

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

RECEIVED
19 MAY 23 PM 1:26
FLORIDA HOUSING
FINANCE CORPORATION

FAIR OAKS, LLC,
a Florida limited liability company,

Petitioner,

CASE NO. 2019-048VW

vs.

Application No. 2018-077C

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

PETITION FOR WAIVER OF RULE 67-48.004(3)(i) - (j) (2017)
FOR A CHANGE IN NUMBER OF UNITS AND TOTAL SET-ASIDE PERCENTAGE

Fair Oaks, LLC, a Florida limited liability company (the "Petitioner") hereby petitions Florida Housing Finance Corporation (the "Corporation") for: (i) a waiver or variance of the Corporation's prohibition on changes in "Total Number of Units" designated by an applicant, and (ii) a waiver or variance of the Corporation's prohibition on changes in the "Total Set-Aside Percentage" designated by an applicant, set forth in. *See* Rule 67-48.004(3)(i) and (j), F.A.C. (2017). In support of its petition, the Petitioner states:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for the Petitioner and its qualified representative for Petitioner's application:

Fair Oaks, LLC
3050 Biscayne Boulevard
Suite 300
Miami, FL 33137
Attn: Francisco Rojo
Telephone: (305)538-9552 x 103
Facsimile: (305)538-9553
E-Mail: Francisco@landmarkco.net

2. For purposes of this Petition, the address, telephone number and facsimile number of the Petitioner’s attorney are:

Brian J. McDonough, Esquire
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
150 West Flagler Street
Miami, Florida 33130
Telephone: 305-789-3350
Facsimile: 305-789-3395
E-mail: bmcdonough@stearnsweaver.com

B. THE DEVELOPMENT

3. The Petitioner timely submitted its Application in response to RFA 2017-112 – Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the “RFA”) for the development named “Fair Oaks Apartments” (the “Development”). See Application No. 2018-077C. The Application proposed 120 total units in in Miami-Dade County.

4. The Development will be constructed using housing credit funding of \$2,400,000.

5. Petitioner’s application for housing credits reflected a total of 120 units, with a Total Set-Aside-Breakdown of 100%, as follows: 108 units (90%) at 60% AMI; 12 ELI set-aside units (10%) and 0% market-rate units.

6. Petitioner is seeking to increase the total number of units from 120 to 124, and to decrease the Total Set-Aside Percentage from 100% to 96.77%. Applicant intends that the additional 4 units will be market rate. Additionally, the ELI set-aside units would increase from 12 to 13 units and the units at 60% AMI would decrease from 108 to 107 units, maintaining a total of 120 set-aside units. Given the increase in total units from 120 to 124, the total set aside percentage would decrease from 100% to 96.77%.

7. Essentially, Petitioner seeks the following:

Units and Set-Asides Per Fair Oaks FHFC Housing Credit Application:

Bedroom Type	Number of Units	ELI Set-Aside Units	Units at 60% AMI	Market Rate Units
1 bedroom/1bath	30	3	27	0
2 bedroom/2bath	90	9	81	0
TOTAL	120	12	108	0
TOTAL %	100%	10%	90%	0%

Units and Set-Asides Per this Waiver Request:

Bedroom Type	Number of Units	ELI Set-Aside Units	Units at 60% AMI	Market Rate Units
1 bedroom/1bath	34	4	26	4
2 bedroom/2bath	90	9	81	0
TOTAL	124	13	107	4
TOTAL %	100%	10.48%	86.29%	3.23%

The request, if granted, would remain in compliance with Section 6(d)(2)(a)(i) of the RFA, which states: “If the proposed Development has a Demographic Commitment of Family or Elderly Non-ALF, the Applicant must set aside a total of at least 80 percent of the Development’s total units at 60 percent AMI or less.”

C. RULES FROM WHICH WAIVER IS SOUGHT

8. Petitioner requests a waiver from Rule 67-48.004(3)(i) and (j), Florida Administrative Code in effect as of the submission of Petitioner’s Application (the “Rule”):

The Rule provides, in relevant part, as follows:

(3) For the SAIL, HOME and Housing Credit Programs, notwithstanding any other provision of these rules, the following items as identified by the Applicant in the Application must be maintained and cannot be changed by the Applicant after the applicable submission, unless provided otherwise below:

(i) Total number of units; notwithstanding the foregoing, the total number of units may be increased after the Applicant has been invited to enter credit underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation. With regard to said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant’s request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development

(j) For the SAIL and HC Programs, the Total Set-Aside Percentage as stated in the last row of the total set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application. . . .

