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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In re: Delmar Terrace South, LLC

Petitioner.
_____/

FHFC Case No. 2023-099VW
FHFC File No: 2015-158CS/2017-253CS/ 2017-285V/2019-434CS

PETITION FOR RULE WAIVER AND VARIANCE TO GENERAL CONTRACTOR CONDITIONS AND FINAL COST CERTIFICATION PROCESS IN RULES 67-48.0072(17)(e) AND (f), AND RULES 67-48.023(5) AND (7)

Pursuant to Section 120.542, Fla. Stat., Petitioner, DELMAR TERRACE SOUTH, LLC, a Florida limited liability company ("Delmar Terrace"), hereby submits this Petition to the Florida Housing Finance Corporation ("FHFC") for a waivers of or variances from Rule 67-48.0072(17)(e) and (f), and Rule 67-48.023(5) and (7), Fla. Admin. Code (2014), and provisions of the Final Cost Certification Package and RFA 2014-115. As explained more fully in this Petition, in the construction of Delmar Terrace South's development (now known as Delmar 745), the original General Contractor was terminated for non-performance, and the Surety Company on the Performance Bond was required to step in as General Contractor. The Surety, performing as the General Contractor, retained a Completing Contractor as a subcontractor; the Completing Contractor performed the role that a General Contractor would have performed, in the absence of the Surety. As a result, Delmar Terrace must seek waivers of rule requirements for General Contractor duties and subcontractor payment, and on documentation requirements and timing of the Final Cost Certification Application Package.

In support of this petition, Petitioner states as follows:

NATURE OF REQUEST

1. Pursuant to Section 120.542, Fla. Stat. (2017), and Rules 28-104.001 through 28-104.006, Fla. Admin. Code, Petitioner requests a waiver of or variance from the following rules:

a. Rule 67-48.0072(17)(e), prohibiting the General Contractor from subcontracting the GC's duties to manage and control construction;

b. Rule 67-48.0072(17)(f) (2014 version), prohibiting more than 20 percent of the construction cost to be subcontracted to any one entity;

c. Rule 67-48.023(5), requiring completion of the final cost certification process "as required in a competitive solicitation" (i.e., completion of the Final Cost Certification Application Package); Delmar Terrace seeks an alternative means of providing some of the assurances that are part of the Final Cost Certification Application; and

d. Rule 67-48.023(7), requiring the final cost certification documentation to itemize all expenses incurred in the construction of the development, which requires a General Contractor Cost Certification that includes confirmation of amounts for the three largest dollar subcontractors.

2. The competitive solicitation in which Delmar Terrace was initially awarded funding was RFA 2014-115.

THE PETITIONER

3. As explained in this Petition, Petitioner was the recipient of Housing Credits and a SAIL loan from FHFC for a homeless development in Pinellas County. Petitioner was also the recipient of a Development Viability Loan for this development in RFA 2017-109. For purposes of this petition, Petitioner's address is that of its undersigned attorney, M. Christopher Bryant, Oertel, Fernandez, Bryant & Atkinson, P.A., 2060 Delta Way, Tallahassee, Florida 32303 (telephone (850) 521-0700, fax (850) 521-0720, E-mail: cbryant@ohfc.com)

FUNDING AWARDED

4. Through Request for Applications (RFA) number 2014-115, FHFC sought to allocate federal low income housing tax credits ("Housing Credits") to applicants for the development of affordable housing in the six large counties of Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas. FHFC also sought to fund at least one Homeless development in one of those counties, utilizing both Housing Credits and State Apartment Incentive Loan ("SAIL") financing. The awards of SAIL and Housing Credit funding are subject to FHFC Rule Chapter 67-48, Fla. Admin. Code.

5. Delmar Terrace successfully applied in RFA 2014-115 for an award of Housing Credits and a SAIL loan for the construction of a 65 unit high-rise development for homeless tenants in Pinellas County. Delmar Terrace received an award of Housing Credits in the amount of $1.66 million and a SAIL loan of $3.25 million. Subsequently, Delmar Terrace applied for and was awarded Development Viability Loan funding in RFA 2017-109.

6. For purposes of Section 42 of the Internal Revenue Code, Delmar Terrace proposed to set aside 40% of the units for residents earning 60% or less of Area Median Income. In the Total Set-Aside Breakdown Chart included in the Delmar Terrace application, Delmar Terrace committed to set aside 15% of the units for tenants at or below 40% of AMI (the Extremely Low Income level for Pinellas County in RFA 2014-115) and the remaining 85% of the units for tenants at or below 60% of AMI.

PRINCIPALS INVOLVED

7. The Applicant entity is Delmar Terrace South, LLC, a Florida limited liability company. The Member/Manager of Delmar Terrace South, LLC, is Delmar Terrace MBS Member, Inc., a Missouri Corporation, which has two shareholders, both of which are corporate

entities. The principal disclosure provisions of RFA 2014-115 did not require disclosure to the level of all natural persons; Delmar Terrace complied with such applicable disclosure requirements.

