

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

SAVANNAH SPRINGS APARTMENTS II, LTD.

As applicant for SAVANNAH SPRINGS

APARTMENTS II—Application No. 2007-163BS;

SUNSET VIEW, LTD., as applicant for HUNT

CLUB APARTMENTS, Application No. 2007-26S;

CASE NO. 2007-048UC

FERN HILL APARTMENTS, LTD., as applicant for

REMINGTON PARK APARTMENTS— Application

No. 2007-020BS; *et al*,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

EMERSON OAKS APARTMENTS, LTD.

As applicant for EMERSON OAKS

CASE NO. 2007-049UC

APARTMENTS —Application No. 2007-33BS,

Petitioners,

v.

FLORIDA HOUSING FINANCE CORPORATION,

FINAL ORDER

This cause came before the Board of Directors of the Florida Housing Finance Corporation (“Board”) for consideration and final agency action on August 8, 2008, pursuant to Sections 120.569 and 120.57(2), Florida Statutes.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Sherry Shea DATE: 8-11-08

On August 27, 2007, nine Petitioners filed two Petitions challenging Florida Housing's scoring and ranking of twenty-two Universal Cycle Applications (the "Challenged Applications"), each of which listed as its Developer Atlantic Housing Partners, LLLP. Each petition stated two bases for relief: the first alleged that Florida Housing erred in accepting Atlantic Housing Partners, LLLP, as the Developer, as its general partner was misidentified; second, that each of the developments proposed in the Challenged Applications was not feasible or economically viable.

Florida Housing transmitted the Petitions to the Division of Administrative Hearings. On December 3, 2007, following an exchange of motions and a hearing, jurisdiction over the Petitions was relinquished to Florida Housing for proceedings under Section 120.57(2) Florida Statutes as to the "First Basis for Relief" stated in each Petition.

On May 1, 2008, six petitioners, Savannah Springs Apartments II, Ltd., as applicant for Savannah Springs Apartments II—Application No. 2007-163BS; Sunset View, Ltd., as applicant for Hunt Club Apartments - Application No. 2007-26S¹; Fern Hill Apartments, Ltd., as applicant for Remington Park Apartments – Application No. 2007-020BS; Sabal Ridge Apartments, Ltd., as applicant For Sabal Ridge Apartments - Application No. 2007-166BS; Sligh Avenue

Apartments, LTD., As applicant for Cross Creek Apartments – Application No. 2007-032BS; and in Case No. 2007-049UC: Emerson Oaks Apartments, Ltd., As applicant for Emerson Oaks Apartments – Application No. 2007-33BS (collectively, the “Petitioners”), filed two “First Amended Petition[s] Challenging Final Action of the Florida Housing Finance Corporation Pursuant to Florida Administrative Code §§ 28-106.201, et. seq., and §§ 28-106.301, et. seq.,” (the “Amended Petitions”) challenging the scoring and ranking of: in Case No. 2007-048UC, Fountains at Millenia III, LLLP, as applicant for the Fountains at Millenia Phase III - Application No. 2007-175BS; Fairview Cove, LLLP, as applicant for Fairview Cove Phase I, - Application No. 2007-137BS; Fountains at Falkenberg I, LLLP, as applicant for Fountains at Falkenberg Phase I - Application No. 2007-176BS; Fountains at Falkenberg II, LLLP, as applicant for Fountains at Falkenberg Phase II - Application No. 175BS; and Owens Pointe, LLLP, as applicant for Owens Pointe Phase I - Application No. 2007-182BS², and in Case No. 2007-049UC, Rolling Acres Club LLLP, as applicant for Rolling Acres Phase I - Application No. 2007-127S; Rolling Acres Club II LLLP, as applicant for Rolling Acres Phase II, Application No. 2007-129S; Oviedo Town Centre Partners, LLLP, as applicant for Oviedo Town Centre Phase III - Application No. 2007-

¹ Sunset View, Ltd., (Application No. 2007-026S) is included in the caption, but not mentioned in the body of the Amended Petition in Case No. 2007-048UC. The project was awarded and accepted SAIL and Supplemental Loan funding after ranking, thus is not at issue in this proceeding.

