

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

CAPE MORRIS COVE II PARTNERS, L.L.L.P.,

Petitioner

SAIL LOAN No. 2008-238S

FHFC File No. 2013-020VW

v.

FLORIDA HOUSING  
FINANCE CORPORATION,

Respondent

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FINANCE CORPORATION

**PETITION FOR WAIVER OR VARIANCE FROM  
RULE 67-48.010(8)(a), F.A.C.**

Petitioner, Cape Morris Cove II Partners, L.L.L.P., ("Cape Morris II") petitions the Florida Housing Finance Corporation ("FHFC") for a waiver or variance from Rule 67-48.010(8)(a), Florida Administrative Code. Specifically, Petitioner seeks a waiver or variance from the requirement to maintain its accounting records and audited financial statements on a calendar year basis ending December 31. This Petition is filed pursuant to Chapter 28-104, Florida Administrative Code and Section 120.542, Florida Statutes.

**THE PETITIONER**

1. The address, telephone number and telefax number of the Petitioner is:

Cape Morris Cove II Partners, L.L.L.P.  
Attn: Paul M. Missigman  
200 E. Canton Ave., Suite 102  
Winter Park, FL 32789  
Phone: (407) 741-8505  
Fax: (407) 643-2570  
Email address: p.missigman@atlantichousing.com

2. Petitioner successfully applied for State Apartment Incentive Loan ("SAIL") funding during FHFC's 2008 funding period. The proposed development was targeted to low income persons who are in need of affordable housing. The project is also financed with tax-exempt

bonds issued through the Volusia County Housing Finance Authority and equity from the sale of non-competitive 4% housing credits as well as deferred fees.

**THE RULE FOR WHICH A WAIVER OR VARIANCE IS SOUGHT**

3. Petitioner requests a waiver or variance from Rule 67-48.010(8)(a), Florida Administrative Code, as the rule existed at the time Cape Morris II was awarded its SAIL loan in 2008.

4. The language of this particular rule provision is set forth below:

**67-48.010 Terms and Conditions of SAIL Loans (excerpted to only reference reporting provision for which waiver/variance is sought.)**

(8) The determination of Development Cash Flow, determination of payment priorities, and payment of interest on SAIL loans shall occur annually. Any payments of accrued and unpaid interest due annually on SAIL loans shall be deferred to the extent that Development Cash Flow is insufficient to make said payments pursuant to the payment priority schedule established in this rule chapter. If Development Cash Flow is under-reported and such report causes a deferral of SAIL interest, such under-reporting shall constitute an event of default on the SAIL loan. A penalty of 5 percent of any required payment shall be assessed.

(a) By May 31 of each year of the SAIL loan term, the Applicant shall provide the Corporation with audited financial statements and a certification detailing the information needed to determine the annual payment to be made. However, this certification requirement will be waived until May 31 following the calendar year in which the first unit is occupied. The certification shall require submission of audited financial statements and the SAIL annual reporting form, Cash Flow Reporting Form SR-1, Rev. 9/05, which is incorporated by reference. Form SR-1 can be obtained from the Credit Underwriter acting as the assigned servicer or on the Corporation's Website under the 2008 Universal Application link labeled Related Information and Links. The audited financial statements are to be prepared in accordance with generally accepted accounting principles for the 12 months ended December 31 and shall include:

1. Comparative Balance Sheet with prior year and current year balances;
2. Statement of revenue and expenses;
3. Statement of changes in fund balances or equity;
4. Statement of cash flows; and
5. Notes

The financial statements referenced above should also be accompanied by a certification of the Applicant as to the accuracy of such financial statements. A late fee of \$500 will be assessed by the Corporation for failure to submit the audited financial statements and certification by May 31 of each year of the SAIL loan term. If the applicant has not submitted the required audited financial statements, the Corporation servicer shall deem the Development Cash Flow sufficient and issue a billing for interest due on the SAIL loan for the immediately preceding calendar year by July 31. After receipt of the audited financial statements, the Corporation servicer shall issue revised billing, if necessary. Failure to submit the required audited financial statements and certification by May 31 of each year of the SAIL loan term shall constitute an event of default on the SAIL loan. The Applicant shall furnish to the Corporation or its servicer, unaudited statements, certified by the Applicant's principal financial or accounting officer, covering such financial matters as the Corporation or its servicer may reasonably request, including without limitation, monthly statements with respect to the Development.

For SAIL loans applied for prior to February 22, 2001, the Corporation will extend the annual filing deadline for submission of the audited financial statements and certification detailing the information needed to determine the annual payment to be made, pursuant to subsection 67-48.010(8), F.A.C., to May 31 of each year of the SAIL loan term. The Corporation servicer shall issue a billing for interest due on the SAIL loan for the immediately preceding calendar year by July 31 of each calendar year of the SAIL loan.

In addition, for SAIL loans applied for prior to December 23, 1996, so long as the executed loan agreements contain a provision to assess a late fee for failure to provide this audited financial statement and certification detailing the information needed to determine the annual payment due, such fee will be assessed by the Corporation as outlined above.

5. Petitioner is specifically seeking a waiver or variance of that portion of the rule which requires it to provide FHFC with audited financial statements that use a calendar fiscal year ending December 31. (Petitioner is not seeking a waiver of the requirement to submit audited financial statements, just a waiver of the requirement that the audited financial statements be prepared with a calendar year end of December 31.) Reporting and accounting flexibility that Cape Morris II seeks with this petition is provided to recent recipients of SAIL loans under the current version of Rule 67-48.010(8)(a) which allows for fiscal year ends other than calendar year ends, but this reporting flexibility was not included in the previous version of Rule 67-

48.010(8)(a) in place during the 2008 cycle when Cape Morris II was awarded its SAIL loan. The previous version of Rule 67-48.010(8)(a), with its specific reporting and fiscal year dates, governs the conduct of Cape Morris II related to financial reporting to FHFC.

