

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

FHFC CASE NO. 2019-063VW
Application No.: 2018-044BS

WOODLAND GROVE APARTMENTS, LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

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FLORIDA HOUSING
FINANCE CORPORATION

**PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE
RULES 67-21.027(1) F.A.C (2017), 67-21.003(1)(a) F.A.C (2017), 67-48.023(2) F.A.C (2017),
67-21.003(8)(i) F.A.C (2017) AND 67-48.004(3)(i)**

Petitioner, Woodland Grove Apartments LLC (“Petitioner”), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation (“Florida Housing”) for (i) a waiver or variance from the provisions of Rules 67-21.027(1), Florida Administrative Code (2017), 67-48.023(2), Florida Administrative Code (2017), 67-21.003(8)(j) Florida Administrative Code (2017) and 67-48.004(3)(j), Florida Administrative Code (2017) (the “Rules”) to allow it to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C) and to change its designation of set-aside units and (ii) a waiver or variance of the provisions of RFA 2017-108 (the “RFA”) to allow petitioner to use the Average Income set aside, including without limitation, the provisions of Section Four A.6.d.(2)(a) of the RFA (requiring that at least 80% of the total units be set aside at 60% of area median income or less), Section Four 6.d.(3) of the RFA (stating the Total Set-Aside breakdown

for the Development) and Section Four 6.d.(2)(b)(i)(A) of the RFA (requiring that at least 10% of the total units be set aside as ELI Set-Aside units using 28% area median income). In support of this Petition, Petitioner states as follows:

Petitioner and the Development

The name, address, telephone, and facsimile numbers for Petitioner and its qualified representative are:

Woodland Grove Apartments, LLC
C/O Centennial Management Corporation
Attn: Lewis Swezy
7735 NW 146 Street, Suite 306
Miami Lakes, Florida 33016
Telephone: 305-821-0330
Fax: 305-821-0402

The name, address, telephone and facsimile numbers of Petitioner’s counsel is:

Randal M. Alligood, Esq.
Nelson Mullins Broad and Cassel
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801-4961
Email: Randy.alligood@nelsonmullins.com
Telephone: 407-839-4202
Fax: 407-650-0914

On October 10, 2017, Petitioner submitted Application No.2018-044BS in response to RFA 2017-108 for SAIL Financing of Affordable Multifamily Housing Developments to be Used in Conjunction with Tax-Exempt Bonds and Non-Competitive Housing Credits to assist in the construction of a 190-unit development located in Miami-Dade County, Florida, known as Woodland Grove (the “Development”).

Type of Waiver

The waiver being sought is permanent in nature.

Rules For Which a Variance Is Requested

Rules 67-21.027(1) and 67-48.023(2) required that each Development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code (the “IRC”) that was in effect at the time the rule was adopted. Prior to March 23, 2018, this Section of the IRC did not allow income averaging, and therefore Rules 67-21.027(1) and 67-48.023(2), which were adopted prior to that date also did not allow income averaging.

Rule 67-21.003(8)(j) provides, in relevant part, as follows:

“(8) Notwithstanding any other provision of these rules, there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application is deemed complete. Those items are as follows:

(j) The Total Set-Aside Percentage as stated in the last row of the total set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application...”

Rule 67-48.004(3)(j) provides, in relevant part, as follows:

“(3) For the SAIL, HOME and Housing Credit Programs, notwithstanding any other provision of these rules, the following items as identified by the Applicant in the Application must be maintained and cannot be changed by the Applicant after the applicable submission, unless provided otherwise below:

(j) For the SAIL and HC Programs, the Total Set-Aside Percentage as stated in the last row of the total set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application...”

Rule 67-21.003(1)(a) provides, as follows:

“If the NC Award will be in conjunction with other Corporation funding made available through the competitive solicitation funding process outlined in rule chapter 67-60, F.A.C., the Applicant shall apply for the NC Award using the forms and procedures specified in the applicable competitive solicitation for such other funding. Unless otherwise specifically provided in the solicitation, all of the substantive provisions of this chapter will continue to apply to the NC Award. Any references in this chapter to “Application” shall mean the application or response submitted for such other funding.”

