STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG ASTORIA, LTD,

Petitioner,

FHFC Case No. 2021-006BP
DOAH Case No. 21-0725BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

RST THE WILLOWS, LP,

Intervenor.
_____/

MHP FL VIII LLLP,

Petitioner,

FHFC Case No. 2021-014BP
DOAH Case No. 21-0726BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

FULHAM TERRACE, LTD., BDG FERN GROVE, LP, and QUIET MEADOWS, LTD,

Intervenors.
_____/

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Anne McMurray /DATE: 6/19/2021

VISTA AT COCONUT PALM, LTD,

Petitioner,

FHFC Case No. 2021-017BP
DOAH Case No. 21-0727BID

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

UNIVERSITY STATION I, LLC, RESIDENCES AT SOMI PARC, LLC, and BDG FERN GROVE, LP,

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 June 18, 2021. Petitioners HTG Astoria, Ltd, ("HTG Astoria"), MHP FL VIII, LLLP ("MHP") and Vista at Coconut Palm, Ltd. ("Vista") and Intervenors RST The Willows, LP ("Willows"), Fulham Terrace, Ltd. ("Fulham"), BDG Fern Grove, LP ("Fern Grove"), Quiet Meadows, Ltd., ("Quiet Meadows"), University Station I, LLC ("University Station"), Residences at SoMi Parc, LLC ("SoMi"), and Douglas Gardens IV, Ltd. ("Douglas Gardens") were Applicants under Request for Applications 2020-205 SAIL Financing of Affordable Multifamily Housing

Developments to be Used in Conjunction with Tax-Exempt Bonds and Non-Competitive Housing Credits (the "RFA"). The matter for consideration before this Board is a Recommended Order issued pursuant to §§120.569 and 120.57(3), Fla. Stat. and the Exceptions to the Recommended Order.

On October 15, 2020, Florida Housing Finance Corporation ("Florida Housing") issued the RFA, which solicited applications to compete for an allocation of State Apartment Incentive Loan ("SAIL") funding along with tax-exempt bonds and non-competitive housing credits. On January 22, 2021, Florida Housing posted notice of its intended decision to select applicants for funding including Willows, Fulham, Fern Grove, Quiet Meadows, and University Station. Petitioners HTG Astoria, MHP and Vista, along with SoMi and Douglas Gardens, were deemed eligible, but not selected for funding.

HTG Astoria, Tallman Pines HR, Ltd. ("Tallman Pines"), Douglas Gardens, MHP, and Vista timely filed formal written protests and petitions for administrative proceedings. Several other applicants filed notices of appearances in the challenges. Tallman Pines and Douglas Gardens voluntarily dismissed their respective petitions. All other petitions were referred to the Division of Administrative Hearings ("DOAH") and consolidated. Prior to the hearing, several stipulations were entered into evidence which resulted in the Willows, SoMi, Douglas Gardens, Quiet Meadows, and MHP admitting ineligibility for funding in RFA 2020-205.

A hearing in the consolidated case was conducted as scheduled on March 29, 2021 via Zoom technology before Administrative Law Judge G. W. Chisenhall (the "ALJ") with all parties present. At hearing only one disputed issue remained: whether University Station demonstrated site control pursuant to the requirements in the RFA.

After consideration of the oral and documentary evidence presented at hearing, the parties' proposed recommended orders, and the entire record in the proceeding, the ALJ issued a Recommended Order on May 17, 2021. A true and correct copy of the Recommended Order is attached hereto as "Exhibit A." The ALJ found that Vista failed to meet its burden, University Station met the RFA requirements for site control, and that Florida Housing reasonably applied the RFA's site control requirements for a lease to University Station's site control documentation. The ALJ recommended that Florida Housing enter a final order 1) awarding funding to University Station, subject to credit underwriting, and 2) finding that the applications submitted by Douglas Gardens, MHP, Quiet Meadows, Willows, and SoMi are ineligible for funding.

On May 26, 2021, Vista filed exceptions to the Recommended Order, attached as "Exhibit B." On June 4, 2021, Florida Housing and University Station filed a joint response to Vista's exceptions, a copy of which is attached as "Exhibit C."

RULING ON EXCEPTIONS

Ruling on Exception #1

1. Vista filed an exception to Finding of Fact 35 of the Recommended Order.

2. After a review of the record, the Board finds that Finding of Fact 35 is supported by competent substantial evidence and the Board rejects Exception 1.

Ruling on Exception #2

3. Vista filed an exception to Finding of Fact 36 of the Recommended Order.

4. After a review of the record, the Board finds that Finding of Fact 36 is supported by competent substantial evidence and the Board rejects Exception 2.

Ruling on Exception #3

5. Vista filed an exception to Finding of Fact 37 of the Recommended Order.

6. After a review of the record, the Board finds that Finding of Fact 37 is reasonable and is supported by competent substantial evidence. The Board rejects Exception 3.

Ruling on Exception #4

7. Vista filed an exception to Finding of Fact 38 of the Recommended Order.

8. After a review of the record, the Board finds that Finding of Fact 38 is reasonable and is supported by competent substantial evidence. The Board rejects Exception 4.

Ruling on Exception #5

9. Vista filed an exception to Conclusion of Law 49 of the Recommended Order.

10. After a review of the record, the Board finds that Conclusion of Law 49 is reasonable and is supported by competent substantial evidence. The Board rejects Exception 5.

Ruling on Exception #6

11. Vista filed an exception to Conclusion of Law 50 of the Recommended Order.

12. After a review of the record, the Board finds that Conclusion of Law 50 is reasonable and is supported by competent substantial evidence. The Board rejects Exception 6.

Ruling on Exception #7

13. Vista filed an exception to Conclusion of Law 52 of the Recommended Order.

14. After a review of the record, the Board finds that Conclusion of Law 52 is reasonable and is supported by competent substantial evidence. The Board rejects Exception 7.

Ruling on Exception #8

15. Vista filed an exception to Conclusion of Law 53 of the Recommended Order.

16. After a review of the record, the Board finds that Conclusion of Law 53 is reasonable and is supported by competent substantial evidence. The Board rejects Exception 8.

Ruling on the Recommended Order

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

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

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

ORDER

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

The Exceptions 1 through 8 are hereby rejected and the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order are

adopted as Florida Housing's and incorporated by reference as though fully set forth in this Order.

IT IS HEREBY ORDERED that as to funding in RFA 2020-205:

1) The application of University Station is awarded funding, subject to credit underwriting; and
2) The applications of Douglas Gardens IV, Ltd., MHP FL VIII, LLLP, Quiet Meadows, Ltd., RST The Willows, LP, and Residences at SoMi Parc, LLC are ineligible for funding.

DONE and ORDERED this 18th day of June 2021.

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

HTG ASTORIA, LTD,

Petitioner,

vs. Case No. 21-0725BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

MHP FL VIII, LLLP,

Petitioner,

vs. Case No. 21-0726BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

VISTA AT COCONUT PALM, LTD,

Petitioner,

vs. Case No. 21-0727BID

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted via Zoom on March 29, 2021, before Administrative Law Judge Garnett W. Chisenhall of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Intervenor Quiet Meadows, Ltd:

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STATEMENT OF THE ISSUE

Whether Florida Housing Finance Corporation's ("Florida Housing") preliminary award of funding to University Station I, LLC ("University Station"), was clearly erroneous, contrary to competition, arbitrary or capricious, or contrary to Florida Housing's governing statutes, rules, policies, or RFA specifications.

PRELIMINARY STATEMENT

This case arises from Florida Housing's notice of preliminary award of funding for applications submitted pursuant to Request for Applications 2020-205 "SAIL Financing of Affordable Multifamily Housing Developments to be used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits" ("the RFA"). Vista at Coconut Palm, Ltd. ("Vista"), was found eligible for funding, but was not selected for funding.

Vista timely filed a Formal Written Protest and Petition for Administrative Hearing, which is Case No. 21-0727BID. Vista timely challenged the awards to both University Station and Residences at SoMi Parc ("SoMi Parc"). Prior to the Final Hearing, Vista, Florida Housing, and SoMi Parc entered into a stipulation that SoMi Parc was not eligible for funding in this RFA because it had already entered into credit underwriting under a different RFA. Thus, the only issue remaining is Vista's challenge to University Station's application.

HTG Astoria, Ltd ("HTG Astoria"), filed a timely Petition challenging the funding award to RST The Willows ("The Willows"), which is Case No. 21-0725BID. Prior to the Final Hearing, HTG Astoria, The Willows, and Florida Housing entered into a stipulation agreeing that The Willows was ineligible for funding.

MHP FL VIII, LLLP ("MHP"), filed a timely Petition challenging the funding award to Quiet Meadows, Ltd ("Quiet Meadows"), and Fulham Terrace, Ltd. ("Fulham Terrace"), which became Case No. 21-0726BID.[1] Florida Housing, MHP, Fulham Terrace, Quiet Meadows, and Douglas Gardens IV, Ltd. ("Douglas Gardens"), entered into a settlement agreement

[1] Case Nos. 21-725, 21-726, and 21-727 were consolidated via an Order issued on February 25, 2021.

and stipulation. In that agreement, the parties agreed that Douglas Gardens, MHP, and Quiet Meadows are ineligible for funding under the RFA. The parties further agreed that Fulham Terrace was eligible for funding. MHP then withdrew its Petition.

BDG Fern Grove, L.P. ("Fern Grove"), also entered an appearance as an Intervenor in Case Nos. 21-0726 and 21-0727 because certain changes in the funding scenarios could have resulted in a loss of preliminary funding to its development. Given the stipulations between the parties, Fern Grove's application will not lose funding.

In light of the stipulations, the only remaining issue pertained to Case No. 21-0727 and whether University Station's application should be found ineligible for failing to include a particular document with its application.

The final hearing took place as scheduled on March 29, 2021. Florida Housing presented testimony from Marissa Button. Vista presented testimony from Kenneth Naylor, and Vista Exhibits 1 and 2 were accepted into evidence. University Station called no witnesses, and University Station Exhibits 2 and 3 were accepted into evidence. The undersigned noted Vista's relevancy objections to University Station's exhibits. Finally, Joint Exhibits 1, 5, and 13 were accepted into evidence. Also accepted as exhibits were the stipulations between HTG Astoria, Florida Housing, and The Willows (The Willows Exhibit 1); MHP, Fulham Terrace, Douglas Gardens, Quiet Meadows, and Florida Housing (Fern Grove Exhibit 1); and Vista, SoMi Parc, and Florida Housing (SoMi Parc Exhibit 1).

The Transcript from the final hearing was filed on April 16, 2021. The parties timely filed proposed recommended orders on April 26, 2021, and

those proposed recommended orders were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing, the record as a whole, the stipulated facts, and matters subject to official recognition, the following Findings of Fact are made:

Findings on Florida Housing and the RFA

1. Florida Housing is a public corporation created pursuant to section 420.504, Florida Statutes, and promotes public welfare by administering the financing of affordable housing in Florida. Section 420.5099 designates Florida Housing as the State of Florida's housing credit agency within the meaning of section 42(h)(7)(A) of the Internal Revenue Code. Accordingly, Florida Housing is responsible for establishing procedures for allocating and distributing low income housing tax credits.

