

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

APD HOUSING PARTNERS 20, LP,
a Florida limited partnership

Petitioner,

v.

FHFC CASE NO.: 2009-067UC
Application No. : 2009-214C

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**FLORIDA HOUSING FINANCE CORPORATION'S
ARGUMENT IN OPPOSITION TO RECOMMENDED ORDER**

The conclusions in paragraphs 7, 8, 9 and 10, on page 10 of the Recommended Order are without basis under Florida Housing's rules, and are contrary to case precedent and basic contract law.

Relevant to the issue in this case are the instructions governing a "Qualified Contract" found at Part III.C.2.a. of the Application Instructions. One of the requirements for a Qualified Contract is that

"...the buyer MUST be the Applicant unless a fully executed assignment of the Qualified Contract which assigns all of the buyer's rights, title and interest in the Qualified Contract to the Applicant, is provided." (Emphasis added)

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Della M. Harrell / DATE: 2/10/2010

Acceptance of an assignment by an assignee is an essential element to a valid assignment.¹ Implicit in the Application Instructions requirement of a “*fully executed* assignment of the Qualified Contract” is that the assignment be signed by the Applicant in order to demonstrate that essential element, i.e., that the assignment was accepted by the Applicant.²

Here, the only document purporting to demonstrate site control in the name of the Petitioner, APD 20, is the Assignment and Assumption Agreement. (Exhibit J-6) It is undisputed that the Assignment and Assumption Agreement was not signed in the name of Petitioner, APD 20. In fact, APD 20’s name does not appear on the signature page at all. Instead, the name appearing on the signature line and identified as the new buyer is a different entity. And, making the document even more problematic is that it was not signed by the seller named in the underlying purchase and sale agreement but instead by a different legal entity.³ (Exhibits J-5 and J-6)

¹ See, Essential Workforce Housing, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2008-022CW, and the cases cited therein (Acceptance of an assignment by an assignee is an essential element to a valid assignment)

² There is no question that the Qualified Contract itself must be executed by the Applicant as the buyer where the contract is relied upon to demonstrate site control in the name of the Applicant. The same requirement governs the execution of the assignment of the Qualified Contract by the Applicant as the assignee under the assignment of that contract.

³ It is likely that the signature page at issue here was never intended as the signature page for this Assignment and Assumption Agreement in the first place but, instead, represents the signature page intended for an entirely different agreement involving the parties named on the signature lines. And, having never been intended as the signature page for the Assignment and Assumption Agreement, it cannot now be recast as just that.

As a result, the Assignment and Assumption Agreement on its face is insufficient to demonstrate site control in the name of the Petitioner, APD 20, as required by Florida Housing's rules. It is well established that an agency cannot ignore its own rules.⁴ And, because the assignment is signed by neither the seller under the contract which it purports to assign or by the Petitioner as the purported assignee, its enforceability as a matter of contract law against either is questionable.⁵

Yet, the RO summarily concludes in Paragraph 10 that, "Based on the totality of the application and the cure materials, Florida Housing can readily ascertain the correct signatories and parties to the assignment, and the title above the signature lines does not change the terms or the validity and enforceability" of the Assignment and Assumption Agreement.

The Universal Application Cycle is a competitive application process in which the applications are scored based not upon what an applicant may have intended to provide (or should have provided) in its application in order

⁴ Department of Revenue v. Race, 743 So. 2d 169, 171 (Fla. 5th DCA 1999); Savannah Springs Apartment II, Ltd. V. Florida Housing Finance Corporation, FHFC Case Nos. 2007-048UC and 2007-049UC (Final Order, adopting Recommend Order, August 8, 2008)

⁵ See, Socarras v. Cloughton Hotels, Inc., 374 So. 2d 1057 (Fla. 3d DCA 1979) (To be an enforceable land sales contract, statute of frauds requires contract to be embodied in a written memorandum signed by the party against whom enforcement is sought); Sill v. Oeala Jewelers, Inc., 210 So. 2d 458 (Fla. 1st DCA 1968) (Phrase "party to be charged" as used in the statute of frauds applies to person against whom liability is asserted, whether person is alleged vendor or purchaser).

