STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2023-086VW
APPLICATION NO. _____

FAIRFIELD RUNNING BROOK II LP,

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

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FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF RULE 67-21.026(10)

FAIRFIELD RUNNING BROOK II LP, a Florida limited partnership ("Petitioner"), by and through its undersigned counsel, hereby petitions Respondent, the FLORIDA HOUSING FINANCE CORPORATION (the "Corporation") for a waiver of 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 of the Florida Statutes (2022) and Chapter 28-104 of the Florida Administrative Code (2022). In support of its Petition, the Petitioner states:

A. PETITIONER AND DEVELOPMENT

1. The address, telephone number, facsimile number and e-mail address of the Petitioner are:

Fairfield Running Brook II LP
5355 Mira Sorrento Place, Suite 100
San Diego, California 92121
Attn: Richard Boynton
Telephone: (858) 824-6424
Facsimile: (858) 625-6047
Email: rboynton@ffres.com

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

Hollie A. Croft, Esq.
Nelson Mullins Riley & Scarborough
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4200
Facsimile: (407) 425-8377
Email: hollie.croft@nelsonmullins.com

3. Petitioner previously submitted an application to the Housing Finance Authority of Palm Beach County, Florida for an issuance of multifamily housing revenue bonds to be used for the rehabilitation of that certain 186-unit multifamily housing development to be known as Running Brook Apartments, located at 20505 SW 122nd Avenue, Miami, Florida 33177 (the "Development"). Petitioner has also submitted an application to the Corporation for an allocation of Non-Competitive Housing Credits to fund a portion of the acquisition or rehabilitation of the Development.

B. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

C. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver from Rule 67-21.026(10), F.A.C. (2022) which requires the Petitioner to enter into a GMP Contract for the intended rehabilitation work for the Development that is acceptable to the Corporation (collectively, the "Rule"). The specific provisions of the Rule from which Petitioner is seeking a waiver are as follows:

Rule 67-21.026(10), F.A.C. (2022), which provides in relevant part:

> (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 CNA for rehabilitation units and review the Development's costs.
>
> (emphasis added)

D. STATUTES IMPLEMENTED BY THE RULE

6. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, the statute that created the Housing Tax Credit Program and the Multifamily Mortgage Revenue Bonds Program. *See* §§ 420.509, 420.5099, *Fla. Stat.* (2022) (the "Statute").

7. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, and Chapter 28-104, F.A.C., to grant waivers to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended results in particular instances. Waivers shall be granted when the person subject to the rule demonstrates that the application of the rule would (1) create a substantial hardship or violate principals of fairness, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. § 120.542(2), *Fla. Stat.*

E. JUSTIFICATION FOR GRANTING THE WAIVER OF THE RULE

8. Petitioner is seeking a waiver from Rule 67-21.026(10), F.A.C. (2022), which requires the Petitioner to enter into a GMP Contract for the intended rehabilitation work for the Development that is acceptable to the Corporation. In connection with that certain Agreement of

Purchaser and Sale of Real Estate, dated April 10, 2023 (the "PSA"), by and between Petitioner and Fairfield Running Brook LP ("Seller"), the Development required a number of immediate repairs, which involved life and safety matters, deferred maintenance at the Project which could not be further deferred and design and preparatory work in connection therewith, that Seller needed to address promptly to ensure the well being of the Development and its residents (the "Immediate Repair Work"), and which Petitioner agreed to reimburse Seller for performing (in addition to the purchase price under the PSA). More specifically, the Immediate Repair Work involved:

a. Repairs to the plumbing, landscape irrigation, landscape drainage and units;
b. Installation of new plumbing fixtures, outside lights, carpet, water heaters, AC units, cabinets, countertops (including back splashes), PLANK Vinyl flooring ESG dishwashers, ranges, ESG range hoods and ESG refrigerators;
c. Painting of units;
d. Tree removal;
e. Addition of ADA van accessible parking;
f. Storage of construction materials; and
g. General & administrative expenses and overhead in connection with the foregoing.

