STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING FINANCE CORPORATION

THE LANDINGS AT SUGARLOAF KEY, LLC

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

FHFC Case # 2021-002VW

APPLICATION NO. 2019-010CS

PETITION FOR WAIVER OF RULE 67-48.0072(21)(B) AND FOR WAIVER OF THE QUALIFIED ALLOCATION PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS AND RULE 67-48.002(96)

Petitioner, The Landings at Sugarloaf Key, LLC, a Florida limited liability company (the "Petitioner") submits its petition to Respondent, Florida Housing Finance Corporation (the "Corporation"), for a waiver of Rule 67-48.0072(21)(b), F.A.C. in effect at the time Petitioner submitted its application in response to the Corporation's Request for Applications 2018-115 (the "RFA"), to allow Petitioner to extend the Firm Loan Commitment deadline for the State Apartment Incentive Loan ("SAIL") funding allocated to Petitioner pursuant to the RFA. In addition, Petitioner submits its Petition for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2019 Housing Credit Allocation prior to the last quarter of 2021. The return of the 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 (2019) and 2019 Qualified Allocation Plan Section II.K. In support of this petition (the "Petition"), Petitioner states as follows:

A. Petitioner and the Development.

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

The Landings at Sugarloaf Key, LLC
c/o Rural Neighborhoods, Inc.
19308 SW 380th Street
Florida City, FL 33034
(305) 242-2142
SteveKirk@ruralneighborhoods.org

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

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2. Pursuant to the RFA, Petitioner timely submitted its application for low-income housing tax credits ("Credits") and SAIL funding. See Application Number 2019-010CS. Petitioner was preliminarily awarded $3,534,000.00 in SAIL funding under the RFA (the "SAIL Award"). The SAIL Award Firm Loan Commitment issuance deadline was January 2, 2020, which was twelve (12) months from the invitation to enter credit underwriting.

3. 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 October 8, 2019, Petitioner and the Corporation entered into a Carryover Allocation Agreement for the Development. The carryover allocation (under Section 42 of the Internal Revenue Code) may 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 October 31, 2021.

4. At the meeting of the Board of Directors of the Corporation (the "Board") on July 17, 2020, the Board granted Petitioner's request to extend the loan commitment issuance deadline to January 31, 2021.

5. The SAIL Award is a critical part of the financing for the new construction of 60 units of affordable family/workforce housing to be known as Dockside at Sugarloaf Key, serving income qualifying persons (the "Development"). The development is located in Monroe County.

6. For the reasons explained more fully below, the SAIL Award Firm Loan Commitment will not be issued by the January 31, 2021 deadline and the requirement under the Carryover Allocation Agreement that the development be placed in service by October 31, 2021 cannot be met. Due to (a) substantial opposition received from neighboring landowners in Monroe County to Petitioner's major conditional use application, and (b) the impact of the Covid-19 pandemic, Petitioner is requesting (i) to return its 2018 Housing Credit allocation and obtain from the Corporation an immediate allocation of 2021 Housing Credits, and (ii) an extension of the firm loan commitment issuance deadline until January 31, 2022.

B. Rules from Which the Waiver is Sought.

7. The relevant portion of the Rules in effect at the time the SAIL funds were awarded for which this waiver is sought, provides as follows:

> "(21) Information required by the Credit Underwriter shall be provided as follows:
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> ***
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> (b) For SAIL, EHCL, and HOME, unless stated otherwise in a competitive solicitation, the firm loan commitment must be issued within twelve (12) months of the Applicant's acceptance to enter credit underwriting. Unless an extension is approved by the Corporation in writing, failure to achieve credit underwriting report

> approval and issuance of a firm loan commitment by the specified deadline shall result in withdrawal of the preliminary commitment. Applicants may request one (1) extension of up to six (6) months to secure a firm loan commitment. All extension requests must be submitted in writing to the program administrator and contain the specific reasons for requesting the extension and shall detail the time frame to achieve a firm loan commitment. In determining whether to grant an extension, the Corporation shall consider the facts and circumstances of the Applicant's request, inclusive of the responsiveness of the Development team and its ability to deliver the Development timely. The Corporation shall charge a non-refundable extension fee of one (1) percent of each loan amount if the request to extend the credit underwriting and firm loan commitment process beyond the initial twelve (12) month deadline is approved. If, by the end of the extension period, the Applicant has not received a firm loan commitment, then the preliminary commitment shall be withdrawn." Rule 67-48.0072(21)(b), F.A.C. (2018).

8. The Corporation's Qualified Allocation Plan (Section II.K) provides that Housing Credits may be returned **only** in the last 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 or it is apparent that a development will not be placed in service by the date required, 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…"

2019 QAP at Section II.K (emphasis added).

C. Statute Implemented.

9. The Rules for which a waiver is requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute that created the SAIL

program and provides for the allocation of Housing Credits. See §§ 420.5087 and §§ 420.5099(2), Florida Statutes (2019).

