

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

ABILITY MERCY, LLC, a Florida  
limited liability company,

Petitioner,

FHFC CASE NO. 2017-066VW  
Application No. 2016-327CS

v.

FLORIDA HOUSING FINANCE  
CORPORATION,

Respondent.

**PETITION FOR WAIVER OF RULE 67-48.002 (95)**

Petitioner Ability Mercy, LLC (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of the timing provisions of the 2016 Qualified Allocation Plan ("2016 QAP") as incorporated and adopted by Rule 67-48.002(95), Florida Administrative Code ("F.A.C.") (the "Rule") pertaining to a tax credit exchange. 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:

Ability Mercy, LLC, a Florida limited liability company  
c/o Ability Housing, Inc., a Florida non-profit corporation  
Attn: Shannon Nazworth  
3740 Beach Boulevard  
Suite 304  
Jacksonville, FL 32207  
Telephone: (904) 359-9650 ext. 106  
Fax: (904) 359-9653  
Email: [snazworth@abilityhousing.org](mailto:snazworth@abilityhousing.org)

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.  
150 West Flagler Street  
Suite 2200  
Miami, Florida 33130  
Telephone: 305-789-3350  
Fax: 305-789-3395  
Email: [Bmcdonough@stearnsweaver.com](mailto:Bmcdonough@stearnsweaver.com)

3. On March 10, 2016, Petitioner timely submitted its Application in response to RFA 2016-102 for Housing Credit and SAIL Financing for Homeless Housing Developments located in Medium and Large Counties (the "RFA") to assist in the construction of a 166 unit development located in Orange County, Florida (the "Development"). Petitioner requested housing tax credits in the annual amount of \$2,110,000. The Development received an allocation of 2016 Low-Income Housing Tax Credits ("Tax Credits") and was invited to credit underwriting on July 1, 2016. On December 20, 2016, Petitioner entered into a Carryover Agreement for the allocation of its Tax Credits. Pursuant to 26 U.S.C. 42(h)(1)(E)(i), the Development must be placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made; in this case, the federally-mandated placed-in-service date would be December 31, 2018.

**B. WAIVER IS PERMANENT**

4. The waiver being sought is permanent in nature.

**C. THE RULE FROM WHICH WAIVER IS REQUESTED**

5. Petitioner requests a waiver of Rule 67-48.002(95), F.A.C. and Subsection II.K. of the 2016 QAP, which provides as follows:

**K. Notwithstanding any other provision of this QAP, 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 Housing 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, provided the following conditions have been met: (i) the sponsor must have provided written notice to the Corporation, describing the circumstances, all remedial measures attempted by the Applicant to mitigate the delay, and any other pertinent information, prior to returning the allocation; and (ii) the Executive Director must find and determine that the delay was caused by circumstances beyond the Applicant's control, that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay, that the Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally allocated, and that the Development is still desirable in terms of meeting affordable housing needs.

(emphasis added).

6. The process found in the 2016 QAP requires an applicant to return its allocation of housing tax credits in the last calendar quarter of the year in which it was otherwise required to be placed in service before a tax credit exchange request can be approved by the Executive Director of Florida Housing. Petitioner is requesting a waiver of this limitation on the timing of the tax credit exchange, to allow a credit exchange to be approved by the Executive Director, or the Board of Directors of Florida Housing, at this time rather than in the last calendar quarter of 2018.

**D. STATUTES IMPLEMENTED BY THE RULE AND THE 2016 QAP**

7. The 2016 QAP and the Rule implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes. *See* § 420.5099, Fla. Stat. (2017) (the "Statute").

**E. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE AND SUBSECTION II.K OF THE 2016 QAP**

8. As mentioned above, Petitioner requests a waiver of the timing requirements found in the 2016 QAP to permit Florida Housing to approve the tax credit exchange prior to the last quarter of 2018.

