Florida Housing Finance Corporation
FILED 11/25/2020 8:02 A.M.

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2020-069VW
APPLICATION NO. 2015-002CSG

PROMISE IN BREVARD, LLC

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

AMENDED PETITION FOR WAIVER OF RULES 67-48.023(5), 67-48.023(7), RFA 2014-113 Exhibit F, Part 4(3)(d) Incorporating the Final Cost Certification Package Requirement.

Promise in Brevard, LLC, a Florida limited liability company (the "**Petitioner**") by and through its undersigned counsel submits its Petition to Respondent, Florida Housing Finance Corporation (the "**Corporation**"), for waiver of or variance of Rules 67-48.023(5) F.A.C. (2014); 67-48.023(7) F.A.C (2014); RFA 2014-113 Exhibit F, Part 4(3)(d) which incorporates by reference the Final Cost Certification Application Package ("**Form FCCAP**") requirement, to allow Petitioner to submit the Form FCCAP with a General Contractor Cost Certification (the "**GCCC**") that is not executed by the general contractor, without an unqualified audit report and without confirming certain items with general contractor's three largest dollar sub-contractors.

This Petition is filed pursuant to Section 120.542 of the Florida Statutes (2020) and Chapter 28-104 of the Florida Administrative Code (2020). In support of this Amended Petition for Waiver of Rule 67-48.023(5) F.A.C. (2014); 67-48.023(7) F.A.C (2014); RFA 2014-113 Exhibit

F, Part 4(3)(d); and the Form FCCAP requirement incorporated by RFA 2014-113 Exhibit F, Part 4(3)(d) (the "**Petition**"), Petitioner states as follows:

A. PETITIONER AND DEVELOPMENT

1. The address and telephone number of the Petitioner are:

Promise in Brevard, LLC
3040 W. New Haven Ave
West Melbourne, Florida 32904
Attn: Nan Evans
Telephone: (321) 536-7062

2. For purposes of this Petition, the address, telephone number, facsimile number and e-mail address of Petitioner's counsel is:

Hollie A. Croft, Esq.
Nelson Mullins Broad and Cassel
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4239
Facsimile: (407) 650-0979
Email: hollie.croft@nelsonmullins.com

3. On November 14, 2014, Petitioner submitted an application to the Corporation for housing tax credits in the amount of $1,300,000 and $4,000,000 in grant funding in response to RFA 2014-113 to finance a portion of the construction of a 52-unit project consisting of three 3-story buildings and one 1-story building in West Melbourne, FL (the "**Development**").

4. In order to obtain the Final Housing Credit Allocation for the Development, Rule 67-48.023(7) requires Petitioner to submit Form FCCAP, which itemizes all expenses incurred in connection with the construction of the Development. Form FCCAP is required of all Housing Credit ("**HC**") developments. The Form FCCAP, which is incorporated by RFA 2014-113 Exhibit F, Part 4(3)(d), requires that a GCCC be included in the submission package to the

Corporation, together with an opinion letter and unqualified audit report for the GCCC (collectively, the "**Audit**") from the Petitioner's certified public accountant ("**CPA**").

5. The GCCC instructions set forth specific requirements and audit procedures to be followed by the CPA when performing an audit of the GCCC. Such audit procedures include, but are not limited to, the following:

a. CPA must report its findings of its audit in the GCCC; and

b. CPA's unqualified audit report must state that the GCCC was completed in accordance with the proper regulatory procedures and professional standards; and

c. CPA must send confirmation requests to the three largest dollar sub-contractors and randomly select other sub-contractors sufficient in number (but in no event less than five), when taken together with the three largest dollar subcontractors, to account for at least 40% of the total contract construction cost, and verify the amounts paid to each subcontractor.

6. At this time, the construction of the Development has been completed, all final certificates of occupancy have been received, and the Development has been placed in service. However, Petitioner is in litigation with the general contractor regarding disputes over amounts owed under the construction contract. A summary of such litigation is attached as Exhibit A. As a result, the general contractor is unwilling to execute the GCCC needed for the CPA to issue the opinion letter and unqualified audit report for the GCCC. Pursuant to the provisions of Petitioner's Amended and Restated Operating Agreement, receipt of the Stabilized Capital Contribution (as defined therein) is dependent, in part, upon the receipt of Form 8609 from Corporation (issued after receipt and review of Form FCCAP). Petitioner needs the additional

capital contribution to pay all costs and expenses incurred in connection with the construction of the Development.

