

FLORIDA HOUSING FINANCE CORPORATION

Petition for Variance from Rule 67-48.002(111)

The Carlisle Group, LLC ("Carlisle" or "Petitioner") hereby petitions the Florida Housing Finance Corporation ("Florida Housing" or "Corporation") for a variance from Rule 67-48.002(111). This petition is filed pursuant to section 120.542, Florida Statutes, and chapter 28-104, Florida Administrative Code.

The Petitioner

1. Carlisle applied for State Apartment Incentive Loan ("SAIL") funds as part of Florida Housing's 2003 Universal Application Cycle ("Universal Cycle"). The application that is the subject of this petition is for Meridian West Apartments in Monroe County (#2003-097S). The address, telephone number, and facsimile number of the Petitioner are: 2950 SW 27th Ave., Suite 200, Miami, Florida 33133, (305) 476-8118 telephone, (305) 476-1557 facsimile.

The Rule from Which the Variance is Sought

2. The Petitioner is requesting a variance from a portion of the Universal Application Instructions (the "Instructions") that have been adopted and incorporated by reference through rule 67-48.002(111) (the "Instructions"). More specifically, Petitioner is seeking a variance from what appears to be designated as Ranking and Selection Criteria subsection B.7.e.(7)(c) on page 85 of the Instructions ("section (7)(c)"). That rule provides:

(7) Funds available after final ranking due to Applicant's withdrawal or the Applicant's failure to receive a favorable recommendation from the Credit Underwriter will be allocated as follows:

...

(c) SAIL: Funds will be first allocated to those Applications that received a partial tentative allocation and have been determined not to have declined an invitation into credit underwriting. Funds will be distributed to partially funded Applications in the following order: Applications from Small Counties, Applications from Medium Counties and then, Applications from Large Counties. If funds still remain, the funds will be offered to the highest ranked eligible SAIL Application regardless of set-asides and whether or not the available funding constitutes 60% of the Applicant's SAIL request amount. This process will be applied until the opening date of the next Application Period. The SAUL procedure will not be applied.

FILED WITH THE OFFICE OF THE FLORIDA
HOUSING FINANCE CORPORATION

M. Wilson / DATE 7/1/03

The Statutes that the Rule is Implementing

3. The statutes that the rule is implementing are section 420.5087, Florida Statutes (the "SAIL statute") and section 380.0552, Florida Statutes (the "Florida Keys Area Protection Act").

The Purpose of the Underlying Statutes

4. Florida Housing distributes SAIL across Geographic Set-Asides. When the Florida Legislature created SAIL, it wanted to ensure that Florida Housing distributed the funds throughout the state, roughly in proportion to the affordable housing needs of the various counties. Through the SAIL statute, the legislature divided the state into large, medium, and small counties, based on population. Large counties have more than 500,000 people, medium counties have between 100,000 and 500,000 people, and small counties have 100,000 people or less. The separate pots of money for large, medium, and small counties are generally referred to as "Geographic Set-Asides."

5. The SAIL statute requires preferential treatment for small counties. The SAIL statute recognizes that a strict population-based system could disadvantage small counties, so the statute modifies the Geographic Set-Asides to ensure that at least 10% of SAIL goes to the small counties. When Florida Housing has to adjust the set aside formula to get the small counties up to their 10% minimum, the statute says to take the money from the large counties, which receive the largest portion of the money based on population. Fla. Stat. § 420.5087(1), final ¶.

6. When the small counties cannot use all of their allocation, the money is required to stay with the small counties and not be diverted for other groups. The SAIL statute says that Florida Housing is to measure its compliance with the Geographic Set-Aside distributions over three-year periods. Fla. Stat. § 420.5087(1). The Florida Legislature reinforced its preference for small counties by requiring that Florida Housing adopt a rule to say what would happen if a group of counties did not use all of its 10% allocation during a three year period, and that the rule should give preference to small counties. Fla. Stat. § 420.5087(1), final ¶. Florida Housing has adopted such a rule in 67-48.0095(4): "In the event that the 10% of program funds required to be allocated to counties with a population of 100,000 or less remains unallocated at the conclusion of a successive three-year cycle, the unallocated funds shall be carried forward and shall be added to the funds reserved for counties with a population of 100,000 or less for the next successive three-year period." This rule requires that the money for small counties not be diverted to other uses. If the small counties do not have enough applications to use the full 10% of SAIL funds, then the left over money will be credited and made available to the small counties until there is adequate demand, even if that credit must extend into the next three-year period.

