

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

BOCA CIEGA PARTNERS TC, LP,  
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2018-003VW  
Application No. 2015-516C

v.

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.  
\_\_\_\_\_ /

**PETITION FOR WAIVER OF RULE 67-21.026 (10)**

Petitioner Boca Ciega Partners TC, LP, a Florida limited partnership (the "Petitioner"), by and through its undersigned counsel, submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of Rule 67-21.026 (10) (the "Rule") in effect at the time the Petitioner submitted its Application (as defined below), which no longer allows for the use of a stipulated sum contract in contracting with general contractors. In support of its Petition, the Petitioner states as follows:

**A. THE PETITIONER AND THE DEVELOPMENT.**

1. The name, address, telephone and e-mail address for the Petitioner and its qualified representatives are:

Boca Ciega Partners TC, LP, a Florida limited partnership  
Attn: Mr. Todd Menowitz  
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9131 Queens Blvd., Suite 512  
Elmhurst, New York 11373  
Telephone: (718) 457-2400  
Email: todd@menowitz.com

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

Daniel A. Felix, Esq.  
Downs Pham & Kuei LLP  
One Embarcadero Center, Suite 500  
San Francisco, CA 94111  
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3. Pursuant to the Application, Petitioner timely submitted its application for Non-Competitive Housing Credits (the "Housing Credits") under the low-income housing tax credit program ("LIHTC") and for loan funds pursuant to the MMRB Program. See Application Number 2015-516C (the "Application").

4. In September of 2015, Petitioner acquired and began rehabilitating a 109-unit low-income multifamily residential project located in St. Petersburg, Florida, and commonly known as Boca Ciega Townhomes (the "Development"). The Development is financed with the proceeds of (i) Multifamily Housing Revenue Bonds (the "Bonds"), Series 2015 in the original principal amount of \$9,900,000 issued by the Housing Finance Authority of Pinellas County, (ii) a subordinate bridge loan in the original principal amount of \$3,900,000, (iii) a seller carryback loan in the original principal amount of \$3,000,000, (iv) equity raised from the Housing Credits in the form of capital contributions from the limited partner of the Petitioner, and (v) a deferred developer fee in such amount as may be necessary. The proceeds of a first mortgage U.S. Department of Housing and Urban Development ("HUD") 223(f) loan are being used to cash collateralize the Bonds during construction and permanently finance the Development after completion as the Bonds are projected to be paid off prior to or at permanent loan conversion. The Development serves low-income households and families with income equal to no more than sixty percent (60%)

of area median income, as adjusted for family size. One hundred percent (100%) of the units at the Development are rent restricted.

**B. RULE REQUIREMENTS FROM WHICH RELIEF IS REQUESTED.**

5. The relevant portion of the Rule provides as follows:

(10) 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.

Rule 67-21.026 (10), F.A.C.

**C. STATUTE IMPELEMENTED BY THE RULE.**

6. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute relating to the allocation of LIHTC 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**

7. In June of 2015, the Petitioner submitted its Application, in connection with which it must provide a cost certification and construction contract in support of its final tax credit allocation.

8. In the course of the cost certification process, the Corporation's assigned credit underwriter determined that the Petitioner utilized a stipulated sum (lump sum) construction contract, as opposed to a guaranteed maximum price contract ("GMP Contract").

9. The Petitioner entered into that certain HUD Construction Contract (HUD-92442M (6/14)) (a stipulated sum contract) on January 5, 2015 (as amended, the "Stipulated Sum Contract"). At the time of the Petitioner's execution of the Stipulated Sum Contract the Rule 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.”

10. After the Petitioner’s execution of the Stipulated Sum Contract, the Rule (effected February 2, 2015) was revised to require a GMP Contract and eliminated the use of a stipulated sum construction contract.

11. The work contracted for under the Stipulated Sum Contract has already been substantially completed. Consequently, a retroactive performance of the work already completed under a GMP Contract would be impossible and costly. The work performed under the Stipulated Sum Contract has been already approved by all necessary stakeholders, including, without limitation, all applicable lenders, and the investor limited partner.

12. Because the Stipulated Sum Contract complied with the Rule at the time of its execution and further because the work under said contract has already been substantially completed, Petitioner respectfully requests a waiver of the Rule.

13. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its requirements when strict application of these requirements would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when (1) the person who is subject to the requirement demonstrates that the application of the requirement 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. § 120.542(2), Fla. Stat.

14. In this instance, Petitioner meets the standards for a waiver of the Rule. The requested waiver will not impact the Development or the Corporation and will ensure that 109 affordable housing units will be preserved and made available for the target population in St. Petersburg, Florida. The strict application of the Rule will create substantial hardship for the Petitioner because the work contemplated by the Stipulated Sum Contract has already been substantially completed. If the requested waiver is denied, the Petitioner would have to incur the substantial cost of not only such transactional expenses required to enter into a new GMP Contract, but the additional expense and time of retroactively undoing the work already performed under the Stipulated Sum Contract. The avoidance of these and other costs would ensure the continued goal of maintaining the lowest possible housing costs at the Development. 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 of Florida.

**E. WAIVER IS PERMANENT.**

15. The waiver being sought is permanent in nature.

**F. ACTION REQUESTED.**

16. For the reasons set forth herein, Petitioner respectfully requests the Corporation: (1) grant the requested waiver of the Rule and approve the use of the Stipulated Sum Contract; (2) grant this Petition and all of the relief requested herein; and (3) grant such further relief as the Corporation may deem appropriate.

Respectfully submitted,

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*Counsel for Petitioner*

By: 

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DANIEL A. FELIX, ESQ.

**CERTIFICATE OF SERVICE**

This 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 9th day of January 2018.

By:  \_\_\_\_\_  
DANIEL A. FELIX, ESQ.