TBD

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ANDREA SIMPSON,

Petitioner,

vs. Case No. 21-2946

TAYLOR MORRISON OF FLORIDA, INC.,
JOSE PEREZ, AND MARYA CUEVAS,

Respondents.
_____________________________________/

RECOMMENDED ORDER

Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH") presided over the final hearing in this matter, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021), on January 26 and 27, 2022, via Zoom Conference.

APPEARANCES

For Petitioner: Andrea S. Simpson, pro se
2342 Turtleback Loop
Orlando, Florida 32824

For Respondents: Lara J. Peppard, Esquire
Ogletree Deakins Nash
Smoak and Stewart, P.C.
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STATEMENT OF THE ISSUES

Whether Respondents engaged in discriminatory housing practices against Petitioner on the basis of her race in violation of section 760.23(1), (2), and (4), Florida Statutes; and, if so, what affirmative relief and quantifiable damages should be recommended therefor.

Preliminary Statement

Petitioner filed a Housing Discrimination Complaint ("Complaint") with the Florida Commission on Human Relations ("FCHR") on or around November 24, 2020, alleging that Respondents engaged in discriminatory housing practices on the basis of her race in violation of the Florida Fair Housing Act, sections 760.20 through 760.37, Florida Statutes ("FFHA"). Petitioner alleged that Respondents discriminated against her: (1) by refusing to sell her a lot when one was available; (2) through the terms, conditions, privileges, or services in connection with the sale of a lot; and (3) by falsely representing that a lot was not available for sale.

FCHR investigated the Complaint. On August 27, 2021, FCHR issued a determination that there was no reasonable cause to find that Respondents engaged in the discriminatory housing practices alleged by Petitioner on the basis of her race. On September 21, 2021, Petitioner timely requested a hearing by filing a Petition for Relief ("Petition").[1] On September 27, 2021, FCHR transmitted the Petition to DOAH to conduct a formal administrative hearing under section 120.57.

The final hearing was initially scheduled for December 20 and 21, 2021. However, on November 24, 2021, Petitioner requested a continuance as a result of her work schedule and the holidays; Respondents filed a response in opposition thereto. On December 6, 2021, the undersigned held a telephonic motion hearing on Petitioner's request and found that good cause existed for the requested continuance. Thus, on December 7, 2021, the undersigned rescheduled the final hearing for January 26 and 27, 2022.

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[1] Petitioner alleged discrimination based on marital status in her Petition. However, she omitted such allegations in her Complaint and did not include any argument about them in her Proposed Recommended Order; thus, they are not cognizable in this proceeding. *E.g.*, *Taylor v. Pelican Bay Communities, LLC*, FCHR Order No. 19-007 (Feb. 6, 2019).

On January 18, 2022, Petitioner moved to compel Respondents to respond to outstanding requests to produce. On January 20, 2022, the undersigned held a telephonic motion hearing on Petitioner's request at which the parties addressed the outstanding discovery and Respondents' trade secret concerns about one of the documents. Respondents agreed to produce several of the requested documents, confer with Petitioner regarding the remaining items, and file a response the following day addressing same. After reviewing Respondents' response, which confirmed that the parties were able to reach an agreement about the outstanding documents, the undersigned denied Petitioner's motion in an Order dated January 24, 2022.

The final hearing occurred via Zoom Conference on January 26 and 27, 2022. Petitioner testified on her own behalf and presented the testimony of her sister, Althea Simpson. Respondents presented the testimony of four witnesses via Zoom: (1) Matt Sims, the Orlando-area sales manager for Taylor Morison of Florida, Inc. ("TMF"); (2) Jose Perez, a community sales manager; (3) Mayra Cuevas, a community sales manager; and (4) Larry Mull, the Orlando-area vice president of sales for TMF.

Petitioner's Exhibits 1 through 3, and 6 through 15 were admitted in evidence.[2] Petitioner's proposed exhibits 4 and 5 were not admitted. Respondents' Exhibits 1 through 57 were admitted in evidence.

A three-volume Transcript of the final hearing was filed on March 30, 2022. After receiving one seven-day extension, Petitioner and Respondents timely filed their Proposed Recommended Orders ("PROs") on April 18, 2022, which were duly considered in preparing this Recommended Order.

[2] Petitioner's Exhibits 8 and 12 through 14 are marked confidential in DOAH's exhibit portal and they shall be kept confidential in any subsequent proceedings at FCHR or on appeal.

