BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

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

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

CASE NO.: 2007-049UC (DOAH)

Application No. 2007-33BS

FIRST AMENDED PETITION 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.

Petitioner, EMERSON OAKS APARTMENTS, LTD. as applicant for EMERSON OAKS APARTMENTS – Application No. 2007-33BS ("Petitioner"), pursuant to §§ 120.57(1) – (2), Florida Statutes and Florida Administrative Code §§ 28-106.201, et seq. and §§ 28-106.301, *et seq.* hereby challenges the final scoring given to ROLLING ACRES CLUB, L.L.L.P. as applicant for ROLLING ACRES PHASE I – Application No. 2007-127S, ROLLING ACRES CLUB II, L.L.L.P. as applicant for ROLLING ACRES PHASE II – Application No. 2007-129S, OVIEDO TOWN CENTRE III PARTNERS, L.L.L.P. as applicant for OVIEDO TOWN CENTRE PHASE III – Application No. 2007-132BS,

COVINGTON CLUB, L.L.L.P. as applicant for COVINGTON CLUB – Application No. 2007-136BS, SOUTHWINDS PARTNERS, L.L.L.P. as applicant for SOUTHWINDS COVE – Application No. 2007-140S, SPRING LAKE COVE, L.L.L.P. as applicant for SPRING LAKE COVE PHASE I – Application No. 2007-141S, CAPE MORRIS COVE PARTNERS, L.L.L.P. as applicant for CAPE MORRIS COVE PHASE I – Application No. 2007-142S, HAMMOCK HARBOR I, L.L.L.P. as applicant for HAMMOCK HARBOR PHASE I – Application No. 2007-179BS, PONDELLA COVE, L.L.L.P. as applicant for PONDELLA COVE – Application No. 2007-181BS and MALABAR COVE, L.L.L.P. as applicant for MALABAR COVE PHASE I – Application No. 2007-197BS (the "Challenged Applications") by the Respondent, FLORIDA HOUSING FINANCE CORPORATION. The grounds for this Petition are as follows:

INTRODUCTION

Parties

1. The agency affected is the Florida Housing Finance Corporation (hereafter the "Corporation"), 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329.

2. Petitioner, EMERSON OAKS APARTMENTS, LTD. is located at 580 Village Blvd., Suite 360, West Palm Beach, Florida 33409. For purposes of

this proceeding, Petitioner's address is that of its undersigned attorneys, Robert W. Turken, BILZIN SUMBERG BAENA PRICE & AXELROD, LLP, 200 South Biscayne Boulevard, Suite 2500, Miami, Florida 33131-5340, Telephone: (305) 374-7580, Facsimile: (305) 374-7593, e-mail: rturken@bilzin.com.

3. The other parties interested in this proceeding are the developers of the Challenged Applications ROLLING ACRES CLUB, L.L.L.P., ROLLING ACRES CLUB II, L.L.L.P., OVIEDO TOWN CENTRE III PARTNERS, L.L.L.P., COVINGTON CLUB, L.L.L.P., SOUTHWINDS PARTNERS, L.L.L.P., SPRING LAKE COVE, L.L.L.P., CAPE MORRIS COVE PARTNERS, L.L.L.P., HAMMOCK HARBOR I, L.L.L.P., PONDELLA COVE, L.L.L.P. and MALABAR COVE, L.L.L.P. all of whom are located at 329 N. Park Avenue, Suite 300, Winter Park, Florida 32789.

Procedural History and Notice of Agency Decision

4. On April 10, 2007, Petitioner submitted Application No. 2007-33BS for funding under the State of Florida's State Apartment Incentive Loan Program (the "SAIL Program") for medium-sized counties.

