

**MULTIFAMILY FINANCE PRODUCTION DIVISION**  
**BOARD ACTION REQUEST**  
**December 18, 2008**

**Action Item**

Presentation, Discussion and Possible Consideration of Appeal of Decision to Not Approve Ownership Transfer of Credits Prior to Issuance of 8609's.

**Requested Action**

Approve, Deny or Approve with Amendments a determination on the appeal.

**Background and Recommendations**

**Candlewick Apartments - #07226**

This owner is appealing the denial of an Ownership Transfer of the Housing Tax Credits prior to the issuance of the IRS Forms 8609.

Staff denied the initial request based on both the 2008 Qualified Allocation Plan and Rules (QAP) and the Portfolio Management and Compliance (PMC) rules. §50.17 of the QAP requires a development owner to "...provide evidence that a hardship is creating the need for the transfer..." (examples in the rule include bankruptcy and removal by a partner, etc.) and §60.122 of the PMC rules concludes the Department will not transfer ownership to an owner that is currently in material non-compliance.

The requesting applicant received an award of housing tax credits in 2007. The current general partner is Candlewick Housing and Economic Development Corporation, a Texas public facility corporation organized as an instrumentality of the Cameron County Housing Authority. The owner originally asserted to the Department that the change in the general partner was needed to receive additional funding from the City of Brownsville and Cameron County Housing Authority no longer wanted to continue as the general partner. It should be noted that the owner has not requested a revision to their budget reflecting a need for new sources or a funding commitment or other documentation to approve an amended the budget that would demonstrate the funding changes.

In the course of the appeal, the owner asserted the reason for the transfer is the "removal" of the general partner at the request of the equity partner, First Sterling Investor 146, LLC. thus, justifying the "need" for the transfer. The Department does not have any confirmation from the equity investor of this removal. Part of the reason for the lack of documentation may be that the owner has not provided evidence that the equity partner has closed on the partnership agreement and therefore, First Sterling Investor 146, LLC. is only the proposed equity partner and has no rights or interests in the project to request a removal.

Even if the Board found that the potential equity partner's request was sufficient need, the Department has also identified material non-compliance with a development that is directly related to

Esiquio Luna, Jr., the Executive Director, of the proposed new general partner, Brownsville Housing Management Corporation, a Texas public facility corporation organized by the Housing Authority of the City of Brownsville. Mr. Luna will also have direct responsibility with the operations of the Candlewick Apartments if the transfer were to be approved. The material non-compliance issues which has been conceded by the owner's representative in correspondence makes the approval of this transfer a violation of the Board's PMC rules.

Staff denied the transfer initially because the owner did not show any valid reason for a hardship that would allow a transfer. Subsequently, the inconsistencies in the information provided with the request to transfer make the request incomplete and reinforce the denial for a transfer in general and the non-compliance issues with this requested transferee place additional hurdles in the approval process.

Relevant documentation related to this appeal is provided behind the Board Action Request.

Applicant:	Chicory GP – VI, Inc.
Site Location:	1155 Paredes Line Road
City/County:	Brownsville/
Regional Allocation Category:	Urban
Set Aside	At-Risk
Population Served:	General
Region:	11
Type of Development:	Rehabilitation
Units:	132
Credits Requested:	\$981,612

**Staff Recommendation:** Staff denied the request and is recommending that the Board deny the appeal.

October 29, 2008

**VIA FEDERAL EXPRESS**  
**AND ELECTRONIC MAIL**

Mr. Michael Gerber  
Executive Director  
Texas Department of Housing and Community Affairs  
507 Sabine Street, Suite 900  
Austin, Texas 78711

Re: Chicory Court VI, LP/Candlewick Apartments;  
TDHCA No.: 07226

Dear Mr. Gerber:

This law firm represents Chicory Court VI, LP, a Texas limited partnership ("Partnership"), and its sole general partner, Chicory GP VI, Inc., a Texas corporation ("General Partner"). I have been requested by Partnership to advise you of the need to obtain the approval of the Texas Department of Housing and Community Affairs ("TDHCA") for the transfer of the ownership interest of General Partner from Candlewick Housing and Economic Development Corporation, a Texas public facility corporation ("CHEDC"), to the Brownsville Housing Management Corporation, a Texas public facility corporation ("BHMC").