8. The Developer Entity for Delmar Terrace is Delmar Terrace Developers, LLC, whose Member/Manager is McCormack Baron Salazar, Inc. The Co-Developer is Boley Centers, Inc. The natural person principal of Delmar Terrace Developers whose prior general development experience was relied upon to satisfy the RFA 2014-115 requirements was Vincent R. Bennett, who is an officer of McCormack Baron Salazar, Inc.

PROGRESS OF THE DEVELOPMENT AND CONSTRUCTION OF DELMAR

9. On May 8, 2017, Delmar executed a Guaranteed Maximum Price ("GMP") General Contract with Lynx Construction Management, LLC, in the amount of $13,989,843.51 for construction of the proposed development. With subsequent change orders, the GMP contract price increased to $15,249,159.64. As explained below, additional construction costs were incurred that were paid for by a Surety Company pursuant to a performance bond when the Original General Contractor was terminated; those additional costs exceeded the amended GMP contract by $3,523,471, and the Owner does not seek funding from Florida Housing based on that exceedance amount.

10. Due to significant performance issues with Lynx Construction that could not be resolved despite repeated efforts, Delmar issued written notice to Lynx on July 27, 2020 declaring the contractor in default, and Delmar exercised its right to terminate the contract. Delmar also notified Traveler's Casualty and Surety Company, which had issued the Performance bond for Lynx, of the default. Delmar terminated the Contract with Lynx on August 6, 2020.

11. Travelers and Lynx subsequently entered into a Takeover Agreement. The

remaining balance of the GMP Contract at that time was $3,632,429.63.

12. A Temporary Certificate of Occupancy was issued for Delmar Terrace in December 2021 and recorded on December 29, 2021. The building was placed in service on December 29, 2021.

13. Delmar has prepared its Final Cost Certification documentation, including the documentation of all expenses. However, Delmar is unable to provide a General Contractor's Cost Certification ("GCCC"). The original GC for the development, Lynx, was terminated before construction was complete. Neither the surety (acting as the GC) nor the completing contractor, Whitney Turner, can certify the costs of construction that occurred during Lynx's tenure as GC.

RULE PROVISIONS

14. The SAIL and Housing Credit programs are governed in part by portions of Rule Chapter 67-48, Fla. Admin. Code. Of relevance to this request are the 2014 versions of Rules 67-48.0072(17)(e) and (f), and 67-48.023(5) and (7), Fla. Admin. Code. Rule 67-48.0072(17)(e) and (f) read, in pertinent part:

> (17) The General Contractor must meet the following conditions:
>
> (e) Ensure that none of the General Contractor duties to manage and control the construction of the Development are subcontracted;
>
> ***
>
> (f) Ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, with the exception of a subcontractor contracted to deliver the building shell of a building at least five (5) stories which may not have more than 31 percent of the contract cost in a subcontract, unless otherwise approved by the Board for a Specific Development. With regard to said approval, the Board shall consider the facts and circumstances of each Applicant's request, inclusive on construction costs and the General Contractor's fees.

15. Rules 67-48.023(5) and (7) (2014 versions) read, in pertinent part, as follows:

> (5) Each Housing Credit Development shall complete the final cost certification process as required in a competitive solicitation
>
> ***
>
> (7) Final Cost Certification documentations 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. …

16. The initial funding for this Development was awarded pursuant to RFA 2014-115. That RFA, at Exhibit C, Item 12(c), required the successful applicant to complete the Final Cost Certification Application Package. The Final Cost Certification Application Package includes a General Contractor Cost Certification ("GCCC") and the GCCC instructions require a Certified Public Accountant's Audit of the GCCC to send confirmation requests to the three largest dollar subcontractors, confirming the construction contract amount, any change orders, any additional costs incurred outside of the contract, the type of services provided, and amounts paid to date and balances to be paid. As explained more fully in this Petition, Petitioner is unable to provide a General Contractor's Cost Certification ("GCCC") due to the unique circumstances of the original general contractor's default, the surety company that provided the performance bond stepping in as the new GC, and the surety's use of another licensed general contractor in the role of a "Completing Contractor" through a subcontractor arrangement. Petitioner and its independent CPA have also only been able to obtain the required information from two of the three largest dollar subcontractors, and a waiver of that requirement is also requested.

17. Petitioner and Florida Housing staff have discussed the use of an Agreed Upon Procedures report to substitute for the GCCC, subject to the Florida Housing Board of Directors approving this alternative means of compliance.

