

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATIONCASE NO. 2018-068VW

VERBENA, LLC

Petitioner,

v.

FLORIDA HOUSING FINANCE
CORPORATION

Respondent.

**AMENDED PETITION FOR WAIVER OF THE QUALIFIED ALLOCATION
PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS
AND RULE 67-48.002(96)**

Petitioner Verbena, LLC, a Florida limited liability company ("Verbena") submits its Amended Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2017 Housing Credit Allocation prior to the last quarter of 2019. The return of these Housing Credits is required before the Corporation may reserve an allocation of Housing Credits that Verbena requests be immediately allocated. *See* Rule 67-48.002(96), Florida Administrative Code (the "Rules"), and Qualified Allocation Plan Section II.K.

1. Pursuant to Section 120.542, Fla. Stat. (2017) and Rules 28-104.001 through 28-104.006, F.A.C., Verbena requests a waiver of Rule 67-48.002(96), Florida Administrative Code, and of Section II.K of the Qualified Allocation Plan ("QAP") to allow the immediate return of its 2017 Housing Credit Allocation, and an immediate allocation of new Housing Credits (2018 or later).

2. The name, address, telephone and facsimile numbers for Verbena and its qualified representative are:

Verbena, LLC
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Attn: David O. Deutch
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(305) 859-9858 (telecopier)
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3. The name, address, telephone and facsimile numbers of Verbena's attorneys are:

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4. Pursuant to RFA 2016-114, Verbena timely submitted (on or about December 15, 2016) its application for competitive Housing Credits under the Low Income Housing Tax Credit program ("LIHTC Program" or "HC Program"). *See* Application Number 2017-161C.

5. Equity raised from Housing Credits will be used for the construction of 110 residential units (all of which will be low-income housing tax credit units) to be known as Verbena (the "Development"). The Development will primarily serve low-income tenants in southern Miami-Dade County, Florida.

6. On February 3, 2017, Verbena's application was preliminarily selected for funding by FHFC. However, due to the matter described below, Verbena was not invited to credit underwriting until August 2, 2017.

7. Under Rule 67-48.028(1), if an applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, such applicant

must enter into a “carryover allocation agreement” with the Corporation by December 31 of the year in which the preliminary allocation is issued. On November 15, 2017, Verbena and the Corporation entered into the carryover allocation agreement for the Development. The carryover allocation may (under Section 42 of the Internal Revenue Code) allow the applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service; in the instant case the Corporation mandated in the carryover allocation agreement that the development be placed in service by November 30, 2019.

8. As explained more fully below, there is uncertainty as to whether or not the Development will be able to meet the above placed in service deadline, and as such is requesting an exchange of Housing Credits in order to effectuate an extension of the placed in service deadline.

9. Since being preliminarily selected for funding, the Development has suffered unforeseen events that make it clear that the Development will not be placed in service by December 31, 2019.

10. Verbena delayed the commencement of the design phase of the Development until it was invited to credit underwriting. Upon commencing the development process, the construction bid amounts for the Development (due to rising construction costs) were significantly in excess of budget, causing Verbena to have to “value engineer” the Development and revise its plans and specifications. Such a revision has caused further delay in the Miami-Dade permitting process. Such development process is now moving forward but not in a manner that allows the Development to make up for lost time, and there is no margin for error remaining in order to satisfy the November 30, 2019 placed in service deadline.

11. The Development’s equity investor (Citibank N.A.) recognizes that there are sufficient headwinds in the construction markets, particularly with regard to labor shortages, that

make adhering to completion deadlines very difficult. The equity investor is concerned that there is insufficient time to complete construction prior to the December 31, 2019 placed in service deadline, and has requested Verbena to seek an extension of the placed in service date. Such extension can only be achieved pursuant to a requested exchange of 2017 housing credit allocations for subsequent credits.

12. The equity investor is concerned about the uncertainty of the credit swap if delayed until the last quarter of 2019 and is unwilling to close on the equity financing for the Development without assurance the tax credits will be available to the Development if the Development is not placed in service prior to December 31, 2019. Given that it is now known that the Development may not meet the placed in service deadline, the equity investor is unwilling to close its investment in the Development if there is any chance that it may not receive credits. Without the waiver request and current approval of the credit swap, the tax credit investor will not participate in the transaction, resulting in the inability of the Petitioner to construct the Development.

13. As discussed above, the delays have been caused by circumstances outside Verbena's control.

14. As set forth more fully below, Verbena seeks to return its 2017 Housing Credit allocation now, rather than wait for the last calendar quarter of 2019 as required under the QAP, and obtain from the Corporation an immediate allocation of new Housing Credits with a later required placed in service date.

