evidence, that Florida Housing's intended award of housing tax credits to HTG Sunset, HTG Creekside, and Harper's Pointe is contrary to Florida Housing's governing statutes, rules or policies, or the RFA specifications. § 120.57(3)(f), Fla. Stat.

58. Although section 120.57(3) provides that this is a de novo proceeding, it is not a "de novo" proceeding in the traditional sense. See State Contracting & Eng'g Corp. v. Dep't of Transp., 709 So. 2d 607, 609 (Fla. 1st DCA 1998). That is, this is not a forward-looking proceeding to formulate agency action, and the Division may not substitute its judgment for that of Florida Housing. See Intercontinental Props., Inc. v. State Dep't of HRS, 606 So. 2d 380, 386 (Fla. 3d DCA 1992); R.N. Expertise, Inc. v. Miami-Dade Cnty. Sch. Bd., Case No. 01-2663BID (Fla. DOAH Feb. 4, 2002; MDCSB Mar. 13, 2002) (explaining the Division's role in procurement-protest

proceedings). Instead, the Division engages in a form of "inter-agency review" in which the ALJ makes findings of fact about the action already taken by the Department. See State Contracting, 709 So. 2d at 609. The Division does not evaluate the Department's decision anew; instead the Division looks to see if the Department followed its governing statutes, its rules, and the RFA specifications during the procurement process. See R.N. Expertise, Case No. 01-2663BID, RO at 71.

59. Agencies enjoy wide discretion when it comes to soliciting and accepting proposals, and an agency's decision, when based upon an honest exercise of such discretion, will not be set aside even where it may appear erroneous or if reasonable persons may disagree. Baxter's Asphalt & Concrete, Inc. v. Dep't of Transp., 475 So. 2d 1284, 1287 (Fla. 1st DCA 1985); Capeletti Bros., Inc. v. State Dep't of Gen. Servs., 432 So. 2d 1359, 1363 (Fla. 1st DCA 1983). Section 120.57(3)(f) establishes the standard of proof: whether the proposed action is clearly erroneous, contrary to competition, arbitrary, or capricious.

60. A decision is considered to be clearly erroneous when, although there is evidence to support it, after review of the entire record, the tribunal is left with the definite and firm conviction that a mistake has been committed. U.S. v. U.S. Gypsum Co., 333 U.S. 354, 395 (1948). An agency action is

capricious if the agency takes the action without thought or reason, or irrationally. Agency action is arbitrary if it is not supported by facts or logic. See Agrico Chem. Co. v. State Dep't of Envtl. Reg., 365 So. 2d 759, 763 (Fla. 1st DCA 1978). An agency decision is contrary to competition if it unreasonably interferes with the objectives of competitive bidding. See Wester v. Belote, 138 So. 721, 723-24 (1931).

Sunset Lake

61. Florida Housing's initial determination to award four proximity points to Sunset Lake for its proximity to the Jewett School was clearly erroneous.[12/] The Jewett School does not meet the RFA definition of a public school and is not a community service for which Sunset Lake should have received proximity points.

62. Petitioner Madison Oaks proved that Florida Housing's initial decision to award affordable housing tax credits to Sunset Lake was contrary to the RFA, and contrary to competition. Sunset Lake should have received a total of seven proximity points, and should not have been recommended for funding.

Oaks at Creekside

63. Florida Housing's initial determination to award four proximity points to Oaks at Creekside for its proximity to the Manatee School was neither clearly erroneous, contrary to

competition, arbitrary, nor capricious. The Manatee School is a public school as defined in the RFA.

64. As noted in Florida Housing's Notice of Change of Position, filed July 6, 2018, Florida Housing determined after discovery depositions that the Manatee School was not a public school for purposes of awarding proximity points to Oaks at Creekside. However, it is Florida Housing's initial decision to award funding to Oaks at Creekside, not its subsequent litigation position, that is at issue in this proceeding.[13/] See Blue Broadway, LLC v. Fla. Hous. Fin. Corp., Case No. 17-3273 (Fla. DOAH Aug. 29, 2017; FHFC Sept. 22, 2017)("In this proceeding, the undersigned continues to review the correctness of Respondent's initial decision which was to find Intervenor's application to be eligible.").

65. Petitioner Sterling Terrace failed to prove that Florida Housing's initial determination to award affordable housing tax credits to Oaks at Creekside was contrary to the RFA.

Harper's Pointe

66. Florida Housing initially determined Harper's Pointe was eligible for an award of affordable housing tax credits pursuant to the RFA.

67. Petitioner Madison Oaks failed to prove Florida Housing's intended award of housing tax credits to Harper's Pointe was contrary to Florida Housing's statutes, rules, or the

terms of the RFA, clearly erroneous, contrary to competition, or arbitrary or capricious.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing issue a final order finding (1) that its initial scoring decision regarding Sunset Lake was erroneous, and awarding funding to the applicant with the next highest lottery number; and (2) awarding funding to Oaks at Creekside and Harper's Pointe, pursuant to its initial scoring decision.

DONE AND ENTERED this 23rd day of August, 2018, in Tallahassee, Leon County, Florida.

Suzanne Van Wyk

SUZANNE VAN WYK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of August, 2018.

ENDNOTES

1/ Madison Oaks filed a First and Second Amended Formal Written Protest of Award and Petition for Administrative Hearing on June 11, 2018.

[2/] The cases were initially consolidated with a third challenge filed by Clermont Ridge, LTD (DOAH Case No. 18-2968BID), which was resolved and voluntarily dismissed on June 21, 2018.

[3/] Arbours at Hester Lake, LLC; Collonade Park, LTD; Blue Sunbelt, LLC; and Clermont Ridge, LLC, initially gained Intervenor status in these proceedings as well. However, the issues initiating intervention by those parties were resolved prior to the final hearing and those parties did not appear at the final hearing.

[4/] Petitioners withdrew from consideration all other issues against the application of Sunset Lake in their Third Amended Formal Written Protest of Award and Petition for Administrative Hearing.

[5/] Petitioners withdrew from consideration all other issues against the application of Oaks at Creekside in their Third Amended Formal Written Protest of Award and Petition for Administrative Hearing.

[6/] The 2010 version of the statute required "a charter school [to be] open to any student covered in an interdistrict agreement or residing in the school district in which the charter school is located[.]"

[7/] Section 1002.31(2)(a) provides, in pertinent part:

> [E]ach district school board or charter school shall allow a parent from any school district in the state whose child is not subject to a current expulsion or suspension to enroll his or her child in and transport his or her child to any public school, including charter schools, that has not reached capacity in the district, subject to the maximum class size pursuant to s. 1003.03 and se. 1, Art. IX of the State Constitution. The school district or charter school shall accept the student, pursuant to that school district's or charter school's controlled open enrollment process, and report the student for purposes of the school district's or charter school's funding pursuant to the Florida Education Finance Program.

[8/] The parties also introduced the deposition testimony of Marisol Quinones, the Manatee School Enrollment Administrator. No party asked Ms. Quinones to identify the radius area of the school.

[9/] The Charter Schools USA policy provides, "the School will endeavor to achieve racial/ethnic balance," but does not award any admission preference based on race or ethnicity. According to the policy, the School "endeavors" to achieve the balance through a marketing plan directed at "underrepresented populations."

[10/] Madison Oaks initially asserted a challenge to the qualification of the Medical Facility identified in the Harper's Pointe application. Madison Oaks is no longer pursuing its challenge to the qualification of the Medical Facility identified in the Harper's Pointe application.

[11/] As of the date of the prehearing stipulation, Florida Housing's initial position--that Harper's Pointe was eligible for funding--had not changed. During opening statements, counsel for Florida Housing stated its position as "[I] guess our position at the moment is it looks like a street, it must be a street. . . . I am sure we are going to hear argument on all sides . . . and when we do, we'll just have to come up with our ultimate position on that[.]"

[12/] Florida Housing conceded this point when it filed a Notice of Change of Position on July 6, 2018.

[13/] However, the undersigned is compelled to comment on Florida Housing's position, taken at final hearing, that the Manatee School does not meet the RFA definition of "public school" because geographic proximity is not the primary admission criteria. That position is untenable. Florida Housing is required to interpret the RFA consistent with its plain and unambiguous language. See Brownville Manor, LP v. Redding Dev. Partners, LLC, 224 So. 3d 891 (Fla. 1st DCA 2017)(citing Creative Choice XXV, Ltd. v. Fla. Hous. Fin. Corp., 991 So. 2d 899, 901 (Fla. 1st DCA 2008). Florida Housing's interpretation of the definition to require compliance with both the first and second sentences of the definition is contrary to the plain language of the RFA.

The first sentence clearly and unequivocally refers to the admission criteria of traditional public schools, where admission is mandatory for all children within a defined

geographic proximity to the school, i.e., the school attendance zone. The second sentence applies specifically to charter schools, which are non-traditional public schools in Florida. § 1002.33(1), Fla. Stat. As it pertains to charter schools, the definition requires only that the school be "open to appropriately aged children in the radius area who apply" and not impose additional admission criteria. Requiring a charter school to meet both parts of the definition of public school is contrary to the plain language of the RFA. While the undersigned is cognizant of the principle of deference to agency interpretations, "judicial adherence to the agency's view is not demanded when it is contrary to the [RFA's] plain meaning." Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997). Within the RFA definition of public school, the second sentence is specific to charter schools and should be applied to Oaks at Creekside's application.

Further, Florida Housing's interpretation would effectively prohibit any charter school from qualifying as a public school under the RFA. Through 2016, charter schools were required to be open to any student residing in the school district in which the charter school is located. § 1002.33(10), Fla. Stat. (2016). Under current law, a charter school "may be exempt from [Public School Parental Choice] as long as it is open to any student residing in the school district in which the charter school is located." § 1002.33(10)(2018). A charter school cannot be both open to any student within the school district and use geographic proximity as the primary admission criteria.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC, and AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2966BID

FHFC Case No. 2018-039BP

STERLING TERRACE, LTD., and STERLING TERRACE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2967BID

FHFC Case No. 2018-040BP

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

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

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

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

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

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

It is the job of the Administrative Law Judge ("the ALJ") to assess the weight of the evidence, and this Board cannot re-weigh it absent a showing that the finding was not based on competent, substantial evidence. *Rogers v. Department of Health*, 920 So.2d 27 9Fla. 1st DCA 2005). *B.J. v. Department of Children and Family Services*, 983 So.2d 11 (Fla. 1st DCA 2008) "Competent substantial evidence," is defined as: "[T]he evidence relied upon to sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Dept. of Highway Safety and Motor Vehicles v. Wiggins*, 151 So.3d 457 (Fla. 1st DCA 2014), quoting *DeGroot v. Sheffield*, 95 So.2d 912, 916 (Fla.1957)

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

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

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

Respondent's First Exception

Florida Housing takes exception to Finding of Fact 10, in which the ALJ described potential funding scenarios. While the ALJ stated that Blue Sunbelt, LLC could be funded, it is actually Clermont Ridge, Ltd that could be funded. *See* Notice of Joinder filed August 3, 2018. In addition, the ALJ failed to note that Madison Oaks could also be funded under one scenario. Finally, it is irrelevant which party demonstrates which other party should or should not have been recommended for funding. Finding of Fact 10 should be amended as follows:

> If the evidence shows ~~Sterling Terrace can demonstrate~~ that any two of the three Intervenors should not have been recommended for funding, Sterling Terrace ~~it~~ and Clermont Ridge, Ltd ~~Blue Sunbelt, LLC~~, will displace them as applications selected for funding. If the evidence shows ~~Madison Oaks can demonstrate~~ that all three Intervenors should not have been recommended for funding, Madison Oaks, Sterling Terrace and Clermont Ridge, Ltd ~~Blue Sunbelt, LLC~~, will displace them as applications selected for funding.

Respondent's Second Exception

Respondent takes exception to Conclusions of Law 63, 64, and 65 in which the ALJ concluded that the Manatee Charter School meets the definition of a public school. A public school is defined in Request for Applications 2017-111 ("the RFA") as follows:

> A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school. This may include a charter school, if the charter school is open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.

The ALJ found that the Manatee Charter School did not meet the requirements of the first sentence of the definition because geographic proximity was not the primary admission criterion. (FOF 23) The ALJ also found that the school did meet the requirements of the second sentence of the definition. (FOF 34) From this the ALJ concluded that that the Manatee Charter School met the definition of a public school in the RFA. (COL 63) This conclusion is based on an interpretation of the definition in the RFA that is contrary to Florida Housing's interpretation and is not supported by any competent substantial evidence.

The undisputed testimony at hearing was that Florida Housing interprets the RFA as requiring any public school to meet the requirements of the first sentence of the definition, and that charter schools are also required to meet the requirements of the second sentence of the definition. (T. 62, 69)[1] Even counsel for HTG Creekside agreed in paragraph 36 of her Proposed Recommended Order that a charter school had to meet the requirements of the second sentence of the definition "in addition to meeting the 'geographic proximity' element of the definition." There was no testimony, and no evidence of any kind, that a charter school was not required to meet the geographic proximity criterion.

[1] Marisa Button, Florida Housing's Corporate Representative, testified as follows:

> Q: Now, going back to the definition, I want to be clear, that definition does allow charter schools, correct?
> A Yes.
> Q Okay. But those charter schools have to meet that original criteria of geographic proximity, right?
> A Yes.
> * * *
> Q: In other words, a charter school would have to not only have principal admission criteria of geographic proximity but also meet other requirements in that definition?
> A: Yes.

The ALJ explains in footnote 13 to COL 64 that her conclusion that the Manatee Charter School met the definition for a public school even though geographic proximity was not a principle admission criterion was because Florida Housing's interpretation of the definition to require compliance with both the first and second sentences of the definition is contrary to the "plain language" of the RFA. She then asserts that "the first sentence clearly and unequivocally refers to the admission criteria of traditional public schools" and therefore does not apply to charter schools. However, the word "traditional" appears nowhere in the definition, nor was there a single bit of evidence that any party to the hearing interpreted the definition as distinguishing between traditional and non-traditional schools. It is entirely improper for the ALJ to add a word to the definition and then assert that this imaginary word makes the meaning of the definition "clear and unequivocal." *See Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001); *Commercial Coating Corp. v. Dep't of Envtl. Reg.*, 548 So. 2d 677, 678 (Fla. 3d DCA 1989); *State v. Cohen*, 696 So. 2d 435, 438 (Fla. 4th DCA 1997).

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

The ALJ acknowledges this principle of deference to agency interpretations, but cites to *Werner v. Dep/t of Ins. & Treasurer*, 689 So.2d 1211 (Fla. 1st DCA 1997) for the proposition that "judicial adherence to the agency's view is not demanded when it is contrary to the [RFA's] plain meaning." In this case, however, the agency's view is only contrary to the RFA's plain meaning

if the word "traditional" is read into the first sentence of the definition. Since that word is not there, and no party has suggested that it is there or should even be implied to be there, Florida Housing's interpretation of the definition of "public school," which is supported by competent substantial evidence which no party has challenged, is at least a reasonable interpretation of the RFA, and as such the principle of deference requires the ALJ to accept the agency's interpretation.

Additionally, in footnote 13 to COL 64 (as well as in FOF 25 and 32), the ALJ cites to Section 1002.33, Fla. Stat. (entitled "Charter Schools"), for the proposition that it is impossible for a charter school "to be both open to any student within the school district and use geographic proximity as the primary admission criteria." There was no argument or testimony from any party concerning the interpretation of Section 1002.33[2], and as the ALJ herself pointed out in ruling on a different subject, it is inappropriate to base any conclusions or findings on the interpretation of statutes or rules over which Florida Housing has no jurisdiction or expertise. Even if the ALJ herself had personal expertise in interpreting the Charter School statute, she noted during the hearing that "I am not supposed to be bringing any knowledge that I might have outside of this room to bear on the case." (T. pg. 17).

The ALJ chose a single sentence in Section 1002.33(10)(a) to support her conclusion that charter schools must be open to any student residing in the school district. The issue was never raised in the hearing and no party had the opportunity to discuss or dispute any provisions of this statute. If the issue had been allowed to be raised, it is entirely possible that one of the parties could have cited to other provisions of that statute to refute the ALJ's conclusion that a charter

[2] The only time Section 1002.31(3) was mentioned in the hearing was in counsel for HTG Creekside's opening statement, where she said "Additionally, Your Honor, the only thing I would add is that under Florida Statutes, and the section is 1002.31(e), is that a child from outside of Manatee County School District cannot displace a child which is already attending a district school within Manatee County."

school could never use geographic proximity as the principle admission criterion. Just by way of example, Section 1002.33(10)(e) states that a charter school may limit enrollment to students "residing within a reasonable distance of the charter school." There was also unrefuted testimony that Florida Housing's position was that a charter school was not automatically excluded from the definition of a public school. (T. pg. 67)

The ALJ's interpretation of Section 1002.33 as a basis for determining that the Manatee Charter School met the RFA definition of a public school was outside the bounds of her jurisdiction, was never argued during or after the hearing, and is inconsistent with the evidence. As such, this interpretation must be rejected. The ALJ's conclusion that Florida Housing's interpretation of this definition was clearly erroneous, based upon the insertion of an imaginary word, must be rejected. Since the ALJ found that the Manatee Charter School did not use geographic proximity as a principle admission criterion, the ALJ's conclusion that this school met the definition of a public school directly conflicts with the relevant provisions of the RFA and must be rejected.

WHEREFORE, Florida Housing respectfully requests that the Board of Directors accept the arguments presented in Respondent's Exceptions, modify Finding of Fact 10 as recommended above, reject Conclusions of Law 63-65, and issue a Final Order determining that the Manatee Charter School listed by HTG Creekside did not meet the definition of a public school, and that Florida Housing's initial determination that HTG Creekside should be awarded funding under RFA 2017-111 was erroneous.

Respectfully submitted this 31st day of August, 2018.

/s/ Chris McGuire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail this 31st of August, 2018 to the following:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC AND AMERICAN RESIDENTIAL COMMUNITIES, LLC

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; COLONNADE PARK, LTD; HTG CREEKSIDE, LLC; HTG SUNSET, LLC HARPER'S POINTE, LP; AND BLUE SUNBELT, LLC;

Intervenors.
_____/

DOAH CASE NO. 18-2966BID

STERLING TERRACE, LTD., AND STERLING TERRACE DEVELOPER, LLC,

Intervenors,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC COLONNADE PARK, LTD.; HARPER'S POINTE, LP; HTG CREEKSIDE, LLC; HTG SUNSET, LLC, BLUE SUNBELT, LLC; AND CLERMONT RIDGE, LTD,

Intervenors.
_____/

DOAH CASE NO. 18-2967BID

BLUE SUNBELT, LLC AND CLERMONT RIDGE, LTD'S
EXCEPTIONS AND OBJECTIONS TO RECOMMENDED ORDER

Pursuant to section 120.57(3)(e), Florida Statutes, ("F.S.") and Rule 28-106.217, Florida Administrative Code ("F.A.C."), and the Recommended Order entered in this case, Blue Sunbelt, LLC and Clermont Ridge, Ltd ("Intervenors"), hereby file their objections and exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") on August 23, 2018, as follows:

Standard of Review

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

Agencies have more discretion in their treatment of conclusions law, if those conclusions fall within the areas of the law or relate to the interpretation of rules over which the agency has substantive jurisdiction. Within those areas, an agency may reject or modify conclusions of law as long as it states its reasons and finds that its substituted conclusions are at least as reasonable as those of the ALJ. As the funding agency, Florida Housing has substantive jurisdiction over the legal conclusions relating to its process for awarding funding.

