**STATE OF FLORIDA**
**FLORIDA HOUSING FINANCE CORPORATION**

In Re: Lofts on Lemon Development Partners

FHFC CASE NO.: 2020-056VW

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**ORDER GRANTING VARIANCE**
**FROM RULE 67-48.023(2)**

THIS CAUSE came on for consideration and final action before the Florida Housing Finance Corporation ("Florida Housing") pursuant to a "Petition for Waiver" ("Petition"). Florida Housing received the Petition on August 25, 2020, from Lofts on Lemon Development Partners, LLC ("Petitioner"). Notice of the Petition was published on August 27, 2020, in Volume 46, Number 168, of the Florida Administrative Register. Florida Housing received no comments regarding the Petition. After careful review of the record and being otherwise fully advised in the premises, Florida Housing hereby finds:

1. Florida Housing has jurisdiction over the subject matter of this case and the parties hereto.

2. On December 18, 2017, Petitioner submitted Application No. 2018-151C in response to RFA 2017-111 for competitive housing tax credits to assist in the construction of a 76-unit development located in Sarasota County, Florida, known as Lofts on Lemon (the "Development"). Petitioners subsequently received

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permission from Florida Housing to add an additional 52 units not funded with housing tax credits.

3. Rule 67-48.023(2), Fla. Admin. Code, required that each Development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code (IRC) that was in effect at the time the rule was adopted. Prior to March 23, 2018, this Section of the IRC did not allow income averaging, and therefore Rule 67-48.023(2), Fla. Admin. Code, also did not allow income averaging.

4. During its 2018 session, the United States Congress passed the "Consolidated Appropriations Act, 2018" ("H.R. 1625"), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

> "(C) AVERAGE INCOME TEST. –
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> (i) IN GENERAL. – The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.
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> (ii) SPECIAL RULES RELATING TO INCOME LIMITATION. - For Purposes of clause (i)
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> (I) DESIGNATION. - The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

(II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

(III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income." Section 42(g)(1)(C), I.R.C. (2018)

5. Rule 67-48.023(2), Fla. Admin. Code, was revised on July 8, 2018, to incorporate the new subsection 42(g)(1)(C) of the IRC. As a result, any applicants for housing tax credits submitted to Florida Housing after July 8, 2018 are allowed to use the income averaging provisions of the IRC. Petitioner's application was submitted prior to the July 8, 2018 rule revisions and was therefore not allowed to take advantage of the average income test.

6. Florida Housing 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.

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. Petitioner has demonstrated that the waiver is needed in order to efficiently serve low-income families, and that Petitioner would be at a competitive disadvantage with other Developments if it was not allowed to use the average

income test solely because of when its application was submitted. 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 waivers are granted.

9. Florida Housing finds that strict application of the above Rule under these circumstances would violate principles of fairness, and that granting this request furthers Florida Housing's statutory mandate to provide safe, sanitary and affordable housing to the citizens of Florida.

10. Pursuant to Resolution No. 2018-036A, the Board of Directors of Florida Housing Finance Corporation has delegated its authority under Section 120.542, Fla. Stat., to consider, grant, or deny waivers and variances of the current and prior versions of Rules 67-21.027(1), 67-21.003(1)(b), and 67-48.0023(2), Fla. Admin. Code, to the Executive Director, the General Counsel, the Director of Multifamily Development, and the Director of Multifamily Allocations of Florida Housing.

**IT IS THEREFORE ORDERED:**

Petitioner's request for a waiver of Rule 67-48.023(2), Fla. Admin. Code, is hereby **GRANTED** to to allow for calculation of the minimum set aside percentage based on income averaging.

DONE and ORDERED this 22nd day of October, 2020.

Florida Housing Finance Corporation

By: _____

Hugh R. Brown
General Counsel

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Joint Administrative Procedures Committee
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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.**