B. WAIVER IS PERMANENT

7. The waiver being sought is permanent in nature.

C. THE RULES FROM WHICH WAIVER IS REQUESTED

8. Petitioner requests a waiver of Rule 67-48.023(5), which provides, in relevant part, as follows:

> (5). Each Housing Credit Development shall complete the final cost certification process as required in a competitive solicitation.

9. Petitioner requests a waiver of Rule 67-48.023(7), which provides, in relevant part, as follows:

> (7). Final cost certification documentation shall be submitted by an Applicant to itemize all expenses incurred in association with construction or Rehabilitation of a Housing Credit Development, including Developer's and General Contractor's fees as described in Rule 67-48.0072, F.A.C., along with the executed Extended Use Agreement, IRS Tax Information Authorization Form 8821 for all Financial Beneficiaries, a copy of the syndication agreement disclosing the rate and all terms, **the required certified public accountant opinion letter, an unqualified audit report prepared by an independent certified public accountant**, photographs of the completed Development, the monitoring fee, and documentation of the placed-in-service date as specified in the competitive solicitation. **The Final Housing Credit Allocation will not be issued until such time as all items required by a competitive solicitation are received and processed by the Corporation.**
>
> (Emphasis added).

10. Petitioner requests a waiver of RFA 2014-113 Exhibit F, Part 4(3)(d), which provides, in relevant part, as follows, and incorporates the Form FCCAP:

> (Part IV(3)(d)). Final Cost Certification Application Package (Form FCCAP), effective October 2014:

In accordance with Rule 67-48.023, F.A.C., the Final Cost Certification Application Package (Form FCCAP), shall be used by an Applicant to itemize all expenses incurred in association with construction or Rehabilitation of a Housing Credit Development, including Developer's and General Contractor's fees as described in Rule 67-48.0072, F.A.C., and shall be submitted to the Corporation by the earlier of the following two (2) dates: (1) The date that is 75 Calendar Days after all the buildings in the Development have been placed in service, or (2) The date that is 30 Calendar Days before the end of the calendar year for which the Final Housing Credit Allocation is requested. The Corporation may grant extensions for good cause upon written request. The FCCAP shall be completed, executed and submitted to the Corporation in both hard copy format and electronic files of the Microsoft Excel spreadsheets for the HC Development Final Cost Certification (DFCC) and the General Contractor Cost Certification (GCCC) included in the form package, along with the executed Extended Use Agreement and appropriate recording fees, IRS Tax Information Authorization Form 8821 for all Financial Beneficiaries, a copy of the syndication agreement disclosing the rate and all terms, **the required certified public accountant opinion letter for both the DFCC and GCCC, an unqualified audit report prepared by an independent certified public accountant for both the DFCC and GCCC**, photographs of the completed Development, the monitoring fee, and documentation of the placed-in-service date as specified in the Form FCCAP instructions. The Final Housing Credit Allocation will not be issued until such time as all required items are received and processed by the Corporation.

(Emphasis Added).

11. Petitioner requests a waiver of Form FCCAP's GCCC requirements incorporated by RFA 2014-113 Exhibit F, Part 4(3)(d), which provides, in relevant part as follows:

> **The Certified Public Accountant performing the audit of the General Contractor's cost certification must send the following confirmation requests to the three largest dollar sub-contractors**:
>
> 1. Confirm the construction contract amount;
> 2. Confirm any change orders;
> 3. Confirm what additional costs were incurred outside of the contract, if any;
> 4. Confirm the type of services provided (trade breakdown); and
> 5. Confirm amounts paid to date and balance(s), if any, to be paid.
>
> In addition, the Certified Public Accountant must randomly select other sub-contractors sufficient in number (but in no event less than five), when taken together with the three largest dollar sub-contractors, to account for

> at least 40% of the total contract construction cost, and verify the amounts paid to each sub-contractor by reviewing check copies, contract documents, change orders, and other supporting information to verify amounts included within the cost certification for each sub-contractor selected.
>
> (Emphasis added).

