

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

HUNTER'S RUN, LLC, a Florida  
limited liability company

Petitioner,

vs.

APPLICATION NO. 2003-054S

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

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**PETITION FOR VARIANCE  
FROM RULE 67-48.010(4), F.A.C.**

Hunter's Run, LLC ("Petitioner") hereby petitions the Florida Housing Finance Corporation ("Corporation") for a variance from Rule 67-48.010(4)(a), Florida Administrative Code. This Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104.002, Florida Administrative Code.

**The Petitioner**

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

Hunter's Run, LLC  
c/o JDF, LLC  
599 West Putnam Avenue  
Greenwich, CT 06830  
(203) 413-0330

2. The address, telephone number and facsimile number of the Petitioner's representative are:

Maureen Daughton, Esq.  
Broad and Cassel  
215 South Monroe Street, Suite 400  
Tallahassee, Florida 32301  
(850) 681-6810

3. Petitioner successfully applied for State Apartment Incentive Loan (“SAIL”) financing during the 2003 Universal Application Cycle - Multifamily Mortgage Revenue Bonds (MMRB) Program; State Apartment Incentives Loan (SAIL) Program; and Housing Credit (HC) Program. The SAIL financing was obtained to finance a portion of the costs of the acquisition, construction and equipping of a multifamily residential rental apartment complex to be known as Morgan Creek Apartments, f/k/a Pebble Creek Apartments (the “Development” or the “Project”). The financing structure for the Development consists of a first mortgage loan from the Housing Finance Authority of Hillsborough County, Florida for tax-exempt bond proceeds, a second mortgage loan from SunTrust Bank for a taxable loan, and a third mortgage loan from the Corporation for the SAIL proceeds. This financing structure was detailed in the Revised Final Report dated March 15, 2004, prepared by AmeriNational Community Services, Inc., and approved by the Corporation’s Board on April 2, 2004. With this financing structure, which closed in 2003, credit enhancement for the tax-exempt bonds is provided via a direct pay credit enhancement instrument from Fannie Mae, with Fannie Mae relying on a letter of credit from SunTrust Bank during the construction period. The taxable loan provided by SunTrust Bank will be assigned to Fannie Mae at conversion to permanent financing. The taxable loan allows the Petitioner to lock in an interest rate on an otherwise variable rate loan. Accordingly, the credit enhancer of the tax-exempt bonds, while having the ability to enhance both tax-exempt and taxable variable rate debt, is only enhancing the variable rate tax-exempt bonds and is providing the taxable portion via a second mortgage loan rather than enhancing taxable bonds. The tax-exempt bond and second mortgage loan financing occurred in 2003. The SAIL loan closing must close

by June 4, 2004, the date which is sixty (60) days following the issuance of the SAIL loan commitment letter from the Corporation.

**The Rule From Which Variance Is Sought and Action Requested**

4. Petitioner requests a variance from a portion of Rule 67-48, Part II (§§ 48.009-48.013), Florida Administrative Code (the "SAIL Rule"). More specifically, Petitioner is seeking a variance from what is designated as Terms and Conditions of SAIL Loans, subsection (4)(a) of Rule 67-48.010 (2003), F.A.C. That section of the Rule provides:

(4) The loans described in paragraphs 67-48.010(3)(a), and (b), F.A.C., above shall be repaid from all Development Cash Flow, and if the SAIL loan is not a first mortgage loan, each year, subject to the provisions of paragraph (6) below, Development Cash Flow shall be applied to pay the following items in order of priority:

(a) First mortgage fees and debt service;

\* \* \*

**Statute Implemented By The Rule**

5. The statute that the Rule is implementing is Section 420.507, Florida Statutes.

**Petitioner Requests A Variance Of The Rule Set Forth Above For The Following Reasons**

6. (a) Prior to 2002, the SAIL Rule provided that the SAIL loan had to be in a first or second lien position. See Rule 67-48.010(2) (2001). For purposes of the 2001 SAIL Rule, two prior mortgages that secured the same indebtedness and credit enhancement fees were considered to be in a single, prior position. See Rule 67-48.010(2) (2001). The SAIL loan payment provision of the 2001 SAIL Rule allowed for repayment of debt service on a first mortgage loan prior to repayment of SAIL loan debt

service. See Rule 67-48.010(4)(a) (2001). Thus, under the 2001 SAIL Rule, the SAIL mortgage was required to be in a second lien position, and payment of first mortgage debt service prior to SAIL debt service was consistent with the Rule's mortgage lien priority requirement.

(b) As with the SAIL Rule adopted for the 2002 application cycle, the SAIL Rule adopted for the 2003 application cycle provided that the SAIL loan was approved to be in a first, second or other subordinated lien position (emphasis supplied), Rule 67-48.010(2), F.A.C. (2003). However, the payment provision of the 2003 SAIL Rule was not likewise modified to reflect repayment of debt service on a first or second mortgage prior to payment of a SAIL loan in a subordinate lien position. With the change to the 2003 SAIL Rule to allow the SAIL loan to be in a subordinate position beyond a second lien position, the 2003 SAIL Rule became inconsistent in that the payment structure did not change to allow the subordinate SAIL loan debt service payments to fall subsequent to prior mortgage debt service payments.

