

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. _____
Application No. 2007-101BS

CEC TIMBER TRACE, LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

_____ /

**PETITION FOR WAIVERS OF RULE 67-48.004(1)(a),
RULE 67-21.003(1)(a) AND RULE 67-48.0075**

CEC Timber Trace, LLC (“Timber Trace”), a Florida limited liability company, petitions Florida Housing Finance Corporation (the “Corporation”) for a waiver of the restriction on changing the ownership structure of the Applicant under Rules 67-48.004(1)(a) and 67-21.003(1)(a), Florida Administrative Code (2007), as applied to the 2007 Universal Application Instructions, Part II.2.a(2) (“Application Instruction 2.a”), and for a waiver of principal forgiveness for ELI residential rental units under Rule 67-48.0075, Florida Administrative Code (2007).

1. Pursuant to Section 120.542, Fla. Stat. (2006), and Rules 28-104.001 through 28-104.006, F.A.C. (2006), Timber Trace requests a waiver of the Rules to (a) change its ownership structure, and (b) modify the automatic forgiveness term of the loan documents.

A. The Petitioner and the Development

2. The address, telephone and facsimile number of the Timber Trace is:

CEC Timber Trace, LLC
c/o Nick Kanieff,, Manager
151 Summer Street
Somerville, MA 02143
Telephone: 978-460-4166
Facsimile: 267-284-6934

3. The address, telephone and facsimile number of Timber Trace’s counsel is:

Brian J. McDonough, Esquire
Stearns Weaver Miller Weissler Alhadeff
& Sitterson, P.A.
150 W. Flagler Street, Suite 2200
Miami, FL 33130
Telephone: 305-789-3350
Facsimile: 305-789-3395
E-mail bmcdonough@swmwas.com

Mimi L. Sall, Esquire
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
200 East Las Olas Boulevard, Suite 2100
Fort Lauderdale, Florida 33130
Telephone: 954-462-9575
Facsimile: 954-462-9567
E-mail: msall@swmwas.com

4. Timber Trace submitted its Universal Application (the “Application”) during the 2007 Universal Cycle, and Florida Housing made a preliminary commitment for a loan under the State Apartment Incentive Loan Program (“SAIL Program”) comprised of a base loan amount of \$4,050,000 and a supplemental loan amount of \$1,020,000 for the total amount of \$5,070,000, an annual allocation of housing credits in an amount not to exceed \$439,910, and a preliminary allocation of tax-exempt bonds in an amount not to exceed 5,800,000 under the Multi-Family Mortgage Revenue Program (“MMRP Program”). The amounts allocated will be used for the acquisition and substantial rehabilitation of Timber Trace, a 116-unit rental development in Tampa, Hillsborough County, Florida (the “Development”). The Development is intended to serve the Family demographic, including extremely low and low income families.

5. The requested waivers will not adversely affect the Development, would not have affected consideration by Florida Housing of Timber Trace's Application, and would not have altered the scoring by Florida Housing that qualified Timber Trace for a SAIL loan and MMRB funding. Nor would the requested waivers have provided Timber Trace with an unfair competitive advantage over other applicants.

6. The requested waivers will ensure the financial feasibility of the Development and its ability to provide desperately needed affordable housing in Hillsborough County, Florida.

7. However, a denial of this Petition (a) would result in substantial economic hardship to Timber Trace; (b) could deprive Hillsborough County of essential, affordable housing units in a timely manner; and (c) would violate principles of fairness. § 120.542(2), Fla. Stat. (2006).

8. The waivers being sought are permanent in nature.

B. The Rules from which Relief is Requested and the Statute Implementing the Rules

9. Rules 67-48.004(1)(a) and 67-21.003(1)(a), F.A.C. (2007), adopt and incorporate the 2007 Universal Application Package, including the Application Instructions, used to apply for loans under the SAIL Program and for supplemental funding under the MMRB Program, respectively.

10. Timber Trace requests a waiver of Application Instruction 2.a that provides as follows:

If applying for MMRB, SAIL or HOME, the Applicant entity shall be the borrowing entity and cannot be changed until after loan closing. Replacement of the Applicant or a material change (33.3 percent 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 funding and shall be deemed a

material misrepresentation. Changes after loan closing require Board approval.

See 2007 Universal Application Instructions, Part II.2.a(2).

11. Rule 67-48.004(1)(a) implements, among other sections of the Florida Housing Finance Corporation Act (the “Act”)¹, the statutes that created the SAIL Program, and Rule 67-21.003(1)(a) implements the statutes that created the MMRB Program. §§ 420.5087 and 420.509, Fla. Stat. (2007).

12. Timber Trace also requests a waiver of Rule 67-48.0075 that provides:

The supplemental loan shall be (i) based on each ELI Set-Aside unit above the minimum ELI Set-Aside threshold requirement in the Universal Application instructions; and (ii) non-amortizing at 0% simple interest per annum over the life of the loan, with the principal forgivable provided the units *for which supplemental loan amount is awarded are targeted to ELI Households for at least 15 years.* (Emphasis added).

13. Rule 67-48.0075 implements the provisions of Section 34 of Chapter 2006-69 (H.B. No. 1363), which appropriated the sum of \$30,000,000 to assist in the production of housing units for extremely low-income persons as defined in Florida Statutes Section 420.0004(8). In the 2007 Universal Application Cycle, provision was made for the award of “supplemental” loans to applicants agreeing to set aside a specified percentage of apartment units to extremely low-income persons (“ELI Households”).

