STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FINANCE CORPORATION

CEDAR OAKS SENIOR HOUSING LIMITED PARTNERSHIP, a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2021-041VW
FHFC Application No. 2020-159C

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.0072(28)(g) (7/11/2019)

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner Cedar Oaks Senior Housing Limited Partnership (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of the requirement in Rule 67-48.0072(28)(g), Florida Administrative Code ("F.A.C.") (7/11/2019) (the "Rule"), which requires the credit underwriter to follow certain procedures when utilizing the gap calculation in determining a recommendation for the amount of Housing Credit Allocation. Because the loan amount is not from a "traditional first mortgage lender," Petitioner respectfully requests permission to combine its Sponsor Note and Seller Note to form the first mortgage loan amount. Since the Sponsor Note and Seller Note are from the same ultimate source, they should be added together as, and considered to be, the first mortgage for gap calculation purposes. If this request is denied, and only the Sponsor Note is considered for purposes of determining the minimum qualifying first mortgage utilized in the gap calculation, Petitioner will suffer a severe reduction in its Housing Credit Allocation. In support, Petitioner states as follows:

A. THE PETITIONER

1. The address, telephone, facsimile numbers and e-mail address for Petitioner and its qualified representative are:

Matthew D. Rule
National Church Residences
2335 North Bank Drive
Columbus, OH 43220
Telephone: (614)273-3539
Fax: N/A
Email: MRule@NationalChurchResidences.org

2. The address, telephone and facsimile number and e-mail address of Petitioner's counsel is:

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street
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Tallahassee, Florida 32301
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B. THE DEVELOPMENT

3. The following information pertains to the development ("Development"):

- Development Name: Cedar Oaks
- Developer: National Church Residences
- County of Development: Volusia
- Number of Units: 44
- Type: Garden Apartments (acquisition and preservation)
- Demographics: Elderly Non-ALF
- Set Asides: 20% @ 40% AMI and 80% @ 60% AMI

- Funding Amounts: $468,683 9% housing credits (annual)

C. THE RULE FROM WHICH WAIVER IS REQUESTED

4. Petitioner requests a waiver of Rule 67-48.0072(28)(g), F.A.C. (7/11/19), which provides:

> For Competitive Housing Credits, the Credit Underwriter shall use the following procedures during the credit underwriting evaluation: . . . .
>
> (g) **When utilizing the gap calculation** in determining a recommendation for the amount of the Housing Credit Allocation as part of the process the Corporation uses to determine financial feasibility as set forth in Section 42(m)(2) of the IRC, the Credit Underwriter shall assume a first mortgage loan amount from a non-governmental agency (i.e., **a traditional first mortgage lender**) to be the greater of:
>
> 1. The actual amount committed to the Development, or
>
> 2. The amount of the proposed Development's minimum qualifying first mortgage as determined herein. The Development's minimum qualifying first mortgage shall be the lesser of a. or b. as follows: . . . .

(emphasis added).

D. STATUTES IMPLEMENTED BY THE RULE

5. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statutes relating to the State Apartment Incentive Loan Program contained in Section 420.5087 of the Florida Statutes, the HOME Investment Partnership Program and HOME Investment Partnership Fund, contained in Section 420.5089 of the Florida Statutes, and the allocation of the Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes. *See* §§ 420.5087, 420.5089, and 420.5099, Fla. Stat. (the "Statutes").

E. JUSTIFICATION FOR GRANTING WAIVER

6. Petitioner timely submitted Application No. 2020-159C on October 23, 2019 in response to RFA 2019-115 (Housing Credit Financing for the Preservation of Existing Affordable Multifamily Housing Developments).

7. On February 6, 2020, Petitioner received an invitation to enter credit underwriting.

8. A Carryover Allocation Agreement was executed on August 19, 2020.

9. Because the Development has Project Rental Assistance Contracts ("PRACs"),[1] it does not have traditional first mortgage financing. The PRAC program requirements did not allow for traditional debt and also required the rents be set well below market rents. In fact, the current restricted rents are more than 100% below market rents. As confirmed in the Market Study performed during credit underwriting, the average rent at the Development is $480 per month whereas the average market rent in Volusia County is $801 per month. Given the suppressed rents at the Development, it would be very challenging for a traditional lender to loan funds. Accordingly, National Church Residences filled the gap with a Sponsor loan, Seller financing, and Capital Magnet Fund dollars.

10. Applicant obtained two mortgages in conjunction with the Development: (a) a seller mortgage in the amount of $2,479,500, which was assigned from National Church Residences of Holly Hill, Inc. to National Church Residences Foundation on April 22, 2021 (the "Seller Note");[2] and (b) a mortgage dated April 22, 2021 for the benefit of National Church

[1] Developer applied to convert the PRACs to project based rental assistance, permitting application for low income housing tax credits.

