

**BEFORE THE FLORIDA HOUSING FINANCE CORPORATION**

THE ARLINGTON, LP, a Georgia Limited Partnership, and CEC ARLINGTON, LLC, a Florida Limited Liability Company,

Petitioners

vs.

FHFC Case No. \_\_\_\_\_

FLORIDA HOUSING FINANCE CORPORATION

Respondent.

\_\_\_\_\_ /

**PETITION FOR WAIVER OF RULE 67-48.027(1)(f), F.A.C.**

The Arlington, LP, a Georgia limited partnership, and CEC Arlington, LLC, a Florida limited liability company ("Petitioners"), by and through their undersigned counsel, hereby petition the Florida Housing Finance Corporation ("FHFC") for a waiver of Rule 67-48.027(1)(f), Florida Administrative Code (2003). This Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code.

**THE PETITIONERS**

1. The address, telephone number and facsimile number of the Petitioners are:

The Arlington, LP  
Protech Holdings 158, LLC  
c/o Capmark Affordable Properties, Inc.  
1801 California Street  
Denver, CO 80202  
ATTN: Legal Division  
Phone: (617) 573-5840 (Attn: Chrysa Long)  
Fax: (617) 523-6850 (Attn: Chrysa Long)

CEC Arlington, LLC  
297 Boston Post Road, Suite 100  
Wayland, MA 01778  
ATTN: Nick Kanieff  
Phone: (978) 460-4166  
Fax: (267) 284-6934

2. The address, telephone number and facsimile number of Petitioners' counsel is:

Broad and Cassel  
Randal M. Alligood, P.A.  
390 North Orange Avenue, Suite 1400  
Orlando, FL 32801  
Phone: (407) 839-4202  
Fax: (407) 650-0914

3. The Arlington, LP, a Georgia limited partnership ("Arlington"), successfully applied for financing in the 2003 Supplemental MMRB Application Cycle that FHFC administers pursuant to Chapter 67-21, Florida Administrative Code. Arlington's application number is 2003A-204B (the "Application"). The Application was submitted for the rehabilitation of a 288-unit multifamily rental development in Jacksonville, Florida, consisting of 26 buildings, and known as The Arlington Apartments (the "Development"). The MMRB financing closed in May of 2004. Due to a variety of factors, including hurricane damage in August of 2004 and the failure of the then existing managing general partner to satisfy its obligations which led to the removal of such managing general partner in May of 2006, the rehabilitation of 5 of the 26 buildings was never completed, leaving only 21 of the 26 buildings completed and placed in service as of the date hereof. Further, because 5 buildings are not complete, Arlington has not been able to meet the requirements to accomplish Final Cost Certification or apply for 8609s for any of the buildings.

4. Arlington desires to sell the Development and CEC Arlington, LLC, a Florida limited liability company ("CEC"), desires to purchase the Development. CEC plans to refinance the existing debt and obtain new tax credit equity to fund the completion of certain repairs on the 21 buildings that have been previously placed in service, bring the Development into compliance by constructing the clubhouse and the car wash (and other items), and demolish

the 5 damaged buildings that have not been placed in service. The financial feasibility of CEC's plan depends on the continued availability of low income housing tax credits ("LIHTC") to the Development in order to obtain new tax credit equity.

5. Under Section 42(d)(7) of the Internal Revenue Code of 1986, as amended (the "Code"), LIHTC will continue to be available to a subsequent owner if the LIHTC was previously "allowed" to the prior owner. Revenue Ruling 91-38 provides that, for purposes of a development financed with tax exempt bonds, tax credits will be considered "allowed" when the following conditions have been met: (1) the tax-exempt obligations have been issued; (2) the building has met the requirements for allocation of a housing credit dollar amount under the qualified allocation plan applicable to the area in which the project is located as required by section 42(m)(1)(D); (3) the governmental unit issuing the bonds has determined the credit dollar amount necessary for the financial feasibility of the project and its viability as a qualified low-income housing project throughout the credit period as required by section 42(m)(2)(D); and (4) the state housing credit agency has assigned a building identification number ("BIN") to the building as is customarily done when an allocation of credit is made by the state housing credit agency. It is our understanding that (1)–(3) above have been met, leaving (4) above outstanding.

6. Although BINs are issued by FHFC for "9%" transactions prior to construction of the buildings, FHFC does not issue BINs on "4%" transactions until the Final Cost Certification is complete. Consequently, if CEC purchases the Development prior to the issuance of BINs, then LIHTC will not be available to the Development, CEC will not be able to raise tax credit equity and CEC's plan will not be financially feasible.