All references to the Florida Statutes are to the 2021 versions. In making the findings below, the undersigned only considered hearsay evidence that supplemented or explained other evidence or would be admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat.

FINDINGS OF FACT

1. Petitioner, Andrea Simpson, an African American woman, has been a licensed Florida realtor since 2005. In September 2021, she purchased a newly-constructed house in Woodland Park, a community in Orlando, Florida, from which the housing discrimination Complaint at issue arises.

2. Respondent, TMF, is a home-building company that develops residential communities, including Woodland Park.

3. Respondents, Jose Perez and Maria Cuevas, are TMF community sales managers. Mr. Perez has held this position since 2016 and worked exclusively at Woodland Park from 2017 until mid-2021. Ms. Cuevas has held this position since 2015 and worked exclusively at Woodland Park from 2015 until December 2021. Both Mr. Perez and Ms. Cuevas interacted with Petitioner on various occasions from her initial visit to Woodland Park through the purchase of her new home.

4. As with all of its communities, TMF followed a process in developing Woodland Park. It divided the land into series of lots based on their widths—40-foot, 50-foot, and 60-foot—and released batches of lots in phases to minimize disruption to current residents. It offered several model homes and predetermined which could be constructed on each lot. TMF does not allow prospective buyers to alter those predeterminations because they are based on applicable setbacks and easements. For instance, the Antigua model, in which Petitioner expressed interest, only could be constructed on a limited number of 50-foot lots that were deep enough to accommodate the floorplan.

5. TMF's pricing is based on three components: the base price of the home; the lot premium, which varies with the size of the lot and its location; and

any options chosen by the buyer. TMF does not negotiate the price of the model or the lot premium with prospective buyers. As it constructed each phase of Woodland Park, TMF issued memoranda to its sales managers reflecting the lots being released and their applicable premiums. With every six sales, TMF also increased the base price of the homes by $2,000.

6. When a prospective buyer visits one of TMF's communities, the sales manager greets them, provides them with information about models and available lots, tours model homes with them, and discusses the process for purchasing a home. First-time visitors complete a registration card with their contact information, which the sales managers enter into TMF's system. Sales managers maintain contact with prospective buyers and use their best efforts to follow up with those on the list of interested persons when lots become available. They are the primary points of contact from the initial visit through facilitation of the sale, upon which they receive a commission.

7. In 2020, Ms. Cuevas and Mr. Perez served as the primary sales managers in Woodland Park, though neither of them ever lived in the community. TMF also utilized a third sales manager at times to assist with the high demand at the community. When TMF released a batch of lots, it divvied them up equally among the sales managers so they had the same opportunity to earn commissions. Sales managers would then follow up with the interested persons list and otherwise facilitate sales of their assigned lots to minimize competition. They work together, however. If a sales manager is out of the office, the others assist with completing paperwork for qualified buyers purchasing a lot that is not assigned to them. Sales managers also routinely inform each other not to sell one of their assigned lots for a few days while they are out of the office or awaiting a scheduled appointment with a buyer who is ready to purchase the lot. This helps to ensure that they all earn commissions on roughly the same type and number of lots each month.

8. TMF requires every sales manager to undergo training at the time of hiring and on an ongoing basis throughout their employment. The training

concerns TMF's sales policies and procedures, and anti-discrimination policies under the federal Fair Housing Act. Both Mr. Perez and Ms. Cuevas received such training. They also credibly testified that they do not discriminate against any buyers on account of race or other reasons.

9. TMF has area sales managers and Matt Sims serves in that capacity in Orlando. He manages the community sales managers, provides them with the updated pricing and lot premium memoranda, and holds weekly meetings to discuss the backlog of owners under contract and closings throughout the year. Mr. Sims began overseeing Woodland Park in February 2020.

10. TMF also uses its website to provide information about its communities, available models and lots, and pricing. Prospective buyers also can schedule a visit online. TMF tries to keep the website up-to-date as to availability and requires sales managers to conduct monthly web audits. But, that is not always possible when demand is high, as it was at Woodland Park.

11. In 2020 and 2021, the housing market experienced dramatic growth, resulting in substantial interest in Woodland Park. The 40-foot lots that accommodated smaller models had the highest demand, followed by 50-foot and 60-foot lots, respectively. TMF and its sales managers had to adapt to keep up. The pandemic made things even more difficult, as sales managers rotated shifts, worked from home, and had to limit the number of people in the lobby at the same time.