² The application for Owens Point Phase I was withdrawn after ranking, thus is not at issue in this proceeding.

132BS; Covington Club, LLLP as applicant for Covington Club - Application No. 2007-136BS; Southwinds Partners, LLLP, as applicant for Southwinds Cove – Application No. 2007-140S; Spring Lake Cove, LLLP, as applicant for Spring Lake Cove – Application No. 2007-141S; Hammock Harbor I, LLLP, as applicant for Hammock Harbor Phase I – Application No. 2007-179BS; Pondella Cove, LLLP, as applicant for Pondella Cove - Application No. 2007-181BS; and Malabar Cove, LLLP, as applicant for Malabar Cove Phase I - Application No. 2007-197BS (collectively, the “Challenged Applications”)³.

The Amended Petitions added a new “Second Basis for Relief,” alleging that Florida Housing had improperly considered materials filed on behalf of the Challenged Applications in making its scoring and ranking decisions.

Florida Housing transmitted the Amended Petitions to DOAH for proceedings. On June 2, 2008, by an “Order Closing Files and Returning Cases to Florida Housing Finance Corporation,” the cases were again returned to Florida Housing for proceedings under Section 120.57(2) Florida Statutes as to the “First Basis for Relief” stated in each Amended Petition.

Pursuant to notice and Sections 120.569 and 120.57(2), Florida Statutes, on July 12, 2008, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing Finance Corporation’s appointed

³ Covington Club, Pondella Cove, and Fountains at Falkenberg Phase I were rejected after ranking.

Hearing Officer, Diane D. Tremor, only as to the “First Basis for Relief,” of each Amended Petition. The Hearing Officer issued a Recommended Order. A true and correct copy of the Recommended Order is attached hereto as “Exhibit A.”

The issue for determination is whether Florida Housing Finance Corporation (“Florida Housing”) properly interpreted its rules, instructions and forms in its determination that Universal Cycle Applications for State Apartment Incentive Loan (“SAIL”) funding in the 2007 Universal Application Cycle, challenged by Petitioners in this action, did meet the threshold requirement for identifying the Developer entity, pursuant to rule 67-48.004(I4) Fla. Admin. Code, and Part II. (“Development Team”) Section A.3 of the Universal Application Instructions and the Universal Application. More specifically, the relevant issue is whether Respondent properly interpreted applicable statutes, rules, instructions and forms in accepting Atlantic Housing Partners, LLLP, as the Developer in each Challenged Application, where Atlantic Housing Partners Managers, LLC, was misidentified as its general partner.

The Hearing Officer recommended Florida Housing enter a Final Order finding that:

1. Petitioners have satisfactorily demonstrated that Florida Housing erred in finding that the Challenged Applications satisfied the requirement of Part II., Section A., Subsection 3., of the 2007 Universal Cycle Application, by

accepting Atlantic Housing Partners, LLLP, as the developer in each of the Challenged Applications’

2. If Florida Housing had rejected the Challenged Applications, the Petitioners, Savannah Springs Apartments II, Ltd., as applicant for Savannah Springs Apartments II–Application No. 2007-163BS; Fern Hill Apartments, Ltd., as applicant for Remington Park Apartments – Application No. 2007-020BS; Sabal Ridge Apartments, Ltd., as applicant For Sabal Ridge Apartments - Application No. 2007-166BS; Sligh Avenue Apartments, LTD., As applicant for Cross Creek Apartments – Application No. 2007-032BS; and in Case No. 2007-049UC: Emerson Oaks Apartments, Ltd., As applicant for Emerson Oaks Apartments – Application No. 2007-33BS, would have been ranked for funding.