5. On April 10, 2007, ROLLING ACRES CLUB, L.L.L.P., ROLLING ACRES CLUB II, L.L.L.P., OVIEDO TOWN CENTRE III PARTNERS, L.L.L.P., COVINGTON CLUB, L.L.L.P., SOUTHWINDS PARTNERS, L.L.L.P., SPRING

LAKE COVE, L.L.L.P., CAPE MORRIS COVE PARTNERS, L.L.L.P., HAMMOCK HARBOR I, L.L.L.P., PONDELLA COVE, L.L.L.P. and MALABAR COVE, L.L.L.P. (the "Applicants") submitted the Challenged Applications also for funding under the State of Florida's SAIL Program for medium-sized counties.

6. On or about May 17, 2007, Petitioner and other applicants submitted Notices of Potential Scoring Errors (the "NOPSES") in respect of the Challenged Applications. The NOPSES identified certain threshold deficiencies contained in the Challenged Applications, including the threshold deficiencies set forth in the First and Third Basis for Relief, *infra.*

7. On May 23, 2007, Randal Alligood of the firm of Broad & Cassel, counsel for the Applicants, wrote a letter to Stephen P. Auger, the Executive Director of the Corporation (the "May 23 Letter"). A copy of the May 23 Letter is attached hereto as Exhibit "A." The May 23 Letter responded to certain issues raised in the NOPSES, including those set forth in the First Basis for Relief, *infra.* The May 23 Letter was copied to General Counsel for the Corporation, Wellington Meffert.

8. On May 25, 2007, Matthew Sirmans, counsel for the Corporation, wrote a letter to Mr. Alligood responding to the May 23 Letter (the "May 25

Response"). A copy of the May 25 Response is attached hereto as Exhibit "B." In the May 25 Response, Mr. Sirmans, among other things, stated that:

> Florida Housing staff cannot accept your letter and attachments as 'cures.' As you are aware, under 67-48.004(4), F.A.C., applicants may submit Notice of Possible Scoring Errors (NOPSE) relative to another applicant's application. Per 67-48.004(5), F.A.C., Florida Housing is currently evaluating the NOPSEs received and will shortly transmit the NOPSE score to each applicant.
>
> Once transmitted, each applicant shall be allowed to cure its application within the time period prescribed by 67-48.004(6), F.A.C. Your May 23rd letter is outside of the 2007 Universal Cycle application process and the aforementioned time period. In order for the Florida Housing staff to consider the information you've provided in scoring any specific application, it must be submitted in accordance with the rules and the instructions that govern the 2007 Universal Cycle.
>
> Accordingly, we cannot take any action based upon your letter.

9. On June 5, 2007, the Corporation issued its scoring summaries for the Challenged Applications. In each of these scoring summaries, the Corporation identified as a threshold violation the Applicants' "failure to provide a complete list of the General and Limited Partners, Officers, Directors and Shareholders for the Developer."

10. On June 18, 2007, the Applicants submitted their formal "cures" to the Corporation's June 5, 2007 scoring summaries. Thereafter, Petitioner and other applicants submitted their Notices of Alleged Deficiencies (the "NOADS") in respect of the Challenged Applications. Petitioner's NOADS again identified the threshold deficiencies set forth in the First Basis for Relief, *infra*.

11. On July 3, 2007, Mr. Alligood wrote a second letter to Mr. Auger (the "July 3 Submission"), and attached a detailed statement together with exhibits and purported legal authority in response to Petitioner's NOADS. A copy of the July 3 Submission, which was also copied to Mr. Meffert, is attached hereto as Exhibit "C."

12. The July 3 Submission was sent to Mr. Auger as an attachment to an e-mail of the same date:

> Steve- Attached is a cover letter and a Statement regarding the issues raised by the NOADs relating to the general partner of the developer in certain of the Atlantic Housing applications. I apologize for once again sending something to you in writing that is not customary in the application process, but we were concerned that the NOADs raised new issues and the Rule does not give us a chance to respond. I have attached the Statement without exhibits, which exhibits will be hand delivered to you this afternoon from our Tallahassee office. Thanks for your indulgence and consideration.

