

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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TALLAHASSEE, FLORIDA

GRANDE OAKS, LLC, a Florida
limited liability company,

Petitioner,

vs.

APPLICATION NO. 2004-009S

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

**PETITION FOR WAIVER
FROM RULE 67-48.010(4), F.A.C.**

Grande Oaks, LLC ("Petitioner") hereby petitions the Florida Housing Finance Corporation ("Corporation") for a variance from Rule 67-48.010(4)(a), Florida Administrative Code (2004).

This Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104.002, Florida Administrative Code.

The Petitioner

1. The address, telephone number and facsimile number of the Petitioner are:

Grande Oaks, LLC
c/o JDF, LLC
340 Pemberwick Road
Greenwich, CT 06831
Office: (203) 869-0900
Facsimile: (203) 869-0900

2. The address, telephone number, and facsimile number of the Petitioner's counsel are:

Maureen McCarthy Daughton, Esq.
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301
Office: (850) 681-6810
Facsimile: (850) 521-1478

3. Petitioner successfully applied for a State Apartment Incentive Loan (“SAIL”) financing during the 2004 Universal Application Cycle - Multifamily Mortgage Revenue Bonds (MMRB) Program; State Apartment Incentives Loan (SAIL) Program; and Housing Credit (HC) Program. The SAIL financing was obtained to finance a portion of the costs of the acquisition, construction and equipping of a multifamily residential rental apartment complex to be known as Grande Oaks Apartments (the “Development” or the “Project”). The financing structure for the Development consists of a first mortgage loan from the Housing Finance Authority of Hillsborough County, Florida for tax-exempt bond proceeds and taxable bond proceeds in the aggregate amount of \$8,130,000 (the “Bond Loan”), a second mortgage loan from the City of Tampa in the amount of \$830,000 (the “City Loan”), and a third mortgage loan from the Corporation for the SAIL proceeds in the amount of \$2,000,000 (the “SAIL Loan”). With this financing structure, credit enhancement for the Bond Loan during the permanent phase is provided via a direct pay credit enhancement instrument from Fannie Mae. The Bond Loan for this Development closed on February 20, 2004, and conversion to the permanent phase occurred on October 21, 2005. The SAIL Loan closing for this Development occurred on June 24, 2005. The commitments from Fannie Mae and from GMAC Commercial Mortgage Corporation (as Fannie Mae’s DUS Lender) (collectively, the “Fannie Mae Commitment”) to enhance the Bond Loan during the permanent phase contemplated a second mortgage loan from Fannie Mae to replace the \$830,000 taxable bond portion (the “Taxable Bond Portion”) of the Bond Loan in conjunction with the conversion to the permanent phase. The Bond Loan, City Loan and SAIL

Loan financing structure was detailed in the Credit Underwriting Report - Final Report dated April 7, 2005, as approved by the Corporation's Board on April 22, 2005, prepared by AmeriNational Community Services, Inc. (the "Credit Underwriting Report"). The Credit Underwriting Report referenced the Fannie Mae Commitment, which detailed the replacement of the taxable bonds with a taxable fixed rate loan upon conversion to the permanent phase. The taxable fixed rate loan allows the Petitioner to lock in an interest rate on an otherwise variable rate loan. Accordingly, upon closing of the taxable fixed rate loan and redemption of the Taxable Bond Portion of the Bond Loan, Fannie Mae will enhance only the variable rate tax-exempt bonds, allowing the Petitioner to lock in an interest rate on an otherwise variable rate taxable loan. Although the transaction has converted to the permanent phase, effective as of October 21, 2005, Fannie Mae has approved a waiver to allow the Petitioner to close the taxable loan following the conversion to permanent financing.

The Rule From Which Variance Is Sought and Action Requested

4. Petitioner requests a variance from a portion of Rule 67-48, Part II (§§ 48.009-48.013), Florida Administrative Code (2004) (the "2004 SAIL Rule"). More specifically, Petitioner is seeking a variance from what is designated as Terms and Conditions of SAIL Loans, subsection (4)(a) of Rule 67-48.010 (2004), F.A.C. That section of the 2004 SAIL Rule provides:

(4) The loans described in Rule 67-48.010(3)(a) and (b), F.A.C., above shall be repaid from all Development Cash Flow, and if the SAIL loan is not a first mortgage loan, each year, subject to the provisions of subsection (6) below, Development Cash Flow shall be applied to pay the following items in order of priority:

(a) First mortgage fees and debt service;

* * *

Statute Implemented By The Rule

5. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act¹, the statute that created the SAIL program. See Section 420.5087, Florida Statutes.

