

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. _____
Application No. 2006-074CS

350 NW LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

**PETITION FOR WAIVER AND/OR VARIANCE OF
RULES 67-48.002(30) and (32), 67-48.010(5) AND 67-48.0072(10)**

Petitioner 350 NW LLC ("Petitioner") petitions Respondent Florida Housing Finance Corporation ("Florida Housing") for (1) a variance to allow for the establishment of a Supplemental Operating Reserve for the deposit of all Development Cash Flow; and (2) a waiver of minimum combined debt service coverage ("DSC") requirements. *See* Rules 67-48.002(30) and (32), 67-48.010(5), and 67-48.0072(10) F.A.C. (2006) (collectively the "Rules").

1. Pursuant to Section 120.542, Fla. Stat.(2006) and Rules 28-104.001 through 28-104.006, F.A.C., and under the unique circumstances described below, Petitioner requests waivers and/or variances of the Rules: (a) to establish a Supplemental Operating Reserve; (b) to allow for the deposit of development sources and all net cash flow generated by the Development (as hereinafter defined) into the Supplemental Operating Reserve; (c) to allow for the disbursements of "Developer Cash Flow" in accordance with Paragraph 14 below; and (d) to waive the requisite DSC.

A. The Petitioner

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

350 NW LLC
Attention: Liz Wong
2950 S.W. 27th Avenue, Suite 200
Miami, Florida 33133
Telephone: 305-476-8118
Facsimile: 305-476-1557

3. The name, address, telephone and facsimile numbers, and e-mail addresses of the Petitioner's attorneys are:

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4. Pursuant to the 2006 Universal Cycle, Petitioner was a successful applicant under its 2006 Universal Application ("Universal Application")¹ for a loan of up to \$4 million under the State Apartment Incentive Loan ("SAIL") Program. The SAIL funds will be used to finance a portion of the costs for the development of Labre Place², a new 90-unit apartment development (the "Development"), in Miami, Miami-Dade County, Florida. At least 50% of the units are designated for permanent housing for the homeless. *See* Application No. 2006-074CS.

¹ The Universal Application Package has been adopted and incorporated into Chapter 67-48 by Rule 67-48.004(1)(a), F.A.C. (2006).

² On November 2, 2006, Florida Housing approved Petitioner's request to change name of the Development from St. David to Labre Place.

5. In its Universal Application, Petitioner also applied for housing tax credits (“Housing Credits”) under the Low Income Housing Tax Credit program, with the equity raised from Housing Credits also being used for the Development. Florida Housing has issued its Preliminary Allocation of Housing Credits reserved in the amount of up to \$2.435 million, and it is anticipated that there will be a Final Housing Credit Allocation granted to Petitioner in accordance with Florida Housing’s final allocation procedures.

6. The requested Rule waivers and variances will not adversely affect the Development. However, a denial of this Petition (a) would result in substantial economic hardship to Petitioner; (b) could deprive Miami-Dade County of essential housing units for the homeless in a timely manner; and (c) would violate principles of fairness. § 120.542(2), Fla. Stat. (2006).

7. The waiver being sought is permanent in nature.

B. Rules from Which Relief is Requested and Statute Implemented by the Rules

8. Petitioner requests a waiver and/or variance of the following Rules:

a. “Development Cash Flow” means, with respect to SAIL Developments, cash flow of a SAIL Development as calculated in the statement of cash flows prepared in accordance with generally accepted accounting principles (“GAAP”) and as adjusted for items including any distribution or payment to the Principal(s) or any Affiliate of the Principal(s) or to the Developer or any Affiliate of the Developer, whether paid directly or indirectly, which was not expressly disclosed in determining debt service coverage in the Board approved final credit underwriting report. *See* Rule 67-48.002(30);

b. “Development Expenses” means, with respect to SAIL Developments, usual and customary operating and financial costs, such as the compliance monitoring fee, the financial monitoring fee, replacement reserves, the servicing fee and the debt service reserves. As it relates to SAIL Developments and to the application of Development Cash Flow described in subsections 67-48.010(3) and (4), F.A.C., the term includes only those expenses disclosed in

the operating pro forma included in the final credit underwriting report, as approved by the Board. *See* Rule 67.48-002(33);

c. If the SAIL loan is secured by a first mortgage lien, each year, subject to the provisions of subsection (6) below, Development Cash Flow shall be applied to pay the following items in order of priority:

(a) First mortgage fees and interest payment on SAIL loan balance equal to 1% as stated in paragraph (3)(a) above and equal to 3% as stated in paragraph (3)(b) above over the life of the SAIL loan;

(b) Development Expenses on the SAIL loan including up to 20% of total Developer fees per year;

(c) Interest payments on the SAIL loan deferred from previous years;

(d) Mandatory payment on subordinate mortgages.

After the full SAIL loan interest has been paid, the Applicant shall retain all remaining monies, unless the Applicant chooses to prepay a portion of the loan balance. *See* Rule 67-48.010(5); and

d. The proposed Development must demonstrate, based on current rates, that it can meet minimum 1.10 debt service coverage (DSC) requirements with all first and second mortgages for Competitive Housing Credits and non-competitive Housing Credits without SAIL. . . . For SAIL Applications, the minimum debt service coverage shall be 1.10 for the SAIL loan, including all superior mortgages. However, if the Applicant defers at least 35% of their developer fee for at least 6 months following construction completion, the minimum debt service coverage shall be 1.00 for the SAIL loan, including all superior mortgages. For SAIL and HOME Applications, the maximum debt service coverage shall be 1.50 for the SAIL or HOME loan, including all 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. *See* 67-48.010(10).

