

**STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION**

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

**Petitioner**

v.

**FHFC CASE NO. 2018-065VW  
APPLICATION NO. 2016-535C**

**FLORIDA HOUSING FINANCE  
CORPORATION,**

**Respondent.**

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**AMENDED 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 Amended Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code.

In support of this Amended 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](mailto: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](mailto:spape@zkslawfirm.com)

Jack Grygiel, Esq.

[jgrygiel@zkslawfirm.com](mailto:jgrygiel@zkslawfirm.com)

Zimmerman Kiser Sutcliffe PA

315 East Robinson St.

Suite 600

Orlando, FL 32801

Phone: (407) 425-7010

Fax: (407) 425-2747

#### **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 (the “Bond and Construction Closing”), 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. Construction of the Development was completed at the end of 2017.

4. On October 19, 2017, nearly two years after the Bond and Construction Closing and shortly before construction of the Development was completed, Petitioner submitted an Application to the Corporation for Non-Competitive Housing Credits (“Application”) requesting an annual amount of \$1,654,690.00 in 4% low-income housing tax credits (“Credits”), pursuant to Chapter 67-21, Florida Administrative Code to assist in financing the Development. The Corporation’s underwriter has advised the Petitioner that a waiver of the Rule (as defined below)

is required in order for the Corporation to approve the Application.

**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 hardship<sup>1</sup> *or* (b) violate principles of fairness<sup>2</sup>.

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

9. As stated in this Petition, the purpose of the underlying statute will be or has been achieved by other means (Section G below) and application of the rule will create a substantial hardship and violate principles of fairness (Section F below). To qualify for a rule waiver, a petitioner need only show that application of the rule would create a substantial hardship *or* violate principles of fairness. In this case, application of the rule would both create a substantial hardship *and* violate principles of fairness. Thus, the Corporation must grant a waiver pursuant to Section 120.542(2), Fla. Stat.

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

10. The Rule requires the form of the contract between an “Applicant” and its general contractor to be a guaranteed maximum construction contract (“GMP Contract”). For the purposes of the Rule, Applicant means “any person or legal entity . . . that is *seeking a loan or funding from the Corporation by submitting an Application . . .*” Rule 67-21.002(9), F.A.C. (emphasis added). Application means “the forms and exhibits created by the Corporation for the purposes of providing the means to apply for MMRB only, Non-Competitive Housing Credits only, or both MMRB and Non-Competitive Housing Credits, as outlined in subsection 67-21.003(1), F.A.C.” Rule 67-21.002(10), F.A.C.

11. Stated another way, the Rule applies to Applicants only when they “*apply* for MMRB, Non-Competitive HC, or a combination of MMRB and Non-Competitive HC.” Rule 67-21.003(1), F.A.C. (emphasis added).

12. On September 3, 2015, Petitioner and its General Contractor, Naimisha Construction, Inc. (the “General Contractor”), signed a Stipulated Sum Standard Form of

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<sup>2</sup> “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.

Agreement Between Owner and Contractor (AIA Document 101) (the “Construction Contract”). The Bond and Construction Closing then occurred on September 25, 2015, and rehabilitation and construction of the Development commenced. Construction of the Development was completed at the end of 2017, and all work contracted for under the Construction Contract has been completed.

13. 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. *See* Rule 67-21.026(10), F.A.C. (2015). Although the Construction Contract was signed on September 3, 2015, the negotiation and preparation of the Construction Contract between the Petitioner and the General Contractor began before February 2, 2015, and thus Petitioner relied on the prior version of the Rule and believed that the stipulated sum contract form would be an acceptable form for the Corporation’s purposes.

14. 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.

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 Construction Contract or the documents related to the Construction Contract, that its fee shall be limited to the amount permitted under Rule 67-21.016(12)(b), F.A.C. Of all of the amounts that have been billed and paid as of the date of this Petition, there have been no cost savings billed or paid under the Construction Contract and the only costs that have been billed and paid are actual costs incurred, plus a fee which amount is limited under Rule 67-

21.026(12)(b), F.A.C. Additionally, of the amounts that remain to be paid, there will be no cost savings billed or paid under the Construction Contract. The only costs that will be billed and paid are actual costs incurred, plus a fee which amount is limited under Rule 67-21.026(12)(b), F.A.C. *See* Affidavit attached hereto as Exhibit “A.”

16. Petitioner will amend the Construction Contract so that the result of the Construction Contract will be the same result had the form of the contract been the GMP Contract form. The General Contract has agreed to such an amendment. *See* Affidavit attached hereto as Exhibit “A.”