A copy of the July 3 E-mail is attached hereto as Exhibit "D." The e-mail thus acknowledged that the Corporation's procedures did not provide for a response to a NOAD. The cover letter accompanying the July 3 Submission went further, recognizing that the July 3 Submission was being provided to the Corporation in response to the NOADs because "there [was] no further 'cure' period in which to respond to the NOADs prior to the issuance of final scores." *See* Exhibit C.

13. To be clear: Applicants sent the July 3 Submission despite the fact that (a) they had been previously advised that the Corporation would not consider any submissions outside the "Universal Cycle application process"; and (b) they expressly acknowledged that the Universal Cycle application process did not allow a party to file a response to a NOAD. Petitioner had no knowledge of the July 3 Submission because it was not copied or disclosed to Petitioner or the other participants in the SAIL Program.

14. The Corporation did not disqualify the Challenged Applications despite their clear violations of the Threshold Requirements of the 2007 Universal Application Instructions (the "Threshold Requirements") and of the applicable administrative rules. Indeed, the Corporation adopted the flawed reasoning outlined in the July 3 Submission as the basis for rejecting the NOADS.

15. On July 13, 2007, the Corporation promulgated its final scores. As a consequence of the improper failure of the Corporation to disqualify the Challenged Applications, Petitioner's applications were excluded from funding under the SAIL Program.

16. On August 27, 2007, Petitioner filed its (original) Petition 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 "Petition"). The Petition raised the grounds identified in the First and Third Basis for Relief, *infra*, as bases for disqualification of the Challenged Applications.

17. On October 17, 2008, this matter was referred to the Division of Administrative Hearings before Administrative Law Judge Stuart M. Lerner. On November 29, 2007, Judge Lerner held a telephonic hearing on Petitioner's Motion for Partial Summary Final Order on First Basis for Relief (which raised the same grounds identified in the First Basis for Relief herein) and on Corporation's Motion to Relinquish Jurisdiction as to the First Basis for Relief (the "November 29, 2007 Hearing"). During the November 29, 2007 Hearing, counsel for the Corporation made the arguments articulated in the July 3 Submission.

18. On December 3, 2007, Judge Lerner entered an Order which concluded that the Challenged Applications should have been disqualified and that

Petitioner should have been granted the relief sought in the First Basis for Relief, *infra*. The Court relinquished jurisdiction to the Corporation "so that it [might] conduct proceedings pursuant to Section 120.57(2), Florida Statutes, culminating in the issuance of a final order consistent with the observations made by the undersigned in this order." A copy of Judge Lerner's Order Relinquishing Jurisdiction is attached hereto as Exhibit "E."

19. Judge Lerner explained the reasoning in his Order Relinquishing Jurisdiction as follows:

> By identifying in the Subject Challenged Applications Atlantic Housing Partners Managers, L.L.C., instead of Atlantic Housing Partners Group, L.L.C., as the general partner of their developer, Atlantic Housing Partners, L.L.L.P, a limited partnership, the Competing Applicants effectively misidentified their developer and thereby committed a "threshold" error requiring the rejection of the Subject Challenged Applications pursuant to Subsection (14) of Florida Administrative Code Rule 67-48.004.
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> * * *
>
> Having adopted a rule mandating rejection of any application that, as of the application deadline, does not include the correct identity of the project developer, the Corporation is not free to ignore this mandate.
>
> * * *

> It is indisputable that, as of the application deadline, each of the Subject Challenged Applications misidentified the general partner of the project developer and therefore also misidentified the project developer. Pursuant to Subsection (14) of Florida Administrative Code Rule 67-48.004, this was fatal, incurable error. The name changes that occurred after the application deadline could not and did not cure this error.

20. Because Judge Lerner ruled that Petitioner should have been granted the relief sought in its First Basis for Relief and because that relief would have accorded Petitioner a complete remedy in this matter, Judge Lerner did not deem it necessary to adjudicate any of the legal or factual issues raised in the Second Basis for Relief. *See* Exhibit E (noting that any further proceedings by the Corporation should result "in the issuance of a final order consistent with the observations made by the undersigned in this order").