3. The Petitioners should be funded.

RULING ON THE RECOMMENDED ORDER

The findings of fact and conclusions of law contained in the Recommended Order are supported by competent substantial evidence.

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

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

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

3. Accordingly, it is found that the Challenged Applications failed to satisfy the requirement of Part II., Section A., Subsection 2.a., a threshold requirement of the 2007 Universal Cycle Application, in that they did not correctly identify the general partner of the Developer, Atlantic Housing Partners, LLLP. that the Challenged Applications

4. It is further found that the Amended Petitions have satisfactorily demonstrated had the Challenged Applications been scored as failing to satisfy all threshold requirements, the Petitioners' applications would have been ranked as eligible for funding.

5. The above findings are dispositive of the both cases, thus this Final Order will render the Second Basis for Relief and the Third Basis for Relief contained in each of the Amended Petitions moot.

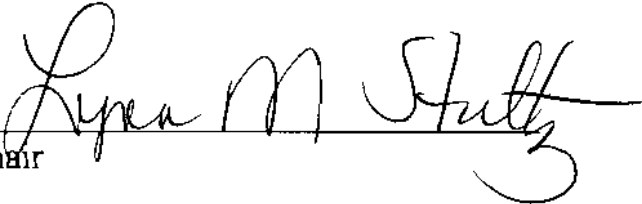
IT IS HEREBY ORDERED that:

1. Petitioners' Applications for State Apartment Incentive Loan funding in the 2007 Universal Application Cycle shall be funded.

2. The "Second Basis for Relief," and the "Third Basis for Relief," of each of the Amended Petitions are hereby DISMISSED.

DONE and ORDERED this 8th day of August, 2008.

FLORIDA HOUSING FINANCE CORPORATION

By: 
Chair

Copies to:

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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

SAVANNAH SPRINGS APARTMENTS
II, LTD., as applicant for SAVANNAH
SPRINGS APARTMENTS II-Application
No. 2007-163 BS; et al.,

Petitioners,

vs.

FHFC CASE NO. 2007-048UC
Application Nos.: 2007-020BS
2007-032BS
2007-163BS
2007-166BS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent,

_____ /

-and-

EMERSON OAKS APARTMENTS,
LTD., as applicant for EMERSON
OAKS APARTMENTS-Application
No. 2007-33BS,

Petitioner,

vs.

FHFC CASE NO. 2007-49UC
Application No.: 2007-33BS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice and Sections 120.569 and 120.57(2), Florida
Statutes, the Florida Housing Finance Corporation, by its duly designated

Hearing Officer, Diane D. Tremor, held an informal hearing in Tallahassee, Florida, in the above captioned proceeding on July 11, 2008.

APPEARANCES

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STATEMENT OF THE ISSUES

There are no disputed issues of material fact. The issue for determination¹ is whether the Atlantic Housing Group applicants should have been rejected for failure to meet the threshold requirement of identifying the developer(s) of their proposed projects.

¹ There was an issue raised by Petitioners regarding Exhibit 11 of the Atlantic Housing Group applications (Joint Exhibit 9). Because the issue pertaining to Exhibit 9 of the applications (Joint Exhibit 8) is dispositive of all issues, no Findings of Fact or Conclusions of Law are made regarding Joint Exhibit 9.

PRELIMINARY STATEMENT

The procedural history of the administrative “appeal” in these cases is somewhat complicated. That history is fully set forth in the parties’ Proposed Recommended Orders, as well as their prehearing filings. Because the prior proceedings which were initially transmitted to the Division of Administrative Hearings (DOAH) are not determinative of the limited issues currently before the undersigned in this informal proceeding, a recitation of the prior proceedings before the DOAH will not be repeated or included in this Recommended Order.

At the informal hearing conducted on July 11, 2008, the parties stipulated to the admission into evidence of Joint Exhibits 1 through 9. Prior to the hearing, the parties filed a prehearing brief or statement and, subsequent to the hearing, the parties timely submitted their Proposed Recommended Orders.