The proposed incoming sole shareholder of General Partner, BHMC, is an instrumentality of the Housing Authority of the City of Brownsville ("HACB"). The Employee Identification Number ("EIN") of BHMC is 20-3343558. The proposed outgoing sole shareholder of General Partner is the Candlewick Housing and Economic Development Corporation, EIN 26-0645231, is an instrumentality of the Cameron County Housing Authority ("CCHA").

The need to obtain the written approval and consent of TDHCA is for the purpose of having Partnership conform with the representations made in its application for the Candlewick Apartment project, TDHCA No. 07226 (the "Project"). Pursuant to the application for the Project, the ownership interest in General Partner is to be the CCHA or an instrumentality of CCHA at the time when the low-income housing tax credit investor is admitted as the limited partner of Partnership (the "Closing"). Instead of having the ownership interest in General Partner being with CCHA or its instrumentality, the parties have agreed to substitute at Closing

Mr. Michael Gerber  
Texas Department of Housing and Community Affairs  
October 29, 2008  
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BHMC, an instrumentality of HACB as the sole shareholder of General Partner. The overall statements and representations set forth in the application will be achieved since the general partner will be a public facility corporation acting as an instrumentality of a housing authority; only the housing authority owning the interest in General Partner will not be consistent with the application for the Project. Additionally, CCHA's involvement in the Project was not a variable in Partnership's award of the allocation of the low income housing tax credits.

\* The change in the sole shareholder of General Partner was instigated by the need to obtain HOME funds awarded by the City of Brownsville (the "City") to an affiliate of HACB for the rehabilitation of the Project. HACB agreed to loan the HOME funds to Partnership if an affiliate of HACB controlled General Partner. The HOME funds would be necessary for Chicory Court VI, LP to complete the rehabilitation of the Project. CHEDC is willing to transfer its interest in General Partner and withdraw from the Partnership.

We are therefore requesting TDHCA's written approval and consent of the substitution of BHMC as the sole shareholder of General Partner. Partnership, who is the applicant and who is to receive the allocation of the low income housing tax credits, nor General Partner has changed. Except as noted herein, no other changes are being requested with respect to the ownership of Partnership. Partnership, and its principals remain involved and the organizational structure of Partnership corresponds with the structure represented by Partnership in its application filed with TDHCA, with the only difference being the sole shareholder of General Partner; however, the sole shareholder of General Partner will remain an instrumentality of a housing authority. This request to transfer the general partner is not because a person involved with this project no longer associated with the project.

As you further know, Section 50.17(e) of the 2008 Qualified Allocation Plan and Rules (the "QAP") provides that "A Development Owner may not transfer an allocation of housing tax credits or ownership of a Development supported with an allocation of housing tax credits to any Person other than an Affiliate of the Development Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer." Furthermore, Section 50.17(d) of the QAP requires parties to a transfer to provide TDHCA with a copy of any applicable agreement between the parties. Accordingly, enclosed with this letter please find a copy of the current draft of the Assignment and Assumption Agreement, to be executed at the time the low-income housing tax credit investor is admitted to Partnership, evidencing the transfer of CHEDC's ownership interest in General Partner to BHMC.

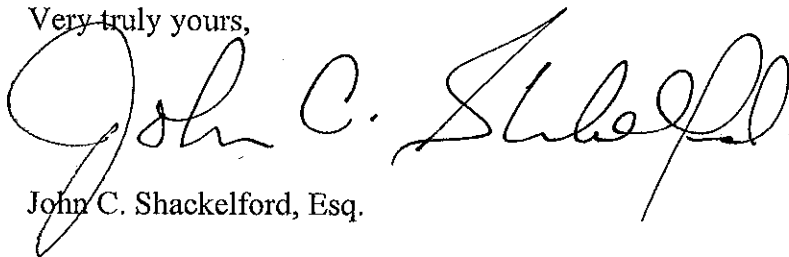
For the foregoing reasons, Partnership hereby respectfully requests your written approval of the transfer of interest in General Partner from CHEDC to BHMC. Since the parties intend to close

Mr. Michael Gerber  
Texas Department of Housing and Community Affairs  
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this transaction by October 30, 2008, the parties would appreciate any actions that can be taken to expedite this matter.

