STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

RECEIVED
JUNE 23 2023 3:38 PM
FLORIDA HOUSING
FINANCE CORPORATION

Melissa Grove, Ltd.,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-049VW
Application No. 2022-252C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.002(96), F.A.C. (5/18/21) AND THE 2021 QAP

Melissa Grove, Ltd. (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of the provisions of the 2021 Qualified Allocation Plan ("2021 QAP") as incorporated and adopted by Rule 67-48.002(96), Florida Administrative Code ("F.A.C.") (5/18/21), such that Petitioner may return its 2022 Housing Credit Allocation now as opposed to waiting until after the end of the second calendar quarter of 2024. Due to forces outside of Petitioner's control, namely an inability to shorten – much less predict the length of – the timeline for issuance of its requested building permit, St. Johns River Water Management District permit, and/or U.S. Army Corps of Engineers permit, Petitioner is uncertain whether Petitioner will receive the requested permits with sufficient time to allow Petitioner to incur the costs necessary to meet the 10% test by the August 11, 2023 deadline.[1] Thus, in an abundance of caution, and an effort to remain at all times

[1] The original deadline of February 28, 2023, was extended to August 11, 2023. Based on Petitioner's analysis, it would not be cost effective to purchase the amount of materials sufficient to satisfy the 10% test prior to construction. For example, Petitioner's accountant advised that, for purchased materials to be eligible, Petitioner must take ownership of the materials, which would require Petitioner to store them in a warehouse, and to insure them, thereby causing Petitioner to incur unnecessary additional costs.

in compliance with Florida Housing's requirements, Petitioner respectfully requests a Rule waiver.[2] 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:

Melissa Grove, Ltd.
Attn: James R. Hoover
3030 Hartley Road, Suite 310
Jacksonville, FL 32257
Phone: 904-260-3030
Fax: N/A
E-mail: rhoover@vestcor.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
Fax: 305-789-3395
Email: Bmcdonough@stearnsweaver.com

Bridget Smitha
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
106 East College Avenue, Suite 700
Tallahassee, FL 32301
Telephone: 850-329-4852
Fax: 850-329-4844
Email: BSmitha@stearnsweaver.com

B. DEVELOPMENT BACKGROUND

3. The following information pertains to the development underlying Petitioner's application:

- Development Name: Melissa Grove

[2] In the event Petitioner is able to obtain the requested permits prior to July 20, 2023, Petitioner is poised to begin construction and incur sufficient costs to meet the 10% test by the deadline. However, because Petitioner has no control over when those permits will be issued, nor can it predict when those permits will be issued, the uncertainty forces Petitioner to request this waiver in an abundance of caution.

- Development Address: Lane Ave. S., NW of intersection of Lane Ave. S. and Lenox Ave.
- County: Duval
- Developer: TVC Development, Inc.
- Number of Units: 90 new construction
- Type: Garden Apartments
- Set Asides: 10% at or below 33% AMI; 90% at or below 60% AMI
- Demographics: Elderly, Non-ALF
- Funding: 9% HC request of $1,868,000 annually

C. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

D. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver of Rule 67-48.002(96), effective May 18, 2021, which provides in pertinent part:

> "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2021 Qualified Allocation Plan which is adopted and incorporated herein by reference, effective upon approval by the Governor of the State of Florida, pursuant to Section 42(m)(1)(B) of the IRC and sets forth the selection criteria and the preferences of the Corporation for Developments which will receive Housing Credits. The QAP is available on the Corporation's website under the Multifamily Programs link or by contacting the Housing Credit Program at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, or from http://www.flrules.org/Gateway/reference.asp?No=Ref-13097.

6. Subsection II.J. of the 2021 QAP, provides as follows:

> Notwithstanding any other provision of this QAP, 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 pursuant to Section 42 of the IRC, provided the following conditions have been met: (i) The sponsor must have provided written notice to the Corporation, describing the circumstances, all remedial measures attempted by the Applicant to mitigate the delay, and any other pertinent information, prior to returning the allocation; and (ii) A site inspection reflecting the percentage of Development completion must be completed. If the Development is at least fifty (50) percent completed, as reflected in the site inspection, the approval may be made by Corporation staff. If the Development is less than fifty (50) percent completed, as reflected in the site inspection, the approval must be made by the Board. In making such determination, the Board must find and determine that the delay was caused by circumstances beyond the Applicant's control, and that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay; and (iii) The Corporation or Board, as applicable, must find that the Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally allocated, and that the Development is still desirable in terms of meeting affordable housing needs.

E. STATUTES IMPLEMENTED BY THE RULE AND THE 2021 QAP.

7. The Rule implements Section 420.5087 (State Apartment Incentive Loan Program), Section 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund), and Section 420.5099 (creating the Housing Credits Program) of the Florida Housing Finance Corporation Act (the "Act").[3] The Act designates Florida Housing 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, Florida Housing is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits ("Allocation Procedures"). *See* § 420.5099(1) and (2), Fla. Stat. Accordingly, the, Rule implements, among other sections of the Act, the statutory authorization for Florida Housing's establishment of Allocation Procedures for the HC Program. *Id.*

[3] The Act is set forth in Sections 420.50 through 420.55 of the Florida Statutes.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE.

8. Petitioner timely submitted Application No. 2022-252C on February 2, 2022 in response to RFA 2022-301 Housing Credit Financing For Affordable Housing Developments Located In Duval County (the "RFA").

9. The Development was selected for funding on or about April 29, 2022.

10. The Development received an allocation of the 2022 Housing Credit dollar amount meeting the requirements of Section 42(h)(1)(E) and (F) of the Internal Revenue Code of 1986 as amended ("Tax Credits") and was invited to credit underwriting.