18. With the close cooperation and input from Florida Housing staff, Petitioner and its accountants have prepared a set of Agreed Upon Procedures that would produce a detailed report of the costs incurred in developing and constructing Delmar 745. The AUP would be of equivalent detail and reliability as a GCCC, and would satisfy Florida Housing's duty to administer the housing credit program to insure the proper accountable use of housing credit resources. As part of the AUP process, Petitioner has made repeated attempts to obtain confirmation from each of the 24 subcontractors who worked on the development of the contracted amounts, paid amounts, additional costs incurred, balance due, and lack of identity between the subcontractor and either the original General Contractor or the Surety, and to date has obtained such confirmation from 9 of the 24 subcontractors.

JUSTIFICATION FOR REQUESTED WAIVER

19. As explained in paragraph 11 above, the original General Contractor on the Delmar Terrace development was terminated for cause due to non-performance. The Owner served the original General Contractor's surety company with notice of the termination, and filed a claim on the performance bond. Under the terms of the performance bond, the surety had several options as to how to proceed. The surety could have:

- Arranged for the existing Contractor to complete the contract, with Delmar's consent (Section 5.1 of the Performance Bond);
- Undertaken to perform and complete the contract itself, through agents or independent contractors (Section 5.2 of Performance Bond);
- Obtain bids from qualified contractors acceptable to the Owner for a contract to complete the work (Section 5.4 of the Performance Bond); or
- Waive its right to perform, and either make payment to the Owner or deny

liability (Section 5.4 of the Performance Bond).

Travelers opted for the second option – to complete the contract itself, through agents or independent contractors. Travelers and Delmar thus entered into a Takeover Agreement on December 1, 2020, which designated Whiting Turner Construction as the Completing Contractor.

20. Although designated in the Takeover Agreement as the "Completing Contractor," Whiting-Turner was technically a subcontractor to Travelers. The work to be performed by Whiting-Turner totaled $4,009,494.56, which is 26.3% of the total adjusted contract price of $15,249,159.64.

RELIEF REQUESTED

21. Delmar Terrace seeks several waivers, variances, and authorizations by this Petition.

a. First, Delmar Terrace seeks a waiver of Rule 67-48.0072(17)(e) in order to allow the Surety, who is technically the General Contractor, to subcontract the duties to manage and control the construction of the development to Whiting-Turner, the Completing Contractor.

b. Second, Delmar Terrace seeks a waiver of Rule 67-48.0072(17)(f), to allow Whiting-Turner, as the Completing Contractor serving as a subcontractor to the Surety Company under the Takeover Agreement, to perform work for compensation that is in excess of twenty percent (20%) of the Construction Cost, and allow up to 26.3% of the Construction Cost.

c. Third, Delmar Terrace seeks a waiver of the rule requirement to utilize the Final Cost Certification Package, which includes a General Contractor Cost Certification. Due to the unique circumstances under which this development was

completed, with an original General Contractor, then a Surety acting as a General Contractor, utilizing a Completing Contractor as a subcontractor to the Surety, Delmar Terrace is unable to provide a Cost Certification certified to by a single General Contractor. Lynx Construction, the original General Contractor, has not been cooperative in providing a certification that satisfies Florida Housing's requirements for work completed before its termination; and Whiting Turner, as the Completing Contractor, is unable to certify those costs incurred during the period of time Lynx was the General Contractor. Instead, Delmar Terrace, with guidance from Florida Housing staff, proposes the use of an Agreed Upon Procedures report to provide assurances as to the reasonableness of the costs incurred in the development of this housing.

22. Granting the requested waivers and variance would not adversely affect any required set-asides or points considered by Florida Housing in the scoring of the Delmar Terrace, and would not alter the scoring by Florida Housing that qualified Delmar Terrace for Housing Credits and SAIL funding. The change would also not provide Delmar Terrace with an unfair competitive advantage over other applicants. All scoring of competing applications would have been the same.

23. The requested Rule waivers or variances will not adversely impact the Delmar Terrace development or the Florida Housing funding processes, and will serve the statutory purposes of the Florida Housing process. A denial of this Petition, however, would result in substantial economic hardship to Delmar Terrace., and essentially would result in Delmar Terrace losing its investor funding.

STATUTORY PURPOSE SERVED

24. Section 420.5087, Fla. Stat., created the State Apartment Incentive Loan program to provide loans to provide affordable housing to very low income persons. The SAIL statute specifies certain tenant groups which are to be considered in the allocation of SAIL funding, and one of those tenant groups is "persons who are homeless." Section 420.5087(3)(c), Fla. Stat.

25. Section 420.5099, Fla. Stat., designates Florida Housing as the housing credit agency, pursuant to the Internal Revenue Code, and assigns Florida Housing the responsibility to allocate and distribute low-income housing tax credits. The statute also instructs Florida Housing to adopt procedures to ensure the maximum use of housing credits to encourage the development of low-income housing.

