

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2013-004VW
Application No. 2011-046C

ABILITY OAKLAND II, LLC

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

**PETITION FOR WAIVER OF 2011 UNIVERSAL APPLICATION INSTRUCTIONS,
HOUSING CREDIT PROGRAM, PART III, SECTION B(4)(b)**

Petitioner, Ability Oakland II, LLC, a Florida limited liability company (“Ability”) petitions Respondent Florida Housing Finance Corporation (“Florida Housing”) for a waiver of the requirement to provide hot water heaters within each unit located in the Development (as defined below). *See* 2011 Universal Application Instructions, Housing Credit Program, Part III, Section B(4)(b) (the “Instructions”).

Pursuant to Section 120.542, Fla. Stat., and Rule 28-104.001 through 28-104.006, F.A.C., Ability requests a waiver of that portion of the Instructions that has been interpreted by Florida Housing's underwriter to require individual hot water heaters within each unit. In lieu of individual hot water heaters within each unit of the Development, Ability would like to utilize shared tankless hot water heaters (the “Alternative Water Heating System”). Such Alternative Water Heating System would be installed on the exterior of the units, not within a closet of the unit. Each shared tankless hot water heater would serve two (2) or three (3) units in the Development, depending upon the number of bathrooms in each unit. Inclusion of the

Alternative Water Heating System will allow the Development to achieve substantially lower costs of installation and, more importantly, will provide increased living space and reduced expense to the residents as the Development will pay for the utility, not the resident. As a project serving primarily Extremely Low Income households, reduction of utility expenses is especially beneficial to the residents.

A. The Petitioner

1. The name, address, telephone and facsimile numbers, and email address for Ability and its qualified representative are:

Ability Oakland II, LLC
c/o Ability Housing of Northeast Florida, Inc.
76 South Laura Street
Suite 303
Jacksonville, Florida 32202
Telephone: 904-359-9650
Facsimile: 904-359-9653
E-mail: snazworth@abilityhousing.org

2. The name, address, telephone and facsimile numbers, and e-mail address of Ability's attorney, for purposes of this Petition, are:

Brian J. McDonough, Esquire
STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
150 West Flagler Street
Miami, Florida 33130
Telephone: 305-789-3350
Facsimile: 305-789-3395
E-mail: bmcdonough@stearnsweaver.com

B. The Development

3. In 2011, Ability applied for low-income housing tax credits from Florida Housing pursuant to the 2011 Universal Cycle. *See* Application No. 2011-046C (the "Application.") The Universal Application package has been adopted and incorporated into Chapter 67-48 by Rule

67-48.004(1)(a), F.A.C. (2011). Ability received an allocation of low income housing tax credits from Florida Housing.

4. Ability intends to close on the financing and housing credit syndication which will provide funds for the acquisition and rehabilitation of 60 units in 6 residential buildings intended to serve low-income persons in Jacksonville, Duval County, Florida (the "Development").

5. The provisions of the Instructions, as more particularly described in Section C below, may require the installation of an individual water heater within each rehabilitated unit [see Part III, Section B(4)(b).] Such section provides that "the rehabilitation units must include as many of the following energy feature as structurally and financially feasible within the scope of the rehabilitation work." One of those features listed is "water heater (choose gas, electric, gas tankless, or boiler/hot water maker). As one of the items to be selected is a boiler, which cannot be located with a residential unit and serves multiple units within a single building, is an option, it could be contended that the Instructions do not clearly state the gas tankless heater must be located within the unit or that a single water heater is required for each individual unit. In the Application, Ability agreed "to provide **feasible energy features** (as outlined in the Instructions) as determined by a capital needs assessment ("CNA") performed during credit underwriting. A CNA was prepared by zumBrennan for the credit underwriter which CNA recommended "replacing the existing 40 gallon water heaters." However, the CNA was prepared without the benefit of a review of the plans and specifications for the Development. The preparer of the CNA has indicated that if the plans and specifications were utilized in developing the CNA, the Alternative Water Heating System would have been included within the CNA, as individual water heaters are not financially feasible given the scope of the

rehabilitation work. Additionally, the Project Cost Review includes the use of the Alternative Water Heating System. As you will note from the attached composite Exhibit A (letters from the various professionals involved with the rehabilitation of the Development) the architect, the general contractor and the engineer for the Development have determined that the use of individual water heaters would be unduly expensive, and the substitution of the Alternative Water Heating System would be less expensive as well as more efficient and provide more space within each unit for the benefit of Ability's residents.

