

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION _____

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In re: St. Elizabeth Gardens Apartments, Ltd.

FHFC CASE NO. 2019-078VW
Application No. 2017-181C
RFA No. 2016-116

PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE
RULE 67-48.023(2)

Petitioner, St. Elizabeth Gardens Apartments, Ltd. ("Petitioner"), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, petitions Florida Housing Finance Corporation ("Florida Housing") for a variance from the provisions of Rule 67-48.023(2), Florida Administrative Code effective September 15, 2016, to allow Petitioner to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C). In support of this Petition, Petitioner states:

Petitioner and the Development

The name, address, telephone, and email address for Petitioner is:

St. Elizabeth Gardens Apartments, Ltd.
3MiamiCentral, 161 NW 6th Street, Suite 1020
Miami, Florida 33136
Telephone: 305-357-4725
Email: lwong@apcompanies.com

The name, address, telephone, and email address of Petitioner's counsel is:

Donna E. Blanton
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301
Telephone: 850-425-6654
Email: dblanton@radeylaw.com

On February 3, 2017, Petitioner submitted Application No. 2017-181C in response to RFA 2016-116 for competitive housing credits to assist in the rehabilitation of a 155-unit development located in Broward County, Florida, known as St. Elizabeth Gardens (the “Development”).¹

Type of Variance

The variance being sought is permanent in nature.

Rule For Which a Variance Is Requested

Rule 67-48.023(2) required that each Development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code (IRC) that was in effect at the time the rule was adopted. Prior to March 23, 2018, this Section of the IRC did not allow income averaging and, therefore, Rule 67-48.023(2) also did not allow income averaging.

Statutes Implemented by the Rule

The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the “Act”), section 420.5099, Florida Statutes, which relates to the allocation of Low-Income Housing Tax Credits.

¹ The following information regarding the Development is provided to facilitate staff’s preparation of background material for the Florida Housing Board of Directors (“Board”):

- Development Name: St. Elizabeth Gardens
- Developer, including at least one natural person Principal: St. Elizabeth Gardens Development, LLC; Howard D. Cohen
- County of Development: Broward
- Number of Units: 155
- Type: Mid-rise, four stories
- Set Asides: 25.2% at 30% AMI; 34.9% at 60% AMI; 37.4% @ 80% AMI; and 2.5% Market Rate
- Demographics: Elderly
- Funding Amounts: 9% HC: \$1,124,111

Justification for Granting Variance From the Rule

During its 2018 session, the United States Congress passed the “Consolidated Appropriations Act, 2018” (“H.R. 1625”), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

“(C) AVERAGE INCOME TEST. –

(i) IN GENERAL. – The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

(ii) SPECIAL RULES RELATING TO INCOME LIMITATION. -
For Purposes of clause (i)

(I) DESIGNATION. - The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

(II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

(III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.”
Section 42(g)(1)(C), I.R.C. (2018)

Rules 67-21.027(1) and 67-48.0023(2), Florida Administrative Code, were revised on July 8, 2018, to incorporate the new subsection 42(g)(1)(C) of the IRC. As a result, any applications for housing tax credits submitted to Florida Housing after July 8, 2018, are allowed to use the income averaging provisions of the IRC.

Petitioner’s application was submitted prior to the July 8, 2018, rule revisions and Petitioner was, therefore, not allowed to take advantage of the average income test. It would violate principles of fairness and put Petitioner at a competitive disadvantage with other Developments if it was not allowed to use the average income test solely because of when its application was submitted.

Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to or variances from its requirements when strict application of the requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

Variances and waivers 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. For purposes of this section, “substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, “principles of fairness” are violated when the 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 the rule.

Granting the requested variance in this instance would allow Petitioner to utilize the average income test as allowed by the Internal Revenue Code. The controlling statutes and Florida Housing’s rules are designed to allow the flexibility necessary to provide relief when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results.

Additionally, by granting this variance, Florida Housing would recognize the goal of increasing the supply of affordable housing and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing. The purpose of the underlying statute, which is to “encourage development of low-income housing in the state” (§ 420.5099, Fla. Stat.), would still be achieved if the variance is granted.

In this instance, Florida Housing has jurisdiction to grant a variance from the Rule, and Petitioner meets the standards for a variance from the Rule.

Action Requested

WHEREFORE, Petitioner respectfully requests that Florida Housing:

Grant this Petition and all relief requested therein;

Grant a variance from Rule 67-48.023(2) and allow for calculation of the minimum set aside percentage based on income averaging; and

Grant such further relief as may be deemed appropriate.

Respectfully submitted this 10th day of September, 2019.



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Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org,

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

this 10th day of September, 2019.



Donna E. Blanton