

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

NORTH CENTRAL HEIGHTS, L.L.C.,
Petitioner,

v.

2009-026VW

FLORIDA HOUSING FINANCE
CORPORATION,
Respondent.

PETITION FOR WAIVER OR VARIANCE FROM
RULE 67-48.020(2)(b), FLORIDA ADMINISTRATIVE CODE

Petitioner, NORTH CENTRAL HEIGHTS, L.L.C. ("NCH") pursuant to Section 120.542, Florida Statutes ("F.S.") and Rule Chapter 28-104, Florida Administrative Code ("F.A.C."), hereby petitions Respondent, the FLORIDA HOUSING FINANCE CORPORATION ("FHFC"), for a waiver or variance from Rule 67-48.020(2)(b), F.A.C. (2007), to allow NCH (FHFC Application No. 2007-041H) to qualify for a 0% interest rate HOME loan. In support of this Petition, NCH states as follows:

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

North Central Heights, L.L.C.
21 Tulane Drive
Avon Park, FL 33825
Telephone No. (610) 439-1965

2. The name, address, telephone number, and faesimile number of the Petitioner's attorneys, which shall be Petitioner's address for service and all other communication purposes during this proceeding is:

Maureen McCarthy Daughton
Cathy M. Sellers

Broad & Cassel
215 South Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone No. (850) 681-6810
Facsimile No. (850) 521-1443
mdaughton@broadandcassel.com
csellers@broadandcassel.com

The HOME Investments Partnerships Program

3. The State of Florida provides below-market-rate loans through its HOME Investment Partnership ("HOME") Program to encourage private developers to construct and operate affordable rental housing for low-income Florida residents. Derived from an annual allocation of federal funds from the United States Department of Housing and Urban Development, these loans reduce the amount of income required for debt service on the development, making it possible to operate the project at rents that are affordable to low-income tenants.

4. Pursuant to Section 420.5089, F.S., the HOME Program is administered by the FHFC, which is a public corporation created in Section 420.504, F.S., to provide and promote the financing of affordable housing and related facilities in Florida. FHFC is an "agency" as defined in Section 120.52(1), F.S., and thus is subject to Chapter 120, F.S., including Section 120.542, F.S.

5. In 2007, by FHFC Application No. 2007-041H, NCH applied to the FHFC for a HOME loan to help finance North Central Heights, a low-income multifamily housing development located in Avon Park, Florida, that NCH is developing in cooperation with the Avon Park Housing Development Corporation. NCH was awarded a HOME loan of \$5,340,560.00 (five million three hundred forty thousand five hundred sixty dollars) by the FHFC.

6. NCH is wholly owned and controlled by the Avon Park Housing Development Corporation, which is a 501(c)(3) non-profit entity established under Chapter 617, F.S. The Articles of Incorporation for the Avon Park Housing Development Corporation are attached as Exhibit "A."

7. Generally under FHFC rules, a for-profit HOME loan applicant receives a 1.5% interest rate, whereas a non-profit applicant receives a 0% interest rate. The North Central Heights low-income multi-family housing development project will not be financially feasible unless NCH receives a HOME loan with a 0% interest rate.

8. Rule 67-48.020(2), F.A.C. (2007), provides in pertinent part:

All HOME Rental Development loans shall be in compliance with the Act, 24 CFR Part 92 and, at a minimum, contain the following terms and conditions:

* * *

(2) The annual interest rate will be determined by the following:

(a) All for-profit Applicants that own 100 percent of the ownership interest in the Development held by the general partner entity will receive a 1.5 percent per annum interest rate loan.

(b) All qualified non-profit Applicants that own 100 percent of the ownership interest in the Development held by the general partner entity will receive a 0 percent interest rate loan. For purposes of determining the annual HOME interest rate, the definition of Non-Profit found at Rules 67-48.002 and 67-48.0075, F.A.C., shall not apply; **instead, qualified non-profit Applicants shall be those entities defined in 24 CFR Part 92, Section 42(h)(5)(c), subsection 501(c)(3) or 501(c)(4) of the IRC and organized under Chapter 617, F.S.,** if a Florida corporation, or organized under similar state law if organized in a jurisdiction other than Florida.

