

BEFORE THE  
FLORIDA HOUSING FINANCE CORPORATION

CREATIVE CHOICE HOMES XXIX, LTD.,  
a Florida limited liability company,

Petitioner,

v.

Application No.: 2003-023CS  
Case No.: 2006-076 VW

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

**PETITION FOR VARIANCE AND WAIVER FROM RULES  
67-48.004(14)(l), 67-48.009(4), 67-48.012(g) AND PART V.A.1 OF  
THE UNIVERSAL APPLICATION INSTRUCTIONS (REV. 4-03)  
INCORPORATED BY REFERENCE INTO RULE 67-48.002(111)**

Creative Choice Homes XXIX, Ltd. ("Petitioner"), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a waiver from Rules 67-48.004(14)(l) AND 67-48.009(4), Florida Administrative Code (2003) and a variance from Rule 67-48.012(g) (2003) and Part V.A.1. of the Universal Application Instructions (Rev. 4-03) incorporated by reference into Rule 67-48.002(111) (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 number, and facsimile number of Petitioner is:

Jason Larson  
Creative Choice Homes, Inc.  
4243-D Northlake Boulevard  
Palm Beach Gardens, FL 33410  
Phone: (561)627-7988  
Fax: (561)627-3218

RECEIVED  
NOV 14 2006  
FLORIDA HOUSING  
FINANCE CORPORATION

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

Cathy M. Sellers, Esq.  
Broad and Cassel  
Suite 400  
215 South Monroe Street (32301)  
Post Office Drawer 11300  
Tallahassee, Florida 32302  
Phone: (850) 681-6810  
Fax: (850) 521-1443

3. Petitioner applied for financing from the State Apartment Incentive Loan ("SAIL") program through the 2003 Universal Application Cycle (the "Universal Cycle") that the Corporation administers pursuant to Chapter 67-48, Florida Administrative Code (the "Rule"). The Petitioner's application number is 2003-023CS (the "Application"). Petitioner successfully applied for SAIL funds to finance a portion of the costs to build a 112 unit development for the Elderly population in Lee County, Florida known as Mariner's Landing (the "Development"). In the 2003 Universal Cycle, Lee County was designated as a Medium County by the Corporation. Construction of the Development began January 25, 2005, and the SAIL loan closed on November 15, 2004. Construction is well underway, however, not completed.<sup>1</sup>

**The Rules From Which Waiver and Variance is Sought**

4. Due to circumstances explained more fully in this Petition, Petitioner seeks to have the total amount of its SAIL loan increased from \$860,000 to \$2,860,000 and seeks to have the minimum debt service coverage ratio reduced to less than 1.10. In order to obtain this relief, Petitioner seeks a waiver or variance from various provisions of the Corporation's Rule and the 2003 Universal Application Instructions.

---

<sup>1</sup> The Petitioner hopes to obtain certificates of occupancy by December 31, 2006.

5. Petitioner seeks a waiver from Rule 67-48.004(14)(1), Florida Administrative Code (2003) (the “2003 SAIL Rule”), which provides in part:

14. Notwithstanding any other provision of these rules, there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application Deadline.

\* \* \*

Any attempted changes to these items will not be accepted. Those items are as follows:

\* \* \*

(1) Funding Request (except for Taxable Bonds) amount;

\* \* \*

6. Petitioner also seeks a waiver from Rule 67-48.009(4), Florida Administrative Code (2003), which provides:

(4) Applicants cannot request additional SAIL funding for the same Development, unless otherwise specified in the Universal Application.

7. Rule 67-48.002(111), Florida Administrative Code (2003), defines “Universal Application Package” as the forms and instructions received by the Corporation. Moreover, it further provides that the Universal Application Package is adopted and incorporated by reference into the Rule.

8. Petitioner seeks a variance from Part V.A.1 of the 2003 Universal Application Instructions which limits the SAIL request amount of Medium County applicants to no more than \$1.5 million or in excess of 25% of the Total Development Cost.<sup>2</sup>

---

<sup>2</sup> The Corporation in the 2005 Universal Application Cycle modified its rules for Medium County applicants to request a SAIL Loan of up to \$3 million and to allow SAIL-financed development to be underwritten with a debt service coverage of 1.00 under certain circumstances. In the 2006 Universal Application Cycle, the SAIL Funding request was increased to \$4 million for Medium County applicants. Thus, as a matter of policy, the Corporation has determined that such requests are consistent with the provisions of affordable housing in Florida.

9. Petitioner lastly seeks a variance from Rule 67-48.012(g) which requires a minimum combined debt service coverage of 1.10 for SAIL financed developments.

**Statutes Implemented by the Rules**

10. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act<sup>3</sup>, the statute that created the SAIL Program. See §420.5087, Fla. Stat.

11. The Corporation has the authority pursuant to Section 120.542(2), Florida Statutes, and Rule Chapter 28-104, F.A.C., to grant variances and waivers to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended consequences in particular instances. Variances and waivers 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>4</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 requests for rule variances and rule waiver in this case will present substantial hardship to the Petitioner and will frustrate the underlying purpose of the statute.

