

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

RECEIVED
19 MAY -2 AM 10:59

In re: Concord Court at Creative
Village Partners, Ltd., formerly known
as Amelia Court at Creative Village

FHFC Case No.
Application Nos.

2019-040VW
2016-305CS
2017-292V

PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE
RULE 67-48.023(2), F.A.C. (2016)

Petitioner, CONCORD COURT AT CREATIVE VILLAGE PARTNERS, LTD., formerly known as Amelia Court at Creative Village Partners, Ltd., (“Petitioner”), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation (“Florida Housing”) for a Variance from the provisions of Rule 67-48.023(2), F.A.C. (2016) to allow it 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 as follows:

Petitioner and the Development

1. Petitioner, Concord Court at Creative Village Partners, Ltd., is a Florida limited partnership formerly known as Amelia Court at Creative Village Partners, Ltd. (Florida Housing’s Board of Directors approved the name change of the Applicant at its meeting on March 16, 2018; a change in the name of the Development from Amelia Court at Creative Village to Concord Court at Creative Village was approved by staff on February 13, 2018.)

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

Jay P. Brock
335 N. Knowles Avenue, Suite 101
Winter Park, Florida 32789
Telephone: (407) 741-8682
Facsimile: (407) 643-2590

3. The name, address, telephone and facsimile numbers of Petitioner's counsel is:

M. Christopher Bryant
Oertel, Fernandez, Bryant & Atkinson, P.A.
P.O. Box 1110
Tallahassee, Florida 32302
Telephone: (850) 521-0700
Facsimile: (850) 521-0720

4. On December 15, 2016, Amelia Court at Creative Village Partners, Ltd., submitted Application No. 2016-305CS in response to RFA 2015-113, Housing Credit and SAIL Financing to Provide Affordable Multifamily Rental Housing that is part of Local Revitalization Initiatives, for Competitive Housing Credits and a State Apartment Incentive Loan. The financing was sought to assist in the construction of a 116 unit development located in Orange County, Florida, originally to be known as Amelia Court at Creative Village but now known as Concord Court at Creative Village. Petitioner was selected for funding.

5. Further, on August 4, 2017, Petitioner submitted Application No. 2017-292V for Development Viability Loan Funding in RFA 2017-109. Petitioner was selected for the receipt of Development Viability Loan Funding.

6. Petitioner initially proposed a unit mix of twelve (12) units for tenants at or below 40% Area Median Income (AMI); eighty-one (81) units for tenants at or below 60% AMI; and twenty-three (23) unrestricted "market rate" units. (RFA 2015-113 encouraged applicants to include market rate units in their developments, awarding points to Family Demographic applicants if the income-restricted Set-Aside units did not exceed 80% of the total number of units in the Development; Petitioner's 40% AMI units and 60% AMI units total 80% of the total number of units in the development.)

7. In order to enhance the financial viability of the Development, Petitioner seeks to make a set-aside election to have an income mix for the affordable units of 18 units (15.517% of

the total) at 30% AMI; 18 units (15.517%) at 40% AMI; 12 units (10.345%) at 60% AMI; and 45 units (38.793%) at 80% AMI. The average AMI level for the set-aside units would not exceed 60%.

Type of Waiver

8. The waiver being sought is permanent in nature.

Rule For Which a Variance Is Requested

9. Rule 67-48.023(2), F.A.C. (2016), in effect at the time of original application 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, instead requiring all affordable units to be for tenants at or below 60% AMI. Therefore Rule 67-48.023(2), F.A.C. (2016) also did not allow income averaging.

Statutes Implemented by the Rule(s)

10. The Rule(s) implement, among other sections of the Florida Housing Finance Corporation Act (the “Act”), the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes.

Justification for Granting Waiver of the Rule(s)

11. 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)

12. Rules 67-21.027(1) and 67-48.023(2) F.A.C. 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.

13. Petitioner’s application was submitted prior to the July 8, 2018 rule revisions and were 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.

14. 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:

Variations 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.

15. 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.

16. Additionally, by granting this waiver, 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.

17. In this instance, Florida Housing has jurisdiction to grant a waiver of the rule and Petitioner meets the standards for a waiver of the Rule.

Action Requested

WHEREFORE, Petitioner respectfully requests that Florida Housing:

Grant this Petition and all relief request therein;

Grant a variance from Rule 67-48.023(2), F.A.C. (2016) 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 2nd day of May, 2019.

/s/ M. Christopher Bryant

M. CHRISTOPHER BRYANT
Florida Bar No. 434450
OERTEL, FERNANDEZ, BRYANT
& ATKINSON, P.A.
P.O. Box 1110
Tallahassee, Florida 32302-1110
Telephone: 850-521-0700
Telecopier: 850-521-0720
Primary: cbryant@ohfc.com
Secondary: bpetty@ohfc.com

CERTIFICATE OF SERVICE

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

2nd of May, 2019 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

/s/ M. Christopher Bryant

Attorney