6. The requested waiver will not adversely affect the Development. However, a denial of this Petition (a) would result in substantial, unnecessary economic hardship to Ability; (b) would provide residents with a less efficient apartment; (c) will cause constructions delays so as to deprive Duval County of essential, affordable housing units in a timely manner; and (d) would violate principles of fairness¹. § 120.542(2), Fla. Stat. (2011).

7. The waiver being sought is permanent in nature.

C. Rule from Which Relief is Requested and Statute Implemented by the Rule

8. Ability realleges and incorporates Paragraphs 1 through 7 as though fully set forth herein.

9. Ability requests a waiver of Part III, Section B(4)(b) of the Universal Application Instructions that provides as follows:

A. For all rehabilitation units:

If the proposed Development includes any rehabilitation units (regardless of the Development Category selected at Part III.A.3.a. of the Application), the rehabilitation units must include as many of the following energy features as structurally and financially feasible

¹“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.

within scope of the rehabilitation work. The feasible energy features for each proposed Development will be based on a capital needs assessment performed during the credit underwriting process. If this provision applies to the proposed Development, the Applicant must select “Yes” to be considered for participation in any program.

- Energy Star qualified refrigerator
- Energy Star qualified dishwasher
- Water heating (choose gas, electric, gas tankless, or boiler/hot water maker).

10. The Florida Housing Finance Corporation Act² designates Florida Housing as the State of Florida’s housing credit agency within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code of 1986. As the designated agency, Florida Housing is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits. § 420.5099(1) and (2), Fla. Stat. (2011). The Allocation Procedures were established in Rule Chapter 67, Florida Administrative Code. Accordingly, the Instruction that is the subject of Ability’s waiver request is implementing, among other sections of the Act, the statutory authorization for Florida Housing’s establishment of Allocation Procedures for Housing Credit Programs. § 420.5099(1) and (2), Fla. Stat. (2011).

D. Justification for Petitioner’s Requested Waiver

11. Ability realleges and incorporates Paragraphs 1 through 11 as though fully set forth herein.

12. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., Florida Housing has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when the person who is subject to the rule demonstrates that

² The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.516 of the Florida Statutes (the “Act”). See also, Rule 67.40.020(1), F.A.C. (“ ‘Act’ means the Florida Housing Finance Corporation Act, section 420.501 through 420.516 of the Florida Statutes”)

the application of the rule would (1) create a substantial hardship or violate principles of fairness, 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. (2011).

13. In this instance, Ability meets the standards for a waiver.

14. Pursuant to the Instructions, Ability agreed to provide energy features in each of its units which were “structurally and financially feasible within the scope of the rehabilitation work, based on a capital needs assessment”. The preparer of the CNA did not have all the information needed (it was lacking plans and specifications) to support its conclusion that each unit should have an individual water heater. A shared tankless hot water heater (the Alternative Water Heating System) is the current, state of the art method of heating water in many apartment projects; the other available option for heating equipment (individual hot water heaters within each unit) is inappropriate for the Development given its initial cost, the reduction of living space within each unit, and the cost benefit to the low-income residents of the Development, as the Development will pay for the utility rather than the resident. As noted on the attached Exhibit A, Ability has been advised that the installation and use of individual hot water heaters would be a more expensive and less efficient means of providing hot water to units in the Development. The Alternative Water Heating System is a more cost-efficient method which does not compromise energy conservation measures.

E. Conclusion

15. 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. (2011).