Parties are required by controlling case law to raise these issues by exception, or risk waiving the issue for subsequent judicial review. When a party to an administrative proceeding does not file exceptions to a recommended order, it waives objections and those matters are not preserved for possible subsequent appellate review. *Kantor v. School Board of Monroe County,*

648 So. 2d 1266, 1267 (Fla. 3rd DCA 1995), citing *Environmental Coalition of Florida, Inc. v. Broward County*, 586 So. 2d 1212, 1213 (Fla. 1st DCA 1991).

Intervenors takes exception to Finding of Fact Number 10 which in relevant part provides:

> 10. If Sterling Terrace can demonstrate that any two of the three Intervenors should not have been recommended for funding, it and Blue Sunbelt, LLC, will displace them as applications selected for funding. If Madison Oaks can demonstrate that all three Intervenors should not have been recommended for funding, Sterling Terrace and Blue Sunbelt, LLC, will displace them as applications selected for funding.

In this finding the ALJ finds that Blue Sunbelt, LLC, assuming Petitioners success, would be next in line for funding. In the Recommendation section of the Recommended Order the ALJ however recommends awarding funding to the Applicant with "the next highest lottery number." It could be argued that Finding of Fact Number 10 incorrectly reflects that Blue Sunbelt, LLC would be funded as the Application with the next highest lottery number. Intervenors point out that the competent substantial evidence demonstrates that Clermont Ridge is the Application with the next highest lottery number.

CONCLUSION

Intervenors, based on this objection requests that a Final Order be entered which rejects or modifies Finding of Fact 10, and identifies Clermont Ridge as the Application with the next highest lottery number recommended for funding .

Respectfully submitted,

CARLTON, FIELDS, JORDEN BURT, P.A.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by E-Mail this 4th day of September 2018 to:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC, and AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

FHFC CASE NO: 2018-039BP
DOAH CASE NO: 18-2967BID

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

PETITIONERS MADISON OAKS, LLC, AND AMERICAN RESIDENTIAL COMMUNITIES, LLC,'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioners Madison Oaks, LLC and American Residential Communities, LLC (collectively "Madison Oaks" or Petitioners), by and through the undersigned counsel, and pursuant to Section 120.57(3)(e), Florida Statutes ("F.S.") and Rule 28-106.217(1), Florida Administrative Code ("F.A.C."), hereby file their exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") on August 23, 2018.

INTRODUCTION

Madison Oaks challenged Florida Housing Finance Corporation's ("Florida Housing") intended decision to award low-income housing tax credits pursuant to Request for Applications No. 2017-111 (the "RFA" or "RFA 2017-111"). Madison Oaks alleged in its petition HTG

Creekside, LLC, ("Oaks at Creekside") failed to select a qualifying school that met the definition of a "public school" as defined in the RFA, was not entitled to be awarded proximity points for this community service, and therefore was ineligible for funding. Oaks at Creekside selected Manatee Charter School ("Manatee School") as it's claimed qualifying "public school." Contrary to Florida Housing's interpretation of its rule and position at the final hearing, the ALJ concluded in her Recommended Order that Madison Oaks failed to prove that the selection of Manatee School was contrary to the RFA. In addition, Madison Oaks challenged the Harper's Pointe, LP ("Harper's Pointe") application. The petition alleged that although the Harper's Pointe development site is bisected by a platted street easement, Harper's Pointe failed to disclose that the development is a "scattered site" as required by the RFA and was therefore ineligible for funding. Contrary to Florida Housing's interpretation of its rule and position at the final hearing, the ALJ concluded in her Recommended Order that Madison Oaks failed to prove that the Harper's Pointe development is a "scattered site." For the reasons stated herein, Florida Housing should reject and/or modify a number of Findings of Fact and Conclusions of Law contained in the Recommended Order and enter a Final Order determining that the Oaks at Creekside and Harper's Pointe applications should not have been funded and awarding funding to Petitioners.

STANDARD OF REVIEW

Section 120.57(1)(l), F.S., establishes the scope of an agency's authority regarding a recommended order. It provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order **may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction**. When rejecting or modifying such 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 were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

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

The agency may reject the ALJ's findings of fact in the recommended order only if the findings are not supported by competent, substantial evidence in the record. *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (*citing Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996)). If the findings are supported by competent, substantial evidence in the record, the agency is bound by those findings. *Id.; see also Dep't of Corrections v. Bradley*, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

With respect to conclusions of law, an agency may reject or modify an ALJ's conclusions of law and application of agency policy. When doing so, the agency must make a finding that its substituted conclusion of law is as reasonable or more reasonable than that which was rejected or modified. *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d at 1092; *see also Goin v. Comm'n on Ethics*, 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

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

For purposes of this response, Florida Housing Finance Corporation will be referred to as "Florida Housing." Intervenor HTG Sunset, LLC will be referred to as "Sunset Lake;" Intervenor HTG Creekside, LLC will be referred to as "Oaks at Creekside;" and Intervenor Harper's Pointe L.P. will be referred to as "Harper's Pointe." Citations to the Recommended Order will appear as (RO p. __). Findings of Fact will be abbreviated "FOF" and Conclusions of Law will be abbreviated as "COL." Citations to the Final Hearing Transcript will appear as (T. __). Citations to Joint Exhibits will appear as (J Ex. __, p.__). Citations to Petitioners' Exhibits will appear as (P Ex. __, p.__). Citations to Harper's Pointe's Exhibits will appear as (HP Ex. __, p.__). Citations to the Joint Pre-Hearing Stipulation will appear as (PHS p.____).

EXCEPTIONS

Exception to FOF #10

In FOF #10 the ALJ incorrectly described the potential funding scenarios. As such, Madison Oaks adopts the following proposed revised Finding of Fact by Florida Housing in its Exceptions:

> If the evidence shows ~~Sterling Terrace can demonstrate~~ that any two of the three Intervenors should not have been recommended for funding, Sterling Terrace ~~it~~ and Clermont Ridge, Ltd ~~Blue Sunbelt, LLC~~, will displace them as applications selected for funding. If the evidence shows ~~Madison Oaks can demonstrate~~ that all three Intervenors should not have been recommended for funding, Madison Oaks, Sterling Terrace and Clermont Ridge, Ltd ~~Blue Sunbelt, LLC~~, will displace them as applications selected for funding.

OAKS AT CREEKSIDE

Exception to COL #63 & #65

In COL #63 the ALJ erroneously, and in conflict with Florida Housing's legal interpretation of its RFA, concludes that the "Manatee School is a public school as defined in the RFA." This conclusion is based upon an erroneous interpretation of the undisputed terms of the

RFA and conflicts with the ALJ's conclusion in FOF #16 that a different school does "not meet the RFA definition of 'public school' because geographic proximity to the school is not the principal admission criterion." This error is carried over to COL #65 where the ALJ determined that Sterling Terrace (implicitly Madison Oaks as well) failed to prove that the award to Oaks at Creekside was erroneous.

As stated by Florida Housing in its Notice of Change of Position, because "geographic proximity to the school was not the principal admission criterion" the Manatee School does not meet the definition of a "public school" in the RFA. (*FHFC Notice of Change of Position*, ¶3; T. 61; *FHFC Proposed Recommended Order*, ¶26). The ALJ acknowledges and adopts this conclusion in FOF #16 stating "*because geographic proximity to the school is not the principal admission criterion*" the school does not meet the definition of "public school." (FOF #16)(emphasis added). Despite finding that geographic proximity is not the principal admission criterion for Manatee School (Oaks at Creekside's selected "public school") the ALJ takes a conflicting position to FOF #16 and fails to concur in Florida Housing's position that its prior award to Oaks at Creekside was "clearly erroneous." (*FHFC Notice of Change of Position*, ¶ 26; FOF #23).

Instead the ALJ independently argues that charter schools are not subject to the geographic proximity requirement.[1] This incorrectly ignores the clear and undisputed language in the RFA which defines a "public school" as:

[1] The genesis of this issue is unclear as this argument was not raised by any party at any point during this proceeding, including Oaks at Creekside. In fact, Oaks at Creekside acknowledged that the Manatee School was required to meet the requirement and, instead argued that it met the requirements. (T. 37-38). In its Proposed Recommended Order, Oaks at Creekside acknowledges:

> A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school. This may include a charter school, if the charter school is open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.

(J. Ex. 1, p. 82). The first sentence of the quoted language requires a school to have geographic proximity as its principal admission criterion in order to qualify as a "public school." The second sentence then says that "this may include a charter school if . . . ." The second sentence cannot be read in isolation without regard to the prior sentence to which it relates. To the extent there is any question, Florida Housing clearly explained its interpretation of the clear and unambiguous language of the RFA that the geographic proximity requirement applies to all schools. (T. 61-62; P. Ex. 19, p. 12). In FOF #23 the ALJ finds that the Manatee Charter School does not meet the first part of the definition, i.e., geographic proximity. Upon making that determination, no further analysis is necessary.

As noted above, it is the undisputed position of the relevant parties, Oaks at Creekside, Madison Oaks, Sterling Terrace and Florida Housing, that to meet the definition of "public school" the school must use "geographic proximity" as the primary admission criteria. (T. 61-62; P. Ex. 19, p. 12; *see also HTG Creekside Proposed Recommended Order*, ¶ 36 ("[c]harter schools, *in addition to meeting the 'geographic proximity' element of the definition*, must also be 'open to appropriately aged children in the radius area who apply....'")(emphasis added)).[2] It is

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> Charter Schools have *an additional requirement to qualify as a Public School* under the RFA terms. *Charter schools, in addition to the meeting the "geographic proximity" element of the definition, must also....*

(*HTG Creekside Proposed Recommended Order*, ¶ 36).

[2] The parties also stipulated that "[i]f the Manatee Charter School does not meet the definition of a "public school" then Oaks at Creekside would not be entitled to 3 points for proximity." (PHS

well established that an agency's interpretation is entitled to great deference. *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998)("courts must also defer to the expertise of an agency in interpreting its rules"); *see also Humana, Inc. v. Dep't of Health and Rehab. Serv.*, 492 So. 2d 388, 392 (Fla. 4th DCA 1986)(an agency's interpretation of its own rule is entitled to great weight and persuasive force). The RFA defines a "public school" as a "*public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school.*" (J. Ex. 1, p. 82)(emphasis added). The ALJ's suggestion that the first part of the definition (geographic proximity) is limited to "traditional" schools, is misplaced. *See Commercial Coating Corp. v. Dep't of Envtl. Reg.*, 548 So. 2d 677, 678 (Fla. 3d DCA 1989)(stating that "[i]n construing statutes courts may not invoke a limitation or add words to the statute not placed there by the legislature."); *see also, State v. Cohen*, 696 So. 2d 435, 438 (Fla. 4th DCA 1997)(courts are without the power to construe an unambiguous statute in a way that would limit its express terms); *see also Syslogic Technology Srvcs. v. South Fla. Water Mgmt. Dist.*, DOAH Case No. 01-4385BID (R.O. Jan. 18, 2002)(agency's interpretation of RFP provision stands unless clearly erroneous).

Even if the ALJ's suggestion is one of the possible interpretations, it is clearly not the only interpretation. Because Florida Housing's interpretation, which utilizes the plain meaning of the RFA provision, clearly falls within the permissible range of interpretations, it must be upheld. *Colbert v. Dep't of Health*, 890 So. 2d 1165 (Fla. 1st DCA 2004); *see also Dep't of Natural Res. v. Wingfield Dev. Co.*, 581 So. 2d 193 (Fla. 1st DCA 1991)(only upon a determination that an agency's interpretation is clearly erroneous will such an interpretation be

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p. 20). There is no suggestion that it is only necessary for the school to meet part of the definition.

overturned). As Florida Housing's interpretation is as reasonable or more reasonable as the ALJ's, it must be upheld. And as the ALJ finds that the Manatee School does not use geographic proximity as the principal admission criterion, the ALJ's conclusion that the school meets the RFA's definition of "public school" must be rejected.

Exceptions to COL #64

In COL #64, the ALJ notes that it is Florida Housing's initial decision to award funding to Oaks at Creekside that is at issue. While true, this statement is followed by Footnote #13 in which the ALJ states that she is compelled to comment on Florida Housing's position that Manatee School does not meet the RFA definition of "public school." It is in this footnote that the ALJ outlines her erroneous suggestion that Florida Housing's interpretation is contrary to the plain language of the RFA. This is despite the fact that this interpretation is expressed by ALL of the relevant parties, including, as previously noted, Oaks at Creekside. Because the ALJ's arguments are clearly erroneous Madison Oaks is compelled to comment on her position.

The ALJ first argues that the first sentence "clearly and unequivocally refers to the admission criteria of *traditional* public schools" while the "second sentence applies specifically to charter schools...." The ALJ is correct that the second sentence refers specifically to charter schools. However, to support her argument that the first sentence does not apply to charter schools, she erroneously adds the term "traditional" into the definition.[3] *See Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001) ("[A] basic principle of statutory construction" prevents courts from "add[ing] words to statutes that were not placed there by the Legislature."). The plain

[3] Section 1002.33, Florida Statutes, upon which the ALJ relies to support her argument, does not distinguish between "traditional" and "non-traditional" public schools.

language of the RFA does not use the term "traditional"[4] and the first sentence does not distinguish between "traditional" and charter schools. Instead, the plain language of the definition applies to "public elementary, middle, junior and/or high schools." (J. Ex. 1, p. 82). All charter schools are "public schools." Section 1002.33(1), Florida Statutes. Therefore, the first sentence's reference to "public ... schools" includes charter schools.

If taken to its logical extension, the ALJ's argument would nullify the primary purpose of the proximity preference, recognized in FOF # 17, that the intended residents are able to use the services in proximity to the development. Under the ALJ's interpretation, an applicant in Manatee County gets proximity points for a charter school that, by contract, has a radius area of Leon County, so long as it is open to appropriately-aged children in Leon County who apply.[5] While an extreme example, it demonstrates the error of the ALJ's argument.

Finally, the ALJ argues that a charter school cannot be both open to any student within the school district and use geographic proximity as the primary admission criteria. While Petitioners dispute this reading of the law,[6] even if true, the requirement remains applicable. Challenges to the requirements in an RFA are subject to the time limitations in section

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[4] The term "traditional" with respect to public schools is not found in the RFA and there is no discussion or testimony regarding what constitutes a "traditional public school."

[5] Those criteria are: (1) open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations; and, (2) been in existence and available for use by the general public as of the Application Deadline.

[6] Though the ALJ is attempting to create an untimely challenge on an issue not raised by any party, in reaching her conclusion that a charter school cannot be both, the ALJ confuses being "open to any student" with applying "admission criteria." Section 1002.33(10), Florida Statutes, which is cited by the ALJ in support of her argument, only references a charter school being open to any student. No limitation is placed upon the charter schools admission criteria. As such, the ALJ's conclusion is misguided. State universities are open to any student; however, the universities still apply admission criteria when determining which of those students are accepted. Nothing in Chapter 1002, Florida Statutes, precludes a charter school from operating similarly.

120.57(3)(b), Florida Statutes. *See Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569 (Fla. 4th DCA 1998)(the purpose of specification challenges is to allow an agency to clarify the specifications prior to accepting bids to save expense and assure fair competition); *see also Capeletti Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855 (Fla. 1st DCA 1986). Therefore, if any party felt that the requirements were invalid or exceeded Florida Housing's authority, it was required to pursue a challenge pursuant to section 120.57(3), Florida Statutes. Because no challenge was filed, the requirement is applicable and cannot be dismissed. In *Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569 (Fla. 4th DCA 1998), the court found that the right to challenge an alleged unconstitutional race-based requirement in a RFP was waived due to the failure to timely challenge the criteria. *Id.* at 573-74 ("Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, Optiplan has waived its right to challenge the criteria."); *see also Capeletti Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855 (Fla. 1st DCA 1986)("The proper procedure for contesting the [invalid requirement] was by filing a bid solicitation protest within seventy-two hours of receipt of the project plans and specifications.").

Based upon the above, the arguments raised by the ALJ are either erroneous or untimely. Further, as Florida Housing's interpretation is at least as or more reasonable than that argued by the ALJ, the ALJ's interpretation must be rejected. When the correct interpretation of the RFA term is applied, and based upon the finding that Manatee Charter School does not use geographic proximity as its primary admission criteria, it must be concluded that Oaks at Creekside is not entitled to the three (3) points for proximity and must not be awarded funding.

Exception to FOF #31, #33 & #34

In FOF #33, the ALJ incorrectly labels her legal conclusion that "preferences are not additional requirements" as a factual finding. This legal conclusion also contradicts the agency interpretation attested to by Florida Housing's Corporate Representative, Marisa Button. At the Corporate Representative deposition Florida Housing stated that a sibling preference is an additional requirement for admission if it can preclude a student living in geographic proximity from attending the school. (P. Ex. 19, p. 68). Because Manatee School's preferences can prevent a student in the area from being able to attend the school (P. Ex. 1, p. 10, FOF #32), those requirements take Manatee School outside the RFA's definition of "public school." (P. Ex. 19, p. 68-69). Florida Housing's interpretation of its RFA terms regarding the award of proximity points to affordable housing developments is within its expertise. Because the ALJ makes no determination that Florida Housing's interpretation of the RFA is clearly erroneous she is bound by that interpretation. *See Pan American World Airways, Inc. v. Public Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983)("We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous."). Given Florida Housing's interpretation that these preferences are additional requirements for admission, and the ALJ's finding in FOF #32 that Manatee School does have admission preferences, the ALJ's conclusions in FOFs #31 and #34 are clearly erroneous and must be rejected.

HARPER'S POINTE

Turning to the Harper's Pointe application, the only issue remaining at the hearing was whether the proposed Development Site is a "scattered site" as defined by Florida Housing rule 67-48.002(105), F.A.C. Prior to the hearing, Florida Housing, in its position statement in the Joint Prehearing Stipulation, announced the Agency interpretation of the "scattered site" rule

stating that if the "Harper's Pointe's Development site is bisected by an easement for a roadway or street, even if no actual roads or streets have been constructed, then it would ... meet the definition of a Scattered Site." (PHS p. 19). Indeed, Florida Housing's representative at hearing, Ms. Button, testified that Florida Housing's interpretation of this "scattered site" rule is that an easement for a roadway or a street, even a dirt road, bisecting a property, creates a scattered site. (T. 115-116). The agency interpretation of this rule is that the presence of an easement for a roadway or street bisecting the Development site is a "scattered site."

