

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2017-082VW

WEST LAKE I, LTD.

Petitioner,

vs.

FHFC APPLICATION: 2016-184BS
REQUEST FOR APPLICATIONS: 2015-112

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

PETITION FOR WAIVER OF RULE 67-21.008(1)(a), F.A.C.

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner West Lake I, Ltd., a Florida limited partnership, submits its Petition to Respondent Florida Housing Finance Corporation (“Florida Housing”) for a temporary waiver or variance of Florida Housing’s requirement that “Each Mortgage Loan for a Development made by the Corporation shall: (a) Be evidenced by a properly executed Note or other evidence of indebtedness and be secured by a recorded Mortgage” *See* Rule 67-21.008(1)(a), Florida Administrative Code (the “Rule”). Petitioner will suffer a hardship if the waiver is denied as the U.S. Department of Housing and Urban Development (“HUD”) currently has a declaration of trust that will remain on the property subsequent to the closing of the Multi-Family Mortgage Revenue Bond (“MMRB”) loan thereby preventing Petitioner from recording the mortgage until after the closing.

In support thereof, Petitioner states:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for Petitioner and its qualified representative are:

Matthew Rieger
West Lake I, LTD
3225 Aviation Ave.
Suite 602
Coconut Grove, FL 33133
Tel: 305-537-4704
Fax: N/A
E-mail: MattR@htgf.com

2. The name, address, telephone and facsimile numbers, and email address for Petitioner’s attorney are:

Brian J. McDonough
Stearns Weaver Miller Weissler Alhadeff & Sitterson
150 West Flagler Street
Suite 2200
Miami, FL 33130
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B. THE DEVELOPMENT AND ITS FINANCING

3. Petitioner timely submitted its Application in response to the Request for Applications (“RFA”) for the development named “West Lake Apartments,” which later received an approval to change the development name to “Twin Lakes Estates – Phase I” (the “Development”). See Application No. 2016-184BS. The Development received credit underwriting approval by Florida Housing’s Board, and such included a Freddie Mac financing plan under its TEL Program. Essentially, a “Project Loan” to provide funds to Petitioner to build its multifamily affordable Development will be funded from a loan (the “Funding Loan”) incurred by Florida Housing pursuant to a Funding Loan Agreement among U.S. Bank National Association, as the construction lender (the “Construction Lender”), Florida Housing, and a

fiscal agent. The Funding Loan being made by the Construction Lender to Florida Housing is funded by the Construction Lender's "purchase" of a tax-exempt Multifamily Mortgage Revenue Note being issued by Florida Housing. Florida Housing, in turn, will loan the proceeds of the Funding Loan to the Borrower as the Project Loan which loan will be evidenced by a Project Note given by the Borrower to Florida Housing. Upon construction completion, the Funding Loan will be sold/assigned to Walker & Dunlop, LLC ("W&D"). Pursuant to a written commitment of the Federal Home Loan Mortgage Corporation ("Freddie Mac"), and accepted by W&D at the time of the making of the loans, W&D will immediately thereafter sell/assign the Funding Loan to Freddie Mac.

4. The closing on the tax-exempt financing described immediately above will occur prior to receiving the requisite HUD approvals necessary for certain matters pertaining to the overall financing of the Development. Among other things, because HUD currently has a declaration of trust on the Development property (which will not be released until some time after the MMRB closing) Petitioner cannot record a mortgage at the closing of the tax exempt bond financing as would otherwise be required by the Rule and as otherwise would have occurred but for the need to release the HUD declaration of trust. Thus, Petitioner is in need of a Rule waiver.

5. The requested Rule waiver will not adversely affect the Development or Florida Housing because the Construction Lender will be depositing the entire proceeds of the tax exempt financing into an account to be held by The Bank of New York Mellon Trust Company, N.A. (the "Fiscal Agent") as collateral for the Funding Loan. The proceeds of the Funding Loan will not be released from the collateral account held by the Fiscal Agent until various conditions are satisfied, including the placement of a mortgage lien on the Development. However, a denial

of this Petition: (a) will result in a substantial economic hardship to Petitioner, (b) could deprive Polk County of desperately needed affordable housing units, and (c) would violate principles of fairness.¹ *See* Section 120.542(2), Fla. Stat.

