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

**FHFC CASE NO. _2023-082VW_____**
**APPLICATION NO.** 2021-024VW

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FLORIDA HOUSING FINANCE CORPORATION

ORLANDO LEASED HOUSING ASSOCIATES XI, LLLP,

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

**PETITION FOR WAIVER OF RULE 67-21.026(10) F.A.C. (2018)**

ORLANDO LEASED HOUSING ASSOCIATES XI, LLLP, a Minnesota limited liability limited partnership authorized to conduct business in the State of Florida, (the "Petitioner"), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a waiver or variance of Rule 67-21.026(10), Florida Administrative Code ("F.A.C") (2018) (the "Rule"), which requires a guaranteed maximum price construction contract (a "GMP Contract") for all of the rehabilitation work. This Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code. In support of its Petition, the Petitioner states:

## A. THE PETITIONER

1. The address, telephone number, facsimile number and email address of the Petitioner are:

ORLANDO LEASED HOUSING ASSOCIATES XI, LLLP

2905 Northwest Blvd. Suite 150
Plymouth, Minnesota 55441
Attention: Owen Metz
Phone: (623) 265-6828
Email: ometz@dominiuminc.com

2. For purposes of this Petition, the address, telephone number, facsimile number and email address of Petitioner's counsel is:

Yisell Rodriguez, Esq.
Nelson Mullins Riley & Scarborough LLP
390 North Orange Avenue, Suite 1400
Orlando, Florida 32801
407-669-4290 (Phone)
407-425-8377 (Fax)
Email: yisell.rodriguez@nelsonmullins.com

## B. THE DEVELOPMENT

3. On August 28, 2018, Petitioner submitted a Multifamily Revenue Bond Program Application to the Orange County Housing Finance Authority requesting $34,000,000 in tax exempt bonds (the "Bonds"). Petitioner thereafter acquired Chapel Trace Apartments in order to rehabilitate it by utilizing the Bonds and 4% low-income housing tax credits ("Housing Credits"), to preserve and expand the affordable units at Chapel Trace Apartments. Petitioner will be using the Freddie Mac Tax Exempt Loan Program ("Freddie TEL") and the Bonds that were issued in the structure of a tax-exempt note in the maximum principal amount of $25,610,000. Petitioner applied for Non-Competitive Housing Credits and requested an annual amount of $1,674,341 in Housing Credits to assist in financing the rehabilitation of the 312-unit family development, known as Chapel Trace Apartments (the "Development"). One hundred percent of the units of the Development will be restricted to 60 percent AMI for 30 years.

## C. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

## D. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver from Rule 67-21.026(10), F.A.C. (effective July 8, 2018), which provides in part:

**Rule 67-21.026 HC Credit Underwriting Procedures.**

> "(10) The Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, acceptable to the Corporation, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant's sole expense, and review a pre-construction analysis for all new construction units or a physical needs assessment for rehabilitation units and review the Development's costs."

## E. STATUTES IMPLEMENTED BY THE RULE

6. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute that designated the Corporation as the State of Florida's housing credit agency and authorizes the Corporation to establish procedures for allocating and distributing low-income housing tax credits. See Fla. Stat. § 420.5099.

## F. JUSTIFICATION FOR GRANTING THE WAIVER OF THE RULE

7. Petitioner is seeking a waiver from Rule 67-21.026(10), F.A.C. (2018), which requires the Petitioner to enter into a GMP Contract for the intended rehabilitation work for the Development that is acceptable to the Corporation. On April 8, 2019 Petitioner executed a GMP Contract with Legacy Construction Services, LLC (the "GC") in which the guaranteed Contract Sum was not to exceed $8,150,365. After the execution of the GMP Contract, unforeseen delays came about and a deduction change order became necessary in the amount of $807,428.45, as evidenced by the Prepayment Contract dated December 27, 2019 (the "Prepayment Contract").

To accommodate this change, the Prepayment Contract was made for the same scope of work at the same cost. The change order primarily involved hard construction costs, specifically related to Accessory Buildings, Recreational Amenities, Rehabilitation of Existing Common Areas, and Rehabilitation of Existing Rental Units. The Petitioner initially aimed to complete the rehabilitation by 2019. However, unforeseen weather-related delays extended the timeline, causing the completion to overlap with the emergence of COVID-19. This further delayed the project until mid-2020. This extended timeline meant that the rehabilitation wouldn't accrue sufficient construction costs to qualify for the anticipated tax credits for 2019, leading to a potential downward tax credit equity adjustment of $411,706. To alleviate this financial strain on the Development, the Petitioner chose to prepay these costs directly instead of using their construction loan.