The ALJ made the following relevant findings of fact regarding Harper's Pointe:

> 35. Madison Oaks argues Harper's Pointe is ineligible for funding pursuant to the RFA because the Harper's Pointe development site is a "scattered site," and Harper's Pointe did not identify the site as such and comply with the RFA requirement to designate latitude and longitude coordinates for both sites.
>
> 36. Rule 67-48.002(105) defines "scattered sites" as follows:
>
> > (105) "Scattered sites," as applied to a single Development, means a Development site that, when taken as a whole, is comprised of real property that is not contiguous (each such non-contiguous site within a Scattered Site Development, is considered to be a "Scattered Site"). For purposes of this definition "contiguous" means touching at a point or along a boundary. Real property is contiguous if the only intervening real property interest is an easement, **provided the easement is not a roadway or street**. All of the Scattered Sites must be located in the same county. (emphasis added)
>
> 37. Section Four A.5.c. of the RFA states: "The Applicant must state whether the Development consists of Scattered Sites."
>
> 38. Section Four A.5.d. of the RFA requires that applicants provide latitude and longitude coordinates for the Development Location Point and any scattered sites.
>
> 39. Section Five A.1. provides that "only items (sic) that meet all of the following will be eligible for funding and consideration for funding selection." Among the items listed are "Question whether a Scattered Sites Development answered" and "Latitude and Longitude Coordinates for any Scattered Site provided, if applicable."

40. Harper's Pointe did not state in its application that the development consists of scattered sites, and did not provide separate latitude and longitude coordinates for scattered sites.

41. Harper's Pointe's proposed development site, as identified in its Site Control Documents, consists of land located within a platted tract of property. The plat recorded in Alachua County indicates that the site is bisected by a platted 50-foot street easement running east/west through the property.

The plat identified in FOF #41 was not contained in Harper's Pointe's application. (*See* J. Ex. 6). When Florida Housing initially scored the Harper's Pointe application, there was no indication in the application that the development site was bisected by a platted street easement, and Florida Housing scored the application as eligible. During the hearing, however, the evidence was clear that there actually was an express easement bisecting the development site, and that this easement was identified on the plat as a "50-foot street." (P. Ex. 6). Therefore, the fact that the site was bisected by a platted 50-foot street easement was not reviewed by Florida Housing when scoring the application and subsequently determining the proposed agency action to award Harper's Pointe funding. This lack of information, at the time of the initial review, caused the erroneous recommendation for funding.

FOFs #35 through #41 of the Recommended Order ruled that if an applicant's Development site is a "scattered site" and it did not disclose this in the application nor provide the required information regarding the "scattered site," the applicant would not be eligible for funding. With FOF #41 establishing that "the site is bisected by a platted 50-foot street easement running east/west through the property" and the application of the Florida Housing interpretation of its rule that a bisecting easement for a road or street creates a "scattered site," there is no need for further findings of fact to reach the conclusion of law that Harper's Point is not eligible for funding. The original proposed agency action was based on a material omission in the Harper's Pointe application that was unknown to Florida Housing at the time of scoring and ranking the

application. With the knowledge that the Harper's Pointe Development site is a "scattered site" and the fact that this was not disclosed in the application, Florida Housing's preliminary determination of eligibility is contrary to RFA specifications. The determination to find Harper's Pointe eligible for funding was clearly erroneous. With a clear understanding of the facts now known, it is fundamentally evident that "a mistake has been committed" and the proposed award should be overturned. *U.S. v. U.S. Gypsum Co.*, 333 U.S. 354, 395 (1948).

However, the ALJ continues into a lengthy discussion of the existing conditions on the Harper's Pointe Development site which are irrelevant to the determination of whether the Development is a "scattered site" under the rule. One of these findings is incorrect and requires modification to be accurate. FOF #45 should be amended as follows:

> 45. An existing roadway, Northeast 23rd Street~~Avenue~~, terminates at the northern~~eastern~~ property line~~just south of the east/west easement~~. The City has placed barriers at that property line along Northeast 3rd Avenue prohibiting access to the property from the north onto Northeast 23rd Street~~Avenue~~.

Only two short conclusions of law address the Harper's Pointe application and provide no indication of the ALJ's interpretation of the "scattered site" rule; however, it is apparent through the findings of fact that the ALJ is interpreting the rule definition to require other factors to be considered beyond the existence of an easement for a street bisecting the development site.

The ALJ does not challenge Florida Housing's interpretation of the "scattered site" rule nor even discuss her implicit alternate interpretation of the Florida Housing "scattered site" rule. Indeed, neither any findings of fact nor conclusions of law in the Recommended Order provide any explanation of the ALJ's interpretation of this rule. Without a ruling finding that the agency rule interpretation is clearly erroneous, Florida Housing's interpretation must be applied. *Dep't of Natural Res. v. Wingfield Dev. Co.*, 581 So. 2d 193 (Fla. 1st DCA 1991)(only upon a determination that an agency's interpretation is clearly erroneous will such an interpretation be

overturned); *see also State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998); *Humana, Inc. v. Dep't of Health and Rehab. Serv.*, 492 So. 2d 388, 392 (Fla. 4th DCA 1986). Even if the ALJ's suggestion was one of the possible interpretations, it is clearly not the only interpretation. Because Florida Housing's interpretation falls within the permissible range of interpretations, it must be upheld. *Colbert v. Dep't of Health*, 890 So. 2d 1165 (Fla. 1st DCA 2004)

The status of construction is not relevant once the existence of an easement for a street is established under the Florida Housing interpretation of its rule. Indeed, Florida Housing set forth in its position statement that even if no actual roads or streets have been constructed, if there is a bisecting easement for a roadway or street it is a "scattered site" under its interpretation of its rule. (PHS p. 19). Florida Housing's representative confirmed this interpretation and the ALJ found that she testified "Florida Housing's determination did not depend on whether a roadway or street is actually constructed within the easement." (FOF #47).

FOFs #43 through #45 continue discussing some improvement to the street easement areas and whether the street easement would connect to other roadways. Again, this is not relevant to the issue that an existing easement for a road or street bisects the Development site. In FOF #46, the ALJ is paraphrasing the rule, stating that "[i]f the **platted street** is a 'roadway or street' as those terms are used in rule 67-48.002(105), the site would meet the definition of a 'scattered site.'" (emphasis added). Under the Florida Housing interpretation of its rule, a platted street constitutes a "roadway or street" and is a "scattered site." The ALJ once again is acknowledging that the platted easement is for a street which is sufficient under the agency interpretation of its rule to determine the Harper's Pointe development is a scattered site.

From this point on, from FOF #47 through #53, the ALJ goes far afield from the agency interpretation of the "scattered site" rule. She seems confused and implies that there are some "other factors," which do not exist in rule or in agency past practices to determine whether the street easement could actually support traffic or provide additional routes and whether improvements exist on the property that would have to be demolished to construct the proposed project.

Finally, these other factors are irrelevant if it is determined that a street easement exists. It is the existence of the street easement that hinders site control. The "scattered site" condition is only considered under the site control section of the RFA. (J. Ex. 1, pp. 19, 33). To complete the development as a continuous parcel, the street easement would have to be extinguished or waived. There is no evidence in the record that Harper's Pointe received a waiver from the easement holders nor that the platted street easement was vacated by the City of Gainesville. None of the issues discussed in these "other factors" findings (FOFs #42-53) is relevant since the determination that the easement is for a street has already been found in FOF #41.

With FOF #45 corrected, FOFs #42 through #53 are unnecessary and irrelevant, but need not be rejected or stricken since they do not impact the conclusion that Harper's Pointe's development site is a "scattered site" under the Florida Housing interpretation of its rule

Petitioner's exceptions to FOF #54, FOF #55, and COL #67 will be argued together. In FOFs #54 and #55, the ALJ mislabels conclusions of law as findings of fact when she concludes that the Harper's Pointe property is not a "scattered site" and, therefore, Madison Oaks failed to prove Harper's Pointe was improperly awarded funding. If a COL is improperly labeled as a FOF, an agency is not bound by the labels affixed by the ALJ and "the label is disregarded and the item is treated as though it were properly labeled." *Battaglish Properties, Ltd. v. Florida*

Land & Water Adjudicatory Comm'n., 629 So. 2d 161, 168 (Fla. 1st DCA 1993) (*citing Kinney v. Dep't of State*, 501 So. 2d 129 (Fla. 5th DCA 1987)). These erroneous conclusions of law appear to be based upon her unnecessary findings in FOF #53 that:

> 53. There is not an improved area preventing access from the northern to the southern portion of the development site. There is no structure built within the easement which would have to be demolished in order to build the project on the development site as a single parcel.

This conclusion ignores the definition of "scattered site" and is clearly erroneous as it negates the purpose of the rule, i.e., that the applicant has sufficient site control over the entire parcel. As stated by counsel for Florida Housing at hearing, "[t]he only real question left is, is this an easement for a street or a roadway. It may or may not be a roadway or street, but whatever it is, it's an easement of something." (T. 19).

In FOF #41, the ALJ finds that the plat "indicates the site is bisected by a platted 50-foot street easement running east/west through the property." (*See also* PHS #22; *Joint Stipulation Between Madison Oaks and Harper's Pointe*, ¶19). Upon making that finding, as noted by Florida Housing, no further analysis is required. Pursuant to rule 67-48.002(105), F.A.C., a property is a "scattered sites" if it:

> is comprised of real property that is not contiguous.... *Real property is contiguous if the only intervening real property interest is an easement, provided the easement is not a roadway or street.*

(emphasis added). Therefore, once the ALJ made her finding in FOF #41 that the easement is a street easement and bisects the site the only conclusion remaining is that the property is not contiguous and is a "scattered site." Examining the rule language closely provides for no other logical interpretation. The "scattered site" rule states that as long as the easement is not for a roadway or street, the property will be considered contiguous. The alternative interpretation proposed by the ALJ to read the corollary as "the easement is a roadway or street" is impossible.

Easements are property rights not a street or roadway. Any attempt to add in requirements that the street easement be a constructed or paved street, be a tributary road to connect other roads or be a public thoroughfare is beyond any logical reading and is arbitrary.

The parties stipulated to the existence of the street easement and the ALJ specifically found that the easement was a "50-foot street easement running east/west through the property." (FOF #41; *see also* PHS #22; *Joint Stipulation Between Madison Oaks and Harper's Pointe*, ¶19). Once an easement was created by expressed grant, as in this case, "any ambiguity must be resolved against the grantor." *Diefenderfer v. Forest Park Springs*, 599 So. 2d 1309 (Fla. 5th DCA 1992). Had there been no expressed street easement nor stipulation as to the existence of the easement, such as when Florida Housing conducted its initial review and determination, "other factors" may have supported a finding that an easement did not exist. With the finding that the plat contains a "platted 50-foot street easement" (FOF #41) and the stipulation, such consideration at this point is fruitless.

It is readily apparent the "other factors" analysis is an attempt to determine the validity of the platted street easement and the extent of property rights conferred by the express street easement. However, the ALJ already ruled that real property actions are beyond the jurisdiction of this tribunal. (T. 11-12)(ALJ granted Motions in Limine to exclude expert testimony on real property issues regarding the easement and plat); *see also* section 26.012(2)(g), F.S. (Circuit Courts shall have exclusive original exclusive jurisdiction in all actions involving title and boundaries of real property). If the validity of the plat or quality of the express street easement are to be considered in this tribunal, then Madison Oaks should not have been precluded from putting on its real property experts to testify that the express street easement is currently valid for public and private use and that the Parcel 2 owner has the right to construct paved road bisecting

the Harper's Pointe Development site. (*See* Attachment 1, *Madison Oaks Expert Report of Ross Payne*).

Given the ruling precluding testimony regarding real property issues, the only remaining issue that could exist is whether the easement is for a street or roadway easement as opposed to a utility or other type of easement. (FOF #48; T. 19, 43). In this case, the parties stipulated, and the ALJ found, that this was and is a street easement. Neither argument nor evidence in the record exist that it is any other type of easement. The attempt by counsel for Harper's Pointe in its Proposed Recommended Order and now the ALJ in the Recommended Order to impermissibly and inaccurately analyze the current validity and quality of the property rights granted by the expressed street easement that bisects the Harper's Pointe development site is improper. The ALJ found that the platted 50-foot wide street easement bisects the Harper's Pointe site. Florida Housing's interpretation of the "scattered site" rule mandates Harper's Point Development site be deemed a "scattered site." Florida Housing's counsel stated Florida Housing's interpretation consistently in its prehearing stipulation, at hearing in this matter and in Florida Housing's Proposed Recommended Order. Consistent with this interpretation, Florida Housing's representative, Ms. Button, provided uncontroverted testimony that this 50-foot street easement bisects the site making the Harper's Pointe site a "scattered site" and that its failure to disclose the fact that it had a "scattered site" renders it ineligible for funding. Florida Housing must consistently apply its rules and cannot choose at this point to ignore the proper application of this rule even with the erroneous ruling by the ALJ. *Collier Cty. Bd. of Cty. Comm'n v. Fish & Wildlife Conservation Comm'n*, 993 So. 2d 69, 72–73 (Fla. 2d DCA 2008)("And, of course, an agency is required to follow its own rules."); *Vantage Healthcare Corp. v. Agency for Health Care Admin.*, 687 So. 2d 306, 308 (Fla. 1st DCA 1997)(the agency is obligated to follow its own

rules); *Marrero v. Dep't of Prof. Reg.*, 622 So. 2d 1109, 1111 (Fla. 1st DCA 1993); *Decarion v. Martinez*, 537 So. 2d 1083, 1084 (Fla. 1st DCA 1989); *Gadsden State Bank v. Lewis*, 348 So. 2d 343 (Fla. 1st DCA 1977).

In COL #67, the ALJ erroneously concludes that Madison Oaks failed to prove that the intended award to Harper's Pointe was clearly erroneous. This error is based upon the errors in FOF #54. As discussed above, the conclusions reached in FOF #54 and #55 were based upon an erroneous interpretation of Florida Housing's rule and must be rejected. Because Florida Housing's interpretation of its own rule is as reasonable as that of the ALJ it controls and, as a result, COL #67 must be overturned and Florida Housing's interpretation inserted.

CONCLUSION

For the reasons stated herein, Florida Housing should reject or modify the Findings of Fact and Conclusions of Law and enter a Final Order determining that Oaks at Creekside and Harper's Pointe are ineligible for funding; and awarding tax credits to Petitioners Madison Oaks, LLC and American Residential Communities, LLC.

Respectfully submitted this 4th day of September, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via electronic mail on the following persons this 4th day of September, 2018:

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/s/ Craig D. Varn
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Attorneys for Petitioners
Madison Oaks, LLC and
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON OAKS, LLC AND AMERICAN RESIDENTIAL COMMUNITIES, LLC, Petitioners, vs FLORIDA HOUSING FINANCE CORPORATION, Respondent, and ARBORS AT HESTER LAKE, LLC; COLONNADE PARK, LTD; HTG CREEKSIDE, LLC; HTG SUNSET, LLC; AND HARPER'S POINTE, LP, Intervenors. _____/	Case Nos.: 18-2966BID 18-2967BID 18-2968BID

EXPERT REPORT OF ROSS E. PAYNE

Introduction

My name is Ross E. Payne, and I have been retained by the law firm of Zimmerman, Kiser & Sutcliffe, P.A., counsel for Petitioners, Madison Oaks, LLC and American Residential Communities, LLC, as an expert witness in this matter.

Documents Reviewed

1. Portions of the Second Amended Formal Written Protest of Award and Petition for Administrative Hearing.
2. The Davis Replat which appears in Official Records Book 134, page 378 (best copy) (the "Plat").
3. Chains of title as to Parcel 1, Parcel 2, Parcel 3, and Parcel 4. Parcel 1 is the property at issue here, the Harper's Pointe development site. Parcel 2 is land to the east thereof consisting of Lots 1 and 2 of Block 3 of the Plat. Parcel 3 is land consisting of Lot 4 of Block 2 of the Plat. Parcel 4 is the South ½ of Lot 3 of Block 1 of the Plat.
4. A survey of Parcel 1 which also shows Parcel 2, Parcel 3, and Parcel 4. A copy is attached to this Report as Exhibit "A."
5. Case law other legal research as I have deemed necessary to render the opinions set forth in this Report.

Opinions

1. The Statement of the Case of Florida Housing Finance Corporation in part states: "If Petitioners can demonstrate that Harper's Pointe's proposed Development site is bisected by an easement for a roadway or street, even if no actual roads or streets have been constructed, then it would be Florida Housing's position that this Development would meet the definition of a Scattered Site." Parcel 1 is in fact bisected by easements for streets.

2. The Plat was recorded in 1961. The Plat contains three separate references to 50-foot and 60-foot wide streets. A plat recorded before 1971was an offer of dedication of the streets on the plat to the county or municipality (after 1971, dedication was complete on recording). No public rights arose until acceptance of such offer. Acceptance could be by formal government action, or implied by public use. See Fund Title Note 24.01.01(A)(1)(a) and the cases cited therein. When the Plat was recorded, there was an offer to dedicate the streets to the public. I have received no information indicating that the offer was formally accepted or impliedly accepted by public use, or revoked. Any revocation would require notice to the applicable governing body and the consent of those who later took title to lots within the Plat. See Fund Title Note 24.01.01(A)(1)(c) and the cases cited therein. There has not been a vacation of any of the streets shown on the Plat. Thus, there is an open offer to dedicate the streets shown on the Plat. If however the Plat did not meet the formal requirements of the applicable governing body, then there may not have been an offer to dedicate.

3. The owner of Parcel 2 has an express easement over the streets shown on the Plat. This express easement was first created by a 1966 deed from Davis to Moore and also in subsequent deeds including the last deed of record from 1996. The language is as follows: "together with the right of ingress and egress over the streets as shown on the plat recorded in Official Records Book 134, page 378, of the Public Records of Alachua County, Florida." The easement is valid even if the plat did not meet the formal requirements of the applicable governing body. See 25 Am. Jur. 2d Easements and Licenses Sec. 21 ("An easement created on conveyance with a reference to a map or plat is not negated by the fact that the map or plat is not properly made or recorded for purposes of dedication. Such an easement also is not negated by the mere failure of the public authorities to accept the streets or ways or by an abandonment of them.")

4. The owners of Parcel 3 and Parcel 4 have private rights in the streets shown on the Plat that arose upon the initial conveyance of Parcel 3 and Parcel 4 (implied easements, in other words). See Fund Title Note 24.01.01(B)(1) and the cases cited therein. These rights might possibly be limited by the beneficial use rule but this determination would have to be made by a court unless the owners of Parcel 3 and Parcel 4 agreed in a recorded document to such limitation. These owners hold title to a reversionary interest to the center of the streets adjacent to their properties. The conveyances of Parcel 3 and Parcel 4 is valid even if the plat did not meet the formal requirements of the applicable governing body. On the latter point, see *D.R.L., Inc. v. Murphy*, 508 So.2d 413 (Fla. 5th DCA 1987) (at 414: "The validity of deeds does not depend on the 'validity' of the plat to which the property descriptions in the deeds refer if the plat is sufficient to locate on the ground the property described.).

