STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In Re: MALIBU BAY PRESERVATION LTD. FHFC Case No.: 2023-034VW

_____/

ORDER GRANTING WAIVER OF RULE 67-21.026(13)(e), FLORIDA ADMINISTRATIVE CODE (2021)

THIS CAUSE came for consideration and final action before the Board of Directors of the Florida Housing Finance Corporation (the "Board") on June 9, 2023. On May 8, 2023, Florida Housing Finance Corporation ("Florida Housing") received a Petition for Waiver of Rule 67-21.026(13)(e), F.A.C. (07/06/2022) (the "Petition") from Malibu Bay Preservation, Ltd. (the "Petitioner") to allow the development's general contractor ("GC") to self-perform work exceeding the de minimis amount. Notice of the Petition was published on May 10, 2023, in Volume 49, Number 91, 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:

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

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
Ann McMurray /DATE: 6/12/2023

2. Petitioner successfully applied for funding to assist in the acquisition and rehabilitation of the Malibu Bay Apartments, a 264-unit development located in Palm Beach County, Florida (the "Development").

3. Florida Administrative Code Rule 67-21.026(13)(e) (2019) applies; however, on April 29, 2022, the Board amended Rule 67-21.026(13)(e), effective retroactively, to developments that had previously submitted applications under prior rule versions. Florida Administrative Code Rule 67-21.026(13)(e), as amended, states, in relevant part:

> Ensure that no construction or inspection work is performed by the General Contractor, with the following exceptions: (i) the General Contractor may perform its duties to manage and control the construction of the Development; and (ii) the General Contractor may self-perform work of a de minimis amount, defined for purposes of this subparagraph as the lesser of $350,000 or 5 percent of the construction contract.

4. Petitioner requests a waiver of the above Rule to allow the Development's GC to self-perform work exceeding the de minimis amount. Petitioner states that, when the contract was initiated with the GC, the parties did not expect the GC to self-perform any work under the GC contract. However, as the project progressed, it became necessary for the GC to supplement certain trades in order to (i) minimize and mitigate risk in occupied units considering the demographic level of tenants, (ii) meet the accelerated project delivery timeline, and (iii) maintain the budget by

providing self-performing foremen with industry-specific knowledge to run division crews provided by contracted subcontractors. Petitioner requests a waiver of the above Rule because the GC has exceeded the $350,000 in self-performed work allowed by the Rule by less than $2,000.

5. Staff received a recommendation on May 4, 2023 from Seltzer Management Group, Inc, the underwriter on this transaction, in conjunction with Partner Engineering and Science, Inc, a construction consultant, which included a positive recommendation to approve the work that was self-performed by the GC.

6. Staff did not recommend a further workout because the General Contractor's Fee is below the maximum allowed amount.

7. Section 120.542(2), Florida Statutes, provides in pertinent part:

> 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.

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 a waiver of Rule 67-21.026(13)(e), Florida Administrative Code is hereby **GRANTED** to allow the Development's general contractor to self-perform work exceeding the de minimis amount.

DONE and ORDERED this 9th day of June, 2023.

Florida Housing Finance Corporation

By: _____
Chairperson

Copies furnished to:

Brian J. McDonough, Esq.
Petitioner's Counsel
bmcdonough@sternsweaver.com

Betty Zachem, Interim General Counsel
Melissa Levy, Managing Director of Multifamily Programs
Florida Housing Finance Corporation
Betty.Zachem@floridahousing.org
Melissa.Levy@floridahousing.org

Joint Administrative Procedures Committee
Attention: Ms. Yvonne Wood
Joint.admin.procedures@leg.state.fl.us

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.