

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

**GLORIETA PARTNERS, LTD.,
a Florida Limited Partnership,**

Petitioner

FHFC CASE NO. 2018-065VW

v.

APPLICATION NO. 2016-535C

**FLORIDA HOUSING FINANCE
CORPORATION,**

Respondent.

_____ /

PETITION FOR WAIVER OF RULE 67-21.026(10), F.A.C.

Glorieta Partners, Ltd., a Florida Limited Partnership (“Petitioner”), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the “Corporation”) for a waiver of Rule 67-21.026(10), Florida Administrative Code (2017) (the “Rule”). This Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code.

In support of this Petition, the Petitioner states as follows:

A. THE PETITIONER AND ATTORNEYS FOR THE PETITIONER

1. The name, address, e-mail address, telephone number, and facsimile number of the Petitioner is:

Glorieta Partners, Ltd.
Attn: Kenneth G. Weiss
8895 North Military Trail
Suite 201E
Palm Beach Gardens, FL 33410
Phone: 561-309-6501

Fax: 561-627-5116

E-Mail: kgw.partners@gmail.com

2. The name, address, e-mail address, telephone number, and facsimile number of the Attorney for the Petitioner is:

Sarah Pape, Esq.

spape@zkslawfirm.com

Jack Grygiel, Esq.

jgrygiel@zkslawfirm.com

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315 East Robinson St.

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B. THE DEVELOPMENT (BACKGROUND)

3. On September 25, 2015, Petitioner closed on tax-exempt multi-family bonds issued by Capital Trust Agency in the amount of \$24,000,000.00, which financing was used for the acquisition and rehabilitation of a 330-unit development known as Gardens-Glorieta Apartments, located in the City of Opa Locka, Miami-Dade County (the "Development"). Thereafter, Petitioner began the rehabilitation of the Development.

4. On October 19, 2017, Petitioner applied to the Corporation for Non-Competitive Housing Credits requesting an annual amount of \$1,654,690.00 in 4% low-income housing tax credits ("Housing Credits"), pursuant to Chapter 67-21, Florida Administrative Code to assist in financing the Development.

C. RULE(S) FROM WHICH WAIVER IS SOUGHT

5. Petitioner requests a waiver from the Rule, which provides:

(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.).

D. STATUTE(S) IMPLEMENTED BY THE RULE(S)

6. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute that designated the Corporation as the housing credit agency and created the Housing Credit Tax Program. *See* § 420.5099, Fla. Stat.

E. TYPE OF ACTION REQUESTED (PETITIONER'S REQUEST FOR WAIVER FROM THE RULE)

7. Petitioner hereby requests a waiver of the Rule for the reasons set forth below.

8. Pursuant to Section 120.542, Fla. Stat., and Chapter 28.104, F.A.C., the Corporation has the power and authority to grant waivers to its rule requirements. In this regard, Section 120.542(2), Fla. Stat., provides that waivers *shall* be granted when the person subject to the rule demonstrates that (1) the purpose of the underlying statute will be or has been achieved by other means by the person, and (2) the application of the rule would (a) create a substantial hardship¹ or (b) violate principles of fairness².

9. As stated in this Petition, the purpose of the underlying statute will be or has been achieved by other means (Section F below) and application of the rule will create a substantial hardship and violate principles of fairness (Section G below). Thus, the Corporation must grant a waiver pursuant to Section 120.542(2), Fla. Stat.

¹ "Substantial hardship" means a demonstrated economic, technical, legal, or other type of hardship to the person requesting the variance or waiver.

² "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.

F. A WAIVER OF THE RULE WILL SERVE THE PURPOSES OF THE UNDERLYING STATUTE

10. The waiver requested by the Petitioner will serve the purposes of Section 420.5099, Fla. Stat., and the Act because one of the responsibilities of the Corporation is to facilitate and encourage the development of safe housing for low-income persons in the state. If the waiver is granted, then the Development will proceed and provide low-income affordable housing in the state. Additionally, the requested waiver will not adversely impact the Development or the Corporation. Notably, the waiver requested is with respect to a non-competitive application so no other parties will be adversely impacted.

G. SPECIFIC FACTS THAT JUSTIFY A WAIVER OF THE RULE FOR THE PETITIONER (SUBSTANTIAL HARDSHIP OR VIOLATION OF PRINCIPLES OF FAIRNESS)

11. The Rule requires the form of the contract between an applicant and its general contractor to be a guaranteed maximum construction contract (“GMP Contract”). The prior version of the Rule, effective until February 2, 2015, allowed the form of the contract between an applicant and its general contractor to be either a GMP Contract or a stipulated sum construction contract. (“Stipulated Sum Contract”) *See* Rule 67-21.026(10), F.A.C. (2015). Both a GMP Contract form and a Stipulated Sum Contract form create a maximum price that a general contractor should not exceed without cause, and both forms allow for change orders.