* * *

Fla. Admin. Code R. 67-48.020(2)(2007)(emphasis added).

9. NCH is wholly owned by the Avon Park Housing Development Authority, a 501(3)(c) non-profit entity organized under Chapter 617, F.S. However, under the FHFC's interpretation of its rules, it appears that NCH will only qualify for a 0% interest rate HOME loan if FHFC waives or grants a variance from the requirements of Rule 67-48.020(2)(b), F.A.C.,

to allow NCH, as presently organized under the *direct ownership and control of a 501(c)(3) non-profit entity organized under Chapter 617, F.S.*, to qualify for a 0% interest rate HOME loan.¹

10. Accordingly, NCH hereby petitions FHFC to grant a waiver or variance from the provisions of Rule 67-48.020(2)(b), F.A.C., to allow NCH, as presently organized under the direct ownership and control of the Avon Park Housing Development Corporation, a 501(c)(3) non-profit entity organized under Chapter 617, F.S., to qualify for a 0% interest rate HOME loan.

11. Pursuant to Section 120.542, F.S., and Rule Chapter 28-104, F.A.C., FHFC has the authority to grant waivers or variances from its rules when strict application of such rules in particular circumstances would lead to unreasonable, unfair, and unintended results. A waiver or variance will be granted when the person subject to the rule demonstrates that the strict application of the rule would: (a) result in 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. Fla. Stat. §120.542(2009).

12. Rule 67-48.020(2)(b), F.A.C., from which NCH seeks a waiver or variance, specifically implements Section 420.5089, F.S., which authorizes the FHFC to make HOME loans to fund development of affordable housing for Florida's low-income families.

13. In this case, the rule's imposition of a 1.5% interest rate works a substantial hardship on NCH because it renders the development of the North Central Heights project financially impossible. Denial of the requested waiver or variance would therefore render the project financially impossible and, further, would lead to the loss of over \$500,000.00 (five

¹ With respect to Rule 67-48.020(2)(b), F.A.C., the 2007 rule's reference to "general partner" appears to contemplate that only an applicant organized as a limited partnership ("LP") would qualify for a 0% loan (absent a waiver or variance such as requested here). NCH notes that the recently adopted amendment to Rule 67-48.020(2)(b), F.A.C. (2009) adds the term "managing member" to the rule, which makes clear that LLC's also are eligible for a 0% loan under the rule. This recent rule amendment indicates that FHFC apparently does not have concerns regarding LLCs qualifying for a 0% loan.

hundred thousand dollars) that NCH already has invested in the North Central Heights project. The grant of a waiver or variance to allow NCH to obtain a 0% HOME loan would enable development of the project. Further, denial of the waiver or variance would deprive the future residents of the development, as well as all the other residents of Avon Park, an opportunity to establish an economically diverse community that provides low-income residents with decent and safe affordable housing. Approval of the waiver or variance would not negatively affect the residents of Avon Park in any way.

14. Grant of the waiver or variance also will serve the purpose of the statute that the HOME Program rules, including Rule 67-48.020(2), F.A.C., implement. Section 420.5089, F.S., and the rest of the Florida Housing Finance Corporation Act (§§420.501, et seq.) was enacted to encourage private investment in the creation of affordable housing for low-income and very low-income families. By approving the requested waiver or variance, FHFC will advance this goal and ensure the development of new multi-family housing for low-income families in Avon Park.

15. Importantly, NCH gained no competitive advantage in the 2007 Universal Cycle by submitting its application with its current organizational structure. Indeed, the opposite is true. If NCH had originally been formed as a more conventional non-profit entity, it would have benefitted from tiebreakers that actually would have improved its ranking. *See 2007 Universal Cycle Application Instructions*, pp. 75-76.

