

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2018-081VW

ST. ELIZABETH GARDENS APARTMENTS, LTD.,

Petitioner,

vs.

FHFC Application No. 2017-181C
REQUEST FOR APPLICATIONS: 2016-116

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**AMENDED PETITION FOR WAIVER OF RULES 67-48.004(3)(i) and (j)
FOR CHANGE IN NUMBER OF UNITS AND IN TOTAL SET-ASIDE PERCENTAGE**

Pursuant to section 120.542, Florida Statutes, and rule 28-104.002, Florida Administrative Code, Petitioner St. Elizabeth Gardens Apartments, Ltd. (“St. Elizabeth” or “Petitioner”) submits this Amended Petition to Respondent Florida Housing Finance Corporation (“Florida Housing”) for a waiver of Rules 67-48.004(3)(i) and (j), relating to total number of units and the Total Set-Aside Percentage. Petitioner proposes to add two additional market-rate units to the St. Elizabeth Development, which would increase the total number of units to 155 and change the Total Set-Aside Percentage from 98.7% to 97.4%.¹ In support of this Petition, St. Elizabeth states:

¹ St. Elizabeth proposed in its Application to preserve 151 units in a Development to serve the elderly demographic in Broward County, Florida, with a Total Set-Aside Percentage of 100% for low-income units. In October of 2017, St. Elizabeth received approval from staff to increase the total number of units from 151 to 153, pursuant to Rule 67-48.004(3)(i). On October 27, 2017, the Florida Housing Board of Directors (“Board”) approved a request from St. Elizabeth to waive rule 67-48.004(3)(j) and reduce its Total Set-Aside Percentage from 100% to 98.7%. That waiver had the effect of allowing the development of two additional units and for those units to be rented at market rate. *See In Re: St. Elizabeth Gardens Apartments, Ltd. – FHFC Case No. 2017-069VW.*

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A. PETITIONER AND ATTORNEY

1. The name, address, telephone number, and email address for Petitioner is St. Elizabeth Gardens Apartments, Ltd., 3 Miami Central, 161 NW 6th Street, Suite 1020, Miami, FL 33136; 305-357-4725; lwong@apcommunities.com. For purposes of this proceeding, the contact information for Petitioner shall be that of the undersigned counsel.

2. The name, address, telephone number, and email address for Petitioner's attorney is: Donna E. Blanton, Radey Law Firm, 301 South Bronough Street, Suite 200, Tallahassee, Florida 32301; 850-425-6654; dblanton@radeylaw.com.

B. BACKGROUND²

3. St. Elizabeth submitted an application (No. 2017-181C) for Housing Credits (also known as tax credits) in response to Request for Applications ("RFA") 2016-116, Housing Credit Financing for the Preservation of Existing Affordable Multifamily Developments. St. Elizabeth proposed to use equity raised from the Housing Credits to preserve 151 units in an existing mid-rise development in Pompano Beach (Broward County) to serve the elderly demographic. St. Elizabeth received a preliminary allocation of Housing Credits for the Development.

² The following background information regarding St. Elizabeth is provided to facilitate staff's preparation of a memorandum to the Florida Housing Board of Directors ("Board"):

- Development Name: St. Elizabeth Gardens
- Developer, including at least one natural person Principal: St. Elizabeth Gardens Development, LLC; Howard D. Cohen
- County of Development: Broward
- Number of Units: 151
- Type: Mid-rise, four stories
- Set Asides: 20% at 30% AMI; 80% @ 60% AMI
- Demographics: Elderly
- Funding Amounts: 9% HC: \$1,124,111

4. If the requested waiver is granted, St. Elizabeth will maintain the total number of committed “low-income units” at 151, as was originally proposed in its Application. St. Elizabeth proposes to create one new studio apartment unit in one building and convert one two-bedroom, one-bathroom unit into two one-bedroom, one-bathroom units. The net result would be two additional market-rate units. In total, if this waiver is granted, the St. Elizabeth Development would encompass 151 low-income units and four market-rate units. As previously noted in footnote 1, the Florida Housing Board granted a waiver to St. Elizabeth in 2017, permitting two market-rate units to be added at that time.