2. Florida Housing allocates housing credits and other funding via requests for proposals or other competitive solicitation methods identified in section 420.507(48).

3. Florida Housing initiated the instant competitive solicitation by issuing the RFA on October 15, 2020, and anticipates awarding up to an estimated $88,959,045.00 in State Apartment Incentive Loan ("SAIL")[2] financing.

4. The RFA set forth a process by which applications would be scored based, in part, on eligibility items. Only applications satisfying all of the eligibility items were eligible for funding and considered for selection.

[2] Marissa Button, the Director of Multifamily Programs at Florida Housing, testified that the SAIL program finances the development of multifamily, affordable rental housing. The Florida Legislature traditionally appropriates money for the SAIL program via the State Housing Trust Fund.

5. Site Control was an eligibility item because Florida Housing wants assurances that applicants selected for funding will be able to actually use the development sites.[3]

6. Applicants satisfy the Site Control requirement by providing a properly completed and executed Florida Housing Site Control Certification Form ("the Site Control Form"). In order for the Site Control Form to be considered complete, an applicant had to attach documentation demonstrating that it: (a) was a party to an eligible contract or lease; or (b) owned the property in question.

7. The RFA set forth specific requirements for contracts and leases used for demonstrating site control. For example, a contract had to satisfy all of the following conditions:

> (a) It must have a term that does not expire before May 31, 2021 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than May 31, 2021.
>
> (b) It must specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance;
>
> (c) The Applicant must be the buyer unless there is an assignment of the eligible contract, signed by the assignor and the assignee, which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant; and
>
> (d) The owner of the subject property must be the seller, or is a party to one or more intermediate contracts, agreements, assignments, options, or

[3] Ms. Button explained that Site Control "is a component of how the applicant demonstrates its ability to proceed with the proposed development. And essentially it is the – the way that we require them to demonstrate they have control over the proposed development site." As for why Site Control is important, Ms. Button testified that Florida Housing wants "to be assured if the – the applicant is successful in its request for funding, that the – they will be able to actually use the development site."

> conveyances between or among the owner, the Applicant, or other parties, that have the effect of assigning the owner's right to sell the property to the seller. Any intermediate contract must meet the criteria for an eligible contract in (a) and (b) above.

8. The language quoted above indicates that the RFA was referring to a sales contract when it used the term "contract."

9. If an applicant used a lease to satisfy the Site Control requirement, then the RFA provided the following:

> (3) Lease – The lease must have an unexpired term of at least 50 years after the Application Deadline and the lessee must be the Applicant. The owner of the subject property must be a party to the lease, or a party to one or more intermediate leases, subleases, agreements, or assignments, between or among the owner, the Applicant, or other parties, that have the effect of assigning the owner's right to lease the property for at least 50 years to the lessee.

10. Marissa Button, Florida Housing's Director of Multifamily Programs, testified that the RFA did not require a lease to have a commencement date.

11. The RFA required that Site Control documentation for leases "include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases. If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites."

12. Ms. Button provided the following testimony about this requirement:

> A: Florida Housing includes the requirements for that documentation to – to essentially acknowledge that there are circumstances where there may be an intermediate contract or agreement that would demonstrate one of the criteria for those different types of site control and the requirements that we

want to see that -- that chain back to the requirement itself.

* * *

Q: So Florida Housing considers this term to broadly include all different types of potential contract agreements, et cetera; correct?

A: Yes.

Q: Could you give me an example of an intermediate contract or agreement?

A: Yes. An intermediate contract or agreement may be where – with regard to the [ ] contract, the terms require an owner of the subject property to be a seller of the subject property. And so there may be an applicant that has a contract with the seller of the property. And that seller might not be the actual owner; so there may be an intermediate contract that we need to see between the seller to the buyer and the actual owner of the subject property.

Q: And that situation that you just described, that happened in the past few years; correct?

A: I can think of one example where that happened, yes.

Q: Okay. And in that case Florida Housing agreed that the intermediate agreement was necessary to include with the site documentation; correct?

A: Florida Housing reviewed – yes. That – Florida Housing's position was there was an intermediate agreement necessary because the site control documentation provided did not include the owner of the subject property.

13. As for Florida Housing's review of Site Control documentation, the RFA provided as follows:

> Note: [Florida Housing] will not review the site control documentation that is submitted with the Site Control Certification form during the scoring process unless there is a reason to believe that the form has been improperly executed, nor will it in any case evaluate the validity or enforceability of any such documentation. During scoring, [Florida Housing] will rely on the properly executed Site Control Certification form to determine whether an Applicant has met the requirement of this RFA to demonstrate site control. [Florida Housing] has no authority to, and will not, evaluate the validity or enforceability of any eligible site control documentation that is attached to the Site Control Certification form during the scoring process. During credit underwriting, if it is determined that the site control documents do not meet the above requirements, [Florida Housing] may rescind the award.

14. When questioned about Florida Housing's review of Site Control documentation, Ms. Button offered the following testimony:

> Q: If you look at the next page, Page 48, at the end of Subsection A there's a note. It says Florida Housing will not review the site control during the scoring process. It will not evaluate the authority or enforceability of such documentation; correct?
>
> A: Yes.
>
> Q: But even though Florida Housing does not review the site documentation during scoring, it will review the documentation during the bid protest; correct?
>
> A: Yes as it relates to the RFA requirements.
>
> * * *
>
> Q: If the documents attached to a site control documentation [do] not meet the RFA criteria, then

> that site control certification form would be incorrect; right?
>
> A: Yes.
>
> Q: And the applicant would be found ineligible; correct?
>
> A: Yes.

15. The RFA and Ms. Button's testimony indicate that Florida Housing intended, under most circumstances, to accept the representations set forth in an applicant's Site Control documentation during the scoring process. In other words, Florida Housing did not go behind the Site Control documentation to verify the representations therein.

16. The terms of the RFA were not challenged.

Stipulated Facts Pertaining to Certain Parties

17. Douglas Gardens and Florida Housing agree that Douglas Gardens' application is ineligible for funding via the RFA.

18. Quiet Meadows and Florida Housing agree that Quiet Meadows' application is ineligible for funding via the RFA.

19. MHP and Florida Housing agree that MHP's Application is ineligible for funding via the RFA.[4]

20. MHP, Quiet Meadows, and Douglas Gardens agree that Fulham Terrace's application remains eligible for funding via the RFA.

21. The Willows and Florida Housing agree that the Willows Application is ineligible for funding via the RFA.

22. The Willows agrees that the HTG Astoria Application is eligible for funding via the RFA.

[4] MHP, Florida Housing, Quiet Meadows, Douglas Gardens, and Fulham Terrace entered into a Settlement Agreement and Stipulation on March 26, 2021, that was entered into evidence as Fern Grove Exhibit 1.

23. SoMi Parc, Vista, and Florida Housing agree that the SoMi Parc Application is ineligible for funding via the RFA. SoMi Parc has accepted an invitation to enter credit underwriting for the same Development in RFA 2020-203 and thus cannot be funding via the RFA.

Findings Regarding the Applications of University Station and Vista

24. Florida Housing received 90 applications in response to the RFA. Those applications were processed, deemed eligible or ineligible, scored, and ranked pursuant to the terms of the RFA. On January 22, 2021, Florida Housing announced its intention to award funding to 17 applicants, subject to satisfactory completion of the credit underwriting process.

25. University Station was one of the 17 successful applicants, and University Station's Site Control documentation included: (a) a Ground Lease Agreement between the City of Hollywood, Florida ("the City"), and University Station ("the University Station I Lease"); (b) a Ground Lease Agreement between the City and University Station II, LTD ("the University Station II Lease"); and (c) an Assignment of Ground Lease Agreement assigning University Station II, LTD's interests in the Ground Lease Agreement between the City and University Station II, LTD to University Station.[5]

26. The University Station I Lease described its terms as follows:

> This lease shall be effective as of the Effective Date, but the term shall commence on the Commencement Date and expire at 11:59 p.m. on the seventy-fifth (75th) anniversary of the Commencement Date (the "Term"), unless this lease is terminated earlier pursuant to the provisions contained herein. For purposes of this lease, the "Commencement Date" shall be the closing date of Tenant's construction financing for the development of the Phase I Project (the "Construction Financing"), but in no event later

[5] The Assignment of Ground Lease Agreement between University Station and University Station II was a relevant intermediate document for demonstrating Site Control.

> than June 30, 2022. Tenant's right to take physical possession of the Leased Premises shall begin on the Commencement Date.

27. The University Station II Lease between the City and University Station II described its terms as follows:

> (a) This lease shall be effective as of the Effective Date, but the term shall commence on the Commencement Date and expire at 11:59 p.m. on the seventy-fifth (75th) anniversary of the Commencement Date (the "Term"), unless this lease is terminated earlier pursuant to the provisions contained herein. For purposes of this Lease, the "Commencement Date" shall be the later of the closing date of Tenant's construction loan for the development of the Project (the "Construction Loan") and the termination of the lease of the premises to Barry University, but in no event later than June 30, 2023. Tenant's right to take physical possession of the Leased Premises shall begin on the Commencement Date.
>
> (b) Landlord and Tenant acknowledge that the leased premises are currently improved with an educational facility and adjacent ground parking that is leased to Barry University through November 23, 2021 and the Landlord may enter into an additional one-year extension of the lease to Barry University at Landlord's sole discretion. Until the Commencement Date, Landlord, or its tenant, shall be solely responsible for the operation and maintenance of the leased premises and any uses on the Leased Premises.

28. University Station's proposed Development site consists of five Scattered Sites. Barry University currently leases a building and parking spaces located on the Scattered Site described as latitude and longitude coordinates of 26.014703, -80.148572 in Question 5.d.2 of the University Station Application. This is the site described in the University Station II Lease.

29. The City and Barry University, Inc., are the parties to the Barry University Lease ("the Barry University Lease"). The Barry University Lease was executed on May 23, 2011, with a term of 10 and one-half years, which would expire on approximately November 23, 2021. With regard to its term, the Barry University Lease states that "[t]he term of this lease shall be for ten and one-half (10 ½) years commencing upon the execution of this lease. The parties will have the mutual option to renew this lease subject to City Commission and the Lessee's Board of Directors approval."

30. A copy of the Barry University Lease was not included in University Station's application.

31. In contrast to the statement in the University Station II Lease that the Barry University Lease could be extended by "an additional one-year extension" at the City's "sole discretion," the Barry University Lease simply says that the parties have a "mutual option to renew" with no mention of a particular term.

32. Ms. Button provided the following testimony regarding the Barry University Lease:

> Q: And you are aware that University Station did not submit the Barry University lease as part of its site control documentation; correct?
>
> A: Yes.
>
> Q: And does the existence of that Barry University lease change your position on whether University Station met the requirements in the RFA for a lease?
>
> A: No.
>
> Q: And why not?
>
> A: Because the documents submitted with the application meet the terms of the RFA for a lease site control documentation.

> Q: Did the existence of the Barry University lease impact whether or not the University Station site control documentation met the requirements for a lease?
>
> A: No.
>
> Q: As Florida Housing's corporate representative, what is your position regarding University Station's application?
>
> A: It is eligible for funding.