The enforceability of the contract against the seller is of added significance here in that one of the requirements for a Qualified Contract is that the buyer have the remedy of specific performance against the seller. The lack of that remedy alone is grounds for rejection of the Assignment and Assumption Agreement. See, Part III.C.2.a. of the Application Instructions.

to satisfy the applicable rule requirements but, rather, upon the information actually provided in its application, including the exhibits and cure materials.

The fact that the individuals who signed the Assignment and Assumption Agreement on behalf of the entities named on the signature lines may also be authorized to sign on behalf of the Petitioner, APD 20, and the seller under the underlying contract, does not change or alter the names of the entities appearing on the signature lines on the signature page. The seller named on the signature page, and the new buyer named on the signature page, are themselves existing entities, and the individuals who signed on their behalf are authorized signatories for those entities. Importantly, and in the context of scoring the Petitioner's Application, no documents were submitted to Florida Housing during the cure period demonstrating that the individuals who signed on the signature page to the Assignment and Assumption Agreement did so on behalf of any entity other than the entity named on the signature line appearing above that individual's signature. To now conclude that those individuals, in signing on behalf the entities named on the signature line, instead bound a different entity (in this case, the Petitioner, APD 20, and the original seller) to the terms of the Assignment and Assumption Agreement is not only speculative but contrary

to the face of the signature page itself. The entities named on the signature lines cannot be ignored as meaningless.⁶

In Essential Workforce Housing, LLC v. Florida Housing Finance Corporation, FHFC Case No. 2008-022CW, the assignment was rejected because it was not signed by the applicant as assignee. There is no meaningful distinction between that assignment and the assignment at issue here that would warrant a different result.

Florida Housing is neither required nor permitted to assist Petitioner or any other applicant in completing its application.⁷ Moreover, as recognized by the Hearing Officer in Essential, even if Florida Housing could somehow infer (from the names of the individual signers or the relationship of the parties) that APD 20 accepted and assumed, or intended to accept and assume, the Assignment and Assumption Agreement “such an inference would necessarily be speculative and improper on the part of” Florida Housing in the context of the Universal Application Cycle.

⁶ See, Savannah Springs Apartment II, Ltd. V. Florida Housing Finance Corporation, FHFC Case Nos. 2007-048UC and 2007-049UC (Final Order, adopting Recommend Order, August 8, 2008) (Where identity of developer at issue, Florida Housing not allowed to disregard the entity named in the application at deadline even though “natural persons” responsible for the operations of the entities were identical at all times) ; see also, Finlay Interests 35, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2005-019UC (2005)(Had the applicant’s name on the signature line of the assignment “been misspelled or misstated, that may have constituted grounds for rejection of the document since it would not be clear that the ‘applicant’ was the recipient of the assignment”)

⁷ Rule 67-48.004(1)(b), F.A.C.

Florida Housing's scoring decision in the instant case is entirely consistent with its rules and Application Instructions. To have reached a different result would have required Florida Housing to ignore the plain meaning of those rules and instructions. An agency's interpretation of its own rules will be upheld unless it is clearly erroneous, or amounts to an unreasonable interpretation.⁸ The interpretation should be upheld even if the agency's interpretation is not the sole possible interpretation, the most logical interpretation, or even the most desirable interpretation.⁹

In the instant case, and in the context of a competitive funding process, Florida Housing has reasonably interpreted its rules and incorporated instructions and forms, and properly determined that Petitioner's Application should be rejected because it failed to satisfy applicable threshold requirements relating to site control.

For the reasons set forth herein, Conclusions of Law 7, 8, 9 and 10, in the Recommended Order are contrary to Florida Housing's rules and applicable law, and should be rejected as a matter of law.

Instead, the Board should adopt conclusions of law consistent with its rules and applicable law as set forth herein and enter its Final Order rejecting Petitioner's Application.

⁸ 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).

⁹ Golfcrest Nursing Home v. Agency for Health Care Administration, 662 So.2d 1330 (Fla. 1st DCA 1995).

Respectfully submitted, this 10th day of February, 2010.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Argument in Opposition to Recommend Order has been furnished this 10th day of February, 2010 by electronic mail to David E. Ramba at David@rambaconsulting.com and to Michael P. Donaldson at mdonaldson@carltonfields.com



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