RECEIVED
AUGUST 20, 2021 8:00 AM
FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

KELSEY COVE, LTD,
a Florida limited partnership,

Petitioner,

vs.

CASE NO. 2021-054VW
FHFC App. 2021-021C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

PETITION FOR WAIVER OF RULE 67-48.0075(3)(a), F.A.C. (06/23/2020)

Kelsey Cove, Ltd., a Florida limited partnership (the "Petitioner") hereby petitions Florida Housing Finance Corporation (the "Corporation") for a waiver or variance of the Corporation's prohibition against including within the Total Development Cost ("TDC") total costs of acquiring real property which exceed the appraised value of that real property as determined in the credit underwriting process. *See* Rule. 67-48.0075(3)(a), F.A.C. (06/23/2020) (the "Rule"). Petitioner requests the waiver because the appraised value is artificially low and does not reflect the Property's true value. If this Petition is granted, the purpose of the Rule will still be satisfied because: (i) the land cost in excess of the appraised value will be captured as part of the Total Development Cost Per Unit limitation as outlined in RFA 2020-202; (ii) the Gap Calculation, utilizing the minimum first mortgage and TDC with the total cost of acquiring real property, still determines financial feasibility for 26 U.S.C. Section 42(m)(2); and (iii) the original request amount was validated through a leveraging process that is part of the sorting and selection process. If this Petition is denied, and the appraised value is utilized, the amount of tax credits allocated to the development will most likely be unnecessarily reduced. In support of this Petition, Petitioner states as follows:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for the Petitioner and its qualified representative for Petitioner's application:

Kelsey Cove, Ltd.
3030 Hartley Road
Suite 310
Jacksonville, FL 32257
Attn: Steve Moore
Telephone: (904)260-3030
E-Mail: moore@vestcor.com

2. For purposes of this Petition, the address, telephone number and facsimile number of the Petitioner's attorneys are:

Brian J. McDonough, Esquire
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
150 West Flagler Street
Miami, Florida 33130
Telephone: (305)789-3350
Facsimile: (305)789-3395
E-mail: bmcdonough@stearnsweaver.com

Bridget Smitha, Esquire
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
106 E. College Ave. Ste 700
Tallahassee, Florida 32301
Telephone: (850)329-4852
Facsimile: (850)329-4844
E-mail: BSmitha@stearnsweaver.com

B. BACKGROUND

3. General Development information:

- Development Name: Kelsey Cove (the "Development")
- Developer: TVC Development, Inc.
- County of Development: Hillsborough
- Property: 1010 E. Brandon Blvd., Brandon, FL (the "Property")
- Number of Units: 108
- Type: Garden (New Construction)
- Set Asides: 15.7% at or below 30% (17 units); 37.1% at or below 60% (50 units); and 47.2% at or below 70% (51 units)

- Demographics: Family
- Funding Amounts: $2,000,000 9% Housing Credits (annually)

4. Petitioner timely submitted application number 2021-021C on October 20, 2020 in response to RFA 2020-202 (Housing Credit Financing For Affordable Housing Developments Located In Broward, Duval, Hillsborough, Orange, Palm Beach, And Pinellas Counties) and was awarded competitive housing credits.

5. RFA 2020-202 had a funding goal to fund one Family Development that qualifies for the Geographic Areas of Opportunity / SADDA Funding Goal in Hillsborough County.

6. Petitioner identified property that satisfies the Corporation's Geographic Areas of Opportunity / SADDA Funding criteria and negotiated a purchase price with the seller (an unrelated third-party). The negotiated purchase price reflects the value that the market placed on the Property due in large part to the limited number of properties in Hillsborough County that satisfy the Geographic Areas of Opportunity / SADDA Funding criteria. This negotiated purchase price with an unrelated third party is reflective of the law of supply and demand specifically as it relates to the number of buyers vying for a scarce resource, such as land. The appraisal, as a tool for validating the purchase price, should be used only in connection with related party transactions similar to restrictions on related party transactions with the general contractor. The negotiated purchase price is not reflected in the historical sales captured in the appraisal because the market dynamics are different as the Geographic Area of Opportunity / SADDA Funding criteria impacts the supply of land. When solely relying on historical sales to justify the appraised value, the result is an artificially low appraised value. Because the appraised value is unrealistically low, Petitioner's arm's-length negotiated purchase price is higher, necessitating this Petition.

C. RULES FROM WHICH WAIVER IS SOUGHT

7. Petitioner requests a waiver from Rule 67-48.0075(3)(a), F.A.C. (6/23/2020) which provides:

> (3) Total Development Cost includes the following:
>
> (a) The cost of acquiring real property and any buildings thereon, including payment for options, deposits, or contracts to purchase properties, of which the total cost **cannot** exceed the appraised value of the real property as determined in the credit underwriting process.

(emphasis added).

D. STATUTES IMPLEMENTED BY THE RULE

8. The Rule implements, among other sections of the Florida Housing Finance Corporation Act, Section 420.5099 (Allocation of the low-income housing tax credit), Section 420.5089 (HOME Investment Partnership Program) and Section 420.5087 (State Apartment Incentive Loan Program).

