

**BEFORE THE FLORIDA HOUSING FINANCE CORPORATION**

**FLORIDA NON-PROFIT SERVICES, INC.**

a Florida Not-For-Profit Corporation

Petitioner,

vs.

FHFC CASE NO. 2009-024VW

**FLORIDA HOUSING FINANCE**

**CORPORATION**

Respondent

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**AMENDED PETITION FOR WAIVER OF**

**RULE 67-48.0072(19), FLORIDA ADMINISTRATIVE CODE**

FLORIDA NON-PROFIT SERVICES, INC., a Florida Not-For-Profit Corporation ("Petitioner"), pursuant to Section 120.542, Florida Statutes and Chapter 28-104, Florida Administrative Code ("FAC"), hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a waiver of that portion of Rule 67-48.0072(19), FAC, which requires that contingency reserves total no more than five (5%) percent of hard and soft costs for new construction within the Total Development Cost for application and underwriting purposes. In support, Petitioner states the following:

**THE PETITIONER**

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

Florida Non-Profit Services, Inc.

900 Broad Avenue South; #2C

Naples, FL 34102

Telephone: (239) 434-6001

Facsimile: (239) 434-7318

**THE RULE FROM WHICH WAIVER IS SOUGHT**

2. Petitioner requests a waiver of that portion of Rule 67-48.0072(19), FAC, which mandates that contingency reserves total no more than five (5%) percent of hard and soft costs for new construction within the Total Development Cost for application and underwriting purposes.

**STATUTES IMPLEMENTED BY RULE 67-48.0072(19), FAC**

3. The Rules implement, among other sections of the Florida Housing Finance Corporation Act, the Statutes relating to the SAIL program, See §420.507(12), )22) Florida Statutes.

**JUSTIFICATION FOR GRANTING WAIVER OF RULE 67-48.0072(19), FAC**

4. Petitioner applied for and was awarded an allocation of \$5,000,000 from FHFC in accord with RFP 2007-10. Petitioner has also been awarded a \$2,700,000 grant and a \$300,000 loan from USDA. After a competitive bidding process, a construction contract in the amount of \$3,214,736 was awarded to J.L. Wallace, Inc. of Fort Myers, Florida ("Contractor"). As required by the Credit Underwriter, a Preconstruction Plan and Cost Review ("PCR") was prepared by Consultech & Associates, Inc. ("Consultech") of Tampa, Florida. One of Consultech's recommendations is to increase the project's hard cost contingency from 5% to 10% of the construction contract. The reason for said recommendation is that the square footage cost of the J.L. Wallace, Inc. contract is well below the average historic cost range for this type of construction. Consultech's explanation for this situation is that:

"The local and national construction industry is experiencing an overall decrease in material costs and a slight decrease in labor costs due to current economic conditions; the subject project includes a high ratio of larger (two and three-bedroom, two-bath) units than the comparables which can equate to some of the lower per square foot costs."

Since eight bids were received, and two were within \$15,000 of each other, it is likely that Consultech's explanation is correct. However, to provide an additional contingency reserve, Consultech has suggested the increase in the hard cost contingency from 5% to 10%. This recommendation is endorsed by Seltzer Management Group, Inc. the Credit Underwriter.

5. Petitioner believes that a waiver/variance of this 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 persons of low income. The creation of the SAIL program was to provide a subordinated mortgage loan to affordable rental developments that serve low-income persons and families. Waiver and/or variance of the rule will allow Florida Non-Profit Services, Inc. to provide affordable rental opportunities to farmworking families in Collier County, Florida.

6. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, and Rule Chapter 28-104, F.A.C., to grant waiver/variances to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended consequences in particular instances.

Waivers/variances 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 principals of fairness<sup>1</sup>, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person, Section 120.542(2), Florida Statutes. Denial of Petitioner's request for a waiver of that portion of the rule which states "contingency reserves which total no more than 5 percent of hard and soft costs" will present substantial hardship to the Petitioner because, based upon historical data, the Contractor is quite likely to utilize change orders and other techniques to increase the actual cost of the underlying contract to recoup his cost, or profit. This is a situation which is not of Petitioner's making and one which may prohibit the project from being developed, thereby denying 47 farmworkers and their families safe and decent rental housing, which would be unfair and a frustration of the purpose of the statute.

#### **ACTION REQUESTED**

7. For the reasons set forth herein, Petitioner respectfully requests the Corporation to grant the requested waiver of the portion of Rule 67-48.0072(19), FAC which limits the contingency

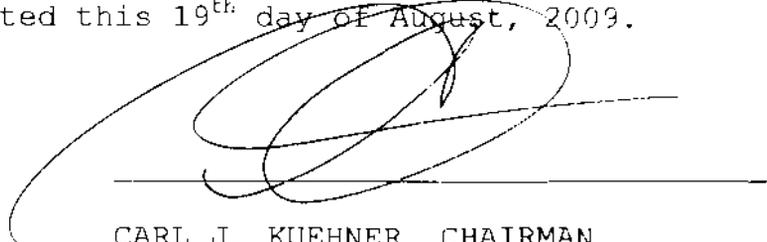
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<sup>1</sup> "Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance. "Principles of Fairness" are violated when literal application of a rule affects a person in a manner significantly different from the way it affects other similarly situated persons who are subject to Rule 12.0542(2), Florida Statutes.

reserve to no more than 5 percent (5%) of hard and soft costs for new construction.

8. A copy of the Petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, FL 32399-1300, as required by Section 120.542(5) Florida Statutes.

Respectfully submitted this 19<sup>th</sup> day of August, 2009.

A handwritten signature in black ink, appearing to read 'Carl J. Kuehner', is written over a horizontal line. The signature is stylized and somewhat circular.

CARL J. KUEHNER, CHAIRMAN

FLORIDA NON-PROFIT SERVICES, INC.

900 Broad Avenue South; #2C

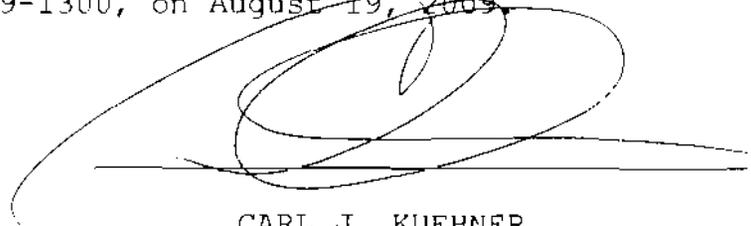
Naples, Florida 34102

Telephone: (239) 434-6001

Facsimile: (239) 434-7318

**CERTIFICATE OF SERVICE**

The Petition is being served by e-transmission and 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 by overnight delivery on the Joint Administrative Procedures Committee, Room 120, 600 Calhoun Street, The Holland Building, Tallahassee, Florida 32399-1300, on August 19, 2009.

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the left, positioned above a solid horizontal line.

CARL J. KUEHNER