

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

PETERBOROUGH REDEVELOPMENT
ASSOCIATES, LLC

Petitioner,

FHFC CASE NO. 2016-011VW
Application No. 2014-321S

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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FLORIDA HOUSING FINANCE CORPORATION

**PETITION FOR WAIVER OF
RULE 67-48.004(3)(j) TO CHANGE TOTAL SET ASIDE PERCENTAGE**

PETERBOROUGH REDEVELOPMENT ASSOCIATES, LLC a Florida limited liability corporation (“Peterborough”), hereby petitions the Florida Housing Finance Corporation (“Florida Housing”) for a waiver or variance in the Total Set Aside Percentage designated in an Application. This request is made in conjunction with Peterborough’s response to RFA 2014-103 Financing of Affordable Multifamily Housing Developments with SAIL Funding To Be Used In Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits (“RFA”).

In support of its Petition Peterborough states as follows:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for Peterborough and its qualified representative for its application in response to the RFA as follows:

Shawn Wilson
5300 W. Cypress Street, Suite 200
Tampa, FL 33607
Telephone: 813-384-4825
E-Mail: swilson@blueskycommunities.com

2. For purposes of this Petition, the address, telephone number and facsimile number of the Peterborough's attorney is:

Michael P. Donaldson
Carlton Fields Jordan Burt, P.A.
Post Office Drawer 190
Tallahassee, FL 32302-0190
Telephone: 850-224-1585
Facsimile: 850-222-0398
E-Mail: mdonaldson@carltonfields.com

B. THE DEVELOPMENT

3. On January 31, 2014, Peterborough timely submitted its (Application No. 2014-321S) seeking SAIL funding in response to the RFA Application No. 2014-321S for the development named Peterborough (the "Development"). Peterborough was awarded funding on March 14, 2014, and closed on that funding on July 27, 2015.

4. The funding will supplement the rehabilitation of an existing multifamily residential apartment community intended to serve low-income elderly households in St. Petersburg, Florida.

5. The requested rule waiver will not adversely affect the Development. However, a denial of this Petition (a) will result in substantial hardship to Peterborough which will violate principles of fairness¹. Section 120.542(2), F.S..

¹ "Substantial hardship" means a demonstrated economic, technological, legal or other type of Substantial hardship to the person requesting the variance or waiver. "Principles of Fairness" are violated when literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. Section 120.542(2), F.S..

6. The waiver being sought is permanent in nature.

C. RULES FROM WHICH WAIVER IS SOUGHT

7. Peterborough requests a waiver from Rule 67-48.004(3)(j), FAC (the "Rule").

Specifically, Peterborough is requesting a waiver or variance in the Total Set-Aside Percentage as stated in the Application from 100% to 98.6%.

The Rule provides, in relevant part, as follows:

"(3) ...notwithstanding any other provision of these rules, the following items as identified by the Applicant in the Application must be maintained and cannot be changed by the Applicant after the applicable submission:

(j) For the SAIL and HC Programs, the Total Set-Aside Percentage as stated in the last row of the total set-aside break-down chart for the program(s) applied for in the Set-Aside Commitment section of the Application."

Rule 67-48.004(3)(j), F.A.C.

D. STATUTES IMPLEMENTED BY THE RULE

8. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, the statute that designated the Corporation as the housing credit agency responsible for the allocation and administration of Low-Income Housing Tax Credits. (See Section 420.5099, F.S.)

E. REASONS FOR REQUEST

9. Peterborough requests a waiver from Rule 67-48.004(3) (j), FAC. Peterborough is seeking a waiver from the Rule allowing it to decrease the Total Set-Aside Percentage from 100% of the total units to 98.6%.

10. Under Section 120.542(1), F.S., and Chapter 28-104, FAC, Florida Housing has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances.

Waivers shall be granted when (1) the person who is subject to the rule demonstrates that the

application of the rule would 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 by the person. § 120.542(2), F.S.

11. The following facts demonstrate the hardship and other circumstances which justify Petitioner's request for waiver:

- a. Petitioner timely submitted its Application to Florida Housing in response to the RFA, for 150 total units, with the Total Set-Aside Percentage of 100%, resulting in a total of 150 set aside units.
- b. Peterborough has discovered that two units that were occupied at the closing of the SAIL and Bond loans do not comply with the tenant income requirements because the household income exceeds 60% of AMI. This was discovered after the submission of the response to the RFA. Typically the solution would be to not renew the leases for these two units. However, based on the attached memo from HUD dated January 12, 2015, this is no longer an option. (See Attachment A) Peterborough could offer the tenants an incentive to vacate the units but the tenants are not required to move. In fact Peterborough has offered generous incentives to both tenants and both have declined. This situation will result in Peterborough being in noncompliance for an issue it inherited and has no way of remedying until the residents vacate.
- c. Peterborough's scoring and ranking would have been the same if it had originally included 148 Set Aside units in the Application versus 150. The ranking under this RFA was determined by leveraging that is, SAIL amount per Set Aside unit. Peterborough's leveraging number was \$26,265.60 per

Set Aside unit. If this waiver is granted, Peterborough's leveraging number would be \$26,620.54 per Set Aside unit. The next lowest ranked Eligible application had a leveraging number of \$27,000.00 per Set Aside unit; thus, Peterborough would have maintained its ranking position. This change does not adversely impact any other applicant in the RFA.

d. Unless the relief sought by Petitioner is granted, compliance issues will result.