D. STATUTES IMPLEMENTED BY THE RULES

12. The Rules for which a waiver is requested is implementing, among other sections of the Florida Housing Finance Corporation Act (the "**Act**"), the statute that governs the allocation of federal low-income housing tax credits. *See* Section 420.5099, Florida Statutes (2020).

13. Pursuant to Chapter 120.542(1), Florida Statutes, "[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." Therefore, under Section 120.542(1), Florida Statutes and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its requirements when strict application of these requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

> "Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "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."

14. In this instance, Petitioner meets the standards for a waiver.

E. JUSTIFICATION FOR GRANTING THE WAIVER OF THE RULES

15. The general contractor has a recorded claim of lien against the Development, currently in the amount of $417,370.39, which Petitioner has currently bonded in the amount of $596,516.18 which thereby has insulated the Development from any further contractor action. In good faith, Petitioner funded more than the likely outcome of the litigation, in order to move forward with the Development and allow more affordable housing in the state.

16. Petitioner engaged the CPA for rendering the Audits. The CPA has completed nearly all work necessary for submission of the Form FCCAP and has advised that any missing information would not change the results of its report, however, due to the litigation described above, the CPA has been unable to obtain the signature of the general contractor to the GCCC forms. While accounting records could not be obtained directly from the general contractor and the CPA could not visit the general contractor's office, the CPA was able to complete the GC Cost Breakdown Schedule with accounting records provided by the Petitioner in conjunction with the pay applications of the sub-contractors, which included the work performed on a consolidated level for the Development and included back-up for the work performed by subcontractors, including lien waivers, invoices, cancelled checks and the like, as applicable.

17. The CPA has advised Petitioner that, despite the general contractor's lack of cooperation, nearly all accounting work required for submission of the Form FCCAP (including the GCCC) has been completed and that any differences noted as a result of its audit are immaterial. The CPA was able to, identify, verify and confirm the names and amounts paid to the first and third highest paid contractor as well as two other randomly selected subcontractors for the Development (and the CPA was able to further verify the names and amount of four

further randomly selected subcontractors for the Development). The CPA was also able to verify the amounts paid to the second highest paid subcontractor through their pay application (which included the work performed on a consolidated level for the Development and included back-up for the work performed by subcontractors, including lien waivers, invoices, cancelled checks and the like as applicable), despite being unable to confirm with the second highest paid subcontractor directly, given its status as an affiliate of the general contractor which has likewise been largely uncooperative due to the ongoing litigation. As the CPA was unable to confirm the amount paid to the second highest paid subcontractor and the two randomly confirmed subcontractors only account for $1,037,104 of the total amounts paid (versus the $1,645,724 that was verified in connection with the second highest paid subcontractor), the CPA, at the Corporation's request, has agreed to confirm the amounts paid to additional subcontractors in an amount equal to at least $608,620. Further, to the extent the CPA confirms the amount paid to any of the subcontractors that have already been verified but not confirmed, the CPA will replace those verifications with an additional random subcontractor.

18. The litigation described in Exhibit A will not affect costs included in the DFCC, as explained herein. The general contractor has made a claim; that it is owed approximately $417,370.39 for work it performed but has not been paid for (and with respect to which funds are being held in retainage). However, it should be noted that the Petitioner has claims that it is asserting in the litigation against the general contractor, as well as affirmative defenses to the claims of the general contractor which would offset these amounts.

None of the foregoing amounts will affect the credit allocation to the Development. Petitioner's CPA has submitted a draft DFCC to the Corporation and in connection therewith none of the amounts in dispute, per the litigation, have been included in the DFCC and, as such,

Petitioner (and its accountants) have taken the most conservative approach available with respect to the disputed costs. However, if Petitioner kept the cost certification process open until resolution of the litigation, and the outcome proved unfavorable, such expenses and additional amounts owed to general contractor should be included in the cost certification. However, Petitioner, in choosing the conservative approach, is electing to forgo such potential increase in total development cost and eligible basis of the Development for purposes of the Form FCCAP.

