

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING FINANCE CORPORATION**

CYPRESS SENIOR VILLAGE, LLC,

Petitioner,

vs.

FHFC Case No: 2009-002VW
Application No. 2006-020H

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____/

**PETITION FOR WAIVER OR VARIANCE
FROM RULE 67-48.020(2)(b) OR, IN THE
ALTERNATIVE, FOR WAIVER OR VARIANCE
FROM RULE 67-48.004(14)(a) & CORRESPONDING
APPLICATION INSTRUCTIONS**

Petitioner, CYPRESS SENIOR VILLAGE, LLC (“Cypress”), pursuant to Section 120.542, Florida Statutes, and Rule Chapter 28-104, Florida Administrative Code (“F.A.C.”), hereby petitions Respondent, the FLORIDA HOUSING FINANCE CORPORATION (“FHFC”), for a waiver or variance from Rule 67-48.020(2)(b), F.A.C. (2006), or, in the alternative, for a waiver or variance from Rule 67-48.004(14)(a), F.A.C. (2006) and the 2006 Universal Cycle Application Instructions cited below, so as to allow Cypress Senior Village (FHFC Applic. #2006-020H) to qualify for a 0% interest rate HOME loan. In support of its Petition, Cypress states as follows:

1. The name, address, and telephone and facsimile numbers of the Petitioner are:

Cypress Senior Village, LLC
7 Booker T. Washington Road
Arcadia, Florida 34265
Telephone No. (863) 494-4343
Facsimile No. (863) 494-5364

2. The name, address, and telephone and facsimile numbers of the Petitioner's attorney, which shall be the Petitioner's address for service purposes during the course of this proceeding, are:

Warren H. Husband
Metz, Husband & Daughton, P.A.
P.O. Box 10909
Tallahassee, Florida 32302-2909
Telephone No. (850) 205-9000
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The HOME Investment Partnerships Program

3. The State of Florida provides below-market-rate loans through its HOME Investment Partnership Program ("HOME") to encourage private developers to build and operate affordable rental housing for low-income Florida residents. Derived from an annual allocation of federal funds from the U.S. Department of Housing and Urban Development, these below-market-rate loans reduce the amount of income required for debt service on the development, making it possible to operate the project at rents that are affordable to low-income tenants.

4. Pursuant to section 420.5089, Florida Statutes, the HOME program is administered by FHFC.¹

5. In 2006, Cypress applied for and was awarded a HOME loan of \$4,000,000 to help finance its project, Cypress Senior Village, a 50-unit garden-style apartment complex for seniors located in Arcadia, Florida, which is being developed in cooperation with the Arcadia Housing Authority.

6. Cypress is wholly owned and controlled by the Arcadia Housing Authority, which is the sole member of Cypress.

7. Completion of the underwriting process for Cypress Senior Village has been delayed by an issue that has arisen regarding the applicable interest rate for the HOME loan. In general, under FHFC's rule, a for-profit applicant receives a 1.5% interest rate, whereas a non-profit applicant receives a 0% interest rate. Cypress and its Developer do not believe that Cypress Senior Village will be financially viable unless it receives a HOME loan with a 0% interest rate.

8. Specifically, Rule 67-48-020(2) (2006), F.A.C., states in relevant part:

(2) The annual interest rate will be determined by the following:

(a) All for-profit Applicants that own 100% of the ownership interest in the Development held by the

¹ FHFC is a public corporation created by law in section 420.504, Florida Statutes, to provide and promote the financing of affordable housing and related facilities in Florida. FHFC is an "agency" as defined in section 120.52(1), Florida Statutes, and is therefore subject to the provisions of Chapter 120, Florida Statutes.

general partner entity will receive a 1.5% per annum interest rate loan.

(b) All qualified non-profit Applicants that own 100% of the ownership interest in the Development held by the general partner entity will receive a 0% interest rate loan. For purposes of determining the annual HOME interest rate, the definition of Non-Profit found at Rule 67-48.002, F.A.C., shall not apply; instead, qualified non-profit Applicants shall be those entities defined in 24 CFR Part 92, Section 42(h)(5)(c), subsection 501(c)(3) or 501(c)(4) of the IRC and organized under Chapter 617, F.S., if a Florida corporation, or organized under similar state law if organized in a jurisdiction other than Florida.²

The corresponding 2008 rule is materially identical.

9. While the referenced 24 CFR Part 92 contains no specific definition of “non-profit” or similar terms, it does define a number of entities that operate on a non-profit basis and fulfill the same essential role and policy goals, including a “public housing agency.” Specifically, 24 CFR Section 92.2 defines “public housing agency” by a cross-reference to 24 CFR Section 5.100, which further defines the term as:

any State, county, municipality, or other governmental entity or public body, or agency or instrumentality of these entities, that is authorized to engage or assist in the development or operation of low-income housing under the 1937 Act.

² All emphasis in quoted material is supplied by the undersigned unless otherwise noted.

10. The Arcadia Housing Authority is a “housing authority,” created pursuant to Chapter 421, Florida Statutes, as a “public body corporate and politic” serving the specific governmental purpose of developing and operating affordable, low-income housing. Fla. Stat. §§421.04, 421.08. By law, the Arcadia Housing Authority must operate as a non-profit entity. Fla. Stat. §421.09.