E. JUSTIFICATION FOR THE WAIVER

9. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers must be granted when: (1) the person who is subject to the rule demonstrates that the application of the rule would create a substantial hardship 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.

10. Petitioner acquired nine acres of undeveloped land located at 1010 E. Brandon Blvd., Brandon, FL from Grace Bible Church of Brandon, Inc. on July 30, 2021 for $3,240,000. The Development's 108 units and amenities will be constructed on this Property.

11. During credit underwriting, the Property was appraised for $2,160,000, which is substantially less than the purchase price. However, the appraised value does not reflect the market value of the Property. The purchase price resulted from an arm's-length negotiation and thus is the best indication of the Property's true value. The difference between the appraised value and purchase price is unfortunately in large part a product of the system. In arriving at the appraised value, the appraiser reviewed historical sales of properties of similar size, type and location. These past sales did not take into account that the Corporation's Geographic Area of Opportunity / SADDA Funding criteria, which has the unintended consequence of limiting the available land that would qualify for such designation (and thus for the RFA Goal for Hillsborough County), thereby increasing the land cost in a free market environment. An analysis of historical sales does not take into consideration the increased value placed on the Property by the market as a result of the selection criteria and land availability. In other words, the value of the Property was increased by the law of supply and demand whereby there was a limited number of properties that satisfied the Geographic Area of Opportunity / SADDA Funding criteria and the sudden increase in interest of applicants in purchasing such properties.

12. If the artificially low appraised value is used in the TDC for the Gap Calculation, instead of the true market value of the Property, the amount of tax credits allocated to the Development will most likely be substantially reduced during cost certification to the extent the Development can achieve cost savings (*i.e.* not utilize all of hard cost contingency).

13. The Rule states that the TDC includes the "cost of acquiring real property and any buildings thereon, including payment for options, deposits, or contracts to purchase property, of which the total cost **cannot** exceed the appraised value of the real property as determined in the credit underwriting process." Because the true value of the Property is much higher than the appraised value, a waiver of the Rule is required to allow Petitioner to complete the transaction,

pursue Development Cost savings, and not have credits reduced as a result of such efficiencies. Under the current Rule, the only Development Cost that is subject to independent verification is the cost of land. In this example, the cost of land equates to 12.8% of the Total Development Cost. The other 87.2% of costs are not subjected to the same level of scrutiny as the purchase price even though the majority of other costs do directly impact the amount of tax credits and the Developer Fee is earned on these costs and not land.

14. Neither the Corporation, nor Petitioner will be prejudiced by the grant of this Petition. The Corporation has three tools that, when combined, achieve the Corporation's intent relative to financial feasibility as set forth in IRC § 42(m)(2). The Corporation, as part of its competitive solicitations, such as RFA 2020-202, includes a TDC Per Unit Limitation, which is calculated exclusive of land cost and any operating deficit reserves. In this instance, when TDC is reduced by the appraised value, the TDC for Per Unit Limitation purposes is increased by the difference between the purchase price and appraised value. The resulting TDC Per Unit for Petitioner is still well below the TDC Per Unit Limitation amount. The second tool the Corporation can rely upon is the Gap calculation, which includes a minimum first mortgage amount. This satisfies financial feasibility in accordance with § 42(m)(2) without adjusting the TDC. Finally, as part of the competitive solicitation, applications are sorted based upon leveraging. Even if the Petition is granted, the purpose of the Rule will still be satisfied because the TDC will be reconciled with the TDC Per Unit Limitation, Gap calculation, and request amount. Put another way, irrespective of the Petition, the actual TDC, for Per Unit Limitation purposes, will be reduced by the lesser of the actual cost or appraised value of the Property to arrive at a TDC per Unit. Where this calculation, which includes the difference between the actual cost and appraised value, is less than the TDC per Unit Limit, the purpose of the Rule is

satisfied. The Corporation has procedures in place that determine financial feasibility as set forth in § 42(m)(2) without the need to reduce land cost as part of TDC here.

15. A waiver of the Rules would serve the purposes of Sections 420.5099, 420.5089 and 420.5087 Fla. Stat., and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means.

16. 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.

F. PERMANENCY

17. The waiver being sought is permanent in nature.

G. ACTION REQUESTED

Petitioner requests the following:

a. That the Corporation grant Petitioner a waiver from Rule 67-48.0075(3)(a), F.A.C. (6/23/2020) and allow the Total Development Cost to include the actual cost of acquiring the Property, which exceeds the appraised value as determined in the credit underwriting process;

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

c. Grant such further relief as may be deemed appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Brian J. McDonough, Esq.
Bridget Smitha, Esq.
Counsel for Petitioner
150 West Flagler Street, Suite 150

Miami, Florida 33131
Tel: (305) 789-3350
Fax: (305) 789-3395
E-mail: bmcdonough@swmwas.com

By: *s/Brian J. McDonough*

CERTIFICATE OF SERVICE

The Petition is being served via e-mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, *CorporationClerk@FloridaHousing.org*, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 19th day of August, 2021.

s/Brian J. McDonough