

BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

MALABAR COVE, L.L.L.P.,

Petitioner,

APPLICATION NO. 2007-197BS

vs.

FHFC CASE NO.: _____

FLORIDA HOUSING FINANCE CORP.,

Respondent.

**PETITION FOR WAIVER FROM FLORIDA
ADMINISTRATIVE CODE RULE 67-48.0072(4)(c)**

MALABAR COVE, L.L.L.P. ("Petitioner" or "Applicant"), by and through its undersigned attorney, hereby petitions the Florida Housing Finance Corporation ("Florida Housing" or "FHFC") for a waiver from Rule 67-48.0072(4)(c), Florida Administrative Code ("FAC"). This Petition is filed pursuant to Section 120.542, Florida Statutes and Chapter 28-104, Florida Administrative Code.

THE PETITIONER

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

Malabar Cove, L.L.L.P.
c/o Atlantic Housing Partners
329 North Park Avenue, Suite 300
Winter Park, Florida 32789
407-741-8682 (telephone)
(407) 643-2590 (facsimile)

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

Kerey Carpenter
AHG Group, LLC
1551 Sandspur Road
Maitland, Florida 32751
407-741-8534 (direct line)
407-551-2353 (facsimile)

3. Petitioner successfully applied for a State Apartment Incentive Loan (“SAIL”) in the 2007 Universal Application Cycle that Florida Housing administers pursuant to Chapter 67-48, Florida Administrative Code. Petitioner’s Application Number is 2007-197BS (the “Application”). Petitioner applied for SAIL to finance a portion of the costs to develop a 76-unit multifamily rental apartment community in Brevard County, Florida, to be known as Malabar Cove Phase I (the “Development”).

THE RULES FROM WHICH A WAIVER IS SOUGHT

4. Petitioner requests a waiver from Rule 67-48.0072(4)(c), as in effect for the 2007 Universal Application Cycle. Rule 67-48.0072(4)(c) provides in relevant part as follows:

(4)(c) For SAIL and HOME Applicants and Applicants eligible for a supplemental loan, the loan(s) must close within 14 months of the issuance of the preliminary commitment. Applicants may request one (1) extension of up to 10 months. All extension requests must be submitted in writing to the program administrator and contain the specific reasons for requesting an extension and shall detail the time frame to close the loan. The written request will then be submitted to the Corporation’s Board for consideration. The Board shall consider the facts and circumstances of each Applicant’s request and any credit underwriting report, if available, prior to determining whether to grant the requested extension. The Corporation shall charge a non-refundable extension fee of 1 percent of each loan amount if the Board approves the request to extend the commitment beyond the initial 14 month period. In the event the loan does not close within 24 months of the issuance of the preliminary commitment, the preliminary commitment or firm commitment, as applicable, will be deemed void and the funds will be deobligated.

STATUTES IMPLEMENTED BY THE RULE

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

6. Florida Housing has 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 such rules would lead to unreasonable, unfair and unintended consequences in particular

¹ The Florida Housing Finance Corporation Act is set forth in Section 420.501 through 420.526, Florida Statutes.

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 principals 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.

FACTS DEMONSTRATING ENTITLEMENT TO WAIVER

7. For the reasons set forth below, strict application with the provisions of the aforementioned Rule under the circumstances would give rise to substantial hardship to Petitioner, would violate principles of fairness and would lead to unreasonable, unfair and unintended consequences.

8. On October 1, 2007, FHFC issued a preliminary commitment letter and an invitation to enter credit underwriting for a SAIL loan in an amount up to \$4,000,000 and a Supplemental loan in the amount of \$680,000 for the Malabar Cove Phase I Development.

9. On September 3, 2008, Applicant provided a full and complete due diligence package to the FHFC credit underwriter. Applicant anticipated that a final credit underwriting report would be submitted for consideration by the FHFC Board of Directors at its October 31, 2008 board meeting. The Applicant timely submitted all additional information requested by the credit underwriter.

10. Prior to the October 31, 2008 board meeting, Applicant was advised by FHFC that the credit underwriters were overwhelmed with numerous credit underwriting reviews for other developments, and that they were unable to provide a report for the Malabar Cove Phase I Development prior to the October 31st board meeting. Applicant was advised that the final credit underwriting report would be presented to the FHFC Board of Directors at the November 14, 2008 board meeting instead. Having the credit underwriting report considered at this meeting

was critical because this was the last board meeting prior to Applicant's loan closing deadline of December 1, 2008. Again, at this point in time, Applicant had timely submitted all required information to the credit underwriter, had not missed any deadlines imposed on it by the FHFC rules governing the credit underwriting and loan closing process, and was ready, willing and able to close the loan on or before December 1, 2008.