12. Prospective buyers could only reserve released lots that were available—*i.e.*, neither under contract nor awaiting execution of a contract—and could accommodate the desired model. Because of how quickly lots were being sold, Woodland Park maintained an interested persons list for prospective buyers who often waited months for a suitable lot to be released.

13. As a result, TMF required every prospective buyer who intended to finance their purchase to receive a prequalification from a subsidiary, Taylor Morrison Home Funding ("TMHF"), before they could reserve an available lot or be added to the interested persons list. Although TMF did not accept

prequalification letters from other lenders at this stage in the process, buyers could ultimately use a different lender to finance the purchase.

14. Upon receipt of the TMHF assessment, buyers were assigned one of three colors—green, yellow, or red. A green assessment indicated that the buyer had no stipulations, was approved for financing, and could sign a contract for sale within 45 days. Buyers with a green assessment could reserve an available lot or be added to the interested persons list.

15. A yellow assessment indicated that the buyer had a contingency that had to be resolved before being approved for financing, such as the need to provide documentation about the source of the funds to purchase the home. A contingency also existed where a buyer intended to use the proceeds of the sale of another home to fund the new purchase. Due to the high demand and traffic at Woodland Park, buyers could not reserve lots or be added to the interested persons list until they provided a fully-executed contract for the sale of their existing home.

16. A red assessment indicated that the buyer was not in a financial position to purchase a new home and, thus, financing approval was down the road. Such buyers could not reserve a lot or be added to the interested persons list.

17. Petitioner first visited Woodland Park in December 2019. She first spoke to Mr. Perez and expressed her interest in the Antigua model. As he does with all new customers, Mr. Perez asked if she owned another home and confirmed that she would likely need to sell it in order to proceed given TMF's policy against accepting contingencies.

18. Petitioner briefly left the office and returned to speak to Ms. Cuevas. Ms. Cuevas provided Petitioner with information about Woodland Park, available models, and upgrade options. She told Petitioner that no lots were available that day, but TMF was about to begin phase six with a new batch of lots set to be released in January 2020. Ms. Cuevas informed Petitioner that she needed to obtain prequalification from TMHF to be added to the

interested persons list. She gave Petitioner contact information for Brandon Cobb, a TMHF consultant who could assist with the prequalification process.

19. In December 2019, Petitioner sought prequalification through TMHF. She communicated with Mr. Cobb about the model in which she was interested, which had an anticipated sales price of $305,000. Petitioner told Mr. Cobb that she wanted to put down $100,000 as a down payment and would use the sale of her house to come up with those funds. She also listed her sister, Althea Simpson, as a co-borrower to try to increase the income used in the financial assessment. Mr. Cobb confirmed that TMF would not allow her to reserve a lot if she had a house-to-sell contingency, though he informed her that she could clear the contingency by getting her home under contract or renting it out. Petitioner confirmed that she would sell her home because she did not want renters damaging it. She never told Mr. Cobb that she wished to use her savings or 401k accounts to fund her down payment.

20. Mr. Cobb completed Petitioner's assessment that day and emailed it to Ms. Cuevas. He marked Petitioner's prequalification as yellow due to the contingency of her owning another home. Mr. Cobb noted that TMHF needed confirmation that Petitioner either sold her home or rented it out; he also noted his uncertainty about Petitioner's sister who lived in California and rented a property there.

21. Ms. Cuevas immediately contacted Petitioner to discuss the assessment and contingency. She confirmed that Petitioner needed to provide a copy of the executed contract to sell her home to purchase a lot or be added to the interested persons list. Through telephone calls and text messages with Petitioner's sister, Ms. Cuevas confirmed the same information.

22. Because of the contingency, Ms. Cuevas could not sell Petitioner a lot or add her to the interested persons list. Petitioner testified that she knew she had to provide TMF with a copy of the fully-executed contract for sale to clear the contingency based on the information she received from Mr. Cobb and Ms. Cuevas. Petitioner never provided such a contract at any point.

23. Petitioner testified that she visited Woodland Park again in March 2020 and spoke with Mr. Perez, though he did not recall the visit. Regardless, the evidence is undisputed that Petitioner's contingency remained at that time because she had not yet put her existing house on the market. Further, the record contains no evidence that lots that could accommodate the Antigua model, in which Petitioner expressed interest, were available at that time.