7. The Florida Legislature is trying to solve the affordable housing crisis in the Florida Keys. In the Florida Keys Area Protection Act, the legislature declared its intent to be, "To provide for affordable housing in close proximity to places of employment in the Florida Keys." Fla. Stat. § 380.0552(2)(d). The legislature also said that a principle that must guide development in that part of the state is, "To make available adequate affordable housing for all sectors of the population of the Florida Keys." Fla. Stat. § 380.0552(7)(j).

8. To specifically help create affordable housing in Monroe County, the legislature amended the SAIL statute during the 2002 Regular Session to provide more generous financing parameters for affordable housing there. Fla. Stat. § 420.5087(2)(d), created by ch. 2002-160, §4, Laws of Fla. The staff analysis of CS/HB 547, which was adopted by the legislature as 2002-160, noted: “[T]he Keys economic reliance on tourism combined with its limited land base inherently resulted in a demand-supply problem, inflating the cost of housing[.]” “Monroe County has the highest rental rates in Florida,” and “Income needed to afford a three-bedroom unit in Monroe County was \$45,640, or 85% of area median income.”

9. The current Universal Cycle is the first that Florida Housing has conducted since the legislature amended the SAIL statute to reflect its special concern for affordable housing in Monroe County.

The Current Situation

10. Florida Housing has not used all of its small county allocation in past years. This is the second year of the current three-year SAIL measurement period. Florida Housing entered this year’s SAIL cycle with allocation that was carried forward from the past three-year period and that was not used last year.

11. Florida Housing will initially leave some small county applications unfunded this year. This year, Florida Housing is in the unusual position of having received more applications for small county SAIL funds than it has money to distribute. Given Florida Housing’s history with small counties, this normally would be a good problem to have. Traditionally underutilized small county SAIL funds are finally in sufficient demand that Florida Housing can meet the objectives that the legislature prescribed.

12. Florida Housing only satisfies the Geographic Set-Asides if the applications it funds ultimately close. The purpose of the SAIL statute is met only if the proposed developments to which Florida Housing awards funds actually close. If a small county application receives a preliminary allocation and then does not close, the purpose of the SAIL statute can be met only if the unused funds go to another small county application, so long as small county applications remain unfunded. It is not sufficient that Florida Housing allocate all of its small county funds to proposed small county developments during its October 9-10, 2003, Board meeting. If some of those proposed developments withdraw from consideration or fail credit underwriting, then Florida Housing should reallocate the small county funds to other current small county proposed developments to meet the mandates of the SAIL statute. Unfortunately, section (7)(c) would not permit that to happen unless Florida Housing grants this petition.

Some of the Small County SAIL Funds that Florida Housing Allocates this Year May Be Returned to the Corporation

13. This year, several of the proposed small county developments that are likely to receive SAIL awards are at a greater than usual risk of not being able to close.

14. Three such proposed developments, each requesting \$2,000,000 in SAIL funds, are seeking to build affordable housing units using tax-exempt bonds in small counties. It is rare that such developments actually close. In fact, of all of the times that Florida Housing has made preliminary awards of bond funds to proposed developments in small counties over the years, it appears that none has closed at Florida Housing since 1989.

15. As is evidenced by the relative abundance of tax-exempt bond allocation each of the last few years, the market has determined that tax-exempt bond transactions are difficult to complete in today's economic environment. Those market conditions have been reinforced yet again, as Florida Housing has announced its intent to begin rule making for a supplemental bond cycle because the Corporation's tax-exempt bonds are under-subscribed this year. See Notice of Proposed Rule Development for supplemental multifamily mortgage revenue bond application cycle, Fla. Admin. Weekly, p. 2174, May 30, 2003.

16. Merely because a developer submits an application for tax-exempt bonds does not necessarily mean that the transaction will close. During Florida Housing's competitive bond cycles in 2000-2002, the Corporation received 140 applications that passed threshold. Of those, the applicants withdrew 68, or 48.6%, before the transactions could close. Of the 72 applications that have not yet been withdrawn, 24 have not yet closed. It is entirely likely some of those that have not yet closed never will.