5. The primary purpose of requesting the two additional units now is to allow tenants of the current housing project to continue living at the St. Elizabeth Development. These elderly residents currently receive housing assistance through a federal Housing and Urban Development program, but their income exceeds 60% of the Area Median Income (“AMI”), which means they would not be eligible for low-income units at St. Elizabeth. Petitioner has considered application of the new Average Income Test, authorized by Congress in the 2018 Consolidated Appropriations Act, as a means of addressing this situation. However, because the income of certain existing elderly residents exceeds 80 percent of AMI, they do not qualify under the Average Income Test, and market-rate units are required in order to continue to accommodate those residents at St. Elizabeth Gardens.

6. Petitioner recognizes that rule 67-48.004(3)(i) provides that Florida Housing may approve an increase in the number of units in its underwriting process, but, since (a) in this case, the additional units are not “like-kind” (i.e., set-aside at the same income limitations as the units described in the Application), and (b) adding such units is the direct cause of the decrease in the

Total Set-Aside Percentage, Petitioner is requesting that the change in unit count be approved as part of Florida Housing's approval of the decrease in the Total Set-Aside Percentage.

7. The requested waiver is permanent in nature.

C. RULE FROM WHICH WAIVER IS SOUGHT

8. St. Elizabeth seeks a waiver of rules 67-48.004(3)(i) and (j), which provide in relevant part:

(3) For the SAIL, HOME and Housing Credit Programs, notwithstanding any other provision of these rules, the following items as identified by the Applicant in the Application must be maintained and cannot be changed by the Applicant after the applicable submission, unless provided otherwise below:

...

(i) Total number of units; notwithstanding the foregoing, the total number of units may be increased after the Applicant has been invited to enter credit underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation. With regard to said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant's request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development, as well as review of 24 CFR Part 92 to ensure continued compliance for the HOME Program;

(j) For the SAIL and HC Programs, the Total Set-Aside Percentage as stated in the last row of the total set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application. For the HOME Program, the total number of HOME-Assisted Units committed to in the Set-Aside Commitment section of the Application. Notwithstanding the foregoing, the Total Set-Aside Percentage, or total number of HOME-Assisted Units, as applicable, may be increased after the Applicant has been invited to enter credit underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation. With regard to said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant's request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development, as well as review of 24 CFR Part 92 to ensure continued compliance for the HOME Program.;

D. STATUTES IMPLEMENTED BY THE RULE

9. Pursuant to section 420.5099(1), Florida Statutes, Florida Housing is designated as

the “housing credit agency” for Florida within the meaning of section 42 of the Internal Revenue Code. Florida Housing is responsible for the allocation and distribution of Housing Credits and is required by federal law to adopt an allocation plan that includes priorities and selection criteria. Section 420.5099(2) also requires Florida Housing to “adopt allocation procedures that will ensure 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.”

10. St. Elizabeth was preliminarily selected for an allocation of Housing Credits through the selection procedures developed by Florida Housing. The rules subject to this waiver request implement section 420.5099, Florida Statutes, as well as other provisions of Part V of chapter 420, Florida Statutes, the Florida Housing Finance Corporation Act.

E. JUSTIFICATION FOR REQUESTED WAIVER

11. Section 120.542(1), Florida Statutes, provides that “[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.” That procedure requires those seeking a variance of, or waiver from, a particular rule to demonstrate that application of the rule would create a substantial hardship or would violate principles of fairness. § 120.542(2), Fla. Stat. Petitions for variances and waivers also are required to demonstrate the purposes of the underlying statute will be achieved. *Id.*

12. St. Elizabeth here is seeking a waiver of rules 67-48.004(3)(i) and (j), relating to total number of units and the Total Set-Aside Percentage. St Elizabeth proposes to add two additional market-rate units to the St. Elizabeth Development, which would increase the total number of units to 155 and decrease the Total Set-Aside Percentage from 98.7% to 97.4%. The number of low-income housing units would remain at 151, as St. Elizabeth originally proposed in its Application.