12. On September 3, 2015, Petitioner and its General Contractor, Naimisha Construction, Inc. (the “General Contractor”), signed a Stipulated Sum Standard Form of Agreement Between Owner and Contractor (AIA Document 101). Through mistake and inadvertence, Petitioner used a Stipulated Sum Contract form, instead of a GMP Contract form.

13. Following Petitioner’s October 2017 submission to the Corporation of its application for Housing Credits, during the cost certification process, the Corporation’s assigned

credit underwriter discovered the error in the use of the wrong form, which as noted above was inadvertent.

14. The work contracted for under the Stipulated Sum Contract has already been completed.

15. Rule 67-21.026(12)(b) provides: “The General Contractor’s fee shall be limited to a maximum of 14 percent of the actual construction costs.” The General Contractor has represented, warranted, covenanted, acknowledged, and agreed that notwithstanding anything to the contrary in the Stipulated Sum Contract or the documents related to the Stipulated Sum Contract, that its fee shall be limited to the amount permitted under Rule 67-21.016(12)(b), F.A.C. *See* Affidavit attached hereto as Exhibit “A.”

16. Since the work has already been completed, and the General Contractor has agreed that its fee will be limited to the maximum amount set forth in Rule 67-21.026(12)(b), the use of the wrong form contract under these circumstances is a harmless error and a distinction without difference. Requiring the use of the GMP Contract form under these circumstances would be the ultimate in form over substance. Through the cost certification process, all of the General Contractor’s fees and costs will be accounted for and if there is a rebate owed by the General Contractor, it will be recognized and recovered. The Corporation’s requirements regarding the maximum fee paid to the General Contractor will be met.

17. Petitioner will endure substantial hardship if this waiver request is denied because it would not be able to obtain the Housing Credits and will therefore lose a substantial portion of its financing on a project for which the construction has already been completed. Without the Housing Credit financing, the Development will not be able to proceed and the opportunity for affordable housing in the State of Florida will be at risk. Moreover, a denial of this waiver

would violate the principles of fairness because the prior version of the Rule that was effective less than one year prior to the execution of the Stipulated Sum Contract form allowed for the use of this form, and the Petitioner's use of the Stipulated Sum Contract form was mistaken and inadvertent. The purpose of the Rule has been met in that although the GMP Contract form was not used, the General Contractor's fee will be limited to the maximum amount allowed under Rule 67-21.026(12)(b).

H. STATEMENT AS TO WHETHER THE VARIANCE IS PERMANENT OR TEMPORARY

18. The waiver requested by the Petitioner is permanent.

I. ACTION REQUESTED

19. 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 the Petition and all relief requested herein; and (3) grant such further relief as it may deem appropriate.

Respectfully submitted this 17th day of August, 2018.


Respectfully Submitted,



Sarah Pape, Esq.
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Phone: (407) 425-7010
Fax: (407) 425-2747
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition is being served by email and overnight mail delivery for filing with the Corporation Clerk of the Florida Housing Finance Corporation to the following address: Corporation Clerk, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, CorporationClerk@Floridahousing.org, with a copy being served by overnight delivery to the Joint Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 17th day of August, 2018.

By: 

Sarah Pape
Florida Bar No. 0026398

AFFIDAVIT OF YASH PAL KAKKAR

STATE OF FL
COUNTY OF Palm Beach

BEFORE ME, the undersigned authority, personally appeared Yash Pal Kakkar who after being duly sworn, deposes and says:

1. I am over the age of eighteen years and have personal knowledge of the contents of this affidavit.
2. I am the President of Naimisha Construction, Inc. (the "General Contractor").
3. On September 3, 2015, the General Contractor entered into a Standard Form of Agreement Between Owner and Contractor where the basis of payment is a Stipulated Sum, AIA Document A101 – 2007 (the "Construction Contract").
4. Notwithstanding anything to the contrary in the Construction Contract or the documents related to the Construction Contract, the General Contractor represents, warrants, covenants, acknowledges, and agrees that its fee shall be limited to the amount permitted under Rule 67-21.026(12)(b), F.A.C.

FURTHER AFFIANT SAYETH NAUGHT.

[Signature]
Yash Pal Kakkar

STATE OF FL
COUNTY OF Palm Beach

Sworn to (or affirmed) and subscribed before me this 17th day of August, 2018, by Yash Pal Kakkar .

[Signature]
(Signature of Notary Public)

Vaneeta Arora
(Print, Type, or Stamp Name of Notary)

Personally known x
Or Produced Identification _____
Type of Identification Produced _____

SLP/kag
12059-GLORIETA

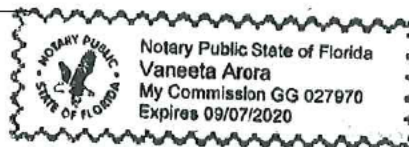


EXHIBIT
A