

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. _____
Application No. 2006-362CHR (2006 RRLP)

ECLIPSE WEST ASSOCIATES, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

PETITION FOR WAIVERS OF RULE 67ER06-27(14)(b)
AND RULE 67ER06-34(4)

Petitioner Eclipse West Associates, Ltd., a Florida limited partnership (“Eclipse”), petitions Florida Housing Finance Corporation (the “Corporation”) for a waiver of the restriction under Rule 67ER06-27(14)(b), Florida Administrative Code (2006), on changing the identify of a developer in Applications submitted under the 2006 Rental Recovery Loan Program (“RRLP Program”) and for a waiver of principal forgiveness under Rule 67ER06-34(4), Florida Administrative Code (2006), for ELI residential units.

1. Pursuant to Section 120.542, Fla. Stat. (2006), and Rules 28-104.001 through 28-104.006, F.A.C. (2006), Eclipse requests a waiver of the Rules to (a) change the identity of its developer from an accrual basis taxpayer to a cash basis taxpayer, and (b) modify the automatic forgiveness term of the loan documents.

A. The Petitioner and the Development

2. The name, address, and telephone and facsimile numbers for Eclipse and its qualified representative are:

Eclipse West Associates, Ltd.
c/o Reliance-Eclipse West, LLC
Attention: Robert O. Jackson, its managing member
805 East Broward Boulevard, Suite 200
Fort Lauderdale, Florida 33301
Telephone: 954-927-4545
Facsimile: 954-764-7860

3. The address, telephone and facsimile number of Eclipse's counsel is:

Brian J. McDonough, Esquire	Mimi L. Sall, Esquire
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.	STEARNS WEAVER MILLER WEISSLER ALHADEFF & SITTERSON, P.A.
150 W. Flagler Street, Suite 2200	200 East Las Olas Boulevard, Suite 2100
Miami, FL 33130	Fort Lauderdale, Florida 33130
Telephone: 305-789-3350	Telephone: 954-462-9575
Facsimile: 305-789-3395	Facsimile: 954-462-9567
E-mail bmcdonough@swmwas.com	E-mail: msall@swmwas.com

4. Eclipse submitted its 2006 RRLP Application for an RRLP Loan and competitive housing credits ("HC"), and Florida Housing awarded Eclipse a preliminary commitment for a 2006 RRLP Loan comprised of a base loan amount of \$4,316,235 and a supplemental loan amount of \$1,715,000 for the total amount of \$6,031,235, and preliminary allocation of HCs in an amount not to exceed \$2,435,000. The financing will be used for the development of Eclipse, a new 101-unit high-rise apartment building (the "Development") in Fort Lauderdale, Broward County, Florida.² Ninety-six units will be housing tax credit units intended to serve the Family demographic, including extremely low and low income families.

² On March 14, 2008, Florida Housing granted Eclipse's First Amended Petition for a Waiver of Rules 67ER06-27(14)(j) and 67ER06-27(14)(k) of the 2006 Rental Recovery Loan Program to Change the Number of Units and Total Set-Aside Percentage in the 2006 RRLP Application. As a result, the number of units was reduced from 117 to 101, and the RRLP base loan amount was proportionally reduced from \$5 million to \$4,316,235 and the supplemental loan amount was reduced from \$1,995,000 to \$1,715,000.

5. The requested waivers will not adversely affect the Development, would not have affected consideration by Florida Housing of Eclipse's 2006 RRLP Application, and would not have altered the scoring by Florida Housing that qualified Eclipse for a 2006 RRLP Loan and HC allocations. Nor would the requested waivers have provided Eclipse with an unfair competitive advantage over other applicants.

6. The requested waivers will ensure the financial feasibility of the Development and its ability to provide desperately needed affordable housing in Broward County, Florida.