33. Vista also applied for funding from the RFA. Florida Housing determined that Vista was eligible for funding, but Florida Housing did not preliminarily select Vista for funding.

34. If University Station is deemed ineligible for funding, then Vista will be selected for funding subject to the successful completion of credit underwriting.

Ultimate Findings

35. Vista has failed to carry its burden of demonstrating that Florida Housing's proposed award to University Station was clearly erroneous, contrary to competition, arbitrary, or capricious. Also, the greater weight of the evidence demonstrates that: (a) Florida Housing's proposed action is not contrary to the RFA's terms; and that (b) University Station will have control over the site in question.

36. The greater weight of the evidence demonstrates that the University Station Lease I Lease, the University Stations II Lease, and the assignment of University Station II's interest to University Station collectively satisfied the RFA's requirements because: (a) there is unexpired term of at least 50 years after the application deadline; (b) University Station, i.e., the lessee, was the applicant for funding; and (c) the City, as the owner of the subject property, was a party to the lease.

37. Upon considering Florida Housing's preliminary approval of University Station's application without the benefit of reviewing the Barry University Lease, the greater weight of the evidence demonstrates that Florida Housing was not clearly erroneous when it determined that the Barry University Lease was not a relevant intermediate lease within the meaning of the RFA. The University Station II Lease between the City and University Station II requires the lease to begin no later than June 30, 2023. Also, the City and University Station II acknowledge that Barry University's Lease runs through November 23, 2021, and they agree that the City may extend Barry University's lease by "an additional one-year." Accordingly, the Barry University Lease will end prior to June 30, 2023, and University Station will have site control no later than that date. In other words, the greater weight of the evidence demonstrates that University Station has control over the site in question.

38. The analysis set forth above does not change if one considers the Barry University Lease.[6] Even though the Barry University Lease does not limit a renewal to one year, the lease cannot be renewed without the City's assent, and the City agreed in the University Station II Lease that any renewal would not exceed one year. Therefore, even if one considers the terms of the Barry University Lease, the greater weight of the evidence does not demonstrate that it is a relevant intermediate document that was required to be included with University Station's application. Again, the greater weight of the evidence demonstrates that University Station has control over the site in question.

[6] As will be explained in more detail in the Conclusions of Law below, "[n]ew evidence cannot be offered to amend or supplement a party's response or application. § 120.57(3)(f), Fla. Stat. However, new evidence may be offered in a competitive protest proceeding to prove that there was an error in another party's application. *Intercontinental Props.*, *supra*." *Heritage at Pompano Housing Partners, Ltd. v. Fla. Housing Fin. Corp.*, Case No. 14-1361BID, ¶ 116 (Fla. DOAH June 10, 2014; Fla. Hous. Fin. Corp. June 13, 2014).

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(3), Fla. Stat.

40. Section 120.57(3)(f), Florida Statutes, governs protests to proposed actions of Florida Housing and provides that:

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

41. With regard to the applicable standard of proof, *Colbert v. Department of Health*, 890 So. 2d 1165, 1166 (Fla. 1st DCA 2004), defined the clearly erroneous standard to mean that "the interpretation will be upheld if the agency's construction falls within the permissible range of interpretations. If, however, the agency's interpretation conflicts with the plain and ordinary intent of the law, [then] judicial deference need not be given it."

42. An agency action is "contrary to competition" when it unreasonably interferes with the objectives of competitive bidding. Those objectives have been described as follows:

> [T]o protect the public against collusive contracts; to secure fair competition upon equal terms to all bidders; to remove not only collusion but temptation for collusion and opportunity for gain at public expense; to close all avenues to favoritism and fraud in various forms; to secure the best values for [the public] at the lowest possible expense; and to afford an equal advantage to all

> desiring to do business with the [government], by affording an opportunity for an exact comparison of bids.

43. As for whether a proposed award would be arbitrary or capricious, a capricious action is taken without thought or reason. *Agrico Chem. Co. v. Dep't of Envtl. Reg.*, 365 So. 2d 759, 763 (Fla. 1st DCA 1978). "An arbitrary decision is one that is not supported by facts or logic[.]" *Id.*

44. In assessing whether an agency has acted arbitrarily or capriciously, a tribunal evaluates "whether the agency: (1) has considered all relevant factors; (2) has given actual, good faith consideration to those factors; and (3) has used reason rather than whim to progress from consideration of these factors to its final decision." *Adam Smith Enter. v. Dep't of Envtl. Reg.*, 553 So. 2d 1260, 1273 (Fla. 1st DCA 1989). "[I]f an administrative decision is justifiable under any analysis that a reasonable person would use to reach a decision of similar importance, it would seem that the decision is neither arbitrary nor capricious."

45. Finally, a tribunal conducts the analyses described above via a *de novo* review. However, as explained by the Honorable F. Scott Boyd:

> "[p]roceedings to challenge a competitive award are not simply a record review of the information that was before the agency. They remain 'de novo' in the sense that in the chapter 120 hearing the evidence adduced is not restricted to that which was earlier before the agency when making its preliminary decision. A new evidentiary record based upon the historical, objective facts is developed. *Asphalt Pavers, Inc. v. Dep't of Transp.*, 602 So. 2d 558 (Fla. 1st DCA 1992).

Pinnacle Rio, LLC v. Fla. Housing Fin. Corp., DOAH Case No. 14-1398BID, ¶ 93 (Fla. DOAH June 4, 2014), *rejected in part*, (Fla. Hous. Fin. Corp. June 13, 2014).

46. As for whether new evidence can be offered for consideration under this competitive procurement *de novo* review, the Honorable Elizabeth

McArthur explained that "[n]ew evidence cannot be offered to amend or supplement a party's response/application. § 120.57(3)(f), Fla. Stat. However, new evidence may be offered in a competitive protest proceeding to prove that there was an error in another party's application. *Intercontinental Props.*, *supra*." *Heritage at Pompano Housing Partners, Ltd. v. Fla. Housing Fin. Corp.*, Case No. 14-1361BID, ¶ 116 (Fla. DOAH June 10, 2014; Fla. Hous. Fin. Corp. June 13, 2014).[7]

47. Turning to the instant case, Vista would receive finding if University Station were found ineligible for funding. Accordingly, no party disputed that Vista had standing to challenge Florida Housing's preliminary decision to award funding to University Station.

48. Vista argues that the Barry University Lease should have been included in University Station's application as a relevant intermediate document so that Florida Housing could determine when and if the aforementioned lease would end. Without that information, Vista argues that University Station cannot demonstrate that it has site control:

> 54. Like the redevelopment agreement in Madison Oaks,[8] the Barry Lease is relevant to demonstrate site control. It clarifies who has the right to possess the property. Currently, it is Barry University and not University Station. As of the date of the application, no documents were submitted that demonstrated that the Barry Lease would be terminated by June 30, 2023, the latest date by which University Station's lease would purportedly commence. While the information available and included in the application is determinative, it is significant to note that no such documentation demonstrating the termination date of the Barry Lease appeared in the record in this case.

[7] Accordingly, it was appropriate for the undersigned to consider the Barry University Lease in the process of reaching the ruling herein.

[8] This is a reference to the Recommended Order in DOAH Case No. 20-1770.

> 55. The property University Station is attempting to lease is currently encumbered by another lease. By the terms of the agreement with the City of Hollywood, the University Station lease cannot commence until the Barry Lease is terminated. This is consistent with well-established law that a lease provides a tenant with exclusive right to use the property, even to the exclusion of the owner except for certain circumstances. *See Turner v. Fla. State Fair Auth.*, 974 So. 2d 470, 473 (Fla. 2d DCA 2009)("A tenant under a lease is one who has been given a possession of land which is 'exclusive even of the landlord except as the lease permits his entry, and saving always the landlord's right to enter to demand rent or to make repairs,'")(quoted source omitted).
>
> 56. Because Barry University currently has possession of the property, the Barry Lease is not only a relevant agreement to demonstrate site control, but also a necessary agreement to determine when the Barry Lease will terminate so that the University Station lease can commence. The City of Hollywood does not have control of the property until the Barry Lease is terminated and cannot lease it to another party until the Barry Lease is terminated.

49. Vista's argument overlooks that Barry University's Lease was set to end on November 23, 2021, and the City agreed that the University Station II Lease would begin no later than June 30, 2023. The City also agreed that any renewal of the Barry University Lease would be limited to a single, one-year extension. Thus, based on the information available to it during the scoring process, Florida Housing reasonably determined that the Barry University Lease was not a relevant intermediate document and that University Station had control over the site in question.

50. Even though the Barry University Lease does not limit a lease renewal to a single, one-year term, an *ex post facto* review of the Barry University Lease does not demonstrate that it is a relevant intermediate

document because Barry University cannot unilaterally renew its lease and extend its lease beyond June 30, 2023. Therefore, even if one considers the Barry University Lease, the greater weight of the evidence demonstrates that University Station has control over the site in question.

51. Vista also argues that the leases utilized by University Station are actually contracts because no interest in the land at issue is immediately conveyed. As a result, Vista argues that the aforementioned documents should be evaluated under the RFA's requirements for contracts rather than leases. Vista further argues that University Station's application would be ineligible for funding under the correct standard:

> 60. It is not necessary to consider here whether a leasehold estate that springs into existence at some future date could ever be sufficient to establish site control. If the commencement of the leasehold estate were conditioned on the occurrence of some certain-to-occur future event that is wholly outside the control of the owner of the property, the tenant might plausibly argue that it has a vested interest and will have a leasehold estate upon the occurrence of that event and therefore has established site control. Such is not the case here. This document provides that the leasehold estate will not commence unless the current lease to Barry University terminates by June 30, 2023. That the Barry Lease will terminate by that date (or indeed, by any particular date) is by no means certain and has not been demonstrated. Moreover, bringing about such termination is to some extent within the control of the City of Hollywood. But the agreement between the City of Hollywood and University Station here does not obligate the City of Hollywood to cause such termination, and does not require the City of Hollywood to refrain from entering into extensions with Barry University. Accordingly, the contract between City of Hollywood and Barry University is not a lease because it does not grant to University Station a leasehold interest in the property, either presently,

> or certain to occur in the future. Since it is not a lease within the meaning and intent of the site control requirements, it must be evaluated based on the requirements of a contract. Since it does not even obligate the property owner to cause the termination of the Barry Lease, much less provide for specific performance, it fails to establish site control.

52. This argument overlooks the City's agreement that the University Station II Lease would begin no later than June 30, 2023, and that any renewal of the Barry University Lease would be limited to a single, one-year extension. Vista again overlooks the fact that Barry University cannot unilaterally extend its lease beyond June 30, 2023. In sum, the greater weight of the evidence demonstrates that University Station had control over the site in question.

53. Moreover and as noted above, Vista has the burden under section 120.57(3) of proving that Florida Housing acted contrary to "the solicitation specifications." The RFA's Site Control specifications for a contract unambiguously contemplated a sales agreement. The agreements between the City, University Station, and University Station II do not amount to a sales agreement. Even though those agreements do not immediately convey a present leasehold estate to University Station, Florida Housing reasonably applied the RFA's Site Control specifications for a lease to University Station's funding application.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Florida Housing Finance Corporation enter a final order: (a) awarding funding to University Station I, LLC, via Request for Application 2020-205 subject to credit underwriting; and (b) finding that the applications submitted by Douglas Gardens IV, Ltd., MHP FL VIII, LLLP,

Quiet Meadows, Ltd, RST The Willows, LP, and Residences at SoMi Parc, LLC are ineligible for funding via Request for Application 2020-205.