19. As a result of the litigation and the general contractor's lack of cooperation, the CPA has been unable to review the general contractor's original source documents or confirm the amounts paid to the second highest paid sub-contractor directly. Nonetheless, the CPA issued the GCCC-GC Cost Breakdown Schedule including a certified public accountant opinion letter and qualified audit report to be attached to Petitioner's Form FCCAP.

20. Petitioner is requesting that the Corporation waive the required execution of the GCCC by the general contractor. Petitioner will submit the GCCC, unexecuted by general contractor.

21. The facts set forth above demonstrate the hardship and other circumstances which justify Petitioner's request for a waiver of or variance from the Rules. The Petitioner's inability to obtain the general contractor's execution of the GCCC and other documentation necessary for the issuance of a CPA's opinion letter and unqualified audit report required for the GCCC; results in Petitioner's inability to obtain further equity installments from the tax credit investor which are dependent on the submission of the Form FCCAP and the issuance of Form 8609 by the Corporation.

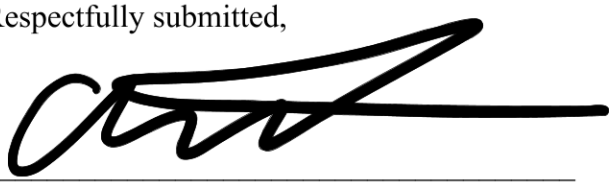
22. The requested waiver of or variance from the Rules serves the purpose of the Statutes that are implemented by the Rules. The Florida Housing Finance Corporation Act

(Section 420.501, *et seq*.) was passed in order to encourage private and public investment in facilities for persons of low-income. The purpose of the creation of the Housing Tax Credit Program is to stimulate creative private sector initiatives to increase the supply of affordable housing. By granting this waiver, the Corporation would recognize the principles of fundamental fairness in the development of affordable housing. Moreover, the Corporation would also further its goal of increasing the supply of affordable housing through private investment in persons of low-income.

F. ACTION REQUESTED

23. For the reasons set forth herein, Petitioner respectfully requests the Corporation (i) grant the requested waiver of Rules 67-48.023(5), F.A.C. (2014), 67-48.023(7) F.A.C (2014) and Exhibit F, Part 4(3)(d), of RFA 2014-113, incorporating the Form FCCAP requirement, which require the general contractor to execute the GCCC and a CPA to issue an opinion letter and unqualified audit report in connection with its submission of the GCCC and requires the CPA performing the audit of the GCCC to confirm certain cost-related items of general contractor's three largest dollar sub-contractors; (ii) grant the Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,



Andrew Bennett, Esq.
Fla. Bar No. 0125189
NELSON MULLINS BROAD AND CASSEL
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4205
Facsimile: (407) 425-8377
Email: drew.bennett@nelsonmullins.com

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org,

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

This 25th day of November, 2020.



Andrew Bennett, Esq.
Fla. Bar No. 0125189

Exhibit A

Don Facciobene, Inc., a Florida Corporation v. Promise in Brevard, LLC, a Florida Limited Liability Company and Hartford Fire Insurance Company, a foreign Corporation pending in the Eighteenth Judicial Circuit in and for Brevard County, Case No. 05-2018-CA-053728-XXXXX-XX.

Summary of Litigation

Don Facciobene, Inc. ("DFI") has claimed it was not paid for work it performed. Specifically, DFI filed a lien in the amount of $938,941.06 which per, Florida Statute 713.24(1)(b) was transferred to surety bond security in the amount of $1,341,840.67. Promise in Brevard, LLC ("Promise") has disputed the amount owed to DFI due to among other things, DFI's failure to, complete the project by the contract deadline, complete punchlist items, correct defective work, pay its subcontractors and suppliers.

The parties have been engaged in ongoing litigation. Throughout the course thereof the parties came to an agreement on certain amounts owed to certain subcontractors as full and final payment for such subcontractors' labor, services and materials furnished to DFI for the construction of the project. In connection therewith and through an Unopposed Motion to Reduce Security, DFI's claim was reduced to $417,370.39 and the amount to which Promise was required to bond was reduced to $596,516.18.

The litigation remains an ongoing matter. There is not yet a trial order in this matter and as such discovery deadlines have been set and the matter is not currently scheduled for trial.