STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2024-004VW

APOLLO GARDENS, LLLP,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION

Respondent.

Application No. 2022-271 CAN

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FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF RULE 67-48.002(96) AND THE 2022 QUALIFIED ALLOCATION PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS

Apollo Gardens, LLLP, a Florida limited liability limited partnership ("Petitioner"), submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2023 Housing Credit Allocation prior to the third quarter of 2025. The return of these Housing Credits is required before the Corporation may reserve an allocation of Housing Credits that Petitioner requests be immediately allocated. *See* Rule 67-48.002(96), Florida Administrative Code (2021) (the "Rules"), and 2022 Qualified Allocation Plan Section II.J. Due to events outside of Petitioner's control, Petitioner cannot meet the "placed in service" and "10% test" deadlines as required by the Carryover Allocation Agreement.

1. Pursuant to Section 120.542, Fla. Stat. (2023) and Rules 28-104.001 through 28-104.006, F.A.C., Petitioner requests a waiver of Rule 67-48.002(96), Florida Administrative Code (2021), and of Section II.J of the 2022 Qualified Allocation Plan ("QAP") to allow the immediate return of its 2023 Housing Credit Allocation, and an immediate allocation of new Housing Credits (2024 or later).

2. The name, address, telephone and facsimile numbers for Petitioner and its qualified representative are:

Apollo Gardens, LLLP
1398 S.W. 1st Street
Miami, FL 33155
Attn: Stephanie Berman
305-371-8300 (telephone)
sberman@carrfour.org (e-mail)

3. The name, address, telephone and facsimile numbers of Petitioner's attorneys are:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, FL 33131
305-347-7308 (telephone)
305-347-7808 (facsimile)
gcohen@shutts.com (e-mail)

4. Pursuant to RFA 2022-210, Petitioner timely submitted its application for competitive Housing Credits under the Low Income Housing Tax Credit program ("LIHTC Program" or "HC Program"). *See* Application Number 2022-271CAN.

5. Equity raised from Housing Credits will be used for the construction of 84 residential units (all of which will be low-income housing tax credit units) to be known as Apollo Gardens (the "Development"). The Development will serve low and extremely low income adult persons requiring independent living services in order to maintain housing or develop independent living skills and who have a disabling condition that neither currently impairs nor is likely to impair their physical mobility, in the City of Titusville and Brevard County, Florida.

6. Petitioner's application was selected for funding by FHFC, and Petitioner was invited to credit underwriting in August 2022.

7. Under Rule 67-48.028(1), if an applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, such applicant

must enter into a "carryover allocation agreement" with the Corporation by December 31 of the year in which the preliminary allocation is issued. On April 13, 2023, Petitioner and the Corporation entered into the carryover allocation agreement for the Development (the "carryover Allocation Agreement"). The carryover allocation may (under Section 42 of the Internal Revenue Code) allow the applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service; in the instant case the Corporation mandated in the carryover allocation agreement that the development be placed in service by December 31, 2025. The carryover allocation agreement requires satisfaction of the 10% test by October 31, 2023 (extended to April 21, 2024 upon Petitioner's request) (collectively, the "Deadlines"). In order to meet the 10% test, Petitioner will need to have closed debt and equity financing, which will likely not occur by April 21, 2024.

8. As explained more fully below, there is uncertainty as to whether or not the Development will be able to meet the Deadlines, and as such Petitioner is requesting an exchange of Housing Credits in order to effectuate an extension of such deadlines.

9. Since being preliminarily selected for funding and invited to credit underwriting, the Development has suffered unforeseen events outside of its control that make it clear that the Development may not be able to meet its December 31, 2025 placed in service deadline, or meet the 10% test by April 21, 2024. These challenges are set forth below:

(a) Petitioner commenced pre-development activities in September 2022 upon receipt of its invitation to credit underwriting from the Corporation, after resolution of all appeals pertaining to RFA 2022-210. Petitioner has been processing all necessary pre-development and development approvals diligently since that time. Petitioner submitted for site plan approval in February 2023 and received conditional site plan approval in November

2023. Petitioner received HUD Environmental approval in March 2023. Petitioner requested reduction of parking requirements from the City of Titusville, and received City Design Review Committee approval of such request in August 2023. Petitioner has commenced preparation of construction plans which are approximately 50% complete.

(b) However, in the third quarter of 2023, a resident of a nearby single-family home filed a complaint against Petitioner, seeking (among other things) to prohibit the City of Titusville from issuing any development orders for the Development. Petitioner was served with the complaint on August 25, 2023.

(c) On August 28, 2023 Petitioner filed a motion to dismiss the above complaint, and (in September 2023) separately filed a Fair Housing Complaint against the plaintiff and is awaiting a decision with respect thereto. On December 12, 2023, Petitioner's motion to dismiss the complaint was granted without prejudice. On January 3, 2024, the plaintiff filed an amended complaint, setting forth primarily the same legal theories and arguments used in her previously dismissed complaint. Petitioner filed a motion to dismiss the amended complaint with prejudice (meaning it cannot be refiled again) on January 16, 2024, and the City of Titusville thereafter filed its own, substantially similar, motion to dismiss.