21. However, the Corporation determined not to follow Judge Lerner's Order Relinquishing Jurisdiction. Instead, the Corporation took the position that it could revisit Judge Lerner's decision, de novo, through a Section 120.57(2) proceeding before a Florida Housing Finance Corporation Hearing Officer.

22. On January 23, 2008, Petitioner served a public records request upon the Corporation concerning the Corporation's consideration of the Challenged Applications. In response to this request, Petitioner received, *inter alia*, the May

23 Letter, the May 25 Response and the July 3 Submission and learned, for the first time, about the Applicants' *ex parte* communications with the Corporation.

23. In view of the Corporation's expressed refusal to follow the Order Relinquishing Jurisdiction, and in light of the discovery of the Applicants' ex parte communications with the Corporation, Petitioner believes it is necessary to return this matter to the Division of Administrative Hearings for adjudication – both to permit the reissuance of Judge Lerner's Order as a formal Order pursuant to Section 120.57(1), and to allow Petitioner a full and fair adjudication of the factual issues raised in the Second and Third Basis for Relief.

Summary of Grounds for Petition

24. The Corporation should have rejected the Challenged Applications without an opportunity to cure and should disqualify the Challenged Applications and exclude them from the final scoring for at least three reasons. First, the Applicants failed to comply with Part II, Section A, Subsection 3 of the Specific Instructions of the 2007 Universal Application Instructions by failing to provide a complete and correct list of the "General and Limited Partner(s), Officers, Directors and Shareholders for the Applicant and for each Developer." The Applicants misidentified the general partner of their developer and then engaged in a series of transactions designed to hide their error from the Corporation and the

other participants in the SAIL Program. This misidentification is a violation of the Threshold Requirements, which, pursuant to Fla. Admin. Code R. 67-48.004(14)(b), may not be cured.

25. Second, the Applicants violated the Florida Administrative Code by their submission of the May 23 Letter and July 3 Submission to Mr. Auger, and the Corporation violated the Florida Administrative Code by considering these writings in determining the final scoring.

26. Third, the Corporation should have rejected the Challenged Applications because the proposed development subjects of the Challenged Applications failed to demonstrate Project Feasibility and Economic Viability as mandated by Florida Statutes §§ 420.5087(c)(9) and (10), Part I, Exhibit I and Part V.B. of the 2007 Universal Application Instructions, and paragraph 14 of the Threshold Requirements.

27. Using even the most favorable assumptions and financial terms available, the Applicants' projects could not possibly support the debt service for the financing necessary to fund the projects' total development costs. Thus, on an annual basis, the projects as presented in the Challenged Applications would have a significant operational shortfall. Moreover, if the financing set forth in the Challenged Applications were reduced to accommodate the maximum revenue

potential of the projects, there would be a significant funding shortfall for the development of the projects. Thus, the Applicants' certification pursuant to Part I of the Specific Instructions and Exhibit I to the Challenged Applications that "the proposed Development can be completed and operating within the development schedule and budget submitted to the Corporation" is demonstrably false.

Explanation of Substantial Interests Affected

28. As a result of the Corporation's improper failure to reject the Challenged Applications for violation of the Threshold Requirements discussed above, the project that is the subject of Petitioner's application has been excluded from funding under the SAIL Program. If the Corporation's error is corrected and the Challenged Applications are rejected based on their violations of the Threshold Requirements, Petitioner's project will be elevated within the funding range.

STATEMENT OF ULTIMATE FACTS WARRANTING MODIFICATION OF AGENCY ACTION

FIRST BASIS FOR RELIEF:

The Challenged Applications are deficient pursuant to Fla. Admin. Code R. 48.004(14)(b) because they fail to identify the developer.