24. Petitioner testified that she executed a contract to sell her existing house on July 2, 2020. However, she did not introduce a fully-executed copy of the contract. Instead, the version in evidence only was signed by the prospective buyer on July 1, 2020; it was not signed by Petitioner. And, the house was not officially taken off the market in MLS until July 6, 2020. It, thus, remains unclear if a fully-executed contract ever existed and, if so, on which day it became effective.

25. Petitioner believed that she had cleared the contingency at that point and wanted to re-visit Woodland Park. Yet, she did not reach out directly to Ms. Cuevas about her house being under contract or provide a fully-executed contract, even though she had spoken with her about the contingency six months earlier. Indeed, Petitioner had not contacted Ms. Cuevas at all since December 2019. Instead, Petitioner scheduled an appointment for July 4, 2020, on TMF's website and indicated her interest in the Antigua model with a closing date in 2021.

26. At that time, the construction of phase six was underway and there was substantial demand for lots. TMF had recently released several lots in early June 2020. Petitioner did not receive any communication about that release because she had neither spoken to Ms. Cuevas in over six months nor informed anyone at TMF about the contract on her existing house, which she knew was a requirement before she could proceed.

27. As of July 3, 2020, only two available lots remained that were not yet under contract: lot 427, a 40-foot lot assigned to Mr. Perez that could accommodate the Anastasia model but not the Antigua model; and lot 462, a

50-foot lot assigned to Ms. Cuevas that could accommodate the Antigua model. As explained below, neither lot was available for Petitioner to reserve at the time of her appointment on July 4, 2020.

28. On July 4, 2020, Petitioner arrived before her appointment at 11:00 a.m. Ms. Cuevas was on vacation and not in the office. Mr. Perez was meeting with other buyers who had a 10:00 a.m. appointment, which was made several days before. These buyers received a green assessment back in May 2020 and were awaiting the release of a 40-foot lot suitable for the Boca Grande model. When lot 427 was released, Mr. Perez reached out to them and scheduled the appointment. These customers, who were Hispanic, signed a contract on lot 427 at that appointment.

29. Mr. Perez thereafter met with Petitioner. He neither realized she had made an appointment online nor recalled her previous visits, so he asked her to fill out a registration card. He testified that Petitioner never mentioned speaking to Ms. Cuevas or Mr. Cobb in the past. He recalled discussing the Anastasia and Antigua models, answering questions about homes, features, and available lots, and printing out packages for those models.

30. Mr. Perez informed Petitioner that no lots were available that day. He had just sold lot 427. As for lot 462, he did not believe it was available because Ms. Cuevas asked him to hold it for a buyer with whom she would be meeting to sign a contract when she returned from vacation. The buyer, who identified as Asian, had visited the property every week since May while awaiting an available lot. Prior to going on vacation, Ms. Cuevas directed the buyer to go through the prequalification process so that they could sign the paperwork when she returned. Unlike Petitioner, this buyer did not have a housing contingency and received a green assessment. The buyer signed the purchase agreement a few days after Ms. Cuevas returned from vacation.

31. Even if Ms. Cuevas should not have asked Mr. Perez to hold lot 462 for the other buyer, the weight of the credible evidence failed to establish that Petitioner was qualified to make a bona fide offer that day. For one, she did

not bring a copy of a fully-executed contract for the sale of her existing home to her appointment, which she admitted she knew was required to qualify her to reserve a lot. Petitioner's prequalification assessment also was over six months old and the previous credit report was only valid for 120 days, so an updated assessment had to be conducted in any event. Without an updated assessment and a copy of the executed contract, TMF policy precluded her from reserving a lot that day. Although Petitioner faults Respondents for not telling her about needing to obtain an updated assessment, it bears emphasizing that she is a licensed realtor with experience on these issues.

32. After Petitioner left the office, Mr. Perez discovered that she had previously worked with Ms. Cuevas when he tried to input her registration card information into the system. Thus, Mr. Perez forwarded Petitioner's information to Ms. Cuevas to follow up on her return from vacation.

33. On July 6, 2020, Petitioner took screenshots of TMF's website, which she believed served as proof that lots 427 and 462 were available on July 4th. However, the site plan was not accurate. It showed lots 427 and 462 shaded in grey, which indicated they had not yet been released. That was wrong as both lots were released the month before. In fact, the lots should have been shaded in red to indicate that they were no longer available because they were either sold or about to be sold. This discrepancy is not surprising as TMF's website was not kept up-to-date with live information due to the high demand at Woodland Park.