17. In 2017, Petitioner applied to the Corporation for the Credits, and the Petitioner is now in the underwriting process for the Credits. The Corporation’s underwriter has advised the Petitioner that a waiver of the Rule is required in order for the Corporation to approve the Application.

18. It would be a violation of principles of fairness to apply the Rule to the Petitioner, because at the time of the Construction Contract was signed in 2015, the Petitioner had not yet submitted an application to the Corporation to seek a loan or funding from the Corporation and Petitioner was not an Applicant within the meaning of the Rule. *See* Rule 67-20.002(9), F.A.C.; Rule 67-21.003(1), F.A.C. Since the Petitioner was not an Applicant and had not yet submitted an application to the Corporation, the Rule did not apply at the time of the Construction Contract was signed, and there is no way for Petitioner to change the type of contract form that was used nearly two years ago. Notwithstanding the fact that the stipulated sum contract form was used rather than the GMP Contract form, the purpose of the Rule has been met because there were no cost savings billed or paid under the Construction Contract, the General Contractor’s fee will be limited to the maximum amount allowed under Rule 67-21.026(12)(b), and the General

Contractor has agreed to sign an amendment to the Construction Contract to effect the same result as a GMP Contract form. Applying the Rule to the Petitioner retroactively would, in effect, be an unfair and unjust application of the Rule.

19. A denial of this waiver would also 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 Construction Contract allowed for the use of this form, and the Petitioner's use of the stipulated sum contract form was in partial reliance on the prior version of the Rule.

20. Since the work has already been completed, and the General Contractor has agreed that there were no cost savings billed or paid and 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 violate principals of fairness and 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.

21. Moreover, Petitioner will endure substantial hardship if this waiver request is denied as it would not be able to obtain the Credits and will therefore lose a substantial portion of its financing, thereby suffering a demonstrated economic hardship. Without the requested waiver, Petitioner's Application will fail. If the Petitioner's Application fails, the Petitioner's investor limited partner will not receive the tax credits for which it bargained, entitling the Petitioner's investor limited partner to exercise various remedies, including, without limitation, (i) the right to withhold the remaining capital contributions (approximately \$6,910,191.00) upon

which the Petitioner depends to complete the rehabilitation, (ii) the right to assert claims against the general partners, the developer, the Petitioner, and any tax credit guarantors, and (iii) the right to exit the transaction.

**G. A WAIVER OF THE RULE WILL SERVE THE PURPOSES OF THE UNDERLYING STATUTE**

22. 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.

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

23. The waiver requested by the Petitioner is permanent.

**I. ACTION REQUESTED**

24. 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 form; (2) grant the Petition and all relief requested herein; and (3) grant such further relief as it may deem appropriate.

Respectfully submitted this 24th day of August, 2018.

Respectfully Submitted,



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Sarah Pape, Esq.



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Attorneys for Petitioner

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Amended 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](mailto: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, and a copy being served by email to Chris McGuire, Assistant General Counsel, Florida Housing Finance Corporation, [Chris.mcguire@floriudahousing.org](mailto:Chris.mcguire@floriudahousing.org), this 24th day of August, 2018.



By: \_\_\_\_\_  
Sarah Pape  
Florida Bar No. 0026398

AMENDED AFFIDAVIT OF YASH PAL KAKKAR

STATE OF FLORIDA  
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. I am the President of Naimisha Construction, Inc. (the "General Contractor").

2. 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").

3. 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.

4. There will be no cost savings billed or paid under the Construction Contract. The only costs that will be billed and paid are actual costs incurred, plus a fee which is limited amount is limited under Rule 67-21.026(12)(b), F.A.C.

5. The General Contractor agrees to sign an amendment to the Construction Contract so that the result of the Construction Contract will be the same result had the form of the Construction Contract been a guaranteed maximum price contract instead of a stipulated sum contract.

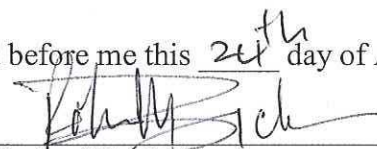
FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
Yash Pal Kakkar

STATE OF FLORIDA  
COUNTY OF DADE

Sworn to (or affirmed) and subscribed before me this 24<sup>th</sup> day of August, 2018, by Yash Pal Kakkar.



  
\_\_\_\_\_  
(Signature of Notary-Public)

Rohan M Bickram  
\_\_\_\_\_  
(Print, Type, or Stamp Name of Notary)

Personally known \_\_\_\_\_  
Or Produced Identification \_\_\_\_\_  
Type of Identification Produced FL Driver's lic.