If you have any questions or comments regarding this request, please contact me at your earliest convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read "John C. Shackelford". The signature is written in a cursive style with a large initial "J" and a long, sweeping underline.

John C. Shackelford, Esq.

Kevin Hamby

From: John Shackelford [JSHACKELFORD@shacklaw.net]  
 Sent: Sunday, November 16, 2008 5:39 PM  
 To: michael.gerber@tdhca.state.tx.us  
 Cc: kevin.hamby@tdhca.state.tx.us  
 Subject: FW: Material Noncompliance causing ineligibility

Mike,

I'm seeking assistance in connection with a transfer approval request of the property 07226—Candlewick Apartments, from the Cameron County Housing Authority to the Brownsville Housing Management Corporation, which is a wholly owned subsidiary of the Brownsville Housing Authority. We are earnestly endeavoring to close this week. I thought it should be easy since the transfer is from one housing authority to another. To my surprise, which I know I shouldn't be surprised anymore having done tax credit business for over 15 years, the Executive Director of the Brownsville Housing Authority has material non-compliance issues with a property known as Paseo Plaza and the Dept. is recommending denial of the request. If you scroll down you will see who is handling this for you at the Dept.

I spoke yesterday to Kevin about this and have copied him on this email. I don't know the circumstances of Paseo Plaza or the nature of the material non-compliance issues burdening Esiquio (Zeke) Luna, Jr. He is the ED and would participate in Candlewick Apartments. I request your review and approval despite Mr. Luna's issues for the following reasons, while at the same time being cognizant of the obligations of the Dept. to insure participants in the program comply with its rules and regulations:

1. Although Mr. Luna would participate, his involvement would be limited as this transaction puts an extremely tight leash on the general partner to do anything without approval of the tax credit investor and the interim construction lender. In light of the current environment for tax credit deals, there is such little trust between the investor and lender that the other will perform that the investor and lender have negotiated the toughest and tightest documents I've ever seen. They both have the attitude that the owner and developer have no other options and that they have all the leverage. Unfortunately, they are correct. The failure of Mr. Luna or the housing authority to perform will constitute a default under both the limited partnership agreement with the investor and the loan documents with the lender, which would then cause a default under the perm loan commitment from MMA Financial (the permanent loan lender). Consequently, the consequences to the general partner for failing to perform are incredibly high and both the investor and the lender have the right to step in and cure any defaults by the general partner. The Dept. therefore has the protection of more than just the general partner to perform in accordance with the Dept.'s rules and regulations of the tax credit program and Section 42 of the Code and related regulations.
2. In addition to the investor and lender, I have included in the partnership agreement a mechanism whereby the developer, ORH Development IV, LLC, which is controlled by Salem Jafar, has rights to cure defaults and to protect the owner/partnership from the general partner failing to discharge its duties and obligations including complying with the Dept.'s rules and regulations. In these transactions, guaranties are required to be given to the lender and investor which ORH and Mr. Jafar are giving, but not the general partner nor the housing authority. To protect ORH and Mr. Jafar from having their guaranties enforced due to the general partner failing to perform its duties and obligations, they have certain rights to protect them which in turn adds another party overseeing and ensuring that the general partner does what is expected to avoid issues with the Dept.
3. This is a rehabilitation of an existing property in an area that needs affordable housing due to hurricanes and economic conditions. If we are unable to consummate the transaction with the Brownsville Housing Authority, the transaction will terminate and the needed housing will not be available. Initially we had the Cameron County Housing Authority lined up to do the deal, but a change in a majority of the Board resulted in it changing its position about doing the deal, which is why we reached out to the Brownsville Housing Authority. They agreed, but we had no idea of any material non-compliance issues with it or Mr. Luna. I appreciate your responsibility to the citizens of this State to require compliance from participants in the program, but in this instance, not to approve the transfer benefits no one and does a disservice to the residents of Candlewick Apartments and other low income families in Brownsville. It would also terminate a tax credit transaction that will close and fund this week at a time when developers are having the most difficult time in the history of the program to find equity and credit and to close their deals. We heard the stories of the developers at the last board meeting. This deal will close. The credits will not go back. The citizens of Brownsville will benefit.
4. Instead of penalizing the entire project by not approving the transfer due to Mr. Luna's issues, I ask if there's another means of penalizing Mr. Luna for his material non-compliance issues. I know that if the Brownsville Housing Authority submitted an application on its own account for a tax credit allocation, the Dept. would deny it due to the material non-compliance. The housing authority is essentially foreclosed from participating in the program on its own and therefore it already is subjected to a severe penalty for its transgressions. I therefore submit that it is being punished regardless of your permitting the transfer in this instance. Your approval would in no way excuse the material non-compliance issues nor release the housing authority from being penalized and held accountable for its acts or actions.