34. On July 6, 2020, Petitioner also texted TMF's internet specialist about her July 4th appointment. She noted that Mr. Perez was the only agent there, that she would like to move forward with a purchase, and that she already had a pre-approval from Mr. Cobb. She also asked about the process.

35. On July 7, 2020, Mr. Sims received information about Petitioner's visit and spoke with her on the phone. She informed him of her interest, that she had been prequalified, and that her existing house was now under contract.

Mr. Sims communicated that information to Ms. Cuevas, who had not yet learned that Petitioner's existing house was under contract.

36. Ms. Cuevas called Petitioner that day to discuss the waiting list. During the call, Ms. Cuevas reiterated that she could not have added Petitioner to the interested persons list back in December 2019 because of the contingency. She also told Petitioner she needed to get an updated prequalification from Mr. Cobb given that over six months had expired since the last one.

37. Ms. Cuevas and Petitioner continued to communicate via email and text over the next few days. Petitioner asked for updates on available lots and for the brochure for the Anastasia and Antigua models; Ms. Cuevas emailed that along with the applicable price list that same day. Ms. Cuevas asked if Petitioner had closed on her existing house and Petitioner responded that the closing was scheduled for August 12, 2020. Petitioner asked if Ms. Cuevas needed a copy and Ms. Cuevas responded, "not yet," as Petitioner had not yet obtained an updated prequalification assessment.

38. Ms. Cuevas reached out to Mr. Cobb. He had questions about Petitioner's sister who was still listed as a co-buyer. He needed more information about her job situation and whether she had moved back to Florida. He also needed a copy of the executed contract on Petitioner's existing house. Without that information, an updated assessment could not be completed at that time.

39. Petitioner testified that the contract on her existing house fell through so she placed the house back on the market on or around July 15, 2020. Petitioner knew that this fact would preclude her from proceeding with TMF but she failed to inform anyone at TMF about it.

40. On July 17, 2020, Ms. Cuevas called Petitioner to discuss the updated prequalification. Ms. Cuevas informed Petitioner that they needed additional information about her sister's circumstances and a copy of the executed contract on her house. Petitioner testified that she did not inform Ms. Cuevas

that the contract on her house had fallen through because Ms. Cuevas had confirmed that no lots were available at that time.

41. Petitioner failed to submit the executed contract (and, indeed, could not do so because there was no contract at that point). She also failed to contact Mr. Cobb or otherwise complete an updated qualification assessment. Thus, Ms. Cuevas could not add Petitioner to the interested persons list and did not reach out to her about the next lot release on July 22, 2020.

42. Petitioner visited Woodland Park again in August 2020 and brought her grandmother with her. Mr. Perez did not recall which models they discussed, but Petitioner testified that she inquired about the Amelia model that required a 60-foot lot. Although Ms. Cuevas was not present that day, she confirmed that Petitioner only expressed interest to her in the Antigua and Anastasia models. Regardless, Petitioner did not seek to reserve a 60-foot lot at that time and the record is undisputed that only 60-foot lots were released in August 2020 and September 2020.

43. Petitioner got her existing house under contract on August 26, 2020, with a closing date set for September 28, 2020. Petitioner never provided a copy of this contract to Ms. Cuevas or anyone else at TMF. Instead, she pursued a prequalification letter from her employer, Fifth Third Bank.

44. On September 11, 2020, Fifth Third Bank issued a prequalification letter for Petitioner and her sister as co-borrowers to purchase a home valued at $375,000 with a loan amount of $250,000. Petitioner waited 12 days to email the letter to Ms. Cuevas who responded that day that she would let Petitioner know as soon as the next batch of lots were released. Ms. Cuevas favorably stretched the rules for Petitioner by not requiring her to update her assessment with TMHF. Ms. Cuevas did so because Petitioner sold her house, which was her primary contingency, and she provided a letter from her employer prequalifying her for enough money to purchase the home based on the new prices. Petitioner closed on the sale of her existing home on September 28, 2020.