16. NCH further notes that granting the waiver or variance also would serve the purpose of Rule 67-48.040(2)(b), F.A.C., because NCH is wholly owned by the Avon Park Housing Development Corporation, a 501(3)(c) non-profit corporation organized under Chapter 617, Florida Statutes, which is one of the types of entities identified in the rule as qualifying for a 0% loan. The 501(3)(c) non-profit corporation, as the sole owner of NCH, clearly and

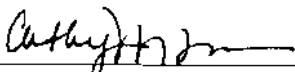
completely controls NCH, so that granting the waiver or variance would achieve the purpose of the rule itself. as well as achieving the purpose of the underlying statute.

17. The waiver or variance that NCH seeks is permanent in nature.

18. If the FHFC requires any additional information regarding the requested waiver or variance, NCH stands ready to respond quickly to such request.

WHEREFORE, Petitioner North Central Heights, L.L.C., requests that the FHFC grant it a waiver or variance from Rule 67-48.020(a)(b), F.A.C., as requested herein, to allow North Central Heights, L.L.C. to qualify for a 0% interest rate HOME loan.


Respectfully submitted this 17th day of August, 2009.



Maureen McCarthy Daughton
Fla. Bar No. 655805
Cathy M. Sellers
Fla. Bar No. 0784958
Broad & Cassel
215 South Monroe Street, Suite 400
Tallahassee, FL 32301
Telephone (850) 681-6810
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mdaughton@broadandcassel.com
csellers@broadandcassel.com
Attorneys for Petitioner North Central Heights, L.L.C.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this document was filed with the Florida Housing Finance Corporation and was served via U.S. Mail to the Joint Administrative Procedures Committee, Holland Building Room 120, 600 South Calhoun Street, Tallahassee, FL 32399 this 17th day of August, 2009.



Cathy M. Sellers

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SECRETARY OF STATE
TALLAHASSEE FLORIDA

**THE ARTICLES OF INCORPORATION
OF
AVON PARK HOUSING DEVELOPMENT CORPORATION**

We, the undersigned, being the Incorporator(s) of *AVON PARK HOUSING DEVELOPMENT CORPORATION*, a Florida not for profit corporation, hereby file the following Articles of Incorporation, that comply with the requirements of Florida Statutes Chapter 617 (Florida Not For Profit Corporation Act):

ARTICLE I- NAME

The name of the Corporation is *AVON PARK HOUSING DEVELOPMENT CORPORATION*, a Florida not for profit corporation (hereinafter the "Corporation").

**ARTICLE II- REGISTERED OFFICE AND AGENT AND
PRINCIPAL PLACE OF BUSINESS AND MAILING ADDRESS**

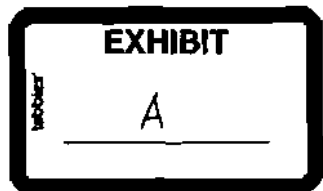
The registered office of the Corporation shall be located at One Barnett Plaza, 101 East Kennedy Boulevard, Suite 3200, Tampa, Florida 33601, and the initial registered agent of the Corporation at that address shall be Ricardo L. Gilmore, Esquire.

The principal place of business and the mailing address of the Corporation shall be: *AVON PARK HOUSING DEVELOPMENT CORPORATION*, Post Office Box 1327, Avon Park, FL 33826.

ARTICLE III - PURPOSES AND POWERS

The general nature of the objects, purposes, powers and limitations of the Corporation shall be as follows:

- (a) to provide and develop affordable housing opportunities to low and moderate income persons and/or families primarily located in, but not limited to, Avon Park, Florida and the surrounding areas;
- (b) to operate in any manner for such nonprofit, charitable and/or educational purposes as will qualify the Corporation as a charitable organization exempt from federal income tax under Internal Revenue Code Section 501(c)(3);
- (c) to accept a substantial part of its support (exclusive of income received in the exercise or performance by such organization of its charitable, educational or other purpose or function constituting the basis for its exemption) from a governmental unit or from direct or indirect contributions from the general public, the Corporation's organizers, corporations, foundations, and any other public or private sources;
- (d) to generally perform any function necessary to engage in any lawful purpose or purposes not for pecuniary profit;
- (e) no part of the earnings of the Corporation shall inure to the benefit of or be distributable to its members, officers or other private persons, except that the Corporation may be authorized and empowered to pay reasonable compensation for services rendered and products purchased and to make payments and distributions in furtherance of the purposes hereinafter set forth. No substantial part of the



activities of the Corporation shall be the carrying on of propaganda, or otherwise attempting to influence legislation, and the Corporation shall not participate in or intervene in (including the publishing or distribution of statements) any political campaign on behalf of any candidate for public office;

