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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In Re: CREATIVE CHOICE HOMES XXIX, LTD.

FHFC Case No.: 2006-076VW
Application No.: 2003-023CS

**ORDER DENYING VARIANCE and WAIVER OF RULES 67-48.012(1)(g),
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 January 26, 2007, pursuant to a "Petition for Variance and Waiver from Rules 67-48.004(14)(l), 67-48.009(4), 67-48.012(12)(g) and Part V.A.1. of the Universal Application (Rev. 4-03) Incorporated by Reference into Rule 67-48.002(111)" (the "Petition"). Florida Housing Finance Corporation ("Florida Housing") received the Petition on November 14, 2006, from Creative Choice Homes XXIX, Ltd. ("Petitioner"). On November 22, 2006, Florida Housing published the Notice of the Petition in Volume 32, Number 47, of the Florida Administrative Weekly. Florida Housing received no comments regarding the Petition. 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 \$860,000.00 in State Apartment Incentive Loan Program (SAIL) funding and \$825,000.00 in low income housing Tax Credits to Petitioner, a for-profit limited liability company, to build a 112 unit elderly rental apartment complex in Lee County, Florida, known as Mariner's Landing ("the Development").

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HOUSING FINANCE CORPORATION



DATE: 2-13-07

The Development has completed construction and achieved its placed in service date for its allocation of housing Tax Credits on December 31, 2006.

3. Petitioner seeks variances and waivers of Florida Housing's rules to obtain additional SAIL funds to offset the cost overruns it alleges it incurred due to unexpected hurricanes making landfall in south Florida during construction. Specifically, Petitioner wishes to change the original SAIL funding request of \$860,000.00 to request an additional \$2,000,000.00 for a total SAIL funding request of \$2,860,000.00 and to reduce its debt service coverage ratio to less than 1.10.

4. Petitioner requests a waiver of Rule 67-48.009(4), (2003), which prohibits it from requesting 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 medium county applicants to no more than \$1.5 million.

6. Petitioner requests a variance of Rule 67-48.012(1)(g), which states that the minimum combined debt service coverage shall be 1.10 and the maximum debt service coverage shall be 1.50, including the SAIL mortgage and all other superior mortgages.

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 (Rev. 04-03), incorporated by reference in Rule 67-48.002(111), Florida Administrative Code (2003), states in pertinent part:

SAIL request cannot exceed...\$1.5 million...

10. Rule 67-48.012(1)(g), Florida Administrative Code (2003), states in pertinent part:

The minimum combined debt service coverage shall be 1.10 and the maximum debt service coverage shall be 1.50, including the SAIL mortgage and all other superior mortgages

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. Previously, Florida Housing requested information from Petitioner pursuant to Section 120.542(7), Florida Statutes, seeking documentation supporting Petitioner's allegations of substantial hardship, regarding how the hurricanes of 2004 and 2005 created additional expenses specific to this development. On October 18, 2006, Petitioner submitted its response. Petitioner provided revised Forms G 702 and G 703, signed change order number 8, and revised development budget.

13. Petitioner has completed construction and met its placed in service date requirement under IRC Section 42(h)(1)(E)(i). In its application, Petitioner requested \$825,000 in low income housing Tax Credits. Per IRC Section 42(h)(1)(E)(i), the placed in service date was originally set as December 31, 2005. A one-year extension of the project's

placed in service date, to December 31, 2006, was granted pursuant to IRS Rev. Proc. 95-28. Petitioner has placed units in service, meeting this requirement and will commence leasing units in the near future. Petitioner has not demonstrated how additional SAIL funds will improve the viability of the Development after construction is completed; it has complied with the IRC requirements allowing it to finalize its tax credit allocation.

14. Petitioner has failed to demonstrate entitlement to a variance or a waiver of the rules pled in its Petition. 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. It must then demonstrate substantial hardship or a violation of the principles of fairness.

15. Petitioner failed to demonstrate that it is furthering the purpose of the underlying statute by other means. Rather, Petitioner would employ the identical means—additional funding from the SAIL program to supplement that previously received from SAIL. Florida Housing is charged by statutory mandate to build safe, sanitary affordable housing. 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 additional SAIL funds.

16. Under the second prong of the statutory requirement, Petitioner failed to demonstrate substantial hardship¹. Petitioner must demonstrate that the application of a rule to it would create a substantial hardship². Petitioner has neither pled nor provided information that

¹ Petitioner did not allege a violation of the principles of fairness in its Petition.

²Under 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.

demonstrated that the application of the pertinent rules, which govern the SAIL request amount or the debt service coverage ratio, has in any way contributed to Petitioner's cost-overruns or construction delays. Rather, Petitioner has made it clear that it is seeking additional funds to offset 'significant cost overruns' due to hurricane activity. The mere fact that Petitioner can demonstrate that it has incurred unanticipated economic costs, does not by itself equate to a substantial hardship that is caused by the application of Florida Housing's rules to Petitioner or its Development. Petitioner must demonstrate how the application of a rule to its particular circumstances has created the substantial hardship. See Zoe Gail McLendon v. Florida Department of Law Enforcement, Criminal Justice Standards and Training Commission, DOAH Case No. 00-2350 (November 7th, 2000).

17. Petitioner was one of 79 applicants who applied for SAIL funding in the 2003 Universal Cycle. Its circumstances are not unique. Many developments funded by Florida Housing through the Universal Cycle were equally affected by the unforeseen hurricanes. Petitioner fails to demonstrate how the application of the rules will affect it in a manner significantly different from the way the rules affect other similarly situated developers who are subject to the rule. Accordingly, it is not entitled to a variance or waiver. McLendon *infra*.

18. 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 make Florida Housing the guarantor of project completion in the event of unanticipated expenses.

19. 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.

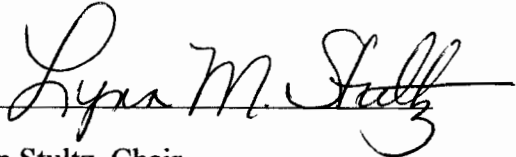
20. Denial of the variance and waiver request for \$2,000,000 in additional SAIL funding renders the request for a waiver reducing the debt service coverage ratio unnecessary.

IT IS THEREFORE ORDERED:

The Petition for Waiver and Variance of Rules 67-48.012(1)(g), (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 relief requested are hereby **DENIED**.

DONE and ORDERED this 13th day of February, 2007.

Florida Housing Finance Corporation

By: 
Lynn Stultz, Chair

Copies furnished to:

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Joint Administrative Procedures Committee
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120 Holland Building
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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.