17. This is more than just a theoretical issue. The three small county applications in this year's cycle that may receive preliminary awards of bonds and SAIL were submitted by two different developers; one submitted two and the other submitted one. Over the course of the 2000-2002 bond cycles, the developer that submitted two of the current applications has closed four bond transactions with Florida Housing, but has withdrawn eight others. The developer that filed the other current bond/SAIL small county application does not appear to have closed or withdrawn a Florida Housing bond application in any of the last three cycles.

18. The low incomes and small populations in small counties tend to exacerbate the normal market pressures on bond-financed developments.

19. Upon careful examination of the pro formas in the small county applications seeking bonds and SAIL, it is questionable whether those proposed developments can satisfy Florida Housing's credit underwriters, staff, and Board, and then ultimately close.

20. Given the recent history of developers being unable to close bond transactions with Florida Housing, and given today's market pressures on those proposed developments, it is reasonable to assume that one or more of the current small county applications may be unable to close, and therefore unable to use the small county SAIL funds that they have been awarded.

21. During Florida Housing's NOPSE process, the corporation declined to examine the financial viability of these proposed developments. It appears that Florida Housing decided that it should wait until the credit underwriting process, after awards are made, to determine whether a proposed application should be denied funding.

22. To protect the integrity of its competitive processes and of the portfolio of housing that it helps to create, Florida Housing must rigorously underwrite the proposed applications and must ensure that funds ultimately go to developments that will create financially viable affordable housing developments that meet the statutory objectives for how the money should be distributed.

If SAIL Funds are Returned, a Literal Application of Section (7)(c) Would Divert the Money Away from Small Counties

23. When an applicant withdraws a proposed development after it has been awarded SAIL funds, or when an application fails the Corporation's credit underwriting review, the allocation of SAIL funds is returned to Florida Housing. Section (7)(c) describes what happens to those funds (such funds being "returned SAIL funds").

24. Section (7)(c) says that Florida Housing will take any returned SAIL funds and use them to fund the balance of any partially-funded applications across the Geographic Set-Asides, and then will use the balance to start funding applications without giving any consideration to Geographic Set-Asides.

25. That is, if Florida Housing awards SAIL funds to a proposed development and then that proposed development withdraws from further consideration or fails credit underwriting, a literal application of Section (7)(c) could result in funds that the legislature and Florida Housing intended for small counties to actually be diverted to large and medium counties, while other eligible small county applications are ignored and remain unfunded.

A Literal Application of Section (7)(c) Would Create a Substantial Hardship on the Petitioner and Would Violate Principles of Fairness

26. A literal application of Section (7)(c) would create a substantial hardship and would violate principles of fairness for the Petitioner's Meridian West Apartments application. Meridian West is proposed for the Florida Keys in Monroe County. Florida Housing and the Florida Legislature have recognized an intense need for affordable housing in the Keys and have also recognized that it is substantially more expensive to build in that Area of Critical State Concern than in other counties. Without adequate subsidy, affordable housing simply cannot happen there.

27. If the Petitioner is denied SAIL funds for Meridian West Apartments, it will result in a demonstrated economic hardship to the Petitioner because Carlisle will not receive much needed dollars to help construct that development for the benefit of the residents of that small county whom the Florida legislature intended to protect.

28. Meridian West received tax credits and a tentative, partial allocation of SAIL funds during Florida Housing's 2002 Universal Application Cycle. Leading up to that cycle, there was a lot of discussion both in Florida Housing's rule making efforts and during technical assistance sessions sponsored by the Department of Community Affairs in the Florida Keys about how to create affordable housing opportunities in that part of the state. Florida Housing

recognized that the unique economic pressures in Monroe County required that the Corporation permit more generous subsidy levels to provide an environment in which affordable housing could have a chance in that small county.

29. However, a last-minute change to the rules governing that cycle placed an unreasonably low cap on the amount of SAIL that an application from a small county could receive. That cap was inconsistent with what Florida Housing's staff had committed to proposing throughout the rule development process and was not adequate to permit a development such as Meridian West to be built.

