STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In Re: Promise in Brevard, LLC

FHFC CASE NO.: 2020-069VW

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ORDER GRANTING WAIVER OF RULES 67-48.023(5) and (7)

THIS CAUSE came on for consideration and final action before the Board of Directors of the Florida Housing Finance Corporation on December 4, 2020, pursuant to a "Petition for Waiver" ("Petition"). Florida Housing Finance Corporation ("Florida Housing") received the Petition on November 18, 2020, from Promise in Brevard, LLC ("Petitioner"). Notice of the Petition was published on November 17, 2020, in Volume 46, Number 224, of the Florida Administrative Register. An Amended Petition was filed with Florida Housing on November 25, 2020. After careful review of the record and being otherwise fully advised in the premises, the Board of Directors (the "Board") of Florida Housing hereby finds:

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

2. Petitioner was selected to receive an allocation of 9% Housing Tax Credits and Grant and SAIL funding under RFA 2014-113, Financing to Build Larger Permanent Supportive Housing Properties for Persons with Developmental

FILED WITH THE CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION
/DATE: 12/4/2020

Disabilities, to assist in the development of Promise in Brevard in Brevard County, Florida.

3. Rule 67-48.023(5), Fla. Admin. Code (2014) provides:

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

4. Rule 67-48.023(7), Fla. Admin. Code (2014) which provides:

(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.

5. Exhibit F, Part IV(3)d. of RFA 2014-113 provides, in relevant part:

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.

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.

6. The instructions to the GCCC, which are incorporated into the RFA, state in relevant part:

> 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.

7. Petitioner asserts that the construction of the Development is complete, all final certificates of occupancy have been received and the Development has been

placed in service. Petitioner is currently in litigation with the general contractor regarding disputes over amounts owed under the construction contract. As a result of the litigation, Petitioner asserts that the general contractor is unwilling to execute the GCCC necessary for the CPA to issue the opinion letter and unqualified audit report. Petitioner's CPA has been unable to obtain the general contractor's accounting records and could not visit the general contractor's office.

8. Petitioner was able to provide the CPA with supporting documentation which enabled the CPA to complete the General Contractor Cost Breakdown Schedule. 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.

9. In addition, per the GCCC instructions the CPA was able to identify, verify and confirm the names and amounts paid to the first and third highest paid subcontractors as well as two other randomly selected subcontractors for the Development. However, while the CPA was able to verify the amounts paid to the second highest paid subcontractor through their pay application, they were 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. Petitioner has agreed that its CPA will identify, verify and

confirm the names and amounts paid to other randomly selected subcontractors so that the total amounts confirmed are at least as much as the total amounts paid to the three highest paid subcontractors, of which two of those confirmations will include the first and third highest paid subcontractors.

10. The Board finds that granting the waiver will not have any impact on other participants in funding programs administered by Florida Housing, nor would it have a detrimental impact on Florida Housing or the Development.

11. 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.

12. Petitioner has demonstrated that the waiver is needed in order to efficiently serve persons with developmental disabilities. Petitioner has also demonstrated that the purpose of the underlying statute, which is to "encourage development of low-income housing in the state" (§420.5099, Fla. Stat.), would still be achieved if the waiver is granted.

13. The Board finds that strict application of the above Rule under these circumstances would cause substantial hardship to Petitioner, and that granting this request furthers Florida Housing's statutory mandate to provide safe, sanitary and affordable housing to the citizens of Florida.

IT IS THEREFORE ORDERED:

Petitioner's request for a waiver of Rules 67-48.023(5) and (7), Fla. Admin. Code (2014), as well as Exhibit F, Part IV(3)d. of RFA 2014-113 (specifically including the GCCC form and instructions), is hereby **GRANTED** to allow Petitioner to submit its Cost Certification with a GCCC that is not executed by the general contractor accompanied by an opinion letter and qualified audit report that does not include confirmation of the second highest paid subcontractor. Florida Housing will not consider the GCCC final until the total amounts confirmed are at least as much as the total amounts paid to the three largest dollar subcontractors (of which two of those confirmations will include the first and third highest paid subcontractors).

DONE and ORDERED this 4th day of December, 2020.

Florida Housing Finance Corporation

By: _____
Chair

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.