29. Part II, Section A, Subsection 3 of the 2007 Universal Application Instructions requires an applicant to provide a complete list of "General and Limited Partners, Officers, Directors, and Shareholders for the Applicant and for

each Developer" to be set forth on Exhibit 9 to the Challenged Applications. On Exhibit 9 to the Challenged Applications (a copy of which is attached hereto as Exhibit "F"), each of the Applicants identified **Atlantic Housing Partners Managers, L.L.C.** as the General Partner of the Developer. This identification was incorrect. In fact, at the time the Challenged Applications were filed, the General Partner of the Developer was another limited liability company registered under the name of **Atlantic Housing Partners Group, L.L.C.** The Applicants' failure to correctly identify the General Partner of the Developer is a threshold error.

30. The original General Partner of the Developer was a Florida limited liability company by the name of **Atlantic Housing Group Managers, L.L.C.** After the application date, **Atlantic Housing Group Managers, L.L.C.** changed its name to **Atlantic Housing Partners Managers, L.L.C.** which was the entity that the Applicants identified on Exhibit 9 to the Challenged Applications as the General Partner of the Developer. However, on May 16, 2006, almost a year before the Applicants filed the Challenged Applications, the Developer filed an Amended Certificate of Limited Partnership, stating that **Atlantic Housing Group Managers, L.L.C.** had withdrawn as General Partner of the Developer, and that the new General Partner was another Florida limited liability company by the name

of **Atlantic Housing Partners Group, L.L.C.** A copy of the Developer's May 16, 2006 Amended Certificate of Limited Partnership reflecting the withdrawal of the old General Partner and the admission of the new General Partner is attached hereto as Exhibit "G."

31. Thus, by identifying **Atlantic Housing Partners Managers, L.L.C.** as the General Partner of the Developer on Exhibit 9, the Applicants not only failed to properly name the General Partner of the Developer, the Applicants identified the wrong entity. As of the date of the Challenged Applications, **Atlantic Housing Partners Managers, L.L.C.** was not the General Partner of the Developer; **Atlantic Housing Partners Group, L.L.C.** was the General Partner of the Developer. Pursuant to Rule 67-48.004(14)(b), the Applicants' misidentification of the General Partner of the Developer requires rejection of the Challenged Applications. This misidentification is not curable because the identity of a Developer could only be changed upon written request granted by the Corporation *after* the Applicants were invited to enter credit underwriting – circumstances that do not exist here.

32. Significantly, the record reflects that the Applicants, themselves, recognized that their misidentification of the General Partner of the Developer was not curable. Indeed, instead of admitting this error, the Applicants embarked on an

elaborate shell-game to mask their misidentification of the Developer's General Partner and give the impression that they properly identified the Developer's General Partner.

33. On May 21, 2007, **Atlantic Housing Partners Managers, L.L.C.** filed its Articles of Amendment to its Amended and Restated Articles of Organization. By this Amendment, **Atlantic Housing Partners Managers, L.L.C.,** which again was the entity misidentified by the Applicants as the General Partner of the Developer, changed its name to **Atlantic Housing Partners Mauagers II, L.L.C.** Also on May 21, 2007, **Atlantic Housing Partners Group, L.L.C.**, which was the actual General Partner of the Developer but was not identified as such by the Applicants on Exhibit 9, filed its Amended and Restated Articles of Organization. By these Amended Articles, **Atlantic Housing Partners Group, L.L.C.** changed its name to **Atlantic Housing Partners Managers, L.L.C.** This, of course, was the same name that the Applicants had listed on Exhibit 9 as the Developer's General Partner, but until May 21, 2007 was the name of an entirely different entity.

34. In short, on the same day – May 21, 2007 – the Applicants orchestrated a double name change by two different limited liability companies just so **Atlantic Housing Partners Group, L.L.C.**, which was the actual General

Partner of the Developer but was not even mentioned on Exhibit 9 by the Applicants, could then adopt the name that the Applicants had listed as the General Partner of the Developer. *See* May 21, 2007 Articles of Amendment to Amended and Restated Articles of Organization by which **Atlantic Housing Partners Managers, L.L.C.** changed its name to **Atlantic Housing Partners Managers II, L.L.C.** attached hereto as Exhibit "H"; *see also* May 21, 2007 Amended and Restated Articles of Organization by which **Atlantic Housing Partners Group, L.L.C.** changed its name to **Atlantic Housing Partners Managers, L.L.C.** attached hereto as Exhibit "I."

