STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In Re: KEYS AFFORDABLE DEVELOPMENT IV, LLC

FHFC Case No.: 2024-014VW

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ORDER GRANTING WAIVER OF
RULE 67-48.0072(12) and (17)(h), FLA. ADMIN. CODE (2018)

THIS CAUSE came for consideration and final action before the Board of Directors of the Florida Housing Finance Corporation (the "Board") on March 26, 2024. On March 4, 2024, Florida Housing Finance Corporation ("Florida Housing") received a Petition for Waiver of Rule 67-48.0072 (12) and (17)(h) (2018) (the "Petition") from a) Keys Affordable Development IV, LLC (the "Petitioner") to allow Petitioner's General Contractor to subcontract with an affiliated subcontractor and to allow for costs of work that was completed outside the Guaranteed Maximum Price contract. Notice of the Petition was published on March 5, 2024, in Volume 50, Number 45, 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
/DATE 3/27/2024

2. Petitioner successfully applied for funding to assist in the construction of Boatworks Residences, a 52-unit development located in Monroe County, Florida (the "Development").

3. Rule 67-48.0072(12), Fla. Admin. Code (2018), states, in relevant part:

> For competitive HC, SAIL, and HOME, the Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, which may include change orders for changes in cost or changes in the scope of work, or both, if parties agree, and shall order at the Applicant's sole expense, and review a pre-construction analysis for all new construction units and a capital needs assessment for rehabilitation units and review the Development's costs.

4. Rule 67-48.0072(17)(h), Fla. Admin. Code (2018), states, in relevant part:

> The General Contractor must meet the following conditions:... Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of the General Contractor or the Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-48.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor.

5. Petitioner requests a waiver of the 67-48.0072(12) to allow work performed outside of the Guaranteed Maximum Price ("GMP") contract. Petitioner incurred additional hard construction costs outside of the GMP due to the COVID-19 pandemic which brought about increases of 15% to 20% for materials as well as a scarcity of needed materials. This led Petitioner to a strategy of purchasing materials whenever possible. Materials purchased

outside of the GMP included items related to landscaping, painting, carpentry, windows, plumbing, and equipment rentals. The total costs above the GMP were $1,114,383. Petitioner also requests a waiver of rule 67-48.0072(17)(h) to allow Petitioner's General Contractor, Sherwood Construction, Inc ("Sherwood"), to subcontract with an affiliated entity. Sherwood struggled to find a subcontractor for the proposed development with the ability to build the shell of the building within budget due to the limited number of available subcontractors in the Keys and the conditions of the COVID-19 pandemic. Sherwood received two bids that were in excess of the 31% limitation for a shell subcontract. The Qualifying Agent for Sherwood, Yann LeLourec, had the willingness and ability to construct the shell of the building, at a lower price, and under the 31% limitation, through his company, Lenken Consultants. As a result, in March 2020, Sherwood removed Mr. LeLourec as the Qualifying Agent and hired Lenken Consultants to perform the shell work. Due to pandemic related issues, including price increases, the final amount for the shell-related construction work was $3,028,789.88, of which $86,060.88 was for concrete. The concrete was purchased directly by Mr. LeLourec who was reimbursed for this cost by Sherwood. Mr. LeLourec was also reimbursed $1,674,710, for payment of non-shell related costs and materials. These costs and materials were purchased in an effort to avoid

delays, future price increases and the possibility of materials being unavailable in the future. In March of 2022, upon completion of the building shell, Mr. LeLourec returned as Qualified Agent for Sherwood.

6. As justification for the request, Petitioner states that the costs paid outside of the GMP contract and the use of an affiliated subcontractor could not be avoided due to increased prices for materials as well as a need to purchase materials when they were available to avoid a future scarcity of needed materials. These strategies allowed the development to meet the goal for timely completion of the development thereby delivering 52 much needed units to Monroe County. The Placed-in-Service date was met on April 22, 2022, and the Development is fully leased. Staff requested Seltzer Management Group, Inc., the underwriter on this transaction, provide Florida Housing with a recommendation on the cost incurred by Lenken Consultants for the shell of the building. Staff received a recommendation on November 14, 2023. Seltzer Management Group, Inc., in conjunction with GLE Associates, Inc., the construction consultant, made a positive recommendation to approve the costs incurred by Lenken Consultants. Staff also requested Novogradac & Company, LLP, the independent Certified Public Accountant for the Petitioner and Sherwood, test all reimbursed costs to Yann LeLourec. Of the $1,674,710 in costs, Novogradac was able to test, through a review of

supporting documentation such as invoices, receipts, and payments, $1,329,927 of the total costs. Leaving a balance of $344,783 of untested costs.

7. 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.

8. 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.

9. 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 67-48.0072(12) and (17)(h), Fla. Admin. Code (2018), is hereby **GRANTED** to allow Petitioner's General Contractor to subcontract with an affiliated subcontractor and to allow for costs of work that was completed outside the Guaranteed Maximum Price. This waiver is conditioned upon the Petitioner's compliance with the following conditions:

a. The General Contractor will limit the General Contractor's Fee to 10% on the Lenken Consultants shell contract; and

b. No General Contractor fee will be taken on the $344,783 untested portion of the reimbursements to Mr. LeLourec.

DONE and ORDERED this 26th day of March, 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.