

BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

POWERS AVENUE APARTMENTS, LTD.,
a Florida limited partnership,

Petitioner,

vs.

FHFC CASE NO. 2008-049VW

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**PETITION FOR VARIANCE OF RULE 67-21.008(1)(b),
FLORIDA ADMINISTRATIVE CODE (2007) AND FOR WAIVER OF
RULE 67-48.0075(7)(a)(1), FLORIDA ADMINISTRATIVE CODE (2007)**

POWERS AVENUE APARTMENTS, LTD., a Florida limited partnership ("Petitioner"), by and through its undersigned counsel and pursuant to Section 120.542, Florida Statutes and Chapter 28-104, Florida Administrative Code ("F.A.C."), hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a variance of Rule 67-21.008(1)(b), Florida Administrative Code (2007), which imposes certain conditions on mortgage loans issued by the Corporation under its Multi-Family Mortgage Revenue Bond ("MMRB") Program, and for a waiver of that portion of Rule 67-48.0075(7)(a)(1) which requires the principal of a supplemental loan awarded in the 2007 Universal Application Cycle to be forgivable. In support, Petitioner states the following:

THE PETITIONER

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

**Powers Avenue Apartments, Ltd.
c/o JDF, LLC
340 Pemberwick Road
Greenwich, CT 06831**

FLORIDA HOUSING FINANCE CORPORATION
1000 N. W. 11th Street
Miami, Florida 33136
Tel: 305-375-3000
Fax: 305-375-3001
www.fhfc.com

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

Heather M. Conger, P.L.
Broad and Cassel
Suite 1400
390 North Orange Avenue
Orlando, Florida 32801
Phone: (407) 839-4252
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THE RULE FROM WHICH VARIANCE IS SOUGHT

3. Petitioner requests a variance of Rule 67-21.008(1)(b), F.A.C. (2007), which mandates that each recipient of a mortgage loan shall provide for a fully amortized payment of the loan beginning on the earlier of 36 months after closing, or stabilized occupancy or conversion to permanent financing pursuant to the loan documents.

THE RULE FROM WHICH WAIVER IS SOUGHT

4. Petitioner requests a waiver of that portion of Rule 67-48.0075(7)(a)(1), F.A.C. (2007) which mandates that the principal of a supplemental loan awarded in the 2007 Universal Application Cycle be forgivable provided the units for which the supplemental loan amount is awarded are targeted to Extremely Low Income ("ELI") Households for at least 15 years.

STATUTES IMPLEMENTED BY RULE 67-21.008(1)(b), F.A.C. AND BY RULE 67-48.0075(7)(a)(1), F.A.C.

5. Rule 67-21.008(1)(b), F.A.C. (2007), implements Sections 420.507 and 420.508, Florida Statutes. Section 420.507, Florida Statutes, authorizes the Corporation to, among other things, issue bonds for the provision of affordable housing; impose conditions respecting the granting of mortgage loans and make rules to carry out the purposes of and exercise any power granted by the Florida Housing Finance Corporation Act, Part V, of Chapter 420, Florida

Statutes.¹ Section 420.508, Florida Statutes, authorizes the Corporation to, among other things, make and participate in the making of mortgage loans for permanent or construction financing of development costs of projects subject to specified conditions, and to establish terms of mortgage loans funded pursuant to Part V of Chapter 420, Florida Statutes. Pursuant to these provisions, the Corporation has adopted Rule 67-21.008, F.A.C. (2007), entitled "Terms and Conditions of MMRB Loans." Rule 67-21.008(1)(b), F.A.C. (2007), provides:

(1) Each Mortgage Loan for a Development made by the Corporation shall:

(b) Provide for a fully amortized payment of the Mortgage Loan in full beginning on the earlier of 36 months after closing, or stabilized occupancy, or conversion to permanent financing under the loan documents and ending no later than the expiration of the useful life of the property, and in any event, no later than 45 years from the date of the Mortgage Loan.

* * *

6. Rule 67-48.0075(7)(a)(1), F.A.C. (2007), implements Sections 420.5087, Florida Statutes, and the provisions of Section 34 of Chapter 2006-69 (H.B. No. 1363). Section 420.5087, Florida Statutes, authorizes the Corporation to, among other things, make mortgage loans for financing of development costs of projects under the State Apartment Incentive Loan ("SAIL") Program subject to specified conditions, and to establish terms of such loans funded pursuant to Part V of Chapter 420, Florida Statutes. Section 34 of Chapter 2006-69 (H.B. No. 1363) appropriated funds to assist in the production of housing units for ELI Households. Pursuant to these provisions, the Corporation has adopted Rule 67-48.0075(7)(a)(1), F.A.C. (2007), entitled "Miscellaneous Criteria." Rule 67-48.0075(7)(a)(1), F.A.C. (2007), provides:

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

(7) Supplemental loans will be subject to the credit underwriting provisions outlined in Rule 67-48.0072 and the loan provisions outlined below:

(a) The terms and conditions of the supplemental loan shall be as follows: (1) 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 percent simple interest per annum over the life of the loan, with principal forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 15 years.