35. The Applicants' shell game should be seen for what it is – the Applicants' desperate attempt to cover up an incurable failure to properly identify the General Partner of the Developer. Moreover, the Applicants' actions show that they made knowing and material misrepresentations of information in the Challenged Applications. Under these circumstances, the Challenged Applications should have been rejected, and the Applicants' projects should be found to be ineligible for funding pursuant to Rule 67-48.004(12)(b) of the Florida Administrative Code.

36. The Challenged Applications also should have been rejected because they each failed to provide the required "Developer or Principal of Developer

Certification" on Exhibit 11 as required by Part II, Section B, Subsection Ib of the 2007 Universal Application Instructions. On Exhibit I1, each of the Applicants included a certification that was to be signed by W. Scott Culp purportedly on behalf of **Atlantic Housing Partners Managers, L.L.C.**, the entity listed on the Challenged Applications as the General partner of the Developer. Because Atlantic Housing Partners Managers, L.L.C. was not the General Partner of the Developer at the time the certification was signed and the Challenged Applications were filed, the purported certification is invalid. This is a separate violation of the Threshold Requirements and a separate misrepresentation, which required that the Challenged Applications be rejected.

37. For these reasons, the Corporation should:

(1) Reject the Challenged Applications;

(2) Re-Order the final rankings without the Challenged Applications, thus placing Petitioner's application within the funding range;

(3) Award Petitioner its requested funding; and

(4) Award such other relief as is deemed just and proper.

SECOND BASIS FOR RELIEF:

The Applicants' representatives engaged in impermissible, *ex parte* contact with the Corporation's Board, which the Board considered.

38. The Applicants' counsel first wrote to Mr. Auger (the Executive Director of the Corporation) on May 23, 2007. The May 23 Letter specifically addressed the arguments raised in the NOPSES directed at the Challenged Applications.

39. In the May 23 Letter, the Applicant's counsel recognized that there was a question as to the permissibility of his contact with the Corporation, and thus sought to excuse the contact by an incomplete reference to the applicable rule and facts:

> It is our understanding that that [the Florida Administrative Code] does not prohibit us from contacting the Florida Housing Finance Corporation ("Florida Housing") staff in writing during the 2007 Universal Cycle Application process. The rule states that at no time "from the Application Deadline until the issuance of the final scores as set forth in subsection (9) above, may Applicants or their representatives ***verbally*** contact Corporation staff concerning their own Application or any other Applicant's Application[.]"

See Exhibit A (emphasis in original).

40. In his May 25 Response to the May 23 Letter, the Corporation's counsel wrote that it was generally not prohibited for an applicant to communicate

with the Corporation in writing during the application process. However, the Corporation's counsel advised the Applicant's counsel that the subject matter and content of the May 23 in fact were improper. Specifically, the May 25 Response stated that: (a) the Applicants' May 23 Letter was outside the 2007 Universal Cycle application process; (b) the Corporation could not consider information unless submitted "in accordance with the rules and the instructions that govern the 2007 Universal Cycle"; and (c) the Corporation could not take any action based on the May 23 Letter.

41. The May 23 Letter was not provided to any of the other applicants in the SAIL Program, including those participants that had publicly filed NOPSES in respect of the Challenged Applications. Applicants' counsel, in fact, emphasized that "it would be more efficient to handle resolution" of the NOPSES through his private letter. *See* Exhibit A. As such, Applicants affirmatively sought to thwart Petitioner's ability to respond to the arguments raised in the May 23 Letter.

42. On July 3, 2007, the Applicants' counsel wrote his second – *ex parte* – letter to Mr. Auger. This July 3 Submission purported to respond to the NOADS filed by Petitioner (and others) in respect of the Challenged Applications and thus, again, was an improper communication with the Corporation.