(f) notwithstanding any other provisions of these Articles, the Corporation shall not carry on any other activities not permitted to be carried on (i) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 or (ii) by an organization, contributions to which are deductible under Section 170(c)(2) of such Code as it now exists or as it may be amended;

(g) the Corporation will distribute its income for each tax year at such time and in such manner as not to become subject to the tax on undistributed income imposed by Section 4942 of the Internal Revenue Code of 1986, or corresponding section of any other federal tax code;

(h) the Corporation will not engage in any act of self-dealing as defined in Section 4941(d) of the Internal Revenue Code of 1986, or corresponding section of any future federal tax code without providing for fair, adequate, and reasonable compensation;

(i) the Corporation will not retain any excess business holdings as defined in Section 4943(c) of the Internal Revenue Code of 1986, or corresponding section of any future federal tax code;

(j) the Corporation will not make any investments in such manner as to subject it to tax under Section 4944 of the Internal Revenue Code of 1986, or corresponding section of any future federal tax code; and

(k) the Corporation will not make any taxable expenditures as defined in Section 4945(d) of the Internal Revenue Code of 1986, or corresponding section of any future federal tax code.

The Corporation shall have the power to:

(a) have succession by its corporate name for the period set forth in its Articles of Incorporation;

(b) sue and be sued and appear and defend in all actions and proceedings in its corporate name to the same extent as a natural person;

(c) adopt and use a common corporate seal and alter the same provided, however, that such seal shall always contain the words "not for profit corporation,"

(d) elect or appoint such officers and agents as its affairs shall require and allow them reasonable compensation, if so voted by a majority of the Directors of the Corporation;

(e) adopt, change, amend and repeal bylaws, not inconsistent with law or its Articles of Incorporation, for the administration of the affairs of the Corporation and the exercise of its corporate powers;

(f) make contracts and incur liabilities, borrow money at such rates of interest as the Corporation may determine, issue notes, bonds and other obligations, and secure any of its obligations by mortgage and pledge of all or any of its property, franchises or income;

(g) conduct its affairs, carry on its operations, and have offices and exercise the powers granted herein in any state, territory, district or possession of the United States or any foreign country;

(h) purchase, take, review, lease, take by gift, devise or bequest, or otherwise acquire, own, hold, improve, use or otherwise deal in and with real or personal property, or any interest therein, wherever situated;

(i) acquire, enjoy, utilize and dispose of patents, copyrights and trademarks and any licenses and other rights or interests thereunder or therein;

(j) sell, convey, mortgage, pledge, lease, exchange, transfer or otherwise dispose of all or any part of its property and assets;

(k) purchase, take, receive, subscribe for, or otherwise acquire, own, hold, vote, use, employ, sell, mortgage, lend, pledge or otherwise dispose of and otherwise use and deal in and with, shares and other interest in, or obligations of other domestic or foreign corporations, whether for profit or not for profit, associations, partnerships or individuals, or direct or indirect obligations of the United States, or of any other government, state, territory, governmental district, municipality, or of any instrumentality thereof;

(l) lend money for its corporate purposes, invest and reinvest its funds and take and hold real and personal property as security for the payment of funds so loaned or invested;

(m) make donations and work together with public or private entities to encourage and facilitate the provision of affordable housing opportunities to persons and families of low and moderate income, for the public welfare, and for religious, charitable, scientific, educational or other similar purposes;

(n) have and exercise all powers necessary or convenient to effect any or all of the purposes for which the Corporation is organized; and

(o) the above stated powers shall in no way be a limitation of those corporate powers set forth in Florida Statutes §617.0302 (Florida Not For Profit Corporation Act) which powers are included herein by reference.

ARTICLE IV - MEMBERS

The Corporation shall have no members and no stockholders.