11. Florida Housing staff executed a 2022 Carryover Allocation Agreement ("CAA") on or about August 11, 2022 for the allocation of its Tax Credits. The CAA required Petitioner to incur at least ten percent of the reasonably expected basis of the Development (the "10% Test") on or before February 28, 2023 (the "CAA Deadline"). Upon Petitioner's request, the CAA Deadline was subsequently extended to August 11, 2023.

12. Failure to comply with the CAA Deadline will cause the Housing Credits allocated within the CAA to be deemed returned to Florida Housing under 26 U.S.C. § 42(h)(3)(C).

13. Pursuant to 26 U.S.C. § 42(h)(1)(E)(i), the Development must be placed in service no later than the close of the second calendar year following the calendar year in which the allocation is made; in this case, the federally-mandated placed-in-service date would be December 31, 2024.

14. After being selected for funding and invited to credit underwriting, Petitioner took all steps within its power to move the Development forward. Petitioner began predevelopment activities immediately upon the Board's resolution of litigation surrounding the RFA at the April

29, 2022 Board Meeting. Since that time, Petitioner has been engaged in the pursuit of all necessary development approvals; specifically:

- Petitioner applied for construction plan approval from the City of Jacksonville.
- Petitioner's building permit application was submitted to the City of Jacksonville on February 28, 2023.
- Petitioner's permit application was submitted to the St. Johns River Water Management District ("SJRWMD") on December 19, 2022
- Petitioner's permit application was submitted to the Army Corp of Engineer ("ACOE") on January 5, 2023.

Petitioner has invested more than $530,000 to date in efforts to progress the Development, and has received construction plan approval from the City of Jacksonville. However, Petitioner cannot commence construction until the requested permits are issued, and the entities from whom those permits were requested cannot provide a date certain for their issuance. Petitioner is therefore uncertain if it will be able to obtain the building permit, SJRWMD permit, and ACOE permit in sufficient time to allow Petitioner to incur the costs necessary to meet the 10% Test by the CAA Deadline.

15. Because Petitioner believes that circumstances outside of its control will prevent it from satisfying the 10% Test by the CAA Deadline, Petitioner respectfully requests a waiver of the 2021 QAP to permit Florida Housing to approve the tax credit exchange now as opposed to waiting until after the end of the second calendar quarter of 2024.

16. As set forth above, this request was not necessitated through any fault of Petitioner. Rather, Petitioner exercised due diligence in attempting to move the Development towards construction.

17. If the Petition is denied, and Petitioner loses the allocated Housing Credits as a result of insufficient time to satisfy the 10% Test, Petitioner will be forced to abandon the Development. Stated differently, losing this funding source will cause Duval County to lose the Development's 90 affordable housing units.

18. This Petition should be granted, as opposed to de-obligating the award, because Duval County is currently experiencing a shortage of affordable elderly (non-ALF) housing units. Granting the Petition will result in the delivery of 90 new affordable housing units much faster than would reallocating the funding to a new development.

19. 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 rule demonstrates that the application of the rule would: (1) create a substantial hardship or, violate principles of fairness,[4] 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.

20. Strict adherence to Subsection II.J. of the QAP would violate principles of fairness, as Florida Housing has granted waivers to other Developments similarly facing unforeseen delays beyond their control (*e.g.,* Arbor Village- granted credit swap in November 2019; Georgian Gardens- granted credit swap in November 2019; Luna Trails- granted credit

[4] "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.

swap in 2019; Northside Transit Village- granted credit swap in November 2019; Residences at Dr. King Boulevard, Ltd.- granted credit swap in 2019).[5]

21. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2021 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 90 affordable housing units will be made available for the target population in Duval County, Florida. The strict application of the 2021 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for Petitioner because it likely cannot – due to no fault of its own – meet the 10% Test by the CAA deadline. Further, the waiver will serve the purposes of the Statute and the Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State. Moreover, the Statute was enacted, in part, to encourage private and public investment in facilities for persons of low-income. By granting this waiver, and further ensuring the development of 90 affordable housing units in Duval County, Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable housing. *See* § 420.5099(2), Fla. Stat.

22. The foregoing demonstrates the hardship and other circumstances justifying this Petition.

23. The requested waiver should be granted because, as demonstrated above, the delay was caused by circumstances beyond Petitioner's control, due diligence was employed in

[5] The reasons that precipitated the credit swaps include, but are not limited to: need for off-site improvements, which required negotiation with neighboring property owners; revision to construction plans due to increased construction costs, which required the securing of additional funds; redesign requirements due to a fire code violation in the design of a staircase; post-Hurricane clean up; and title issues, which only became known after the design process.

an attempt to resolve those circumstances, the Development in all respects, except timing, still meets the conditions upon which the Housing Credits were originally allocated, and the Development is still desirable in terms of meeting affordable housing needs.

24. Should Florida Housing require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

G. ACTION REQUESTED

25. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver to permit the requested credit exchange, immediate return of Petitioner's 2022 Housing Credit Allocation, and an immediate allocation of new Housing Credits; (ii) grant a corresponding extension of deadlines relative to those credits; (iii) grant this Petition and all of the relief requested herein; and (iv) grant such further relief as it may deem appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, 22nd Floor
Miami, Florida 33131
Tel: (305) 789-3350
Fax: (305) 789-3395
E-mail: bmcdonough@stearnsweaver.com

Counsel for Petitioner

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

CERTIFICATE OF SERVICE

This Petition is being served by electronic transmission for filing with the Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 23rd day of June, 2023.

By:___*/s/ Brian J. McDonough*_____
Brian J. McDonough, Esq.