

BEFORE THE STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION
CASE NO. 2005-002VW

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STATE OF FLORIDA

ARBOURS AT WILLISTON, LTD.,

Petitioner.

Agency Case No.: Application No. 2004-003C
Arbours at Williston

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

PETITION FOR VARIANCE/WAIVER FROM FLORIDA
ADMINISTRATIVE CODE RULE 67-48.002(111)

Pursuant to Section 120.542, Florida Statutes, Rule 67-48.002(111), Florida Administrative Code ("FAC") and Rule 28-104.001 through 28-104.006, Florida Administrative Code ("FAC"), Petitioner, ARBOURS AT WILLISTON, LTD. ("Petitioner") requests the FLORIDA HOUSING FINANCE CORPORATION ("FHFC") to grant a waiver from the provisions of FAC Rule 67-48.004(1)(a) and to grant the relief requested herein. In support of this Petition, Petitioner states as follows:

AGENCY AFFECTED

1. The name and address of the agency affected is Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329. The agency's file or identification number with respect to this matter is 2004-003C.

PETITIONER

2. The Petitioner is Arbours at Williston, Ltd., a Florida limited partnership. The address of Petitioner is 1037 22nd Street South, Suite 101, Birmingham, Alabama 35205, telephone number (205) 250-9000, facsimile number (205) 250-9008. Petitioner's attorney is Gary J. Cohen, Esq., Shutts & Bowen LLP, whose address is 201 South Biscayne Boulevard, Suite 1500, Miami, Florida 33131, telephone number (305) 347-7308, facsimile number (305) 347-7808.

RULE WITH RESPECT TO WHICH A WAIVER IS SOUGHT

3. The Rule with respect to which a waiver is sought is FAC Rule 67-48.002(111), as in effect for the 2004 Universal Application Cycle pursuant to which Petitioner received an allocation of low-income housing tax credit authority. Rule 67-48.002(111) defines the "Universal Application Package" and adopts its contents (including the Universal Application Instructions discussed more fully below) and incorporates them by reference into the foregoing Rule. Page 4 of the 2004 Universal Application Instructions (Part IIA.2.a(1)) provides as follows:

“If applying for HC, the Applicant must be a limited partnership (including a limited liability limited partnership) or a limited liability company. The Applicant entity shall be the recipient of the Housing Credits and cannot be changed until after a Final Housing Credit Allocation has been issued. Replacement of the Applicant or a material change (33.3% or more of the Applicant, a General Partner of the Applicant, or a member of the Applicant) in the ownership structure of the named Applicant prior to this time shall result in disqualification from receiving an allocation and shall be deemed a material misrepresentation. Changes to the limited partner of a limited partnership will not result in disqualification.”

4. Rule 67-48.002(111) implements the provisions of Florida Statute § 420.5099, which statute designates FHFC to establish and administer the Low Income Housing Tax Credit Program (“HC Program”) and to establish procedures necessary for the proper allocation and distribution of low-income housing tax credits, and to exercise all powers necessary to administer the allocation of such credits .

TYPE OF ACTION REQUESTED

5. Petitioner requests that FHFC grant a waiver and variance from the provisions of FAC Rule 67-48.002(111), as in effect and governing the 2004 Universal Application Cycle. The provisions of the foregoing Rule, incorporating by reference pages 4 and 5 of the 2004 Universal Application Instructions, prohibit a material change of a tax credit applicant, which term is defined to mean 33.3% or more of the tax credit applicant, or a general partner of the applicant. For the reasons set forth below, compliance with the foregoing provisions of the aforementioned Rule would give rise to substantial hardship to Petitioner and would violate principals of fairness.

FACTS

6. The specific facts that demonstrate a substantial hardship or a violation of principles of fairness which justify a waiver or variance for Petitioner, as requested above, are as follows:

a. The original HC application filed by Petitioner reflected a limited partnership (Arbours at Williston, Ltd.) consisting of an initial 99.9% limited partner (John Moore, Jr.), and two co-general partners (Arbour One, Inc. and Cahaba Valley Development Corporation, each holding 50% of the aggregate 0.1% general partner interest). The 99.9% limited partner interest of John Moore, Jr. will (as permitted by the Universal Application Instructions) be changed and replaced by SunAmerica Housing Fund 1290, a Nevada limited partnership (the “Tax Credit Investor”) pursuant to the pending closing of the syndication of the HC. The construction and permanent first mortgage

