STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. : 2021-045VW
APPLICATION NO.: _____

ORLANDO LEASED HOUSING ASSOCIATES VII, LLLP

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

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FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF RULE 67-21.027(6) F.A.C. AND THE FINAL COST CERTIFICATION APPLICATION PACKAGE REQUIREMENT TO CONFIRM CERTAIN ITEMS WITH THE THREE LARGEST DOLLAR SUBCONTRACTORS

Petitioner, Orlando Leased Housing Associates VII, LLLP ("**Petitioner**"), a Minnesota limited liability limited partnership authorized to conduct business in the State of Florida, pursuant to section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions respondent, Florida Housing Finance Corporation ("**Florida Housing**"), for a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, which in turn incorporates by reference the Final Cost Certification Application Package ("**Form FCCAP**"), as required pursuant to the Non-Competitive Application Package (Rev. 08-2016). Specifically, Petitioner seeks a variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification confirm certain items with the general contractor's three largest dollar subcontractors, as one of these three subcontractors could not be confirmed due despite multiple attempts to receive subcontractor's confirmation as further discussed below,

Petitioner asks for a variance from this requirement so that the certified public accountant may instead confirm items with the fourth largest dollar subcontractor. In support of this request, Petitioner states:

A. THE PETITIONER

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

Orlando Leased Housing Associates VII, LLLP
2905 Northwest Blvd. Suite 150
Plymouth, Minnesota 55441
Attention: Jaime Avery
Phone: (763) 354-5510
Email: Jaime.Avery@dominiuminc.com

2. The address and telephone number of Petitioner's counsel are:

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Nelson Mullins Riley & Scarborough, LLP
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B. THE DEVELOPMENT

3. On September 20, 2016, Petitioner submitted a Multifamily Revenue Bond Program Application to the Orange County Housing Finance Authority requesting $20,160,000 in tax exempt bonds (the "**Bonds**"). Petitioner thereafter acquired Landon Pointe 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 Landon Pointe Apartments. Petitioner applied for Non-Competitive Housing Credits and requested an annual amount of $1,305,733 in Housing Credits to assist in financing the rehabilitation of the 276-unit family development, known

as Landon Pointe Apartments (the "**Development**"). One hundred percent of the units of the Development will be restricted to 60 percent AMI for 30 years.

C. THE RULE FROM WHICH WAIVER IS SOUGHT

4. Petitioner requests a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, which adopts and incorporates the Form FCCAP. Specifically, Petitioner requests a waiver of or variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification request confirmation of certain cost-related items by the general contractor's three largest dollar subcontractors.

5. As a condition for receiving housing credits, each applicant must use the Form FCCAP to itemize all expenses incurred in association with construction or rehabilitation of a housing credit development, including expenses associated with the general contractor's use of subcontractors. *See* Rule 67-21.027(6) F.A.C. As part of the Form FCCAP, each applicant must submit, among other things, a General Contractor Cost Certification and an unqualified audit report prepared by an independent certified public accountant for the General Contractor Cost Certification. *Id*. The General Contractor Cost Certification is used to establish the actual total costs incurred by the general contractor in the delivery of the development and assists Florida Housing in determining certain development costs and the amount of subsidy to be allocated to the development. Form FCCAP, General Contractor Cost Certification Form and Instructions, p. 1. Florida Housing will not issue a final housing credit allocation until all required items in the Form FCCAP are received and processed. Rule 67-21.027(6) F.A.C. Rule 67-21.027(6) adopts and incorporates the Form FCCAP by reference. *Id.* ("The Final Cost Certification Application Package (Form FCCAP) is adopted and incorporated herein by reference, effective August 2016 …").

6. To assist the certified public accountant in completing an audit of the General Contractor Cost Certification, each applicant's general contractor must provide a list of all subcontractors to be used on the job, with amounts paid or to be paid. GCCC, p. 2. The certified public accountant must ask the three largest dollar subcontractors to confirm the following:

1) Confirm the construction contract amount;
2) Confirm any change orders;
3) Confirm what additional costs were incurred outside of the contract, if any;
4) Confirm the type of services provided (trade breakdown); and
5) Confirm amounts paid to date and balance(s), if any, to be paid. *Id*., pp 2.

7. In addition, the certified public accountant must randomly select other subcontractors sufficient in number (but in no event less than five) that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total construction cost, and review certain documentation to verify the amounts paid to each subcontractor. *Id.*, p. 2.

