

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

In Re: NATIONAL DEVELOPMENT
FOUNDATION, INC.

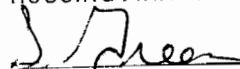
FHFC Case No. : 2007-022VW
Application No. : 2007-157H

**ORDER DENYING WAIVER FROM
RULE 67-48.018(1)(b), FLORIDA ADMINISTRATIVE CODE**

THIS CAUSE came on for consideration and final action before the Board of Directors of Florida Housing Finance Corporation on July 27, 2007, pursuant to a Petition for Variance or Waiver of Rule 67-48.018(1)(b), Florida Administrative Code, (the "Petition"). Florida Housing Finance Corporation ("Florida Housing") received the Petition on June 18, 2007, from National Development Foundation, Inc., ("Petitioner"). On June 29, 2007, the Notice of the Petition was published in Volume 33, Number 26, 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 2005 Universal Cycle, Florida Housing awarded a preliminary commitment of \$5,425,000.00 in HOME Investment Partnerships Rental Program ("HOME") funding to Petitioner to finance the construction of a 96-unit townhouse development intended to serve the Family demographic to be located in Highlands County, Florida (the "Development"). Petitioner's application number was 2005-104H.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

 /DATE. 7/27/07

3. On or about April, 10, 2007, Petitioner submitted an application in the 2007 Universal Cycle, for an allocation of \$12,000,000.00 in HOME funding to finance the construction of the same Development.

4. The application deadline for the 2007 Universal Cycle was April 10, 2007. Petitioner provided written notice on April 12, 2007, that it was withdrawing its acceptance of its 2005 Universal Cycle application, 2005-104H.

5. Rule 67-48.018(1)(b), Florida Administrative Code (2007), states in pertinent part:

(1) Unless the Board approves a competitive allocation process outside of the Universal Cycle, an Applicant is not eligible to apply for HOME Program funding if any of the following pertain to the proposed Development:

(b) The Applicant has already accepted a preliminary commitment of funding for the proposed Development through the HOME Program, the SAIL Program, or the RRLP Program, unless the Applicant has provided written notice to the Corporation prior to the Application Deadline for the current cycle that it is withdrawing its acceptance and returning its prior HOME Program, SAIL Program, or RRLP Program funding.

6. 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.

7. Petitioner requests a variance or waiver from the above Rule to allow Petitioner to remain eligible to apply for HOME funding in the current 2007 Universal Cycle, despite the fact that the current cycle is ongoing and that final scores for the 2007 Universal Cycle were not issued until July 12, 2007.

8. Section 120.542, Florida Statutes (2006), provides that petitions for a waiver of agency rules shall be granted when the person requesting the waiver demonstrates that the purpose of the underlying statute will or has been achieved by other means by the person, and when the application of the rule in question would create a substantial hardship or would violate the principles of fairness. Both of these elements are necessary to meet the threshold for the granting of a waiver of an agency rule.

9. Petitioner alleges that granting the waiver of Rule 67-48.018(1)(b), Florida Administrative Code, would serve the underlying purpose of the statute, in that it will enable Petitioner to obtain funding for the Development, thereby aiding it in accomplishing the statutory goals of providing affordable housing to the residents of Florida.

10. Granting this waiver would not serve the purpose of the underlying statute. Florida Housing is charged under Section 420.5089(2), Fla. Stat., to make HOME loans available under a selection process established and described by Florida Housing's rules, and under Section 420.5089(6), Fla. Stat., applications for loans under any competitive scoring process established by Florida Housing rule must be approved by a review committee. Granting Petitioner's waiver request would undermine the competitive application process, by allowing Petitioner to ignore a deadline which all other applicants are required to adhere.

11. Moreover, Petitioner is required to demonstrate that the purpose of the underlying statute will or has been achieved by other means by the person. Petitioner failed to demonstrate that it can achieve the goals of the underlying statute by other means. In both of its applications, Petitioner requested HOME funds to construct its Development. In its Petition, Petitioner is

seeking a waiver to allow it to apply for additional HOME funds. It is seeking to achieve the goal of the underlying statute by the same means, HOME funds.

12. Section 120.542, Florida Statutes (2006), defines “substantial hardship” as a demonstrated economic, technological, legal, or other type of hardship to the person, and provides that “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.

13. Petitioner has not demonstrated a substantial hardship resulting from the application of the rule. By Petitioner’s own admission, it failed to withdraw its 2005 application by the 2007 Universal Cycle application deadline. Instead, Petitioner states that it submitted written notice two days late due to an “inadvertent oversight.” Petitioner created its own substantial hardship by not adhering to the Rule it was well aware of prior to the application deadline.¹ Petitioner alleges that it would suffer a substantial hardship should its Petition be denied, but those consequences are no different for any other applicant in the Universal Cycle who failed to properly comply with the requirements of the Rule.

14. Petitioner has not demonstrated that the literal application of Rule 67-48.018(1)(b), Florida Administrative Code, affects Petitioner in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule, and therefore has not demonstrated that the literal application of the Rule violates the principles of fairness as defined in Section 120.542, Florida Statutes (2006). Indeed, it would be fundamentally unfair to

¹ Petitioner supplied a copy of an email dated September 13, 2006, as an exhibit to its Petition, which demonstrates that it was aware of Florida Housing’s rules regarding requesting additional HOME funds.

the other approximately 190 applicants currently seeking funding in the 2007 Universal Cycle to allow Petitioner to remain eligible for funding when it failed to follow Florida Housing's rules.

15. The policy precedent set by any rule variance or waiver is a consideration that Florida Housing should be able to take into account. Here, granting the waiver would be contrary to Florida Housing's decision in Fifth Avenue Estates, Ltd., v. Florida Housing Finance Corporation, FHFC Case No. 2002-025 (*per curiam affirmed*, 875 So.2d 1242 (Fla. 1st DCA 2004)). There Florida Housing determined that maintaining the integrity of the competitive application process was paramount, notwithstanding that the petitioner's own error in failing to comply with the application rule resulted in hardship.


IT IS THEREFORE ORDERED:

The Petition for Variance or Waiver of Rule 67-48.018(1)(b), Florida Administrative Code, is hereby **DENIED**.

DONE and ORDERED this 27th day of July, 2007.

Florida Housing Finance Corporation



By: 
Lynn M. Stultz, Chair

Copies furnished to:

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Joint Administrative Procedures Committee
Attention: Ms. Yvonne Wood
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Tallahassee, Florida 32399-1300

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.