DONE AND ENTERED this 17th day of May, 2021, in Tallahassee, Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
Administrative Law Judge
1230 Apalachee Parkway
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Filed with the Clerk of the
Division of Administrative Hearings
this 17th day of May, 2021.

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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.

BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

VISTA AT COCONUT PALM, LTD.,

Petitioner,

vs.

FHFC Case No.: 2021-017BP
DOAH Case No.: 21-0727BID
RFA 2020-205
Application No.: 2021-249BS

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Petitioner, Vista at Coconut Palm, Ltd. ("Vista"), pursuant to section 120.57(3)(e), Florida Statutes, and rule 28-106.217, Florida Administrative Code, files these exceptions to the Administrative Law Judge's (ALJ) Recommended Order entered on May 17, 2021.

I. Introduction

This matter involves a notice of Florida Housing Finance Corporation's ("Florida Housing") intended decision to award funding pursuant to the Request for Applications 2020-205 SAIL Financing of Affordable Multifamily Housing Developments to be used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits (the "RFA") on January 22, 2021, when Florida Housing's Board voted to approve the recommendation of its Review Committee, which previously had recommended certain applicants for funding. Petitioner was determined to be eligible for funding, but was not among those recommended for funding.

The Recommended Order will result in an award of funding to University Station I, LLC (University Station), despite the fact that University Station failed to include a relevant intermediate agreement to a lease that would demonstrate site control when the plain language of

the RFA requires any relevant contract, agreement, or lease to be included in the application that relates to site control.

Section 120.57(1)(l), Florida Statutes, restricts an agency's authority to reject or modify Findings of Facts in a Recommended Order. State agencies have much more flexibility to change Conclusions of Law in a Recommended Order. Section 120.57(1)(l), Florida Statutes, provides in relevant 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 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 supplied).

The Recommended Order purports to make findings of fact about the meaning of the language in the leases included in University Station's application, when these interpretations are, in actuality, a legal determination as to the meaning of the terms in the leases. Thus, the Board can modify these conclusions of law.

In this case, for the reasons discussed below, Florida Housing should exercise its discretion to reject the ALJ's Findings of Fact (which are in essence Conclusions of Law) paragraphs 35-38, Conclusions of Law in paragraphs 49-50 and 52-53, and the ALJ's ultimate Recommendation that University Station be awarded funding.

II. Background

1. This case arises from Florida Housing's notice of preliminary award of funding for applications submitted pursuant to the RFA. Vista was found eligible for funding, but was not selected for funding. (RO. p.4)

2. Vista timely filed a Formal Written Protest and Petition for Administrative Hearing, which challenged the awards to both University Station and Residences at SoMi Parc ("SoMi Parc"). Prior to the Final Hearing, Vista, Florida Housing, and SoMi Parc entered into a stipulation that SoMi Parc was not eligible for funding in this RFA because it had already entered into credit underwriting under a different RFA. Thus, the only issue remaining is Vista's challenge to University Station's application. The RFA was issued on October 15, 2020, and responses were initially due November 12, 2020. (RO. p.4)

3. Site Control was an eligibility item in the RFA because Florida Housing wants assurances that applicants selected for funding will be able to actually use the development sites. (RO, ¶ 5). Applicants satisfy the Site Control requirement by providing a properly completed and executed Florida Housing Site Control Certification Form (the "Site Control Form"). In order for the Site Control Form to be considered complete, an applicant had to attach documentation demonstrating that it: (a) was a party to an eligible contract or lease; or (b) owned the property in question. (RO, ¶ 6)

4. The RFA set forth specific requirements for contracts and leases used for demonstrating site control. A contract had to satisfy all of the following conditions:

> (a) It must have a term that does not expire before May 31, 2021 or that contains extension options exercisable by the purchaser and conditioned solely upon payment of additional monies which, if exercised, would extend the term to a date that is not earlier than May 31, 2021.

> (b) It must specifically state that the buyer's remedy for default on the part of the seller includes or is specific performance;
> (c) The Applicant must be the buyer unless there is an assignment of the eligible contract, signed by the assignor and the assignee, which assigns all of the buyer's rights, title and interests in the eligible contract to the Applicant; and
> (d) The owner of the subject property must be the seller, or is a party to one or more intermediate contracts, agreements, assignments, options, or (d) The owner of the subject property must be the seller, or is a party to one or more intermediate contracts, agreements, assignments, options, or conveyances between or among the owner, the Applicant, or other parties, that have the effect of assigning the owner's right to sell the property to the seller. Any intermediate contract must meet the criteria for an eligible contract in (a) and (b) above.

(Jt. Exh. 1, p.47)

5. A lease had to satisfy the following conditions:

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

(Jt. Exh. 1, p.48)

6. The RFA required that Site Control documentation for leases "include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases. If the proposed Development consists of Scattered Sites, site control must be demonstrated for all of the Scattered Sites." (Jt. Exh. 1, p.)

7. The RFA further states:

> The Corporation will not review the site control documentation that is submitted with the Site Control Certification form during the scoring process unless there is a reason to believe that the form has been improperly executed, nor will it in any case evaluate the validity or enforceability of any such documentation. During scoring, the Corporation will rely on the properly executed Site Control Certification form to determine whether an Applicant has met the requirements of this RFA to demonstrate site control. The Corporation has no authority to, and will not, evaluate the validity or enforceability of any eligible site control documentation that is attached to the Site Control Certification form during the scoring process. During

> credit underwriting, if it is determined that the site control documents do not meet the above requirements, the Corporation may rescind the award.

(Jt. Exh. 1, p.48)

8. Although Florida Housing does not review the site control documentation during scoring, Ms. Button testified that it will review the documentation during a bid protest to ensure it meets the requirements of the RFA. (T. p.31) If the documentation attached to the site control certification does not meet the RFA criteria, then the Site Control Certification would be incorrect and the applicant would be found ineligible for funding. (T. p.34)

9. University Station was one of the successful applicants. If University Station is deemed ineligible for funding, then Vista will be selected for funding. (RO. ¶¶ 25 & 34)

10. University Station's Site Control documentation included: (a) a Ground Lease Agreement between the City of Hollywood, Florida (the "City"), and University Station; (b) a Ground Lease Agreement between the City and University Station II, LTD (the "University Station Lease"); and (c) an Assignment of Ground Lease Agreement assigning University Station II, LTD's interests in the Ground Lease Agreement between the City and University Station II, LTD to University Station. (RO. ¶ 25)

11. The University Station Lease described its terms as follows:

> (a) This lease shall be effective as of the Effective Date, but the term shall commence on the Commencement Date and expire at 11:59 p.m. on the seventy-fifth (75th) anniversary of the Commencement Date (the "Term"), unless this lease is terminated earlier pursuant to the provisions contained herein. For purposes of this Lease, the "Commencement Date" shall be the later of the closing date of Tenant's construction loan for the development of the Project (the "Construction Loan") and the termination of the lease of the premises to Barry University, but in no event later than June 30, 2023. Tenant's right to take physical possession of the Leased Premises shall begin on the Commencement Date.
>
> (b) Landlord and Tenant acknowledge that the leased premises are currently improved with an educational facility and adjacent ground parking that is leased to

> Barry University through November 23, 2021 and the Landlord may enter into an additional one-year extension of the lease to Barry University at Landlord's sole discretion. Until the Commencement Date, Landlord, or its tenant, shall be solely responsible for the operation and maintenance of the leased premises and any uses on the Leased Premises.

(RO. ¶ 27; Jt. Exh. 13, p.69)

12. Barry University currently leases a building and parking spaces located on the scattered sites. The City and Barry University are the parties to the Barry University Lease (the "Barry Lease"). The Barry Lease was executed on May 23, 2011, with a term of 10 and one-half years, which would expire on approximately November 23, 2021. With regard to its term, the Barry Lease states that "[t]he term of this lease shall be for ten and one-half (10 ½) years commencing upon the execution of this lease. The parties will have the mutual option to renew this lease subject to City Commission and the Lessee's Board of Directors approval." A copy of the Barry Lease was not included in University Station's application. (RO. ¶¶ 28-30) Therefore, Florida Housing in unable to determine if indeed the site control documents provided have the effect of assigning the owner's right to lease the property for at least 50 years to the lessee as required per the RFA.

13. In contrast to the statement in the University Station Lease that the Barry Lease may be extended by "an additional one-year extension" at the City's "sole discretion," the Barry Lease simply says that the parties have a "mutual option to renew" with no mention of a particular term. (RO. ¶ 31)

III. Exceptions

14. The Applicant, University Station, should be found ineligible for funding because it failed to demonstrate Site Control. Specifically, University Station does not have control of one the scattered sites that is currently leased to Barry University by the City. University Station failed to include the current relevant lease between Barry University and the City for one of the Scattered

Sites, and for this reason, it should be found to be ineligible for award. More importantly, because there is an already existing leasehold estate between Barry University and the City, University Station cannot also have a valid lease on the same site at the same time.

15. Rule 67-60.006, Florida Administrative Code, states:

> The failure of an Applicant to supply required information in connection with any competitive solicitation pursuant to this rule chapter shall be grounds for a determination of nonresponsiveness with respect to its Application. If a determination of nonresponsiveness is made by the Corporation, the Application shall be considered ineligible.

16. University Station failed to include the Barry Lease in its Application, which is a relevant, intermediate agreement for purposes of demonstrating Site Control. This lease was required to be included in the University Station Application. Moreover, the failure to include the Barry Lease cannot be immaterial as "the relative importance of the omission couldn't be evaluated on the face of [University Station's] application." *Flagship Manor LLC v, Fla. Housing Fin. Corp.*, 199 So. 3d 1090, 1093 (Fla. 1st DCA 2016). University Station's failure to include said lease renders its Application ineligible.

Exception # 1

17. Petitioner takes exception to finding of fact paragraph 35:

> Vista has failed to carry its burden of demonstrating that Florida Housing's proposed award to University Station was clearly erroneous, contrary to competition, arbitrary, or capricious. Also, the greater weight of the evidence demonstrates that: (a) Florida Housing's proposed action is not contrary to the RFA's terms; and that (b) University Station will have control over the site in question.

18. While this conclusion is couched as a finding of fact, it is really a conclusory summary of the ALJ's conclusions of law over which the Board has substantive jurisdiction as it is an interpretation of its own RFA. This paragraph does not discuss any evidence or make any

particular finding based on the evidence. Petitioner proposes to replace this finding with the following finding: "Undersigned finds that the Barry Lease is a relevant contract or agreement that was required by the RFA to be included in the application. Therefore, University Station is found to be ineligible and funding should be awarded to Vista at Coconut Palm."

19. The subject property is already encumbered by a prior existing lease with Barry University. By the plain language of the agreement, University Station's lease cannot commence until the lease with Barry University is terminated. Thus, review of the Barry Lease is necessary to determine whether the City of Hollywood has the ability to lease the property to University Station.

