

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

In Re: HARBOUR COVE ASSOCIATES, LTD.

FHFC Case No.: 2006-053VW

FHFC Case No.: 2006-067VW

Application No.: 2003-040S

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**ORDER DENYING VARIANCE and WAIVER OF RULES 67-48.010(3)(b),  
67-48.009(4) and 67-48.004(14)(l), FLORIDA ADMINISTRATIVE CODE,  
and PART V.A.1. OF THE UNIVERSAL APPLICATION (REV. 4-03)  
INCORPORATED BY REFERENCE INTO RULE 67-48.002(111)**

THIS CAUSE came for consideration and final action before the Board of Directors of Florida Housing Finance Corporation on December 15, 2006, and on January 26, 2006, pursuant to a "Petition for Variance from Rule 67-48.010(3)(b)" and a "Petition for Variance and Waiver from Rules 67-48.004(14)(l), 67-48.009(4) and Part V.A.1. of the Universal Application (Rev. 4-03) Incorporated by Reference into Rule 67-48.002(111)" (the "Petitions<sup>1</sup>"). Florida Housing Finance Corporation ("Florida Housing") received the Petitions on September 18 and 20, 2006, from Harbour Cove Associates, Ltd., ("Petitioner"). On September 29, 2006, Florida Housing published the Notice of the Petitions in Volume 32, Number 39, of the Florida Administrative Weekly. Florida Housing received no comments regarding the Petitions. After careful review of the record and being otherwise fully advised in the premises, the Board of Directors (the "Board") of Florida Housing hereby finds:

1. The Board has jurisdiction over the subject matter of this case and the parties hereto.
2. During the 2003 Universal Cycle, Florida Housing awarded \$2,000,000 in State Apartment Incentive Loan Program ("SAIL") funding to Petitioner, a for-profit limited

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<sup>1</sup> As the two Petitions pertain to a single application, the Petitions are consolidated for the purposes of the Order.

partnership, to build a 212 unit, multi-family rental apartment complex in Broward County, Florida, known as Harbour Cove Apartments (“the Development”). The Development is currently undergoing construction. Petitioner alleges that as a result of the discovery of oil on the property, it has suffered a substantial hardship and seeks variances and waivers of Florida Housing’s rules.

3. Petitioner requests a waiver of Rule 67-48.004(14)(1), (2003), to permit a change in the funding request. Specifically, Petitioner wishes to change the original funding request of \$2,000,000.00 to request an additional \$2,000,000.00 for a total funding request of \$4,000,000.00.

4. Petitioner requests a waiver of Rule 67-48.009(4), (2003), which prohibits it to request additional SAIL funding for the same Development.

5. Petitioner requests a variance from Part V.A. 1 of the 2003 Universal Application Instructions, incorporated by reference in Rule 67-48.002(111), (2003), which limits the SAIL request amount of large county applicants to no more than \$2 million.

6. Petitioner requests a variance of Rule 67-48.010(3)(b), which states that SAIL loans shall be non-amortizing and shall have an interest rate of 3% simple interest per annum for the Development.

7. Rule 67-48.004(14), Florida Administrative Code (2003), states in pertinent part:

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....those items are as follows:

(l) Funding request...;

8. Rule 67-48.009(4), Florida Administrative Code (2003), states in pertinent part:

Applicants cannot request additional SAIL funding for the same Development, unless otherwise specified in the Universal Application.

9. Part V.A. 1 of the 2003 Universal Application Instructions, incorporated by reference in Rule 67-48.002(111), Florida Administrative Code (2003), states in pertinent part:

SAIL request cannot exceed...\$2 million...

10. Rule 67-48.010(3)(b), Florida Administrative Code (2003), states in pertinent part:

The loans shall be non-amortizing and shall have interest rates as follows:

...

(b) 3% simple interest per annum on loans to Developments other than those identified in (a) above;

11. Section 120.542(2), Florida Statutes provides in pertinent part:

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.

12. On October 10, 2006, Florida Housing requested information from Petitioner pursuant to Section 120.542(7), Florida Statutes, seeking documentation supporting Petitioner's allegations of substantial hardship and remedial measures taken in response to the discovery of oil at the site of the Development. On November 2, 2006, Petitioner submitted its response. In part, Petitioner provides that it has suffered cost-overruns and delays in construction due to the undisclosed presence of oil; that it is in active litigation against two prior owners of the property and an environmental engineering firm; that it has received funds as a result of being designated a Brownfield Area; and that construction of the Development is anticipated to be complete around the first quarter of 2007.