5. Charles Gardner, an attorney who has been retained as an expert witness in this matter by Harper's Pointe, LP, in his Memorandum to File dated July 9, 2018, attempts to address, as his Question 3, whether certain easements within Parcel 1 (he does not agree that there are implied easements, only the express easement with respect to Parcel 2) are a "roadway or street." He concludes that "no 'roadway or street' exists within the easement area . . . ." He is correct only to the extent that there are not constructed, paved streets on the areas in question. The easements discussed in this Report are for ingress and egress to and from the pertinent lands. The very language of the express easement is "together with the right of ingress and egress over the streets as shown on the plat." It's the same as if they had said "an easement for street purposes" or "an easement for road right of way." These are often called "paper streets" by real estate lawyers and surveyors. Just because there's no paved roadway it does not mean there will not be one in the future. In fact, the owner of Parcel 2 has the right to build streets there now if it wants to. The holder of an easement may use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of easement. See, e.g., Diefenderfer v. Forest Park Springs, 599 So. 2d 1309 (Fla 5th DCA 1992). *Kovach v. Holiday Springs RV. LLC*, 223 So.3d 1069 (Fla. 5th DCA 2017). Every plat has paper streets until the streets are actually built.

6. Any reasonably prudent title insurance company issuing a policy on Parcel 1 would require exceptions for the rights of the Parcel 2 owner under the express easement as to the streets on the Plat and the rights of the owners of Parcel 3 and Parcel 4 under the implied easements as to the streets on the Plat.

Qualifications

My qualifications for issuing this Report and acting as an expert witness in this action include the following (with my resume being attached to this Report as Exhibit "A"):

1. I have been a member in good standing of The Florida Bar since November 5, 1982.

2. I am a Board Certified Real Estate Lawyer (since 1992).

3. For over five years (from August 1987 through October 1992) I was a member of the Legal Department at Attorneys' Title Insurance Fund, Inc., serving as Senior Underwriting Counsel.

4. I have had significant speaking experience in areas of real estate law and title examination.

5. I have had substantial experience in title searches, title examination, the resolution of title problems (many of which involved easements and platted streets), and title insurance commitments and policies.

6. Presently, I am in private law practice, concentrating in real estate and business matters of varying complexity. The name of my law firm is Resort Law Firm, P.A. (formerly Caldwell & Payne, P.A., which is located at in Clermont, Florida.

Other Cases

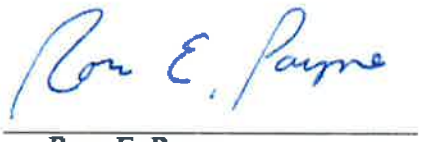
During the last three years, I have testified (at trial, by deposition, or by affidavit) as an expert witness the cases listed in Exhibit "B" attached to this Report.

Compensation

My compensation in this matter is based on the hourly rate of $450.00.

□ □ □

EXECUTED this 10th day of July, 2018.



Ross E. Payne

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

STERLING TERRACE, LTD., and
STERLING TERRACE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

FHFC CASE NO: 2018-040BP
DOAH CASE NO: 18-2967BID

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

PETITIONERS STERLING TERRACE, LTD. AND STERLING TERRACE DEVELOPER, LLC'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioners Sterling Terrace, Ltd. and Sterling Terrace Developer, LLC (collectively "Sterling Terrace"), by and through the undersigned counsel, and pursuant to Section 120.57(3)(e), Florida Statutes ("F.S."), hereby file their exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") on August 23, 2018.

ADOPTION OF FHFC'S OAKS AT CREEKSIDE EXCEPTIONS

Sterling Terrace adopts and incorporates herein Florida Housing Finance Corporation's ("Florida Housing") Exceptions to the Recommended Order regarding Oaks at Creekside. In addition, Sterling Terrace submits the following exceptions.

INTRODUCTION

Sterling Terrace challenged Florida Housing's intended decision to award low-income housing tax credits pursuant to Request for Applications No. 2017-111 (the "RFA" or "RFA 2017-111"). Sterling Terrace alleged in its petition that Intervenor HTG Creekside, LLC, ("Oaks at Creekside") failed to select a qualifying school that met the definition of a "public school" as defined in the RFA and therefore was not entitled to be awarded proximity points for this community service. Oaks at Creekside selected Manatee Charter School as it's claimed qualifying "public school." Contrary to Florida Housing's position at the final hearing, the ALJ concluded in her Recommended Order that Sterling Terrace failed to prove that the selection of Manatee Charter School was contrary to the RFA. For the reasons stated herein, Florida Housing should reject and/or modify a number of Findings of Fact and Conclusions of Law contained in the Recommended Order and enter a Final Order determining that Oaks at Creekside's application was ineligible, and awarding funding to Petitioners.

STANDARD OF REVIEW

Section 120.57(1)(l), F.S., establishes the scope of an agency's authority regarding a recommended order. It provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order **may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction**. When rejecting or modifying such 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 were not based upon competent

> substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.

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

The agency may reject the ALJ's findings of fact in the recommended order only if the findings are not supported by competent, substantial evidence in the record. *Charlotte Cnty. v. IMC Phosphates Co.,* 18 So. 3d 1089, 1092 (Fla. 2d DCA 2009) (*citing Brogan v. Carter*, 671 So. 2d 822, 823 (Fla. 1st DCA 1996)). If the findings are supported by competent, substantial evidence in the record, the agency is bound by those findings. *Id.; see also Dep't of Corrections v. Bradley,* 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987).

With respect to conclusions of law, an agency may reject or modify an ALJ's conclusions of law and application of agency policy. When doing so, the agency must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. *Charlotte Cnty. v. IMC Phosphates Co.*, 18 So. 3d at 1092; *see also Goin v. Comm'n on Ethics,* 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995).

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

Citations to the Recommended Order will appear as (RO p. __). Findings of Fact will be abbreviated "FOF" and Conclusions of Law will be abbreviated as "COL." Citations to the Final Hearing Transcript will appear as (T. __). Citations to Joint Exhibits will appear as (J. Ex. __, p. __). Citations to Petitioners' Exhibits will appear as (P. Ex. __, p. __). Citations to the Joint Pre-Hearing Stipulation will appear as (PHS p. __).

EXCEPTIONS

Exception to COL #63 & #65

In COL #63 the ALJ erroneously, and in conflict with Florida Housing's legal interpretation of its RFA, concludes that the Manatee Charter School "is a public school as defined in the RFA." This conclusion is based upon an erroneous interpretation of the undisputed terms of the RFA and conflicts with the ALJ's conclusion in FOF #16 that a school does "not meet the RFA definition of 'public school' because geographic proximity to the school is not the principal admission criterion." This error is carried over to COL #65 where the ALJ determined that Sterling Terrace failed to prove that the award to Oaks at Creekside was erroneous.

As stated by Florida Housing in its Notice of Change of Position, because "geographic proximity to the school was not the principal admission criterion" the Manatee Charter School does not meet the definition of a "public school" in the RFA. (*FHFC Notice of Change of Position*, ¶3; T. 61; FHFC Proposed Recommended Order, ¶26). The ALJ acknowledges and adopts this conclusion in FOF #16 stating "*because geographic proximity to the school is not the principal admission criterion*" the school does not meet the definition of "public school." (emphasis added). Despite finding that geographic proximity is not the principal admission criterion for Manatee Charter School (Oaks at Creekside's selected "public school") the ALJ takes a conflicting position to FOF #16 and fails to concur in Florida Housing's position that its prior award to Oaks at Creekside was "clearly erroneous". (*FHFC Notice of Change of Position*, ¶ 26; FOF #23).

Instead the ALJ independently argues that charter schools are not subject to the geographic proximity requirement.[1] This incorrectly ignores the clear and undisputed language in the RFA. And, while the RFA definition of "public school" makes no distinction as to the type of school to which the first sentence applies, to the extent there is any question, Florida Housing clearly explained its interpretation of the clear and unambiguous language of the RFA stating that the geographic proximity requirement applies to all schools. (T. 61-62; P. Ex. 19, p. 12). In FOF #23 the ALJ finds that the Manatee Charter School does not meet the first part of the definition, i.e., geographic proximity. Upon making that determination, no further analysis is necessary.

As noted above, it is the undisputed position of the relevant parties, Oaks at Creekside, Sterling Terrace, Madison Oaks and Florida Housing, that to meet the definition of "public school" the school must use "geographic proximity" as the primary admission criteria. (T. 61-62; P. Ex. 19, p. 12; *HTG Creekside Proposed Recommended Order*, ¶ 36 ("[c]harter schools, *in addition to meeting the 'geographic proximity' element of the definition*, must also be 'open to appropriately aged children in the radius area who apply....'")(emphasis added)).[2] It is well

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[1] The genesis of this issue is unclear as this argument was not raised by any party at any point during this proceeding, including Oaks at Creekside. In fact, Oaks at Creekside acknowledged that the Manatee Charter School was required to meet the requirement and, instead argued that it met the requirements. (T. 37-38). In its Proposed Recommended Order, Oaks at Creekside acknowledges:

> Charter Schools have *an additional requirement to qualify as a Public School* under the RFA terms. *Charter schools, in addition to the meeting the "geographic proximity" element of the definition, must also....*

(*HTG Creekside Proposed Recommended Order*, ¶ 36).

[2] The parties also stipulated that "[i]f the Manatee Charter School does not meet the definition of a "public school" then Oaks at Creekside would not be entitled to 3 points for proximity." (PHS p. 20). There is no suggestion that it is only necessary for the school to meet part of the definition.

established that an agency's interpretation is entitled to great deference. *State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607 (Fla. 1st DCA 1998)("courts must also defer to the expertise of an agency in interpreting its rules"); *see also Humana, Inc. v. Dep't of Health and Rehab. Serv.*, 492 So. 2d 388, 392 (Fla. 4th DCA 1986)(an agency's interpretation of its own rule is entitled to great weight and persuasive force). This deference also applies to solicitations. *See Syslogic Technology Srvcs. v. South Fla. Water Mgmt. Dist.*, DOAH Case No. 01-4385BID (R.O. Jan. 18, 2002)(agency's interpretation of RFP provision stands unless clearly erroneous). The RFA defines a "public school" as a "*public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school.*" (emphasis added). The ALJ's suggestion that the first part of the definition (geographic proximity) is limited to "traditional" schools is misplaced. *See Commercial Coating Corp. v. Dep't of Envtl. Reg.*, 548 So. 2d 677, 678 (Fla. 3d DCA 1989)(stating that "[i]n construing statutes courts may not invoke a limitation or add words to the statute not placed there by the legislature."); *see also, State v. Cohen*, 696 So. 2d 435, 438 (Fla. 4th DCA 1997)(courts are without the power to construe an unambiguous statute in a way that would limit its express terms); *see also Syslogic Technology Srvcs. v. South Fla. Water Mgmt. Dist.*, DOAH Case No. 01-4385BID (R.O. Jan. 18, 2002).

Even if the ALJ's suggestion is one of the possible interpretations, it is clearly not the only interpretation. Because Florida Housing's interpretation, which utilizes the plain meaning of the RFA provision, clearly falls within the permissible range of interpretations, it must be upheld. *Colbert v. Dep't of Health*, 890 So. 2d 1165 (Fla. 1st DCA 2004); *see also Dep't of Natural Res. v. Wingfield Dev. Co.*, 581 So. 2d 193 (Fla. 1st DCA 1991)(only upon a determination that an agency's interpretation is clearly erroneous will such an interpretation be

overturned). As Florida Housing's interpretation is as reasonable or more reasonable, it must be upheld. And as the ALJ finds that the Manatee Charter School does not use geographic proximity as the principal admission criterion, the ALJ's conclusion that the school meets the RFA's definition of "public school" must be rejected.

Exceptions to COL #64

In COL #64, the ALJ notes that it is Florida Housing's initial decision to award funding to Oaks at Creekside that is at issue. While true, this statement is followed by Footnote #13 in which the ALJ states that she is compelled to comment on Florida Housing's position that Manatee Charter School does not meet the RFA definition of "public school." It is in this footnote that the ALJ outlines her erroneous suggestion that Florida Housing's interpretation is contrary to the plain language of the RFA. This is despite the fact that this interpretation is expressed by ALL of the relevant parties, including, as previously noted, Oaks at Creekside. Because the ALJ's arguments are clearly erroneous Sterling Terrace is compelled to comment on her position.

The ALJ first argues that the first sentence of the definition "clearly and unequivocally refers to the admission criteria of *traditional* public schools" while the "second sentence applies specifically to charter schools...." The ALJ is partially correct; the second sentence does refer specifically to charter schools. However, to support her argument that the first sentence does not apply to charter schools, she erroneously adds the term "traditional" into the definition.[3] *See Seagrave v. State*, 802 So. 2d 281, 287 (Fla. 2001)("[A] basic principle of statutory construction" prevents courts from "add[ing] words to statutes that were not placed there by the Legislature.").

[3] Section 1002.33, Florida Statutes, upon which the ALJ relies to support her argument, does not distinguish between "traditional" and "non-traditional" public schools.

The plain language of the RFA does not use the term "traditional"[4] and the first sentence does not distinguish between "traditional" and charter schools. Instead, the plain language of the definition applies to "public elementary, middle, junior and/or high schools." (J. Ex. 1, p. 82). All charter schools are "public schools." Section 1002.33(1), F.S. Therefore, the first sentence's reference to "public … schools" includes charter schools.

If taken to its logical extension, the ALJ's argument would nullify the primary purpose of the proximity preference, recognized in FOF #17, that the intended residents are able to use the services in proximity to the development. Under the ALJ's interpretation, an applicant in Manatee County gets proximity points for a charter school that, by contract, has a radius area of Leon County, so long as it meets the other criteria.[5] While an extreme example, it demonstrates the error of the ALJ's argument.

Finally, the ALJ argues that a charter school cannot be both open to any student within the school district and use geographic proximity as the primary admission criteria. Petitioners dispute this reading of the law.[6] Further, even if true the requirement remains applicable.

---

[4] The term "traditional" with respect to public schools is not found in the RFA and there is no discussion or testimony regarding what constitutes a "traditional public school."

[5] Those criteria are: (1) open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations; and, (2) been in existence and available for use by the general public as of the Application Deadline.

[6] Though the ALJ is attempting to create an untimely challenge on an issue not raised by any party, in reaching her conclusion that a charter school cannot be both, the ALJ confuses being "open to any student" with applying "admission criteria." Section 1002.33(10), Florida Statutes, which is cited by the ALJ in support of her argument, only references a charter school being open to any student. No limitation is placed upon the charter schools admission criteria. As such, the ALJ's conclusion is misguided. For example, state universities are open to any student; however, the universities still apply admission criteria when determining which of those students are accepted. Nothing in Chapter 1002, Florida Statutes, precludes a charter school from operating similarly.

Challenges to the requirements in an RFA are subject to the time limitations in section 120.57(3)(b), F.S. *See Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, 710 So. 2d 569 (Fla. 4th DCA 1998)(the purpose of specification challenges is to allow an agency to clarify the specifications prior to accepting bids to save expense and assure fair competition); *see also Capeletti Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855 (Fla. 1st DCA 1986). Therefore, if any party felt that the definition was invalid or exceeded Florida Housing's authority, it was required to pursue a challenge pursuant to section 120.57(3), F.S. Because no challenge was filed, the requirement is applicable and cannot be dismissed. In *Optiplan, Inc. v. Sch. Bd. of Broward Cnty.*, the court found that the right to challenge an alleged unconstitutional race-based requirement in a RFP was waived due to the failure to timely challenge the criteria. *Id.* at 573-74 ("Having failed to file a bid specification protest, and having submitted a proposal based on the published criteria, Optiplan has waived its right to challenge the criteria."); *see also Capeletti Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855 (Fla. 1st DCA 1986)("The proper procedure for contesting the [invalid requirement] was by filing a bid solicitation protest within seventy-two hours of receipt of the project plans and specifications.").

Based upon the above, the arguments raised by the ALJ are either erroneous or untimely. Further, as Florida Housing's interpretation is at least as reasonable as that argued by the ALJ, the ALJ's interpretation must be rejected. When the correct interpretation of the RFA term is applied to the finding that Manatee Charter School does not use geographic proximity as its primary admission criteria, it must be concluded that Manatee Charter Schools does not meet the definition of "public school," that Oaks at Creekside is not entitled to the three (3) points for proximity and that Oaks at Creekside must not be awarded funding.

Exception to FOF #31 & #33

In FOF #33, the ALJ incorrectly categorizes her legal conclusion that "preferences are not additional requirements" as a factual finding. This legal conclusion also contradicts the agency interpretation attested to by Florida Housing's Corporate Representative, Marisa Button. At the Corporate Representative deposition Florida Housing stated that a sibling preference is an "additional requirement for admission" if it can preclude a student living in geographic proximity from attending the school. (P. Ex. 19, p. 68). Because Manatee Charter School's preferences can prevent a student in the area from being able to attend the school (P. Ex. 1, p. 10, FOF #32), those requirements take the Manatee Charter School outside the RFA's definition of "public school." (P. Ex. 19, p. 68-69). Florida Housing's interpretation of its RFA terms regarding the award of proximity points to affordable housing developments is within its expertise. Because the ALJ makes no determination that Florida Housing's interpretation of the RFA is clearly erroneous she is bound by that interpretation. *See Pan American World Airways, Inc. v. Public Service Comm'n*, 427 So. 2d 716, 719 (Fla. 1983)("We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous."). Given Florida Housing's interpretation that these preferences are additional requirements for admission, and the ALJ's finding in FOF #32 that Manatee Charter School does have admission preferences, the ALJ's conclusion in FOF #31 is clearly erroneous and must be rejected.

CONCLUSION

For the reasons stated herein, Florida Housing should reject or modify the Findings of Fact and Conclusions of Law and enter a Final Order determining that Oaks at Creekside is

ineligible for funding and awarding tax credits to Petitioners Sterling Terrace, Ltd. and Sterling Terrace Developer, LLC.

Respectfully submitted this 4th day of September, 2018.

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/s/ Craig D. Varn
CRAIG D. VARN

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON OAKS, LLC AND
AMERICAN RESIDENTIAL
COMMUNITIES, LLC
Petitioners,

v. DOAH Case No. 18-2966BID

FLORIDA HOUSING FINANCE
CORPORATION,
Respondents,
and

ARBOURS AT HESTER LAKE, LLC; BLUE
SUNBELT, LLC; COLONNADE PARK, LTD.;
HARPER'S POINTE. L.P., HTG CREEKSIDE, LLC;
and HTG SUNSET, LLC;
Intervenors.
_____/

STERLING TERRACE, LTD., and
STERLING TERRACE DEVELOPER, LLC
Petitioners,

v. DOAH Case No. 18-2967BID

FLORIDA HOUSING FINANCE
CORPORATION,
Respondents,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT,
LLC; COLONNADE PARK, LTD; HARPER'S POINTE, L.P.,
HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;
Intervenors.

_____/

INTERVENOR HTG SUNSET, LLC'S
EXCEPTIONS TO RECOMMENDED ORDER

Intervenor, HTG Sunset, LLC ("HTG Sunset") files these exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge on August 23, 2018.