* * *

**JUSTIFICATION FOR GRANTING VARIANCE OF
RULE 67-21.008(1)(b), F.A.C. AND WAIVER OF RULE 67-48.0075(7)(a)(1), F.A.C.**

7. Petitioner applied for MMRB, SAIL and supplemental loan financing in the 2007 Universal Application Cycle (Application Number 2007-027BS), and was awarded an allocation of MMRB, SAIL and supplemental loan funds for the acquisition, construction and development of a 168-unit multifamily apartment complex located in Duval County, Florida (the "Development"). The financing for the Development is structured such that the Petitioner will receive SAIL funds, supplemental loan funds, and MMRB funding, which MMRB will be credit enhanced by Bank of America during the construction and permanent period. Petitioner has received approval from Bank of America for a thirty-six (36) month interest only period, subject to two (2) extensions of six (6) months each, with amortization to commence at such time, regardless of when stabilized occupancy or conversion to permanent financing occurs. However, because the Rule requires amortization to commence upon the earlier of 36 months after closing, stabilized occupancy or conversion to permanent financing, Petitioner seeks a variance from Rule 67-21.008(1)(b), F.A.C. (2007) to delay the start of the fully amortized payment of the mortgage loan to the Corporation for a period of up to an additional 12 months beyond the 36

months after closing of the MMRB financing that is currently allowed under the Rule, regardless of whether stabilized occupancy or conversion to permanent financing has occurred.

8. The Corporation is authorized by Section 120.542(1), Florida Statutes, and Rule Chapter 28-104, F.A.C., to grant variances to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended consequences in particular instances. Variances 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. Section 120.542(2), Florida Statutes. The application of this rule will have a material adverse effect on the viability of the Development.

9. In this case, strict application of Rule 67-21.008(1)(b), F.A.C. (2007) will create a substantial hardship for Petitioner. Petitioner has negotiated loan terms with its lender to allow sufficient time for rents to stabilize in today's market prior to servicing the principal on the debt. By stabilizing rents over a longer period of time, Petitioner is ensuring the economic viability of the Development and the ability of the Development to generate sufficient revenue to service the principal, interest, taxes and insurance for MMRB loan. Further, the variance will serve the underlying purpose of the statutes because the variance will ensure the viability of this affordable housing development by allowing Petitioner to proceed with a viable financing structure in a timely manner to acquire and construct the Development and thus continue the Corporation's purpose to provide decent, safe and affordable housing in Florida.

² "Substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance. "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 Rule 120.542(2), Florida Statutes.

10. In addition to MMRB funding and SAIL funds, the financing for the Development is structured such that the Petitioner will receive supplemental loan funds (the “ELI Loan”). In its application, Petitioner agreed to target ELI Households with respect to a specified percentage of units in the Development for at least 15 years. However, the Rule requires that the principal of such loan be forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 15 years. A forgivable loan will have negative federal income tax consequences for the Petitioner, and Petitioner therefore seeks a waiver of that portion of Rule 67-48.0075(7)(a)(1), F.A.C. (2007) that provides “with principal forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 15 years”. Petitioner requests that the ELI Loan be repaid at the end of the initial 15-year period, and that at the end of the initial 15-year period, Petitioner be given an automatic extension on the maturity date of the ELI Loan to a date coterminous with senior financing if the units for which the ELI Loan was awarded were targeted to ELI Households during that initial 15-year period. The Corporation is authorized by Section 120.542(1), Florida Statutes, and Rule Chapter 28-104, F.A.C., to grant waivers to its rule requirements when strict application of 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 fairness; and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. Section 120.542(2), Florida Statutes. The application of this rule will result in a substantial financial burden to the Petitioner.

11. In this case, strict application of Rule 67-48.0075(7)(a)(1), F.A.C. (2007) in this case will create a substantial financial hardship for Petitioner. The designation of the ELI Loan

as forgivable may, whether forgiven or not, cause the Internal Revenue Service to consider the loan as “phantom” taxable income, and the Petitioner may be subject to taxes on the ELI Loan even though it has not yet received the benefit of the ELI Loan being forgiven. In addition, the designation of the ELI Loan as forgivable may, whether forgiven or not, cause the full amount of the loan to be deducted from eligible basis, thereby reducing the net tax credit for the Development. Further, the waiver will serve the underlying purpose of the statutes because the waiver will ensure the viability of this affordable housing development by allowing Petitioner to proceed with a viable financing structure in a timely manner to acquire and construct the Development and thus continue the Corporation’s purpose to provide decent, safe and affordable housing in Florida.

ACTION REQUESTED

12. For the reasons set forth herein, Petitioner respectfully requests the Corporation to grant the requested variance of Rule 67-21.008(1)(b), F.A.C. (2007), to allow a delay of the start of payment of the fully amortized mortgage payments for a period of at least 36 months, and up to an additional 12 months beyond the 36 months, after closing of the MMRB financing, regardless of whether conversion to permanent financing or stabilized occupancy has occurred.

13. Additionally, for the reasons set forth herein, Petitioner respectfully requests the Corporation to grant the requested waiver of that portion of Rule 67-48.0075(7)(a)(1), F.A.C. (2007), to forgo the automatic forgiveness of the supplemental loan’s principal balance provided the units for which the supplemental loan amount was awarded were targeted to ELI Households for at least 15 years, and to instead cause the ELI Loan to be repaid at the end of the initial 15-year period, with an automatic extension on the maturity date at the end of the initial 15-year

period to a date coterminous with senior financing if the units for which the ELI Loan was awarded were targeted to ELI Households during that initial 15-year period.

14. A copy of the Petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, FL 32399-1300, as required by Section 120.542(5), Florida Statutes.

Respectfully submitted this ~~24th~~
2nd day of ~~June~~
July, 2008.



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