

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

RIVER OAKS PARTNERS, LTD.,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2017-072VW

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

PETITION FOR WAIVER OF RULE 67-21.026(10)

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner River Oaks Partners, LTD, (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of Rule 67-21.026(10), Florida Administrative Code ("F.A.C.") (the "Rule"), which no longer allows for the use of a stipulated sum contract in contracting with general contractors. In support, Petitioner states as follows:

A. THE PETITIONER

1. The address, telephone, facsimile numbers and e-mail address for Petitioner and its qualified representative are:

River Oaks Partners, LTD, a Florida limited partnership
2100 Hollywood Boulevard
Hollywood, FL 33020
Telephone: (786)709-2300
Fax: (305)443-9339
Email: Lenny.Wolfe@CornerstoneGrp.com

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

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
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Suite 2200
Miami, Florida 33130
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Email: Bmcdonough@stearnsweaver.com

B. THE RULE FROM WHICH WAIVER IS REQUESTED

3. Petitioner requests a waiver of Rule 67-21.026(10), F.A.C. (2016), which provides:

The Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, acceptable to the Corporation, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant's sole expense, and review a pre-construction analysis for all new construction units or a physical needs assessment for rehabilitation units and review the Development's costs.

C. STATUTE IMPLEMENTED BY THE RULE

4. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute relating to the allocation of the Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes. *See* § 420.5099, Fla. Stat. (2017) (the "Statute").

D. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE AND REASONS THE WAIVER WOULD SERVE THE PURPOSES OF THE UNDERLYING STATUTE

5. In July 2015, Petitioner acquired and began rehabilitating a 160-unit development in Miami-Dade County known as River Oaks (the "Project"). The financing included tax-exempt bond financing from the local bond issuer in Miami-Dade County. In October 2016, Petitioner submitted a non-competitive application for the allocation of four percent low-income housing tax credits, in connection with which it must provide a cost certification in support of its

final tax credit allocation. The Project has no subsidy from the Florida Housing Finance Corporation.

6. In the course of the cost certification process, Florida Housing determined that Petitioner utilized a stipulated sum contract, as opposed to a Guaranteed Maximum Price Construction Contract.

7. Petitioner entered into the stipulated sum contract on January 27, 2015 (the “Stipulated Sum Contract”). At that time, Rule 67-21.026(10), F.A.C., read: “The Corporation’s assigned Credit Underwriter shall require a guaranteed maximum price **or stipulated sum construction contract**, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant’s sole expense, and review a pre-construction analysis for all new construction units or a physical needs assessment for rehabilitation units and review the Development’s costs.”

8. After execution of the Stipulated Sum Contract, Rule 67-21.026(10), F.A.C., was revised to require a guaranteed maximum price contract as opposed to, alternatively, also allowing the use of a Stipulated Sum Contract.

9. The work contracted for under the Stipulated Sum Contract has been completed, rendering it impossible to retroactively having the work performed under a guaranteed maximum price contract. All construction under the Stipulated Sum Contract was completed in accordance with the Plans and Specifications and approved by all stakeholders (*i.e.*, the lenders, investor, underwriter and County).

10. Because the Stipulated Sum Contract complied with the Rule at the time of execution, and because the work thereunder has already been completed, Petitioner respectfully requests a waiver of the Rule.

11. 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 rules demonstrates that the application of the rules 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. (2017).

12. In this instance, Petitioner meets the standards for a waiver of the Rule. The requested waiver will not adversely impact the Project or Florida Housing and will ensure that 160 affordable housing units will be preserved and made available for the target population in Miami-Dade County, Florida. The strict application of the Rule will create substantial hardship for Petitioner because the work contemplated by the Stipulated Sum Contract has already been completed. If the requested waiver is denied, Petitioner would have to incur the cost of undoing the work provided for under the Stipulated Sum Contract and entering into a new guaranteed maximum price contract. Avoiding this unnecessary cost would ensure the housing costs at the Project are as low as possible. The waiver will therefore serve the purposes of the Statute and the Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary low-cost housing in the State.

13. As mentioned above, the requested waiver serves the purpose of the Statute because one of the primary goals of the Statute is to facilitate the availability of decent, safe, 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. (2017).

sanitary housing in the State for low-income households. By granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing to persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable rental housing. *See* § 420.5099(2), Fla. Stat. (2017).

E. WAIVER IS PERMANENT

14. The waiver being sought is permanent in nature.

F. ACTION REQUESTED

15. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver of the Rule and approve of the use of the aforescribed Stipulated Sum Contract; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

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ALHADEFF & SITTERSON, P.A.
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Counsel for River Oaks Partners, LTD

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

CERTIFICATE OF SERVICE

The Petition For Rule Waiver is being served by hand delivery, with a copy served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by hand delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 10th day of October, 2017.

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