Petitioner Requests A Variance Of The Rule Set Forth Above For The Following Reasons

6. (a) Prior to 2002, the SAIL Rule provided that the SAIL loan had to be in a first or second lien position. See Rule 67-48.010(2) (2001) (the “2001 SAIL Rule”). For purposes of the 2001 SAIL Rule, two prior mortgages that secured the same indebtedness and credit enhancement fees were considered to be in a single, prior position. See Rule 67-48.010(2) (2001). The SAIL loan payment provision of the 2001 SAIL Rule allowed for repayment of debt service on a first mortgage loan prior to repayment of SAIL loan debt service. See Rule 67-48.010(4)(a) (2001). Thus, under the 2001 SAIL Rule, the SAIL mortgage was required to be in a second lien position, and payment of first mortgage debt service prior to SAIL debt service was consistent with the Rule’s mortgage lien priority requirement.

(b) The SAIL Rule adopted for the 2002 application cycle provided that the SAIL loan was approved to be in a first, second or other subordinated lien position (emphasis supplied), Rule 67-48.010(2), F.A.C. (2002) (the “2002 SAIL Rule”). However, the payment provision of the 2002 SAIL Rule was not likewise modified to reflect repayment of debt service on a first or second mortgage prior to payment of a SAIL loan in a subordinate lien position. With the change to the 2002 SAIL Rule to allow the SAIL loan to be in a subordinate position beyond a second lien position, the 2002 SAIL Rule became inconsistent in that the payment

¹ The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.516 of the Florida Statutes.

structure did not change to allow the subordinate SAIL loan debt service payments to fall subsequent to prior mortgage debt service payments. That inconsistency has continued through each year's rule development, and remains in place in Rule 67-48.010(4), F.A.C. (2004).

(c) The financing structure of the Development detailed in the Credit Underwriting Report, reflects the SAIL Loan in a subordinate lien position to the Bond Loan and to the City Loan, and also references the Fannie Mae Commitment which clearly states that the Petitioner may convert a portion of the Bond Loan to a taxable loan provided by Fannie Mae. In conjunction with the conversion to permanent financing, the Petitioner elected to redeem the Taxable Bond Portion and replace the Taxable Bond Portion with a taxable loan from Fannie Mae. However, the 2004 SAIL Rule and the Promissory Note executed in connection with the SAIL Loan (the "SAIL Note") only allows for the payment of first mortgage fees and debt service prior to payment of the SAIL Loan fees and debt service. See Rule 67-48.010(4)(a)-(e). Fannie Mae, upon discovering that although it could be in a prior lien position with respect to the taxable loan, it would not receive payment of its debt service on the taxable loan prior to payment of debt service on the SAIL Loan, agreed to move forward with the conversion to permanent financing, and to allow the Petitioner to close the taxable loan upon the Corporation's granting Petitioner's petition to the Corporation for a Rule variance to permit payment of debt service on the second mortgage prior to payment of debt service on the subordinate SAIL Loan. Fannie Mae will require as a condition to the taxable loan closing that the SAIL Loan be subordinated, in form satisfactory to Fannie Mae, to the taxable mortgage loan. The SAIL Loan is already subordinated, via a Fannie Mae form of subordination agreement, to the Bond Loan. The approved form of subordination requires that the SAIL Loan lien priority, as well as the

payment priority, be subordinated. Without that subordination, Fannie Mae will not provide the taxable loan to the Petitioner.

