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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION
FHFC Case No.: 2023-054VW

Application No.: 2021-269SN

SOUTHWICK COMMONS, LTD.,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.0072(21)(b)

Petitioner, Southwick Commons, Ltd., ("Petitioner") petitions to Respondent, Florida Housing Finance Corporation ("FHFC"), for a waiver of Rule 67-48.0072(21)(b), F.A.C. (2020) in effect at the time Petitioner submitted its application in response to FHFC's Request for Applications 2020-205 (the "RFA"), to allow Petitioner to extend the Firm Loan Commitment deadline for the State Apartment Incentive Loan ("SAIL"), Extremely Low Income Loan ("ELI"), and National Housing Trust Fund ("NHTF") funding allocated to Petitioner pursuant to the RFA, and states as follows in support of the Petition:

A. Petitioner and the Development.

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

Southwick Commons, Ltd.
Attn: Jonathan L. Wolf
1105 Kensington Park Drive, Suite 200
Altamonte Springs, FL 32714

Telephone: (407) 333-3233
jwolf@wendovergroup.com

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

J. Timothy Schulte, Esquire
Zimmerman, Kiser & Sutcliffe, P.A.
315 E. Robinson Street, Suite 600
Orlando, FL 32801
Telephone: (407) 425-7010
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2. Pursuant to the RFA, Petitioner timely submitted its application for SAIL, ELI, and NHTF funding. See Application Number 2021-269SN. Petitioner was preliminarily awarded $8,689,548.00 funding under the RFA (the "SAIL, ELI, and NHTF Award").

3. The SAIL, ELI, and NHTF Award is a critical part of the financing for a new construction of 192 units of workforce housing (the "Development"). The Development is located in the City of Apopka, Orange County, Florida.

4. The SAIL, ELI, and NHTF Award firm loan commitment issuance deadline was June 29, 2022, which was twelve (12) months after the acceptance of the invitation to enter credit underwriting.

5. At the meeting of the Board of Directors of the Corporation (the "Board") on June 17, 2022, the Board granted Petitioner's request to extend the loan commitment issuance deadline to December 29, 2022.

6. At the meeting of the Board on December 9, 2022, the Board entered an Order Granting Waiver of Rule 67-48.0072(21)(b), F.A.C. (2020), granting Petitioner's request to extend its firm loan commitment issuance deadline from December 29, 2022, to June 29, 2023.

7. For the reasons explained more fully below, the June 29, 2023 deadline for the issuance of the FHFC firm loan commitment will not be met. Due to unavoidable delays encountered in obtaining approval for the Development from the City of Apopka, Petitioner is requesting an additional 6 month extension of the firm loan commitment issuance deadline until December 29, 2023.

B. Rules from Which the Waiver Is Sought.

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

> "(21) Information required by the Credit Underwriter shall be provided as follows:
>
> ***
>
> (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. (2020).

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 (2020).

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 is requesting an additional extension of the deadline to secure a loan commitment from June 29, 2023 to December 29, 2023, to have additional time to complete permitting, and credit underwriting for the Development.

13. The reasons and good cause for this request are set forth below:

A. The delays in obtaining a firm loan commitment have been caused by circumstances outside Petitioner's control. Specifically, the City of Apopka ("City") has unlawfully attempted to block the Development in violation of the Florida Fair Housing Act.

B. The City originally supported the Development as evidenced by the City signing the *Florida Housing Financing Corporation Local Government Verification that Development is Consistent with Zoning and Land Use Regulations* (the "Verification"), on November 4, 2020. In the Verification, the City certified that the Development's "proposed number of units, density and intended use are consistent with current land use regulations and zoning designations." The Verification also provided that the Property could be developed with 195 units pursuant to the City's land development regulations. The Verification was provided by the City and submitted as part of Petitioner's Application for funding. As a result, Petitioner expected the City to fully cooperate with the approvals necessary for the Development.

C. Instead, the City turned against the development for unlawful reasons and refused to provide the necessary approvals. On June 16, 2022, Petitioner filed an action in the Ninth Judicial Circuit Court seeking injunctive relief and damages against the

City for violations of the Florida Fair Housing Act, Florida Statutes §§760.26 and 760.35.

D. On November 28, a Final Judgment was entered in favor of Petitioner and against the City of Apopka. See attached Exhibit 1. The Final Judgment found that the City was in violation of Section 760.26, Florida Statutes (2022) and permanently enjoined the City from the restrictions on the Development.

E. Despite the entry of the Final Judgment, the City of Apopka has committed further violations of the Florida Fair Housing Act in an unlawful attempt to block the Development. First, the City reduced the number of units that could be developed on the Property from 195 to 192. As stated above, the City's Verification confirmed that Petitioner could construct 195 units in the Development. That Verification was relied upon by Petitioner and Florida Housing Finance Corporation (the "Corporation").