10. Pursuant to Chapter 120.542(1), Florida Statutes, "[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation." Therefore, under Section 120.542(1), Florida Statutes and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its requirements when strict application of these requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

> "Variances and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "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." Section 120.542(2), Florida Statutes.

11. In this instance, Petitioner meets the standards for a waiver.

D. Justification for Petitioner's Requested Waiver

12. Petitioner was previously granted an extension to secure a firm loan commitment of the SAIL Award, extending such deadline to January 31, 2021. A further extension of the deadline to secure a firm loan commitment may not be granted without a waiver of the Rule.

13. Petitioner is requesting an extension of the deadline to secure a loan commitment from January 31, 2021 to January 31, 2022, to have additional time to complete permitting and credit underwriting for the Development. The reasons for this request are as set forth below.

14. Petitioner is required to place the Development in service by October 31, 2021, pursuant to the provisions of its Carryover Allocation Agreement. Petitioner is requesting to return its 2019 Housing Credit Allocation now, rather than wait for the last calendar quarter of 2021 as required under QPA, and obtain from the Corporation an immediate allocation of new housing credits (2021) with a later required place in service date, in order to have additional time to complete the permitting and credit underwriting for the Development. The reasons for this request are as forth below.

15. Petitioner has faced and continues to face substantial opposition from organized entities and neighboring landowners in Monroe County to its major conditional use application causing the Developer and Applicant to retain planners, traffic engineers, biologists, legal counsel, and other professionals to establish an extensive record and address expressed concerns. These groups have previously appeared before board and staff on several occasion expressing various reasons for their opposition to affordable housing.

16. Petitioner held two large voluntary public meetings of an estimated 100 and 80 attendees on Sugarloaf Key in which it presented conceptual drawings and polled neighborhood reactions to design alternatives. In addition, the Petitioner participated in an October 1st, 2020 mandatory community meeting and public participation required by the Monroe County Planning and Environmental Resources Department in accordance with the Monroe County Land Development Code.

17. Petitioner participated in a public Development Review Committee meeting on November 16th, 2020 in which Monroe County presented its staff report recommending approval of requested conditional uses and heard public comment.

18. Petitioner participated in an extensive public meeting of the Monroe County Planning Commission on December 16th, 2020 in which the conditional uses were approved 5-0 after public participation. In addition to supportive presentations, entities in opposition presented consultant experts in their effort to construct an alternate record.

19. Entities opposed to this approved action may appeal the Planning Commission approval to the Florida Division of Administrative Hearings ("DOAH") and other official forums. No time-certain date is known by which the DOAH process will be concluded, which date is dependent on the number and timeliness of opponents' filings, the assignment of a hearing officer, the conducting of discovery and the conducting of a hearing before a DOAH hearing officer, and issuance of a ruling by DOAH. The pending appellant action precludes the Applicant from taking certain development actions necessary to satisfy Housing Credits requirements, including the purchase of the subject property, executing a limited partnership agreement with a tax credit investor and initiating the start of construction.

20. The developer (Rural Neighborhoods, Incorporated, a IRS 501(c)(3) tax-exempt corporation; "Developer") has responded to numerous correspondence requests from corporations, limited liability companies and individuals in opposition to the project including requests for its charitable tax returns and audits. In addition, Developer and Applicant has been forced to respond to a series of correspondence addressed to potential Housing Credit investors, the assigned credit underwriting firm and FHFC from entities in opposition to the project. This interference with financial sources and credit underwriting has caused significant delay and financial harm including legal costs to be borne by the Developer and Applicant.

21. In addition to the slow-downs caused by organized opposition as described above, the project has been hindered by public health orders and pandemic-related delays, particularly in Monroe County, FL in which remote public meetings continue to be held.

22. The Florida Department of Health issued a Declaration of Public Health Emergency on March 1st, 2020 followed by Governor DeSantis' March 9th Executive Order 20-52. The President issued a major disaster declaration for the pandemic retroactive to January 20th, 2020. Petitioner has several substantive impacts attributable to the COVID-19 pandemic in these 2020 periods which remain ongoing.

23. State of Florida and local government COVID-19 pandemic orders caused essential businesses to close and requested employees to shelter-in-place in numerous counties including Miami-Dade, Duval, Orange and Monroe from which the project's land seller, developer, co-developers, architect, biologist, legal counsel, accountants civil and traffic engineers operate their professional businesses and reside. Business interruptions to professionals ranged from office closures to reductions in staff. The transition to remote operations reduced near-term productivity and, indeed, several such professionals remain sequestered in a less than desirable remote operation mode. These unexpected barriers to development slowed various work products and billing typically incurred to date as progress payments. Local COVID-19 case surge remains an ongoing hurdle in several key locales; in Miami-Dade, for example, the Developer has experienced COVID-19 diagnoses among 25% of its local workforce resulting in intermittent office closure and quarantine.