D. STATUTES IMPLEMENTED BY THE RULE

9. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, Section 420.5087 (State Apartment Incentive Loan Program), and Section 420.5099 (Allocation of the low-income housing tax credit).

E. PETITIONER REQUESTS A WAIVER FROM THE RULE FOR THE FOLLOWING REASONS

10. Petitioner requests a waiver from Rule 67-48.004(3)(i) and (j), Florida Statutes.

11. It is not uncommon for development changes to occur after submission of an application to the Corporation. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when: (1) the person who is subject to the rule demonstrates that the application of the rule would create a substantial hardship or violate principles of fairness, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. *See* § 120.542(2), Fla. Stat.

12. The following facts demonstrate the economic hardship and other circumstances which justify Petitioner's request for waiver:

- a. Petitioner timely submitted its Application to the Corporation in response to the RFA, for 120 units, with the Total Set-Aside Percentage of 100%.
- b. The Development's zoning designation allows for the addition of 4 units, for a total of 124 units.

- c. By granting this request, the Total Set-Aside Percentage will decrease from 100% to 96.77%.
- d. Specifically, granting the requested waiver will increase the ELI set-asides by 1 unit and decrease the units set aside at 60% AMI by one unit.
- e. Currently, there are no market rate units planned for the Development. Providing for 4 market rate units at the Development would provide an economic and social benefit, by allowing for a more diverse mix of incomes in the Development. Further, the addition of 4 market rate units would assist the Petitioner respond to the desire of local government officials for affordable housing developments to provide for a mix of resident incomes.
- f. Additionally, denying this Petition would cause economic hardship for Petitioner in the form of lower Development rental revenues and decreased economies of scale. The additional rental revenue from the 4 market rate units will improve the economies of scale since greater revenues would be available to cover the Development's fixed operational costs (such as administrative expenses, elevator maintenance, grounds upkeep, etc.). This would result in an improvement of the Development's debt service coverage ratio, facilitating the long-term viability of the Development.
- g. The additional market rate units will, however, result in a corresponding decrease in the Total Set-Aside Percentage provided for in the Application from 100% to 96.77%.

- h. Grant of the requested waiver will not substantively impact the number or quality of affordable housing units referenced in Petitioner's application and would augment the proposed Development by permitting a unique mixed-income housing opportunity.
- i. Lastly, the requested changes will not impact the Application or other applicants under the RFA. Since the requested changes maintain a total of 120 units set-aside at 10% and 60% of AMI, and the Petitioner's requested Housing Credits remain the same, the leveraging calculation and the points allocated in the Application's scoring are not affected.

13. A waiver of the Rule's restriction against increasing the total number of units and changing the Total Set-Aside Percentage from Petitioner's Application would serve the purposes of Section 420.5099, F.S., and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means, and would provide the additional benefit of meeting the critical need for mixed-income developments with Market Rate Housing units.

14. By granting the waiver and permitting Petitioner to decrease the total Set-Aside Percentage, the Corporation would recognize the economic realities and principles of fundamental fairness in developing affordable rental housing by encouraging the development of mixed-income housing projects, particularly in urban areas well-suited to a mixed-income housing project, and enabling developers to meet the needs of both low-income families and families in need of moderately-priced Market Rate Housing. This recognition would promote participation by owners such as Petitioner in meeting the Act's purpose of providing affordable housing in an economical and efficient manner.

15. The requested rule waiver will not adversely affect the Development or FHFC. However, a denial of this Petition (a) will result in substantial economic hardship to Petitioner; (b) could deprive Miami-Dade County of essential, affordable housing units in a timely manner, and (c) would violate principles of fairness¹. *See* § 120.542(2), Fla. Stat.

16. Should the Corporation require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

F. PERMANENCY

17. The waiver being sought is permanent in nature.

G. ACTION REQUESTED

Petitioner requests the following:

- a. That the Corporation grant Petitioner a waiver from Rule 67-48.004(3)(i) and (j), Florida Administrative Code, allowing it to decrease the Total Set-Aside Percentage from 100% to approximately 96.77% and to increase the total number of units in the Development from 120 to 124;
- b. Grant the Petition and all the relief requested therein; and
- c. Grant such further relief as may be deemed appropriate.

¹“Substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. “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 the rule. *See* § 120.542(2), Florida Statutes.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Counsel for Petitioner
150 West Flagler Street, Suite 150
Miami, Florida 33131
Tel: (305) 789-3350
Fax: (305) 789-3395
E-mail: bmcdonough@swmwas.com

By: s/Brian J. McDonough
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition is being served via e-mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, *CorporationClerk@FloridaHousing.org*, with copies served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 23rd day of May, 2019.

s/Brian J. McDonough
Brian J. McDonough, Esq.