(d) Since that time, Petitioner and the party filing the amended complaint have entered into settlement negotiations but have not yet reached agreement on a settlement. The hearing on Petitioner's motion to dismiss the amended complaint is scheduled to be heard on March 15, 2014.

(e) Petitioner will (assuming the complaint is resolved favorably) proceed with the completion of construction drawings and permitting. Petitioner estimates completion of such drawings and submission for permitting by the fourth quarter of 2024, resulting in a financial closing in the third quarter of 2025 and placement in service in the fourth quarter of 2026.

(f) Due to the delays described above, the estimated completion date for the Development does not meet the December 31, 2025 placed in service date required by the Carryover Allocation Agreement.

(g) As noted above, Petitioner is required to satisfy the 10% test by April 21, 2024. Due to the delays described above, Petitioner will not be able to meet this deadline. As such, Petitioner will be unable to satisfy the 10% test, further giving rise to the necessity of exchanging the 2023 Housing Credits for later Housing Credits (2024 or later) in order to obtain a later date for satisfaction of the 10% test.

10. As discussed above, the delays have been caused by circumstances outside Petitioner's control. As a result, such delays make it impossible to meet the April 21, 2024 10% test deadline and the December 31, 2025 placed in service deadline.

11. As set forth more fully below, Petitioner seeks to return its 2023 Housing Credit allocation now, rather than wait for the third calendar quarter of 2025 as required under the QAP, and obtain from the Corporation an immediate allocation of new Housing Credits with a later required 10% test date and placed in service date.

12. The requested waivers and variance will not adversely affect the Development. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner as set forth herein, (b) deprive the City of Titusville and Brevard County of new constructed rental

units set aside for low-income and extremely low-income tenants with special needs, and (c) violate principles of fairness. Petitioner already acquired the land and has invested approximately $1,980,000 to date in the development, and respectfully requests the relief sought herein in order to keep Development of this badly needed new construction of special needs affordable housing moving forward.

13. Section 42(m) of the Internal Revenue Code requires each state allocating agency to adopt an allocation plan for the allocation and distribution of federal low income housing tax credits. The Corporation, as the allocating agency for the State of Florida, must distribute housing credits to applicants pursuant to its qualified allocation plan.

14. The Corporation's 2022 Qualified Allocation Plan (Section II.J) (incorporated by Rule 67-48.002(96)) provides that Housing Credits may be returned **only** after the second calendar quarter of the year in which a development is required to be placed in service:

> ...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 the Applicant has returned its Housing Credit allocation after the end of the second 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 will reserve allocation in an amount not to exceed the amount of Housing Credits returned, and will 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..."

QAP at Section II.J.

15. The applicable Rules for which waivers are requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),[1] the statute that created

[1] The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.55 of the Florida Statutes (the "Act").

the Housing Credits Program. *See* § 420.5099, Fla. Stat. (2023). 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"). §§ 420.5099(1) and (2), Fla. Stat. (2023). Accordingly, the Rules subject to Petitioner's waiver requests are implementing, among other sections of the Act, the statutory authorization for the Corporation's establishment of Allocation Procedures for the HC Program. §§ 420.5099(1) and (2), Fla. Stat. (2022).

16. The requested waivers will ensure the availability of Housing Credits which might otherwise be lost as a consequence of development delays described herein.

17. The facts set forth in Sections 9 through 14 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for Rule waiver.

18. As demonstrated above, the requested waiver serves the purposes of Section 420.5099 and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households by ensuring:

> The maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.

§ 420.5099(2), Fla. Stat. (2023).

19. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable rental housing. In addition,

grant of the requested waiver will permit the construction of much needed housing for low-income and extremely low-income tenants with special needs. Finally, grant of the requested waiver will enable Petitioner to utilize (and not lose) its significant investment in due diligence expenses (and acquisition of the land) that cannot be recouped if the requested waiver is not granted.

20. The requested waiver will not adversely impact the Development or the Corporation.

21. The waiver being sought is permanent in nature.

Should the Corporation require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver.

WHEREFORE, Petitioner Apollo Gardens, LLLP, respectfully requests that the Corporation:

A. Grant the Petition and all the relief requested therein;

B. Waive the provisions of the Qualified Allocation Plan (incorporated by Rule 67-48.002(96)) prohibiting Petitioner from returning Housing Credit Allocations prior to the third quarter of 2025;

C. Allow the immediate return of Petitioner's 2023 Housing Credit Allocation;

D. Immediately allocate new Housing Credits to Petitioner with a later placed in service date, in an amount equal to the amount of its 2023 Housing Credit Allocation; and

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

GARY J. COHEN
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200 S. Biscayne Blvd., Suite 4100
Miami, Florida 33131
(305) 347-7308
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The Original Petition is being served by email and overnight delivery for filing with the Corporation Clerk of the Florida Housing Finance Corporation, 227 North Bronough Street, City Centre Building, Room 5000, Tallahassee, Florida 32399, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 22nd day of February, 2024.

GARY J. COHEN