

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

CASE NO. 2016-020VW

SOUTHERN VILLAS, LLC,
Petitioner

vs.

FHFC APPLICATION: 2014-377C
REQUEST FOR APPLICATIONS: 2014-104

FLORIDA HOUSING FINANCE
CORPORATION,
Respondent

**PETITION FOR WAIVER OF RULE 67-48.0072(13)(b)
FOR MAINTENANCE OF EXCESS RESERVE FUNDS**

Petitioner Southern Villas, LLC, a Wisconsin limited liability company (“Southern Villas”) submits its Petition to Respondent Florida Housing Finance Corporation (the “Corporation”) for a waiver of the Corporation’s prohibition on the escrow of replacement reserves in an amount exceeding 50% of the total amount of reserves required for a two year period. *See* Rule 67-48.072(13)(b), Florida Administrative Code.

In support of its Petition, Southern Villas states:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for Southern Villas and its qualified representative for Southern Villas’ application (the “Application”) in response to RFA 2014-104 for the Preservation of Existing Affordable Housing Developments (the “RFA”) are:

Southern Villas, LLC
200 North Main Street
Oregon, WI 53575
Attention: Hana Eskra
Telephone: (305) 668-5810
Facsimile: (608) 835-3922
E-Mail: heskra@gormanusa.com

2. The name, address, telephone and facsimile numbers for Southern Villas' attorney are:

Brian J. McDonough, Esq.
Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Telephone: (305) 789-3350
Facsimile: (305) 789-3395
E-Mail: bmcdonough@stearnsweaver.com

B. THE DEVELOPMENT

3. Southern Villas timely submitted its Application in response to the RFA for the development named "Southern Villas" (the "Development"). *See* Application No. 2014-377C. Financing for the acquisition of the Development included the assumption, by Southern Villas, of the existing so-called "§515 loans" (the "Existing Debt") made by the United States of America acting through the Rural Housing Service, United States Department of Agriculture ("USDA") to the then-current owner. A component of the Existing Debt was an existing replacement reserve account previously funded in the amount of \$486,515 (the Reserve Amount), which could not be expended, depleted or reduced in any manner prior to the land closing under USDA regulations, and therefore had to be assumed by Southern Villas along with the principal balance of the Existing Debt. The Reserve Amount exceeds the allowable escrow of replacement reserves under Rule 67-48.072 (13)(b), Florida Administrative Code (the "Rule"), which for the Development, is \$24,540. Accordingly, Southern Villas hereby petitions the

Corporation for a waiver of its prohibition on the escrow of replacement reserves in an amount exceeding 50% of the total amount of reserves required for a two year period.

4. The requested rule waiver will not adversely affect the Development. However, a denial of this Petition (a) will result in a substantial economic hardship to Southern Villas and (b) could deprive the residents of St. Johns County, Florida of 60 units of affordable housing and (c) would violate principles of fairness¹. Section 120.542(2), Fla. Stat. (2015).

5. The waiver being sought is permanent in nature.

C. RULES FROM WHICH WAIVER IS SOUGHT

6. Southern Villas requests a waiver from Rule 67-48.0072(13)(b) of the Florida Administrative Code (the “Rule”). Specifically, Southern Villas is requesting approval of the escrow of replacement reserves in an amount which exceeds 50% of the total amount of reserves required for a two year period. The Rule provides, in relevant part, as follows:

(13) For Competitive HC, SAIL, and HOME, in addition to operating expenses, the Credit Underwriter must include an estimate for replacement reserves and operating expense reserves deemed appropriate by the Credit Underwriter when calculating the final net operating income available to service the debt. A minimum amount of \$300 per unit per annum must be used for all Developments.

.....

(b)... An Applicant may choose to fund a portion of the replacement reserves at closing. The amount cannot exceed 50 percent of the required replacement reserves for two (2) years and must be placed in escrow at closing.

D. STATUTES IMPLEMENTED BY THE RULE

7. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, the statute that designated the Corporation as the housing credit agency

¹“ 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.

responsible for the allocation and administration of Low-Income Housing Tax Credits. See Section 420.5099, Florida Statutes.

E. PETITIONER REQUESTS A WAIVER FROM THE RULE FOR THE FOLLOWING REASONS

8. Southern Villas requests a waiver from Rule 67-48.0072(13)(b), Florida Administrative Code. Southern Villas is seeking a waiver from the Rule prohibiting the escrow of replacement reserves in an amount exceeding 50% of the total amount of reserves required for a two year period. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when (1) the person who is subject to the rule demonstrates that the application of the rule would 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. § 120.542(2), Fla. Stat. (2011).

9. The following facts demonstrate the circumstances which justify Southern Villas' request for waiver:

a. Southern Villas timely submitted its Application to the Corporation in response to the RFA, for the rehabilitation and preservation of 60 affordable housing units intended for occupancy by elderly households. Southern Villas was invited into credit underwriting for an allocation of housing credits on July 29, 2014. It closed on its acquisition and construction loans for the Development and the syndication of the housing credits on November 20, 2015.

b. The acquisition of the Development was funded, in part, by Southern Villas' assumption of the Existing Debt, including the Reserve Amount.

c. The maintenance of the Reserve Amount is governed by the provisions of 7 CFR §3560.306 (the “Code”). Under the Code and its attendant Asset Management Handbook (the “Handbook”) published by the Rural Housing Service within the USDA, the Reserve Amount can be used only for planned expenditures for replacements that are presented in the annual budget submitted to USDA prior to the beginning of the Development’s fiscal year. Special circumstances allow for disbursements in the event of emergency capital repair needs. Copies of the relevant Code and Handbook sections are attached hereto as Exhibits “A” and “B”, respectively.