6. The requested waiver is temporary in nature.

C. RULE FROM WHICH WAIVER IS SOUGHT

7. Petitioner requests a waiver from Rule 67-21.008(1)(a), F.A.C., which requires each mortgage loan for a development made by Florida Housing to be evidenced by a properly executed note or other evidence of indebtedness and be secured by a recorded mortgage.

D. STATUTES IMPLEMENTED BY THE RULE

8. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, Sections 420.502, 420.507, and 420.508, Florida Statutes. Section 420.507, Florida Statutes, authorizes Florida Housing to, among other things, issue bonds/make tax exempt mortgage loans for the provision of affordable housing; impose conditions respecting the granting of mortgage loans and make rules to carry out the purposes of and exercise any power granted by the Florida Housing Finance Corporation Act, Part V, of Chapter 420, Florida Statutes. Section 420.508, Florida Statutes, authorizes Florida Housing to, among other things, make and participate in the making of mortgage loans for permanent or construction financing of development costs of projects subject to specified conditions, and to establish terms of mortgage loans funded pursuant to Part V of Chapter 420, Florida Statutes.

E. JUSTIFICATION FOR REQUESTED WAIVER

9. On November 16, 2017, the U.S. House of Representatives passed bill 227-205 (the "Bill"), which would terminate the tax-free status of certain bonds, including Private

¹ "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. *See* Section 120.542(2), Florida Statutes.

Activity Bonds, beginning January 1, 2018. As a result of this Bill, Petitioner must close on the tax exempt financing described herein prior to December 31, 2017 or it will lose the benefits of such tax exempt financing including the tax credit equity that will be generated through the anticipated allocation of housing credits that the Development will receive due to its use of tax exempt financing to construct the Development.

10. In order to close within this timeframe, Petitioner needs a temporary waiver from the Rule requiring the mortgage to be recorded prior to closing on the tax exempt financing. Petitioner cannot record a mortgage against the Development until HUD releases the declaration of trust and such release cannot occur until after the closing of the tax-exempt financing. It is anticipated that Petitioner will be able to record the mortgage, and come into full compliance with the Rule early in 2018.

11. 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 these rules would lead to unreasonable, unfair, and unintended consequences in particular instances. Waivers shall be granted when: (1) the person who is subject to the rule demonstrates that the application of the rule 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.

12. For the reasons stated above, application of the Rule would have a material adverse effect on the Development's viability. Strict application of the Rule would create a substantial hardship for Petitioner in that the closing could not occur.

13. If this requested waiver is not granted, Petitioner will suffer a substantial and unnecessary economic and operational hardship. Absent the waiver, Petitioner will not be able

to close on the tax-exempt financing in 2017 and – if the Bill passes – will not ever be able to close. Further, the Development’s schedule for closing and construction could not accommodate the resulting delay and inevitable associated costs of requiring the recording of a mortgage, jeopardizing the feasibility of the Development. Denial of the requested waiver would thus deny Polk County of this much-needed affordable housing.

14. A waiver of the Rule’s requirements would serve the purposes of Section 420.509, F.S., and the Act as a whole, because one of the Act’s primary purposes is to facilitate the availability of decent, safe, and sanitary housing in the State of Florida to households of limited means.

15. Should Florida Housing require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

F. ACTION REQUESTED

16. Petitioner requests the following:

- a. That Florida Housing grant Petitioner a temporary waiver from Rule 67-2.008(1)(a), Florida Administrative Code, allowing the tax exempt mortgage financing to close without a recorded mortgage; Petitioner will comply with the Rule, and record the mortgage, once HUD provides the requisite approvals, HUD releases the declaration of trust, and the tax syndication and construction loan closing is complete.
- b. That Florida Housing grant the Petition and all the relief requested therein; and
- c. That Florida Housing grant such further relief as may be deemed appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
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/s Brian J. McDonough
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The original Petition is being served by hand delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation, CorporationClerk@floridahousing.org, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by hand delivery to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 20th day of November, 2017.

/s Brian J. McDonough
Brian J. McDonough, Esq.