STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING
FINANCE CORPORATION

WRDG T3C, LP, a Florida
limited partnership,

Petitioner,

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

FHFC CASE NO. 2023-052VW
Application No. 2019-019BS/2018-529C

PETITION FOR WAIVER OF RULES 67-48.0072(17)(h), 67-21.014(2)(r)(8) and 67-21.026(13)(g), F.A.C. (7/8/2018)

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code ("F.A.C."), Petitioner WRDG T3C, LP, (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of the requirement in Rules 67-48.0072(17)(h), 67-21.014(2)(r)(8), and 67-21.026(13)(g), F.A.C., (the "Rules") that a general contractor may not subcontract to an entity that has common ownership or is an Affiliate of the General Contractor. Petitioner recently learned that two subcontractors are affiliated with the General Contractor ("GC"). The subcontracts comprise approximately 1.84% of the total actual costs of the GC's construction contract (1.23% of the total development cost). For the reasons set forth in paragraph 11 below, the GC is unaware of an unaffiliated subcontractor that could have provided the same services at a lower cost. 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:

WRDG T3C, LP, a Florida limited partnership
c/o Jerome Ryans
5301 W. Cypress St.
Tampa, FL 33607
Telephone: (813) 341-9101
Fax: (813) 367-0784
Email: JeromeR@thafl.com

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
Suite 2200
Miami, Florida 33130
Telephone: 305-789-3350
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Tallahassee, Florida 32301
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Fax: 850-329-4864
Email: BSmitha@stearnsweaver.com

B. THE DEVELOPMENT

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

- Development Name: Boulevard Tower 2
- Address: 1350 W. Chestnut St., Tampa, FL 33607[1]
- Developer: WRDG T3C Developer, LLC
- County of Development: Hillsborough
- Number of Units: 119
- Type: High Rise (new construction)
- Demographics: Family

[1] At the time of the cost certification, the Development's address was 1809 N Oregon Avenue, Tampa, FL 33607. However, the City of Tampa officially changed the address to 1350 W. Chestnut St., Tampa, FL 33607.

- HC/SAIL Set-Asides: 36.98% of the units (*i.e.*, 44 units) at or below 30% AMI; 9.24% (*i.e.*, 11 units) at or below 60% AMI and 53.78% of the units (*i.e.*, 64 units) at or below 80%. Bond Set-Asides: 40% at or below 60% AMI

- Funding Amounts: $1,506,362 4% housing credit (annual); $4,720,000 SAIL; while the original bond amount was $25.5 million, at conversion in January, the bonds were paid down to $15.145 million.

C. THE RULES FROM WHICH WAIVER IS REQUESTED

4. Petitioner requests a waiver of Rule 67-48.0072(17)(h), F.A.C. (7/8/2018), which provides:

> The General Contractor must meet the following conditions: . . . Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of the General Contractor or the Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-48.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor."

5. Petitioner also seeks a waiver of Rule 67-21.014(2)(r)(8), F.A.C. (7/8/2018), which provides:

> (r) General Contractor's fees are inclusive of general requirements, profit and overhead and shall be limited to 14 percent of actual construction costs. For the purpose of the HUD Risk Sharing Program, if there exists an Identity of Interest as defined herein between the Applicant or Developer and the General Contractor, the allowable fees shall in no case exceed the amount allowable pursuant to the HUD subsidy layering review requirements. Additionally, fees shall be allowed to be paid only to the person or entity that actually meets the definitional requirements to be considered a General Contractor. The Corporation shall not allow fees for duplicative services or duplicative overhead. The General Contractor must meet the following conditions:
>
> ***
>
> 8. Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of the General Contractor or the Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-21.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor."

6. Petitioner similarly seeks a waiver of Rule 67-21.026(13)(g), F.A.C. 7/8/2018), which provides:

> The General Contractor must meet the following conditions:
>
> ***
>
> (g) Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of with the General Contractor or the

Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-21.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor."

D. STATUTES IMPLEMENTED BY THE RULES

7. The Rules implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statutes relating to the Powers of the corporation, contained in Section 420.507 of the Florida Statutes, multifamily and single-family projects, contained in Section 420.508 of the Florida Statutes, 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* §§ 420.507, 420.508, 420.5087, 420.5089, and 420.5099, Fla. Stat. (the "Statutes").

E. JUSTIFICATION FOR GRANTING WAIVER

8. Petitioner timely submitted Application No. 2019-019BS/2018-529Con November 5, 2018 in response to RFA 2018-114 SAIL Financing for the Construction of Workforce Housing (the "RFA").

9. The Development was invited to credit underwriting.

10. After completing construction, Petitioner learned that two subcontractors (FUSE Equipment, LLC and Fuse Builds, LLC) have common principals with the General Contractor and meet the definition of an "Affiliate" under Rules 67-48.002(5) and 67-21.002(5), F.A.C.

11. Accordingly, Petitioner is in need of a waiver of the Rules.

12. The affiliated subcontractors performed rough carpentry work equating to approximately 1.84% of the total actual costs of the GC's $27,815,011 construction costs (1.23% of the $41,880,566 total development cost). FUSE Equipment, LLC's work totaled $41,375 and

FUSE Builds, LLC's totaled $471,695 (collectively "FUSE"). Specifically, FUSE performed rough carpentry work such as installing temporary doors, as well as temporary wooden handrails that were removed once the permanent aluminum balcony rails were installed. FUSE also installed the backing and blocking throughout the project, which is used within the walls for cabinetry, grab rails, closet shelving, IT equipment racks, and bathroom accessories (*e.g.*, toilet paper holders, towel bars, shelving, and mirrors).

13. When asked why the GC utilized affiliated subcontractors, the GC explained that, at that time, Tampa had a "very challenging labor market" in that many firms were unable to staff the requisite skillsets. FUSE provided the Development's requested local outreach, used to attract and hire local, skilled labor. As a Davis-Bacon Act project, the Development was subject to additional requirements (*see, e.g.*, 40 U.S.C. § 3142), and FUSE had the credentials necessary to hire, document, and pay in accordance with the Act. The GC is unaware of an unaffiliated subcontractor that could have provided the same services at a lower cost.[2]

14. 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,[3]

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[2] The GC assured Petitioner that the bid was awarded to the lowest qualified bidder. However, due to the passage of time, the GC is unable to now locate those alternative bids.

[3] "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.

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.

15. In this instance, Petitioner meets the standards for a waiver of the Rules. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 119 affordable housing units will remain available for the target population in Hillsborough County, Florida. The strict application of the Rules will create substantial hardship for Petitioner because failure to satisfy the technical requirements of the Rules would result in rescission of allocation of housing credits awarded to the Development. If the requested waiver is denied, Petitioner would have to tear out the work completed by the affiliated subcontractor. Avoiding this unnecessary cost would ensure the costs for the Development are as low as possible. 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.

16. 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.

F. WAIVER IS PERMANENT

17. The waiver being sought is permanent in nature.

G. ACTION REQUESTED

18. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver of the Rules and allow the General Contractor to subcontract to two affiliates; (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: *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 26th day of June, 2023.

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