[2] The Seller Note is based on a calculation of appraised value minus outstanding debt. The note is not in the name of National Church Residences, but rather the seller entity. Because the rents are well below market, as discussed above, traditional debt would not be feasible. National Church Residences therefore leveraged some of its Capital Magnet Fund dollars, which –

Residences in the amount of $490,500 (the "Sponsor Note").[3] Because National Church Residences is the sole owner of the seller entity, as well as the holder of the promissory note, the Seller Note and Sponsor Note come from the same ultimate source. Since the Seller Note and Sponsor Note are essentially from the same source, Petitioner respectfully requests that they be combined for purposes of determining the minimum qualifying first mortgage test utilized in the gap calculation.

11. If the Petition is not granted, the Sponsor Note ($490,050) would be considered the first mortgage. The Second draft Credit Underwriting Report states that the minimum qualifying first mortgage, per the Rule, would be $1,098,150. Thus, absent the waiver, an additional $607,650 would be added to the Gap Calculation, resulting in a reduction of housing credits of nearly $4,500 annually.

12. If the waiver is granted, Petitioner will still meet the intent of the Rule, which is to require the Petitioner to secure an amount of debt that is adequate to support the Development before accessing housing credit funds (*i.e.*, sufficiently leverage FHFC resources). As discussed above, traditional financing was not feasible due to the suppressed rents. Petitioner, through its principals, leveraged nearly $3,110,000, even opting to add $140,000 of Capital Magnet Fund dollars to help fill the financing gaps caused by the lack of traditional debt. By adding Capital Magnet Fund dollars, Petitioner was required to secure the Sponsor Note. If the waiver is denied, and Petitioner is required to obtain a loan – at a much higher rate – from a "traditional first mortgage lender" to pay off the seller financing, the purpose of the Rule would not be

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pursuant to a Capital Magnet Fund requirement – necessitated obtaining funds from its parent company in the form of the Sponsor Note.

[3] The Sponsor Note constitutes a true cash advancement from National Church Residences' parent company to financially assist the deal (*i.e.*, a soft cash flow contingent note) – a Capital Magnet Fund requirement imposed as a result of using Capital Magnet Fund dollars to leverage the financing gap.

satisfied. Such actions would not enhance the leveraging of FHFC resources in light of the level of funding from Petitioner's principals.

13. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., Florida Housing has the 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. Waivers shall be granted when the person who is subject to the rules demonstrates that the application of the rules would: (1) create a substantial hardship or, violate principles of fairness,[4] 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.

14. In this instance, Petitioner meets the standards for a waiver of the Rule. As set forth in paragraphs 9-12, above, strict application of the Rule to Petitioner's non-traditional financing will create substantial hardship for Petitioner by substantially reducing its Housing Credit Allocation. Paragraphs 9-12 also demonstrate that the purpose of the Rule and implementing statutes will still be achieved if the waiver is granted because Petitioner has secured an amount of debt that is adequate to support the Development before accessing housing credit funds. A loan through a traditional first mortgage lender would not more sufficiently leverage FHFC resources. The Sponsor Note and Seller Note should instead be combined to prevent the Development from appearing to be under-leveraged or otherwise under-estimating the amount of equity required to make the Development viable. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 44 affordable housing

[4] "Substantial hardship" means a demonstrated economic, technological, legal, or other type of hardship to the person requesting the variance or waiver. For purposes of this section, "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* § 120.542(2), Fla. Stat.

units will be preserved and made available for the target population in Volusia County, Florida. The waiver will therefore serve the purposes of the Statutes and the Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary low-cost housing in the State.

15. The requested waiver serves the purpose of the Statutes because one of the primary goals is to facilitate the availability of decent, safe, and sanitary housing in the State for low-income households. By granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing to persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable rental housing. *See* § 420.5099(2), Fla. Stat. The Development is one of the first PRAC deals in the country to go through the Rental Assistance Demonstration for PRAC conversion and a Low-Income Housing Tax Credit ("LIHTC") closing; likely because PRAC deals cannot support debt due to the program restrictions discussed above. The U.S. Department of Housing and Urban Development did not allow PRACs to leverage LIHTC to convert and fund long overdue capital improvements until 2019. LIHTCs provide a crucial mechanism for bringing in new capital to fund repairs, especially since the Development was not allowed a rent increase with the conversion. PRACs in general, and the Development specifically, house some of the most vulnerable older adults. The combination of onsite service coordinators and decent, affordable housing ensures these seniors have a healthy and safe living environment. Because traditional first mortgage lenders would not become involved with a PRAC deal due to the substantially low average rent and financials, Petitioner's principals leveraged approximately $3,110,000 of its own funds. If the housing credits are not funded, there will be no financing source available to fund the much needed repairs and preserve this PRAC.

F. WAIVER IS PERMANENT

16. The waiver being sought is permanent in nature.

G. ACTION REQUESTED

17. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver of the Rule and allow the Seller Note and Sponsor Note to be combined for purposes of determining the minimum qualifying first mortgage test utilized in the gap calculation; (ii) grant this 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

By: *s/ Brian J. McDonough*
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition For Rule Waiver is being served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation via CorporationClerk@floridahousing.org, with copies served U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 29th day of June, 2021.

By: *s/ Brian J. McDonough*
Brian J. McDonough, Esq.