Again, simply put, Petitioner is merely seeking accounting flexibility to avoid an economic hardship. The result Petitioner seeks is consistent with the current rule governing the provision of audited financial statements which allows for fiscal year ends other than a calendar year end. The portion of Rule 67-48.010(8)(a) for which a waiver or variance is sought are underlined above in paragraph 5.

### **STATUTES IMPLEMENTED BY THE RULE**

6. Rule 67-48.010(8)(a), F.A.C., set forth above, implements section 420.5087, Florida Statutes.

7. FHFC has the express authority pursuant to section 120.542(1), Florida Statutes, to grant variances or waivers to its rules under certain circumstances. Specifically, FHFC may grant relief from strict application of a rule in particular instances when application of the rule would lead to unintended consequences, an unreasonable result, or an unfair result. A waiver should be granted when the person subject to the rule demonstrates that the application of the rule would 1) create a substantial hardship or violate principles of fairness; and 2) the purpose of the underlying statute has been or will be achieved by other means. The Legislature has indicated that a “substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.

8. Petitioner seeks a waiver of a select portion of Rule 67-48.010(8)(a) to allow Petitioner to use a fiscal year of its choosing. In May 2012, Regions Bank (which has a fiscal calendar year end of December 31), and RB Affordable Housing (an affiliate of Regions Bank) transferred their limited partner interests which constituted more than a majority ownership interest in Cape Morris II to TD CCG SLP, LLC and Four Eighty-One Corp (“TD” and “481”, respectively) which are affiliates of TD Bank which has a fiscal year end of October 31, which is the underlying reason for the requested change to a fiscal year end beginning October 31, 2012. For tax accounting purposes, Section 706(a) I.R.C. requires that the fiscal year for a limited partnership be the same as the fiscal year end of the partner(s) that own the majority interest

unless otherwise approved by the I.R.S. As such, due to the change in ownership consisting of more than 51%, Cape Morris II must have a fiscal year end of October 31 in accordance with TD Bank's fiscal year end of October 31. In order to comply with Rule 67-48.010(8)(a) as it existed when the SAIL loan in question was awarded, an audit would have to be performed as of the fiscal year end on October 31 to comply with TD Bank's fiscal year end as well as of the calendar year end December 31 to comply with the rule governing SAIL reporting requirements, resulting in significant additional accounting expenses in the range of \$3,500 to \$7,500. If the variance or waiver is granted, these funds will be available for the Development and assist the Development financially. Given the above, an economic hardship is demonstrated and Petitioner's request for a variance or waiver from Rule 67-48.010(8)(a) should be granted.

**GRANTING THE VARIANCE OR WAIVER WILL  
SERVE THE UNDERLYING PURPOSE OF THE STATUTE**

9. Granting the variance or waiver as requested will serve the purpose of the underlying statute. Specifically, section 420.5087, which is implemented by the rule in question, seeks to provide safe, sanitary and affordable housing pursuant to the SAIL loan program. The Cape Morris II housing development seeks to provide safe, sanitary and affordable housing to persons of low income means. Accordingly, granting of the variance or waiver will comport with the objectives of section 420.5087, Florida Statutes, and will promote the development of affordable housing in Volusia County, serving the underlying purpose of the section 420.5087, which is the statute Rule 67-48.010(8)(a) implements.

**REQUEST FOR PERMANENT RELIEF**

10. The variance or waiver being sought is permanent in nature and begins with the fiscal year end October 31, 2012.

**RELIEF REQUESTED**

11. Petitioner requests the following:

- a. Cape Morris II respectfully requests that its Petition for a variance or waiver of Rule 67-48.010(8)(a) be granted so that it is not required to maintain its financial books and records on a calendar fiscal year ending December 31, and instead be allowed to report on a fiscal year end of October 31.
- b. Cape Morris II requests such other relief as the Board deems appropriate.

Respectfully submitted this 23 day of July, 2013.

Cape Morris Cove II Partners, L.L.L.P.  
By: Cape Morris Cove II Managers, L.L.C.

  
\_\_\_\_\_  
Paul M. Missigman, Manager

**CERTIFICATE OF SERVICE**

I hereby certify that this Petition was provided by overnight delivery for filing to the Corporation Clerk for the Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, Florida 32301 with a copy being provided by overnight delivery to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399 this 23 day of July, 2013.

  
\_\_\_\_\_  
Paul M. Missigman

# CAPE MORRIS COVE II PARTNERS, L.L.L.P.

200 E. Canton Avenue, Suite 102  
Winter Park, Florida 32789  
407-741-8500

July 23, 2013

Della Harrell  
Clerk  
Florida Housing Finance Corporation  
227 E. Bronough Street, Suite 5000  
Tallahassee, FL 32301

Re: Cape Morris Cove II Partners, L.L.L.P.

Dear Ms. Harrell:

Please find enclosed a Petition for Waiver or Variance from Rule 67-48.010(8)(a), F.A.C.  
for Cape Morris Cove II Partners, L.L.L.P.

A copy has also been sent to the Joint Administrative Procedures Committee.

Sincerely,  
on behalf of Cape Morris Cove II Partners, L.L.L.P.

  
Paul M. Missigman, Manager

Encl.

cc: Wellington Meffert, General Counsel FHFC

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