7. However, a denial of this Petition (a) would result in substantial economic hardship to Eclipse; (b) could deprive Broward County of essential, affordable housing units in a timely manner; and (c) would violate principles of fairness. § 120.542(2), Fla. Stat. (2006).

8. The waivers being sought are permanent in nature.

B. The Rules from which Relief is Requested and the Statute Implementing the Rules

9. Eclipse requests a waiver of Rule 67ER06-27(14)(b) that identifies certain non-curable matters in an application for a 2006 RRLP loan as follows:

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 Deadline. ... Those items are as follows:

(b) Identity of each Developer, including all co-developers

10. Eclipse also requests a waiver of Rule 67ER06-34(4) that provides:

The supplemental loan shall be non-amortizing and shall be based on each ELI unit at 0% simple interest per annum *with the principal forgivable provided the units for which supplemental loan amount is awarded are targeted to ELI Households for at least 20 years.* (Emphasis added).

11. The Rules for which this waiver is requested are implementing the statute enacting Florida's response to housing disasters resulting from the 2004 and 2005 hurricane seasons. § 420.55, Fla. Stat. (2006).

12. Specifically, "[t]he Florida Housing Finance Corporation is authorized to provide funds to eligible entities for affordable housing recovery in those areas of the state which sustained housing damage due to hurricanes during 2004 and 2005." Florida Housing adopted emergency rules pursuant to § 120.54, Fla. Stat. (2006), and the Legislature found "that emergency rules adopted pursuant to this section meet the health, safety, and welfare requirement of s. 120.54(4)." In addition, the Legislature determined that:

such emergency rulemaking power is necessary for the preservation of the rights and welfare of the people in order to provide additional funds to assist those areas of the state that sustained housing damage due to hurricanes during 2004 and 2005.

§ 420.55, Fla. Stat. (2006).

13. Moreover, in the 2006 RRLP Application Cycle, provision was made for the award of "supplemental" loans to applicants agreeing to set aside a specified percentage of apartment units to extremely low-income persons ("ELI Households"). Rule 67ER06-34(4) sets forth the terms and conditions of such supplemental loans, providing in part that ". . . with the principal forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 20 years". Accordingly, Rule 67ER06-34(4) implements the provision of Chapter 2006-69, Section 31, Florida Law.

C. Justification for Eclipse's Requested Waivers

14. Florida Housing has the 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

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 principles of fairness³, 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. (2006).

i. Waiver of Restriction on Changing the Identity of the Developer

15. Eclipse requests a waiver of Rule 67ER06-27(14)(b), to change the identity of a co-developer Ellis Diversified, Inc. (“EDI”), an accrual basis taxpayer, to EDI Eclipse, LLC (“EDI Eclipse”), a cash basis taxpayer.

16. EDI’s income is calculated on an accrual basis and therefore, must include earned, but not yet paid (i.e., deferred) developer’s fees. In this instance, the deferred income is a significant portion of the developer fees payable to EDI. As a result, EDI would be obligated to pay taxes due on income that has not yet been received. Such result would place an undue economic hardship on EDI which would be substantial and, without the change of developer herein requested, unavoidable.

17. EDI Eclipse, the proposed co-developer for the Project, is a cash basis taxpayer. In contrast to EDI, EDI Eclipse’s taxable income does not include earned, but unpaid or deferred compensation such as developer fees. EDI Eclipse, therefore, would not be burdened with the obligation to pay taxes without the source of funds available for this purpose. EDI Eclipse would, of course, pay taxes on its portion of developer fees as such fees are actually paid to it which is customary in the industry and consistent with the tax treatment of cash basis taxpayers.

³ “Substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. “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 (2006).

18. EDI Eclipse will be owned by EDI (99%) and Tom Bluth (1%), and as a result, EDI Eclipse can rely upon and benefit from the identical expertise, experience, services, resources and support personnel available to EDI. Accordingly, the continuity, progress and quality of the Project will not be disrupted or otherwise affected by a change in co-Developer from EDI to EDI Eclipse.