20. As the purpose of providing the documentation to show site control is to demonstrate that the applicant can develop the property, a review of the Barry Lease is critical to determining whether University Station actually has control of the site. Without including the Barry Lease, it is unknown when the Barry Lease will terminate or whether there are conditions to that termination that could affect development of the site.

Exception # 2

Petitioner takes exception to finding of fact paragraph 36:

> The greater weight of the evidence demonstrates that the University Station Lease (sic) I Lease, the University Stations (sic) II Lease, and the assignment of University Station II's interest to University Station collectively satisfied the RFA's requirements because: (a) there is unexpired term of at least 50 years after the application deadline; (b) University Station, i.e., the lessee, was the applicant for funding; and (c) the City, as the owner of the subject property, was a party to the lease.

21. Petitioner does not disagree that the purported leases contain (a) – (c) above. However, there is another requirement that University Station failed to satisfy, which was providing any relevant agreements or contracts. Petitioner requests that this paragraph be stricken

for the same reasons that are in Exception Number 1. Again, while this is couched as a finding of fact, it is really a conclusion of law over which the Board has substantive jurisdiction as it is an interpretation of meeting the requirements of its own RFA.

22. The issue here is whether University Station can demonstrate site control. The fact that the owner of the property is a party to the lease is important, but equally important is the current lease in which it is demonstrated that Barry University actually controls the property currently because it is leasing the property. Thus, the lease and its terms are necessary to show the City will have site control in the future.

Exception # 3

23. Petitioner takes exception to finding of fact paragraph 37:

> Upon considering Florida Housing's preliminary approval of University Station's application without the benefit of reviewing the Barry University Lease, the greater weight of the evidence demonstrates that Florida Housing was not clearly erroneous when it determined that the Barry University Lease was not a relevant intermediate lease within the meaning of the RFA. The University Station II Lease between the City and University Station II requires the lease to begin no later than June 30, 2023. Also, the City and University Station II acknowledge that Barry University's Lease runs through November 23, 2021, and they agree that the City may extend Barry University's lease by "an additional one-year." Accordingly, the Barry University Lease will end prior to June 30, 2023, and University Station will have site control no later than that date. In other words, the greater weight of the evidence demonstrates that University Station has control over the site in question.

24. This is not a finding of fact. The ALJ considered only the language of the lease to make this finding. "The interpretation of a written contract is a question of law." *Command Security Corp. v. Moffa*, 84 So. 3d 1097, 1099 (Fla. 4th DCA 2012). *See also, e.g.*, *Miren Internat'l Lodging Corp. v. Manley*, 982 So. 2d 1203, 1204 (Fla. 5th DCA 2008) ("The interpretation or construction of a written contract is a matter of law . . . ."). Thus, this is a conclusion of law based on an interpretation of contract language.

25. The conclusion is erroneous. Ms. Button admitted, as Florida's Housing representative, that nothing in the University Station lease obligates the City of Hollywood to cause a termination of the Barry Lease, and it does not require the City of Hollywood to refrain from entering into extensions with Barry University, which could be for up to 10 ½ years. (T. p.41) Instead, the lease makes representations as to the termination date and potential extension of the Barry Lease. But it does not include any language that expressly states that it will not renew the Barry Lease longer than one year. It says it "may enter into an additional one-year extension of the lease to Barry University at Landlord's sole discretion." Certainly the Barry Lease is relevant as to the termination and extension rights to ascertain who will have control of the property on June 30, 2023.

26. To the extent that this is a finding of fact, there is no competent substantial evidence to support the finding. Ms. Button agreed that the University Lease requires the Barry Lease to terminate before the University Station Lease can commence. (T. p. 40) Ms. Button also specifically testified as follows:

> Q If you can look again at Page 69 -- 68, 69 of the Barry lease. There's nothing in this provision that requires the City of Hollywood to terminate the Barry lease; correct?
>
> A That's correct.
>
> Q And there's also nothing that states that the City of Hollywood will refuse to renew its current lease with Barry University; correct?
>
> A To my knowledge, that's correct.
>
> Q So based on the plain language of this document, the City is under no obligation to terminate or not renew its lease with Barry University; correct?
>
> A Yes, that's my understanding.

(T. p.41) Thus, the ALJ's findings are the opposite of what Florida Housing's interpretation of the University Station Lease.

27. Florida Housing and University Station do not argue that it is not a relevant contract, only that it is not relevant to one of the three enumerated provisions required for a lease. (T. p.35-36) In fact, even Ms. Button admitted that the termination of the Barry Lease may be relevant to the commencement date of the University Station Lease. (T. 40) The plain language of the RFA, however, does not limit relevant documentation in the way that Florida Housing and the ALJ limited it. The RFA language states that the site control "documentation must include all relevant intermediate contracts, agreements, assignments, options, conveyances, intermediate leases, and subleases." (Jt. Ex. 1, p.47) It does not say the documentation must include relevant agreements, etc., that relate to the specific enumerated requirements of a contract, deed, or lease as explained in the RFA.

28. The greater weight of the evidence demonstrates that the University Station Lease cannot commence until the Barry Lease is terminated. Thus, the Barry Lease is directly relevant to <u>when and if</u> the University Station Lease can commence. While a commencement date may not explicitly be required by the RFA, it is implicit. If the University Station Lease does not commence, then University Station does not have site control and cannot develop the property.

29. Petitioner requests that the finding be moved to the Conclusions of Law and changed as follows:

> Upon considering Florida Housing's preliminary approval of University Station's application without the benefit of reviewing the Barry University Lease, the greater weight of the evidence demonstrates that Florida Housing was ~~not~~ clearly erroneous when it determined that the Barry University Lease was not a relevant intermediate lease within the meaning of the RFA. The University Station II Lease between the City and University Station II requires the lease to begin no later than June 30, 2023. ~~Also, the City and University Station II acknowledge that Barry University's~~

~~Lease runs through November 23, 2021, and they agree that the City may extend Barry University's lease by "an additional one-year." Accordingly, the Barry University Lease will end prior to June 30, 2023, and University Station will have site control no later than that date. In other words, the greater weight of the evidence demonstrates that University Station has control over the site in question.~~ However, the University Station Lease cannot commence until the Barry Lease is terminated. Thus, the Barry Lease is directly relevant to *when and if* the University Station Lease can commence. While a commencement date may not explicitly be required by the RFA, it is implicit. If the University Station Lease does not commence, then University Station does not have site control and cannot develop the property.

Exception # 4

30. Petitioner takes exception to finding of fact paragraph 38:

> The analysis set forth above does not change if one considers the Barry University Lease.[] Even though the Barry University Lease does not limit a renewal to one year, the lease cannot be renewed without the City's assent, and the City agreed in the University Station II Lease that any renewal would not exceed one year. Therefore, even if one considers the terms of the Barry University Lease, the greater weight of the evidence does not demonstrate that it is a relevant intermediate document that was required to be included with University Station's application. Again, the greater weight of the evidence demonstrates that University Station has control over the site in question.

31. Again, this does not appear to be a finding of fact. It is simply an interpretation of contract language.

32. The point of introducing the Barry Lease was to show that it is relevant and that it was misrepresented in the University Station Lease. The ALJ relied on the City's representation in the University Station Lease that it would only renew the Barry Lease for a year. As discussed above, there is no language in the University Station Lease expressly stating that the City will terminate or not renew the Barry Lease. Instead, there is a representation that any renewal of the Barry Lease would only be for a year. This representation, however, is not consistent with the actual terms of the Barry Lease that state only that it can be renewed and does not give a time period. The more reasonable reading of that language is that it is renewed for the same 10 ½ year

time period. *See Goldbloom v. J. I. Kislak Mortgage Corp.*, 408 So. 2d 748, 750 (Fla. 3d DCA 1982) (agreeing in dicta that "an otherwise silent agreement simply to renew an existing lease implies that the renewed term is for the same rental as the existing one").

33. In any event, the point is that Florida Housing could not verify the renewal or termination terms in the Barry Lease because the Barry Lease was not included in the Application. This was a relevant contract that could determine whether University Station had site control. Petitioner requests that the finding be moved to a conclusion of law and changed as follows:

> The analysis set forth above ~~does not change~~ is reinforced if one considers the Barry University Lease.[] ~~Even though the Barry University Lease does not limit a renewal to one year, the lease cannot be renewed without the City's assent, and the City agreed in the University Station II Lease that any renewal would not exceed one year. Therefore, even if one considers the terms of the Barry University Lease, the greater weight of the evidence does not demonstrate that it is a relevant intermediate document that was required to be included with University Station's application. Again, the greater weight of the evidence demonstrates that University Station has control over the site in question.~~
> The Barry Lease does not limit renewal to one year as represented in the University Station Lease. This reinforces the conclusion that the Barry Lease should have been included in the University Station application for Florida Housing to be able to verify the termination date of the Barry Lease to ensure that University Station had site control.

Exception # 5

34. Petitioner takes exception to conclusion of law number 49:

> Vista's argument overlooks that Barry University's Lease was set to end on November 23, 2021, and the City agreed that the University Station II Lease would begin no later than June 30, 2023. The City also agreed that any renewal of the Barry University Lease would be limited to a single, one-year extension. Thus, based on the information available to it during the scoring process, Florida Housing reasonably determined that the Barry University Lease was not a relevant intermediate document and that University Station had control over the site in question.

35. As argued above, the City in the University Station Lease did not agree that any renewal of the Barry Lease would be limited to one year, it represented that the City may renew it

for one year at its sole discretion. This is not an accurate representation of the Barry Lease. Florida Housing agreed that there was no obligation for the City to terminate or not renew the Barry Lease in the University Station Lease.

36. While the specific issue of whether a relevant, pre-existing lease on a property must be included in an application has not previously been adjudicated, DOAH and Florida Housing have considered a very similar issue with the owner of a property subject to a sales contract. In *HTG Addison II, LLC v. Florida Housing Finance Corporation*, Case Nos. 20-1770BID, 20-1778BID, 20-1779BID, & 20-1780BID (Fla. DOAH June 19, 2020) (Recommended Order), Madison Oaks, an applicant, was found to be ineligible because it did not include an intermediate contract related to ownership of the subject property. *Id.* at 17-20. Madison Oaks included a Purchase and Sale Agreement with West Oaks Developers, LLC as the seller and Madison Oaks as the purchaser; however, the property was actually owned by the city of Ocala. *Id.* at 18. The contract stated that the seller had a valid and binding agreement with the city to acquire fee simple title to the property. *Id.* There was a redevelopment agreement that clarified the ownership of the property, but it was not included in Madison Oaks' application. *Id.* at 18-19. The ALJ found that the redevelopment agreement was a relevant intermediate contract for the purpose of demonstrating site control and the failure to include it rendered Madison Oaks' application ineligible. *Id.* at 19.

54. Like the redevelopment agreement for Madison Oaks, the Barry Lease is relevant to demonstrate site control. It clarifies who has the right to possess the property. Currently, it is Barry University and not University Station. Although it was represented in the University Station Lease that there was only a year renewal of the Barry Lease, as of the date of the application, no

documents were submitted that demonstrated that the Barry Lease would be terminated by June 30, 2023, the latest date by which University Station's lease would purportedly commence.