43. Fla. Admin. Code R. 67-48.004 establishes the procedures for objecting to applications for SAIL Program funding and for responding to such objections. Rule 67-48.004 does not permit a response to a NOAD, a point that Applicants' counsel *expressly acknowledged* in the July 3 Submission:

> Regardless of whether [the] NOADs were appropriately filed, the NOADs misstate both law and facts with respect to the identity of the developer.
>
> Because there is no further "cure" period in which to respond to the NOADs prior to issuance of final scores, we request that you consider the attached Statement in Response to Filed NOADs prior to issuing the final scores.

See Exhibit B. Applicants' counsel made a similar concession in his July 3 E-mail to Mr. Auger, noting "we were concerned that the NOADs raised new issues and the Rule does not give us a chance to respond. I have attached the Statement without exhibits, which exhibits will be hand delivered to you this afternoon from our Tallahassee office. Thanks for your indulgence and consideration."

44. The May 23 Letter and the July 3 Submission constitute violations of, *inter alia*, Fla. Admin. Code R. 67-48.004(12) and Fla. Admin. Code R. 67-48.004(18). Moreover, they both represent improper submissions expressly violative of the procedures established in Rule 67-48.004 – as Applicants' counsel acknowledged. Worse, the July 3 Submission was made after the Corporation had

specifically admonished Applicants' counsel that only those submissions authorized by the Rules could be considered. These violations in and of themselves should have disqualified the Challenged Applications.

45. In addition, the Challenged Applications should have been disqualified because the Corporation improperly relied on the July 3 Submission to reject the NOADS and include the Challenged Applications in the final scoring. The matters that may be considered by the Corporation prior to issuance of its final scoring for the SAIL Program are described in Florida Administrative Code Rules 67-48.004(5), (6) and (7). As previously noted, none of these sections permits a response to a NOAD – which was precisely the stated purpose of the July 3 Submission.

46. The Corporation's reliance on the arguments in the July 3 Submission extended, in fact, to its defense of this action. As discussed above, the arguments raised by counsel for the Corporation during the November 29, 2007 hearing with Judge Lerner were an almost verbatim recitation of the July 3 Submission.

47. As a last point in respect of this issue, Applicant's counsel was not communicating with the Corporation with respect to the general NOAD process or the evaluation and review of applications, generally. Quite the opposite – the communications of Applicants' counsel specifically discussed only matters

pertaining to the Challenged Applications and were intended to unfairly persuade the Corporation with respect to matters pertaining only to the Challenged Applications.

48. In sum, the Applicants knowingly presented substantive submissions to the Corporation in regard to their pending Applications in direct violation of the Rules and the Corporation's prior admonishment, and the Corporation relied on the July 3 Submission to reject the NOADS and include the Challenged Applications in the Final Scoring.

For these reasons, the Corporation should:

(1) Reject the Challenged Applications;

(2) Re-Order the final rankings without the Challenged Applications, thus placing Petitioner's applications within the funding range;

(3) Award Petitioner its requested funding; and

(4) Award such other relief as is deemed just and proper.

THIRD BASIS FOR RELIEF:

The Challenged Applications are deficient pursuant to § 420.5087(c)(9) and (10), Fla. Stat., because the record shows that the projects depicted in the Challenged Applications are not feasible or economically viable.

49. Independent of the threshold deficiencies discussed in the First and Second Basis of Relief, the Challenged Applications also should have been rejected because the record shows that the projects fail to demonstrate project feasibility and economic viability as mandated by Florida Statutes Sections 420.5087(c)(9) and (10), Part I, Exhibit I and Part V.B. of the 2007 Universal Application Instructions, and paragraph 14 of the Threshold Requirements.

50. Pursuant to Part I of the Specific Instructions and Exhibit I to the Challenged Applications, the Applicants were required to certify "that the proposed Development can be completed and operating within the development schedule and budget submitted to the Corporation." The Applicants were further required to certify under penalties of perjury that "the information [contained in this application] is true, correct and complete."