Introduction

Following a formal hearing a Recommended Order was issued in this case by Administrative Law Judge ("ALJ") Van Wyk on August 23, 2018, recommending that a final order be entered finding that Florida Housing's initial scoring decision awarding funding to HTG Sunset was incorrect.

Standard of Review

Section 120.57 (1), Florida Statutes, addresses an agency's authority to modify Findings of Fact and Conclusions of Law in a Recommended Order. Concerning findings of fact, an "agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law." 120.57(1)(l), Fla. Stat. Agencies have more flexibility to change Conclusions of Law. Section 120.57(1)(l) provides in pertinent part:

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

Florida Housing has substantive jurisdiction over the Conclusions of Law relating to the process for awarding tax credits.

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

Exceptions 1 and 2 to Findings of Fact 16 and 17

HTG Sunset selected the Jewett School of the Arts, a Magnet School, within the Polk County School District, as its public school for the purposes of proximity points. HTG Sunset takes exception to portions of Finding of Fact 16 and 17 which provide in their entirety,

16. *The Jewett School does not meet the RFA definition of "public school" because geographic proximity to the school is not the principal admission criterion. Although a student must live in Polk County Schools' Magnet Zone B to apply for admission to the Jewett School, the principal admission criteria is a random lottery process. Geographic location within the Polk County magnet school zones is a threshold issue which qualifies a student to apply for admission. However, the magnet school decision-making process entails a subsequent elaborate demographic diversity analysis, sorting based on the outcome of that analysis, and, ultimately, a random lottery drawing which determines final admission.*

17. *The Jewett School admission process is contrary to Florida Housing's primary purpose of awarding proximity points to proposed housing developments—to ensure the intended residents can, in fact, use the services in proximity to the development.*

Exception to Finding of Fact 16

The definition of Public School as set forth in RFA 2017-111 is as follows,

> A public elementary, middle, junior and/or high school, where the **principal admission criterion is the geographic proximity to the school.** This may include a charter school, if the charter school is open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as parring an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

Florida Housing, as explained by Marisa Button interprets the phrase, "geographic proximity to school" as follows,

> A. We interpret that to mean the school accepts students within its—whatever geographic proximity is included in that district, so to speak, or area. And so that ties into how we do proximity points because if you are getting proximity points as a development because you are closest to the school, we want that principal criterion for that school to be the geographic proximity of the students to the school itself. We don't want them to be prohibited from attending.
>
> Q.... So in terms of geographic proximity, that doesn't mean it has to be within half a mile—just in terms of the definition, it doesn't have to be within three blocks or three miles; its just that there is some geographic proximity component, correct?
>
> A. **That it is a principal component.**[1] But that's correct, we don't have a specific distance set forth within the definition itself or anywhere else.

(T.73:18-25;74:1-3) (Emphasis Supplied)

Polk County is divided up into four Magnet School Zones which are broad **geographic** communities within which Magnet Schools are located. (Pet. Exhibit 2 at 7:15-21) As part of the on-line application process for potential students to apply for admission to a Magnet School within Polk County, prospective parents are first required to input their address of residence. From that point forward the student is only provided with Magnet Schools from within their Magnet Area Zone within which to apply. (Pet. Exhibit 2 at 7:12-17) It is only after the *geographic proximity determination* is made that other secondary factors are applied to determine acceptance of a student for enrollment.[2] In terms of the random lottery, the Jewett School of the Arts utilizes a lottery system for admissions but *only to the extent* that the number of applications received exceeds the number of available seats for prospective students. (Pet. Exhibit 2 at 26:18-23) The findings of

[1] The word "principal" is not defined by rule, RFA or statute.

[2] According to the testimony of the Administrator of the Magnet School Program, Carolyn Bridges, the enrollment process is broken down into several steps, Step One is "...you applied in the correct zone, Step two is we look at what grade level you applied for and if that grade level is currently balanced or not balanced in comparison to the overall community numbers. If it is not balanced, then we look at which waiting pool would most likely enhance or better balance that particular grade level. And then they pull from those criteria selections based on where the need is." (Bridges deposition, p. 22:6-16)

fact in Paragraph 16 of the Recommended Order are not supported by Florida Housings interpretation of the RFA nor by competent substantial evidence.

As such, Finding of Fact 16 should be modified as follows,

> 16. *The Jewett School ~~does not~~ meets the RFA definition of "public school" because geographic proximity to the school is ~~not~~ the principal admission criterion. ~~Although~~ A student must live in Polk County Schools' Magnet Zone B to apply for admission to the Jewett School. ~~the principal admission criteria is a random lottery process.~~ Geographic location within the Polk County magnet school zones is ~~an threshold issue which qualifies a student to apply for~~ the first step in the admission process. ~~However,~~ The magnet school decision-making process entails a subsequent elaborate demographic diversity analysis, sorting based on the outcome of that analysis, and, ultimately, a random lottery drawing, if needed, which determines final admission.*

Exception to Finding of Fact 17

This statement is located in the "statement of facts" section of the Recommended Order but is substantively a mixed question of law and fact because it requires an interpretation of RFA 2017-111. For the following reasons paragraph 17 should be stricken.

The RFA does not require that the applicant "guarantee" admission to the subject school of all children that may reside within the proposed development. As acknowledged by Marisa Button,

> Q. And the definition of public school as it appears in the RFA in front of you, there is not a requirement within that definition that a child who would be living in the prospective development would be enrolled—let me strike that. Let me ask it a different way.
> The definition of public school does not require that a child must be guaranteed a slot in the school for the school to meet the definition of public school, does it?
>
> A. The language of the definition does not—does not include it—does not include it- in the language of the definition

(T. at 72:14-25;73:1) The rules of statutory construction require Florida Housing to apply the clear language of the RFA. As stated by the First District Court of Appeal, in its decision reversing the Final order issued by Florida Housing in Brownsville Manor, LP v. Redding Partners, LLC,

> Florida Housing was required to interpret the RFA consistently with its plain and unambiguous language. *Creative Choice XXV, Ltd. v. Fla. Hous. Fin. Corp., 991 So. Ed 899, 901 (Fla. 1st DCA 2008)*

Florida Housing instead of applying the clear language of the RFA has added a new requirement that children who may reside within the proposed development cannot be prohibited from attending the selected public school. While certainly a reasonable and laudable goal, the RFA and more importantly the definition of "Public School" does not require this for a school to meet the Public School definition.

Conclusion

For the reasons expressed, HTG Sunset respectfully request that upon consideration of these exceptions, Florida Housing enter a Final order that rejects the identified Findings and Conclusions of the ALJ and determines that the Application of HTG Sunset, LLC should be funded.

Respectfully Submitted,

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I HEREBY CERTIFY that this has been filed by e-mail with the Corporation Clerk(CorporationClerk@floridahousing.org) and e-served to, Chris McGuire,

Esq.(Chris.McGuire@floridahousing.com) Assistant General Counsel Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, Douglas P. Manson, Esq. and Craig D. Varn, Esq., Manson Bolves Donaldson & Varn, P.A., 109 North Brush Street, Suite 300, Tampa, Florida 33602, J. Timothy Schulte, Zimmerman, Kiser & Sutcliffe, P.A., 315 East Robinson Street, Suite 600, Orlando, Florida 32801 and Michael J. Glazer, Anthony L. Bajoczky, Jr., and David Weiss, Ausley & McMullen, PO Box 391, Tallahassee, Florida 32302, this 4th day of September, 2018.

/s/Maureen M. Daughton

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC, and AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2966BID

FHFC Case No. 2018-039BP

STERLING TERRACE, LTD., and STERLING TERRACE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2967BID

FHFC Case No. 2018-040BP

RESPONDENT'S RESPONSE TO INTERVENOR'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Florida Housing Finance Corporation, hereby submits its Response to Intervenor HTG Sunset's Exceptions to Recommended Order, pursuant to Rule 28-106.217(3), Fla. Admin. Code.

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

Response to Exception #1

Intervenor takes exception to Finding of Fact #16, in which the ALJ found that the Jewett School does not meet the RFA definition of "public school" because geographic proximity to the school in not the principal admission criterion. Intervenor argues that because where a student lives is relevant to whether a student can apply for admission, and because the school uses a lottery system if the number of applications received exceed the number of available seats, the ALJ's finding is not supported by competent substantial evidence.

Carolyn Bridges, senior director of acceleration and innovation at the Polk County School Board, testified in her deposition that "Every seat at Jewett School of the Arts is filled through the lottery process." (Madison Oaks Exhibit 2 pg. 9) There is a geographic component for admission because a student has to be within a certain Magnet zone, "but the principal admission criteria is the random lottery." (Madison Oaks Exhibit 2 pg. 17) She stated that "it is correct that the Jewett School does not use geographical proximity to the school as a principal admission criteria. (Madison Oaks Exhibit 2 pg. 23) And "proximity is not one of the factors that is used to determine

whether or not a student attends that school." (Madison Oaks Exhibit 2 pp. 25-26) None of the deposition testimony was refuted.

Because there is competent substantial evidence to support the ALJ's Finding, this Exception should be rejected.

Response to Exception #2

Intervenor takes exception to Finding of Fact 17, in which the ALJ found that the primary purpose of awarding proximity points was to ensure the intended residents can, in fact, use the services in proximity to the development. Intervenor argues that the RFA does not specifically require that the applicant "guarantee" admission to the school of all children that may reside with the proposed development.

Intervenor is correct as to what the RFA does not specifically require, but since that is not what the ALJ found, this argument is irrelevant. Marissa Button, the Director of Multifamily Allocations for Florida Housing, testified that "the purpose of proximity to that service is naturally so that the intended residents for the proposed developments can, in fact, use those services for which the applicant is getting points for." (T. pg. 66) She noted additionally that "if you are getting points as a development because you are closest to the school, we want the principal criterion for that school to be the geographic proximity of the students to the school itself." (T. pg. 74)

Because there is competent substantial evidence to support the ALJ's Finding, this Exception should be rejected.

WHEREFORE, Florida Housing respectfully request that the Board of Directors reject the arguments presented in Intervenor's Exceptions to Findings of Fact #16 and #17, and issue a Final Order consistent with same in this matter.

Respectfully submitted this 4th day of September, 2018.

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC, and AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2966BID

FHFC Case No. 2018-039BP

STERLING TERRACE, LTD., and STERLING TERRACE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT, LLC; COLONNADE PARK, LTD.; HARPER'S POINTE, L.P., HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;

Intervenors.
_____/

DOAH Case No. 18-2967BID

FHFC Case No. 2018-040BP

RESPONDENT'S RESPONSE TO PETITIONERS' EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Florida Housing Finance Corporation, hereby submits its Response to Petitioners Madison Oaks and American Residential Communities' Exceptions to Recommended Order, pursuant to Rule 28-106.217(3), Fla. Admin. Code.

Petitioners Sterling Terrace and Sterling Terrace Developer also submitted Exceptions, which are essentially identical to those regarding Oaks at Creekside that are addressed below. Florida Housing's Response to those Exceptions is likewise identical to those regarding Oaks at Creekside.

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

Oaks at Creekside

Response to Exception to COL #63 and #65

Petitioners' Exception is consistent with the Exceptions filed by Florida Housing.

Response to Exception to COL #64

Petitioners' Exception is consistent with the Exceptions filed by Florida Housing.

Response to Exception to FOF #31 and #33

Petitioners take exception to Finding of Fact #33, in which the Administrative Law Judge (the "ALJ") stated that "preferences are not additional requirements for admission." Petitioners cite to deposition testimony that could be read as contradictory to this Finding, but do not allege or demonstrate that there was no competent substantial evidence to support the Finding. Even if Florida Housing had clearly stated that the phrase "without additional requirements for

admissions" included preferences in all cases, which it did not, this would not necessarily preclude the ALJ from making the finding she did. "Preferences" is not a term that appears in the definition of "public school" in the RFA, and there is no evidence that Florida Housing has any expertise in how charter schools administer or evaluate any "preferences" in their admissions policy. This exception should therefore be rejected.

Harper's Pointe

Petitioners' Exceptions do not initially identify which Findings of Fact or Conclusions of Law are being objected to. It appears, however, that Petitioners are taking exception to Findings of Fact #45, 54, and 55, and Conclusion of Law #67.

Petitioners argue that Finding of Fact #35 should be amended, and offer alternate language, but do not explain why the amendment is necessary, do not cite to any record evidence to support the proposed alternate language, and do not argue that the Finding is not supported by competent substantial evidence. Section 120.57(1)(k), Fla. Stat., states that an agency need not rule on an exception that does not "identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." For this reason, this exception should either be rejected or should not be considered.

Petitioners argue that Findings of Fact #54 and #55 are actually conclusions of law, and do not allege that they are not supported by competent substantial evidence. Finding of Fact #54 states: "Based on the entirety of the reliable evidence, the Harper's Pointe development site is not a "scattered site" as defined in the RFA." While this Finding may be conclusory, it is not accurate to say that it is purely a Conclusion of Law. Petitioners do not actually dispute any of the evidence that the ALJ relies upon. Instead, their sole argument is that the ALJ should not have considered most of this evidence at all.

The definition of a "scattered site" in Rule 67-48.002(105), Fla. Admin. Code, means property that is not contiguous, and further states that "real property is contiguous if the only intervening real property interest is an easement, provided the easement is not a roadway or street." The testimony from Florida Housing was uncontroverted that this language does not require that a roadway or street actually be in existence, and that a valid easement for a roadway or street would render the property non-contiguous. The terms "easement," "street," and "roadway" are not defined in the RFA, nor was any specific evidence offered as to how they should be defined.

Petitioners rely for their arguments primarily on Finding of Fact #41, which they describe as "establishing that 'the site is bisected by a platted 50-foot street easement running east/west through the property.'" However, this is not what the ALJ actually found. Instead, Finding of Fact #41 states: "The plat recorded in Alachua County indicates that the site is bisected by a platted 50-foot street easement running east/west through the property." It is undisputed that there is a plat map that identifies an easement through the property, and that this easement is labeled as a "street," which is all that the ALJ is finding. Contrary to the Petitioners' allegations, the ALJ did not make a finding that that site actually was bisected by an easement and that this easement was for a street. In fact, in Finding of Fact #46, the ALJ specifically finds that "If the platted street is a "roadway or street" as those terms are used in rule 67-48.002(105), the site would meet the definition of a "scattered site." [emphasis added] Since Finding of Fact #54 states that the property is not a scattered site, the clear implication is that the ALJ found that the platted street was not a "roadway or street" as those terms are used in the rule.

There was record evidence that Florida Housing would consider a number of factors aside from what was written on a plat map to determine whether or not there was an easement for a roadway or street that bisected the property. There was undisputed record evidence to support the

ALJ's findings that there was no roadway or street constructed on the property; that the property was not currently passable by a vehicle; that there was no access to the property from either the adjoining street to the east or from the residential development to the west; and that there was nothing preventing access between the northern and southern parcels that were bisected by the platted easement. After weighing all of the evidence, including judging the credibility of witnesses, the ALJ found that the property was not a scattered site, and by implication that the easement was not for a "roadway or street" regardless of how it was designated on a plat map.

Petitioners argue that Florida Housing's position was that the easement on the platted map should be considered a "roadway or street" and that the ALJ was thus prohibited from disputing this position absent a finding that the position was clearly erroneous. However, the testimony in this regard was at least ambiguous, and the ALJ found that Florida Housing's position on the matter was at least unclear. The ALJ found that while there was testimony that Florida Housing's initial position was that the easement was for a "road or a street," there was testimony that it would also consider a number of other factors in determining whether there was an easement for a street or roadway. (FOF 47, 49) Based upon the ALJ's weighing of the evidence, it cannot be said that Florida Housing articulated a clear and unequivocal position on whether this particular easement was for a roadway or street.

At the commencement of the administrative hearing, the ALJ granted a Motion in Limine that prevented the parties from presenting evidence regarding real property law, including whether any easements on the property may or may not have been valid. Petitioners argue that because they were not allowed to present evidence concerning the validity of the easement, then it must have been presumed that the easement was a valid street easement. It was stipulated by the parties that an express easement existed on the property, that it bisected the property, and that it was

labeled as an easement for a "street." The question in this case, however, was not whether the easement was valid, but whether it was an easement for a "roadway or street" as defined in Florida Housing' rules. Evidence concerning what constitutes a "roadway or street" for purposes of this RFA was not subject to the order granting the Motion in Limine, and is within the authority of Florida Housing (and thus the ALJ) to determine.

The Petitioners make several statements to the effect that the purpose of the "scattered site" requirements is to assure that the Applicant has sufficient site control over the entire parcel. There is no evidence to support this assertion, and the Petitioners do not cite to any record evidence otherwise.

Finding of Fact #55 and Conclusion of Law #67 are similar in that each states that the Petitioners did not carry their burden of proving that Florida Housing's initial determination that Harper's Pointe should be awarded funding was contrary to statutes, rules, or terms of the RFA, was clearly erroneous, was contrary to competition, or was arbitrary and capricious. The ALJ's implicit finding that there was no easement for a roadway or street bisecting the property is supported by competent substantial evidence; therefore, her conclusion that Petitioners failed to carry their burden is reasonable and based upon competent substantial evidence. For these reasons, Petitioners' exceptions to Findings of Fact #54 and #55, and Conclusion of Law #67, should be rejected.

WHEREFORE, Florida Housing respectfully request that the Board of Directors reject the arguments presented in Petitioners' Exceptions to Findings of Fact #31, #33, #54, and #55, and Conclusion of Law #67, and issue a Final Order consistent with same in this matter.

Respectfully submitted this 4th day of September, 2018.

/s/ Chris McGuire
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by electronic mail this 4th of September, 2018 to the following:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC AND
AMERICAN RESIDENTIAL
COMMUNITIES, LLC

Petitioners,

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC;
COLONNADE PARK, LTD; HTG
CREEKSIDE, LLC; HTG SUNSET, LLC
HARPER'S POINTE, LP; AND BLUE
SUNBELT, LLC;

Intervenors.
_____/

DOAH CASE NO. 18-2966BID

STERLING TERRACE, LTD., AND
STERLING TERRACE DEVELOPER, LLC,

Petitioners,

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

and

ARBOURS AT HESTER LAKE, LLC
COLONNADE PARK, LTD.; HARPER'S
POINTE, LP; HTG CREEKSIDE, LLC;
HTG SUNSET, LLC, BLUE SUNBELT,
LLC; AND CLERMONT RIDGE, LTD,

Intervenors.
_____/

DOAH CASE NO. 18-2967BID

NOTICE OF JOINDER IN RESPONSE TO EXCEPTIONS TO RECOMMENDED ORDER

Intervenor, Clermont Ridge, Ltd ("Clermont") by and through its undersigned counsel, hereby files this Notice of Joinder in the Response to HTG Sunset, LLC's Exceptions to Recommended Order ("Response") filed by Florida Housing Finance Corporation in the above referenced case. Clermont hereby adopts, joins in and incorporates by reference the Response submitted.

Dated September 10, 2018.

Respectfully submitted,

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MADISON OAKS, LLC AND AMERICAN RESIDENTIAL COMMUNITIES, LLC,

Petitioners,

vs.

