STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ARBOURS AT HESTER LAKE, LLC,

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent

_____/

FHFC CASE NO. 2019-002VW

Application No. 2018-1976

PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE RULE 67-48.023(2)(2017)

Petitioner, Arbours at Hester Lake, LLC ("Petitioner"), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation ("Florida Housing") for a variance from the provisions of Rule 67-48.023(2), F.A.C. (2017) to allow it to utilize the Average Income Test (defined below) to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code Section 42(g)(1)(C). In support of this Petition, Petitioner states as follows:

Petitioner and the Development

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

Sam T. Johnston
242 Inverness Center Drive
Birmingham, AL 35242
Telephone: (205) 981-3300
Fasimile: (205) 991-9674
E-Mail: sam@arbourvalley.com

2. The name, address, telephone and facsimile numbers of Petitioner's counsel is:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
200 S. Biscayne Boulevard
Suite 4100
Miami, FL 33131
Telephone: (305) 347-7308
Facsimile (305) 347-7808
Email: gcohen@shutts.com

3. On or about December 20, 2017, Petitioner submitted Application No.2018-197C in response to RFA 2017-111 to assist in the construction of a 80-unit development located in Pasco County, Florida, known as Arbours at Hester Lake (the "Development"), and was awarded an allocation of low income housing tax credits ("Credits").

Type of Waiver

4. The waiver being sought is permanent in nature.

Rule For Which a Variance Is Requested

5. Rule 67-48.023(2), F.A.C. (2017) required that each Development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code (IRC) that was in effect at the time the rule was adopted. Prior to March 23, 2018, this Section of the IRC did not allow income averaging, and therefore Rule 67-48.023(2), F.A.C. (2017) also did not allow income averaging.

Statutes Implemented by the Rule

6. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute relating to the allocation of Credits contained in Section 420.5099 of the Florida Statutes.

Justification for Granting Waiver of the Rule

7. During its 2018 session, the United States Congress passed the "Consolidated Appropriations Act, 2018" ("H.R. 1625"), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

> "(C) AVERAGE INCOME TEST. –
>
> (i) IN GENERAL. – The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.
>
> (ii) SPECIAL RULES RELATING TO INCOME LIMITATION. -
>
> For Purposes of clause (i)
>
> (I) DESIGNATION. - The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause
>
> (II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income
>
> (III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income." Section 42(g)(1)(C), I.R.C. (2018)

8. Rule 67-48.0023(2) F.A.C. was revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. As a result, any applications for Credits submitted to Florida Housing after July 8, 2018 are allowed to use the income averaging provisions of the IRC.

9. Petitioner's application was submitted prior to the July 8, 2018 rule revisions and were therefore not allowed to take advantage of the Average Income test. It would violate

principles of fairness and put Petitioner at a competitive disadvantage with other developments if it was not allowed to use the Average Income test solely because of when its application was submitted.

10. Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to or variances from its requirements when strict application of the requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

> Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "principles of fairness" are violated when the 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.

11. Granting the requested variance in this instance would allow Petitioner to utilize the Average Income test as allowed by the Internal Revenue Code. The controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results.

12. Additionally, by granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing.

13. In this instance, Florida Housing has jurisdiction to grant a waiver of the rule and Petitioner meets the standards for a waiver of the Rule.

Action Requested

14. WHEREFORE, Petitioner respectfully requests that Florida Housing:

(a) Grant this Petition and all relief request therein;

(b) Grant a variance from Rule 67-48.023(2), F.A.C. (2017) and allow for calculation of the minimum set aside percentage based on income averaging; and

(c) Grant such further relief as may be deemed appropriate.

Respectfully submitted this 15th day of January, 2019.

Gary J. Cohen, Esq.
Counsel for Petitioner
Florida Bar No. 0353302
Shutts & Bowen LLP
200 S. Biscayne Boulevard
Suite 4100
Miami, FL 33131
Telephone: (305) 347-7308
Facsimile (305) 347-7808
Email: gcohen@shutts.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org,

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

this 15th day of January, 2019.

Gary J. Cohen, Esq.





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0198761
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to
Joint Administrative
Procedures Committee
111 W MADISON ST
TALLAHASSEE , FL
32399-6588
United States
(850) 488-9110
residential address
No
return label
No
notification type
Delivery
notification recipients
GCohen@shutts.com
mnunes@shutts.com

from
Gary Cohen (0111)
Shutts & Bowen LLP
200 S. Biscayne Blvd.
Suite 4100
Miami , FL 33131
United States
305-347-7308
billing
Moore, John C..Arbours
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(22545.0041)
operator
Madeline Ruiz
305 415 9024
mnunes@shutts.com
create time
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to
Corporation Ana McGlamory
Florida Housing Finance Corporation
227 N BRONOUGH ST
Suite 5000
TALLAHASSEE , FL 32301-1380
United States
(850) 488-4197
residential address
No
return label
No
notification type
Delivery
notification recipients
GCohen@shutts.com
mnunes@shutts.com

from
Gary Cohen (0111)
Shutts & Bowen LLP
200 S. Biscayne Blvd.
Suite 4100
Miami , FL 33131
United States
305-347-7308
billing
Moore, John C..Arbours 2018 Tax Cre...catio (22545.0041)
operator
Madeline Ruiz
305 415 9024
mnunes@shutts.com
create time
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vendor
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