Section Four A.6.(d)(2)(a)(i) of the RFA requires that the applicant must set aside at least 80% of the Development's total units at 60% area median income or less.

Section Four 6.d.(3) of the RFA requires that the applicant complete the Total Set-Aside Breakdown Chart for the Development.

Section Four 6.d.(2)(b)(i)(A) of the RFA requires that the applicant set aside at least 10% of the total units as ELI Set-Aside units (at 28% area median income).

Statutes Implemented by the Rules

The Rules implement, among other sections of the Florida Housing Finance Corporation Act (the “Act”), the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes.

Justification for Granting Waiver of the Rules and RFA Provisions

During its 2018 session, the United States Congress passed the “Consolidated Appropriations Act, 2018” (“H.R. 1625”), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

“(C) AVERAGE INCOME TEST. –

(i) IN GENERAL. – The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

(ii) SPECIAL RULES RELATING TO INCOME LIMITATION. -
For Purposes of clause (i)

(I) DESIGNATION. - The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

(II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

(III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.” Section 42(g)(1)(C), I.R.C. (2018)

Rules 67-21.027(1) and 67-48.0023(2) F.A.C. were revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. Petitioner's application in response to the RFA was submitted prior to the date of the adoption of the Average Income test under section 42 of the IRC and prior to the July 8, 2018 rule revisions. As the RFA was formulated prior to the adoption of the Average Income test under federal law, the RFA did not contain provisions which would allow the Petitioner to adopt that test. Nevertheless, federal law and Florida Housing's policy would permit Petitioner to elect to use the Average Income test. Therefore, waivers are necessary to implement both the intent of federal law and Florida Housing's policy.

More specifically, pursuant to the RFA, the Petitioner was required to set-aside 80% of the units at 60% area median income or less. Further, the Total Set-Aside Breakdown Chart in Petitioner's application was required to be completed in a manner that did not contemplate the use of the Average Income test. As such, the applicant indicated a commitment for MMRB and Non-Competitive Housing Credits at 100% at or below 60% area median income and a commitment for SAIL with 10% of units at or below 28% area median income and 90% of units at or below 60% area median income. If the Petitioner's application were submitted after the rule revisions for income averaging, the Petitioner would have been able to complete the Total Set-Aside Breakdown Chart for MMRB, SAIL and Non-Competitive Housing Credits in the manner consistent with the Average Income test. Petitioner would have designated units at various area median income levels rather than indicating percentages of total units at various area median income levels. Even if Petitioner designated percentages of area median income levels for SAIL and MMRB, it would have done so in a manner consistent with the Average Income test. Accordingly, to implement the intent of federal law and Florida Housing's policy, Petitioner

should be permitted to change certain of its responses in the application in order to comply with the Average Income test.

Therefore, in connection with Petitioners' request to elect the Average Income test, Petitioner is seeking a waiver of the Rules and the provisions of the RFA, to the extent necessary, to allow Petitioner to use the income averaging set aside and to change its set-aside percentages for MMRB (and, to the extent necessary, for SAIL) to permit the income averaging set aside for Non-Competitive Housing Credits. The income averaging set asides are currently contemplated to be 35 units at 30% area median income, 76 units at 60% area median income 53 units at 70% area median income and 26 units at 80% area median income. Therefore, the MMRB set aside is specifically requested to be reduced to 40% of the units at 60% of area median income. Furthermore, Petitioner requests a waiver, to the extent necessary, of the Rules and provisions of the RFA in connection with the requirement to allocate 10% of the total units as ELI set-aside units at 28% area median income. In connection with the Average Income Test, Petitioner will allocate units at 30% area median income to satisfy Florida Housing's Best Practices on Income Averaging guidelines with respect to ELI units. In fact, although such Best Practices guidelines would only require 29 units at 30% of area median income, Petitioner has agreed to set aside 35 units at 30% of area median income, in order to incentivize Florida Housing to grant the waivers herein, including specifically the MMRB set aside reduction.

Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to or variances from its requirements when strict application of the requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved

by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the 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.

Granting the requested variance in this instance would allow Petitioner to utilize the Average Income test as allowed by the Internal Revenue Code. Without a corresponding waiver of the Rules and provisions in RFA 2017-18 as described above, the Petitioner would be unable to utilize the Average Income test. The controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results. It would violate principles of fairness and put Petitioner and its Project at a competitive disadvantage with other Developments if Petitioner is not permitted to use the Average Income test solely because of when its application was submitted. Further, principles of fairness would be violated and it would be unreasonable if Petitioner is not permitted to use the Average Income test contrary to federal law. Using the Average Income test would not change the number of affordable housing units identified in the application as all units in the Development would remain affordable housing units under the Average Income test and would increase the number of ELI units. The application of the Average Income test would only change the designation of the set-aside units and the target AMI percentage for ELI units from 28% to 30% in accordance with Florida Housing's policy.

Additionally, by granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing (and ELI units therein) and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing. If

Petitioner were able to use the Average Income Test and modify the Total Set-Aside Percentages, the Petitioner would increase the 19 units initially designated at 28% area median income to satisfy the ELI set-aside requirement to 35 units at 30% area median income. A variance of the Rules would result in an increase in the supply of deeper set-aside units available for affordable housing. Additionally, with the use of the Average Income test, more units would be available to the workforce (i.e., those earning over 60% area median income but below 80% area median income) and would help provide affordable housing to those who would not otherwise qualify for affordable housing prior to the implementation of the Average Income test. The purpose of the underlying statute, which is to “encourage development of low-income housing in the state” (§420.5099, Fla. Stat.), would still be achieved if the variance is granted.

We recognize that Florida Housing’s policy states that the MMRB set aside should not be changed. However, in this case, a change in the MMRB set aside to 40% of the units at 60% of area median income to allow Petitioner to use the Average Income test would have no effect on the tax exempt status of the MMRB, or the length of time the affordable requirements would need to be met (i.e., 50 years) and would comply with the requirements of the Rules and provide an additional concession of more ELI units (from 29 units to 35 units as described above), not heretofore required. Given that such a change in the designated set-aside for the MMRB would be immaterial (other than to permit the use of the Average Income test and the public benefit of additional ELI units), it seems that prohibiting the change in this case would be unreasonable and would conflict with the intent of federal law and Florida Housing’s Rules to permit the use of the Average Income test. To put an MMRB deal at a disadvantage seems arbitrary and unfair in this case.

In this instance, Florida Housing has jurisdiction to grant a waiver of the rule and Petitioner meets the standards for a waiver of the Rule.

Action Requested

WHEREFORE, Petitioner respectfully requests that Florida Housing:

Grant this Petition and all relief request therein;

Grant a variance from the Rules and allow for calculation of the minimum set aside percentage based on income averaging;

Grant a variance from Section Four A.6.d.(2)(a), Section Four 6.d.(3) of RFA 2017-108 and Section Four 6.d.(2)(b)(i)(A); and

Grant such further relief as may be deemed appropriate

Respectfully submitted this 11 day of July, 2019.



Randal M. Alligood, Esq.
Fla. Bar No. 459445
Nelson Mullins Broad and Cassel
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4200
Facsimile: (407) 425-8377
Email: randy.alligood@nelsonmullins.com
COUNSEL FOR PETITIONER

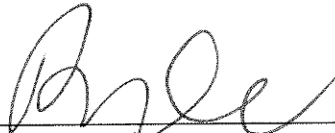
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org,

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

This 12 day of July, 2019.



Randal M. Alligood, Esq.
Fla. Bar No. 459445