Case Nos. 18-2966BID
18-2967BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

HTG CREEKSIDE, LLC; HTG SUNSET, LLC; AND HARPER'S POINTE, LP,

Intervenors.
_____/

HARPER'S POINTE'S RESPONSE TO EXCEPTIONS

Intervenor, Harper's Pointe, LP ("Harper's Pointe"), responds to the exceptions filed by Petitioners, Madison Oaks, LLC and American Residential Communities, LLC (collectively, "Madison Oaks" or "Petitioners"), pursuant to section 120.57(3), Florida Statutes, and rules 28-106.217 and 67-60.009, Florida Administrative Code, and says:

Introduction

Florida Housing selected Harper's Pointe for an intended award of housing tax credits. Madison Oaks challenged Harper's Pointe's eligibility to receive the award based on an easement on its development site. Madison Oaks argued that the development site consists of undisclosed "Scattered Sites" because the easement is a "roadway or street." Harper's Pointe acknowledged the existence of the easement but explained that the easement is not a "roadway or street" and thus its development site does not consist of Scattered Sites. Accordingly, a hearing

was conducted at the Division of Administrative Hearing to determine whether or not the easement is a "roadway or street."

At the hearing, it was shown that Florida Housing's evaluation of an easement and determination of whether the easement is a "roadway or street" for purposes of the Scattered Sites definition is fact specific and based on the totality of the evidence. Florida Housing identified a number of factors that it would consider. Madison Oaks presented evidence of one factor supporting a finding that the easement is a "roadway or street."[1] Alternatively, Harper's Pointe presented evidence of at least three factors supporting a finding that the easement is not a "roadway or street." After hearing all of the evidence and argument from the parties, the ALJ ruled in favor of Harper's Pointe. She determined that the easement is not a "roadway or street" and that Madison Oaks, as the petitioner challenging agency action, failed to carry its heavy burden of proof.

Madison Oaks has now taken exception to certain findings and conclusion in the Recommended Order. It attempts to argue that its one factor is determinative and that the other factors are not relevant.[2] Madison Oaks also relies on a conclusory statement by Florida Housing during the course of the hearing that the easement was a "roadway or street." First, these arguments go to the weight of the evidence which is the prerogative of the ALJ. And second, these arguments conflict with the decision-making framework explained and applied by

[1] The only factor which supports Madison Oaks' position is the description of the easement as a "right of ingress and egress over the streets as shown on the plat . . ." However, as set forth herein, words used to describe the easement area do not determine whether the easement is a "roadway or street."

[2] As set forth below and in the Response to Petitioners' Exceptions filed by Florida Housing, the primary basis for Madison Oaks' arguments is a mischaracterization of the ALJ's findings of fact in paragraph 41 which is refuted by the remainder of the Recommended Order.

Florida Housing. For example, the ALJ specifically addressed the conclusory statement and explained why she found the statement unpersuasive.

Importantly, Florida Housing, like Harper's Pointe, opposes Madison Oaks' exceptions to the Recommended Order; describes its own conclusory statement at the hearing as "equivocal"; and requests that Madison Oaks' exceptions related to Harper's Pointe be rejected. The ALJ, Harper's Pointe, and Florida Housing's staff find the findings of fact in the Recommended Order to be supported by competent, substantial evidence and the resulting conclusion of law to be reasonable. The Board should find the same, deny the exceptions, and enter a Final Order approving the Harper's Pointe application.

Standard of Review

Before addressing the specific exceptions, a brief review of the law applicable to the review of the Recommended Order is helpful. The scope of agency review and its ability to modify a recommended order are limited by Florida Statutes.

Section 120.57(1)(l), Florida Statutes, provides that "[t]he 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 the essential requirements of law." Consequently, it is the role of the ALJ alone to judge the credibility of witnesses, draw permissible inferences from the evidence, resolve any conflicts in the evidence, and make findings of fact. An agency may not reject those findings unless there is no competent substantial evidence on which the ALJ's findings can be reasonably inferred. Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985).

Specifically, an agency may not reject or modify the ALJ's findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that specific findings of fact were not based upon competent substantial evidence. See Fla. Stat. § 120.57(1)(l); Cordes Health Care Mgmt. Corp. v. Dep't of Health & Rehab. Servs., 461 So. 2d 184 (Fla. 1st DCA 1984). Absent such an express and detailed finding, it is well established that an agency is bound to honor an ALJ's findings of fact, and it is a gross abuse of discretion for an agency to fail to do so. See Southpointe Pharm. v. Dep't of Health & Rehab. Servs., 596 So. 2d 106, 109 (Fla. 1st DCA 1992).

This limited scope of review exists because it is solely the prerogative of the ALJ to listen to the evidence, judge the credibility of witnesses, resolve conflicts in the evidence, draw permissible inferences from that evidence, and reach findings of fact based on competent substantial evidence. See Belleau v. Dep't of Env'tl Prot., 695 So. 2d 1305 (Fla. 1st DCA 1997); Strickland v. Fla. A&M Univ., 799 So. 2d 276 (Fla. 1st DCA 2001). An agency is not authorized to perform those functions, substitute its judgment for that of the ALJ by taking a different view of or placing greater weight on the same evidence, reweigh the evidence, or otherwise interpret the evidence to fit its desired ultimate conclusion. See Prysi v. Dep't of Health, 823 So. 2d 823 (Fla. 1st DCA 2002); Strickland, 799 So. 2d at 279; Schrimsher, 694 So. 2d at 860; Heifetz, 475 So. 2d at 1281; Wash & Dry Vend. Co. v. Dep't of Bus. Reg., 429 So. 2d 790, 792 (Fla. 3rd DCA 1983).

Additionally, although an agency may reject or modify a conclusion of law over which it has substantive jurisdiction, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law and must make a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. See Fla. Stat. § 120.57(1)(l);

Prysi, 823 So. 2d at 824. In addition, a rejection or modification of a conclusion of law may not form the basis for or effectuate a rejection or modification of a finding of fact. See Fla. Stat. § 120.57(1)(l).

Furthermore, an agency cannot circumvent the statutory limitations on its ability to modify or reject a recommended order by characterizing findings of fact as conclusions of law. See Dep't of Labor & Employment Sec. v. Little, 588 So. 2d 281 (Fla. 1st DCA 1991); see also Schrimsher, 694 So. 2d at 860. More specifically, an agency may not reject a finding that is substantially one of fact by simply treating it as a legal conclusion, and this is so regardless of whether the finding is labeled a conclusion of law. See Gross v. Dep't of Health, 819 So. 2d 997 (Fla. 5th DCA 2002); Gordon v. State Comm'n on Ethics, 609 So. 2d 125 (Fla. 4th DCA 1992). Similarly, a finding that involves both a finding of fact and a conclusion of law cannot be rejected where there is substantial competent evidence to support the finding of fact and the conclusion of law necessarily follows. See Berger v. Dep't of Prof. Reg., 653 So. 2d 479 (Fla. 3rd DCA 1995); see also Strickland, 799 So. 2d at 279 (concluding that because competent substantial evidence supported the ALJ's findings, the agency erred in rejecting the findings of fact and the ultimate findings of fact set out in the ALJ's conclusions of law); Dunham v. Highlands County Sch. Bd., 652 So. 2d 894 (Fla. 2d DCA 1995) (concluding that agency had improperly substituted its own findings of fact and that, once the ALJ's findings were reinstated, the agency's conclusions of law were erroneous because they were premised upon the improperly substituted findings).

Finally, although an agency is entitled to give less weight to ultimate findings of fact that are matters of opinion infused with policy considerations for which the agency has special responsibility when determining if substantial evidence supports an ALJ's findings, this so-called

"deference rule" does not apply when the question is simply the weight or credibility of testimony by witnesses, when the factual issues are otherwise susceptible of ordinary methods of proof, or when the agency may not claim special insight as to those facts. See McDonald v. Dep't of Banking and Fin., 346 So. 2d 569 (Fla. 1st DCA 1977); Gross, 819 So. 2d at 1001; Schrimsher, 694 So. 2d at 860; see also McGann v. Fla. Elections Comm'n, 803 So. 2d 763 (Fla. 1st DCA 2001) (concluding that an agency could not reject ALJ's finding of fact on ultimate issue of "willfulness" by recasting findings as a conclusion of law); Harac v. Dep't of Prof. Reg., 484 So. 2d 1333 (Fla. 3rd DCA 1986) (agency was not permitted to substitute its findings for those of ALJ on issue of architect's "competency," even though the determination of design competency required specialized knowledge and experience, because it is not so unique as to defy ordinary methods of proof).

Response

Madison Oaks takes exception to paragraphs 45, 54, 55, and 67 of the Recommended Order. The primary basis for Madison Oaks' Exceptions is its mischaracterization the ALJ's finding of fact in paragraph 41 as a finding that a street easement bisects the development site. However, as stated in the Response to Petitioners' Exceptions filed by Florida Housing, the finding of fact does not state that a street easement bisects the development site, but that "[t]he plat recorded in Alachua County indicates that the site is bisected by a platted 50-foot street easement running east/west through the property." Contrary to the assertions in Madison Oaks' Exceptions, the ALJ did not find that the site was actually bisected by an easement or that the

easement was for a roadway or street. In fact, the ALJ found the opposite.[3] For the following reasons, each exception should be denied.

Paragraph 45:

Madison Oaks takes exception to paragraph 45. Paragraph 45 consists of findings of fact. Madison Oaks contends that the findings are incorrect but makes no citations to the record to substantiate its exception. Therefore, the exception is facially deficient and either does not merit a ruling or should be summarily denied. See § 120.57(1)(k), Fla. Stat. ("[A]n agency need not rule on an exception . . . that does not include appropriate and specific citations to the record."); Fla. Admin. Code r. 28-106.217(1); see also Prince Consulting, LLC v. Dep't of Transp., Case No. 16-039, at *2 (FDOT Jan. 20, 2017) ("Exception 1 does not include appropriate and specific citations to the record as required. The Department therefore need not rule on Exception 1."); Fla. Dep't of Transp. v. ZFI Eng'g & Constr., Inc., Case No. 16-022, at *2 (FDOT Nov. 15, 2016) ("This exception does not include appropriate and specific citations to the record. The Department therefore need not rule on this exception.").

Moreover, the proposed modifications to the findings are irrelevant and would not alter the ALJ's conclusion that the easement is not a "roadway or street" and the development site does not consist of Scattered Sites. The findings are based on the testimony of Madison Oaks'

[3] Madison Oaks also mischaracterizes the parties' agreement in the Joint Pre-Hearing Stipulation and the Stipulation of Facts Between Madison Oaks and Harper's Point as an agreement that a street easement bisects the development site. The statement in the Joint Pre-Hearing Stipulation is similar to the ALJ's finding of fact in paragraph 41 in that it recognizes that the recorded plat identifies a "street" bisecting the property which has never been constructed. See Joint Pre-Hearing Stipulation, p. 12, ¶ 20. However, the parties did not agree that a street easement bisected the property. In addition, Madison Oaks and Harper's Pointe did not agree in the Stipulation of Facts that the development site was bisected by a street easement, but stipulated that recorded deeds in the chain of title to an adjacent property granted a "right to ingress and egress over the streets as shown on the plat . . ." See Stipulation of Facts Between Madison Oaks and Harper's Point, ¶ 19.

witness and are relevant to show that physical obstructions at the property boundaries prevent access and connection to the easement area, which is true due to the fence and residential lots on the western property line, the barriers on the northern property line, and the severed concrete and manmade berms on the eastern property line. See T. at 98, 102, 104-11.

Paragraph 54:

Madison Oaks takes exception to paragraph 54. In paragraph 54, the ALJ found that "the Harper's Pointe development site is not a 'scattered site' as defined in the RFA." Madison Oaks contends that this finding is a conclusion of law -- not a finding of fact -- and that the ALJ misapplied Florida Housing's definition of "Scattered Sites." However, while the finding is not necessarily an "evidentiary fact," it is an "ultimate fact" drawn from the evidence presented at the hearing and/or a mixed question of law and fact.

Madison Oaks relies exclusively on the finding in paragraph 41 that a plat indicates the development site is bisected by a platted "street easement." Madison Oaks argues that this should be the end of the inquiry because a site consists of Scattered Sites if it is bisected by an easement that is a "roadway or street." See Fla. Admin. Code r. 67-48.002(105). However, Florida Housing is not bound by the labels on a plat.

In fact, Marisa Button, testifying as a corporate representative for Florida Housing, testified that the fact that an easement labelled as a "street" on a plat was not determinative of whether or not the easement was a "roadway or street" for purposes of creating Scattered Sites under Florida Housing's rule. See Harper's Ex. 12 at 44-47; T. at 120. Instead, Ms. Button testified that Florida Housing's determination of what constitutes a "roadway or street" is a fact-specific analysis based on the totality of the circumstances. For example, Ms. Button testified as follows:

Q. If the parcel is split by that platted street, does that create a scattered site?

A. I think it would depend on whether or not we -- whether there is, indeed, a roadway or street there. So I think it depends on the actual -- the proposed development site itself. But it could certainly create a scattered site if there was an existing roadway or street that is that -- referenced that platted road, yes.

Q. Okay. Explain your clarification that if the road is actually there. How is that different from if it's still platted that way?

A. Well, I think it would depend whether or not if there is a -- if there is a roadway or street. As I say, I think it could be and may be a problem, but physically if there is no roadway or street, and let's say there is actually an existing building there on that parcel and it's there, we may look at that further and have to determine whether or not it meets the definition of "scattered site."

If there is just a platted road, indeed, it can be looked at as a roadway or street in conjunction with what we define as a scattered site, that could certainly make it a scattered site.

Q. Again, I want to be clear. If the plat hasn't been vacated, so the plat still is in existence, you are still going to distinguish between whether the road is in existence or not?

A. We would want that information. It's something we would want to know to make a determination in our analysis.

Q. Okay. Help me understand the difference between the road existing and the road not existing.

A. I think I just did. I said if there is a platted roadway, there may be something existing that says that that's there, but in reality -- we have seen -- I'm trying to think of past examples where we have seen, yes, it may exist in a plat, but in reality it's one big site, there is an existing parcel on it. And while the platted road may not have been vacated, legally vacated, there is not an existing roadway or street there.

So I don't know whether that's specifically an issue here or that's the case, but that's an example where we would want to know that information before saying definitively that something in our opinion is a scattered site. We would want to hear both sides of what the property is and what -- in reality.

> Q. Okay. So the fact that the road could be built does not cause for Florida Housing concern?
>
> A. It may.
>
> Q. As long as it doesn't exist?
>
> A. That may be a part of information that we would want to know as well, too.
>
> * * *
>
> Q. Let's go back to my hypothetical. If the road can be built, but it's a private road, does that make a difference?
>
> A. It might.
>
> Q. Okay. And why would that make a difference?
>
> A. I think we would just want to know, like in any situation, the full context of both sides of the issue. Again, it's existing roadway or street, and that may factor into the analysis. I can't give you a specific example, but it would be something we would want to know.

Harper's Ex. 12 at 44-47 (emphasis added).

Florida Housing thereafter identified a number of non-exclusive factors that it may consider when evaluating whether or not an easement is a "roadway or street" that creates Scatter Sites:

a. whether the purported "roadway or street" physically existed;

b. whether physical impediments existed on the land where the purported "roadways or streets" are or would be located;

c. whether the purported "roadway or street" was accessible by or to the public.

See Harper's Ex. 12 at 44-47, 92-95; T. at 120-22.

The evidence presented at the hearing demonstrated that no physical roadway or street existed that bisected the development site. See T. at 104-05, 109-11; Harper's Ex. 11 at 7-9. Findings of fact were made on this point at paragraphs 42, 43 and 52.

The evidence presented at the hearing demonstrated that physical impediments existed that impaired access to and obstructed use of the land identified as a "roadway or street" for vehicular traffic. Namely, the area was heavily wooded and was sandwiched between a fence and subdivision on one boundary and a manmade berm on the other. See T. at 98, 102, 104-11; Harper's Ex. 11 at 12-13. In other words, even if the access easement over the "streets as shown on the plat" could be constructed in a manner that bisected the development site, it would go nowhere because access and connection are prevented on both ends. See T. at 107-08. Findings of fact were made on these points at paragraphs 43, 44, and 52.

Further, Madison Oaks presented no evidence supporting a public right to use the purported "roadway or street" whether it be now or in the future. Madison Oaks improperly attempts to supplement the record by attaching a new exhibit to its exceptions and arguing that the public may yet still acquire a right in the easement because the plat has been "dedicated."[4]

First, agency review of the Recommended Order is confined to the evidence admitted at the final hearing and the findings of fact made in the recommended order. See 2 Fla. Jur 2d Adm. Law § 312. "Chapter 120, Florida Statutes, directs an agency to review a recommended order based on the record that was before the hearing officer. An agency is not authorized . . . to

[4] Madison Oaks attempts to supplement the record with evidence that the ALJ ruled was not appropriate for consideration on the basis that its experts should have been allowed to testify as to the validity of the plat or quality of the easement if they are going to be considered by the Florida Housing Board. However, the ALJ's findings and conclusions were not related to property rights in the easement area, but the physical characteristics of the property that show that the easement area is not a roadway or street and cannot be a roadway or street in the future, which the ALJ correctly found were appropriate for consideration based on the factors enunciated by Florida Housing's corporate representative.

reopen the record, receive additional evidence and make additional findings." Lawnwood Med. Ctr., Inc. v. Agency for Health Care Admin., 678 So. 2d 421, 425 (Fla. 1st DCA 1996) (emphasizes added); see also Bevan v. Dep't of Envtl. Protection, Case No. 93-1314, at 6 n.4 (DEP Dec. 9, 1994) ("Petitioners' Exceptions reference a November 4, 1994, letter from an architect and related architectural drawings which were included as attachments to the Petitioners' Exceptions filed with the Secretary for review . . . . The Department's response to Petitioners' Exceptions correctly points out that the letter and drawings were not admitted into evidence at the DOAH hearing and are not properly part of the record on review. I agree that the filing of the letter and related drawings constitute an improper attempt by the Petitioners to supplement the record on agency review and decline to take these documents into consideration in the preparation and entry of this Final Order."). Consideration of the new evidence and accompanying argument is grounds for reversal of the final order. See Lawnwood, 678 So. 2d at 426; Nest v. Dep't of Prof'l Regulation, 490 So. 2d 987, 989-90 (Fla. 1st DCA 1986). Second, the unrebutted record evidence -- by way of Madison Oaks' own admission -- demonstrates that the plat was never "dedicated." See Harper's Ex. 1 at 4, 11. Therefore, Madison Oaks' new argument is not only improper but is contrary to the record evidence admitted at the final hearing.

After hearing the factors considered by Florida Housing in determining whether as easement is a "roadway or street" for purposes its rule, and evaluating the totality of evidence presented at the hearing, the ALJ made the ultimate finding of fact in paragraph 54 that the easement was not a "roadway or street" given the facts of this particular case. This finding is, at minimum, supported by competent substantial evidence, and the exception to paragraph 54 should be denied.