FINDINGS OF FACT

Based upon the undisputed facts and documents received into evidence at the hearing, the following relevant facts are found:

1. On April 10, 2007, the Petitioners, along with other competing applicants, submitted applications for funding under the State Apartment

Incentive Loan Program (“SAIL”), a program administered by the Florida Housing Finance Corporation. Subsequent to the application process, Petitioners challenged the final scoring and ranking of applications filed by entities related to the Atlantic Housing Group.

2. The 2007 Universal Application Form requires all applicants to provide information for each developer of the proposed project on Exhibit 9 to the application. (Joint Exhibit 1) The 2007 Universal Application Instructions amplify this requirement by instructing that the information to be contained on Exhibit 9 includes the general and limited partners for each developer. For a limited partnership, applicants are instructed to provide a list, as of the application deadline, of the limited partners, and the officers, directors, members and shareholders of the general partner. Similar instructions are included for a limited liability company. Applicants are advised in the Instructions that the identity of the developer or principal of developer is a threshold issue and that the developer identity listed in the application may not change until the construction or rehabilitation of the development is complete, unless approved by the Board. (Joint Exhibit 2, at pages 5 -7)

3. In each of the applications challenged by Petitioners, the applicant’s Exhibit 9 identified Atlantic Housing Partners, L.L.L.P., a Florida Limited

Liability Limited Partnership, as the project developer, and Atlantic Housing Partners Managers, L.L.C., a Florida limited liability company, as the “Sole General Partner” of the developer. Paul M. Missigman and W. Scott Culp were listed as Managers of the sole general partner, Atlantic Housing Partners Manager, L.L.C. (Joint Exhibit 8)

4. In fact, Atlantic Housing Partners Managers, L.L.C. was **not** the general partner of the developer Atlantic Housing Partners, L.L.L.P., on the application deadline of April 10, 2007. Indeed, it is not clear that such an entity known as Atlantic Housing Partners Manager, L.L.C, a Florida limited liability company, even existed on that date. In any event, the actual general partner of Atlantic Housing Partners, L.L.L.P. was Atlantic Housing Partners Group, L.L.C, another limited liability company, which replaced another L.L.C. known as Atlantic Housing Group Managers, L.L.C. as the general partner of Atlantic Housing Partners, L.L.L.P., on May 16, 2006. The Managers of both of these latter entities were Paul M. Missigman and W. Scott Culp. (Joint Exhibit 3)

5. On April 24, 2007, Atlantic Housing Group Managers, L.L.C., the former general partner of the developer Atlantic Housing Partners, L.L.L.P. prior to May 16, 2006, changed its name to Atlantic Housing Partners Managers, L.L.C. (the same name listed on the April 10, 2007 application

for funding as the sole general partner of the developer Atlantic Housing Partners, L.L.L.P). (Joint Exhibit 3)

5. Subsequently, on May 21, 2007, two other name changes occurred. Atlantic Housing Partners Managers L.L.C. changed its name to Atlantic Housing Partners Managers II, L.L.C. Atlantic Housing Partners Group, L.L.C., the actual general partner of the developer on the application due date, changed its name to Atlantic Housing Partners Manager, L.L.C., which happened to be the sole general partner listed on the April 10, 2007 application. (Joint Exhibits 3 and 8)

6. On or about April 24, 2007, subsequent to the application deadline, the developer Atlantic Housing Partners, L.L.L.P. was dissolved. On or about May 21, 2007, prior to the final scoring of all applications, that dissolution was revoked. (Joint Exhibit 3)

7. The Atlantic Housing Group's challenged applications in this proceeding were scored eligible for funding. As a consequence, Petitioners' applications were excluded from funding under the SAIL Program.

CONCLUSIONS OF LAW

Pursuant to Sections 120.569 and 120.57(2), Florida Statutes, and Chapter 67-48, Florida Administrative Code, the Hearing Officer has jurisdiction of the parties and the subject matter of this proceeding. The

Petitioners' substantial interests are affected by the proposed action of the Respondent, Florida Housing Finance Corporation. Therefore, Petitioners have standing to bring this proceeding.

