

## CHAPTER 7

### FINANCIAL INFEASIBILITY WAIVERS

AHP properties were sold at a price discounted to reflect the restricted revenue to be generated by the Set-Aside unit requirements. Under most circumstances, owners should be able to maintain viability and full compliance, assuming proper management. However, circumstances beyond the control of the owner may arise under which continued full compliance with the Set-Aside requirements is not feasible or would jeopardize the financial viability of the property.

Under the provisions of a property's LURA, monitoring agencies have the authority to reduce temporarily the occupancy requirements for Low and Very Low Income tenants in cases where it is no longer financially feasible for an owner to meet these requirements.

To obtain such a reduction, owners must submit an application to the monitoring agency requesting temporary waiver of the occupancy requirements.

This Chapter addresses the process and conditions for financial feasibility waivers.

#### 7.1 FINANCIAL INFEASIBILITY WAIVERS

When conditions arise that threaten the financial feasibility of the property, owners may request a waiver of the AHP occupancy requirements, enabling them to rent some or all of the units set-aside for VLI and LI households temporarily to tenants with higher incomes at rents above the AHP rent limits.

Owners should consider applying for such a waiver only as a measure of last resort to preserve the property. FDIC expects that owners will have taken all reasonable steps to address the source of the property's distress and

strengthen its financial position before applying for a waiver.

For some properties, the waiver alone will not provide sufficient relief to enable owners to generate the income needed to meet their financial obligations. In such a case, FDIC anticipates that a AHP waiver will serve as one component of a larger package of assistance to the property.

The remainder of this section describes:

- ◇ necessary conditions for receiving a waiver;
- ◇ types of waivers; and
- ◇ the extent of a waiver.

#### **A. Necessary Conditions for Granting Waivers**

FDIC has established the following items as necessary conditions for receiving a financial infeasibility waiver.

- ◆ **Serious Financial Distress.** A property should be experiencing serious financial problems to receive a waiver. Properties where profits are lower than anticipated or which encounter occasional monthly losses are not considered to be experiencing serious problems.
- ◆ **Conditions Are Beyond Control of Owner.** The conditions leading to the property's financial distress problems should be beyond the owner's control, such as market changes or catastrophic event.
- ◆ **The Owner Has Made Substantial Efforts to Strengthen Property's Condition.** The owner must have taken, and be able to demonstrate, all reasonable steps to address the source of the distress and improve the property's financial condition.
- ◆ **A Waiver Enables Owner to Address Problem.** The waiver must clearly provide

the increased income necessary to help preserve the property. If the waiver, together with the owner's existing efforts to strengthen the property's financial position, does not provide sufficient relief to overcome a property's distress, the waiver application must show that the owner is attempting to obtain the additional assistance necessary to preserve the property.

- ◆ **A Waiver Must Be Compatible with Other Assistance to the Property.** It may not be possible to unilaterally waive the occupancy requirements for the property if it also has Low Income housing tax credits, tax exempt bond financing, or other public financing with occupancy requirements.

## B. Types of Waivers

Owners may apply for two types of waivers:

- ◆ **VLI Set-Aside Waiver:** Temporarily reduce the number of required VLI-QUs; or
- ◆ **LI-QU Set-Aside Waiver:** Temporarily reduce the number of required QUs (LI and VLI)

These waivers are temporary, not permanent, and must be reviewed annually by the monitoring agency. Agencies also may waive fees temporarily.

Agencies will not issue a waiver to change rent limits for QUs above the limits issued by FDIC.

### ***VLI Set-Aside Waiver: Reduce Required VLI-QUs***

A VLI Set-Aside waiver gives the owner a temporary reduction in the VLI Set-Aside, but not the Total Set-Aside of QUs.

For example, in a property with a Total Set-Aside of 35 units and a VLI Set-Aside of 20 units, an agency granting a VLI Set-Aside waiver may choose to reduce the required number of VLI

QUs from 20 units to ten units. However, the owner is still required to maintain a total of 35 QUs, with an increase in LI units offsetting the reduced number of VLI units.

Owners may not remove QU designation from any units as a result of the waiver. It will pertain only to the decisions regarding vacant units or the application of Next Available Unit (or NAQU) rules to change in tenant status.

***Total Set-Aside Waiver: Reduce Required QUs***

The second type of waiver gives owners a temporary reduction in the total number of required QUs. Under this type of waiver, owners will generally request to reduce both the Total Set-Aside and the VLI Set-Aside.