13. Petitioner has failed to demonstrate entitlement to a variance or a waiver of the rules pled in its Petitions. In order for Florida Housing to grant a variance or waiver, Petitioner must first demonstrate that the purpose of the underlying statute will be or has been achieved by other means by the person. They must then demonstrate substantial hardship or a violation of the principles of fairness. In this instance, Petitioner alleged in its September 20, 2006, Petition that, “[G]ranteeing the request will serve the underlying purpose of the statute in that *additional funding* will enhance the likelihood of financial success and in turn, will further Florida Housing statutory mandate to provide safe, sanitary and affordable housing...”(emphasis added) Petitioner is seeking to build affordable housing by requesting the same SAIL funding that it was originally awarded by rule in 2003, and has neither pled nor demonstrated that they can accomplish the goal of the statute by *other* means. They are attempting to further the purpose of the statute by the same means, by way of SAIL funds.

14. Under the second prong of the statutory requirement, Petitioner failed to demonstrate substantial hardship<sup>2</sup>. Petitioner must demonstrate that the application of a rule would create a substantial hardship<sup>3</sup>. Petitioner has neither pled nor provided information that demonstrated that the application of the pertinent rules, which govern the SAIL request amount or the amount of interest to be paid on the SAIL loan, has in any way contributed to Petitioner’s cost-overruns or construction delays. Instead, Petitioner has made it clear that it is seeking additional funds which will partly mitigate its unanticipated costs, some part of which are due to presence of oil on the site of the Development. The mere fact that Petitioner can demonstrate that it has incurred unanticipated economic costs, does not by itself equate to a substantial

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<sup>2</sup> Petitioner did not allege a violation of the principles of fairness in either of its Petitions.

<sup>3</sup>Under Section 120.542(2), Florida Statutes, “substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver.

hardship that is caused by the application of Florida Housing's rules to Petitioner or its Development. See, Zoe Gail McLendon v. Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, DOAH Case No. 00-2350 (November 7<sup>th</sup>, 2000).

15. Petitioner has the resources to mitigate its unforeseen costs. Pursuant to terms and conditions of the Liquidity Maintenance Agreement ("LMA"), dated July 1, 2003, Petitioner must provide Florida Housing quarterly Certification evidencing that no less than \$4.5 million in liquid assets is being maintained in aggregate by the principals of the Petitioner. According to the most recent quarterly Certification dated September 30, 2006, Jorge Lopez, one of the principals for the Petitioner, has in excess of \$6 million in liquid assets. Further, Petitioner filed a civil lawsuit in Broward County, Florida, Circuit Court on July 8, 2005, Case No. 05-010299; amending its complaint on January 20, 2006, Case No. 05-010301, seeking compensation and indemnification as a result of the damages it claims to have sustained as a result of the previous owners and environmental engineers failing to disclose the presence of oil on the site of the Development.

16. Petitioner has also applied for and received relief under the Brownfields Redevelopment Act, Sections 376.77-376.86, Florida Statutes. On June 15, 2004, the City of Hallandale Beach, Florida, adopted Resolution 2004-18, approving the designation of the site of the Development as a Brownfield Area. On July 6, 2004, the City of Hallandale Beach, Florida, adopted Resolution 2004-21, requesting support from Broward County, Florida by means of subsidies to encourage the construction of the Development. On December 17, 2004, Petitioner entered into a Brownfield Site Rehabilitation Agreement with Broward County, Florida. As a result, Petitioner has received \$1,793,891 and will receive \$763,597 in 2007, to mitigate the cost associated with the clean-up of the site of the Development.

17. Petitioner alleged in its Petitions that it should be awarded additional SAIL funding in part, due to Florida Housing granting a Petition for Waiver for Casa San Juan Bosco, Inc. (“Bosco”) in FHFC Case No. 2006-029 VW. The facts and circumstances surrounding the Bosco petition are clearly distinguishable from the instant matter.