The sole determinative issue in this proceeding is whether the challenged applications submitted by the applicants in the Atlantic Housing Group should have been rejected for failure to meet threshold requirements related to the identity of each developer, including all co-developers, in accordance with Rule 67-48.004(13) and (14), Florida Administrative Code.

Applicants are informed in the Application Instructions that the identity of the developer or principal of developer is a threshold item that may not change until the completion of construction or rehabilitation of the proposed development. (Joint Exhibit 2, page 7) The Application Instructions, as well as the Application Forms, are adopted as rules of the Respondent. Rule 67-48.004(1)(a), Florida Administrative Code.

Rule 67-48.004(13) requires Respondent to reject an application if, following the submission of additional documentation, revised pages and other information, the applicant fails to achieve the threshold requirements. However, there are certain items that must be included in the initial application that cannot be revised, corrected or supplemented after the application deadline. If such items are not submitted in the initial

application, the Respondent must reject the application without opportunity to submit additional information. Any attempted changes to such items may not be accepted. The threshold items which may not be "cured" through the submission of additional information include "the identity of each Developer, including all co-Developers." A change in the identity of a developer may only occur by approval of the Board after the applicant has been invited to enter credit underwriting (i.e., after final scoring and ranking at the conclusion of the application process). See Rule 67-48.004(14), Florida Administrative Code.

It is clear from the Findings of Fact recited above that the Atlantic Housing Group applications which are herein challenged did not correctly identify the developer of the proposed project, a threshold requirement which cannot be "cured" after the application deadline. By listing Atlantic Housing Partners Manager, L.L.C., in lieu of Atlantic Housing Partners Group, L.L.C., as the general partner of the developer, Atlantic Housing Partners, L.L.L.P., the developer was not properly identified. A limited partnership, such as the developer Atlantic Housing Partners, L.L.L.P., gains its identity from its general partners. Nichols v. Paulucci, 652 So.2d 389 (Fla. 5th DCA 1995). Indeed, a limited partnership is not a legal entity and has no identity apart from its members. See Levinson v. Brosche, 578 So.2d

477 (Fla. 4th DCA 1991). By failing to identify in its initial application the correct general partner of the developer, the challenged applicants failed to identify the developer itself. On the date of the application, Atlantic Housing Partners Managers, L.L.C., was not the sole general partner of the developer Atlantic Housing Partners, L.L.L.P., and thus the developer was not correctly identified in the application. The promulgated rules of the Florida Housing Finance Corporation make such a misidentification a fatal, incurable error requiring rejection of the applications. The various name changes that occurred after the application deadline could not and did not cure this fatal error. Rule 67-48.004(13) and (14), Florida Administrative Code.

Respondent Florida Housing urges that the “change” in the name of the sole general partner of the developer is not a fatal error because Florida Housing is less concerned with the “name” of a developer entity than it is with the natural persons who will be responsible for the development, as well as the ability of the developer to go forward with the project. It is pointed out that Rule 67-48.004(14), Florida Administrative Code, was changed to describe the noncurable threshold items from “**Name** of each Developer” to “**Identity** of each Developer.” Part II, § A.3.a of the Application Instructions is cited to demonstrate that Florida Housing is more

interested in the responsible individuals than the “name” of a general partner, as that section requires, for a limited partnership, a list of the limited partner(s), and the **officers, directors, members,** and shareholders of the general partners. Florida Housing argues that neither the Application Instructions nor its rules prohibit a change in the **name** of the developer, but only prohibit a change in the **identity** of the developer.

Respondent’s reliance on its Final Order in the case of Provincetown Village Partners, Ltd. v. Florida Housing Finance Corporation, FHFC Case No. 2003-047 (April 2, 2004) is misplaced. That case is factually distinguishable in that it did not involve a non-curable error of a threshold item, as in the present case.