F. Petitioner was forced to file a Petition for Waiver of Rule 67-48.004(3)(i) to allow Petitioner to reduce the total number of units for the Development from 195 to 192.

G. On April 28, 2023, the Board entered an Order granting the Petition for Waiver allowing the Petitioner to reduce the total number of units. The Corporation's approval of the waiver made the number of units no longer a basis for the City to refuse approval of the Development.

H. However, the City continues to refuse to approve the architectural plans for the Development on the grounds that the units do not have a "balcony or porch." On the contrary, the architectural plans include a balcony on all units. The City takes

the position that the balconies are not big enough, although there is no size requirement in the City's regulations. The failure to approve the balconies has continued to delay the issuance of the required permits for the Development. The City has intentionally delayed approval and issuance of the required permits in a concerted effort to cause Petitioner to lose its funding required for the Development.

I. On June 21, 2023, Petitioner filed an Amended Complaint in the Circuit Court action seeking declaratory and injunctive relief against the City declaring that Petitioner has satisfied the City's requirements regarding the balconies.

J. At a City Council Meeting on June 21, 2023, the City finally approved the balcony design. As a result, the Petitioner believes that all obstacles to issuance of the required permits have been satisfied and construction permits for the Development will be issued shortly. Those Permits are the only condition remaining to issuance of the firm loan commitment.

14. The requested waiver will not adversely affect Petitioner, the Development, any other party that applied to receive SAIL funding in the RFA or the Corporation. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner, because Petitioner has expended funds to acquire the land and Petitioner has incurred substantial costs to date toward ensuring that the Development proceeds to completion; (b) deprive Orange County and the City of Apopka of the provision of much needed affordable housing; and (c) violate principles of fairness. §120.542(2), Fla. Stat.

15. 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 June 29, 2023, deadline for issuance of a firm loan commitment.

16. The requested waiver will ensure the availability of SAIL, ELI, and NHTF funding which will otherwise be lost as a consequence of the development delays described herein.

E. Conclusion

17. The facts set forth in Section 13 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for a Rule waiver; that is, the delays occasioned by the need to secure additional time to obtain injunctive relief to require the City to approve the Development.

18. Petitioner's Development will serve to provide affordable housing in Orange County.

19. As demonstrated above, the requested waiver serves the purposes of Section 420.5087, 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.

20. 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 herein;

B. Grant a waiver of the Rule to extend the deadline to secure a firm loan commitment from June 29, 2023, to December 29, 2023; and

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

Respectfully submitted,

J. Timothy Schulte, Esquire
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Counsel for Petitioner
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CERTIFICATE OF SERVICE

The original Petition is being served by electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, FL 32301 (CorporationClerk@floridahousing.org; a copy served via email on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, FL 32399-1400 (japc@leg.state.fl.us); and a copy served via email to Hugh Brown, Esq. (hugh.brown@floridahousing.org), Marisa Button, Esq. (marisa.button@floridahousing.org) and KaCee Johnson Lackey, Esq. (KaCee.Johnson@floridahousing.org), Florida Housing Finance Corporation this 26th day of June, 2023.

J. Timothy Schulte, Esquire
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IN THE CIRCUIT COURT OF THE NINTH JUDICIAL CIRCUIT
IN AND FOR ORANGE COUNTY, FLORIDA

CASE NO. 2022-CA-005470-O

SOUTHWICK COMMONS, LTD, a Florida limited partnership,

Plaintiff,

vs.

CITY OF APOPKA, Florida, a Political Subdivision of the State of Florida,

Defendant. /

FINAL JUDGMENT AS TO COUNT II

THIS CAUSE having come before the Court on Count II of the Complaint, and the Court having considered the record, and being advised by the parties that there are no disputed issues of fact or questions as to the applicable law, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED as follows:

FINDINGS OF FACT:

1. Southwick owns an approximately 12-acre parcel of vacant property located at the southeast corner of E. 6th Street and S. Alabama Avenue in the City (the "Property"), which is within what is designated as Apopka's City Center.

2. Southwick plans to develop an affordable housing community on the Property (the "Community").

3. Prior to being owned by Southwick, the City owned the Property and the City was under contract to sell it to Taurus Apopka City Center, LLC ("Taurus").

4. Southwick entered into a contract to purchase the Property from Taurus.

EXHIBIT 1

5. On July 22, 2016, the City and Taurus entered into the Development Agreement that governed the City Center.

6. Exhibit "F" of the Agreement sets forth the permitted uses for the City Center.

7. The Development Agreement permitted "Residential Multi-Family (non-subsidized, market rent)" as a permitted use in the City Center. The parenthetical language "non-subsidized, market rent" constitutes a restriction on the use "Residential Multi-Family."