d. The Development’s current annual budget submitted to USDA includes a line item for disbursement of \$100,000 from the Reserve Amount for asphalt repairs or replacement, which will be accomplished during the renovations which are currently ongoing. This will deplete the Reserve Amount to \$386,515, resulting in an excess of \$361,975 over the amount allowed under the Rule.

e. Following discussions with the Corporation, USDA has further agreed to disburse an amount approximately equal to \$212,000 from the Reserve Amount for tree removal, fencing and other site improvements, which will also be accomplished during the renovations which are currently ongoing. This will deplete the Reserve Amount to approximately \$150,000, resulting in an excess of \$125,460 over the amount permitted under the Rule.

f. The current fiscal year for the Development ends on September 30, 2016. There is no opportunity to amend the Development’s current annual budget prior to submission of the budget for the next fiscal year, which commences on October 1, 2016, to withdraw any additional funds from the Reserve Amount other than as set

forth in subsections (d) and (e) above, in a effort to further bring it closer to the amount allowed under the Rule. As evidenced by the letter from USDA attached hereto as Exhibit “C” (the “USDA Letter”) it is not permissible to draw down or deplete the Reserve Amount unless the withdrawal is approved by USDA.

g. The Code allows for the use of funds from the Reserve Amount for emergency purposes. At this time there is no emergent situation at the Development that would warrant an immediate disbursement that would bring the Reserve Amount closer to (or under) the limitations established under the Rule.

h. USDA requirements pertaining to its §515 loans such as those assumed by Southern Villas strictly limit the net cash flow that can be realized by the owners of such projects. Any return to the owner is required to be put into reserve accounts controlled by USDA such as the one in which the Reserve Amount is held, so there is no avenue for diversion or expenditure of the excess. The Reserve Amount is not available to Southern Villas to be spent in its discretion. Simply stated, Southern Villas has no alternative other than to continue to maintain, and even increase, the Reserve Amount in the manner required by the USDA under the Code.

i. For further information on the restricted nature of the Reserve Amount as controlled by USDA, please see the USDA Letter.

j. The Reserve Amount was not funded by Southern Villas at closing of the acquisition of the Development through any allocation of the loan proceeds or equity secured by Southern Villas for the Development. It was a previously-funded account which was assumed as part of the acquisition of the Development and such assumption was a non-negotiable feature of the transaction.

k. Southern Villas' scoring and allocation of housing credits would not have been affected by the existence of the excess Reserve Amount. There are no points associated with this aspect of the Application. Nor does this change adversely impact any other applicant in the RFA.

10. A waiver of the Rule's prohibition on the escrow of replacement reserves in an amount exceeding 50% of the total amount of reserves required for a two year period restriction would serve the purposes of Section 420.5099, F.S., and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means.

11. If the waiver requested herein is not granted, Southern Villas will suffer a substantial economic hardship by failing to meet the technical requirements of the Rule upon completion of the development. Failure to obtain IRS Form 8609 from the Corporation will result in rescission of the allocation of housing credits awarded to the Development. Southern Villas' investor member will withhold the equity contribution earmarked for paydown of its bridge financing upon benchmarks which include (a) the issuance of the Certificate of Occupancy, (b) the stabilization of the Development and (c) the issuance of the Form 8609, if the housing credits cannot be delivered as contemplated. Further hardship will stem from recapture obligations that will be owed to the investor member for capital contributions made prior to the benchmarks enumerated above. The Development will fail altogether as an affordable housing community.

12. Should the Corporation require additional information, a representative of Southern Villas is available to answer questions and to provide all information necessary for consideration of this Petition.

F. ACTION REQUESTED. Southern Villas requests the following:

- a. That the Corporation grant Southern Villas a waiver from Rule 67-48.0072(13)(b), Florida Administrative Code, allowing it to escrow replacement reserves in an amount exceeding 50% of the total amount of reserves required for a two year period;
- b. That the Corporation grant the Petition and all the relief requested therein; and
- c. That the Corporation grant such further relief as may be deemed appropriate.

Respectfully submitted,

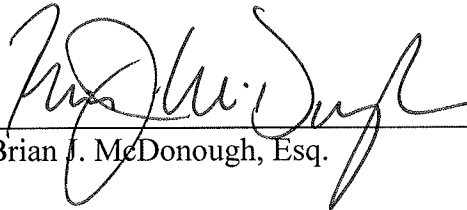
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By: _____


BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition is being served by overnight delivery for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, with copies served overnight delivery on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 23rd day of May, 2016.



Brian J. McDonough, Esq.

STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A.

Patricia K. Green
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Miami, FL 33130
Direct: (305) 789-3345
Fax: (305) 789-2621
Email: pgreen@stearnsweaver.com

May 23, 2016

Via FedEx

Ms. Kate A. Flemming
Legal Analyst/Corporation Clerk
Florida Housing Finance Corporation
227 N. Bronough Street
Suite 5000
Tallahassee, Florida 32301

RE: Petition for Rule Waiver

Dear Ms. Flemming:

Enclosed is a Petition for Rule Waiver, submitted on behalf of Southern Villas, LLC, for consideration by the Board at its next meeting. I have sent a duplicate copy to the Joint Administrative Procedures Committee. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Patricia K. Green

PKG/zs
Enclosure

cc: Joint Administrative Procedures Committee (with Enclosure)