Paragraph 55:

Madison Oaks takes exception to paragraph 55. In paragraph 55, the ALJ found that Madison Oaks failed to carry its burden of proof. Madison Oaks again contends that this finding is a conclusion of law -- not a finding of fact. However, like the finding in paragraph 54, this finding is a mixed question of law and fact, and, as noted in the standard of review section, a finding that involves both a finding of fact and a conclusion of law cannot be rejected where there is substantial competent evidence to support the finding of fact and the conclusion of law necessarily follows. See, e.g., Berger v. Dep't of Prof. Reg., 653 So. 2d 479 (Fla. 3rd DCA 1995). Here, the ALJ's finding that the easement in question was not a "roadway or street" for purposes of Florida Housing's rules is supported by competent substantial evidence, see response to exception 54, and the conclusion that Madison Oaks failed to carry its burden necessarily follows. Based on that finding, no other conclusion could be reached.

Importantly, at all times, Madison Oaks bore the heavy burden to prove that Florida Housing's intended agency action to award housing tax credits to Harper's Pointe was clearly erroneous, contrary to competition, arbitrary, or capricious. See § 120.57(3)(f), Fla. Stat. This burden was not lessened by the fact that Florida Housing changed its litigation position during the course of the proceeding. See Blue Broadway, LLC v. Fla. Housing Fin. Corp., Case No. 17-3273BID, at 10 (DOAH Aug. 29, 2017; FHFC Sept. 22, 2017) ("Respondent's new position is not entitled to the same deference as final agency action; rather, its position and argument shows a change in litigation strategy based on newly discovered evidence. In this proceeding, the undersigned continues to review the correctness of Respondent's initial decision which was to find Intervenor's application to be eligible.").

The only evidence presented at the hearing supporting a finding that the easement constituted a "roadway or street" was the use of the term "street" to describe the easement area and a conclusory statement by Ms. Button that is presented without the context provided above. However, as discussed above, Florida Housing construes the definition of "roadway or street" to be fact specific and not determined by the label designated on a plat. The ALJ recognized in paragraph 50 that the label on the plat was one of many factors evaluated and thereafter explained, after considering all of the evidence, that she did not find persuasive the conclusory statement that the easement in this case was a "roadway or street." The ALJ's evaluation of the evidence is not subject to modification because it is supported by competent substantial evidence. See Strickland v. Fla. A&M Univ., 799 So. 2d 276, 278 (Fla. 1st DCA 2001) ("[T]he weighing of evidence and judging of the credibility of witnesses by the Administrative Law Judge are solely the prerogative of the Administrative Law Judge . . . .").

Paragraph 67:

Lastly, Madison Oaks takes exception to paragraph 67. The ALJ's conclusion in paragraph 67 restates her determination in paragraph 55. For the reasons articulated in response to the exceptions to paragraphs 54 and 55, the exception to paragraph 67 should be denied as well.

Conclusion

The findings of fact made in the Recommended Order are supported by competent substantial evidence and should not be modified. The conclusions of law are reasonable and necessarily follow the findings of fact. The desperation of the continued challenge by Madison Oaks is evidenced by the highly improper attempt to introduce evidence that is not part of this record to support its position. Therefore, the foregoing exceptions made to paragraphs 45, 54, 55,

and 67 should be denied, and a Final Order should be issued adopting the Recommended Order to award housing tax credits to Harper's Pointe.

Dated this 10th day of September, 2018.

/s/ David J. Weiss
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Attorneys for Intervenor
Harper's Pointe, LP

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 10th day of September, 2018 the foregoing has been filed by e-mail with the Corporation Clerk (CorporationClerk@floridahousing.org), Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, and copies have been furnished by Electronic Mail to the following:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON OAKS, LLC AND
AMERICAN RESIDENTIAL
COMMUNITIES, LLC
Petitioners,

v. DOAH Case No. 18-2966BID

FLORIDA HOUSING FINANCE
CORPORATION,
Respondents,
and

ARBOURS AT HESTER LAKE, LLC; BLUE
SUNBELT, LLC; COLONNADE PARK, LTD.;
HARPER'S POINTE. L.P., HTG CREEKSIDE, LLC;
and HTG SUNSET, LLC;
Intervenors.
_____/

STERLING TERRACE, LTD., and
STERLING TERRACE DEVELOPER, LLC
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FLORIDA HOUSING FINANCE
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ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT,
LLC; COLONNADE PARK, LTD; HARPER'S POINTE, L.P.,
HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;
Intervenors.

_____/

INTERVENOR HTG CREEKSIDE, LLC'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

HTG CREEKSIDE, LLC ("HTG Creekside"), responds to the Exceptions to Recommended Order filed by Respondent, Florida Housing Finance Corporation, ("Florida Housing") as follows:

I. Introduction

Following a formal hearing a Recommended Order was issued in this case by Administrative Law Judge ("ALJ") Van Wyk on August 23, 2018, recommending that a final order be entered finding that Florida Housing Finance Corporation's initial scoring decision awarding funding to Oaks at Creekside and Harper's Pointe was correct.[1] On August 31, 2018, Respondent Florida Housing Finance Corporation ("Florida Housing") filed exceptions to the ALJ's Recommended Order. The exceptions specifically challenge the ALJ's Findings of Fact ¶'s 10 and Conclusions of Law ¶'s 63,64 and 65. HTG Creekside only files this response to Florida Housing's Exceptions to the Conclusions of Law. The Exceptions to the Conclusions of Law filed by Florida Housing should be denied by this Board and the Recommended Order adopted subject to the Exceptions filed by HTG Sunset, LLC.

II. Standard of Review

The rules governing bid protests are set forth in Section 120.57(3), Florida Statutes, which provide for:

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

[1] The ALJ also found that Florida Housing's decision awarding funding to HTG Sunset, LLC was erroneous, and that funding should also go to the applicant with the next highest lottery number.

(Emphasis Supplied). Florida Housing's proposed agency action under review in this proceeding is the decision rendered by this Board on May 4, 2018 which found HTG Creekside eligible and awarded funding to HTG Creekside in the amount requested in its application.[2]

Section 120.57, Florida Statutes, establishes the specific and limited parameters for Florida Housing's review of a recommended order and issuance of a final order. Florida Housing may adopt a recommended order in its entirety or may, under narrow circumstances, modify or reject findings of fact and conclusions of law.

Florida Housing may modify or reject conclusions of law over which it has substantive jurisdiction §120.57 (1)(l), Fla. Stat.; *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d. 607 (Fla. 1st DCA 1998) (affirming final order in which Florida Housing rejected ALJ's interpretation of Florida Housing's rule); *see generally Barfield v. Dep't of Health*, 805 So. 2d. 1008 (Fla. 2001). Florida Housing cannot overturn or modify legal conclusions that are outside of its substantive jurisdiction, such as rulings on admissibility of evidence, the interpretation of statutes that Florida Housing is not charged with implementing, and the scope of the ALJ's authority. When modifying or rejecting conclusions of law, Florida Housing must state with particularity the reasons for the modification or rejection, and must make a finding that its substituted conclusion of law is as or more reasonable then the conclusion modified or rejected. § 120.57 (1)(l)

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

[2] Florida Housing filed a Notice of Change of Position on July 6, 2018 indicating its "new" position that the Manatee Charter School was not a public school for purposes of awarding proximity points. Notwithstanding, it is the initial decision of Florida Housing to award funding to HTG Creekside that is at issue in this proceeding.

Transp, 389 So. 2d. 2d 694, 696 (Fla. 4th DCA 1980). The question whether the facts establish a violation of a rule or statute, for example, involves a question of ultimate fact that Florida Housing may not reject without adequate explanation. See *Goin v. Comm'n on Ethics,* 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995)

Public School Definition

The focus of the exceptions filed by Florida Housing surrounds the interpretation of the definition of Public School within RFA 2017-111 which provides as follows,

> A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school. This may include a charter school, if the charter school is open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as parring an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

The ALJ determined that the Manatee Charter School is a public school as defined in the RFA. (COL 63) In so doing and as described within footnote 13, the ALJ explains the legal analysis leading to this conclusion:

> However, the undersigned is compelled to comment on Florida Housing's position, taken at final hearing, that the Manatee School does not meet the RFA definition of "public school" because geographic proximity is not the primary admission criteria. That position is untenable. **Florida Housing is required to interpret the RFA consistent with its plain and unambiguous language.** ***See Brownsville Manor, LP v. Redding Dev. Partners, LLC,*** **224 So. 3d. 891 (Fla. 1st DCA 2017) (citing** ***Creative Choice XXV, Ltd. v. Fla. Hous. Fin. Corp.,*** **991 So. 2d. 899, 901 (Fla. 1st DCA 2008) Florida Housing's interpretation of the definition to require compliance with both the first and second sentences of the definition is contrary to the plain language of the RFA.**
>
> The first sentence clearly and unequivocally refers to the admission criteria of traditional public schools, where admission is mandatory for all children within a defined geographic proximity to the school, i.e., the school attendance zone. The second sentence applies specifically to charter schools, which are non-traditional public schools in Florida. §1002.33(1), Fla. Stat.[3] As it pertains to charter schools, the definition requires only that schools be "open to appropriately aged children in the radius area who apply" and not

[3] Section 1002.33(1), FS provides as follows in pertinent part, *Authorization. – All charter schools in Florida are public schools and shall be part of the state's program of public education....*

impose additional admission criteria. **Requiring a charter school to meet both parts of the definition of public school is contrary to the plain language of the RFA.**

Florida Housing argues that the ALJ has inserted the word "traditional" into the Public-School definition which is improper. HTG Creekside would agree with this statement, if the ALJ had done so, however the ALJ used the term "traditional" only to distinguish between the schools just described and more recent forms of public education- such as Charter schools- which may not function by traditional school zones. The irony is that Florida Housing's interpretation, that the first and second sentence of the definition must be adhered to by Charter schools, is only viable if the word *"Charter"* is inserted into the first sentence of the Public-School definition.

The ALJ in COL 64 discusses the significance of Florida Housing's Change of Position as it relates to the initial funding decision of the Board,

> 64. As noted in Florida Housing's Notice of Change of Position, filed July 6, 2018, Florida Housing determined after discovery depositions that the Manatee Charter School was not a public school for purposes of awarding proximity points to Oaks at Creekside. **However, it is Florida Housing's initial decision to award funding to Oaks at Creekside, not its subsequent litigation position, that is at issue in this proceeding.** *See Blue Broadway, LLC v. Fla. Hous. Fin. Corp.*, Case No. 17-3273 (Fla. DOAH Aug. 29, 2017; Sept. 22, 2017) ("In this proceeding, the undersigned continues to review the correctness of Respondent's initial decision which was to find Intervenor's application to be eligible.")

The ALJ determined that Florida Housings initial decision to award funding to HTG Creekside was not clearly erroneous, contrary to competition, arbitrary or capricious. Florida Housing argues that the ALJ's Conclusions of Law must be overturned because of deference due to the agency.[4] The ALJ acknowledges the due deference standard, stating,

> While the undersigned is cognizant of the principle of deference to the agency interpretations, **"judicial adherence to the agency's view is not demanded when it is contrary to the {RFA's} plain meaning."** *Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997).* Within the RFA definition of public school, the second

[4] Florida Housing is referring to its "change of position" made on July 6, 2018, however the change in position is merely a change in "litigation position" **and is not entitled to deference because it is not the intended agency action under review.**

> sentence is specific to charter schools and should be applied to Oaks at Creekside's application.

Florida Housing argues that, "...the agency's view is only contrary to the RFA's plain meaning if the word "traditional" is read into the first sentence of the definition." This is not a true statement, The first sentence of the public-school definition as it appears in RFA 2017- 111, reads as follows,

> *A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school.*

The word "charter" is noticeably absent and the interpretation of Florida Housing that this requirement applies to charter schools is inconsistent with the plain and unambiguous language. [5]

Charter Schools

Florida Housing also takes issue with the statements in footnote 13 regarding the Charter School statute. That portion of footnote 13 which discusses Florida's charter school statutes provides as follows,

> Further, Florida Housing's interpretation would effectively prohibit any charter school from qualifying as a public school under the RFA. Through 2016, charter schools were required to be open to any student residing in the school district in which the charter school is located. § 1002.33(10), Fla. Stat. (2016). Under current law, a charter school "may be exempt from [Public School Parental Choice] as long as it is open to any student residing in the school district in which the charter school is located." § 1002.33 (10) (2018). A charter school cannot be open to any student within the school district and use geographic proximity as the primary admission criteria.

Florida Housing asserts that that there was no testimony or evidence regarding the application of Section 1002.33, Florida Statutes.

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[5] Similarly, if the phrase "geographic proximity" from the first sentence was intended to apply to charter schools then why include the phrase "radius area" in the second sentence. Ms. Button testified at the Final hearing that she did not know the meaning of the term "radius area" adding, "I can only assume it means if the charter school has a radius area. I don't know". As to the phrase "geographic proximity ", Ms. Button stated, "we interpret that to mean the school accepts students within its—whatever geographic proximity is included in that district, so to speak or area...." (T. at 71:5-9; 72:21-24)

First and foremost, Florida Housing does *not have substantive jurisdiction* over Chapter 1002 and thus is prohibited from modifying or rejecting Conclusions of Law interpreting that statute. Nevertheless, and because the record before the ALJ *did address* the application of Section 1002.33, Florida Statutes HTG Creekside will respond to Florida Housing's assertions.

The Florida Enrollment Policy for the Manatee Charter School, which is Exhibit 1 to the deposition transcript of Marisol Quinones is based on the Charter School statute and references numerous different subsections of Chapter 1002, F.S., including Section 1002.33, F.S. The deposition transcript of Ms. Quinones, the Enrollment Administrator at the Manatee Charter School and the exhibits to her deposition were admitted into evidence as Petitioner's Exhibit 1. The Florida Enrollment Policy for the Manatee Charter School provides the following in pertinent part,

> Pursuant to Section 1002.33(10)(b)-Eligible Students, the charter school shall enroll an eligible student who submits a timely application unless the number of applications exceed the capacity of a program, class, grade level or building. In such cases, all applicants shall have an equal chance of being admitted through a random selection process.

(Exhibit 1 to Petitioners Exhibit 1) Ms. Quinones testified that the Florida Enrollment Policy explains the enrollment policy at the Manatee Charter school and acknowledged that she was familiar with the policy. (Petitioners Exhibit 1 at 7:9-18) Ms. Quinones was also asked a direct question regarding Section 1022.33(10)(d) and provided her interpretation as to what the provision meant. (Petitioners Exhibit 1 at 13:2-15)

In addition, the Charter Contract between The Lee Charter Foundation, Inc., d/b/a Manatee Charter School and The School Board of Manatee County provides as follows,

A. Eligible Students

1. The School shall be open to any student residing in the Manatee School District, students covered in an interdistrict agreement and students as provided for in Section 1002.33 (10), Florida Statutes (2010)

2. The target population of the School will serve no more than 800 students. The School's population are students, in grades K-8 residing in Manatee County.

HTG Creekside Exhibit 9 at 10.[6] (Emphasis added) Florida Housing's assertion that the ALJ's interpretation of Section 1002.33, Florida Statute is beyond the bounds of the ALJ's jurisdiction is not supported by the record and not something that Florida Housing's Board has the authority to decide.

Florida Housing's original purpose of adding charter schools to the Public School definition was to allow charter schools to be used for proximity points.[7]

The Challenged Conclusions of Law are well reasoned and based on competent substantial evidence and should not be overturned or changed. The Recommended Order as it pertains to HTG Creekside, LLC should be adopted in toto.

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[6] HTG Creekside did raise the issue in its Proposed Recommended Order that pursuant to the Charter Contract Manatee Charter School accepts all Eligible students living within Manatee County (PRO at ¶46)

[7] The current definition of "Public School" has been in place since 2012. Although admittedly not part of the record in this matter and thus not considered by the ALJ, the Rule Development Workshop on August 14, 2012 provides the following discussion,

> **Mr. Tatreau:** ...The discussion we had around the public school is there was a lot of uncertainty with the definitional change you proffered and how that would impact charter schools. **We believe charter schools, and I think you all had the charter school as being a suitable alternative for a public school.** I believe **that's still the intent,** but we think that some of the language you added might inadvertently preclude charter schools....
>
> **Mr. Auger:** Just generally, we were definitely not trying to exclude charter schools, you know, across the board. We want to allow for charter schools that serve, you know, a wide range of folks and – live in the area. You know, we want to exclude stuff that's specialty and only these types of students or only students that are in band or only students that are studying engineering or something like that. But for general, you know, charter school, we did not mean to exclude those.

(Emphasis added)

Respectfully submitted this 10th day of September 2018.

/s/Maureen McCarthy Daughton
Maureen M. Daughton
FBN: 655805
Maureen McCarthy Daughton, LLC
1725 Capital Circle NE, Ste 304
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Counsel for HTG Creekside, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this has been filed by e-mail with the Corporation Clerk(CorporationClerk@floridahousing.org) and e-served to, Chris McGuire, Esq.(Chris.McGuire@floridahousing.com) Assistant General Counsel Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, Douglas P. Manson, Esq. and Craig D. Varn, Esq., Manson Bolves Donaldson & Varn, P.A., 109 North Brush Street, Suite 300, Tampa, Florida 33602, J. Timothy Schulte, Zimmerman, Kiser & Sutcliffe, P.A., 315 East Robinson Street, Suite 600, Orlando, Florida 32801 and Michael J. Glazer, Anthony L. Bajoczky, Jr., and David Weiss, Ausley & McMullen, PO Box 391, Tallahassee, Florida 32302, this 10th day of September, 2018.

/s/Maureen M. Daughton

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MADISON OAKS, LLC AND
AMERICAN RESIDENTIAL
COMMUNITIES, LLC
Petitioners,

v. DOAH Case No. 18-2966BID

FLORIDA HOUSING FINANCE
CORPORATION,
Respondents,
and

ARBOURS AT HESTER LAKE, LLC; BLUE
SUNBELT, LLC; COLONNADE PARK, LTD.;
HARPER'S POINTE. L.P., HTG CREEKSIDE, LLC;
and HTG SUNSET, LLC;
Intervenors.
_____/

STERLING TERRACE, LTD., and
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FLORIDA HOUSING FINANCE
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ARBOURS AT HESTER LAKE, LLC; BLUE SUNBELT,
LLC; COLONNADE PARK, LTD; HARPER'S POINTE, L.P.,
HTG CREEKSIDE, LLC; and HTG SUNSET, LLC;
Intervenors.
_____/

INTERVENOR HTG CREEKSIDE, LLC'S
RESPONSE TO EXCEPTIONS TO RECOMMENDED ORDER
FILED BY
STERLING TERRACE, LTD. AND STERLING TERRACE DEVELOPER, LLC
AND
MADISON OAKS, LLC AND AMERICAN RESIDENTIAL COMMUNITIES, INC.