15. The requested waivers and variance will not adversely affect the Development. A denial of the Petition, however, would (a) result in substantial economic hardship to Verbena, (b) deprive southern Miami-Dade County of essential affordable rental units set aside for low-income and very low-income elderly tenants, and (c) violate principles of fairness.

16. Section 42(m) of the Internal Revenue Code requires each state allocating agency to adopt an allocation plan for the allocation and distribution of federal low income housing tax credits. The Corporation, as the allocating agency for the State of Florida, must distribute housing credits to applicants pursuant to its qualified allocation plan.

17. The Corporation's Qualified Allocation Plan (Section II.K) provides that Housing Credits may be returned **only** in the last calendar quarter of the year in which a development is required to be placed in service:

...where a Development has not been placed in service by the date required or it is apparent that a development will not be placed in service by the date required, and such failure is due to circumstances beyond the Applicant's control, and the Applicant **has returned its Housing Credit allocation in the last calendar quarter of the year** in which it was otherwise required to be placed in service, the Corporation may reserve allocation in an amount not to exceed the amount of credits returned, and may allocate such housing credits to the Applicant **for the year after the year** in which the Development was otherwise required to be placed in service..."

QAP at Section II.K (emphasis added).

18. The applicable Rules for which waivers are requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),¹ the statute that created the Housing Credits Program. *See* § 420.5099, Fla. Stat. (2018). The Act designates FHFC as the State of Florida's housing credit agency within the meaning of Section 42(h)(8)(A) of the Internal Revenue Code of 1986. As the designated agency, FHFC is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits ("Allocation Procedures"). §§ 420.5099(1) and (2), Fla. Stat. (2018). Accordingly, the Rules subject to Verbena's waiver requests are implementing, among other sections of the Act,

¹ The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.55 of the Florida Statutes (the "Act").

the statutory authorization for the Corporation's establishment of Allocation Procedures for the HC Program. §§ 420.5099(1) and (2), Fla. Stat. (2018).

19. The requested waivers will ensure the availability of Housing Credits which might otherwise be lost as a consequence of development delays described herein.

20. The facts set forth in Sections 9 through 13 of this Petition demonstrate the hardship and other circumstances which justify Verbena's request for Rule waiver. Verbena respectfully requests that no further fees be imposed in connection with the requested credit exchange, given (a) the significant amount of extension fees already paid for the extension of various dates under the carryover allocation agreement, and (b) that the reasons for the delays described herein were wholly outside of Petitioner's control.

21. As demonstrated above, the requested waivers serve the purposes of Section 420.5099 and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households by ensuring:

... the maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.

§ 420.5099(2), Fla. Stat. (2018).

22. Further, by granting the requested waivers, FHFC would recognize principles of fundamental fairness in the development of affordable rental housing. This recognition would promote participation by experienced developer entities, such as Pinnacle Housing Group, LLC, in meeting the purposes of the Act, regardless of the possible delays from factors outside of its

control. In addition, grant of the requested waivers will permit the development of much needed housing for low-income and very low-income tenants. Finally, grant of the request to waiver will enable Verbena to utilize (and not lose) its significant investment in due diligence expenses that cannot be recouped if the requested waiver is not granted.

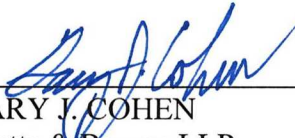
23. The requested waivers will not adversely impact the Development or the Corporation.

24. The waivers being sought are permanent in nature.

Should the Corporation require additional information, Verbena is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver.

WHEREFORE, Petitioner Verbena, LLC, respectfully requests that the Corporation:

- A. Grant the Petition and all the relief requested therein;
- B. Waive the Qualified Allocation Plan's prohibition from returning Housing Credit Allocations prior to the last quarter of 2019;
- C. Allow the immediate return of Verbena's 2017 Housing Credit Allocation;
- D. Immediately allocate new Housing Credits to Verbena with a later placed in service date, in an amount equal to the amount of its 2017 Housing Credit Allocation with no further fees imposed; and
- E. Award such further relief as may be deemed appropriate.



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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The Original Petition is being served by facsimile and overnight delivery for filing with the Corporation Clerk of the Florida Housing Finance Corporation, 227 North Bronough Street, City Centre Building, Room 5000, Tallahassee, Florida 32399, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 24th day of August, 2018.



GARY J. COHEN