11. Prior to the November 14, 2008 board meeting, Applicant was advised that a competitor had objected to approval of Applicant's SAIL loan because the competitor owned a development near in proximity to the Malabar Cove Phase I Development and alleged that the market for affordable housing was soft in the area. To address the concerns of the competitor, FHFC advised Applicant it desired to delay the consideration of Applicant's credit underwriting report until the next board meeting on December 12, 2008. FHFC advised Applicant that once again, the credit underwriters were busy processing numerous credit underwriting reports for other developments and were unable to provide a report that would address the competitor's objections prior to the November 14th board meeting. All other developments in line for the November 14, 2008 board meeting timely received final credit underwriting reports and were approved by the Board of Directors.

12. Because the Malabar Cove Phase I Development would not be considered by the FHFC Board of Directors in time for Applicant to meet its loan closing deadline, FHFC requested Applicant to submit a request for an extension of time to close the loans. FHFC advised that the extension request would be considered at the December 12, 2008 board meeting together with the final credit underwriting report. Applicant complied with FHFC's request and submitted an extension request to accommodate the scheduling of the credit underwriters and the desire of FHFC to review the objections raised by a competitor. This request for extension was

made notwithstanding that at all times prior to the October 31st and November 14th board meetings, Applicant was ready, willing and able to close the loans on or before the December 1, 2008 deadline. In fact, further evidencing Applicant's ability to timely close the SAIL loan, the tax-exempt bonds issued by the Brevard County Housing Authority closed on November 13, 2008.

13. At the December 12, 2008 board meeting, FHFC approved the final credit underwriting report for the Malabar Cove Phase I Development.

14. At this same board meeting, the FHFC Board of Directors also approved Applicant's request for an extension of time to close the loans. Upon receipt of the Consent Agenda portion of the board package, Applicant learned that the extension approval was subject to payment of an extension fee in the amount of \$40,000. A fee of this amount imposes a substantial financial burden on the Applicant and the Development and unfairly penalizes the Applicant for missing a deadline that it was fully prepared to meet.

15. In light of the considerable time that it takes to develop and construct multifamily rental housing, Florida Housing's statutes and rules are designed to allow the flexibility necessary to respond to unusual circumstances, particularly those that arise through no fault of the Petitioner, which might necessitate a waiver of the rules. Indeed, the specific purpose of Rule 67-48.0072(4)(c) is to allow an extension of time to close a loan, but with an extension fee designed to prevent developers from unnecessarily delaying the loan closing process. The extension fee is not designed to punish developers who are ready to close a loan but cannot because of competitors attempting to stop approval of the loan and caused by the heavy workload of the FHFC credit underwriters.

WAIVER WILL SERVE THE UNDERLYING PURPOSE OF THE STATUTE

16. Florida Housing's approval of the requested waiver would serve the purpose of the underlying Florida Statute, Section 420.5087. The purpose of both the Statute and the program is to facilitate and stimulate the development of multifamily rental housing that is affordable to families of limited means. If the requested waiver is granted, the SAIL allocation in question will be used to fund an affordable multifamily rental housing community for which there is a desperate need in the Brevard County, Florida—without the imposition of a substantial hardship and unfair penalty to the Development.

17. The violation of principles of fairness and imposition of a substantial hardship which would result from strict compliance with the provisions of FAC Rule 67-48.004(14) is obvious. It is fundamentally unfair and unreasonable to penalize the Applicant with a substantial financial burden caused by a competitor seeking to halt Applicant's development and further caused by the workload of FHFC's credit underwriters. Applicant was ready, willing and able to close its loans on or before the December 1, 2008 deadline. Applicant simply requested to extension to accommodate the request of FHFC, who desired to address the concerns of the competitor at a later board meeting. To impose a fee under these circumstances would punish the Applicant for unfounded conduct by a competitor and because of the workload of the credit underwriters.

18. By granting a waiver and allowing the extension to be granted without being subject to the payment of the extension fee, FHFC would appropriately address the unintended consequence and the unreasonableness and unfairness imposed by strict application of the rule and would allow the Applicant to meet Respondent's purpose by providing affordable housing, through new construction, in an economical and efficient manner.

TYPE OF WAIVER

19. The waiver being sought is permanent in nature.

ACTION REQUESTED

20. Petitioner requests a waiver from Rule 67-48.0072(4)(c) to allow approval of the request for extension without imposition of the extension fee.

Respectfully submitted this 16th day of December, 2008.



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CERTIFICATE OF SERVICE

I hereby certify that an original and one copy of the foregoing Petition for Waiver have been filed with 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.



Kerey Carpenter