45. In October 2020, TMF began construction of phase seven. On October 7, 2020, Ms. Cuevas notified Petitioner by email that TMF planned to release 11 lots the following weekend, including seven 50-foot lots and four 60-foot lots. Ms. Cuevas confirmed that the Antigua and Anastasia models would not work on any of these lots. Indeed, the Antigua model could only be built on a small number of 50-foot lots in the community and the Anastasia model could only be built on a 40-foot lot. Ms. Cuevas provided the prices for the models that would work on the available lots.

46. Petitioner confirmed via email the following week that she would wait for a lot in phase eight that could accommodate the Antigua model. Petitioner said she would reach out for updates periodically and also asked Ms. Cuevas to let her know as soon as lots became available.

47. The following week, Petitioner emailed Ms. Cuevas to inquire about price increases for some of the homes. She asked Ms. Cuevas for an estimate of how much she should expect to pay for the Antigua model. Ms. Cuevas responded with the current price of the Antigua model, but she did not know what the price would be in phase eight.

48. On November 7, 2020, TMF released another batch of lots in phase seven, including several 50-foot lots. By that point, TMF had discontinued the Antigua model because there were only a limited number of lots on which it could be built. Ms. Cuevas did not reach out to Petitioner when those lots were released because they were still in phase seven and Petitioner had last indicated that she wished to wait for phase eight.

49. However, on November 18, 2020, Petitioner emailed Ms. Cuevas to see if TMF had any cancellations from phase six that could accommodate the Antigua model. Ms. Cuevas confirmed with the permitting department that lot 516, which was released earlier that month as part of phase seven, could accommodate the Antigua model. Ms. Cuevas made this inquiry for Petitioner even though the model technically had been discontinued. She informed

Petitioner that lot 516 was available, could accommodate the Antigua model, and that the price was $14,500 for the lot and $354,995 for the home.

50. Petitioner confirmed that she wanted to reserve the lot and made an appointment. At that point, Ms. Cuevas informed her coworkers not to sell that lot because she would be writing a contract over the weekend. Extending this brief hold on a lot is exactly what she did with lot 462 for another buyer several months earlier.

51. On November 29, 2020, Petitioner met with Ms. Cuevas. During that meeting, Petitioner asked TMF to reduce the price of the home to the price in effect in July 2020. Ms. Cuevas and Mr. Sims confirmed that the price was non-negotiable, but they offered to apply a $1,000 discount on the lot. All of the paperwork, including the purchase agreement, was signed by both Petitioner and her sister as co-buyers.

52. TMF completed Petitioner's home in September 2021. Prior to closing, Petitioner amended the purchase agreement to remove her sister as a co-buyer and she obtained financing through TMHF as the sole borrower.

53. On September 23, 2021, Petitioner closed on the home for $386,333. The total price included $14,500 for the lot, $354,995 for the base price of the home, $27,838 for options, and $11,000 in discounts provided by TMF. Petitioner received a three-percent commission for the purchase as a real estate agent, resulting in a $7,987.99 credit applied at closing; she also received $3,500 in incentives towards the closing costs. Petitioner moved into her new house in Woodland Park after the closing and still lives there.

54. Petitioner filed her Complaint in late November 2020, only days before she signed the purchase agreement with TMF. Petitioner alleged that Respondents discriminated against her on the basis of her race: (1) by refusing to sell her a lot when one was available; (2) through the terms, conditions, privileges, or services in connection with the sale of a lot; and (3) by falsely representing that the lot was not available for sale. TMF, Ms. Cuevas, and Mr. Perez learned of the Complaint in early December 2020.

55. There is no dispute that a number of African American families purchased lots from TMF and live in Woodland Park. Of the seven buyers who purchased homes from TMF in Woodland Park in July and August 2020, and who both used TMHF as their lender and chose to identify their race on their demographic worksheet, one identified as African American, two as Asian, and one as American Indian/Native Alaskan. It also cannot be ignored that, with Ms. Cuevas's assistance, TMF sold Petitioner a home before either learned of her Complaint.

56. Ms. Cuevas credibly testified that she has sold at least 20 homes to African Americans at Woodland Park and did so before learning of Petitioner's Complaint. She also facilitated the sale of a home to Petitioner.

57. Mr. Perez credibly testified that he has sold at least seven homes to African American buyers at Woodland Park and did so before learning of Petitioner's Complaint.

CONCLUSIONS OF LAW

58. DOAH has jurisdiction over the parties and subject matter of this cause. §§ 120.569, 120.57(1), and 760.35(3), Fla. Stat.

