STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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DURHAM PLACE, LTD.,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2021-085VW
Application No. 2020-480CSN

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.002(96), F.A.C. (7/11/19) AND THE 2019 QAP

Petitioner Durham Place, Ltd. (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of the provisions of the 2019 Qualified Allocation Plan ("2019 QAP") as incorporated and adopted by Rule 67-48.002(96), Florida Administrative Code ("F.A.C.") (July 11, 2019), such that Petitioner may return its 2020 Housing Credit Allocation now as opposed to waiting until the last quarter of 2022. While Petitioner has expended approximately $737,854 to diligently move the development forward, delays related to labor and supply chain problems, as well as delays related to issues raised by nearby residents, necessitate this request for waiver. 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:

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

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B. DEVELOPMENT BACKGROUND

3. The following information pertains to the development underlying Petitioner's application:

- Development Name: Durham Place
- Development Address: Lake Jessamine Drive; Approximately 725 feet Northwest of the intersection of Lake Jessamine Drive and Hall Lane, Unincorporated Orange County
- County: Orange
- Developers: Durham Place Developer, LLC and Step Up Developer, LLC
- Number of Units: 102 new construction
- Type: Garden Apartments
- Set Asides: 85% of units at or below 60% AMI and 15% at or below 33%.
- Demographics: at least 80% of the total units will be set aside for Homeless individuals and families, and at least 15% will be set aside for Persons with Special Needs.

- Funding: HC request of $2,375,000 annually; ELI Loan request of $359,500; SAIL request of $4,771,550; and National Housing Trust Fund Loan in the amount of $872,000.

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 of Rule 67-48.002(96), effective July 11, 2019, which provides in pertinent part:

> "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2019 Qualified Allocation Plan which is adopted and incorporated herein by reference, effective upon approval by the Governor of the State of Florida, pursuant to Section 42(m)(1)(B) of the IRC and sets forth the selection criteria and the preferences of the Corporation for Developments which will receive Housing Credits. The QAP is available on the Corporation's website under the Multifamily Programs link or by contacting the Housing Credit Program at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, or from http://www.flrules.org/Gateway/reference.asp?No=Ref-10769.

6. Subsection II.K. of the 2019 QAP, provides as follows:

> Notwithstanding any other provision of this QAP, where a Development has not been placed in service by the date required pursuant to Section 42 of the IRC, or it is apparent that a Development will not be placed in service by the date required pursuant to Section 42 of the IRC, and such failure is due to circumstances beyond the Applicant's control, and the Applicant has returned its Housing Credit Allocation in the last calendar quarter of the year in which it was otherwise required to be placed in service pursuant to Section 42 of the IRC, the Corporation may reserve allocation in an amount not to exceed the amount of Housing Credits returned, and may issue a Carryover Allocation Agreement allocating such Housing Credits to the Applicant for either the current year or the year after the year in which the Development was otherwise required to be placed in service pursuant to Section 42 of the IRC, provided the following conditions have been met: (i) the sponsor must have provided written notice to the Corporation, describing the circumstances, all remedial measures attempted by the Applicant to mitigate the delay, and any other pertinent information, prior to returning the allocation; and (ii) the Executive Director must find and determine that the delay was caused by circumstances beyond the Applicant's control, that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay, that the Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally allocated, and that the Development is still desirable in terms of meeting

affordable housing needs. A Development located in a HUD designated DDA or QCT at the time of original allocation may retain its designation as such.

7. The process found in the 2019 QAP requires an applicant to return its allocation of housing tax credits in the last quarter of the year in which it was otherwise required to be placed in service before a tax credit exchange request can be approved by the Executive Director of Florida Housing. Petitioner is requesting a waiver of this limitation on the timing of the tax credit exchange to allow a credit exchange now rather than in the last calendar quarter of 2022. As demonstrated below, the delay was caused by circumstances beyond Petitioner's control, due diligence was employed in an attempt to resolve those circumstances, the Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally allocated, and the Development is still desirable in terms of meeting affordable housing needs.

E. STATUTES IMPLEMENTED BY THE RULE AND THE 2019 QAP.

8. The Rule implements Section 420.5087 (State Apartment Incentive Loan Program), Section 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund), and Section 420.5099 (creating the Housing Credits Program) of the Florida Housing Finance Corporation Act (the "Act").[1] The Act designates FHFC as the State of Florida's housing credit agency within the meaning of Section 42(h)(8)(A) of the Internal Revenue Code of 1986. As the designated agency, FHFC is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits ("Allocation Procedures"). *See* § 420.5099(1) and (2), Fla. Stat. Accordingly, the, Rule implements, among other sections of the Act, the statutory authorization for Florida Housing's establishment of Allocation Procedures for the HC Program. *Id*.