16. The requested waiver will not adversely impact the Development or Florida Housing, and further, requiring individual water heaters in each unit is unduly expensive with no corresponding increase in efficiency, energy conservation or useful life, when compared against alternative products. The goal of incorporating energy-efficient systems and building components into the Development will be achieved through the installation of the Alternative Water Heating System, with no detriment to any party.

17. A denial of the requested waiver could result in a substantial hardship for Ability.

18. Finally, by granting the requested waiver, 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 the Act through construction of projects in an economical and efficient manner, as well as providing appropriate features and amenities within residential units developed for low-income residents.

19. Should Florida Housing require additional information, Ability is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver of Part III, Section B(4)(b) of the Instructions which accompany the 2011 Universal Cycle Application.

WHEREFORE, Petitioner Ability Oakland II, LLC, respectfully requests that the Florida Housing Finance Corporation provide the following relief:

A. Grant the Petition and all relief requested herein;

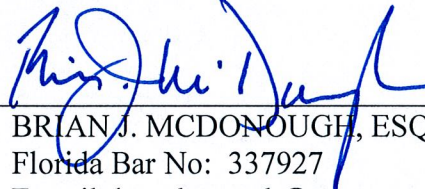
B. Waive the requirement for the use of individual water heaters in each unit of the Development, and allow Ability to install the Alternative Water Heating System in the Development; and

C. Grant such further relief as may be deemed appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Counsel for Ability Oakland II, LLC
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Miami, Florida 33131
Tel: (305) 789-3350
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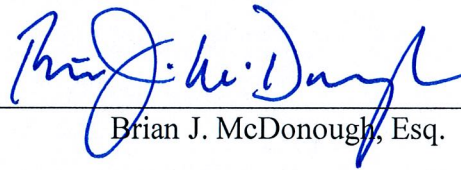
By:



BRIAN J. MCDONOUGH, ESQ.
Florida Bar No: 337927
E-mail: bmcdonough@swmwas.com

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 the 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 28th day of March, 2013.



Brian J. McDonough, Esq.



THE DANTZLER GROUP
GENERAL CONTRACTORS

February 1, 2013

Ability Housing of NE Florida
Attn: Shannon Nazworth
76 South Laura St, Suite 303
Jacksonville, FL 32202

Dear Shannon,

As per you request, this letter is to address the Rennai tankless water heaters verses Electric tank type water heaters.

The estimated cost to install the units as per design is \$33,050.00
To install individual electric tank type water heaters is \$48,000.00
The estimated construction cost savings is \$14,950.00

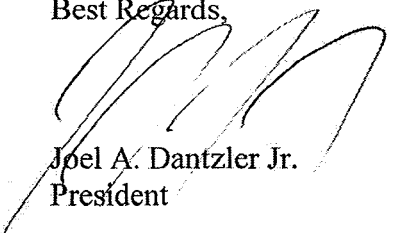
The cost savings is in the cost to operate as well as the cost of maintenance. The gas tankless will be substantially lower to operate than the electric tank type. In addition the designed floor plans don't allow for the tank type, therefore the plans would need modifying to accommodate tank type.

According to ASTM the electric tank type water heaters have a life expectancy of 10 years and the gas tankless have a life expectancy of 15 years.

I installed a Rennai gas tankless water heater at my home in 2004. We have not had any problems or issues with ours and the consumption of gas is minimal. We have one small BTU unit at our house which is a four bedroom five bath home. The Rennai literature states our house would need two units. We have had all bedrooms full of family on holidays and weekends and have never experienced an issue of not enough hot water. I'm not an engineer so I have no opinion on the BTU's specified, but I see no issues with shared water heaters and I think it will be a great application for this project from an energy savings point of view.

If I can be of further assistance on this please let me know.

Best Regards,

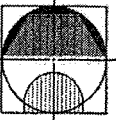


Joel A. Dantzler Jr.
President

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via email: jemmons@abilityhousing.org

Ms. Jenna Emmons
Ability Housing of Northeast Florida
76 Laura Street, Suite 303
Jacksonville, FL 32202

January 31, 2013

Project: Oakland Terrace Apartments

Dear Ms. Emmons:

We are writing this letter to urge that the highly efficient water heating equipment that we have specified for this project will be used and will not become a casualty of a bureaucratic process that is not keeping current with industry advances.