55. This is also similar to *HTG Addison II*, where it was represented in the contract that the seller had a valid and binding agreement with the city to acquire fee simple title to the property. That representation was found to be insufficient in *HTG Addison II*, and the applicant was found to be ineligible for failing to submit that document. Here too, the City's representations in the University Station Lease, which are inaccurate when the Barry Lease is reviewed, are insufficient to meet the requirements of site control.

56. The property University Station is attempting to lease is currently encumbered by another lease. By the terms of the agreement with the City, the University Station Lease cannot commence until the Barry Lease is terminated. This is consistent with well-established law that a lease provides a tenant with exclusive right to use the property, even to the exclusion of the owner except for certain circumstances. *See Turner v. Fla. State Fair Auth.*, 974 So. 2d 470, 473 (Fla. 2d DCA 2008) ("A tenant under a lease is one who has been given a possession of land which is 'exclusive even of the landlord except as the lease permits his entry, and saving always the landlord's right to enter to demand rent or to make repairs.'") (quoted source omitted).

57. Because Barry University currently has exclusive possession of the property, the Barry Lease is not only a relevant agreement to demonstrate site control, but also a necessary agreement to determine when the Barry Lease will terminate so that the University Station Lease can commence. The City does not have control of the property until the Barry Lease is terminated and cannot lease it to another party until the Barry Lease is terminated.

58. The ALJ found that there is no requirement in the RFA site control provisions that the lease term actually have commenced because that requirement is not expressly provided as a

requirement of the RFA. This argument is not self-evident from the language of the RFA itself; the existence of an "unexpired term" arguably presupposes the existence of a "term," which would have to commence. (Jt. Exh. 1, p.48) More importantly, it misses the point. While there is no such express requirement in the site control provisions, such a requirement is imposed in order for an instrument to be a lease at all.

59. Petitioner requests that the conclusion be revised as follows:

~~Vista's argument overlooks that~~ The University Station Lease represented that the Barry University's Lease was set to end on November 23, 2021, and the City agreed that the University Station II Lease would begin no later than June 30, 2023. The City also ~~agreed~~ represented that any renewal of the Barry University Lease would be limited to a single, one-year extension. ~~Thus, based on the information available to it during the scoring process, Florida Housing reasonably determined that the Barry University Lease was not a relevant intermediate document and that University Station had control over the site in question.~~ University Station, however, did not include the Barry Lease, so the information could not be verified.

Exception # 6

59. Petitioner takes exception to conclusion of law number 50:

Even though the Barry University Lease does not limit a lease renewal to a single, one-year term, an *ex post facto* review of the Barry University Lease does not demonstrate that it is a relevant intermediate document because Barry University cannot unilaterally renew its lease and extend its lease beyond June 30, 2023. Therefore, even if one considers the Barry University Lease, the greater weight of the evidence demonstrates that University Station has control over the site in question.

60. This conclusion implicitly suggests that if Barry University could unilaterally renew and extend its lease beyond June 30, 2023, then that potentially would cause a problem with its site control. But the point Petitioner is making here, is that because the Barry Lease was not provided, Florida Housing did not have the ability to review the document to see if there was any error that would affect site control. The application cannot be supplemented at a later date to meet the requirement that the relevant contract should have been submitted. Thus, if there were a

fundamental problem in the Barry Lease that would affect University Station's site control, Florida Housing would not know it. The failure to include the Barry Lease cannot be ignored as "the relative importance of the omission couldn't be evaluated on the face of [University Station's] application." *Flagship Manor LLC v, Fla. Housing Fin. Corp.*, 199 So. 3d 1090, 1093 (Fla. 1st DCA 2016) (cited as authority by *HTG Addison II, LLC v. Florida Housing Finance Corporation*, Case Nos. 20-1770BID, 20-1778BID, 20-1779BID, & 20-1780BID, p.27 (Fla. DOAH June 19, 2020) (Recommended Order)). University Station's failure to include said lease renders its Application ineligible.

61. Petitioner requests that the conclusion be revised as follows:

~~Even though the Barry University Lease does not limit a lease renewal to a single, one-year term, an *ex post facto* review of the Barry University Lease does not demonstrate that it is a relevant intermediate document because Barry University cannot unilaterally renew its lease and extend its lease beyond June 30, 2023. Therefore, even if one considers the Barry University Lease, the greater weight of the evidence demonstrates that University Station has control over the site in question.~~
An ex post facto review of the Barry University Lease demonstrates that it is a relevant intermediate document because it contains termination and renewal rights of the parties. The fact that the representations in the University Station Lease are inaccurate (it is not the sole discretion of the Landlord to renew the lease and there is not mention of a one-year renewal term) demonstrates that it is necessary for the document to be included in the application. The Barry Lease could have had terms that would eliminate site control for University Station. Florida Housing would not know if it did not have the document to review.

Exception # 7

62. Petitioner takes exception to conclusion of law number 52:

This argument overlooks the City's agreement that the University Station II Lease would begin no later than June 30, 2023, and that any renewal of the Barry University Lease would be limited to a single, one-year extension. Vista again overlooks the fact that Barry University cannot unilaterally extend its lease beyond June 30, 2023. In sum, the greater weight of the evidence demonstrates that University Station had control over the site in question.

63. The ALJ made this conclusion in response to the following argument in Petitioner's PRO:

> It is not necessary to consider here whether a leasehold estate that springs into existence at some future date could ever be sufficient to establish site control. If the commencement of the leasehold estate were conditioned on the occurrence of some certain-to-occur future event that is wholly outside the control of the owner of the property, the tenant might plausibly argue that is has a vested interest and will have a leasehold estate upon the occurrence of that event and therefore has established site control. Such is not the case here. This document provides that the leasehold estate will not commence unless the current lease to Barry University terminates by June 30, 2023. That the Barry Lease will terminate by that date (or indeed, by any particular date) is by no means certain and has not been demonstrated. Moreover, bringing about such termination is to some extent within the control of the City of Hollywood. But the agreement between the City of Hollywood and University Station here does not obligate the City of Hollywood to cause such termination, and does not require the City of Hollywood to refrain from entering into extensions with Barry University. Accordingly, the contract between City of Hollywood and University Station is not a lease because it does not grant to University Station a leasehold interest in the property, either presently, or certain to occur in the future. Since it is not a lease within the meaning and intent of the site control requirements, it must be evaluated based on the requirements of a contract. Since it does not even obligate the property owner to cause the termination of the Barry Lease, much less provide for specific performance, it fails to establish site control.

(PRO. ¶ 60)

64. The ALJ did not address Petitioner's argument here. The point here is that the RFA requires a specific performance clause in a contract, but it does not include one for a lease. Presumably, this is because the applicant is supposed to have a leasehold estate in the property by virtue of the lease.

65. A ground lease is more than a contract – it is a conveyance of a leasehold estate in the property. If there is no such conveyance, then whatever else the agreement may be, it is not a lease. A lease and a contract to lease in the future are two different things. *See* 34 Fla. Jur. 2d § 24, Landlord and Tenant ("There is a distinction between a present lease and an executory contract to enter into a lease in that the latter vests no estate in the proposed lessee while the former conveys

an estate."). The purported "lease" is merely a contract to lease in the future. *See W & G Seafood Assocs., L.P. v. Eastern Shore Markets, Inc.*, 714 F. Supp. 1336, 1344 (D. Del. 1989) ("A landlord-tenant relationship arises only if the landlord transfers a present right of possession of the leased property. . . . [A] landlord-tenant relationship may be made to commence on the occurrence of an event. . . . In the latter situation, prior to the time the tenant has the right to possession, the arrangement between the parties is not one of landlord and tenant, although the agreement may impose current obligations on the parties.").

66. Naturally, specific performance is not relevant if the applicant already has fee simple title to the property by deed. Likewise, specific performance is not relevant where the applicant already has a leasehold estate in the property. A ground lease, like a deed, is a conveyance of an interest in land. The application of the varying site control requirements demonstrate clearly that Florida Housing considers a present leasehold estate of the required duration to be equivalent to ownership by deed for development purposes, and therefore sufficient to establish site control; *otherwise, the requirement for specific performance would be included for leases.*

67. To make this point clear, consider the University Station Lease. There is no current conveyance of the property—only a promise to convey the property after the Barry Lease has terminated. If, for example, the City extended the current Barry Lease for 10 ½ years, it would be up to a circuit court whether that breached the University Station Lease. But in any event, University Station would not have a remedy of specific performance; i.e., they could not develop the property. Typically with a lease, the property interest is immediately conveyed so this would not be an issue. The point here is that this "Lease" acts more as a contract rather than a lease and should have had a specific performance requirement that is required for contracts.

68. Petitioner requests the following revision to this conclusion:

~~This argument overlooks the City's agreement that the University Station II Lease would begin no later than June 30, 2023, and that any renewal of the Barry University Lease would be limited to a single, one-year extension. Vista again overlooks the fact that Barry University cannot unilaterally extend its lease beyond June 30, 2023. In sum, the greater weight of the evidence demonstrates that University Station had control over the site in question.~~

A ground lease is more than a contract – it is a conveyance of a leasehold estate in the property. If there is no such conveyance, then whatever else the agreement may be, it is not a lease. A lease and a contract to lease in the future are two different things. *See* 34 Fla. Jur. 2d § 24, Landlord and Tenant ("There is a distinction between a present lease and an executory contract to enter into a lease in that the latter vests no estate in the proposed lessee while the former conveys an estate."). The purported "lease" is merely a contract to lease in the future. *See W & G Seafood Assocs., L.P. v. Eastern Shore Markets, Inc.*, 714 F. Supp. 1336, 1344 (D. Del. 1989) ("A landlord-tenant relationship arises only if the landlord transfers a present right of possession of the leased property. . . . [A] landlord-tenant relationship may be made to commence on the occurrence of an event. . . . In the latter situation, prior to the time the tenant has the right to possession, the arrangement between the parties is not one of landlord and tenant, although the agreement may impose current obligations on the parties.").

Naturally, specific performance is not relevant if the applicant already has fee simple title to the property by deed. Likewise, specific performance is not relevant where the applicant already has a leasehold estate in the property. A ground lease, like a deed, is a conveyance of an interest in land. The application of the varying site control requirements demonstrate clearly that Florida Housing considers a present leasehold estate of the required duration to be equivalent to ownership by deed for development purposes, and therefore sufficient to establish site control; *otherwise, the requirement for specific performance would be included for leases.*

Petitioner proved that University Station's Lease should have been considered as a contract rather than a lease because it did not convey an immediate property interest. Instead, it is a promise to convey the property at a later date upon the occurrence of certain acts. This acts as a contract. University Station's "Lease" should have been considered as a contract that failed to include a remedy of specific performance. Therefore, University Station is ineligible for funding.

Exception # 8

69. Petitioner takes exception to conclusion of law number 53:

Moreover and as noted above, Vista has the burden under section 120.57(3) of proving that Florida Housing acted contrary to "the solicitation specifications." The

> RFA's Site Control specifications for a contract unambiguously contemplated a sales agreement. The agreements between the City, University Station, and University Station II do not amount to a sales agreement. Even though those agreements do not immediately convey a present leasehold estate to University Station, Florida Housing reasonably applied the RFA's Site Control specifications for a lease to University Station's funding application.