[1] The Act is set forth in Sections 420.50 through 420.55 of the Florida Statutes.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE.

9. Petitioner timely submitted Application No. 2020-480 CSN for the Development on March 31, 2020 ("Application") in response to RFA 2020-103 (Housing Credit and SAIL Financing to Develop Housing for Homeless Persons).

10. The Development received an allocation of the 2020 Housing Credit dollar amount meeting the requirements of Section 42(h)(1)(E) and (F) of the Internal Revenue Code of 1986 as amended ("Tax Credits") and was invited to credit underwriting.

11. Florida Housing staff executed a 2020 Carryover Allocation Agreement ("CAA") on or about December 22, 2020 for the allocation of its Tax Credits. The CAA required Petitioner to demonstrate site control and incur at least ten percent of the reasonably expected basis of the Development (the "10% Test") on or before June 30, 2021. This deadline was later extended to December 23, 2021. Petitioner was also required under the CAA to close its tax credit partnership and to commence construction by September 30, 2021, which deadline was extended to December 31, 2021. Failure to comply with the foregoing CAA deadlines (collectively, the "CAA Deadlines") will cause the Housing Credits allocated within the CAA to be deemed returned to Florida Housing under 26 U.S.C. § 42(h)(3)(C).

12. Pursuant to 26 U.S.C. 42(h)(1)(E)(i), the Development must be placed in service no later than the close of the second calendar year following the calendar year in which the allocation is made; in this case, the federally-mandated placed-in-service date would be December 31, 2022.

13. Petitioner requests a waiver of the 2019 QAP to permit Florida Housing to approve the tax credit exchange now as opposed to waiting until the last quarter of 2022. It is not possible for Petitioner to meet the CAA Deadlines for reasons that are outside of Petitioner's control. Petitioner is experiencing delays beyond its control, stemming from an increase in

construction costs due to the volatility of the industry resulting from labor and supply chain disruptions related to the COVID-19 pandemic. As construction costs escalated to the point of non-feasibility, the Development was forced to undergo value engineering and to renegotiate with contractors in order to execute a manageable construction contract. The unprecedented escalation in construction costs over the past year resulted in a domino effect of delays in the pre-development process.

14. Petitioner also experienced delays related to a "not in my back yard" ("NIMBY") group that raised numerous issues regarding building height, wildlife, archaeological impact, the environment, wetlands, etc. Petitioner completed all applicable studies and permit applications required by law to address each issue. The Development is in full compliance with the County Code and ordinances. The only variance obtained pertains to adding a pitched roof to the building and decreasing the parking ratio.

15. In an attempt to mitigate the delays related to the NIMBY group, Petitioner took remedial actions that are not required by law. For example, Petitioner held a community meeting in April 2021 to distribute information about the Development at the request of a District Commissioner. Unfortunately, the meeting resulted in the NIMBY group raising more issues and causing further delays. Requests related to the Development that are typically approved at the County's staff-level must instead be brought to the Board of County Commissioners for public hearing due to continued NIMBY involvement. Waiting for County Commission approval can add delays of weeks to months. As an additional attempt to remediate the delay, Petitioner re-designed several items on the site plan in August 2021 to accommodate requests from the NIMBY group. Such revisions were not required by law because the Development was at all times in compliance with the County Code. The site plan revision required resubmittal of

the entire permit package, as well as a new review of the whole package by Orange County. Petitioner anticipates final approval of the revised site plan on November 30, 2021.

16. The foregoing delays have also prevented Petitioner from commencing construction.

17. When Petitioner submitted the Application in March 2020, COVID had not yet affected the supply chain, nor labor force. The Development could not have continued to be viable without the actions taken by Petitioner to lower costs – time-consuming actions that have prevented Petitioner from complying with the CAA Deadlines.

18. While Petitioner anticipates being able to close in late December 2021, it will not have sufficient time to satisfy the CAA Deadlines.

19. Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2022.

20. As set forth above, this request was not necessitated through any fault of Petitioner. Rather, Petitioner exercised due diligence in attempting to move the Development towards construction. In fact, approximately $737,854 has been expended to date in relation to the Development and has succeeded in obtaining:

- Fully completed soils tests and environmental tests (the Phase I Environmental was completed October 14, 2020; the original Phase 1 is dated August 10, 2020, the updated Phase 1 is dated April 9, 2021 and the further updated Phase 1 is dated September 24, 2021; and the Limited Soils Assessment/Phase 2 is dated November 1, 2021)
- Executed contract with the general contractor dated October 21, 2021

- The architectural plan, engineering plan, and site plan have been submitted and Petitioner anticipates receiving final approval at the November 30, 2021 Orange County Board of County Commissioners' meeting.