7. The existing credit facility for the existing bond financing expires on November 1, 2008 and the credit facility provider has not given any indication there will be an extension of

the expiration date. Even if the expiration date is extended, Arlington does not have sufficient funds to complete all the buildings in the Development and therefore will not be able to achieve Final Cost Certification as is required by FHFC Rules for the issuance of BINs. The Development may then go into foreclosure and become market rate housing, with an accompanying loss to the community of 228 units of affordable housing.

8. Petitioners are submitting this Petition to request a waiver of the requirements for the issuance of BINs in order for CEC to close on the Development and continue the availability of LIHTC in order to obtain tax credit equity financing. The issuance of BINs does not impact Final Cost Certification or any other requirements of the Rule which Petitioners acknowledge must be completed to receive 8609s.

#### **THE RULE FROM WHICH WAIVER IS SOUGHT**

9. Rule 67-48.027(1)(f) (2003) provides:

Tax-Exempt Bond-Financed Developments, as defined in Section 42(h)(4)(B) of the IRC, which applied for 4% Housing Credits when applying for tax exempt bonds from Florida Housing in calendar year 2000 or later shall [r]eceive Building Identification Numbers from [FHFC] upon satisfying the requirements of this section and the Final Cost Certification requirements of Rule 67-48.023, F.A.C.

#### **STATUTES IMPLEMENTED BY THE RULES**

10. The Rule implements the Florida Housing Finance Corporation Act, set forth in Sections 420.501 through 420.517 of the Florida Statutes. The Act designates FHFC as the State of Florida's housing credit agency within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code of 1986. As the designated agency, FHFC is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits ("Allocation Procedures"). Section 420.5099(1), Florida Statutes (2008). Under the Act, FHFC

shall adopt Allocation Procedures “that will ensure the maximum use of available tax credits in order to encourage development of low-income housing in the state.” Section 420.5099(2), Florida Statutes (2008). Accordingly, the Rules subject to Petitioners’ request for rule waiver are implementing, among other sections of the Act, the statutory authorization for FHFC’s establishment of Allocation Procedures for the MMRB Program.

11. The pertinent statute regarding granting of waivers provides: “[W]aivers 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.” Section 120.542(2), Florida Statutes (2008). “Substantial Hardship” is defined as “a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver.” CEC needs BINs assigned to maintain the availability of LIHTC in order to obtain tax credit equity financing. Otherwise, CEC’s plan will not be financially feasible. While Final Cost Certification will remain a requirement for the issuance of 8609s, the imposition of the Final Cost Certification requirement as a condition to receiving BINs in the present context presents a substantial hardship. Petitioners believe that unless BINs are issued and CEC moves forward with its plan, the Development will not be able to achieve Final Cost Certification. Without any BINs assigned, CEC will not be able to obtain tax credit equity financing, and the Development may then proceed to foreclosure and classification as market rate housing. To apply FHFC’s Rule literally to Petitioners would impose a substantial hardship and defeat the underlying purpose of the statute, which is to maintain the supply of affordable housing. Additionally, the requested waiver will not adversely impact the Development or FHFC.

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

12. Petitioners believe that a waiver of the rule will serve the purposes of Section 420.5099 and the Act which is implemented by the rule, because FHFC's goal is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households by ensuring:

[T]he maximum use of available tax credits in order to encourage development of low-income housing in the State, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the Applicant to proceed to completion of the project in the calendar year for which the credit is sought.

Section 420.5099(2), Florida Statutes (2008).

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 Housing Tax Credit Program was to stimulate creative private sector initiatives to increase the supply of affordable housing. By granting this waiver and permitting the issuance of BINs, FHFC would recognize its goal of maintaining the supply of affordable housing through private investment in persons of low-income. The requested waiver will not adversely impact the Development or FHFC.

13. In light of the considerable time that it takes to develop multi-family rental housing, FHFC's statutes and rules are designed to allow flexibility to respond to changed circumstances, which might necessitate a waiver of certain Allocation Procedures. FHFC is authorized to approve such waivers. The issuance of BINs does not impact Final Cost Certification or Final Housing Credit Allocation. FHFC will not be harmed in the granting of this Petition. Arlington's inability to maintain the affordability of the Development without BIN

issuance would constitute a substantial hardship and is an unintended consequence of strict compliance with the provisions of F.A.C. Rule 67-48.027(1)(f). Unless FHFC grants Petitioners' petition to waive the requirements for the issuance of BINs, Petitioners will likely not be able to maintain the Development's affordable housing classification.

**TYPE OF WAIVER**

12. The waiver being sought is permanent in nature.
13. Should FHFC have questions or require any additional information, Petitioners are available to provide any additional information necessary for consideration of the Petition.

**ACTION REQUESTED**

14. Petitioners request that FHFC grant the Petition and all the relief requested here;
15. 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 26<sup>th</sup> day of September, 2008.

  
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