C. Justification for Timber Trace’s Requested Waivers

14. Florida Housing has the authority pursuant to Section 120.542(1), Florida Statutes and Chapter 28-104, F.A.C., to grant waivers to its rule requirements when strict application of

¹ The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.516 of the Florida Statutes. (the “Act”). See also Rule 67-40.020(1), F.A.C. (“‘Act’ means the Florida Housing Finance Corporation Act, section 420.501 through 420.516 of the Florida Statutes”).

such rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall 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 fairness², and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. § 120.542(2), Fla. Stat. (2006).

i. Waiver of Restrictions on a Material Change in Applicant’s Ownership Structure

15. Timber Trace requests a waiver of Application Instruction 2.a to change its sole member, Created Equal Communities, LLC, a foreign limited liability company authorized to do business in the State of Florida (“CEC”), to CEC Timber Trace Member, LLC, a Florida limited liability company (“CEC Timber Trace”).

16. In addition to being the current sole member of Timber Trace, CEC is also the Developer of the Timber Trace project. However, CEC’s dual role creates potentially adverse tax consequences for Timber Trace and could result in substantial economic hardship to Timber Trace. Further, investors in projects utilizing tax credits such as the Development require that the managing member of the owner and the Developer be separate legal entities.

17. Management of Timber Trace, however, will not be impacted by the change of its sole member as CEC is the sole member of CEC Timber Trace and, as a result, Timber Trace can rely upon and benefit from the identical expertise, experience, services, resources and support personnel available to CEC. Accordingly, the continuity, progress and quality of the Project will

² “Substantial hardship” means a demonstrated economic, technological, legal or other type of 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), Florida Statutes (2006).

not be disrupted or otherwise affected by a change in Timber Trace's sole member from CEC to CEC Timber Trace.

18. The change of Timber Trace's ownership structure is being requested solely to avoid unanticipated, negative tax consequences and to satisfy the anticipated requirements of the Timber Trace's tax credit investor.

ii. Forgiveness of the Principal Balance of the Supplemental Loan

19. As a consequence of potential negative federal income tax ramifications for forgivable loans, Timber Trace requests a waiver of Rule 67-48.0075's requirement for the automatic forgiveness of the principal balance of supplemental loans provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 20 years.

20. As a result, loan documentation for the supplemental loan to Timber Trace should provide that its principal "may be forgivable by Florida Housing, in its sole discretion, at maturity provided the units for which the supplemental loan amount were awarded were targeted to ELI Households for at least 20 years and remain in programmatic compliance." Alternatively, if the supplemental loan is not forgiven by Florida Housing, then the loan's maturity date should be extended for an additional 30 years for a total loan term of 50 years.

21. Florida Housing has the authority to provide relief from its rules if strict application of the rule will lead to unreasonable, unfair and unintended consequences in particular instances. § 120.542(1), Fla. Stat. (2006). In this instance, if the principal forgiveness requirement is not modified, Timber Trace could be subjected to "phantom taxable income" resulting in substantial financial burden to the Timber Trace.

D. Conclusion

22. Controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief from rule requirements when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results. Waivers should be granted when the applicant subject to the rule demonstrates that strict application would: (a) create a substantial hardship or violate principles of fairness; and (b) the purpose of the underlying statute has been or will be achieved by other means. § 120.542(2), Fla. Stat. (2006).

23. The requested waiver will not adversely impact the Development or Florida Housing, and will ensure that 116 affordable housing units will be available for families and individuals in Hillsborough County, Florida.

24. However, a denial of the requested waiver would result in a substantial hardship for Timber Trace. More significantly, Timber Trace could be denied the ability to deliver decent, safe, and affordable housing units to a market in desperate need of extremely low and low income housing.

25. Finally, by granting the requested waivers, Florida Housing would recognize the economic realities and principles of fundamental fairness in the development of affordable rental housing. This recognition would promote participation by experienced developer entities in meeting the purpose of Florida Housing Finance Corporation Act (the "Act"),³ through new construction, in an economical and efficient manner.

26. Should Florida Housing require additional information, Timber Trace is available to answer questions and provide all information necessary for consideration of its Petition for Waivers of Rule 67-48.004(1)(a), Rule 67-21.003(1)(a) and Rule 67-48.0075.

³ See §§ 420.501 through 420.516, Fla. Stat. (2006).

WHEREFORE, Petitioner Timber Trace, LLC, respectfully requests that Florida Housing Finance Corporation provide the following relief:

- A. Grant the Petition and all the relief requested herein;
- B. Waive the restriction against changing the Applicant's ownership structure and permit Timber Trace to change its sole member from Created Equal Communities, LLC, to CEC Timber Trace Member, LLC;
- C. Waive Rule 67-48.0075's requirement for the automatic forgiveness of the principal balance of supplemental loans provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 20 years and permit the loan documents for the supplemental loan to provide that its principal "may be forgivable by Florida Housing, in its sole discretion, at maturity provided the units for which the supplemental loan amount were awarded were targeted to ELI Households for at least 20 years and remain in programmatic compliance." Alternatively, if the supplemental loan is not forgiven by Florida Housing, then the loan's maturity date should be extended for an additional 30 years for a total loan term of 50 years; and
- D. Grant such other and further relief deemed appropriate.

Respectfully submitted,

Mimi L. Sall, Esquire
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Attorneys for Timber Trace, LLC
200 East Las Olas Boulevard, Suite 2100
Fort Lauderdale, Florida 33301
Telephone: 954-462-9575
Facsimile: 954-462-9575
E-mail: msall@swmwas.com

By: 
MIMI L. SALL

CERTIFICATE OF SERVICE

The original Petition is being served by overnight delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300, this 1st day of July, 2008

By:  _____
Mimi L. Sall