51. These requirements emanate from the express provisions of Florida Statutes Sections 420.5087(c)(9) and (10), which state:

> The Corporation shall provide by rule for the establishment of a review committee composed of the department and corporation staff and shall establish by

rule a scoring system for evaluation and competitive ranking of applications submitted in this program, including, but not limited to, the following criteria:

***

9. Project feasibility.
10. Economic viability of the project.

52. The Applicants' pro-formas describe projects that fail both the tests of project feasibility and economic viability from an operational and funding perspective.

53. Based on the most favorable assumptions possible (including the most favorable bond rate interest and other financial terms available, minimum non-debt operating costs, and maximum feasible occupancy at maximum feasible rents), the projects could not possibly support the debt service required under the Applicants' pro formas and an annual operational shortfall for the projects would result.

54. If the debt financing set forth in the Challenged Applications were reduced to accommodate the maximum revenue potential of the projects, a significant shortfall in the funding for the projects would be created (up to $4,718,000 in one project alone). Moreover, the reduction in the financing would also trigger additional reductions in other funding sources identified on the Applicants' pro formas, such as deferred development fee and tax credit equity

proceeds. These additional reductions in the funding sources would increase the shortfall in the available funding of the projects to a range with an upper limit of approximately $7,070,000.

55. Significantly, this funding shortfall assumes the development fee will be **fully deferred**, whereas the Applicants' pro-formas are based on the assumption that the development fee will only be partially deferred.

56. The inability of the Applicants' projects to meet the Threshold Requirements of project feasibility and economic viability is not surprising. The Applicants' total development costs far exceed any reasonable estimate and are as much as $100,000 per unit greater in certain developments than the next highest development costs for any SAIL application submitted for the counties in which the development subjects of the Challenged Applications are located.

57. The total development costs presented in the Challenged Applications, in fact, are so disproportionate that it cannot reasonably be anticipated that the Applicants actually intend to develop the projects at the development costs submitted in the Challenged Applications. For this reason alone, the Applicants' certification made under penalties of perjury that "the information [contained in this application] is true, correct and complete" invalidates the Challenged Applications on their faces.

58. Additionally, the Applicants' purported certifications that "the development can be completed and operating within the development schedule and budget submitted to the Corporation" must be discounted in their entirety. The Applicants have misrepresented the amount of their expected total development costs and the petitioner believes that this was intentional – *i.e.*, that they knowingly and unreasonably inflated their submitted total development costs because it would be to their competitive advantage in the scoring system. Under the rules, a tie breaker is established whereby the application with a lower ratio of SAIL funding to total development costs (the SAIL funding amount divided by total development costs) will be awarded funding between otherwise competitive applications.

59. The Challenged Applications should be rejected and the Applicants should be found to be ineligible for funding pursuant to Rule 67-48.004(12)(b) of the Florida Administrative Code.

For these reasons, the Corporation should:

(1) Reject the Challenged Applications;

(2) Re-Order the final rankings without the Challenged Applications, thus placing Petitioner's projects within the funding range;

(3) Award Petitioner its requested funding; and

(4) Award such other relief as is deemed just and proper.

Dated this 5th day of May, 2008.

Respectfully submitted,

EMERSON OAKS APARTMENTS, LTD.
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- by -

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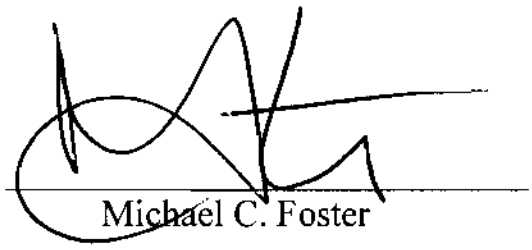
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was served via Federal Express this 15 day of May, 2008 upon: Wellington H. Meffert, II, Esq., General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329.



Michael C. Foster