**Petitioner Seeks Relief From the Rules For the Following Reasons**

12. When Petitioner submitted the Application to the Corporation, it did so in the good faith belief that a 112-unit affordable housing development to serve the Elderly population would be a financially viable undertaking that would serve the affordable housing needs of Lee County.

---

<sup>3</sup> The Florida Housing Finance Corporation Act is set forth in Section 420.501 through 420.516, Florida Statutes.

<sup>4</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 Section 120.542(2), Florida Statutes.

13. The Development was initially delayed in the permitting and pre-construction phases because of disruptions in the Lee County local government functions caused by the impacts of Hurricanes Charley and Ivan in August and September, 2004, respectively. As a result, the acquiring of permits and construction commencement that were planned for August 2004 did not begin until November 2004.

14. In 2005, progress in construction of the Development was also delayed by heavy rainfall from Hurricane Dennis in July, Hurricane Katrina in August, Hurricane Rita in September and Hurricane Wilma in October. While none of these 2005 storms resulted in Lee County being designated a disaster area, the impacts in southwest Florida were significant. The Corporation recognized the impact, particularly of Hurricane Wilma, on Lee County and others by allocating over \$6 million in available SAIL funds to 2005 developments located in counties “hit hard” by Hurricane Wilma.<sup>5</sup> Ironically, the Corporation chose to make these funds available only to projects funded so recently that they have not yet begun construction, while Developments such as Petitioner’s, which are “half-built” and struggling because of the same circumstances those eligible for funding, must do without such assistance.

15. The magnitude of the destruction from these hurricanes on the Gulf coast has and will continue to result in shortages of many different types of construction materials, as well as labor, throughout the state.

16. The Corporation has as recently as November 2005, recognized the impacts of these hurricanes on this particular Development by granting Petitioner’s request for an extension

---

<sup>5</sup> The purpose of the allocation of these SAIL funds is to “maintain the economic viability of 2005 developments” located in counties hit by Hurricane Wilma. The money is intended to provide additional funding to offset the increase in construction costs and to ensure these developments are constructed in a timely manner. Unfortunately, this money is only available to 2005 developments which received an allocation of Low Income Housing Tax Credits (LIHTC).

for their 2003 Carryover Allocation placed in service deadline. The Development must be placed in service by December 31, 2006, or the Development will not be able to claim LIHTC.

17. The 2004 and 2005 hurricane seasons which have necessitated Petitioner increasing its requested SAIL loan amount were not foreseeable at the time of the Application submittal.

18. In this case, strict application of these rules will create a substantial hardship for the Petitioner. Due to the unexpected hurricanes over the last two years, Petitioner has incurred significant cost overruns. To deny Petitioner's request will only exacerbate economic hardship which has resulted in Petitioner's loss of approximately \$1,800,000 to try to offset the cost overruns. This has included, but is not limited to, increases in the costs of construction materials. The cost of concrete alone has increased from \$85 per cubic yard to \$125 per cubic yard, a 47% increase which has resulted in an additional \$566,501 that the Petitioner has absorbed. Additionally, an increase of 30% in petroleum-based building materials such as asphalt shingles, asphalt paving, carpeting and PVC piping, resulting in an additional \$336,267 to the Petitioner.<sup>6</sup> It was not possible for Petitioner to have anticipated these events and would it violate principles of fairness to deny this Petition.

**Variance Will Serve Underlying Purpose of the Statute**

19. The variances and waiver would serve the purposes of the underlying statutes because they would permit construction of much needed affordable housing to continue and be in an area that has suffered significant losses of its housing stock in the past two (2) years. To grant this request will better meet the needs of the community and will ensure that there are adequate financial sources to do so and therefore improve the financial viability of the Development.

---

<sup>6</sup> Other increases include, but are not limited to, \$135,000 for sheetrock and an increase of \$410,267 to cover increased cost of materials and supplier contracts due to construction delays due to the hurricanes.

**Action Requested**

20. Petitioner requests the following relief:

a. That the Corporation grant a waiver of Rule 67-48.004(14)(l) (2003) to allow Petitioner to revise its SAIL funding request amount after the Application deadline.

b. That the Corporation grant a waiver of Rule 67-48.009(4) to allow Petitioner to request additional SAIL funding.

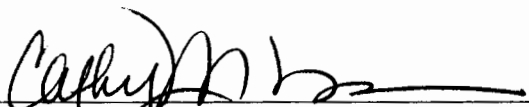
c. That the Corporation grant a variance from Part V.A.1. of the Universal Application and increase the amount of SAIL loan awarded to the Petitioner from the current \$860,000 to \$2,860,000 through sources available to the Corporation.

d. That the Corporation grant the Petitioner a variance from Rule 67-48.012(2)(g) (2003) such that the Corporation allow a minimum combined debt service coverage below 1.10.

21. Each of these waivers and variances would be permanent as to the Petitioner.

22. A copy of this petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, Florida 32399-1300.

Respectfully submitted this 14<sup>th</sup> day of November, 2006.



CATHY M. SELLERS  
Florida Bar #: 0784958  
BROAD AND CASSEL  
Suite 400

215 South Monroe Street (32301)

Post Office Drawer 11300

Tallahassee, Florida 32302

Phone: (850) 681-6810

Fax: (850) 521-1443

Attorney for Petitioner

Creative Choice Homes XXIX, Ltd.