13. It is not uncommon for development changes to occur after submission of an Application to Florida Housing. In the case of St. Elizabeth, the need for two additional market rate units became apparent as residents were income-tested to determine if they would qualify to continue living at the Development. In some cases, the answer was no. Creation of two additional market-rate units will allow St. Elizabeth to provide a mixed-income Development with both affordable housing and market-rate housing. Approval of this waiver request would allow current elderly residents of St. Elizabeth to remain living in the development.

14. A denial of the requested waiver would result in a substantial hardship for St. Elizabeth. The Development is owned in part and operated by Catholic Health Services, a ministry of the Archdiocese of Miami, whose mission is to provide affordable elderly housing to Broward and Miami-Dade County. A denial would result in two elderly households currently living at St. Elizabeth Gardens to be involuntarily displaced, which runs contrary to Catholic Health Services' mission. By increasing the unit count and keeping these elderly households as tenants, the Development would receive added financial stability, thereby improving the quality of renovation of the Development through additional economies of scale, i.e., the Development's feasibility would be enhanced by spreading fixed costs, such as recreational amenities, over two additional

units. The additional rental revenue from the two units will correspondingly increase the Development's debt service coverage ratio, mitigating any operational risks of the Development and further ensuring long-term viability.

15. The addition of two market-rate housing units to the total unit count will necessarily result in a corresponding decrease in the Total Set-Aside Percentage provided for in the Application, but the waiver requested will not result in any decrease in number of committed "low-income units."

16. A waiver of the rules' restriction against increasing the total number of units and changing the Total Set-Aside Percentage from St. Elizabeth's Application would serve the purposes of Section 420.5099, Florida Statutes, 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, and would provide the additional benefit of meeting the critical need for mixed-income developments with market-rate housing units.

17. By granting the waiver and permitting St Elizabeth to decrease the total Set-Aside Percentage, Florida Housing would recognize the economic realities and principles of fundamental fairness in developing affordable rental housing by encouraging the development of mixed-income housing projects, particularly in urban areas well-suited to a mixed-income housing project, and enabling developers to meet the needs of both low-income families and families in need of moderately priced market-rate housing. This recognition would promote participation by owners such as St. Elizabeth in meeting the Act's purpose of providing affordable housing in an economical and efficient manner.

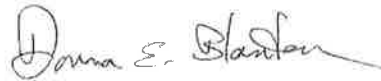
18. The requested waiver will not adversely affect any party, including any other party

that applied to receive an allocation of Housing Credits in RFA 2016-116 or Florida Housing. A denial of the requested waiver, however, would result in substantial economic hardship to St. Elizabeth.

F. ACTION REQUESTED

19. For the reasons expressed, St. Elizabeth respectfully requests that the Florida Housing Board of Directors grant the requested waiver of rules 67-48.004(3)(i) and (j), relating to total number of units and the Total Set-Aside Percentage. The result of the waiver request would allow Petitioner to add two additional market-rate units to the St. Elizabeth Development, which would increase the total number of units to 155 and reduce the Total Set-Aside Percentage from 98.7% to 97.4%.

Respectfully submitted,

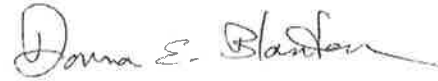


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Counsel for Petitioner

CERTIFICATE OF SERVICE

This original Amended 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 at corporationclerk@floridahousing.org, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, and with a copy served by hand delivery to the Joint Administrative

Procedures Committee, 680 Pepper Building, 111 West Madison Street, Tallahassee, Florida
32399-1400, this 27th day of December, 2018.

A handwritten signature in cursive script that reads "Donna E. Blanton". The signature is written in dark ink and is positioned above a horizontal line.

/s/Donna E. Blanton