21. After successfully timing the market and now having a manageable construction contract in place, Petitioner anticipates an imminent completion of the Credit Underwriting Report and that it will close on the Tax Credit Partnership and commence construction in November of 2021.

22. If the Petition is denied, the Development cannot move forward because Petitioner will not have sufficient time to satisfy the CAA Deadlines and will lose the allocated Housing Credits. Without this funding source, Orange County will thus be denied these 102 affordable housing units.

23. This Petition should be granted, as opposed to de-obligating the award, because Orange County is currently experiencing a shortage of affordable housing units for persons with special needs, such as mental health issues, experiencing homelessness. Step Up on Second Street, Inc., which is the sole Manager/Member of both the co-general partner (Step Up in Durham Place, LLC) and the co-developer (Step Up Developer, LLC), is a non-profit that will provide all supportive services for the community, along with all funding to provide these services. Petitioner, which includes its non-profit partner, has already committed a substantial amount of funds towards the Development, which costs would not be reimbursed if the award is de-obligated. Granting the Petition will result in the delivery of 102 affordable housing units much faster than would reallocating the funding to a new development.

24. Furthermore, the Development will provide highly desirable functions in addition to affordable housing. The Development's primary objective will be to provide permanent

supportive housing for homeless individuals and families, with a particular focus on the chronically homeless individuals with a mental disability. As a permanent supportive housing services provider, the Development's mission is to deliver compassionate support to people experiencing mental health issues to help them recover, stabilize, and integrate into the community. Through dynamic local and national partnerships, the Development will provide positive social and learning environments, vocational training, permanent supportive housing opportunities, and recovery services to empower individuals to cultivate lives of hope and dignity. Additionally, the Development's team will exercise innovative leadership and advocacy to increase public understanding, support and acceptance of all people experiencing mental health issues.

25. In pre- and post-housing engagement, the Development will utilize Assertive Community Treatment ("ACT"), a team-based model designed to provide comprehensive, community-based psychiatric treatment, rehabilitation, and support to persons with serious mental illnesses. This service provides comprehensive services including health, mental health and substance abuse supports. Defining a process for the setting of goals is beneficial, and constant collaboration between case workers and clients to set goals in accordance with their priorities is critical. ACT allows the Development to work with clients in a comprehensive manner to assess current and evolving needs for a variety of issues such as; financial benefits and health insurance, substance abuse, psychological, and medical treatment and prevention services, access to transportation; employment and education; social supports; assistance with legal problems; and recreational activities. The Development's residents will receive intensive case management, life skills enhancement (such as cooking skills, healthy eating, and money management), substance abuse counseling and treatment, and connections to community

resources free of charge. All of these services are aimed at recovery and wellness. No matter the disability status, the Development's team will engage each individual and family where they are, and design a plan that will assist in recovery and stability. For Veteran residents, in addition to the Development's vast experience with the needs of this particular group, staff will connect each Veteran to the local VA and assist with obtaining any benefits for which they are eligible, medical care that may be needed, and short and long term plans for re-integration into the community. Each individual will be assessed by on site staff, and in conjunction with each resident, a voluntary services plan will be developed. Staff will work collaboratively with the residents, other service organization and the local Continuum of Care provider, Homeless Services Network to ensure open communication and a path to success has been established. Because all participation in services in voluntary, staff will continuously attempt to engage even the most resistant residents in hopes of establishing trust.

26. 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 rule demonstrates that the application of the rule would: (1) create a substantial hardship or, violate principles of fairness,[2] 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.

[2] "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.

27. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2019 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 102 affordable housing units will be preserved and made available for the target population in Orange County, Florida. The strict application of the 2019 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for Petitioner because it cannot – due to no fault of its own – satisfy the CAA Deadlines. Further, the waiver will serve the purposes of the Statute and the Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the state.

28. As mentioned above, the requested waiver serves the purpose of the Statute because one of the primary goals of the Statute is to facilitate the availability of decent, safe, and sanitary housing in the State for low-income households. Moreover, the Statute was enacted, in part, to encourage private and public investment in facilities for persons of low-income. By granting this waiver, and further ensuring the development of 102 affordable housing units in Orange County, Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable housing. *See* § 420.5099(2), Fla. Stat.

29. The foregoing demonstrates the hardship and other circumstances justifying this Petition.

30. Should Florida Housing require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

G. <u>ACTION REQUESTED</u>

31. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver to permit the requested credit exchange, immediate return of

Petitioner's 2020 Housing Credit Allocation, and an immediate allocation of new Housing Credits; (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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By: */s/ Brian J. McDonough*
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CERTIFICATE OF SERVICE

This Petition is being served by electronic transmission for filing with the Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 15th day of November, 2021.

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