

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

FHFC CASE NO. 2017-083VW

BDG BANYAN COURT, LP,

Petitioner,

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

PETITION FOR WAIVER OF F.A.C. RULES 67-48.0072(4)(C) AND 67-48.0072(21)(B)

BDG Banyan Court, LP, a Florida limited partnership (the “Petitioner”), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the “Corporation”) for a waiver of Rules 67-48.0072(4)(c) and 67-48.0072(21)(b), Florida Administrative Code (Sept. 15, 2016). This Petition is filed pursuant to Section 120.542, Florida Statutes (2016), and Chapter 28-104, Florida Administrative Code (2016). In support, the Petitioner states as follows:

A. THE PETITIONER

1. The mailing address, telephone number and email of the Petitioner is as follows:

BDG Banyan Court, LP
c/o Banyan Development Group, LLC
Attn: Alexander B. Kiss
501 N. Magnolia Avenue
Orlando, Florida 32801
Telephone: (407) 233-3335
Email: alexbkiss@gmail.com

2. The mailing address, telephone number and email of the Petitioner's legal counsel is as follows:

Hollie A. Croft, P.A.
Broad and Cassel LLP
390 N. Orange Ave., Suite 1400
Orlando, Florida 32801
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3. The Petitioner intends to finance the acquisition and construction of an affordable housing apartment complex known as Banyan Court Apartments in Palm Beach County, Florida (the "Property") through a single tax-exempt bond issuance by the Corporation of approximately \$11,500,000 (the "Bonds"), along with 4% non-competitive low-income housing tax credits (the "Credits") in order to raise private investor equity financing for the Property, plus SAIL funding from the Corporation of approximately \$5,400,000 (the "SAIL Loan"). The Petitioner has previously submitted to the Corporation an application for funding on October 17, 2016 (application # 2016-379S) in response to the Corporation's RFA 2016-109. The Petitioner received from the Corporation an invitation to enter into credit underwriting on March 31, 2017.

4. Changes to the Rule (as defined herein) in 2016 requiring the issuance of a firm loan commitment within nine (9) months of entering into credit underwriting, coupled with the inherent process of obtaining credit underwriting approval and the subsequent issuance of the firm loan commitment, had the unintended consequence of making compliance with the Rule impossible. As such, the Petitioner requests an extension of time until the second (2nd) regularly scheduled 2018 board meeting for the Corporation in order for the Property to complete the Corporation's underwriting process, as more fully described below.

B. THE RULE FROM WHICH WAIVER IS SOUGHT

5. The Petitioner requests a waiver from Rules 67-48.0072(4)(c) and 67-48.0072(21)(b), Florida Administrative Code (Sept. 15, 2016) (the “Rule”), which provides in part:

67-48.0072(4)(c) – Credit Underwriting and Loan Procedures.

“For SAIL, EHCL, and HOME that is not in conjunction with Competitive HC, the credit underwriting process must be completed within the time frame outlined in subsection 67-48.0072(21), F.A.C., below and the loan must close within the time frame outlined in subsection 67-48.0072(26), F.A.C., below.”

67-48.0072(21)(b) – Credit Underwriting and Loan Procedures.

“For SAIL, EHCL, and HOME that is not in conjunction with Competitive HC, unless stated otherwise in a competitive solicitation, the firm loan commitment must be issued within nine (9) months of the Applicant’s acceptance to enter credit underwriting. . . . Applicants may request one (1) extension of up to six (6) months to secure a firm loan commitment. All extension requests must be submitted in writing to the program administrator and contain the specific reasons for requesting the extension and shall detail the time frame to achieve a firm loan commitment. In determining whether to grant an extension, the Board shall consider the facts and circumstances of the Applicant’s request, inclusive of the responsiveness of the Development team and its ability to deliver the Development timely. . . .”

C. STATUTES IMPLEMENTED BY THE RULES

6. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act (the “Act”), the statute that created the Housing Tax Credit Program, the Multifamily Mortgage Revenue Bonds Program and the State Apartment Incentive Loan Program. *See* Fla. Stat. §§ 420.5087, 420.509, 420.5099.