11. The United States Department of Housing and Urban Development (“HUD”) recognizes the Arcadia Housing Authority as a “public housing agency” eligible under the applicable federal laws and regulations to develop and operate federally subsidized public housing. In fact, the Arcadia Housing Authority operates several public housing projects under contract with HUD.

12. At the time Cypress submitted its Application for Cypress Senior Village to FHFC in 2006, Cypress believed that the Arcadia Housing Authority’s sole ownership and control of Cypress would qualify Cypress Senior Village for a 0% interest rate HOME loan under Rule 67-48-020(2)(b), as explained above.

13. After discussions with FHFC staff over the past few months, however, it appears that Cypress Senior Village will be able to qualify for a 0% interest rate HOME loan only if:

- (a) FHFC will waive or grant a variance from the stated requirements of Rule 67-48-020(2)(b) (2006) and allow Cypress, as presently organized under the direct ownership and control of the Arcadia Housing Authority, to qualify for a 0% interest rate HOME loan; or

- (b) FHFC will waive or grant a variance from the requirements of Rule 67-48.004(14)(a), F.A.C. (2006),³ and the corresponding 2006 Universal Cycle Application Instructions,⁴ and allow Cypress to be replaced as the Applicant for Cypress Senior Village by a newly created Florida non-profit corporation qualified as a tax-exempt organization under subsection 501(c)(3) or 501(c)(4) of the Internal Revenue Code.

14. As such, Cypress hereby petitions FHFC to grant whichever of the waivers/variances described above in paragraphs 13(a) or 13(b) as FHFC deems most desirable so as to allow Cypress Senior Village to qualify for a 0% interest rate HOME loan. Naturally, if a waiver in keeping with paragraph 13(b) is selected by FHFC, then the 0% interest rate HOME loan to Cypress Senior Village would be subject to the new Applicant entity providing FHFC and its underwriter

³ This rule provides in relevant 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. Failure to submit these items in the Application at the time of the Application Deadline shall result in rejection of the Application without opportunity to submit additional information. Any attempted changes to these items will not be accepted. Those items are as follows:

(a) Name of Applicant;

⁴ The 2006 Universal Application Instructions state at Part II.A.2.a.(2) (p. 4) as follows:

If applying for MMRB, SAIL or HOME, the Applicant entity shall be the borrowing entity and cannot be changed until after loan closing. . . .

with the necessary documents to demonstrate compliance with the requirements of Rule 67.48.020(2)(b), F.A.C.

15. The cited rules and Application Instructions specifically implement section 420.5089, Florida Statutes, which empower FHFC to make HOME loans for the purpose of funding the development of affordable housing for Florida's low-income families.

16. Pursuant to section 120.542(1), Florida Statutes, and Rule Chapter 28-104, F.A.C., FHFC has the authority to grant waivers or variances from its rule requirements when strict application of such rules in particular circumstances would lead to unreasonable, unfair, and unintended results. A waiver or variance will be granted when the person subject to the rule demonstrates that strict application of the rule would: (a) create a substantial hardship or violate principles of fairness; and (b) the purpose of the underlying statute has been or will be achieved by other means. Fla. Stat. §120.542(2) (2008).

17. In this case, a decision to deny the requested waiver or variance would work a substantial hardship on Cypress in that it would make it impossible to construct Cypress Senior Village and would lead to the loss of over \$100,000 already invested in this project. Denial of the waiver or variance would deprive the future residents of the development, as well as all of the other residents of Arcadia, of the opportunity to establish an economically diverse community that provides

seniors with decent and safe affordable housing. Moreover, approval of the waiver or variance would not negatively impact the current residents of Arcadia or the surrounding area in any way.

18. Importantly, Cypress gained no competitive advantage in the 2006 Universal Cycle by submitting its Application with Cypress' current organizational structure. Indeed, quite the opposite – if Cypress had originally been formed as a more conventional non-profit entity, then Cypress would have benefitted from tie-breakers that actually would have improved its ranking. *See 2006 Universal Cycle Applic. Instructions, pp. 69-70.*

19. FHFC's granting of the requested waiver or variance also will serve the purposes of the statute that the rules implement. Section 420.5089 and the rest of the Florida Housing Finance Corporation Act (§§420.501, et seq.) were enacted to encourage private investment in the creation of affordable housing for low-income and very-low-income families. With the approval of the requested waiver or variance, FHFC will continue to realize this goal and ensure the development of 50 units of new affordable housing for the seniors of Arcadia.

20. The waiver or variance sought by Cypress is permanent in nature.

21. If FHFC has any questions or requires any additional information regarding this requested waiver or variance, Cypress stands ready to respond quickly to any such request.

WHEREFORE, Petitioner, Cypress Senior Village, LLC, requests that FHFC grant Petitioner a permanent waiver or variance from Rule 67-48.020(2)(b), F.A.C. (2006), or, in the alternative, a permanent waiver or variance from Rule 67-48.004(14)(a), F.A.C. (2006) and the 2006 Universal Cycle Application Instructions cited above, so as to allow Cypress Senior Village to qualify for a 0% interest rate HOME loan.

Respectfully submitted on this 9th day of February, 2009.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this document was served via U.S. Mail to the Joint Administrative Procedures Committee, Holland Building, Room 120, Tallahassee, FL, 32399-1300, on this 9th day of February, 2009.



Attorney