8. Petitioner paid the full amount of $807,428.45 (the "Contract Amount"), the work was done in compliance with the Corporation's rules, and no cost savings were realized. The entire Contract Amount was spent on project costs which were included in the GC's Cost Certification (the "GCCC") of $10,473,121, as detailed in the GCCC. However, the final payment application, specifically Payment Application #8, reflected a final disbursement of $9,665,693.96. The difference between these two amounts is the Contract Amount, with slight differentiation due to rounding. As such, the entire Contract Amount was used for project costs and no cost savings were realized.

9. It is important to note that the Petitioner initially intended for all the work to be done under the GMP Contract, as all the work completed under the Prepayment Contract, including its corresponding costs, was initially encompassed within the GMP Contract. The GMP Contract underwent thorough credit underwriting, ensuring that both the work and costs

ultimately carried out under the Prepayment Contract were duly accounted for. Furthermore, the Rule explicitly permits change orders if all parties involved reach an agreement.

10. While the change order work was not performed under a GMP Contract, the Petitioner contracted with the GC and the Contract Amount was paid directly to the GC, as the GC coordinated the work to be done. Further, there are a number of mitigating factors that should nonetheless adequately assure the Corporation that the work was otherwise performed in accordance with the Corporation's rules. Specifically, (i) the change order work, on its own, is not of the type of work that would typically warrant entering a separate GMP contract and is customarily contracted directly by a purchaser in connection with the acquisition of a property; (ii) Petitioner (nor the general contractor under the GMP Contract or Developer) has no common ownership with, nor is it an affiliate of, the contractors hired to perform the change order work; (iii) Petitioner (nor the general contractor under the GMP Contract or Developer) has not directly performed any of the change order work, Petitioner representatives only oversee completion of the change order work by the hired contractors; (iv) the costs incurred for the change order work, which Petitioner bids out and oversees, do not exceed the subcontractor limitations imposed by the Corporation and have been evaluated by the plan and cost reviewer and have been deemed reasonable; and (v) Petitioner has provided a cost certification in accordance with the Corporation rules, with regards to the change order work as it was the same GC doing the change order work.

11. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the power and authority to grant waivers to its rule requirements when strict application of the rules would lead to unreasonable, unfair and unintended consequences in particular instances. A waiver shall be granted when the person who is subject to the rule demonstrates that the

application of the rule would: (1) create a substantial hardship[1] or violate principles of fairness, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. See § 120.542(2), Fla. Stat.

12. Here, Petitioner meets the requirements for a waiver or variance. The Prepayment Contract, while slightly deviating from the technical requirements of the Rule, nonetheless upholds the underlying intent. The work and costs covered by the Prepayment Contract were originally included within the GMP Contract, which underwent a comprehensive credit underwriting process. Therefore, while the Prepayment Contract may not align precisely with the Rule, it remains aligned with the fundamental purpose, as the work and costs were thoroughly evaluated during the credit underwriting process for the GMP Contract and no cost savings were realized in connection with the Prepayment Contract. The Corporation's failure to grant the waiver requested will result in a substantial hardship to Petitioner, as Petitioner will not be able to continue its application for and obtain 4% housing credits and, as such, rehabilitation of the Development will be halted. Specifically, the purpose of the Rule was for the Corporation to ensure the rehabilitation costs included in a petitioner's basis are reasonable and incurred in accordance with the Corporation's rules. However, strict application of the Rule would lead to the unintended result that a petitioner that incurred valid rehabilitation costs is unable to include them in its basis. Petitioner has provided assurances, as stated above, to the Corporation that the costs of the construction were reasonable and otherwise incurred in accordance with the Corporation's rules. Further, the requested variance will not adversely impact the Development

[1] "Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. Further, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. *See* Fla. Stat. § 120.542.

or Florida Housing and will ensure that 312 affordable family housing units will be preserved and made available for the target population in Orange County.

13. A waiver of this Rule will serve the purposes of Section 420.5099 and the Act that are implemented by Chapter 67-21 of the Florida Administrative Code, because one of the goals of the Corporation is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households. Denial of the waiver would deprive Orange County of essential and affordable housing units.

## G. ACTION REQUESTED

14. For the reasons set forth herein, the Petitioner respectfully requests the Corporation (i) grant a waiver of, or variance from, Rule 67-21.026(10) which requires eligible rehabilitation work be performed under a GMP Contract; (ii) grant this Petition and all the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted on the 3rd day of October, 2023.

Respectfully submitted,

Yisell Rodriguez, Esq.
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390 N. Orange Ave., Suite 1400
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COUNSEL FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

This 3rd day of October, 2023.

Visell Rodriguez, Esq.
Fla. Bar No. 117915