lender (SA Affordable Housing, LLC, a Delaware limited liability company; the “Lender”) will be making a \$1,100,000 first mortgage loan to Petitioner, such loan to close simultaneous with the closing of the tax credit equity syndication with the Tax Credit Investor. Both the Tax Credit Investor and the Lender have required the Applicant to replace the existing general partners (Arbour One, Inc. and Cahaba Valley Development Corporation) with a newly formed Florida limited liability company, to be named Williston GP, LLC (the “New General Partner”). The New General Partner will be owned 25% each by the four principals of Arbour One, Inc. and Cahaba Valley Development Corporation; that is, the New General Partner will be owned 25% each by John Moore, Jr., David Sumrall, Stephen G. Lowitz and Gabriel H. Ehrenstein. Lender and Tax Credit Investor are requesting the foregoing change in order to comply with their respective “single purpose entity” and “bankruptcy remote” requirements (collectively, “SPE Requirements”). The purpose of the SPE Requirements is to provide that the borrower (the Petitioner) have as a general partner an entity, formed concurrently with or immediately prior to the closing of the loan and tax credit syndication transaction, that is unlikely to become insolvent as a result of its own activities and that is adequately insulated from the consequences of any related party’s insolvency. Simply put, Arbour One, Inc. and Cahaba Valley Development Corporation are both corporations which have been in business and have undertaken several transactions in the past; it is the desire of the Lender and the Tax Credit Investor that the general partner of the Petitioner be a newly formed entity insulated from the past history of Arbour One, Inc. and Cahaba Valley Development Corporation. These “SPE Requirements” that have become more commonplace over the past few years.

b. The violation of principles of fairness and imposition of a substantial hardship which would result from strict compliance with the provisions of FAC Rule 67-

48.002(111) would be as follows. Unless the foregoing request is granted, Lender and Tax Credit Investor have indicated an unwillingness to close on their respective financing transactions. The substantial hardship which would result from strict compliance with the foregoing Rule are obvious; Petitioner would at that point need to locate new debt and equity financing sources for the development of the Arbours at Williston project, with no assurance that such financing sources could be located. In addition, the transaction must be completed and placed in service no later than December 31, 2006. Delay in closing the debt and equity financing for the subject transaction could place Petitioner in danger of failing to meet the foregoing "placed in service" deadline.

c. A waiver of the Rules' restriction against change in general partners would serve the purposes of Florida Statute Section 420.5099(2), which provides that Respondent shall adopt procedures in order to encourage development of low-income housing in the state, taking into consideration the ability of the Applicant to proceed to completion of the project in the calendar year for which the credit is sought.

d. The waiver request contained herein in no way changes the ultimate identity of the principals responsible for development of Petitioner's housing development. Messrs. Stephen G. Lowitz, Gabriel H. Ehrenstein, John Moore, Jr. and David Sumrall continue to own 100% of the outstanding equity interests in the general partner, consistent with their ownership positions set forth in Exhibit 9 of Petitioner's 2004 Tax Credit Application. The foregoing four principals will continue to be responsible as guarantors of obligations to the Lender and the Tax Credit Investor, in the same manner as if Arbour One, Inc. and Cahaba Valley Development Corporation were to continue as general partners of the Applicant. The change of general partner is being requested to solely to accommodate and meet the "SPE Requirements" imposed by the Lender and Tax Credit Investor.

e. The requested Rule waiver will not adversely impact completion of the development.

f. By granting a waiver and permitting Petitioner to change the general partner in the manner set forth herein before completion of the project and issuance of a final housing credit allocation, Respondent would recognize the economic realities of developing and constructing affordable rental housing. This recognition would promote participation by owners and developers such as Petitioner, and lenders and tax credit equity purchasers such as Lender and Tax Credit Investor, in meeting Respondent's purpose by providing affordable housing, through new construction, in an economical and efficient manner.

7. The waiver being sought is permanent in nature.

RELIEF SOUGHT

8. The specific variance/waiver which Petitioner wishes Respondent to grant is to waive the requirements of Rule 67-48.002(111) and page 4 of the 2004 Universal Application Instructions, and to permit a change in the identity of the general partner of the Petitioner from Arbour One, Inc. and Cahaba Valley Development Corporation (the current general partners) to Williston GP, LLC, or such other similarly named newly formed Florida limited liability company of which Messrs. Lowitz, Ehrenstein, Moore and Sumrall will be the only members, each owning 25% of such newly formed entity.

WHEREFORE, Petitioner respectfully requests FHFC:

1. Waive the prohibition on change of a general partner prior to issuance of final housing credit allocation, in order to permit a newly formed Florida limited liability company wholly owned by the principals of the existing general partners to be substituted as the sole general partner of Petitioner, and to permit the withdrawal of Arbour One, Inc. and Cahaba Valley Development Corporation as general partners of the Petitioner.

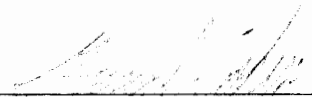
Respectfully Submitted,

By: 

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Miami, Florida 33131
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and one copy of the foregoing have been filed with Maelene Tyson, Corporation Clerk of the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301; and that a true and correct copy of the foregoing has been furnished to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300.


GARY J. COHEN, ESQ.