59. The FFHA makes it unlawful to discriminate in the sale of a dwelling. Section 760.23 provides in pertinent part as follows:

> (1) It is unlawful to refuse to sell … after the making of a bona fide offer, to refuse to negotiate for the sale … , or otherwise to make unavailable or deny a dwelling to any person because of race, color, national origin, sex, disability, familial status, or religion.
>
> (2) It is unlawful to discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, national origin, sex, disability, familial status, or religion.

* * *

> (4) It is unlawful to represent to any person because of race, color, national origin, sex, disability, familial status, or religion that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

60. The FFHA is patterned after Title VIII of the Civil Rights Act of 1968, as amended by the Fair Housing Act of 1988. As such, discriminatory acts prohibited under the federal Fair Housing Act also are prohibited under the FFHA, and federal case law interpreting the federal Fair Housing Act is applicable to proceedings brought under the FFHA. *Bhogaita v. Altamonte Heights Condo. Ass'n*, 765 F.3d 1277, 1285 (11th Cir. 2014).

61. Petitioner, as the complainant, has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. § 760.34(5), Fla. Stat. A "preponderance of the evidence" means the "greater weight" of the evidence, or evidence that "more likely than not" tends to prove the fact at issue. *Gross v. Lyons*, 763 So. 2d 276, 289 n.1 (Fla. 2000).

62. Petitioner may establish a violation of the FFHA through either direct evidence or the burden shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). "Direct evidence encompasses conduct or statements that both (1) reflect directly the alleged discriminatory attitude, and (2) bear directly on the contested [housing] decision." *Noel v. Aqua Vista Townhomes Condo. Ass'n*, 2019 WL 4345903, at *3 (S.D. Fla. Sept. 12, 2019).

63. Petitioner presented no credible, direct evidence of discrimination by Respondents relating to the purchase of her lot and new house that established the requisite discriminatory intent necessary for such a showing.

64. Under *McDonnell Douglas*, the following framework applies:

> First, [Petitioner] has the burden of proving a prima facie case of discrimination by a preponderance of the evidence. Second, if [Petitioner] sufficiently establishes a prima facie

> case, the burden shifts to [Respondent] to articulate some legitimate, nondiscriminatory reason" for its action. Third, if [Respondent] satisfies this burden, [Petitioner] has the opportunity to prove by preponderance that the legitimate reasons asserted by [Respondent] are in fact mere pretext.

U.S. Dep't of Hous. & Urban Dev. v. Blackwell, 908 F.2d 864, 870 (11th Cir. 1990) (quoting *Pollitt v. Bramel*, 669 F. Supp. 172, 175 (S.D. Ohio 1987)).

65. "[C]onclusory allegations of discrimination, without more, are not sufficient to raise an inference of pretext or intentional discrimination." *Young v. Gen. Food Corp.*, 840 F.2d 825, 830 (11th Cir. 1988) (quoting *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 597 (11th Cir. 1987)). In other words, Petitioner cannot rely on suspicion or conjecture to prove that discrimination motivated Respondents' actions. *Id.*

66. To establish a prima facie case of housing discrimination, Petitioner must generally prove that: (1) she is a member of a protected class; (2) she applied for and was qualified to purchase a lot; (3) Respondents rejected her; and (4) the lot remained available thereafter or was sold to a person not in Petitioner's protected class. *Blackwell*, 908 F.2d at 870.

67. Based on the Findings of Fact above, Petitioner failed to prove a prima facie case of discrimination under section 760.23(1) or (2) by a preponderance of the evidence. Although it is undisputed that Petitioner is a member of a protected class as an African American, the weight of the credible evidence established that she was not a qualified buyer prior to September 2020. Petitioner understood as early as December 2019 that she needed to sell her existing home and provide a copy of the fully-executed contract to be deemed qualified to purchase a lot from TMF. Once she purportedly got her home under contract the first week of July 2020, she failed to inform Ms. Cuevas, Mr. Perez, or anyone else at TMF about it before her appointment on July 4, 2020, or submit the contract at any time thereafter. In September 2020, after selling her home and providing a prequalification without contingencies,

Petitioner was deemed qualified. When the next lot became available that was suitable for the Antigua model in November 2020, Petitioner—for the first time—made a bona fide offer as a qualified buyer and TMF accepted it.