As I stated above, the parties need to close this transaction this week because the investor is very concerned with the placed in service date being met for 12/31/09 because construction hasn't started. We desperately need to close so construction can immediately commence. I very much appreciate your review and consideration of this matter. If you have any questions, please call me. This is my highest priority this week. I know you will evaluate all of the circumstances attendant to the transfer and the consequences to every stakeholder if the transfer is denied and will exercise prudent judgment. Thank you.

John

John C. Shackelford, Esq.  
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From: Ben Halpern  
 Sent: Friday, November 14, 2008 6:01 PM  
 To: John Shackelford  
 Subject: FW: Material Noncompliance causing ineligibility

FYI

Benjamin D. Halpern  
 Shackelford, Melton & McKinley, LLP  
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 (214) 889-9779 Direct Fax

11/17/2008

December 3, 2008

**VIA FEDERAL EXPRESS**  
**AND ELECTRONIC MAIL**

The Governing Board  
Texas Department of Housing and Community Affairs  
507 Sabine Street, Suite 900  
Austin, Texas 78711  
c/o Mike Gerber, Executive Director

12-04-08 11:47 AM

Re: Tax Credit Program: Appeal of decision of Department with respect to  
Candlewick Apartments located at 1155 Paredes Line Road, Brownsville, Texas  
(TDHCA No. 07-0226) (the "Development")

Dear Ladies and Gentlemen:

This firm represents Chicory Court VI, LP, a Texas limited partnership ("Partnership"), and its sole general partner, Chicory GP VI, Inc., a Texas business corporation ("General Partner") in connection with financing the acquisition and rehabilitation of the Development. The Partnership has previously applied for and received a reservation for tax credits for the Development from the Department. Pursuant to a letter from this firm dated October 29, 2008 (the "Amendment Request"), the Partnership requested the approval of the Department for the transfer of the ownership interest in General Partner from Candlewick Housing and Economic Development Corporation, a Texas public facility corporation ("CHEDC") organized as an instrumentality of the Cameron County Housing Authority, to a non-affiliate of CHEDC, the Brownsville Housing Management Corporation, a Texas public facility corporation ("BHMC") organized as an instrumentality of the Housing Authority of the City of Brownsville ("HACB"). It is our understanding pursuant to an email from Elizabeth Henderson of the Department dated December 1, 2008 that the proposed transfer has been denied based upon the determination that no "hardship" exists as described in § 50.17 (e)(1) of the 2008 Qualified Allocation Plan ("QAP") of the Department. The purpose of this letter is to formally appeal this decision to the Board.

Section 50.17 (e) gives wide latitude to the Executive Director to approve such transfers. The Section states:

A Development Owner may not transfer an allocation of Housing Tax Credits or ownership of a Development to any Person other than an Affiliate of the Development

Owner unless the Development Owner obtains the Executive Director's prior, written approval of the transfer. The Executive Director may not unreasonably withhold approval of the transfer. (1) Transfers will not be approved prior to the issuance of IRS Forms 8609 unless the Development Owner can provide evidence that a hardship is creating the need for the transfer.

