

STATE OF FLORIDA

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FLORIDA HOUSING FINANCE CORPORATION

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FOUNTAIN TERRACE APARTMENTS
LIMITED PARTNERSHIP

Petitioner,

v.

Florida Housing Case No.: 2008-102UC
Application No.: 2008-018CS

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**RESPONDENT'S ARGUMENT IN OPPOSITION TO
RECOMMENDED ORDER**

Respondent, Florida Housing Finance Corporation ("Florida Housing") files its written argument in opposition to the Recommended Order filed in this matter and states:

1. Pursuant to notice, on February 16, 2009, an informal administrative hearing was held in this case in Tallahassee, Florida, before Florida Housing's appointed Hearing Officer, Diane Tremor.

2. A Recommended Order was filed on March 20, 2009, which concluded that Florida Housing had erred in scoring the Winter Haven application No. 2008-109S. Specifically, the Recommended Order

concluded that the Winter Haven development did not provide evidence of firm funding commitment as Florida Housing had determined in its Final Order, FHFC Case No.: 2008-057UC, and that Fountain Terrace should be awarded funding from the next available allocation. Florida Housing does not disagree with the findings of fact as set forth in the Recommended Order; it does, however, disagree with paragraphs 5, 6, and 7¹ of the Conclusions of Law and the Recommendation.

3. Under section 120.57(1), Fla. Stat., Florida Housing may reject or modify the conclusions of law over which it has **substantive jurisdiction** and interpretation of administrative rules over which it has **substantive jurisdiction**. Florida Housing is vested by the laws of Florida with the authority to interpret and apply such rules as are applicable to programs within Florida Housing's regulatory sphere. The Board of Directors of Florida Housing is not bound by any conclusions of law set forth in the Recommended Order and may substitute its reasonable interpretation of the laws, regulations and policies within Florida Housing's realm of expertise for those found in the Recommended Order. See Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001), Humana, Inc. v. DHRS, 492 So.2d 388, 392 (Fla. 4th DCA 1986); Bayonet Point Regional Medical

¹ The Recommended Order did not number its paragraphs in its Conclusions of Law. For the purposes of this Exception, the paragraphs were numbered starting with the first paragraph under the Conclusions of Law, p. 7, of the Recommended Order.

Center v. DHRS, 516 So.2d 995 (Fla. 1st DCA 1987). To the extent that the conclusions of law in the Recommended Order are incorrect interpretations of law, regulations, and policies within the exclusive purview of Florida Housing, they must be rejected and the Board of Directors of Florida Housing must adopt conclusions of law that accurately reflect the proper interpretation of the applicable law and rules.

4. In Conclusions of Law paragraph 5, The Hearing Officer concludes that the letter from the Housing Authority of Polk County, Florida (“Polk HFA”), “[S]imply does not constitute a firm binding commitment to provide funding as of the date appearing on the letter....It must be concluded that if Polk County Housing Finance Authority had intended to convey that the allocation was reserved or that it had firmly agreed to award the bond funding...it would have used those words...” Such is not the case.

5. Florida Housing determined that the letter from the Polk HFA was evidence of a firm funding commitment under the 2008 Universal Instructions at Part V. Section D.1.d., as these Instructions had been amended in 2007. They no longer required that the applicant could only demonstrate a firm commitment by showing that the allocation had been reserved; after 2007 they provided that applicant need only to demonstrate that the funding will be allocated when available. It is as or more reasonable

to conclude that the letter met this relaxed burden, when the letter is read in its entirety as Florida Housing did when it interpreted its rules.

6. In Conclusions of Law paragraph 6, the Hearing Officer concludes that the 2008 Instructions do not sufficiently relax the affirmation requirement so that the letter as demonstrates a firm commitment. The Hearing Officer does not determine that Florida Housing's interpretation is unreasonable or clearly erroneous. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation. Legal Environmental Assistance Foundation, Inc., v. Board of County Commissioners of Brevard County, 642 So.2d 1081 (Fla. 1994); Miles v. Florida A & M University, 813 So.2d 242 (Fla. 1st DCA 2002). Even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation. Golfcrest Nursing Home v. Agency for Health care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995). Florida Housing amended its Instructions in 2007 specifically to relax the standard required to demonstrate a firm commitment and it is more reasonable to interpret its rules to accept the letter as evidence of a firm commitment. Under Florida

Housing's relaxed interpretation, the letter met the requirement that the proceeds of the bond allocation will be made to the borrower.²

7. In Conclusions of Law Paragraph 7 the Hearing Officer states that the letter "can also be read as a simple explanation of the project's proposed financing structure," and that the letter provided less than evidence of a firm commitment. The Hearing Officer supplants Florida Housing's interpretation of its own rules without finding that Florida Housing's interpretation was not reasonable or was clearly erroneous. The courts must defer to the expertise of an agency in interpreting its rules. State Contracting and Engineering Corp. v. Dept. of Transportation, 709 So.2d 607 (Fla. 1DCA 1998); Level 3 Commun. LLC v. Jacobs, 841 So.2d 447 (Fla. 2003). This principle is clearly illustrated by the Florida Supreme Court: "We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration is entitled to great weight and should not be overturned unless clearly erroneous." Pan American World Airways Inc., v. Florida Public Service Commission, 427 So.2d 716 (Fla. 1983). The Hearing Officer as a matter of law should have deferred in her conclusions to Florida Housing's interpretation and justifications for allowing the letter from the Polk HFA to be considered as

² The Polk HFA letter states in part, "The proceeds of which will be loaned to the Owner to finance the Project."

evidence of a firm commitment as Florida Housing's interpretation of its Instructions is as or more reasonable as the Hearing Officer's interpretation of the 2008 Instructions and is not clearly erroneous.

8. The Hearing Officer cites to Nautilus Development Partners v. Florida Housing (Case No. 2006-023UC, Final Order July 31, 2006) as precedent in this matter. Nautilus does not govern here as it did was decided under the prior, more restrictive rule, and before Florida Housing amended its Instructions in 2007 specifically to relax the standard of the rule at issue in Nautilus.

9. The Recommended Order would have the Board reverse its decision in Gardens of Winter Haven v. Florida Housing, (Case No.: 2008-057UC, Final Order September 26, 2008) regarding the same circumstances as the present case where neither the underlying facts, applicable law nor policies has not changed since that Final Order was entered on September 26, 2008.

WHEREFORE, Florida Housing requests that the Board of Directors reject Conclusions of Law numbered 5, 6 and 7, and the Recommendation enter a Final Order in this matter adopting all findings of fact, the remaining

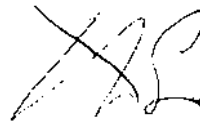
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conclusions of law, and affirm its decision in Gardens of Winter Haven v.

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Florida Housing, (Case No.: 2008-057UC, Final Order September 26, 2008).

FLORIDA HOUSING
FINANCE CORPORATION

DATED this 25 day of March, 2009, in Tallahassee, Florida.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Warren Husband, Metz, Husband & Daughton, P.A., P.O. Box 10909, Tallahassee, FL 32302-2909, and by Hand Delivery to Diane Tremor, Hearing Officer, Rose, Sundstrom & Bentley, 2548 Blairstone Pines Drive. Tallahassee, FL 32301 this 25 day of March, 2009.



Matthew A. Sirmans
Florida Housing Finance Corporation

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della Farrell DATE: 3/25/09