19. The change of Developer is being requested solely to avoid unanticipated, negative tax consequences resulting from the use of an accrual basis developer entity as opposed to a cash basis developer entity.

ii. Forgiveness of the Principal Balance of the Supplemental Loan

20. As a consequence of potential negative federal income tax ramifications for forgivable loans, Eclipse requests a waiver of Rule 67ER06-34(4)'s requirement for the automatic forgiveness of the principal balance of supplemental loans provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 20 years.

21. As a result, loan documentation for the supplemental loan to Eclipse should provide that its principal "may be forgivable by Florida Housing, in its sole discretion, at maturity provided the units for which the supplemental loan amount were awarded were targeted to ELI Households for at least 20 years and remain in programmatic compliance." Alternatively, if the supplemental loan is not forgiven by Florida Housing, then the loan's maturity date should be extended for an additional 30 years for a total loan term of 50 years.

22. Florida Housing has the authority to provide relief from its rules if strict application of the rule will lead to unreasonable, unfair and unintended consequences in particular instances. § 120.542(1), Fla. Stat. (2006). In this instance, if the principal forgiveness

requirement is not modified, Eclipse could be subjected to “phantom taxable income” resulting in substantial financial burden to the Eclipse.

D. Conclusion

23. Controlling statutes and Florida Housing’s Rules are designed to allow the flexibility necessary to provide relief from rule requirements when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results. Waivers should be granted when the applicant subject to the rule demonstrates that strict application would: (a) create a substantial hardship or violate principles of fairness; and (b) the purpose of the underlying statute has been or will be achieved by other means. § 120.542(2), Fla. Stat. (2006).

24. The requested waiver will not adversely impact the Development or Florida Housing, and will ensure that 96 affordable housing units will be available for families and individuals in Broward County, Florida.

25. However, a denial of the requested waiver would result in a substantial hardship for Eclipse. More significantly, Eclipse could be denied the ability to deliver decent, safe, and affordable housing units to a market in desperate need of extremely low and low income housing.

26. Finally, by granting the requested waivers, Florida Housing would recognize the economic realities and principles of fundamental fairness in the development of affordable rental housing. This recognition would promote participation by experienced developer entities in meeting the purpose of Florida Housing Finance Corporation Act (the “Act”),⁴ through new construction, in an economical and efficient manner.

27. Should Florida Housing require additional information, Eclipse is available to

⁴ See §§ 420.501 through 420.516, Fla. Stat. (2006).

answer questions and provide all information necessary for consideration of its Petition for a Waiver of Rules 67ER06-27(14)(b) and 67ER06-34(4)7(14)(k).

WHEREFORE, Petitioner Eclipse West Associates, Ltd., respectfully requests that Florida Housing Finance Corporation provide the following relief:

- A. Grant the Petition and all the relief requested herein;
- B. Waive Rule 67ER06-27(b)'s restriction against changing the identity of its Developer and permit Eclipse to change its co-Developer from Ellis Diversified, Inc., to EDI Eclipse, LLC;
- C. Waive Rule 67ER06-34(4)'s requirement for the automatic forgiveness of the principal balance of supplemental loans provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 20 years and permit the loan documents for the supplemental loan to provide that its principal "may be forgivable by Florida Housing, in its sole discretion, at maturity provided the units for which the supplemental loan amount were awarded were targeted to ELI Households for at least 20 years and remain in programmatic compliance." Alternatively, if the supplemental loan is not forgiven by Florida Housing, then the loan's maturity date should be extended for an additional 30 years for a total loan term of 50 years; and

D. Grant such other and further relief deemed appropriate.

Respectfully submitted,

Mimi L. Sall, Esquire
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By: 
MIMI L. SALL

CERTIFICATE OF SERVICE

The original Petition is being served by overnight delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300, this 24th day of July, 2008

By: 
Mimi L. Sall