18. The rule waiver granted to Bosco was from a provision of the 2006 Universal Cycle Application Instructions which allowed End-of-the-Line SAIL funding for developers to obtain additional SAIL funding, provided that the initial allocation of SAIL funds occurred through the 2005 Universal Cycle. Developments located in DeSoto County, Florida could obtain SAIL funding in an amount not to exceed four million dollars (\$4,000,000.00). The End-of-the-Line SAIL funding was not available to those applicants who did not participate in the 2005 Universal Cycle.

19. Pursuant to “The Development and Rehabilitation of Farmworker Housing” Request for Proposal #2004-11 (“RFP”), Florida Housing solicited sealed proposals from applicants wishing to construct or rehabilitate farmworker housing with SAIL funds. The deadline to submit proposals was January 12, 2005, and funds were awarded March 4, 2005. The RFP was designed to allow these applicants to receive SAIL funds in a more timely manner than if they applied for the SAIL funds through the Universal Cycle, in order to allow them to request funding through the federal United States Department of Agriculture Rural Development program. At their option, these applicants could have participated in the 2005 Universal Cycle instead of submitting a proposal in response to the RFP.

20. Florida Housing, through the RFP, awarded an allocation of \$2,000,000 in State Apartment Incentive Loan Program (SAIL) funding to Bosco to construct a 44-unit farmworker

housing project in DeSoto County, Florida. Bosco did not participate in the 2005 Universal Cycle for its farmworker housing project.

21. The RFP was implemented concurrent with the 2005 Universal Cycle<sup>4</sup> and only three applicants submitted proposals; one applicant subsequently withdrew its proposal. No 2005 Universal Cycle applicants submitted applications requesting funding to construct farmworker housing. Had Bosco and the other RFP applicant instead participated in the 2005 Universal Cycle, they would have been eligible to submit applications for the 2006 Universal Cycle End-of-the-Line funding. In granting the petition for waiver for Bosco, Florida Housing recognized that a violation of the principles of fairness existed as a result of an unintended consequence of the application of the rules to Bosco, which could have received additional funding had it chosen to participate in the 2005 Universal Cycle.

22. Petitioner's circumstances are quite different. Petitioner was one of 79 applicants who applied for SAIL funding in the 2003 Universal Cycle. The 2006 Universal Cycle Rules and Instructions do not contemplate allowing previously funded applicants from the 2003 Universal Cycle to submit applications for additional funding, nor as a matter of policy would Florida Housing grant such relief by way of waiver or variance. Were Florida Housing to now allow Petitioner, and the other 25 still active 2003 Universal Cycle SAIL applicants, to receive additional funding, Florida Housing would be severely hampered in implementing its underlying statutory goal of facilitating the availability of decent, safe and sanitary housing in the State of Florida as funding the 2003 projects in the manner requested by Petitioner could consume a large part of the SAIL funding available for new projects in the 2007 Universal Cycle.

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<sup>4</sup> The 2005 Universal Cycle opened January 18, 2005; the application deadline was February 16, 2005.

23. Developers are required, per Rule 67-48.012(2), Fla. Admin. Code (2003), to provide construction completion guarantees, to assure that in the event of unexpected expenses or circumstances, that the project financed by Florida Housing will be built. The relief requested by Petitioner would instead make Florida Housing the guarantor of project completion in the event of unanticipated expenses.

24. Florida Housing has, and will exercise, discretion to deny the relief sought here to projects which are or will be completed without such relief by way of waiver or variance. Were Florida Housing to now allow Petitioner, and the 25 other 2003 Universal Cycle SAIL applicants still active to receive additional funding, Florida Housing would be severely hampered in implementing its underlying statutory goal of facilitating the availability of decent, safe and sanitary housing in the State of Florida as funding the 2003 projects could consume a large part of the SAIL funding available for new projects in the 2007 Universal Cycle.

**IT IS THEREFORE ORDERED:**

The Petition for Waiver and Variance of Rules 67-48.010(3)(b), (2003), 67-48.004(14)(l), (2003), 67-48.009(4), (2003), and Part V.A.1. of the Universal Application (Rev. 4-03) Incorporated by Reference into Rule 67-48.002(111), (2003), Florida Housing Administrative Code, and all other requests for relief is hereby **DENIED**.

DONE and ORDERED this 8 th day of March, 2007.

Florida Housing Finance Corporation

By:   
Lynn Stultz, Chair



**Copies furnished to:**

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**NOTICE OF RIGHTS**

**A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTIONS 120.542(8), 120.569, AND 120.57, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.**