Respondent argues that in this case, the developer and its general partner were among a large number of similarly named entities, and there was understandable confusion as to those entity names. It labels the error in the initial application as to the identity of the general partner of the limited partnership developer as a “technical misstatement” regarding the name of a business entity, a misstatement which was correctable. Respondent urges that the “natural persons” responsible for the operations of the general partner were identical at all material times. The Respondent’s reliance upon the case of Findlay Interests 35, Ltd. v. Florida Housing Finance

Corporation, FHFC Case No. 2005-019 UC (2005), is again misplaced. That case involved the misidentification of an applicant, not on the page requiring the name or identity of the applicant, but on that portion of the application pertaining to site control, a curable threshold matter.

While Respondent's assertion of prime concern with the natural persons involved in a business entity as opposed to the name of the business entity has some appeal, it is not consonant with the facts in this case, the law involving the various forms of business entities in Florida, or the rules which govern this proceeding. In the first place, events occurring subsequent to the application deadline did not constitute a mere "change in name" of the general partner of the developer. The initial application's identification of the general partner was erroneous. Indeed, the exhibits and stipulations of the parties in this case do not disclose that the entity identified on the application as "Atlantic Housing Partners Managers L.L.C." even existed on April 10, 2007, the application deadline. Since the named developer was a limited partnership and gains its identity only from its general partner(s), the identification of "Atlantic Housing Partners Managers, L.L.C." as its sole general partner constituted a misidentification of the developer. No number of name changes made after the application deadline can erase the fact that the identity of the developer in the initially-filed application was erroneous.

While an agency's interpretation of its rules is entitled to great deference, if that interpretation conflicts with the plain and ordinary intent of the law, such deference need not be afforded. Colbert v. Department of Health, 890 So.2d 1165 (Fla. 1st DCA 2004). As discussed above, the Respondent's interpretation that only the natural persons involved need be named conflicts with the law, the applicable rules requiring a listing of the identity of the developer and the applicable rules regarding threshold requirements which must be met as of the application deadline. As of the application deadline, the challenged applications misidentified the general partner of the project developer and therefore also misidentified the project developer. According to Respondent's rules, this constituted a fatal, incurable error requiring rejection of the applications. An agency cannot ignore its own rules. Department of Revenue v. Rice, 743 So.2d 169 (Fla. 1st DCA 1999).

As acknowledged by counsel for the Respondent in his Proposed Recommended Order, the available pool of SAIL funds each year is limited, qualified applicants must compete for funding, and Florida Housing has established by rule a competitive application process. Having established such a process, Florida Housing, along with all competing applicants, is

bound to adhere to its duly promulgated rules. Had it done so in these cases, Petitioners' applications would have been elevated into the funding range.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law set forth herein, it is RECOMMENDED that Petitioners be deemed eligible and awarded SAIL Program funding on the basis that the Atlantic Housing applications at issue should have been rejected because each failed to correctly identify the general partner of the developer, an incurable threshold violation.

Respectfully submitted this 28th day of July, 2008.



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NOTICE OF RIGHT TO SUBMIT WRITTEN ARGUMENT

In accordance with Rule 67-48.005(6), Florida Administrative Code, all parties have the right to submit written arguments in response to a Recommended Order for consideration by the Board. Any written argument should be typed, double-spaced with margins no less than one (1) inch, in either Times New Roman 14-point or Courier New 12-point font, and may not exceed five (5) pages, excluding the caption and certificate of service. Written arguments must be filed with Florida Housing Finance Corporation's Clerk at 227 North Bronough Street, Suite 5000, Tallahassee, Florida, 32301-1329, no later than 5:00 p.m. on August 4, 2008. Submission by facsimile will not be accepted. Failure to timely file a written argument shall constitute a waiver of the right to have a written argument considered by the Board. Parties will not be permitted to make oral presentations to the Board in response to Recommended Orders.