9. Over the last year, the Development has suffered unforeseen events that make it clear that the Development will not be placed in service by December 31, 2018. The Development was proceeding towards a closing when, unexpectedly, the equity markets suffered a significant pull-back. The result of this drop in equity pricing was felt not only by the Petitioner and this Development, but by many projects scheduled to close in the near future. The Petitioner's tax credit investor has advised the Petitioner that it will not be able to close on the terms that had previously been feasible. Because of these changes (as well as a rising interest rate market) the Petitioner's transaction will need to be re-underwritten and, in part, restructured in order to move forward.

10. The tax credit investor is concerned about the uncertainty of the credit swap if delayed until the last quarter of 2018 and is unwilling to close on the Development without assurance that tax credits will be available to the Development even though the Development will not be placed in service prior to December 31, 2018. Given that it is now known that the Development will not meet the placed in service deadline, the tax credit investor is unwilling to invest millions of dollars 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 for the Petitioner to construct the Development.

11. The Developer has actively worked to obtain additional loan sources to close the substantial funding gap created by the circumstances described in this Petition and has now secured or been awarded the sources needed.

12. As discussed above, the delays have been caused by circumstances outside the control of the Petitioner. The issues which ensued due to the tax credit industry's reaction to the proposed reduction in marginal corporate tax rates were not only unforeseen and unanticipated by the Petitioner, they were unforeseen and unanticipated by the entire tax credit industry. Accordingly, the delay in closing which has arisen due to the investor's need to reevaluate the structure of the transaction, coupled with the typical building period of approximately 18 months, make it unfeasible to meet the December 31, 2018 placed in service deadline.

13. 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 rule demonstrates that the application of the rule would: (1) create a substantial hardship or, violate principles of fairness,<sup>1</sup> 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).

14. In this instance, Petitioner meets the standards for a waiver of the Rule and timing limitations in the 2016 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 166 affordable housing units will be preserved and made available for the target population in Orange County, Florida. The strict application of the 2016

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<sup>1</sup> 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)

QAP and the timing limitation on the credit swap will create substantial hardship for Petitioner because it will not be able to construct the Development if the tax credit investor does not participate. Further, the waiver will 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 housing in the State.

15. 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 sanitary housing in the State for low-income households. Moreover, the Statute was enacted, in part, to encourage private and public investment in facilities for persons of low-income. By granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in 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).

**F. ACTION REQUESTED**

16. For the reasons set forth herein, Petitioner respectfully requests Florida Housing (i) grant the requested waiver of the timing requirements found in the 2016 QAP and allow the requested credit exchange to be approved before the last calendar quarter of 2018; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER  
ALHADEFF & SITTERSON, P.A.  
150 West Flagler Street, 22<sup>nd</sup> Floor  
Miami, Florida 33131  
Tel: (305) 789-3350  
Fax: (305) 789-3395  
E-mail: [bmcdonough@stearnsweaver.com](mailto:bmcdonough@stearnsweaver.com)

*Counsel for Ability Mercy, LLC*

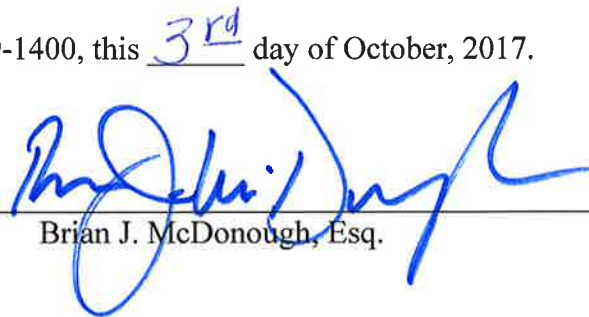
By: \_\_\_\_\_

  
BRIAN J. MCDONOUGH, ESQ.

**CERTIFICATE OF SERVICE**

The Petition For Rule Waiver is being served by overnight 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 overnight delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 3<sup>rd</sup> day of October, 2017.

By: \_\_\_\_\_



Brian J. McDonough, Esq.