30. Because of the late date at which the new cap appeared, the only remedies that the Petitioner could have exercised would have disrupted the entire 2002 cycle for Florida Housing. Petitioner declined to do so.

31. Although Meridian West Apartments received the maximum amount of SAIL funding that was permitted under the 2002 rules, it does not appear to be adequate to build the proposed development. The actual subcontractor bids that Carlisle is receiving to build Meridian West are reflecting costs of construction that are significantly higher than even the exorbitant costs that Carlisle had anticipated for this part of the Florida Keys.

32. Florida Housing recognized the unfairness of the timing and the substance of last year's small county SAIL cap. Florida Housing also recognized that it would be extremely unlikely that the Corporation could accomplish its goal of creating affordable housing in the Florida Keys without some type of relief. Accordingly, this year's rules permit small county applications that received SAIL awards last year to return for more funding this year. (See the penultimate paragraph on p. 3 of the Instructions.)

33. If Florida Housing diverts SAIL funds intended for small counties to large or medium counties before funding the Petitioner's small county applications, the Petitioner would suffer a substantial economic hardship that is not of the type or cause that normally occurs when Florida Housing does not fund an application. Given the history of SAIL funding for small counties in recent years, it would violate principles of fairness to use returned SAIL funds from the 2003 Universal Cycle for any purpose other than funding 2003 small county applications.

The Variance Would Serve the Purposes of the Underlying Statutes and Would Not Unfairly Prejudice Any Other Applicants

34. By granting this petition, Florida Housing would further the purposes of section 420.5087 and of section 380.05. The Florida legislature has specifically stated that the public policy of Florida is to assure that residents of the Florida Keys are afforded a place to live under these rules.

35. By granting this petition, Florida Housing would ensure that all of the SAIL funds that have been set aside to satisfy the statutory mandate for funding to small counties would actually go to that purpose.

36. By granting this petition, Florida Housing would promote the development of affordable housing in the Florida Keys.

37. Granting this petition would not unfairly prejudice any other applicant in the Universal Cycle. Florida Housing has been generally hesitant to grant petitions for rule waiver or variance in the midst of an application cycle. Florida Housing is rightfully concerned that it not change midstream the rules by which applications are scored.

38. This petition is different and does not implicate those same concerns. There is nothing in this petition that affects the scoring process. There is nothing in this petition that would change any aspect of the Universal Cycle on which an applicant would have relied when preparing its application. The only applicants whose substantial interests are affected are those small county SAIL applicants who could now actually be able to receive the funding that was intended for their counties. Those in medium and large counties have no reasonable expectation that small county money will be taken away from those small counties and given to those that already receive 90% of the SAIL funds.

39. Florida Housing does not have to worry about creating undesirable precedent when it grants this petition. Correcting what happens with returned SAIL funds is factually and conceptually distinguishable from every other type of petition that Florida Housing tends to receive and does not open up the Corporation to a rash of future petitions.

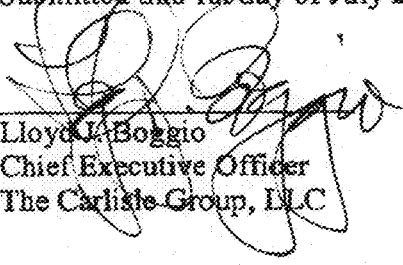
Specific Relief Sought

40. The Petitioner is requesting that Florida Housing grant a variance from section (7)(c) such that any returned SAIL funds from any small county application in the current Universal Cycle be offered to the highest ranked small county SAIL application, regardless of whether the available funding constitutes 60% of the applicant's SAIL request amount.

41. This variance would be temporary and last only so long as there remain small county SAIL applications from the 2003 Universal Cycle that have not yet been funded. The date on which the variance would expire cannot be known at this time. This variance would not expire on the opening date of the next application cycle, but would continue until all small county SAIL applications from the 2003 Universal Cycle have either been withdrawn or offered full SAIL funding.

Based on the foregoing, Carlisle respectfully requests that Florida Housing grant this petition.

Submitted this 1st day of July 2003.



Lloyd J. Boggio
Chief Executive Officer
The Carlisle Group, LLC