70. To the extent that the ALJ finds that the RFA's site control specification for a contract unambiguously contemplated a sales agreement, it is unclear what this conclusion is based on. If that is true, based on the argument above in support of Exception #7, then the University Station "Lease" should not be considered a lease or a contract under the RFA terms. Because it does not convey property it is not a lease. If it is not for sale of the property, it would not be a sales contract. Therefore, it would appear to be a document that is not eligible documentation to demonstrate site control, and University Station should be found ineligible. Petitioner relies on the arguments made in support of Exception #7 for this Exception as well.

71. Petitioner requests that the conclusion be modified as follows:

> Moreover and as noted above, Vista has the burden under section 120.57(3) of proving that Florida Housing acted contrary to "the solicitation specifications." ~~The RFA's Site Control specifications for a contract unambiguously contemplated a sales agreement. The agreements between the City, University Station, and University Station II do not amount to a sales agreement. Even though those agreements do not immediately convey a present leasehold estate to University Station, Florida Housing reasonably applied the RFA's Site Control specifications for a lease to University Station's funding application.~~ Petitioner proved that the purported lease between the City and University Station did not constitute a lease because it did not convey a leasehold interest. Because the documentation was not a lease and did not meet the requirements for a contract, University Station did not meet the site control requirements and is found ineligible for funding.

72. For the reasons expressed, Florida Housing should change the ALJ's Findings of Fact (which are in essence Conclusions of Law) paragraphs 35-38, Conclusions of Law in paragraphs 49-50 and 52-53, and the ALJ's ultimate Recommendation that University Station be awarded funding. Florida Housing should award funding to Vista at Coconut Palm pursuant to RFA 2020-205.

Respectfully submitted this 26th day of May, 2021.

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CERTIFICATE OF SERVICE

I CERTIFY that the foregoing Formal Written Protest and Petition for Formal Administrative Hearing has been filed by email to the Florida Housing Finance Corporation Clerk at CorporationClerk@floridahousing.org, and a copy sent via email to the following this 26th day of May, 2021:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG ASTORIA, LTD,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

RST THE WILLOWS, LP,

Intervenor.
_____/

FHFC Case No. 2021-006BP
DOAH Case No. 21-0725BID

MHP FL VIII LLLP,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent,

and

FULHAM TERRACE, LTD., BDG FERN GROVE, LP, and QUIET MEADOWS, LTD,

Intervenors.
_____/

FHFC Case No. 2021-014BP
DOAH Case No. 21-0726BID

VISTA AT COCONUT PALM, LTD,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

FHFC Case No. 2021-017BP
DOAH Case No. 21-0727BID

Respondent,

and

UNIVERSITY STATION I, LLC, RESIDENCES
AT SOMI PARC, LLC, and BDG FERN GROVE, LP,

Intervenors.
_____/

FLORIDA HOUSING FINANCE CORPORATION'S AND UNIVERSITY STATION I, LLC'S JOINT RESPONSE TO PETITIONER'S EXCEPTIONS TO RECOMMENED ORDER

Pursuant to section 120.57(3)(e), Florida Statutes, and Rule 28-106.217, Fla. Admin. Code, Respondent Florida Housing Finance Corporation ("Florida Housing") and Intervenor, University Station I, LLC ("University Station") hereby files their joint response to Petitioner Vista at Coconut Palm, Ltd.'s ("Vista") Exceptions to the Recommended Order entered in this proceeding by the Administrative Law Judge ("ALJ") as follows:

Introduction

RFA 2020-205 SAIL Financing of Affordable Multifamily Housing Developments to be Used in Conjunction with Tax-Exempt Bonds and Non-Competitive Housing Credits (the "RFA") was issued on October 15, 2020, and responses were due November 18, 2020. Florida Housing's Board of Directors (the "Board") issued its notice of intended decision for the RFA on January 22, 2021. Parties timely filed notices of protests and formal petitions for hearing. The petitions were referred to the Division of Administrative Hearings ("DOAH") and consolidated.

Following a final hearing, ALJ G.W. Chisenhall issued a Recommended Order in this matter on May 17, 2021. In addition to recommending that applications submitted by Douglas Gardens IV, Ltd., MHP FL VIII, LLLP, Quiet Meadows, Ltd., RST The Willows, LP, and

Residences at SoMi Parc, LLC are ineligible for funding, the ALJ recommended that Florida Housing enter a final order awarding funding to University Station, subject to credit underwriting.

The ALJ's Findings of Facts are all supported by competent substantial evidence in the record and the Conclusions of Law are reasonable and consistent with the RFA, Florida Housing's policies, Florida Administrative Code Rules, and Florida Statutes. The exceptions should be denied. Florida Housing and University Station request the Board reject all of Vista's exceptions and adopt the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order.

Standard of Review

The rules of decision making applicable in bid protests are set forth in Section 120.57(3)(f), Fla. Stat., which states:

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

Section 120.57, F.S., allows parties to submit written exceptions to recommended orders and establishes the specific and limited parameters for Florida Housing and the Board in considering and reviewing a recommended order and exceptions. Florida Housing may adopt a recommended order in its entirety or may, under certain limited, prescribed circumstances, modify or reject findings of fact and conclusions of law. Florida Housing's final order must include an explicit ruling on each exception.

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.

Similarly, Rule 28-106.217(1), Fla. Admin. Code, which is the Uniform Rule implementing Chapter 120, Fla. Stat., provides that exceptions "shall include any 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 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).*

A reviewing agency has no authority "to reevaluate the quantity and quality of the evidence beyond a determination of whether the evidence is competent and substantial." Brogan v. Carter, 671 So. 2d 822, 823 (Fla. 1st DCA 1996). Thus, findings of fact that are supported by competent substantial evidence are "binding" on an agency. Fla. Dep't of Corr. v. Bradley, 510 So. 2d 1122, 1123 (Fla. 1st DCA 1987). With respect to conclusions of law, an agency may reject or modify erroneous conclusions of law only if it has substantive jurisdiction over the subject of the conclusion and if its substituted conclusion is as or more reasonable than the one rejected. *See* § 120.57(1)(l), Fla. Stat.

Vista's Exceptions includes sections titled "Introduction" and "Background." Those sections include procedural information, recitation of the facts, and legal argument. Those sections should be considered legal argument only as it relates to a specific exception and not as an opportunity for Vista to reargue its full case.

References to the transcript of the hearing will be (T. pg #). References to the exhibits will be in accordance with the Joint Pre-hearing Stipulation. References to the Stipulated Findings of Fact in the Joint Pre-Hearing Stipulation will be (Stip. ¶ #)

Response to Exception #1 to Finding of Fact 35

Finding of Fact 35 is a summary of the ALJ's factual findings. In its exceptions, Vista proposes to replace Finding of Fact 35 with a conclusory statement that is favorable to Vista's argument. Contrary to the requirements of Section 120.57(1)(k), Fla. Stat. and Rule 28-106.217(1), Fla. Admin. Code, Vista does not include any appropriate and specific citations to the record. Vista reiterates its argument from the hearing that since University Station's lease cannot

"commence" until the lease with Barry University is terminated that University Station failed to meet the RFA requirements for a lease for site control and ignores the fact that a certain "commencement date" is not required in the RFA.

In order to meet the RFA requirements for site control a lease must 1) have an unexpired term of at least 50 years after the Application Deadline, 2) the lessee must be the Applicant or include an assignment to the Applicant, and 3) the owner of the subject property must be a party to the lease. (J-1, p. 48; Stip. ¶27). Florida Housing's corporate representative, Marisa Button, as well as Vista's corporate representative, Kenneth Naylor, agreed that the documentation submitted by University Station met those requirements. (Tr. 44-45 and 61-65).

What Vista argued at hearing, and attempts to re-argue here, is that somehow Florida Housing also intended, but did not state in the RFA, that in order to qualify as a lease under the RFA, the lease must also have an expressed, definitive commencement date. This concept is contrary to the plain language in the RFA (J-1, pg. 48) as well as Ms. Button's testimony. (Tr. 45).

For these reasons and the reasons stated in the other responses, Finding of Fact 35 is supported by competent substantial evidence in the record and Petitioner's Exception #1 should be rejected.

Response to Exception #2 to Finding of Fact 36

In Exception #2, Vista argues, again without any citations to the record, that while University Station satisfied the requirements in the RFA for a lease, it failed to include a relevant intermediate agreement, namely the lease with Barry University, and therefore the entirety of Finding of Fact 36 should be stricken.

In Finding of Fact 36, the ALJ found that the University Station site control documents met the three specific requirements in the RFA for a lease noted above. This finding is not disputed

by any of the parties (Tr. 44-45 and 61-65) and it is not disputed by Vista in this Exception. Instead, Vista argues that the ALJ should have included an additional finding that University Station failed to include a relevant agreement or contract. In Finding of Fact 37, however, the ALJ addressed this very question and found that the Barry University Lease was not a relevant intermediate agreement or contract.

Therefore, based on its own argument, even Vista agrees that Finding of Fact 36 is supported by competent substantial evidence. For these reasons and the reasons stated in the other responses, Finding of Fact 36 is supported by competent substantial evidence in the record. Petitioner's Exception #2 should be rejected.

Response to Exception #3 to Finding of Fact 37

In Exception #3, Vista takes exception to the ALJ's factual determination that University Station has site control. Vista argues that Finding of Fact 37 is a conclusion of law because the ALJ is interpreting a written contract, which is a matter of law.

It is not clear from this Exception whether Vista is arguing that the ALJ is "interpreting" the University Station lease or the Barry University Lease. What is clear is that the ALJ is making findings based on pertinent information in the University Station lease and is not attempting to "interpret" this lease or to make findings regarding the intent or validity of this lease. These findings are supported by competent substantial evidence and, even if they are considered conclusions of law, are reasonable and based upon the evidence.

In Paragraph 37 of the Recommended Order the ALJ found:

> 37. Upon considering Florida Housing's preliminary approval of University Station's application without the benefit of reviewing the Barry University Lease, the greater weight of the evidence demonstrates that Florida Housing was not clearly erroneous when it determined that the Barry University Lease was not a relevant intermediate lease within the meaning of the RFA. The University Station II Lease between the City and University Station II requires the lease to begin no

> later than June 30, 2023. Also, the City and University Station II acknowledge that Barry University's Lease runs through November 23, 2021, and they agree that the City may extend Barry University's lease by "an additional one-year." Accordingly, the Barry University Lease will end prior to June 30, 2023, and University Station will have site control no later than that date. In other words, the greater weight of the evidence demonstrates that University Station has control over the site in question.

The first sentence of Finding of Fact 37 is a summary of the ALJ's findings of fact after weighing the evidence. The second sentence is supported in the record by the plain language of the University Station II lease which states that the "Commencement Date will be in no event later than June 30, 2023." (J-13, p. 69, section 3a). The third sentence is also supported by competent substantial evidence in the record by the plain language reading of the University Station II lease, which is executed by the City and the corporate representative for University Station, and states that:

> [University Station II and City] acknowledge that the Leased Premises are currently improved with an educational facility and adjacent ground parking that is leased to Barry University through November 23, 2021, and the Landlord may enter into an additional one-year extension for the lease to Barry University at Landlord's sole discretion."