Ms. Henderson states in her email that the Director of Compliance and the General Counsel of the Department (rather than the Executive Director) have concluded that the withdrawal by the Cameron County Housing Authority from the transaction does not qualify as a "hardship" within the meaning of the QAP. The QAP does not define "hardship" but merely makes reference to examples such as "potential bankruptcy, removal of a partner, etc." We would argue that indeed a hardship exists in this situation and that broad interpretation to the term "hardship" is both permitted and warranted.

First, in essence a partner *is* being removed here. Our client has advised us that the equity partner in the transaction, First Sterling Investor 146 LLC ("First Sterling"), will *not* underwrite the transaction if CHEDC is the owner of General Partner. It is First Sterling's belief that both CHEDC and CCHA lack experience in low income tax credit housing projects. HABC, on the other hand, has had experience with these types of projects and First Sterling's commitment is based on the use of an instrumentality of HABC as owner of General Partner. As you are aware, federal tax law places many restrictions on the use of these projects which must be monitored and enforced, and requires regular filings to demonstrate compliance with rent restrictions, set asides and other requirements to remain qualified for the tax credits. Under the limited partnership agreement, General Partner makes certain representations and makes covenants to undertake these and numerous other responsibilities related to operation of the Development. Understandably, the equity partner is concerned that the owner of General Partner be well versed in and have experience with federal, state and local restrictions on this project. It is First Sterling's belief that HABC and its instrumentality BHMC will have the knowledge and experience necessary to fulfill these obligations. Although it is our opinion that the definition of "hardship" should be broadly interpreted and that a "hardship" exists based upon the mere fact that this transaction will not close without approval of the transfer and such failure to provide affordable housing in this current economic environment is a real world, heartbreaking "hardship," it is also a "hardship" within a narrow interpretation because it is necessitated by a de facto removal of a partner.

Second, the use of BHMC as the owner of the general partner greatly facilitated the Development's obtaining additional moneys in the form of HOME funds awarded by HACB because HACB is providing such funds to a related entity. Given current costs of construction, reduction in tax credit prices since filing the Application with the Department and general market conditions, this additional source of funding adds considerable value to the financial viability of the Development.

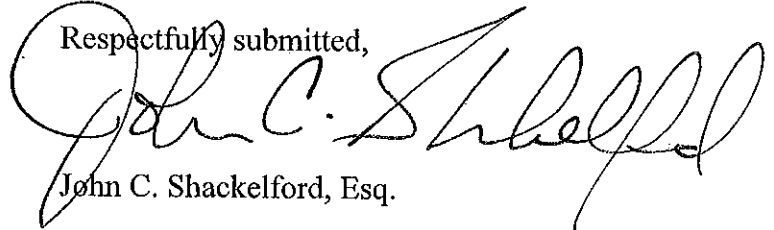
Third, unlike many other low income tax credits projects, this transaction is otherwise ready to close and was set to close last month pending approval by the Executive Director of this proposed transfer. The parties have obtained the commitments of: (i) the equity partner, First Sterling, (ii) the construction lender, International Bank of Commerce, (iii) the permanent



financing lender, MMA Financial Inc. and (iv) the HOME funds lender, HACB. The limited partnership agreement is negotiated with First Sterling and all the loan documents are negotiated with the lenders. Given so many developers' recent inability to close on these types of projects due to the current economic environment and lack of credit in the housing market, it would be a tragedy to deny the people of the City of Brownsville these affordable housing units. Approval of this transfer by the Board would serve the public purpose of the Department by providing 132 units of affordable housing to the people of the City of Brownsville.

On behalf of the Partnership, we respectfully request the Board's consideration of this appeal at its December 18, 2008 meeting.

