

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

In Re: SPINAL CORD LIVING-ASSISTANCE
DEVELOPMENT, INC. (SCLAD).

FHFC Case No. : 2007-027VW
Application No. : 2007-024H

**ORDER DENYING WAIVER FROM
RULE 67-48.004(14)(n), FLORIDA ADMINISTRATIVE CODE**

THIS CAUSE came on for consideration and final action before the Board of Directors of Florida Housing Finance Corporation on September 21, 2007, pursuant to a Petition for Variance or Waiver of Rule 67-48.004(14)(n), Florida Administrative Code, (the "Petition"). Florida Housing Finance Corporation ("Florida Housing") received the Petition on July 31, 2007, from National Development Foundation, Inc., ("Petitioner"). On August 10, 2007, the Notice of the Petition was published in Volume 33, Number 32, of the Florida Administrative Weekly. Florida Housing received no comments regarding the Petition. After careful review of the record and being otherwise fully advised in the premises, the Board of Directors (the "Board") of Florida Housing hereby finds:

1. The Board has jurisdiction over the subject matter of this case and the parties hereto.

BY: WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION
Sheryl Green /DATE: 9-21-07

2. During the 2007 Universal Cycle, Spinal Cord Living-Assistance Development, Inc. (SCLAD), applied for \$1,100,000.00 in HOME Investment Partnerships Rental Program (“HOME”) funding to construct an 18-unit barrier-free rental project for persons with disabilities in Miami-Dade County, Florida.

3. Rule 67-48.004(14)(n), Florida Administrative Code (2007), states in pertinent part:

(14) Notwithstanding any 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 Deadline. Failure to submit these items in the Application at the time of the Application Deadline shall result in rejection of the Application without opportunity to submit additional information. Any attempt to change these items will not be accepted. Those items are as follows:

(n) Funding Request (except for Taxable Bonds) amount;

4. Section 120.542(2), Florida Statutes provides in pertinent part:

Variations 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.

5. Petitioner requests a variance or waiver from the above Rule to allow Petitioner to change its funding application to cover a financing shortfall created when Bank of America did not provide a firm commitment during the 2007 Universal Cycle. Petitioner listed Bank of America on it’s 2007 Universal Cycle

application for First Mortgage Financing in the amount of \$521,009. Bank of America did not provide a firm commitment so Petitioner attempted to cure the deficiency by changing its application to defer its \$205,000 Developer Fee and by increasing its HOME funding request by an additional \$316,000 in HOME funding.

6. Section 120.542, Florida Statutes (2006), provides that petitions for a waiver of agency rules shall be granted when the person requesting the waiver demonstrates that the purpose of the underlying statute will or has been achieved by other means by the person, and when the application of the rule in question would create a substantial hardship or would violate the principles of fairness. Both of these elements are necessary to meet the threshold for the granting of a waiver of an agency rule.

7. Petitioner alleges that granting the waiver of Rule 67-48.004(14)(n), Florida Administrative Code, would serve the underlying purpose of the statute, in that it will enable Petitioner to obtain funding for the Development, thereby aiding it in accomplishing the statutory goals of providing affordable housing to the residents of Florida. Petitioner alleges that if the Agency does not waive the Rule, the SCLAD Plaza would not be eligible for funding under the HOME program. Petitioner would be forced to seek funding elsewhere which would result in delays in the development and increase the construction costs. Petitioner alleges that the

increased costs would jeopardize the affordability for the project's intended users. Petitioner finally alleges if the waiver is not granted that it would lose \$300,000 awarded by Miami-Dade County in Surtax funds.

8. Granting this waiver would not serve the purpose of the underlying statute. Florida Housing is charged under Section 420.5089(2), Fla. Stat., to make HOME loans available under a selection process established and described by Florida Housing's rules, and under Section 420.5089(6), Fla. Stat., applications for loans under any competitive scoring process established by Florida Housing rule must be approved by a review committee. Granting Petitioner's waiver request would undermine the competitive application process, by allowing Petitioner to ignore a rule which all other applicants are required to adhere.

9. Section 120.542, Florida Statutes (2006), defines "substantial hardship" as a demonstrated economic, technological, legal, or other type of hardship to the person, and provides that "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.

10. Petitioner has not demonstrated a substantial hardship resulting from the application of the rule. Petitioner had an opportunity to cure its financing

shortfall by providing a firm commitment from Bank of America. Instead of acquiring the firm commitment the Petitioner sought to increase funding under the HOME program in direct violation of Rule 67-48.004(14)(n), Florida Administrative Code. Petitioner alleges that it would suffer a substantial hardship should its Petition be denied, but those consequences are no different for any other applicant in the Universal Cycle who failed to properly comply with the requirements of the Rule.

11. Petitioner has not demonstrated that the literal application of Rule 67-48.004(14)(n), Florida Administrative Code, affects Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule, and therefore has not demonstrated that the literal application of the Rule violates the principles of fairness as defined in Section 120.542, Florida Statutes (2006). It would be fundamentally unfair to the other approximately 190 applicants currently seeking funding in the 2007 Universal Cycle to allow Petitioner to increase a funding request this long after the deadline for applications.

12. The policy precedent set by any rule variance or waiver is a consideration that Florida Housing should be able to take into account. Here, granting the waiver would be contrary to Florida Housing's decision in Fifth

Avenue Estates, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2002-025 (*per curiam affirmed*, 875 So.2d 1242 (Fla. 1st DCA 2004)). There Florida Housing determined that maintaining the integrity of the competitive application process was paramount, notwithstanding that the petitioner's own error in failing to comply with the application rule resulted in hardship. Petitioner's attempt to rectify its own neglect by evading the rules would undermine the competitive process mandated by the Florida Legislature. See in re National Development Foundation, Inc., 2007-022VW, July 27, 2007.

IT IS THEREFORE ORDERED:

The Petition for Variance or Waiver of Rule 67-48.004(14)(n), Florida Administrative Code, is hereby **DENIED**.

DONE and ORDERED this 21st day of September, 2007.

Florida Housing Finance Corporation



By: Lynn M. Stultz
Lynn M. Stultz, Chair

Copies furnished to:

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Joint Administrative Procedures Committee
Attention: Ms. Yvonne Wood
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NOTICE OF RIGHTS

A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTIONS 120.542(8), 120.569, AND 120.57, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.