

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2016-037VW
PROGRAM NO. 2015-100B

PHOENIX APARTMENTS VENTURE LP,

Petitioner

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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FLORIDA HOUSING
FINANCE CORPORATION

**PETITION FOR WAIVER OF RULE 67-21.014(2)(k) OF
THE FLORIDA ADMINISTRATIVE CODE**

Petitioner, PHOENIX APARTMENTS VENTURE LP, a Florida limited partnership (“Petitioner”), by and through its undersigned counsel, hereby petitions Respondent, FLORIDA HOUSING FINANCE CORPORATION (“Florida Housing”) for a waiver of Rule 67-21.014(2)(k), Florida Administrative Code (“F.A.C.”) (2015) (the “Rule”), in connection with an allocation of Tax-Exempt Multifamily Mortgage Revenue Bonds (“MMRB”) and 4% Non-Competitive Housing Credits (“Housing Credits”). In support, Petitioner states as follows:

A. THE PETITIONER

1. The address, telephone number, and facsimile number for Petitioner and its qualified representative are:

Phoenix Apartments Venture LP
Attention: Sydne Garchik
2711 N. Sepulveda Blvd, #526
Manhattan Beach, CA 90266

Telephone: 310-545-2587
Facsimile: 484-210-0671
Email: sgarchik@mrkpartners.com

2. The address, telephone number, facsimile number and e-mail address of Petitioner's counsel is:

Hollie A. Croft, P.A.
Broad and Cassel
390 N. Orange Avenue, Suite 1400
Orlando, FL 32801
Telephone: (407) 839-4200
Facsimile: (407) 425-8377
Email: hcroft@broadandcassel.com

3. Petitioner successfully applied for an allocation of \$10,500,000 MMRB Bonds (the "Bonds") and \$687,441 in 4% Housing Credits. On April 29, 2016, Petitioner closed on the financing and housing credit syndication which will provide funds for the acquisition and rehabilitation of 164 units intended to serve low-income persons in Miami-Dade County, Florida (the "Development").

B. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

C. THE RULE FROM WHICH WAIVER IS REQUESTED AND STATUTE IMPLEMENTED BY THE RULE

5. Petitioner requests a waiver of subsection (k) within Rule 67-21.014(2), designated as the "MMRB Credit Underwriting Procedures."

6. Rule 67-21.014(2)(k), F.A.C. (2015), provides:

* * * * *

(2)

(k) The Credit Underwriter shall require an operating deficit guarantee. The operating deficit guarantee will be released when the Development achieves a 1.15x debt service coverage ratio on the MMRB Loan and 90 percent occupancy and 90 percent of the gross potential rental income, all for 12 consecutive months as certified by an independent Certified Public Accountant, and verified by the Credit Underwriter. The calculation of the debt service coverage ratio shall be made by the Corporation or its agent. Notwithstanding the above, the **operating deficit guarantee shall not terminate earlier than three (3) years following the final certificate of occupancy.**

* * * * *

D. STATUTES IMPLEMENTED BY THE RULE

7. The Rule implements, among other sections of the Florida Housing Finance Corporation Act, § 420.501, *et seq.* (the “Act”), the statute that created the Housing Tax Credit Program and the Multifamily Mortgage Revenue Bonds Program. *See* §§ 420.509, 420.5099, Fla. Stat. (the “Statute”).

E. JUSTIFICATION FOR GRANTING WAIVER OF RULE 67-21.014(2)(k), F.A.C.

8. Rule 67-21.014(2)(k) requires that the operating deficit guaranty be in place for a minimum of three (3) years commencing on issuance of the final certificate of occupancy. However, the Development consists of the acquisition and rehabilitation of the property and a new final certificate of occupancy will not be issued. Further, the Bonds are short-term and cash-collateralized, with a maturity date eighteen (18) months from closing. There would be no need to have an operating deficit guaranty extend beyond the repayment of the debt. The Proposed Rule published by Florida Housing, which is in the final stages of rulemaking, modifies Rule 67-21.014(2)(k) to clarify, among other things, that the operating deficit guarantee may be released on the “earlier of the date which is three (3) years following certificate of

occupancy or the date on which the MMRB Loan is repaid.” See Proposed Rule Draft (5/19/16 version) (emphasis added).

9. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., Florida Housing has the authority to grant waivers to its rule requirements when strict application of the rules would lead to unreasonable, unfair and unintended consequences, in particular instances. Waivers shall be granted when the person who is subject to the rule demonstrates that the application of the rule would: (1) create a substantial hardship or violate principles of fairness,¹ and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. § 120.542(2), Fla. Stat. (2016).

10. In this instance, Petitioner meets the standards for a waiver of Rule 67-21.014(2)(k).

11. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 164 affordable housing units will be rehabilitated and made available for the target population in Miami-Dade County, Florida.

12. In this case, strict application of Rule 67-21.014(2)(k), F.A.C. (2015) will create substantial hardship for Petitioner. Petitioner is not able to satisfy this requirement because a new certificate of occupancy will not be issued. Additionally, to adhere to a strict application of the three year minimum requirement commencing upon issuance of the certificate of occupancy violates the principles of fairness because rehabilitation deals do not always receive new certificates of occupancy but the same rules are applicable to both types of transactions. Further, as mentioned above, the Bonds will be outstanding for only eighteen (18) months and

¹ “Substantial hardship” means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, “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. § 120.542(2), Fla. Stat. (2016).

will be repaid earlier than the three years during which the Rule requires the operating deficit guaranty to be in place. The Rule does not contemplate the differences between new construction and rehabilitation projects, nor does the Rule contemplate the Bonds being repaid prior to the three year minimum period.

13. In summary, the three year minimum requirement on the operating deficit guaranty is not applicable to the Petitioner because a certificate of occupancy will not be issued in this acquisition and rehabilitation project and the Bonds will be repaid much earlier than the three year period. Accordingly, adhering to a strict interpretation of the Rule would result in substantial hardship to the Petition and violate the principals of fairness.

F. WAIVER WILL SERVE UNDERLYING PURPOSE OF THE STATUTE

14. The requested waiver serves the purpose of the Statutes and the Act because one of the primary goals of the Statute and the Act is to facilitate the issuance of bonds and availability of decent, safe, and sanitary housing in the State of Florida for low-income person. Moreover, the Act was passed in order to encourage private and public investment in facilities for persons of low-income. The purpose of the creation of the Housing Tax Credit Program and Multifamily Mortgage Revenue Bonds Program is to stimulate creative private sector initiatives to increase the supply of affordable housing. By granting this waiver, the Corporation would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income. *See* §§ 420.509(1), 420.5099(2), Fla. Stat. (2016).

G. ACTION REQUESTED

15. For the reasons set forth herein, Petitioner respectfully requests Florida Housing grant the requested waiver to delete the requirement that the operating deficit guaranty be in place for a minimum of three years from issuance of final certificate of occupancy in Rule 67-

21.014(2)(k), F.A.C. (2015) and instead permit Petitioner to terminate the operating deficit guaranty upon redemption of the Bonds.

Respectfully submitted,

 Leonard Collins, Esq.

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Fla. Bar No. 423210

Hollie A. Croft, P.A.

Fla. Bar No. 886181

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

The original Petition is being served by hand delivery, for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, with copies served by hand delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 30th day of August, 2016.

By: Leonard Collins, Esq.
Leonard Collins, Esq.
Fla. Bar No. 423210