12. A waiver of the Rule's restriction against changing the Total Set-Aside Percentage from that provided in the Application would serve the purposes of Section 420.5099, F.S., and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means.

13. By granting the waiver and permitting Peterborough minimally decrease the total Set-Aside Percentage, Florida Housing would recognize the realities and principles of fundamental fairness in developing affordable rental housing. This recognition would promote participation by owners such as Peterborough in meeting the Act's purpose of providing affordable housing in an economical and efficient manner.

14. Should Florida Housing require additional information, Peterborough is available to answer questions and to provide all information necessary for consideration of this Petition.

F. ACTION REQUESTED

Peterborough requests the following:

a. That Florida Housing grant Peterborough a waiver from Rule 67-48.004(3)(j), FAC, allowing it to decrease the Total Set- Aside

Percentage from 100% to 98.6% and to decrease the number of set aside units in the Development from 150 to 148;

- b. Grant the Petition and all the relief requested therein; and
- c. Grant such further relief as may be deemed appropriate.

Respectfully submitted this 22nd day of February 2016.

/s/ Michael P. Donaldson

MICHAEL P. DONALDSON

Florida Bar No. 0802761

CARLTON, FIELDS JORDEN BURT, P.A.

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served Electronically and by Hand-Delivery upon the Agency Clerk for Florida Housing Finance Corporation, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301 and via Hand-Delivery to Joint Administrative Procedures Committee, Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, FL 32399-1400, this 22nd day of February, 2016.

/s/ Michael P. Donaldson

MICHAEL P. DONALDSON




OFFICE OF HOUSING

U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT
WASHINGTON, DC 20410-8000

JAN 12 2015

MEMORANDUM FOR: All Multifamily Regional Center Directors
All Multifamily Hub Directors
All Multifamily Program Center Directors
All Contract Administrators

FROM: 
Benjamin T. Metcalf, Deputy Assistant Secretary for Multifamily
Housing Programs, HT

SUBJECT: Occupancy Protections for HUD-Assisted Households in Properties
with Low-Income Housing Tax Credits

This memorandum provides guidance on tenancy protections for households when owners participate in both a HUD-assisted program (e.g., Project-Based Section 8, Section 236, Section 202) and Low-Income Housing Tax Credits (LIHTCs). This communication expands upon guidance currently published in regulations, HUD Handbook 4350.3, REV-1, *Occupancy Requirements of Subsidized Multifamily Housing Programs*, and the lease agreement signed by the owner and tenant.

This clarifying guidance is provided in response to reports that some owners may be attempting to terminate the tenancy of current HUD-assisted tenants (usually project-based Section 8) who do not meet LIHTC eligibility guidelines. For example, this may be the result of the HUD-assisted tenant having income in excess of the LIHTC eligibility level. An owner may only terminate tenancy in limited circumstances as prescribed by HUD regulations and by the lease, and must follow HUD and state/local procedures. Terminations for reasons other than those permitted by HUD are prohibited. The lease agreement details the grounds for termination of tenancy, which do not include failure to meet LIHTC requirements, including LIHTC-specific income and student eligibility rules.

This restriction also covers any proposed termination for criminal activity, which generally is limited to specified activity during the term of the lease or where an owner discovers there was fraud in the application process. Owners may conduct criminal background checks on existing tenants at recertification for lease enforcement or eviction, if permitted by house rules or any legally adopted changes to them, pursuant to HUD Handbook 4350.3, Ch. 8. However, if this practice constitutes a change to the existing house rules, owners must first notify tenants who have completed their initial lease terms, 30 days prior to implementation, of the modifications to the house rules. Notification is accomplished by forwarding a copy of the revised house rules to existing tenants. For those tenants who have not yet completed their initial lease terms, the owner must provide 60 days notice, prior to the end of their lease terms, of the change in the house rules.

Should an assisted household become over-income and no longer eligible to receive a HUD subsidy, i.e., the owner determines through the annual or an interim recertification that the tenant now has the ability to pay the full contract rent or market rent, the owner will terminate the

assistance to the tenant. However, in accordance with the lease agreement, the tenant retains all other rights under the lease, including the right to occupy the unit.

In many cases, owners of LIHTC properties have offered incentives to HUD-eligible households who become over-income for LIHTC or do not meet another LIHTC requirement, to move voluntarily. Owners may do so as long as the incentives are not paid from Section 8 or FHA project funds. In such cases, owners should first inform tenants in writing that they have the option of remaining in occupancy as HUD-assisted tenants under the terms of their lease, in order to ensure that the choice of moving with incentives is truly voluntary.

If you have any questions regarding this memorandum, please contact Kate Brennan at Catherine.M.Brennan@hud.gov.