Using the same example presented above, a Total Set-Aside waiver might allow an owner to reduce the Total Set-Aside number of QUs from 35 units to 20 units and the required number of VLI Set-Aside units from 20 units to 10 units.

When a waiver is granted and the actual number of occupied QUs in the property exceeds the waiver-approved reduced number of QUs, owners who receive a Total Set-Aside waiver may not remove the QU designation from any occupied QUs. The owner may not raise the rent for a QU above the applicable rent limit until the qualifying tenant vacates the QU.

**C. Size of a Waiver**

Monitoring agencies will determine the type of waiver to be granted and the size and term of any reduction in the number of QUs. Agencies will avoid a complete waiver of the occupancy requirements wherever possible. Waivers will be reviewed annually to determine if there is a continuing need for the waiver.

**7.2 BASIC CONTENTS OF WAIVER APPLICATIONS**

Applications for waivers should be sent to the monitoring agency along with a processing fee as stipulated by the agency. Agencies will render their decision within 60 days from the date of application.

Applications for waivers should provide sufficient information to enable the monitoring agency to evaluate the property's financial condition, as well as a description of the relief the owner is requesting and how the relief will help strengthen the property's financial condition. The application should also include supporting materials that show what the owner has done to address the conditions contributing to the property's financial problems and the fee for processing the request.

Every application must include the items noted below.

#### **Financial Infeasibility Application Contents**

- ◇ Owner's description of the conditions that led to the financial deterioration of the property.
- ◇ Property's financial statements for the past three years.
- ◇ Income and expenses for the property broken down by month for the past year.
- ◇ Listing of other types of assistance received by property (e.g., tax credits, or bond financing) and any other financing.
- ◇ Amount of additional monthly income needed to address problems and for what period of time.
- ◇ The type of relief the owner is requesting (e.g., the type and number of units for which the waiver is requested) and a description of how it will be used to correct the problem.

- ◇ Documentation showing market rate rents for the area.
- ◇ Description of actions owner is taking to strengthen the property's financial position.
- ◇ Processing fee, as stipulated by the agency.

In addition, if vacancies are a significant problem contributing to the property's financial deterioration or distress, the application should also provide the following information:

- ◇ Documentation showing the property's vacancies for the past 12 months;
- ◇ Description of marketing efforts to attract LI and VLI tenants and documentation of these efforts; and
- ◇ The total number of rental applications received during the past six months, and the number of applications from potentially eligible tenants. An explanation of why potentially eligible applicants were turned down or decided not to accept units should be included.

Also, if increased operating expenses are a significant problem contributing to the financial deterioration of the property, a waiver application should also include the following information:

- ◇ Evidence that owner has taken steps to control operating expenses and has invested funds to correct the problem;
- ◇ Sufficient documentation to show that the property's expenses do not include excessive management fees or payments to the owner or related parties for non-essential services; and
- ◇ Documentation showing that increased expenses are consistent with properties in the area or beyond the control of the owner.

Waivers will not be granted for higher debt service costs that may result from additional improvements, equity-takeouts or other refinancing, or scheduled interest rate adjustments.

Owners are solely responsible for submitting all materials necessary to support their request for a waiver. Agencies may make determinations regarding waiver requests solely on the basis of the materials presented in the application. Applications with inadequate documentation may be denied on grounds of insufficient evidence.

### **7.3 WAIVER DETERMINATIONS**

Monitoring agencies will act on waiver applications within 60 days of receipt.

If an agency determines that a waiver should be granted, monitoring staff will inform the owner of the decision within 60 days of the date of application and will send a written notice describing the conditions of the waiver.

Monitoring agencies may establish conditions for a waiver to ensure that the owner will make a good-faith effort to restore the financial health of the property. For example, agencies also may require an owner to submit monthly compliance reports, and additional management performance reports as needed, to document progress in implementing the waiver conditions.

If the monitoring agency decides to deny an owner's request for a waiver, the owners will receive a written notice indicating that the application was denied and stating the reasons the waiver was not granted. This notice will be sent to the owner within 60 days of the date of application. If a request failed to provide sufficient documentation to grant the waiver, the agency will indicate the deficiencies.

If rejected, owners may submit a revised application which addresses the deficiencies found in the original submission. Owners will be

expected to pay another processing fee when submitting revised applications.

#### **7.4 ANNUAL WAIVER REVIEWS**

Monitoring agencies will review waivers at least annually to determine if the need continues to exist for the waiver. Owners may be required to submit updated and additional documentation for this review.