8. Petitioner requests a waiver of or variance from the requirement in the Form FCCAP, incorporated by reference into Rule 67-21.027(6), that the certified public accountant send the required confirmation requests to the three largest dollar subcontractors. One of the three largest dollar subcontractors proposed to be used for the Development, Home Depot, Inc. ("**Home Depot**"), has not responded to its confirmation requests after multiple attempts by the certified public accountant. Thus, the certified public accountant cannot obtain the required confirmation requests for this entity and seeks to send these confirmation requests instead to the fourth largest dollar subcontractor.

D. STATUTES IMPLEMENTED BY THE RULES

9. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act (the "**Act**"), the statute that designated the Corporation as the housing credit agency and created the Housing Tax Credit Program. *See* § 420.5099, *Fla. Stat.*

E. WAIVER WILL SERVE THE UNDERLYING PURPOSE OF THE STATUTE

10. Petitioner requests a waiver of or variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification send confirmation requests on certain cost-related items to the three largest dollar subcontractors used by the general contractor on the project.

11. In 2019, the Petitioner submitted to Florida Housing its final FCCAP along with the General Contractor Cost Certification (the "**Report**"). In the Report the certified public accountant that audited the General Contractor Cost Certification was only able to confirm one of the three largest dollar subcontractors (i.e., National Supply ("**National**")). The certified public accountant was only able to perform invoice, lien waiver and check copy testing for the second largest dollar subcontractor, Ferguson Facilities Supply ("**Ferguson**"), as the general contractor informed certified public accountant that Ferguson was a supplies vendor and that general contractor did not believe that Ferguson would be willing or able to provide the confirmation of the costs request. Further, the certified public accountant also attempted to confirm the third largest dollar subcontractor, Born Again Concrete ("**Born Again**"); however, after various failed attempts to facilitate this confirmation, the certified public accountant ultimately performed invoice, lien waiver and check copy testing over Born Again's costs.

12. As a result of not receiving the confirmation requests from both Ferguson and Born Again in 2019, the certified public accountant moved to the next largest dollar subcontractor;

however, the fourth largest dollar subcontractor listed was the general contractor's payroll, which was neither a true "subcontractor" nor a supplies vendor. Therefore, the certified public accountant moved from the fourth to the fifth largest dollar subcontractor, DevCon MEP ("**DevCon**"), in which certified public accountant successfully received DevCon's confirmation.

13. The certified public accountant also received confirmations from five other randomly selected subcontractors and further performed testing over the invoices, lien waivers and check copies of eleven other randomly selected subcontractors that, when taken together with the confirmed subcontractors (i.e., National and DevCon), and the testing of Ferguson and Born Again, totaled 48.75 percent of the total construction costs either being confirmed or tested. When Petitioner submitted the Report, Florida Housing responded with many comments to fix certain errors, one of which, was to correct the general contractors cost breakdown to conform to Florida Housing's forms. Unfortunately, at the time, the general contractor's accounting system was not adequately supported to perform such a task and conforming its accounting system to be compliant with Florida Housing's rules took general contractor many months to correct.

14. In March of 2021, general contractor finally sent certified public accountant an updated cost breakdown (the "**New Cost Breakdown**"). In the New Cost Breakdown, there were multiple errors, which caused the original confirmed and tested costs to no longer reconcile to the New Cost Breakdown. The certified public accountant requested that the general contractor investigate and correct the errors within the New Cost Breakdown and provide certified public accountant with a corrected version.

15. In May of 2021, the general contractor sent certified public accountant a corrected version of the New Cost Breakdown (the "**Corrected Cost Breakdown**"). However, certified public accountant noted, after reviewing this form to ensure that all errors were corrected, that the

top three largest dollar subcontractors had changed to: (1) Home Depot ($444,655.04), replacing general contractor's payroll as one of the largest dollar subcontractors; (2) National ($425,944.38); and (3) Ferguson ($411,231.67). The certified public accountant immediately sent confirmation requests to the top three largest dollar subcontractors and an additional six confirmations to randomly selected subcontractors, which happened to fall within the top fifteen largest dollar amount subcontractors listed on the Corrected Cost Breakdown. The certified public accountant received its confirmation requests back from National, Ferguson, and from four out of the six additional subcontractors. Nonetheless, after multiple failed attempts, the certified public accountant was unable to receive its confirmation requests back from Home Depot.