8. The Development Agreement was amended through the Amended and Restated Development Agreement (the "Amended Agreement"), which was executed on July 15, 2020.

9. The Amended Agreement retained "Residential Multi-Family (non-subsidized, market rent)" as a restricted permitted use in the City Center.

10. The requirement that all Residential Multi-Family be non-subsidized and rented at market rent (the "Restriction") is a land use restriction on the development of the Property.

11. Southwick has obtained funding to develop the Community through awards of Federal, State and County affordable housing financing sources.

12. In order to construct the Community, Southwick applied for and was awarded approximately $8,689,548 from the FHFC in the form of State Apartment Incentive Loans ($7,000,000), National Housing Trust Funds ($1,089,548), and Extremely Low Income Loans ($600,000).

13. Southwick also was awarded a $2,000,000 loan from the Orange County Affordable Housing Trust Fund to construct the Community.

14. The Orange County Housing Finance Authority (the "OC Finance Authority") allocated $26,300,000 in private activity bonds for the construction of the Community.

15. Because of the receipt of this source of financing, Southwick is limited on the amount of rent that it can charge the residents of the Community.

16. On or about November 1, 2021, Taurus purchased the Property from the City, and the next day, November 2, 2021, sold the Property to Southwick.

17. After closing on the Property, Southwick filed an application with the City requesting an amendment to the Amended Agreement.

18. Among other requests, Southwick requested that the City amend the Agreement to remove the Restriction, "non-subsidized, market rent".

19. The Request was heard before the City Council on May 4, 2022.

20. The City Council voted 3-2 to deny the Application and maintain the Amended Agreement as drafted.

21. On June 15, 2022, the City Council denied Southwick's appeal of the denial.

22. As Southwick is receiving funding from various financing sources for the construction of the Community, the Community is subsidized and is not permitted on the Property because of the Restriction.

CONCLUSIONS OF LAW:

1. "It is unlawful to discriminate in land use decisions or in the permitting of development based on race, color, national origin, sex, disability, familial status, religion, or, except otherwise provided by law, **the source of financing of a development or proposed development**." Section 760.26, *Florida Statutes* (2022) (emphasis added).

2. "Legislative intent is the polestar that guides [a court's] analysis regarding the construction and application of [a] statute." *Diamond Aircraft Industries, Inc. v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013). Legislative intent is primarily derived from the text of the statute

applying the plain meaning of the language used therein. *Id.* "If statutory language is 'clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.'" *Id.* (quoted citations omitted). In instances of ambiguity, a court may examine the legislative history to aid its determination of the legislative intent. The Parties have not proffered legislative history or appellate court guidance which alters the plain language of the statute.

3. In relevant part, the Statute does not permit consideration of the "source of financing of a … proposed development" as a basis for the City's "land use decisions or in the permitting of development."

THEREFORE, IT IS ORDERED AND ADJUDGED THAT:

1. The Court finds that the Restriction is a restriction on the development of the Property based upon the source of financing of the development.

2. The Court declares that the City's enforcement of the Restriction is a violation of Section 760.26, *Florida Statutes* (2022). Pursuant to Section 760.35, *Florida Statutes* (2022), the Court hereby strikes the requirement that Residential Multi-Family be "non-subsidized, market rent" as set forth in Exhibit "G" to the *Amended and Restated Development Agreement* that was executed on July 15, 2020. The City is permanently enjoined from requiring that the Property be developed as non-subsidized and rented at market rent.

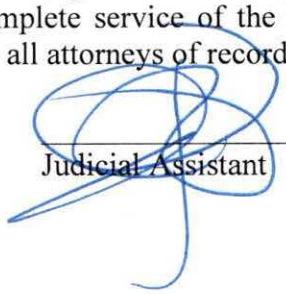
3. The Court reserves jurisdiction to enter further orders regarding entitlement and reasonableness of attorney's fees and costs incurred in this action.

DONE and **ORDERED** in Chambers, Orlando, Florida on this 28th day of November 2022.

Emerson R. Thompson, Jr.
HONORABLE EMERSON R. THOMPSON, JR.
Senior Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 28th day November 2022, I electronically filed the foregoing with the Clerk of Court by using the Florida Courts E-Filing Portal system which will send notice of electronic filing and, pursuant to Supreme Court of Florida Administrative Order No. AOSC13-49, will complete service of the foregoing as required by Florida Rules of Judicial Administration 2.516 to all attorneys of record.



Judicial Assistant