(d) The repayment language contained in the 2004 SAIL Rule creates a substantial hardship in that it prevents Petitioner from locking in an interest rate on an otherwise variable debt loan. In the event the Petitioner maintains the Taxable Bond Portion in the form of taxable bonds, Fannie Mae requires that Petitioner purchase an interest rate cap to protect against fluctuations in the market on the variable rate taxable debt. Allowing Petitioner to replace the Taxable Bond Portion with a taxable fixed rate loan will eliminate Petitioner's obligation to purchase an interest rate cap on the taxable debt. Additionally, in light of the volatility of variable rate taxable debt, allowing Petitioner to replace the Taxable Bond Portion with a taxable fixed rate loan will eliminate the risk associated with variable rate taxable debt and provide Petitioner with a fixed debt service amount for the life of the taxable debt. At all times the Corporation was aware that debt in the principal amount of \$8,130,000 (for the Bond Loan) and \$800,000 (for the City Loan) was being serviced ahead of the SAIL Loan debt service. Petitioner is requesting that the Corporation simply allow (a) the bifurcation of that \$8,130,000 first mortgage debt into two separate loans (\$7,300,000 remaining as tax-exempt variable rate bond debt secured by a first mortgage loan, and \$830,000 in the form of a taxable fixed rate loan secured by a second mortgage loan), and (b) the payment of debt service (in addition to the debt service on the first mortgage loan which is already permitted under the 2004 SAIL Rule and the SAIL Note) on the \$830,000 taxable mortgage loan and the City Loan prior to debt service on the SAIL Loan.

Variance Will Serve the Underlying Purpose Of The Statute

7. Petitioner believes that a variance of the Rule will serve the purposes of the Statute which is implemented by the Rule. The Florida Housing Finance Corporation Act (Section 420.501, et seq.) was passed in order to encourage private and public investment in housing for persons of low income. The creation of the SAIL program was to provide first, second or other subordinated mortgage loans or loan guarantees to sponsors, including for-profit, non-profit and public entities, to provide housing affordable to very low income persons. (Section 420.5087, Florida Statutes). The use of the term “other subordinated mortgage loans” demonstrates that it was, at a minimum, contemplated that debt service on first or second mortgages would have repayment priority. The Corporation approved the SAIL Loan with \$8,130,000 of debt financing in first priority and \$800,000 of debt financing in second priority, with the SAIL Loan having third priority. Petitioner is not changing the amount of debt being serviced ahead of the SAIL Loan debt service. Petitioner structured its financing for the Development to ensure the economic viability of the Development. To prevent Petitioner from implementing the financing structure outlined as an option available to Petitioner in the Fannie Mae Commitment would serve to deter the economic viability of the Development, first, by diverting financial resources from the operation and maintenance of the Development to purchase interest rate caps for a variable rate taxable loan until the repayment in full of that debt, and second, by eliminating Petitioner’s ability to protect against the volatility of the variable rate taxable bond debt, which has the potential to increase beyond the rate of tax-exempt debt.

8. Additionally, the Corporation recognized in the Credit Underwriting Report that the City Loan is senior to the SAIL Loan, and thus Petitioner is also requesting a variance for the 2004 SAIL Rule to implement the financing structure as approved by the Corporation by

allowing the debt service payments due on the City Loan to be paid prior to debt service payments on the SAIL Loan.

9. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, to provide relief from its rule if strict application of the rule will lead to unreasonable, unfair and unintended consequences in particular instances. Unless the Rule variance is granted, the Petitioner will be subjected to a substantial hardship, which will have a negative and unintended effect on the viability of an otherwise economically reasonable project.

Type of Variance

10. The Petitioner requests a permanent variance of the Rule as set forth above.

11. Should the Corporation have questions or require any additional information, Petitioner is available to provide any additional information necessary per consideration of the Petition.

Action Requested

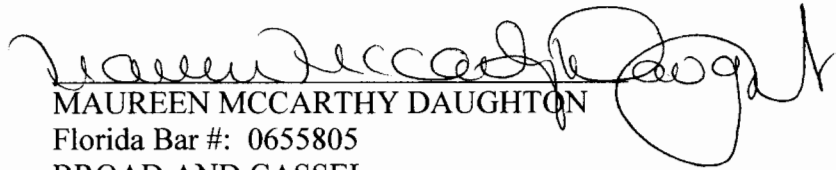
12. Petitioner requests the following:

a. That the Corporation grant the Petitioner a variance from Rule 67-48.010(4)(a), F.A.C. (2004) such that the Corporation allows the bifurcation of the Bond Loan into first and second mortgage loans, and the payment of debt service on first, second and third mortgage loans prior to payment of debt service on the SAIL Loan.

b. This variance will be permanent as to the Petitioner.

13. A copy of this Petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, FL 32399-1300.

Dated this 4 day of November, 2005.

A handwritten signature in black ink, appearing to read 'Maureen McCarthy Daughton', written over the printed name.

MAUREEN MCCARTHY DAUGHTON

Florida Bar #: 0655805

BROAD AND CASSEL

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