

**BEFORE THE FLORIDA HOUSING FINANCE CORPORATION**

HARBOUR COVE ASSOCIATES, LTD.,  
a Florida limited partnership,

Petitioner,

vs.

Application No. 2003-040S  
*FHFC Case # 2006-004VW*

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

**PETITION FOR VARIANCE FROM RULE 67 – 48.012(2)(g)**

HARBOUR COVE ASSOCIATES, LTD., a Florida limited partnership (“Petitioner”), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the “Corporation”) for a variance from Rule 67-48.012(2)(g), Florida Administrative Code (2003). This Petition is filed pursuant to Section 120.542, Florida Statutes and Chapter 28-104, Florida Administrative Code.

**THE PETITIONER**

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

Harbour Cove Associates, Ltd.  
c/o Mara S. Mades  
Executive Vice President  
Cornerstone Group Development, LLC  
2121 Ponce de Leon Boulevard, Penthouse 2  
Coral Gables, FL 33134  
Telephone: (305) 443-8288  
Facsimile: (305) 443-9339

2. The address, telephone and facsimile number of the Petitioner's counsel is:

Maureen McCarthy Daughton, Esquire  
Broad and Cassel  
215 South Monroe Street, Suite 400  
Tallahassee, FL 32301  
Telephone: (850) 681-6810  
Facsimile: (850) 521-1478

3. Petitioner successfully applied for financing from the State Apartment Incentive Loan Program ("SAIL") in the 2003 Universal Application Cycle Multi-Family Mortgage Revenue Bonds (MMRB) Program; State Apartment Incentive Loan (SAIL) Program; Home Investment Partnership (HOME); Rental Program and Housing Credit (HC) Program (the "Universal Cycle"). The Petitioner's application number is 2003-040S (the "Application"). Petitioner applied for \$2,000,000.00 in SAIL funds to finance a portion of the costs to develop a multifamily rental apartment complex on approximately seven (7) acres in Broward County, Florida, known as Harbour Cove Apartments (the "Development"). The Development will have 212 units. The Application for SAIL funds was approved for funding at the October 9, 2003 Corporation board meeting.

**THE RULE FOR WHICH VARIANCE IS SOUGHT**

4. Petitioner requests a variance from Rule 67-48, Florida Administrative Code (the "2003 SAIL Rule"). More specifically, the rule Petitioner is seeking a variance from is designated the SAIL Credit Underwriting and Loan Procedures, subsection (2)(g) of Rule 67-48.012(2003), F.A.C.

5. That section of the 2003 SAIL Rule provides:

(2) The credit underwriter shall verify all information in the Application, including information relative to the Applicant, Developer, Syndicator, General Contractor, and if an ALF, the service provider, as well as other members of the Development Team.

\* \* \*

(g) The minimum combined debt service coverage shall be 1.10 and the maximum debt service coverage shall be 1.50, including the SAIL mortgage and all other superior mortgages. In extenuating circumstances, such as when the Development has deep or short term subsidy, the debt service coverage may exceed 1.50 if the Credit Underwriter's favorable recommendation is supported by the projected cash flow analysis.

\* \* \*

### **STATUTES IMPLEMENTED BY THE RULE**

6. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act<sup>1</sup>, the Statute that created the SAIL program. See §420.5087, Florida Statutes.

7. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, and Rule Chapter 28-104, F.A.C., to grant variances to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended consequences in particular instances. 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>2</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 rule variance in this case will present substantial hardship to the Petitioner and will frustrate the underlying purpose of the statute.

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<sup>1</sup> The Florida Housing Finance Corporation Act is set forth in Section 420.501 through 420.516 of the Florida Statutes.

<sup>2</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 particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to Rule 120.542(2), Florida Statutes.

## **FACTS DEMONSTRATING ENTITLEMENT TO VARIANCE**

8. Petitioners acquired the approximately seven acre site for the Development by special warranty deed dated July 29, 2003. Petitioners performed their due diligence with regard to the Phase I Environmental Site Assessment and Soils test. The plan for development was 212 units, with construction anticipated to be completed in July 2004.

9. In January 2004, during construction, Petitioner discovered oil on the property and the site was shut down for 18 months, while remediation plans were drafted, reviewed and approved. The presence of oil had not been disclosed by the seller of the property who was aware prior to the sale of Department of Environmental Resource Management (“DERM”) violations on the site. The engineer who performed the soil evaluation was also aware of the presence of oil on the site prior to the construction beginning, however, failed to disclose this to Petitioner’s representative. The Petitioner, upon discovery of this environmental hazard, immediately contacted the Hallendale Beach City Commission and sought their assistance in having the property designated as a Brownfield Area pursuant to Section 376.80 (2)(b), Florida statutes. On June 15, 2004, the Hallendale Beach City Commission adopted Resolution 2004-18 which designated the Development site as a Brownsfield Area.