68. In short, Petitioner failed to prove that she was a qualified buyer in July 2020, much less one who made a bona fide offer that was rejected by Respondents. The weight of the credible evidence also failed to establish that Respondents subjected her to discriminatory terms or conditions. Indeed, the evidence showed that Ms. Cuevas favorably bent the rules in Petitioner's favor by holding lot 516 for several days while they awaited execution of the purchase agreement and doing so despite Petitioner not having an updated green assessment from TMHF.

69. It also cannot be ignored that there were no suitable, available lots for Petitioner to purchase on July 4, 2020. The only two lots that were suitable for the Antigua and Anastasia models had been sold to, or otherwise placed on a temporary hold for, other buyers prior to Petitioner's appointment. Thus, neither lot was available for Petitioner to purchase even if she had been deemed a qualified buyer (she was not) when she arrived for her appointment. No credible evidence was presented that Ms. Cuevas or Mr. Perez ever misrepresented the availability of a lot to Petitioner at any time during the process, as alleged to support the claimed violation.

70. Petitioner also failed to prove by a preponderance of the evidence that she was treated differently than similarly-situated buyers outside her race, as required for a claim of disparate treatment. *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1216 (11th Cir. 2008). The weight of the credible evidence established that Respondents treated Petitioner the same as every other prospective buyer, regardless of their race. No credible evidence was presented that other buyers with house-to-sell contingencies were permitted to reserve a lot or otherwise be added to the interested persons list, which was the sole roadblock for Petitioner until September 2020. In fact, the evidence showed that Petitioner was arguably treated more favorably than

other buyers given that Respondents allowed Petitioner to proceed without a green assessment from TMFH and gave her $11,000 in discounts despite TMF's policy of not negotiating the lot or home prices with buyers.

71. Moreover, the weight of the credible evidence established that Respondents sold, or helped facilitate the sale of, numerous lots to other African American buyers prior to learning of Petitioner's Complaint. Those facts undermine even an inference of racial discrimination against her. Indeed, one of the seven buyers who purchased homes from TMF in Woodland Park in July and August 2020, and who both used TMHF as their lender and chose to identify their race, identified as African American. And, importantly, Respondents ultimately sold Petitioner a lot (and agreed to build her a model home that it previously discontinued and apply $11,000 in discounts) within two months of her clearing her contingency and becoming qualified to purchase a new home.

72. Finally, the undersigned rejects Petitioner's argument that she was treated differently than the buyer of lot 462 because Ms. Cuevas held the lot for him without a prequalification but did not extend the same courtesy to Petitioner. The weight of the credible evidence established that Petitioner and the buyer of lot 462 were not similarly situated. Although the buyer of lot 462 did not identify as African American, he had been visiting the sales office once per week for months, maintained consistent contact with Ms. Cuevas, was prequalified with a green assessment, and no house-to-sell contingency. Conversely, Petitioner did not communicate with Ms. Cuevas after her prequalification yellow assessment that established her contingency in December 2019. Prior to her July 4th appointment, Petitioner neither alerted Ms. Cuevas directly that she had her house under contract nor provided Ms. Cuevas with a copy of the contract, despite knowing that she could not proceed until she did both of those things. Instead, she made an appointment online as if she were a first-time visitor, which is exactly what Mr. Perez thought, and did not even bring a copy of the contract with her. And, it bears

repeating that Ms. Cuevas extended the same courtesy to Petitioner when she finally became qualified to purchase lot 516.

73. At the end of the day, Petitioner has done little more than speculate that Respondents refused to sell her a lot before November 2020 because she is African American, even though the weight of the credible evidence does not support such an allegation. *See Lizardo v. Denny's, Inc.*, 270 F.3d 94, 104 (2d Cir. 2001) ("Plaintiffs have done little more than cite to their mistreatment and ask the court to conclude that it must have been related to their race. This is not sufficient."); *Norton v. Sam's Club*, 145 F.3d 114, 120 (2d Cir. 1998) (noting that law "does not make [Respondents] liable for doing stupid or even wicked things; it makes them liable for discriminating").

74. In sum, Petitioner failed to prove a prima facie case of discrimination against Respondents in violation of section 760.23(1), (2) and (4).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations issue a final order dismissing the Petition for Relief.

DONE AND ENTERED this 30th day of June, 2022, in Tallahassee, Leon County, Florida.

ANDREW D. MANKO
Administrative Law Judge
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Filed with the Clerk of the
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this 30th day of June, 2022.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 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.