STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In Re: Delmar Terrace South, LLC FHFC Case No.: 2023-099VW

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ORDER GRANTING WAIVER OF RULES 67-48.0072(17)(e) AND 67-48.0072(17)(f), FLA. ADMIN. CODE (2022), AND VARIENCE OF RULES 67-48.023(5) AND 67-48.023(7), FLA. ADMIN. CODE (2014)

THIS CAUSE came for consideration and final action before the Board of Directors of the Florida Housing Finance Corporation (the "Board") on February 2, 2024. On November 29, 2023, Florida Housing Finance Corporation ("Florida Housing") received a Petition for Rule Waiver and Variance to General Contractor Conditions and Final Cost Certification Process in Rules 67-48.0072(17)(e) and (f), and Rules 67-48.023(5) and (7) (the "Petition") from Delmar Terrace South, LLC (the "Petitioner") to waive the rule requirements for General Contractor duties, subcontractor payment, and to vary from the documentation requirements and timing of the Final Cost Certification Application Package. Notice of the Petition was published December 1, 2023, in Volume 49, Number 232, of the Florida Administrative Register. Florida Housing received no comments regarding the Petition. After careful review of the record and being otherwise fully advised on the premises, the Board hereby finds:

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
/DATE: 2/2/2024

1. The Board has jurisdiction over the subject matter of this case and the parties hereto.

2. Petitioner successfully applied for funding to assist in the construction of Delmar 745, a 65-unit development located in Pinellas County, Florida (the "Development").

3. Rules 67-48.0072(17)(e) and 67-48.0072(17)(f), Fla. Admin. Code (2014), state in relevant part:

> 17) The General Contractor must meet the following conditions:
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> (e) Ensure that none of the General Contractor duties to manage and control the construction of the Development are subcontracted;
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> (f) Ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, with the exception of a subcontractor contracted to deliver the building shell of a building at least five (5) stories which may not have more than 31 percent of the contract cost in a subcontract, unless otherwise approved by the Board for a Specific Development. With regard to said approval, the Board shall consider the facts and circumstances of each Applicant's request, inclusive on construction costs and the General Contractor's fees.

4. Rules 67-48.023(5) and 67-48.023(7), Fla. Admin. Code (2014), state in relevant part:

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

> (7) Final Cost Certification documentations 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. ...

5. On May 8, 2017, Petitioner executed a Guaranteed Maximum Price ("GMP") contract with Lynx Construction Management ("Lynx") for the construction of the Development. Over the course of the project, Lynx experienced significant performance issues that ultimately required Petitioner to terminate the GMP contract for cause on August 6, 2020. Petitioner filed a claim with Travelers' Casualty and Surety Company ("Travelers"), the performance bond surety, who, in turn, entered into a takeover agreement with Lynx to complete the construction of the Development. Travelers opted to hire Whiting Turner Construction ("Whiting Turner") to complete the remaining construction on the project. A Temporary Certificate of Occupancy was issued for the Development in December 2021, and the Development was placed in service on December 29, 2021.

6. Petitioner seeks several waivers and variances:

a. Petitioner seeks a waiver of Rule 67-48.0072(17)(e) in order to allow the Surety, who technically operated as the General Contractor standing in the shoes of Lynx, to subcontract the duties to

manage and control the construction of the development to Whiting-Turner, the completing contractor.

b. Petitioner seeks a waiver of Rule 67-48.0072(17)(f) to allow Whiting-Turner's performance of subcontracted work totaling 26.3% of construction costs, in excess of the 20% of the Construction Cost allowed by the rule.

c. Petitioner seeks a variance of the rule requirement to utilize the Final Cost Certification Package, which includes a General Contractor Cost Certification ("GCCC"). Since the original contractor was terminated, Petitioner is unable to provide a GCCC certified by a single general contractor. Further, Petitioner states that Lynx has not been cooperative in providing a certification that satisfies Florida Housing's requirements, and Whiting Turner is unable to certify the costs incurred prior to its hire.

7. Petitioner has agreed to complete the GCCC process utilizing Agreed Upon Procedures that will be developed with Florida Housing Staff to provide assurance of the reasonableness and accuracy of costs incurred and allow Florida Housing Staff to determine the acceptability of the content of the Agreed Upon Procedures report when the report is completed.

8. The Board finds that granting the requested waiver will not impact other participants in funding programs administered by Florida Housing, nor will it detrimentally impact Florida Housing.

9. The Board also finds that Petitioner has demonstrated that the waiver is needed because of circumstances beyond its control and that it would suffer a substantial hardship if the waiver is not granted.

10. The Board further finds that Petitioner has also demonstrated that the purpose of the underlying statute, which is to "encourage development of low-income housing in the state," would still be achieved if the waiver is granted. §420.5099, Fla. Stat.

IT IS THEREFORE ORDERED that Petitioner's request for waiver of Rules 67-48.0072(17)(e) and 67-48.0072(17)(f), Fla. Admin. Code (2014), and variance of Rules 67-48.023(5) and 67-48.023(7), Fla. Admin. Code (2014), is hereby **GRANTED** to

1) allow Petitioner's General Contractor (in this case the performance bond surety) to subcontract its duty to manage and control construction;

2) to allow Petitioner's General Contractor to subcontract greater than 20% of the Construction Cost to a single contractor;

3) allow Petitioner to complete the General Contractor Cost Certification process utilizing Agreed Upon Procedures that will be developed with Florida Housing Staff to provide assurance of the reasonableness and accuracy of costs and allow Florida Housing Staff to determine acceptability of the content of the Agreed Upon Procedures report when the report is completed.

DONE and ORDERED this 2nd day of February, 2024.

Florida Housing Finance Corporation

By: _____
Chairperson

Copies furnished to:

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Joint Administrative Procedures Committee
Attention: Ms. Yvonne Wood
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NOTICE OF RIGHT TO ADMINISTRATIVE REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO ADMINISTRATIVE REVIEW PURSUANT TO SECTIONS 120.542(8), 120.569, AND 120.57, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.