7. “Strict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.” *See* Fla. Stat. § 120.542(1). The pertinent statute regarding granting of waivers provides: “[W]aivers shall be granted . . . when application of a rule would create a substantial

hardship or would violate principles of fairness.” See Fla. Stat. § 120.542(2). “Substantial Hardship” is defined as a demonstrated economic, technological, legal or other type of hardship to the person requesting the waiver. See Fla. Stat. § 120.542(2).

D. WAIVER WILL SERVE THE UNDERLYING PURPOSE OF THE STATUTE

8. The Rule requires that the firm SAIL Loan commitment be issued by the Corporation within nine (9) months of the Petitioner’s acceptance to enter into the credit underwriting process. In this case, that means the firm SAIL Loan commitment must be issued by the Corporation on or before December 31, 2017 (which is nine (9) months from the Petitioner’s acceptance to enter into the credit underwriting process on March 31, 2017); and as such, the Petitioner would have had to complete the Corporation’s credit underwriting process well before December 31, 2017. As discussed below, this timeframe is not feasible. Further, the Rule states that a failure of the Petitioner to receive the Corporation’s issuance of a firm SAIL Loan commitment by the aforementioned deadline will result in a withdrawal of the preliminary SAIL Loan commitment. Such a result would be catastrophic financially for the Property, and the Property would not be able to proceed with its construction and operation should the SAIL Loan be terminated by the Corporation. Accordingly, the Petitioner is seeking a waiver of the Rule, which would allow the Petitioner to extend the time period for receiving the Corporation’s issuance of a firm SAIL Loan commitment; and thus, would also permit the Petitioner to extend the time period for completing the Corporation’s credit underwriting process.

9. As you know, the Rule was changed to its current substance and time periods from the previous rule, Florida Administrative Code 67-48.0072, dated effective as of October 8, 2014 (the “Old Rule”). The Old Rule imposed two separate deadlines; one deadline for closing the SAIL loan financing within one (1) year after receiving the Corporation’s invitation to enter into

credit underwriting, and the other, second deadline for closing the SAIL loan financing within one hundred eighty (180) days after receiving the firm loan commitment from the Corporation. These two aforementioned timelines ran concurrently; and therefore, would result in two separate extension fees should a developer require an extension of the above-mentioned time periods. As such, the Corporation amended the Old Rule to create the Rule with the intent to streamline the timelines and extension fees so to avoid waste and confusion when a developer would have to make multiple requests to the Corporation with respect to time period extensions.

10. Now under the Rule, the two aforementioned time periods are successive. The nine (9) month time period in the Rule (*i.e.*, the Petitioner's requirement to receive the firm SAIL Loan commitment from the Corporation within nine (9) months of the Petitioner's acceptance to enter into the credit underwriting process) is unrealistic and not possible.

11. A developer is not able to begin its project until the preliminary recommendations are promulgated by, and invitations to credit underwriting are received from, the Corporation. A developer cannot feasibly complete any work on a project before this date because of uncertainty of ultimately receiving an award of tax credits, loan, bond issuance, etc. from the Corporation. In this case, the relevant date is March 31, 2017 with the nine (9) month period ending December 31, 2017. However, due to the Corporation's board meeting schedule, this date is truly December 8, 2017; an unintended cut of nearly one (1) month to the nine (9) month timeline. Essentially, this provides the Petitioner no more than eight (8) months to complete the Corporation's credit underwriting process and receive a firm SAIL Loan commitment from the Corporation. With that said, there is an additional issue, the credit underwriting reports are due in draft format to the Corporation no less than four (4) weeks prior to the Corporation's board meeting, which means the Petitioner's draft credit underwriting report is due to the Corporation no later than November

8, 2017. And with that said, one more issue is that the credit underwriter has to receive all relevant and applicable materials no less than one (1) month prior to issuing a draft credit underwriting report, which means the Petitioner must provide all information (including third party reports) for the Property to the credit underwriter no later than October 8, 2017. Consequently, the Rule only permits a five (5) to six (6) month time period for the Petitioner to complete credit underwriting with respect to the Property, which is not practical under any factual scenario.