Respectfully submitted,

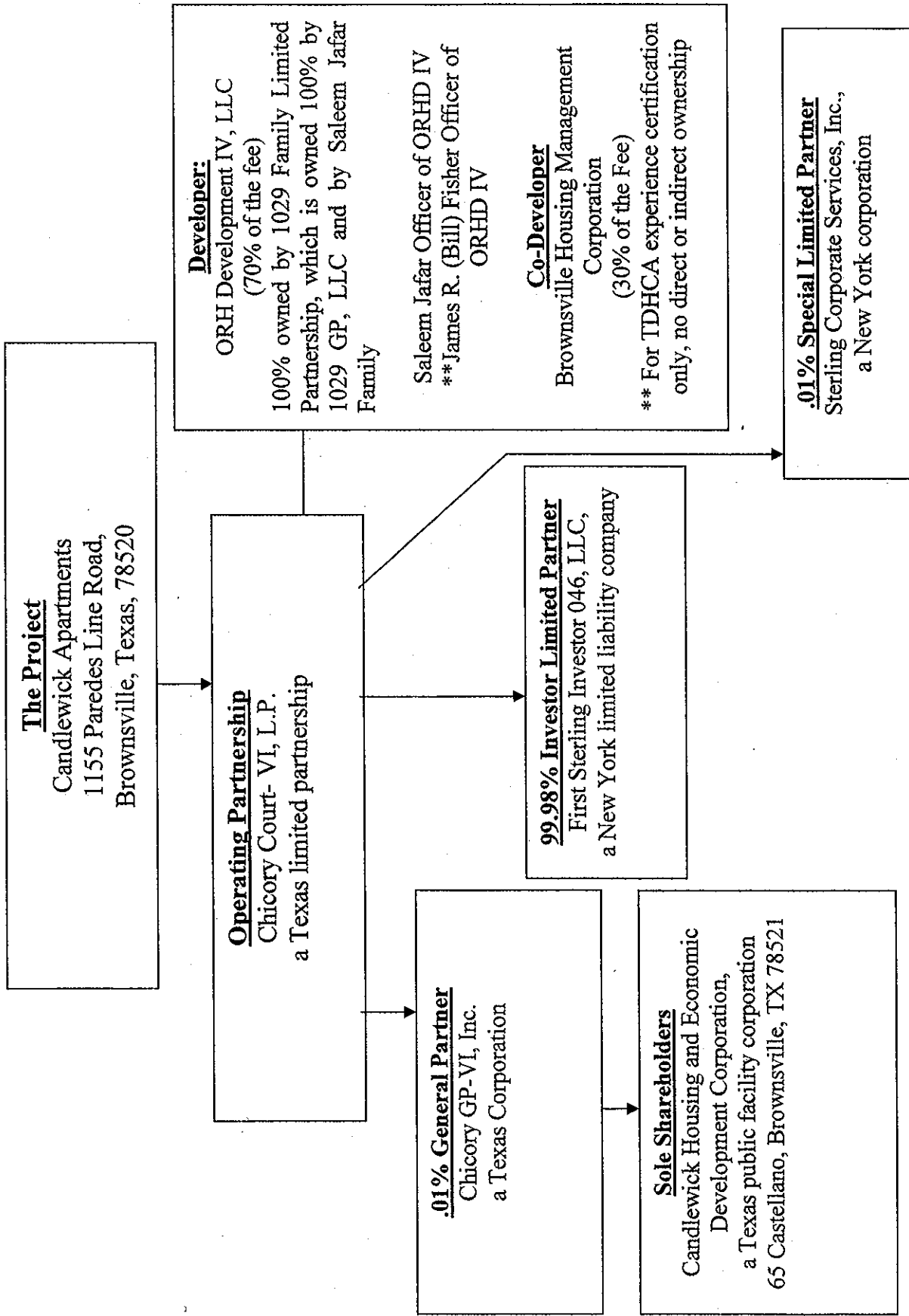
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John C. Shackelford, Esq.

Cc: James R. (Bill) Fisher  
Kevin Hamby, Esq.

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(Prior)**



# ORGANIZATIONAL CHART (Post)