26. In furtherance of these statutory purposes, Florida Housing established the competitive Request for Application process to allocate various forms of funding to satisfy various geographic and demographic affordable housing goals. The RFA in which Delmar Terrace applied included a funding goal for developments to house Homeless persons, and Delmar Terrace applied in and was selected for that funding goal.

27. Florida Housing's rule limiting the amount of a contract that can be awarded to one subcontractor or group of related contractors has a valid purpose to ensure that subcontractor services are efficiently and competitively provided. However, this very uncommon set of circumstances, where an entity preforming the work of General Contractor is technically occupying the position of a subcontractor, that valid purpose is not served. Florida Housing's statutory purpose of financing the development of affordable housing for low income and very low income persons, including persons who are homeless, will still be served by approving alternative means of assuring costs incurred in the development of Delmar 745.

28. Further, under the unique circumstances present here, allowing the Surety, acting as the General Contractor, to subcontract the duty to manage and control construction to an experienced licensed General Contractor who is occupying the role of a subcontractor would satisfy the statutory purpose of ensuring that construction is managed and controlled by a qualified, experienced, responsible party.

29. Finally, allowing the use of an Agreed Upon Procedures process in lieu of a General Contract Cost Certification would serve the statutory purpose by insuring that the costs presented were a reasonably accurate statement of the total actual costs incurred by the General Contractor. This in turn assists in the determination of development costs and the amount of subsidy to be allocated. Although the atypical and protracted term of the Development process, the termination of the original contractor, and the use of a Surety and Completing Contractor resulted in construction costs that exceeded the Guaranteed Maximum Price contract, as adjusted through change orders, that exceedance was paid for by the Surety and is not included in the Total Adjusted Maximum Contract Price upon which subsidy is based.

PRINCIPLES OF FAIRNESS VIOLATED OR SUBSTANTIAL HARDSHIP

30. Principles of fairness would be violated if the Completing Contractor could not be paid for its services which exceed 20% of the Construction Cost. If the Completing Contractor had been the original General Contractor, there would be no question of its entitlement to be paid $4,009,494.56 for its services. However, because of the default by the original General Contractor, and the surety company having to step in and complete the development using Whiting-Turner as a subcontractor, the 20% limitation applies. Principles of fairness are violated when the literal application of a rule affects one person in a manner specifically different from other similarly situated persons. Section 120.542(2), Fla. Stat.

31. Further, principals of fairness would be violated if the Surety, acting as Delmar Terrace's General Contractor, could not subcontract its duty to manage and control construction to a licensed, experienced general contractor who is acting as a subcontractor in this situation. But for the default by the original General Contractor, the Surety would not have had to step into the role of General Contractor, which a Surety is typically not well-positioned to do, and the management and control of construction would have been performed by a General Contractor.

32. Finally, requiring strict adherence to the Final Cost Certification Application requirements would impose a substantial economic hardship on Delmar Terrace. Without a Final Cost Certification, Form 8609 for the development cannot be issued, and Delmar Terrace's limited partners would not receive the benefit of their investment. This would potentially expose the partnership to substantial liability to its investors.

33. The waiver being sought is permanent in nature, to the extent that, now that construction has been completed and the Completing Contractor is paid, the Completing Contractor's role in the development is concluded, subject to any warranty that may exist.

WHEREFORE, Petitioner Delmar Terrace South, LLC respectfully requests that the Florida Housing Finance Corporation provide the following relief:

A. Grant the Petition for Waiver and Variance and all the relief requested herein;

B. Grant a waiver of the provisions of Rule 67-48.0072(17)(e) prohibiting a General Contract (in this case the Surety) from subcontracting its duty to manage and control construction;

C. Grant a waiver of the provisions of Rule 67-48.0072(17)(f) limiting a subcontractor to 20% of the Construction Cost, in order to allow the Completing Contractor to be paid the remaining contract price of $4,009,494.56;

D. Grant a variance to requirements of Rules 67-48.023(5) and (7) to complete the

Cost Certification process utilizing the Final Cost Certification Package, that a General Contractor Cost Certification be included, and that confirmation be obtained from the three largest dollar subcontractors in order to allow Delmar Terrace and Florida Housing staff to develop Agreed Upon Procedures to provide assurance of the reasonableness and accuracy of costs; and to allow staff to determine acceptability of the content of the AUP report when completed; and

E. Grant such further relief as may be deemed appropriate.

RESPECTFULLY SUBMITTED this 29th day of November, 2023.

/s/ M. Christopher Bryant

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition is being filed by electronic filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Fifth Floor, Tallahassee, Florida 32301, CorporationClerk@floridahousing.org, with copies served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, and by electronic transmission to Ethan Katz, Assistant General Counsel, 227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301, ethan.katz@floridahousing.org this 29th day of November, 2023.

/s/ M. Christopher Bryant
Attorney