(*Id.* at section 3b). The fourth sentence recites the date quoted from the University Station II lease and makes a factual finding regarding the weight of the evidence. (*Id.* at section 3a).

Vista notes that the Barry University Lease runs through November of 2021 and contains a provision allowing the parties to mutually agree to extend the lease, while the University Station lease contemplates that the City of Hollywood may extend the lease for only one year. Vista then cites to Ms. Button's testimony that the City of Hollywood "is under no obligation to terminate or not renew its lease with Barry University" and suggests that this testimony conflicts with the ALJ's findings. However, Ms. Button was being asked whether the Barry University Lease contained any provision requiring the City to terminate this lease, while the ALJ found that the University

Station lease essentially required termination of the Barry University Lease by November of 2022. Ms. Button agreed that there was a difference between the potential termination date in the Barry University Lease and the University Station Lease. (T. 41). There is no conflict between Ms. Button's testimony and the ALJ's finding.

Vista also argues that the Barry University Lease must be a relevant intermediate lease because the University Station lease cannot "commence" until the lease with Barry University is terminated. As noted elsewhere, there is no requirement in the RFA that a lease "commence" on a date certain, or that it "commence" as of the Application Deadline.

It is the job of the ALJ to assess the weight of the evidence. This Board cannot re-weigh the evidence absent a showing that the finding was not based on competent, substantial evidence. For these reasons and the reasons stated in the other responses, Finding of Fact 37 is supported by competent substantial evidence in the record and Petitioner's Exception #3 should be rejected.

Response to Exception #4 to Finding of Fact 38

Vista takes exception to Finding of Fact 38 and argues, without citation to the record, that it too is a conclusion of law and should be modified. What Vista really appears to take exception with is the fact that, after weighing the evidence, the ALJ ultimately disagreed with Vista's position. The ALJ specifically found that the greater weight of the evidence demonstrates that University Station met the requirements of site control because the analysis does not change regardless of whether University Station submitted the Barry University lease or not.

The Barry University lease with the City has a term of 10½ years and includes a provision stating that the parties "will have the mutual option to renew this lease." (Vista-1, p. 1; emphasis supplied). The City's lease with University Station II includes a provision stating that "the Landlord may enter into an additional one-year extension of the lease to Barry University at

Landlord's sole discretion." (J-13, p. 69; Stip. ¶30). Since the Barry University lease requires any renewal to be mutually agreed to, and the City has committed not to renew it for more than one year, there is no basis for Vista's speculation that the Barry University lease will not expire by November of 2022. (Tr. 41-43). Additionally, there is no basis for Vista's argument that the language "mutual option to renew" is only consistent with a renewal for the original term of the lease regardless of what the parties would mutually agree to.

For these reasons and the reasons stated in the other responses, Finding of Fact 38 is supported by competent substantial evidence in the record and Petitioner's Exception #4 should be rejected.

Response to Exception #5 to Conclusion of Law 49

Vista takes exception to Conclusion of Law 49 and argues that it is not an accurate representation of the information in the leases. Conclusion of law 49 restates the findings from paragraph 38 regarding the dates stated in the Barry University lease and the University Station II lease. Additionally, Vista takes issue with the ALJ's use of the word "agree" and suggests that "represented" would have been a better word choice.

As stated in the prior responses, the ALJ's findings regarding the date that the Barry University lease was set to end and the date that the University Station II lease would begin were dates taken directly from the University Station II lease. (J-13, p. 69, section 3). Vista argues that the University Station Lease did not "agree" that any renewal of the Barry University Lease would be limited to one year. In the Ground Lease Agreement for University Station II the City committed that the Barry University Lease would terminate "in no event later than June 30, 2023" and also committed that the City "may enter into an additional one-year extension of the lease to Barry University at Landlord's sole discretion. (*Id.*) The suggestion that there was no obligation

for the City to terminate or not renew the Barry University Lease is not supported by the evidence. These are findings of fact that are supported by competent substantial information in the record.

The last sentence of Conclusion of Law 49 is a conclusion that Florida Housing's determination that the Barry University Lease was not a relevant intermediate document was a reasonable determination. That conclusion is reasonable and based on competent substantial evidence as previously discussed in this response.

Additionally, Vista's argument that the requirement for a lease to have a "50-year unexpired term" requires that the lease must have commenced is not an argument that is supported in the record. In fact, there is no such commencement requirement as demonstrated by the language in the RFA and Ms. Button's testimony. (J-1, pg. 48; Tr. 45). Additionally, the word "term" is not synonymous with "commence."

Vista argues that this case is analogous with HTG Addison II, LLC v. Fla. Housing Finance Corp., DOAH Case Nos. 20-1770BID, 20-1778BID, 20-1779BID, and 1780BID (DOAH June 19, 2020; Final Order entered July 17, 2020), in which an applicant, Madison Oaks, failed to include a relevant intermediate agreement with its site control documentation and was found ineligible. In HTG Addison, Madison Oaks submitted documentation in an effort to demonstrate site control for an eligible contract. *Id*. ¶¶36-50. That documentation included a Purchase and Sale Agreement listing West Oak Developers, LLC as the "Seller" and Madison Oaks East, LLC as the "Purchaser." *Id*. ¶¶41-42. The evidence showed, however, that the City of Ocala was the owner of the property in question, and Madison Oaks did not include in its application any relevant documentation demonstrating that West Oak Developers, LLC had the authority to sell the property. *Id*. ¶¶43-45. The ALJ in that case credited Ms. Button's testimony that site control had not been demonstrated because Madison Oaks failed to include a relevant intermediate contract because the

documentation submitted failed to meet the RFA requirements for a "contract." *Id*. ¶¶47-50. The ALJ in that case concluded that its application should be deemed ineligible. *Id*.

In the instant case, there is no evidence that the City was not the owner of the property in question, nor was there any evidence that the City did not have the authority to enter into the lease agreements with University Station. HTG Addison is not analogous to the instant case because here University Station, unlike the Madison Oaks applicant, submitted documentation that met the requirements in the RFA to demonstrate site control, and the Barry University lease was not relevant to any of the site control requirements for a lease.

Finally, Vista argues that the Barry University Lease is a "necessary agreement to determine when the Barry Lease will terminate." However, the ALJ found that the University Lease included language determining that the Barry University Lease will terminate no later than November of 2022 and thus concluded that the Barry University Lease was neither necessary nor relevant.

For these reasons and the reasons stated in the other responses, Conclusion of Law 49 is reasonable and is supported by competent substantial evidence in the record. Petitioner's Exception #5 should be rejected.

Response to Exception #6 to Conclusion of Law 50

In its exception, Vista argues that Conclusion of Law 50 should be revised because the conclusion implies that if Barry University could unilaterally review the lease, then that would potentially cause a problem with University Station's site control. This interpretation is pure speculation and is not supported by the evidence.

In Paragraph 50 the ALJ opines that even though the renewal term in the Barry University Lease is not limited to one year, that fact does not demonstrate that the Barry University Lease is

a relevant, intermediate agreement that should have been included with University Station's site control documentation. He then concluded that, although it was not necessary to review the Barry University Lease in order to determine whether University Station had site control, the Barry University Lease did not in fact contain any provisions that would somehow render it relevant. That conclusion is reasonable and based on competent substantial evidence as discussed in the previous responses.

For these reasons and the reasons stated in the other responses, Conclusion of Law 50 is reasonable and is supported by competent substantial evidence in the record. Petitioner's Exception #6 should be rejected.

Response to Exception #7 to Conclusion of Law 52

In its exception, Vista makes conclusory statements regarding the ALJ's alleged misapplication of the RFA requirements with no citations to the record to support its statements. Vista argues that because University Station's lease with the City has not yet commenced, that University Station's II lease should be treated as a "contract" rather than a lease. Therefore, Vista argues that because the University Station II lease does not contain a specific performance clause required in the RFA for contracts, University Station failed to meet the requirements for a contract to demonstrate site control.

Vista's argument is not supported by the evidence. Ms. Button testified that when determining whether the site control documentation submitted is for a lease, contract, or deed, that Florida Housing reviews the title of the documents and the language in the documents to make that determination. (Tr. p. 34). Here, University Station submitted two documents both entitled "Ground Lease Agreement." (J-13, p. 48-85). Those ground lease agreements refer to a landlord-tenant relationship and met the RFA requirements for leases. (J-13, p. 48-85; Tr. 44-45). Vista

now complains that because the ground leases did not also meet the RFA requirements for contracts University Station should be ineligible. Applicants are not required to establish site control by demonstrating that it is a party to an eligible contract and lease and is the owner of subject property. Rather the RFA requires an Applicant to submit documentation "demonstrating that it is a party to an eligible contract or lease, or is the owner of the subject property." (J-1, p. 47; emphasis supplied).

Vista's argument that the University Station Lease is not actually a lease because it does not "obligate the City of Hollywood to cause such termination, and does not require the City of Hollywood to refrain from entering into extensions with Barry University" is not supported by the evidence. The ALJ looked at the plain language of the University Station II Lease, in which the City stated that the Barry University Lease would be terminated no later than June 30, 2023, and also stated that the City "may" enter into an additional one-year extension of the Barry University Lease "at Landlord's sole discretion, and concluded that this language was sufficient to determine that the lease could not be extended beyond one year. The ALJ's conclusion that the Ground Lease Agreement between the City of Hollywood and University Station II meets the requirements for a lease in the RFA is reasonable and supported by the evidence.

For these reasons and the reasons stated in the other responses, Conclusion of Law 52 is reasonable and is supported by competent substantial evidence in the record. Petitioner's Exception #7 should be rejected.

Response to Exception #8 to Conclusion of Law 53

In paragraph 53, the ALJ rebutted Vista's argument in its PRO that the University Station Lease was actually a contract, rather than a lease. He concluded that the RFA site control requirement for a contract contemplates a sales agreement, but that the documentation submitted

by University Station did not amount to a sales agreement. While the language could have been clearer, the most reasonable implication is that the ALJ is rejecting Vista's argument that the University Station Lease should have included a specific performance clause. The ALJ then concluded that Florida Housing reasonably applied the RFA's requirements for a lease to University Station's Application.

In Exception 8, Vista relies on its arguments in Exception 7 for support of its contention that the documentation submitted by University Station did not meet the RFA requirements for a lease. Florida Housing will rely upon its previous responses and summarize that the RFA did not require a specific commencement date for leases and University Station met the RFA requirements for a lease and is eligible for funding. For these reasons and the reasons stated in the other responses, Conclusion of Law 53 is reasonable and is supported by competent substantial evidence in the record. Petitioner's Exception #8 should be rejected.

CONCLUSION

Florida Housing and University Station respectfully request, for the reasons set forth herein, that this Board reject all exceptions and adopt the Findings of Fact, Conclusions of Law, and Recommendation of the Recommended Order.

RESPECTFULLY SUBMITTED this 4th day of June 2021.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served via e-ALJ and via electronic mail on June 4, 2021 to the following:

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