HTG CREEKSIDE, LLC ("HTG Creekside"), responds to the Exceptions to Recommended Order[1] filed by Sterling Terrace, Ltd. and Sterling Terrace Developer, LLC (hereinafter "Sterling Terrace") and Madison Oaks and American Residential Communities (hereinafter "Madison Oaks") (together "Petitioners") as follows:

Introduction

Following a formal hearing a Recommended Order was issued in this case by Administrative Law Judge ("ALJ") Van Wyk on August 23, 2018, recommending that a final order be entered finding that Florida Housing Finance Corporation's initial scoring decision awarding funding to Oaks at Creekside and Harper's Pointe was correct.[2] On September 4, 2018, Petitioners filed exceptions to the ALJ's Recommended Order. The Exceptions filed by both Sterling and Madison Oaks specifically challenge the ALJ's Findings of Fact ¶'s 31 and 33 and Conclusions of Law ¶'s 63,64 and 65. Madison Oaks has filed one additional exception to Finding of Fact 34. The Petitioners Exceptions to the Findings of Fact and Conclusions of Law should be denied by this Board and the Recommended Order adopted subject to the Exception filed by HTG Sunset, LLC.

Standard of Review

The rules governing bid protests are set forth in Section 120.57(3), Florida Statutes, which provide for:

> ... a de novo proceeding to determine whether **the agency's proposed action** is contrary to the agency's governing statutes, the agency's rules or policies, or the solicitation

[1] Sterling Terrace and Madison Oaks each filed separate Exceptions to the Recommended Order. However, because the Exceptions as to the Findings of Fact and Conclusions of Law as to HTG Creekside are essentially the same the undersigned will be responding to both within this Response.
[2] The ALJ also found that Florida Housing's decision awarding funding to HTG Sunset, LLC was erroneous, and that funding should also go to the applicant with the next highest lottery number.

> specifications. The standard of proof for such proceeding shall be whether the proposed agency action was clearly erroneous, contrary to competition, arbitrary or capricious.

(Emphasis added). Florida Housing's proposed agency action under review in this proceeding is the decision rendered by this Board on May 4, 2018, which found HTG Creekside eligible and awarded funding to HTG Creekside in the amount requested in its application.[3]

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), 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.

"Competent" evidence is evidence that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusions reached. *Schrimscher v. Sch. Bd. of Palm Beach Cnty.*, 694 So. 2d. 856, 860 (Fla. 4th DCA 1997) (citing *DeGroot v. Sheffield*, 95 So. 2d 912,916 (Fla. 1957). "Substantial" evidence is evidence from which the fact at issue can be reasonably inferred, and which a reasonable mind would accept as adequate to support a conclusion. Thus, the term "substantial evidence" does not relate to the quality, character, convincing power, probative value or weight of the evidence. Rather, "competent substantial evidence" refers to the existence of some evidence as to each essential element and as to its

[3] Florida Housing filed a Notice of Change of Position on July 6, 2018 indicating its "new" position that the Manatee Charter School was not a public school for purposes of awarding proximity points. Notwithstanding, it is the *initial decision* of Florida Housing to award funding to HTG Creekside that is at issue in this proceeding.

admissibility under legal rules of evidence. *Scholastic Book Fair, Inc., v. Unemployment Appeals Comm'n*, 671 So. 2d. 287, 289 n.3 (Fla. 5th DCA 1996).

Florida Housing in its review of the Exceptions may not reweigh the evidence or substitute its findings simply because it would have determined factual questions differently. *F.U.S.A., FTP-NEA v. Hillsborough Cnty. Coli.,* 440 So. 2d. 593, 595-96 (Fla. 1st DCA 1983); see also *Resnick v. Flagler Cnty. Sch. Bd.,* 46 So. 3d 1110, 112-13 (Fla. 5th DCA 2010) (*agency may not reject findings of fact supported by competent substantial evidence even if alternative findings were also supported by competent substantial evidence*) (Emphasis added); *Heifetz v. Dep't of Bus. Regulation Div. of Alcoholic Bevs. & Tobacco,* 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other.") "Factual inferences are to be drawn by the [ALJ] as a trier of fact." Id. at 1283. Rejection or modification of conclusions of law may not form the basis for rejecting or modifying findings of facts. § 120.57(1)(l), Fla. Stat. Thus, if the record contains any competent substantial evidence supporting a challenged factual finding of the ALJ, the agency is bound by such factual findings in preparing its Final Order. (*Walker v. Bd. of Prof. Eng'rs,* 946 So. 2d 604 (Fla. 1st. DCA 2006)

Florida Housing may modify or reject conclusions of law *only* where it has substantive jurisdiction §120.57 (1)(l), Fla. Stat.; *State Contracting & Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d. 607 (Fla. 1st DCA 1998) (affirming final order in which Florida Housing rejected ALJ's interpretation of Florida Housing's rule); see generally *Barfield v. Dep't of Health*, 805 So. 2d. 1008 (Fla. 2001). Florida Housing cannot overturn or modify legal conclusions that are outside of its substantive jurisdiction, such as rulings on admissibility of evidence, the interpretation of statutes that Florida Housing is not charged with implementing and the scope of the ALJ's

authority. When modifying or rejecting conclusions of law, Florida Housing must state with particularity the reasons for the modification or rejection and must make a finding that its substituted conclusion of law is as or more reasonable then the conclusion modified or rejected. § 120.57 (1)(l)

Matters that are susceptible of ordinary methods of proof-such as weighing the evidence or determining a witness's credibility- are factual matters to be determined by the ALJ. See *Baptist Hosp.,* 500 So. 2d at 623; Homes, 480 So. 2d at 153. "Ultimate facts" are "those found in that vaguely defined area lying between evidentiary facts on the one side and conclusions of law on the other and are the final resulting effects which are reached by the process of logical reasoning from the evidentiary facts." *Feldman v. Dep't of Transp*, 389 So. 2d. 2d 694, 696 (Fla. 4th DCA 1980). The question whether the facts establish a violation of a rule or statute, for example, involves a question of ultimate fact that Florida Housing may not reject without adequate explanation. See *Goin v. Comm'n on Ethics,* 658 So. 2d 1131, 1138 (Fla. 1st DCA 1995)

Findings of Fact 31 and 33

The focus of the exceptions filed by Petitioners surround the interpretation of the definition of Public School within RFA 2017-111 which provides as follows,

> A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school. This may include a charter school, if the charter school is open to appropriately aged children in the radius area who apply, without additional requirements for admissions such as taking an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations.
>
> Additionally, it must have been in existence and available for use by the general public as of the Application Deadline.

(Emphasis added) Petitioners take exception to Findings of Fact 31 and 33 which provide as follows:

31. The Manatee School does not apply additional requirements for admission, such as passing an entrance exam or audition, payment of fees or tuition, or demographic diversity considerations

32. The Manatee School does provide admissions preferences to students of active duty military personnel, siblings of a student already enrolled, siblings of an accepted applicant, children of an employee of the School, and children of a charter board member. Each of these preferences is authorized pursuant to section 1002.33 (10)(d).[4]

33. The preferences are not additional requirements for admission to the Manatee School.[5]

Contrary to the assertion of Petitioners these findings of fact are supported by competent substantial evidence.

As for Finding of Fact 31, Marisol Quinones the Director of Admissions at the Manatee Charter School testified as follows,

Q. …Am I correct that Manatee Charter School has no –there's no entrance exam, there's no audition, there's no payment of fees is that correct?

A. That's correct?

Q. And there's also no demographic diversity consideration, correct?

A. Correct.

Petitioners Exh. 1 at 25:6-12.

As for Finding of Fact 33, Ms. Button testified as follows in her deposition in response to questions from Counsel for Sterling, regarding whether preferences are considered "additional requirements" of the prospective student,

A. We need to know whether or not—it really comes back to for the public school designation, and this includes the reference to charter school within the definition, whether

[4] Finding of Fact 32 is not being challenged by Petitioners but is being included to provide context.

[5] Both Madison Oaks and Sterling argue that Finding of Fact 33 is a Conclusion of Law and not a Finding of Fact. This characterization is incorrect and thus so long as this Finding of Fact is supported by competent substantial evidence it cannot be modified.

or not there is any impediment to a student who would be living in this proposed development to attending that charter school.[6]

So whether or not a charter school has requirements such as if your sibling goes here you get to go here or you are an employee and your child gets to go here, that may be the case, but that doesn't mean that it doesn't meet the definition....

***

Q. Okay. Well, let me ask you, so you mentioned two examples. If your sibling went here or your parents go here. Are you saying that those aren't additional requirements?

A. I don't consider them to be additional requirements as long as a student is not—that lives in the proposed development within the location close to the school, as long as they can get in, those requirements are not a concern to Florida Housing.

Q. I mean—

A. They are not requirements of the child, the proposed student.

Q. And that's—so we are talking on the same page, let me get clarification. So you don't think those are requirements?

A. The way that they have just—the hypothetical that we are talking about, no, I don't see those as being requirements unless the charter school said those are requirements.

Petitioners Exhibit 19 at 65:3-16; 66:1-19.

The evidence before the ALJ is that the Manatee Charter School, since it began accepting students, has always been *under enrolled.* Thus, just as there has never been a need for the Manatee Charter School to use a lottery system for admission because there have always been more seats than students applying,[7] it is a reasonable inference that it has never, in applying a preference, had to enroll one prospective student to the exclusion of another. Pet. Exh. 19 at 22:25; 23:1-2.

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[6] Ms. Button acknowledged on cross examination during the Final Hearing that the Public School definition within the RFA does not require that a child living in the proposed Development be guaranteed a seat in the subject school.

> Q.... The definition of public school does not require that a child must be guaranteed a slot in the school for the school to meet the definition of public school does it?
>
> A. The language of the definition does not—does not include it—does not include it in the language of the definition.

(T. at 72:24-25; 73:1)

[7] Ms. Quinones testified, "And just so you know, this is one of the reasons why we have never used the lottery; we always been under-enrolled...." Pet. Exhibit 1 at 22:25;23:1-2.

Findings of Fact 31 and 33 are both supported by competent substantial evidence and cannot be rejected or modified.

Finding of Fact 34

Madison Oaks files an exception to Finding of Fact 34 which provides as follows:

> 34. The Manatee School meets the second part of the definition of "public school" for purpose of qualifying Oaks at Creekside to receive proximity points pursuant to the RFA.

Madison Oaks argues first that, "Because Manatee School's preferences can prevent a student in the area from being able to attend the school… those requirements take Manatee School outside the RFA's definition of "public school" (Madison Oaks at p. 11) There is simply no reading of the RFA and the public-school definition which supports this statement. Madison Oaks then concludes with:

> Given Florida Housing's interpretation that these preferences are additional requirements for admission, and the ALJ's finding in Finding of Fact # 32 that Manatee School does have admission preferences, the ALJ's conclusion in Finding of Fact 31 and 34 are clearly erroneous and must be rejected."

This argument fails because as Ms. Button testified, these preferences, for children of active duty military for example as authorized by Chapter 1002, are *not additional requirements on the prospective student.* Finding of Fact 34 is supported by competent substantial evidence and the exception must be denied.

Conclusions of Law 63,64 and 65

In Conclusion of Law 63, the ALJ determined that the awarding of four proximity points to Oaks at Creekside for its proximity to the Manatee Charter School was "neither clearly erroneous, contrary to competition, arbitrary or capricious" and that the Manatee Charter School is a public school as defined in the RFA. This determination is a finding of Ultimate Fact which cannot be rejected without adequate explanation.

Petitioners in their challenge assert that Conclusion of Law 63 is

> "based upon an erroneous interpretation of the undisputed terms of the RFA and conflicts with the ALJ's conclusion in Finding of Fact 16 that a school does "not meet the RFA definition of "public school" because geographic proximity to the school is not the principal admission criterion" This error is carries over to COL # 65 where the ALJ determined that Sterling Terrace failed to prove that the award to Oaks at Creekside was erroneous"

Sterling at p. 4; Madison Oaks at p.4 -5. Finding of Fact 16 has nothing to do with HTG Creekside or the Manatee Charter School. Rather, it provides, in pertinent part,

> "**The Jewett School** does not meet the RFA definition of "public school" because geographic proximity to the school is not the principal admission criterion. Although a student must live in Polk County Schools' Magnet Zone B to apply for admission to the Jewett School, the principal admission criteria is a random lottery process. Geographic location within the Polk County magnet school zones is a threshold issue which qualifies a student to apply for admission....

This Finding of Fact is based on the selection of a *magnet school, not a charter school* chosen by a different applicant.

Petitioners also take issue with Conclusion of law 64, which provides,

> 64. As noted in Florida Housing's Notice of Change of Position, filed July 6, 2018, Florida Housing determined after discovery depositions that the Manatee Charter School was not a public school for purposes of awarding proximity points to Oaks at Creekside. **However, it is Florida Housing's initial decision to award funding to Oaks at Creekside, not its subsequent litigation position, that is at issue in this proceeding.** *See Blue Broadway, LLC v. Fla. Hous. Fin. Corp.*, Case No. 17-3273 (Fla. DOAH Aug. 29, 2017; Sept. 22, 2017) ("In this proceeding, the undersigned continues to review the correctness of Respondent's initial decision which was to find Intervenor's application to be eligible."

(Emphasis added) and portions of footnote 13 in which the ALJ describes the legal analysis upon which her Conclusion of Law are based, which provides in its entirety,

> However, the undersigned is compelled to comment on Florida Housing's position, taken at final hearing, that the Manatee School does not meet the RFA definition of "public school" because geographic proximity is not the primary admission criteria. That position is untenable. **Florida Housing is required to interpret the RFA consistent with its plain and unambiguous language.** ***See Brownsville Manor, LP v. Redding Dev. Partners, LLC,* 224 So. 3d. 891 (Fla. 1st DCA 2017) (citing *Creative Choice XXV, Ltd. v. Fla.***

***Hous. Fin. Corp.*, 991 So. 2d. 899, 901 (Fla. 1st DCA 2008) Florida Housing's interpretation of the definition to require compliance with both the first and second sentences of the definition is contrary to the plain language of the RFA.**

The first sentence clearly and unequivocally refers to the admission criteria of traditional public schools, where admission is mandatory for all children within a defined geographic proximity to the school, i.e., the school attendance zone. The second sentence applies specifically to charter schools, which are non-traditional public schools in Florida. §1002.33(1), Fla. Stat.[8] As it pertains to charter schools, the definition requires only that schools be "open to appropriately aged children in the radius area who apply" and not impose additional admission criteria. **Requiring a charter school to meet both parts of the definition of public school is contrary to the plain language of the RFA.**

Further, Florida Housing's interpretation would effectively prohibit any charter school from qualifying as a public school under the RFA. Through 2016, charter schools were required to be open to any student residing in the school district in which the charter school is located. § 1002.33(10), Fla. Stat. (2016). Under current law, a charter school "may be exempt from [Public School Parental Choice] as long as it is open to any student residing in the school district in which the charter school is located." § 1002.33 (10) (2018). A charter school cannot be open to any student within the school district and use geographic proximity as the primary admission criteria.

Petitioners repeat the arguments made by Florida Housing's counsel that the ALJ has inserted the word "traditional" into the Public School definition which is improper. HTG Creekside would agree with this statement, if the ALJ had done so, however the ALJ used the term "traditional" only to distinguish between the schools just described and more recent forms of public education- such as charter school-which may not function within traditional school zones.[9] The inescapable irony of the Petitioner's position is that the interpretation, that the first and second

[8] Section 1002.33(1), FS provides as follows in pertinent part, Authorization. – All charter schools in Florida are public schools and shall be part of the state's program of public education....

[9] Petitioners observe that all charter schools are public schools and then cite to Section 1002.33(1), which provides in part "All charter schools in Florida are public schools and shall be part of the state's program of public education. However within RFA 2017-111 the applicants are instructed, under Section Two, Definitions of the RFA , *Unless otherwise defined below, capitalized terms within this RFA shall have the meaning as set forth in Exhibit B, in Rule Chapters 67-48 and 67-60, F.A.C., or in applicable federal guidelines* . Unfortunately the definition within Exhibit B of the RFA includes no reference to Section 1002.33(1), Florida statutes. Nor is the term "Public School" defined in Rule Chapters 67-48 or 67-60.

sentence of the definition must be adhered to by Charter schools, is only viable if the word *"Charter"* is inserted into the first sentence of the Public-School definition.

Petitioners' also argue that the ALJ's Conclusions of Law must be overturned because of deference due to the agency.[10] The ALJ anticipated this position and specifically addressed why deference is not required in this instance.

> While the undersigned is cognizant of the principle of deference to the agency interpretations, **"judicial adherence to the agency's view is not demanded when it is contrary to the {RFA's} plain meaning."** *Werner v. Dep't of Ins. & Treasurer, 689 So. 2d 1211 (Fla. 1st DCA 1997).* Within the RFA definition of public school, the second sentence is specific to charter schools and should be applied to Oaks at Creekside's application.

The first sentence of the public-school definition as it appears in RFA 2017- 111, reads as follows,

> *A public elementary, middle, junior and/or high school, where the principal admission criterion is the geographic proximity to the school.*

The word "charter" is noticeably absent and the interpretation of Florida Housing that this requirement applies to charter schools is inconsistent with the plain and unambiguous language.

The Petitioners also argue that somehow the ALJ has turned this into a specifications challenge under Section 120.57(3) and that such a challenge is untimely. The Petitioners miss the point, the ALJ's conclusion is that the RFA must be interpreted by Florida Housing consistent with its *plain and unambiguous language*. That is not the same as a specifications challenge under Chapter 120 which requires that within 72 hours of the issuance of the RFA that a Notice of Intent to bring a specifications challenge is filed.

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[10] Florida Housing is referring to its "change of position" made on July 6, 2018, however the change in position is merely a change in "litigation position" **and is not entitled to deference because it is not the intended agency action under review.** Additionally deference is not required to "implausible" or "unreasonable" interpretations" adopted by the agency. *Sullivan v. Fla. Dep't of Envtl. Prot., 890 So. 2d 417, 420. (Fla. 1st DCA 2004)*

Lastly, Florida Housing *does not have substantive jurisdiction over Chapter 1002* and thus is prohibited from modifying or rejecting Conclusions of Law interpreting that statute.

The Challenged Findings of Fact and Conclusions of Law are supported by competent substantial evidence and are well reasoned and should not be overturned or changed. The Recommended Order as it pertains to HTG Creekside, LLC should be adopted in toto.

Respectfully submitted this 11th day of September 2018.

/s/Maureen McCarthy Daughton
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this has been filed by e-mail with the Corporation Clerk(CorporationClerk@floridahousing.org) and e-served to, Chris McGuire, Esq.(Chris.McGuire@floridahousing.com) Assistant General Counsel Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, Douglas P. Manson, Esq. and Craig D. Varn, Esq., Manson Bolves Donaldson & Varn, P.A., 109 North Brush Street, Suite 300, Tampa, Florida 33602, J. Timothy Schulte, Zimmerman, Kiser & Sutcliffe, P.A., 315 East Robinson Street, Suite 600, Orlando, Florida 32801 and Michael J. Glazer, Anthony L. Bajoczky, Jr., and David Weiss, Ausley & McMullen, PO Box 391, Tallahassee, Florida 32302, this 11th day of September, 2018.

/s/Maureen M. Daughton