9. The requested waivers implement Section 420.5087's mandate empowering Florida Housing with "the power to underwrite and make state apartment incentive loans or loan guarantees to sponsors." § 420.5087(2), Fla. Stat. (2006).

C. Justification for Petitioner's Requested Waivers and Variances

10. Recognizing the need for supportive rental assistance for homeless persons who will rent units in the Development, Petitioner intends to apply for operating subsidies from Miami-Dade County. However, Petitioner is uncertain whether Miami-Dade County and/or HUD will have available operating subsidies to meet the needs of this Development.

11. Due to the nature of the Development's Homeless demographic, and the lack of reliable operating subsidies, the financial performance and viability of the Development is dependent upon the establishment of a Supplement Operating Reserve.

12. The absence of a Supplement Operating Reserve would result in significant revenue shortages, and could result in Petitioner's inability to meet its operating expenses, including debt service.

13. These adverse results can be avoided through the establishment of a Supplemental Operating Reserve³ in an amount (not less than \$2.5 million) reasonably determined by the Petitioner and its investor limited partner to ensure the economic viability of the Development, taking into account the possible availability of operating subsidy funds.

14. The Supplemental Operating Reserve would be funded (a) from development sources prior to or concurrent with project stabilization; and (b) the balance from Development Cash Flow, with the following conditions:

- a. The funding of all net cash flow from the Development, until the Supplemental Operating Reserve has reached its full funding level as reasonably determined by Petitioner and its investor limited partner, will be treated as an expense for purposes of calculating Development Cash Flow available to make interest payment on the SAIL loans; and

³ Authority for establishing a Supplemental Operating Reserve is found in Rule 67-48.0072(12) (2006). Under these Rules, the Credit Underwriter "must include an estimate for ... operating expense reserves deemed appropriate by the Credit Underwriter ..."

- b. Neither Petitioner nor any of its affiliates will receive any funds from the Supplemental Operating Reserve prior to these funds being used for operating shortfalls caused by the unavailability of operating subsidies or for full payment of any accrued and/or deferred SAIL loan interest due to Florida Housing.

15. The funding of the Supplemental Operating Reserve should not impair the 1.10 DSC requirement. The funding of the Supplemental Operating Reserve with all net cash flow from the Development may be treated as an “expense” thereby causing the Development to technically have no net operating income for purposes of meeting the requirement that the Development demonstrate a 1.10 DSC on its first and second mortgages. In such event, and to avoid any possible impairment of the DSC, Petitioner requests that Florida Housing waive the 1.10 DSC requirement under these unique circumstances.

16. The requested Rule waivers and variances will not adversely affect the Development or Florida Housing. However, a denial of the waiver and variance requests would violate principles of fairness and subject Petitioner to substantial hardship as a result of potential defaults and/or breaches of Petitioner’s obligations under its Universal Application that could (a) cause Petitioner to be unable to properly and efficiently develop this Development; (b) adversely impact other affordable housing developments being developed by entities affiliated with Petitioner and financed by Florida Housing; and (c) could prevent Petitioner and affiliated entities from successfully applying for future financing awards available from Florida Housing.

17. Most importantly, the denial of the relief requested herein could deprive Miami-Dade County of essential rental units for homeless persons.

D. Conclusion

18. The requested Rule waivers and variances will not adversely impact the Development or Florida Housing, and will ensure the availability of housing units to homeless individuals in Miami-Dade County, Florida.

19. Controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief for changed circumstances that arise through no fault of an applicant. Florida Housing generally approves such waivers when it would not affect the scoring of an application or otherwise allow an applicant to gain an unfair competitive advantage.

20. The Rules for which waivers and variances are sought implement, among other sections of the Florida Housing Finance Corporation Act,⁴ the statute that created the SAIL Program. *See* § 420.5087, Fla. Stat. (2006). The express purpose of the SAIL Program is to provide "first, second, or other subordinated mortgage loans or loan guarantees to sponsors, including for-profit, nonprofit, and public entities, to provide housing affordable to very-low-income persons," including Florida's homeless persons. The SAIL Program encourages the development of low-income housing to ensure the availability of housing affordable to very-low-income persons throughout the State. §§ 420.5087(1) and (3)(c), Fla. Stat. (2006).

21. Finally, by granting the requested waivers and variances, 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 new construction in an economical and efficient manner.

⁴ 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.

22. Should Florida Housing require additional information, Petition is available to answer questions and to provide all information necessary for consideration of its Petition.

WHEREFORE, Petitioner 350 NW LLC respectfully requests that Florida Housing Finance Corporation:

- A. Grant the Petition and all the relief requested therein;
- B. Provide a variance, modification or clarification of the definition of "Development Expenses" under of Rules 67-48.002(30), 67-48.002(32), and 67-48.010(5), F.A.C. (2006), and thereby allow all net cash flow to be deposited into the Supplemental Operating Reserve and disbursed in accordance with Paragraph 14 above;
- C. Waive the minimum combined debt service coverage requirements under 67-48.0072(10) F.A.C. (2006); and
- D. Grant such further relief as may be deemed appropriate.

Respectfully submitted,

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By: 
MIMI L. SALL

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 N. 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 20 day of September, 2007.

By: Mimi L. Sall
Mimi L. Sall