ARTICLE V - EXISTENCE

The existence of the Corporation shall be perpetual.

ARTICLE VI - DIRECTORS

The affairs of the Corporation shall be managed by the Board of Directors, which initially shall consist of the following seven (7) members, until the first election thereof:

NAME
Lester A. Roberts
President

ADDRESS
1002 S. Waldron Ave.
Avon Park, Florida 33825

Marian Ferrin
Vice-President

313 Dove Street
Sebring, Florida 33872

Alice Oldham
Secretary

406 Tulane Drive
Avon Park, Florida 33825

Christina Blanco

312 S. Lotela Ave.
Avon Park, FL 33825

Earline Sarver

825 W. Main Street

Avon Park, FL 33825

Ray White

*36 DeLaney Heights
Avon Park, FL 33825*

Minnette Williams

*1713 Lake Lotela Drive
Avon Park, FL 33825*

The number of Directors may be raised or lowered by amendment of the bylaws, but shall in no case be less than seven (7). The manner of election shall be as provided by the bylaws.

ARTICLE VII- BYLAWS

The bylaws of the Corporation shall be made and adopted by the Board of Directors and may be amended, altered or rescinded by a majority of the entire Board of Directors present at any regular or special meeting called for that purpose.

ARTICLE VIII- DISSOLUTION

Upon the dissolution of the Corporation, the Board of Directors shall, after paying or making provision for the payment of all of the liabilities of the Corporation, dispose of all of the assets of the Corporation exclusively for the purpose of the Corporation by transferring such assets to any charitable, scientific, religious or educational organization as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Revenue Law), or to any governmental or other entities with purposes similar to the Corporation's, such disposition to be as the Board of Directors shall determine. Any assets remaining after such disposition by the Board of Directors shall be disposed of by the Circuit Court of the county in which the Corporation's principal offices are located, pursuant to the procedures for judicial dissolution, Florida Statutes Section 617.1431.

ARTICLE IX - INCORPORATOR(S)

The name(s) and address(es) of the Incorporator(s) of these Articles of Incorporation is(are) as follows:

NAME
Allee Oldham
Secretary

ADDRESS
406 Tulane Drive
Avon Park, Florida 32835

ARTICLE X - AMENDMENTS

Amendments to the Articles of Incorporation shall be adopted by a majority of the entire Board of Directors at any regular or special meeting called for that purpose.

IN WITNESS OF THE FOREGOING, I (we) hereby set my (our) hand(s) and seal this 13th
day of August 2001.

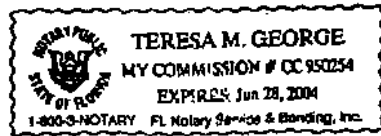
AVON PARK HOUSING DEVELOPMENT CORPORATION

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SECRETARY OF STATE
TALLAHASSEE, FLORIDA

By: Alice Oldham
Alice Oldham, Secretary

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH

The foregoing instrument was acknowledged before me this 13th day of August, 2001, by Alice Oldham, and she executed the foregoing Articles of Incorporation as Secretary of AVON PARK HOUSING DEVELOPMENT CORPORATION.



Teresa M. George
Notary Public, State of Florida
Print, Type or Stamp Name

Personally Known Type of Identification Produced _____ Or Produced Identification _____

CERTIFICATE

That AVON PARK HOUSING DEVELOPMENT CORPORATION, desiring to organize under the laws of the State of Florida, with its principal office at P.O. Box 1327, City of Avon Park, County of Highlands, State of Florida 33826, has named Ricardo L. Gilmore, Esq., located at One Barnett Plaza, 101 East Kennedy Boulevard, Suite 3200, City of Tampa, County of Hillsborough, State of Florida 33601, as its registered agent to accept service of process within this State.

ACKNOWLEDGMENT

Having been named to accept service of process for the above-named Corporation, at the place designated in this Certificate the undersigned agrees to act in this capacity and agrees to comply with the provisions of Florida law relative to keeping designated office open.

Ricardo L. Gilmore
RICARDO L. GILMORE, ESQ.