The state of the market is such that it is common practice for purchasers to reimburse sellers for certain rehabilitation work performed prior to closing if the acquisition is closing directly into bond-financing and re-syndication. The current re-syndication under consideration is expected to close in November 2023 and a GMP for the rehabilitation work associated therewith in the amount of approximately $7,563,000 will be executed at that time. Prior to the closing of the PSA, Seller will have incurred approximately $525,000 in performing the Immediate Repair

Work, which Petitioner will reimburse Seller for, pursuant to the PSA, out of the Petitioner's total budget of approximately $8,088,000, which costs would otherwise be eligible for reimbursement under Treas. Reg. 1.150-2 but for the Rule which requires such costs be under a GMP Contract.

9. But for the Immediate Repair Work being performed outside the purview of a GMP Contract, Petitioner's reimbursement of Seller for the Immediate Repair Work would otherwise constitute eligible rehabilitation costs that Petitioner could include in its basis for the Development. While the Immediate Repair Work was not performed under a GMP Contract, there are a number of mitigating factors that should nonetheless adequately assure the Corporation that the Immediate Repair Work was otherwise performed in accordance with the Corporation's rules. Specifically, (i) the Immediate Repair 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, or by a seller and reimbursed by such purchaser upon acquisition of such property, and as such the contractors to perform the Immediate Repair Work have been directly hired by Seller, which includes subcontractors, trade contractors and architects; (ii) neither Seller nor Petitioner (nor the general contractor under the GMP Contract or Developer) has common ownership with, nor is either an affiliate of, the contractors hired to perform the Immediate Repair Work; (iii) neither Seller nor Petitioner (nor the general contractor under the GMP Contract or Developer) has directly performed any of the Immediate Repair Work, Seller representatives only oversee completion of the Immediate Repair Work by the hired contractors; (iv) the costs incurred for the Immediate Repair Work, which Seller 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; (v) no additional fees were charged or received by the Seller, Petitioner or Developer, the only cost incurred by Seller directly for the work being the salaries paid by Seller to its construction management representatives for overseeing completion of the Immediate Repair Work by the hired contractors; and (vi) Petitioner will cause its accountant to submit Agreed Upon Procedures outlining all costs and contractors and certifying same are in accordance with the Corporation rules, with regards to the Immediate Repair Work.

10. A waiver of the Rule will permit Petitioner to continue its application for non-competitive tax credits to finance a portion of the rehabilitation of the Development. Without this additional source of investor equity, the Petitioner will not have enough funds to preserve and rehabilitate these much needed 184 affordable units in Miami, Florida. Petitioner intends to acquire the Development in November of 2023. While the Development is currently encumbered by a SAIL Land Use Restriction Agreement until 2051, the re-syndication of the Development will extend the rent restrictions at the Development for an additional 30 years.

11. In this instance, Petitioner meets the standards for a waiver of the Rule. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, to provide relief from its rules if strict application of those rules will lead to unreasonable, unfair or unintended results in particular instances. Unless the Rule is waived to allow the Petitioner to continue its application for non-competitive housing credits, certain unreasonable, unfair and unintended results will occur, resulting in a substantial hardship to the Petitioner and the Development. 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. In this

specific instance, 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, will not be able to complete the much-needed rehabilitation of the Development. The Corporation will not be harmed by granting this Petition as the intent of the Rule will not be violated. The Rule was implemented to allow the Corporation to ensure eligible basis costs were incurred in accordance with Corporation's rules. Petitioner is able to provide assurances to the Corporation that the costs of the Immediate Repair Work were reasonable and otherwise incurred in accordance with the Corporation's rules.

12. The requested waiver of the Rule serves the purpose of the Statute that is implemented by the Rule. The Florida Housing Finance Corporation Act (Section 420.501, *et seq*.) was passed in order to encourage private and public investment in facilities for persons of low-income. The purpose of the creation of the Housing Tax Credit Program and Multifamily Mortgage Revenue Bonds Program is to stimulate creative private sector initiatives to increase the supply of affordable housing. By granting the waiver of Corporation's requirement that eligible rehabilitation work for the Development be conducted under a GMP Contract, Petitioner will be able to continue its application for non-competitive housing credits with all of its eligible rehabilitation costs accounted for, as requested in this Petition, the Corporation would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income.

F. ACTION REQUESTED

13. For the reasons set forth herein, Petitioner respectfully requests the Board (i) grant the requested waiver of the Corporation's rule which requires eligible rehabilitation work be

performed under a GMP Contract; (ii) grant the Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,



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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 11th day of October, 2023.



Andrew Bennett, Esq.
Fla. Bar No. 0125189