12. In a gracious attempt to streamline fees and penalties, the Corporation changed the Old Rule to the Rule, but the Rule is impossible for a developer to satisfy. The Rule, with a shortened time period that depends upon receipt of a firm loan commitment, has created unintended consequences, as demonstrated by the Petitioner's current situation. The procedural requirements of reaching a firm loan commitment from the Corporation is an impossibility under the Rule; and thus, the change from the Old Rule to the Rule itself is a substantial hardship. However, the ultimate unintended consequences of the rule change were not known until the Corporation's board meeting schedule was announced to the public-at-large and the Petitioner began its process of finalizing plans, securing funding sources, obtaining permits and finalizing financial information for the credit underwriter; as you know, credit underwriting is a meticulous and time consuming process and cannot be completed by the timeframe required under the Rule.

13. Additionally, the magnitude of the non-refundable extension fee (equal to one percent (1%) of the principal loan amount) is significant, and the intent of this non-refundable extension fee is to provide the ability for a developer to seek and receive an extension from a timeline that is possible to achieve in the first place. As discussed in this Petition, the current timeline under the Rule is not possible.

14. Moreover, the events of this 2017 year (and late in the 2016 year, after applications were submitted to the Corporation) have compounded the impossibility of satisfying the time periods required by the Rule; for example, hurricanes and proposed federal tax reform. Hurricane Irma drastically affected the State of Florida, substantially slowing down business. As for proposed federal tax reform, it has caused tremendous volatility in the low-income housing tax credit market, both for the 9% and 4% tax credits. Further, the current status of the 4% tax credits is unknown given the U.S. House of Representatives' elimination of using private activity bonds for the financing of affordable housing developments. This transaction regarding the Property is only feasible with the use of the Bonds, and financing sources are already stringent as of this date. To alleviate the funding issues caused by proposed federal tax reform and the drastic reduction in low-income housing tax credit pricing in the marketplace since late 2016 and through 2017, the Petitioner is seeking additional local government subsidies and funding to compensate for the decline in anticipated investor equity due to the reduction in tax credit pricing; and the Corporation itself has formerly noted this negative pricing affect throughout the tax credit market when it issued RFA 2017-109 (Development Liability Loan Funding). The threat of eliminating the use of private activity bonds for financing affordable housing developments has exacerbated funding issues for the Property in addition to the reduced anticipated investor equity (caused by the decrease in tax credit pricing), further making the December 31, 2017 deadline impossible to satisfy by the Petitioner.

15. Consequently, an extension of the time period for completing the credit underwriting process and obtaining the firm SAIL Loan commitment until the second (2nd) regularly scheduled 2018 board meeting for the Corporation is necessary to avoid substantial hardship on the Petitioner and the Property. By granting the requested time extension, the Property

will be able to proceed to reach completion in the future, which will provide eighty-five (85) affordable rental housing units to the rapidly growing and expanding Palm Beach County, Florida; such a result assists the Corporation at fulfilling its statutory mandate to provide safe, sanitary and affordable housing to the citizens of Florida.

16. Petitioner believes that a waiver of this Rule will serve the purposes of Section 420.5087 and the Act that are implemented by Chapter 67-48 of the Florida Administrative Code, because one of the goals is for the proceeds of a SAIL Loan be used to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households. The Act (Section 420.501, *et seq.*) was passed in order to create inducements and opportunities for private and public investment in rental housing to increase the supply of affordable housing for low-income persons and households. By granting this waiver, the Corporation would recognize the goal of increasing the supply of affordable housing units via the construction of new developments throughout Florida.

17. The requested waiver will not adversely impact the Property or the Corporation.

E. TYPE OF WAIVER

18. The waiver being sought is permanent in nature.

F. ACTION REQUESTED

19. For the reasons set forth herein, the Petitioner respectfully requests the Corporation (i) grant the requested initial waiver of the time period for issuance of a firm loan commitment until the second (2nd) regularly scheduled 2018 board meeting for the Corporation (*i.e.*, whereby the extension for payment of the non-refundable fee is not yet triggered); (ii) grant this Petition and all the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted this 20th day of November, 2017.

Respectfully submitted,

/s/ Leonard Collins

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