16. In the absence of Home Depot's confirmation, certified public accountant requested all invoices, lien waivers and check copies from general contractor to materially confirm Home Depot's cost. However, general contractor informed certified public accountant, that all such accounting support is keep offsite, and that it would take general contractor some time to send certified public accountant the support. As it currently stands, the certified public accountant and the general contractor are working to confirm the Home Depot costs. Further, in the abundance of precaution, the certified public accountant sent a confirmation request to the fourth largest dollar subcontractor (*i.e.*, Born Again ($382,210)), in case Home Depot was not in a position to provide the cost confirmation. Certified public accountant has successfully received Born Again's confirmation as of June 2021.

17. As such, the certified public accountant in performing the audit of Petitioner's General Contractor Cost Certification was able to confirm those items outlined in the Form FCCAP with two of the three largest dollar subcontractors. Additionally, certified public account

confirmed four out of the top five largest dollar subcontractors (*i.e.*, National, Ferguson, Born Again, and DevCon ($333,734.24)).

18. Petitioner asks that Florida Housing grant a variance and allow the certified public accountant to submit the required confirmation requests to the fourth largest dollar subcontractor, instead of Home Depot. The fourth largest dollar subcontractor is Born Again ($382,210.00). With the substitution of Born Again for Home Depot, the certified public accountant was able to confirm the various cost-related items outlined in Form FCCAP with National, Ferguson, Born Again Concrete, DevCon, along with eight other randomly selected subcontractors, which represent an overall percentage of 51.42 percent of the total construction costs of the development. Additionally, the certified public accountant performed invoice, lien waiver and check copy testing for another twelve subcontractors. In total, the percentage of the total construction costs confirmed is 51.42 percent, Home Depot not included. The total percentage of the total construction costs tested via reviewing invoices, lien waivers and check copies are 5.77 percent. Thus, the total percentage of the construction costs both confirmed and tested stands at 57.19 percent, the sum of 51.42 and 5.77 percent, respectively. As such, in accordance with the Form FCCAP's requirement to verify the amounts paid to the subcontractors accounting for at least 40 percent of the total construction costs, the certified public accountant was still able to verify a substantial portion (more than 50 percent) of the costs for subcontractors for the project.

19. Without the grant of a waiver or variance, the certified public accountant will not be able to complete the required audit and Petitioner will not be able to submit a complete Form FCCAP, jeopardizing its housing credit allocation and its ability to move forward with rehabilitating the Development.

20. 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.

21. Here, Petitioner meets the requirements for a waiver or variance. The requested variance will not adversely impact the Development or Florida Housing and will ensure that 276 affordable family housing units will be preserved and made available for the target population in Orange County. The strict application of the rule and Form FCCAP will create substantial hardship for Petitioner because completion of the Form FCCAP is a condition for receiving a final housing credit allocation.

22. The variance will still serve the underlying purposes of the rule. Even with substituting the fourth largest dollar subcontractor for Home Depot in its review, the certified public accountant will be able to confirm the required cost-related items under the Form FCCAP with subcontractors whose costs represent a similar percentage of the total construction cost. The requested waiver or variance will also not hinder the certified public accountant in verifying the costs of subcontractors representing more than 40 percent of the total construction cost.

[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.

23. Further, 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.

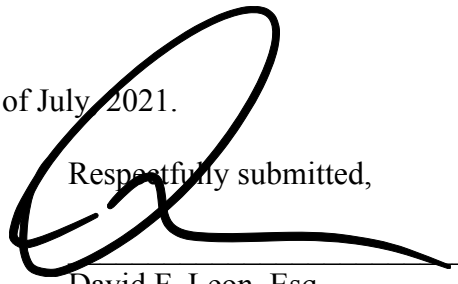
E. TYPE OF WAIVER

24. The waiver or variance being sought is permanent in nature.

F. ACTION REQUESTED

25. For the reasons set forth herein, Petitioner respectfully requests the Corporation (*i*) grant the requested waiver of or variance from Rule 67-21.027(6), F.A.C, and the requirement of the Final Cost Certification Application Package, incorporated by reference, which requires that the certified public accountant performing the audit of the General Contractor's Cost Certification send confirmation requests to the general contractor's three largest dollar subcontractors, and authorize sending those confirmation requests to the general contractor's first, second, and fourth largest dollar subcontractors instead; (*ii*) grant the Petition and all the relief requested herein; and (*iii*) grant such further relief as it may deem appropriate.

Respectfully submitted on the 12th day of July, 2021.



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

The 12th day of July, 2021.

NELSON MULLINS RILEY & SCARBOROUGH, L.L.P.

By: _____
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