24. Monroe County officials closed US-1 highway access to the Florida Keys on March 22nd, 2020 to non-residents and persons without local business credentials. Beginning April 20th, 2020 Monroe County agreed to accept new permit applications using a Drop-Off system. Lack of

guidance on proof of business interests and confusion at US-1 roadblocks slowed or prohibited access and made site visits to and by design consultants and professionals extremely burdensome.

25. The Monroe County Board of County Commissioners and County Manager closed building permitting offices to the public on or about March 24th, 2020 and remain closed until further notice. The Monroe County Planning and Environmental Resources Department closed on a similar date and remained closed through May 3rd, 2010. In their April 15th, 2020 meeting the Monroe County BOCC adopted a resolution enacting a 100-day temporary suspension of the acceptance and processing of applications to the Planning and Environmental Resources Department providing for an effective date of March 15th and ending June 23rd, 2020. In the interim, community meetings required as part of planning commission approval were postponed until late summer reestablishment These suspensions of service impacted the project's ability to expend significant funds toward processing, permit, hearing and other fees due local government and preclude progression of work by design professionals. Moreover, postponement of land use decision-making made site purchase untenable in the absence of final approvals, The Developer and Owner have recently held their final required community meeting on October 1st, 2020, and on December 16 obtained approval from the Monroe County Planning Commission.

26. Inadequate access to Florida Department of Transportation officials and their external engineering consultants limited approval guidance readily available in prior periods. Social distancing requirements have resulted in the inability to obtain preliminary plan review forcing the project to complete additional engineering plans to ascertain FDOT's willingness to approve US1 Overseas Highway access.

27. Final land acquisition has been delayed by the cumulative effect of these planning, permitting and design delays combined with business interruption in scheduling local surveyors

and appraisers reluctant to travel for on-site work. It was not the impact of a singular impediment but the aggregate effect of the above that resulted in multiple state and local government departments and professional being less accessible. Given these issues and that interruptions in predevelopment services remain ongoing, Petitioner believes the length of its extension request is justified.

28. The requested waiver will not adversely affect Petitioner, the Development, any other party that applied to receive SAIL funding or Housing Credits in the RFA or the Corporation. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner, as it has incurred substantial costs to date toward ensuring that the Development proceeds to completion; (b) deprive Monroe County of the provision of much needed affordable workforce housing; and (c) violate principles of fairness. §120.542(2), F.S.

29. As discussed above, the delays have been caused by circumstances outside Petitioner's control. As a result, the delay makes it impossible to meet the January 31, 2021 deadline for issuance of a firm loan commitment and the October 31, 2021 placed in service deadline.

30. The requested waiver will ensure the availability of SAIL and Housing Credit equity funding which will otherwise be lost as a consequence of the development delays described herein.

E. Conclusion

31. The facts set forth in Sections 15 through 27 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for a Rule waiver; that is, the delay in permitting and securing of necessary development approvals for the new construction of the Development caused by neighborhood opposition and COVID-19 and the loss of a substantial sum of money should the transaction not go forward.

32. In 2019, the Florida Legislature established state policy in HB 7103 to "create a state housing finance strategy to provide affordable workforce housing opportunities to essential services personnel in areas of state critical concern....". The Legislature found "essential services personnel vital to the economies of areas of critical state concern are unable to live in the communities where they work, creating transportation congestion and hindering their quality of life and community engagement." See Florida Statutes Section 420.502(8)(2019). The legislation defined "essential service personnel" as households whose total annual income is at or below 120 percent of the area median income and at least one of whom is employed as police or fire personnel, a child care worker, a teacher or other education personnel, health care personnel, a public employee or a service worker. Florida Statutes Section 420.503(18)(2019).

33. Petitioner's development will serve Monroe County (an area of state critical concern) households at or below 120 percent of the area median income and essential services personnel whose income is derived from Monroe County employment. Accordingly, the Developer and Applicant request recognition of this Development's importance in fulfilling state policy.

34. As demonstrated above, the requested waiver serves the purposes of Sections 420.5087 and 420.5089, Florida Statutes, 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. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable rental housing.

35. The waiver being sought is permanent in nature. Should the Corporation require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

WHEREFORE, Petitioner respectfully requests that the Corporation:

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

B. Grant a waiver of the Rule to extend the deadline to secure a firm loan commitment from January 31, 2021 to January 31, 2022, and not require that an additional extension fee be imposed;

C. Waive the Qualified Allocation Plan's Prohibition for returning Housing Credit Allocations prior to the last quarter of 2021;

D. Allow the immediate return of Petitioner's 2019 Housing Credit Allocation;

E. Immediately allocate new 2021 Housing Credits to Petitioner with a later placed service date, in an amount equal to the amount of its 2019 Housing Credit Allocation with no further fees imposed; and

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

The original Petition is being served by overnight delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by overnight delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 6th day of January, 2021.

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