10. Subsequently, Petitioner hired an engineering firm to draft recommendations for remediation and submit them to the Department of Environmental Resources Management for review and approval. In December 2004 these plans were approved and a Brownfield Site Rehabilitation Agreement (“BSRA”) was entered into between Broward County and Harbour Cove Associates, Ltd. The BSRA required the Petitioner to conduct site rehabilitation and throughout the process to submit technical reports to Broward County for oversight purposes. The site work remediation has recently been concluded as has the testing of the twenty-one (21)

existing monitoring wells on the site. The testing results were submitted to the Broward County Environmental Protection Department.

11. The Petitioner closed on the SAIL loan in May 2005. The Development is also funded by a \$13,915,000 MMRB loan from the Housing Finance Authority of Broward County (the "MMRB loan"). Under the terms of the SAIL loan the MMRB loan is to be reduced by \$765,000 with the SAIL funds for a revised MMRB loan amount of \$13,150,000. This reduction was required to enable Petitioner to comply with the SAIL Program combined debt service coverage. Under the terms of the 2003 SAIL program the combined debt service coverage ratio for combined debt could not be less than 1.10, nor greater than 1.50.

12. Due to the extended delay caused by the discovery of oil and the ensuing Brownfield remediation process, Petitioner, who is also the General Contractor on the Development, has had to rebid all of the subcontractor work at great expense. There have been significant increases in basic material costs during this interim period. These factors, as well as the significant additional costs attached to the remediation process, have resulted in cost overruns in excess of approximately \$3.5 million to date. It is anticipated that this number will continue to rise, at least in the immediate future. Due to these unforeseen delays, completion of the construction of the Development will now take three (3) years resulting in Petitioner losing approximately \$1,000,000 in tax credit equity.

13. Petitioner is requesting a variance from the 2003 SAIL Rule combined debt service coverage to a 1 to 1 combined debt service coverage.<sup>3</sup> Such a change could eliminate the requirement of paying down any portion of the bonds at this time. This would enable the Petitioner to use the \$765,000 for payment of development costs. Additionally, in accordance

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<sup>3</sup> The current Rule, 67-48.0072(10), allows for a 1.0 combined minimum debt service coverage if the Applicant defers at least 35% of the developer fee for at least six months after construction completion.

with the 50% test calculation under Section 42(H)(4) of the Code, the Petitioner would be able to obtain 4% tax credits on approximately twice the amount of \$765,000 (or \$1.53 million) thereby generating approximately \$500,000 in additional limited partner equity (due to upward adjusters) to contribute to the Development.<sup>4</sup> Even if the variance is granted, Petitioner anticipates that it will have no General Contractor fee with the 1 to 1 and, in all likelihood, under the final construction costs, no Developer fee.

14. In this case, strict application of Rule 67-048.012(2)(g) will create a substantial hardship for Petitioner. Due to the unexpected series of events and delays resulting from the Brownsfield designation and execution of the BSRA, Petitioner must now meet significant cost overruns. To deny Petitioner's request will create an economic hardship in that Petitioner will not have the use of approximately \$765,000 of bonds and \$500,000 in equity to offset the cost overruns. Moreover, it was not possible for Petitioner to have anticipated these events and thus would also violate principles of fairness to deny this Petition.

**VARIANCE WILL SERVE THE UNDERLYING PURPOSE OF THE STATUTE**

15. Petitioner believes that a 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 first, second or other subordinated mortgage loans or loan guarantees to sponsors, including for-profit, non-profit and public entities, to provide affordable housing to very low income persons. The legislative intent will be served by the granting of this variance.

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<sup>4</sup> Even if FHFC approves this Petition, the construction cost change orders incurred due to the remediation process cannot be included in the final cost certification, because then Petitioner would not be able to meet the 50% test.

**TYPE OF VARIANCE**

16. The variance being sought is permanent in nature.

17. Should the Corporation have questions or require any additional information necessary for consideration of the Petition.

**ACTION REQUESTED**

18. Petitioner requests the following:

a. A variance from Rule 67-48.012(2)(g), Florida Administrative Code, to allow for a 1 to 1 combined debt service coverage.

19. A copy of the Petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, FL 32399-1300.

Respectfully submitted this 17 day of March, 2006.



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