A gas fed tankless water heater shared by tenants is one of the effective and efficient ways to meet the needs of this project. It's an Energy feature that benefits the provider and the end user. A properly selected tankless water heater can provide a continuous supply of hot water to three apartment units. It's on-demand hot water, so there's almost no wait time and wasted cold water as compared to the conventional water heaters. A considerable savings on electricity is one of the best features of this equipment. The existing gas utility on site even made this decision and transition very vital. Limited and valuable space in the apartment units also contributed to the selection of the tankless water heaters. The space allocated for the water heater tank, was effectively used, and added into the storage, bathroom, or bedroom of the tenant spaces. And lastly, we believe that it is time to move on with the advancement of technology and step away from the outdated systems of the past.

Should you have any questions, please contact me.

Sincerely,

Steven E. Hutchins, AIA, LEED AP®

cc: Mr. Marcus Meade

PARAGON ENGINEERING GROUP

11481 Old St. Augustine Rd., Suite 104
Jacksonville, FL 32258

904.521.9007
robert@paragonengineering.net

Steven E. Hutchins Architects, Inc.
9143 Philips Highway, Suite 140
Jacksonville, Florida 32256

31 January 2013

Re: Oakland Terrace Apartments

Ramil Alipio,

The proposed water heating system for Oakland Terrace Apartments is comprised of several gas-fired instantaneous units, 18 in all. Each water heater, based on the calculated flow rates, is sized to serve either 2, 3, or 6 living units. The heaters are strategically placed so as to provide hot water, on demand, at the least amount of wait time. The obvious benefits of this type of water heating system are as follows;

- Since the water utility is not being metered for each unit, which would then require individual water heaters, the property can be more easily maintained since there will be fewer water heaters, 18 as opposed to 60, and they will be located outside so that the tenants are not disturbed.
- From a budget perspective, this system will have approximately the same equipment cost as conventional electric heaters in each unit, but will have 1/3 the installation and labor cost, as well as approx 2/3 of the operating cost.
- These water heaters are highly efficient and do not fire to make hot water until the hot water faucet is opened for use. This eliminates wasted energy needed to maintain temperature in a conventional electric water heater unit. Once they turn on, the water heater delivery temp can be controlled to a predetermined set point, allowing the water heater to modulate as needed.
- The use of gas fired equipment is a benefit to the operation of the property since the cost for gas is somewhat cheaper than the cost for electricity. Another benefit is by using the exterior mounted gas water heaters, no venting through the building or roof is needed, and no gas piping will be inside the living spaces.

Since the domestic water system is combined for all units, this type of water heating system is commonly used for both functionality and for cost reasons. I have used these very same water heaters on other projects here in Jacksonville, including the Holiday Inn Express at Jacksonville Beach (used 8 heaters), and the Tennis Villas at Amelia Island Plantation (used 7 heaters).

I am not aware of any codes that disallow the water heating and distribution system as currently shown. In fact, for projects where the cold water is distributed to all units from a single source, the hot water is commonly distributed from some kind of central water heating plant.

Also mentioned was a requirement to have scald protection at the kitchen sinks in every living unit. I am familiar with these devices and understand the reason for their use. If you read the requirement of the UDVM, it requires that the device will have a means to limit the maximum setting to 120 degrees F". I typically use these devices on water heating systems where the water temperature is maintained at 140 degrees or higher, where scalding is a concern. The requirement for these devices is generally waived for water heating systems that are no hotter than 120 degrees F, or as in our case where the hot water delivery to the fixture will be down around 118 degrees F. In essence, why would a device be necessary to mix and bring down the temperature of hot water to 120 degrees F, when it is already delivered at 118 degrees F. These devices will be an un-necessary and a tremendous financial burden on the property.

Please feel free to call me to discuss further if necessary.

Very Truly Yours,

Robert M. Bird, CPD
President – Paragon Engineering Group, LLC