

BEFORE THE FLORIDA HOUSING FINANCE CORPORATION

MALABAR COVE II, LTD.,
a Florida limited partnership,

Petitioner.

vs.

FHFC CASE NO. 2008-1061W

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**PETITION FOR WAIVER OF
RULE 67-48.0075(7)(a)(I), FLORIDA ADMINISTRATIVE CODE (2008)**

MALABAR COVE II, LTD., a Florida limited partnership ("Petitioner"), by and through its undersigned counsel and pursuant to Section 120.542, Florida Statutes and Chapter 28-104, Florida Administrative Code ("F.A.C."), hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a waiver of that portion of Rule 67-48.0075(7)(a)(I) which requires the principal of a supplemental loan awarded in the 2008 Universal Application Cycle to be forgivable. In support, Petitioner states the following:

THE PETITIONER

1. The address, telephone number and facsimile number of the Petitioner is:

**Malabar Cove II, Ltd.
c/o Atlantic Housing
329 North Park Avenue, Suite 300
Winter Park, Florida 32789
Phone: (407) 741-8530
Fax: (407) 629-6979**

2. The address, telephone number and facsimile number of Petitioner's Counsel is:

**Maureen McCarthy Daughton
Broad and Cassel**

RECEIVED
FLORIDA HOUSING FINANCE CORPORATION
JUL 17 2008
CORPORATION

215 S. Monroe Street, Suite 400
Tallahassee, FL 32301
Phone: (850) 681-6810
Fax: (850) 521-1478

THE RULE FROM WHICH WAIVER IS SOUGHT

3. Petitioner requests a waiver of that portion of Rule 67-48.0075(7)(a)(1), F.A.C. (2008) which provides that the principal of a supplemental loan awarded in the 2008 Universal Application Cycle be forgivable provided the units for which the supplemental loan amount is awarded are targeted to Extremely Low Income (“ELI”) Households for at least 15 years.

STATUTES IMPLEMENTED BY RULE 67-48.0075(7)(a)(1), F.A.C.

4. Rule 67-48.0075(7)(a)(1), F.A.C. (2008), implements Sections 420.5087, Florida Statutes, and the provisions of Section 34 of Chapter 2006-69 (H.B. No. 1363). Section 420.5087, Florida Statutes, authorizes the Corporation to, among other things, make mortgage loans for financing of development costs of projects under the State Apartment Incentive Loan (“SAIL”) Program subject to specified conditions, and to establish terms of such loans funded pursuant to the Florida Housing Finance Corporation Act, Part V, of Chapter 420, Florida Statutes.¹ Section 34 of Chapter 2006-69 (H.B. No. 1363) appropriated funds to assist in the production of housing units for ELI Households. Pursuant to these provisions, the Corporation has adopted Rule 67-48.0075(7)(a)(1), F.A.C. (2008), entitled “Miscellaneous Criteria.”, which provides:

(7) Supplemental loans will be subject to the credit underwriting provisions outlined in Rule 67-48.0072 and the loan provisions outlined below:

(a) The terms and conditions of the supplemental loan shall be as follows: (1) The supplemental loan shall be (i) based on

¹ The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.516 of the Florida Statutes.

each ELI Set-Aside unit above the minimum ELI-Set Aside threshold requirement in the Universal Application instructions; and (ii) non-amortizing at 0 percent simple interest per annum over the life of the loan, with principal forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 15 years.

* * *

JUSTIFICATION FOR GRANTING WAIVER OF RULE 67-48.0075(7)(a)(1), F.A.C.

5. Petitioner applied for SAIL and supplemental loan financing in the 2008 Universal Application Cycle (Application Number 2008-242S), and was awarded an allocation of SAIL and supplemental loan funds for the acquisition, construction and development of a 72-unit multifamily apartment complex located in Brevard County, Florida (the "Development"). The debt financing for the Development is structured such that the Petitioner will receive tax-exempt bond financing from the Brevard County Housing Finance Authority. SAIL funds and supplemental loan funds (the "ELI Loan"). In its application, Petitioner agreed to target ELI Households with respect to a specified percentage of units in the Development for at least 15 years. However, the Rule requires that the principal of such loan be forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 15 years. Since a forgivable loan will have negative federal income tax consequences for the Petitioner and will prevent much needed dollars from being re-used to fund the Corporation's affordable housing programs in future years, Petitioner seeks a waiver of that portion of Rule 67-48.0075(7)(a)(1), F.A.C. (2008) that provides "with principal forgivable provided the units for which the supplemental loan amount is awarded are targeted to ELI Households for at least 15 years". Petitioner requests that the ELI Loan be repaid at the end of the initial 15-year period, and that at the end of the initial 15-year period, Petitioner be given an automatic extension on the maturity date of the ELI Loan to a date coterminous with senior financing if the units for which

the ELI Loan was awarded were targeted to ELI Households during that initial 15-year period. The Corporation is authorized by Section 120.542(1), Florida Statutes, and Rule Chapter 28-104, F.A.C., to grant waivers to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when the person subject to the rule demonstrates that the application of the rule would: (1) create a substantial hardship or violate principles of fairness²; and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. Section 120.542(2), Florida Statutes. The application of this rule will result in a substantial financial burden to the Petitioner.

6. In this case, strict application of Rule 67-48.0075(7)(a)(1), F.A.C. (2008) in this case will create a substantial financial hardship for Petitioner. The designation of the ELI Loan as forgivable may, whether forgiven or not, cause the Internal Revenue Service to consider the loan as "phantom" taxable income, and the Petitioner may be subject to taxes on the ELI Loan even though it has not yet received the benefit of the ELI Loan being forgiven. In addition, the designation of the ELI Loan as forgivable may, whether forgiven or not, cause the full amount of the loan to be deducted from eligible basis, thereby reducing the net tax credit for the Development. Further, the waiver will serve the underlying purpose of the statute because the waiver will ensure the viability of this affordable housing development by allowing Petitioner to proceed with a viable financing structure in a timely manner to acquire and construct the Development and will also promote the long-term continuation of affordable housing programs in Florida through repayment of the ELI Loan, thus routing additional dollars to the Corporation

² "Substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance. "Principles of Fairness" are violated when 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 Rule 120.542(2), Florida Statutes.

for future affordable housing programs, both of which, in turn, will further the Corporation's purpose to provide decent, safe and affordable housing in Florida.

ACTION REQUESTED

7. For the reasons set forth herein, Petitioner respectfully requests the Corporation to grant the requested waiver of that portion of Rule 67-48.0075(7)(a)(1), F.A.C. (2008), to forgo the automatic forgiveness of the supplemental loan's principal balance provided the units for which the supplemental loan amount was awarded were targeted to ELI Households for at least 15 years, and to instead cause the ELI Loan to be repaid at the end of the initial 15-year period, with an automatic extension on the maturity date at the end of the initial 15-year period to a date coterminous with senior financing if the units for which the ELI Loan was awarded were targeted to ELI Households during that initial 15-year period.

8. A copy of the Petition has been provided to the Joint Administrative Procedures Committee, Room 120, The Holland Building, Tallahassee, FL 32399-1300, as required by Section 120.542(5), Florida Statutes.

Respectfully submitted this 7 day of November, 2008.



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