(c) The financing structure of the Development, which reflects the SAIL loan in a subordinate lien position to the first and second mortgage, was approved by the Corporation's Board of Directors on April 2, 2004. With that approval, Petitioner has proceeded with the transaction as structured, and is scheduled to close the SAIL financing on or before June 4, 2004. SunTrust Bank and Fannie Mae, through its servicer, GMAC Commercial Mortgage Corporation, the ultimate holder of the second mortgage loan upon conversion of the Development to permanent financing, will require the Corporation to enter into subordination agreement, in form satisfactory to Fannie Mae, subordinating the SAIL loan to the second mortgage loan. The approved form of

subordination requires that the SAIL loan lien priority, as well as the payment priority, be subordinated. Without that subordination, the SAIL loan will not be considered approved subordinate financing, and Petitioner will have to choose to (a) not close on the SAIL loan so that the SunTrust Bank/Fannie Mae financing documents will not be violated, or (b) close on the SAIL loan and repay the taxable second loan debt, either of which will leave Petitioner with a substantial shortfall of financing needed to complete and operate the Development.

(d) The repayment language contained in the 2003 SAIL Rule creates a substantial hardship in that the financing structure with respect to the first and the second mortgage loans is already in place on the Development. The Corporation was aware of this financing structure when it approved the SAIL Final Report at its April 2, 2004 Board meeting. In the event Petitioner's petition is not granted to allow the Corporation to subordinate the SAIL loan to the first and second mortgage loans, both in priority and in payment, Petitioner will have to locate a substitute financing source to cover the shortfall that will result if the SAIL loan is not closed (or if the SAIL loan is closed and the taxable second loan is instead repaid), and if substitute financing cannot be obtained, the economic viability of the Development will be jeopardized, as the SAIL proceeds and the taxable loan proceeds are both an integral funding source for the development and operation of the Development. The Petitioner cannot move forward with the SAIL loan if this Petition for Rule Variance is not granted, as closing the SAIL loan will cause a default under the SunTrust Bank/Fannie Mae financing documentation, which will result in the collapsing of the bond financing transaction, and ultimately, the collapsing of the Development. Petitioner's only alternative is to close on the SAIL loan

and repay the taxable loan, which will jeopardize the financial viability of the Development by eliminating one of the financing sources on which the Development relied.

**Variance Will Serve the Underlying Purpose Of The Statute**

7. Petitioner believes that a variance of the Rule will serve the purposes of the Statute which is implemented by the Rule. The Florida Housing Finance Corporation Act (Section 420.501, et seq.) was passed in order to encourage private and public investment in housing for persons of low income. The creation of the SAIL program was to provide first, second or other subordinated mortgage loans or loan guarantees to sponsors, including for-profit, non-profit and public entities, to provide housing affordable to very low income persons. (Section 420.508, Florida Statutes). The use of the term “other subordinated mortgage loans” demonstrates that it was, at a minimum, contemplated that debt service on first or second mortgages would have repayment priority. Petitioner structured its financing for the Development to ensure the economic viability of the Development. Petitioner’s ability to develop the Development hinged on certain financial sources being available to Petitioner to complete the acquisition, construction, development and equipping of the Development. Petitioner has already closed on the first and second mortgage loan financing, which financing structure was approved by the Corporation when the SAIL financing was approved for the Development. To now require that the second mortgage lender subordinate its payment to the payment of the SAIL loan debt service, in contravention of the financing structure already in place, in essence denies Petitioner the SAIL funding it was awarded. The first and second mortgage lenders will require the Corporation to subordinate the SAIL loan in

lien and payment priority, to the first and second mortgage loans, and without the Corporation's subordination, the Borrower risks default under the prior mortgage loan documents if it chooses to go forward with the SAIL financing (unless it repays the taxable mortgage loan), or risks the economic viability of the Development by not closing on funds that are much needed for the development and operation of the Development.

8. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, to provide relief from its rule if strict application of the rule will lead to unreasonable, unfair and unintended consequences in particular instances. Unless the Rule variance is granted, the Petitioner will be subjected to a substantial hardship, which will have a negative and unintended effect on the viability of an otherwise economically reasonable project.

#### **Type of Variance**

9. The Petitioner requests a permanent variance of the Rule as set forth above.

10. A copy of this Petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, FL 32399-1300.

Dated this \_\_\_\_\_ day of April, 2004.

**PETITIONER**

**SAWGRASS PINES, LLC**, a Florida limited liability company

By: TRG GP LLC, a Florida limited liability company, its managing member

By: \_\_\_\_\_  
Kristin M. Miller, President



**HUNTER'S RUN, LLC**, a Florida limited liability company

By: TRG GP LLC, a Florida limited liability company, its managing member

By:  \_\_\_\_\_  
Kristin M. Miller, President