STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Florida Housing Finance Corporation
FILED 12/21/2020 3:36 P.M.

Silver Pointe Development Partners, LLC a Florida limited liability company,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

CASE NO. 2020-077VW

Application No. 2017-002C/2018-361C/ 2018-334V

PETITION FOR WAIVER OF RULE 67-48.002(95), F.A.C. (9/15/16) AND FOR BOARD APPROVAL UNDER 67-48.004(3)(a)-(b), F.A.C. (9/15/16) AND SECTION 3.c. and f. OF THE APPLICANT CERTIFICATION AND ACKNOWLEDGEMENT FORM FOR RFA 2016-110 AND EXHIBIT C THERETO

Silver Pointe Development Partners, LLC, a Florida limited liability company (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 2016 Qualified Allocation Plan ("2016 QAP") as incorporated and adopted by Rule 67-48.002(95), Florida Administrative Code ("F.A.C.") (September 15, 2016) such that Petitioner may return its 2018 Housing Credit Allocation now as opposed to waiting until the last quarter of 2021. Petitioner also seeks Board approval pursuant to Rule 67-48.004(3)(a)-(b), F.A.C. (September 15, 2016) and the provisions of RFA 2016-110 Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties ("RFA") to change the applicant name, applicant principals, and developer principals because Petitioner would like to transfer the Development to a new owner. Absent the requested waiver, Petitioner will not be able to close on the sale of the development. 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:

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2. The address, telephone and facsimile number and e-mail address of Petitioner's counsel are:

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B. THE DEVELOPMENT

3. On December 2, 2016, Petitioner submitted application number 2017-002C in response to RFA 2016-110 (Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties) and was awarded funding.

4. Petitioner subsequently submitted application number 2018-334V on April 13, 2018 in response to RFA 2018-109 (Development Viability Loan Funding) for developments experiencing a reduction in equity funding for their active award, which recognized a funding need based on changes in market pricing that had been exacerbated by increased construction

costs due to hurricane impact and construction market changes. Petitioner was also awarded funding pursuant to this RFA.

5. The applications pertain to the following development (the "Development"):

- Development Name: Silver Pointe
- Developer: Gardner Capital Development Florida, LLC
- County of Development: Marion
- Number of Units: 90
- Type: Garden Apartments (new construction)
- Demographics: Family
- Funding Amounts: $1,400,000 Housing Credits (annual allocation); $1,250,000 viability loan funding.
- Set Asides: 10% at 45% AMI and 90% at or below 60% AMI

6. The Development received an allocation of the 2017 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 on August 2, 2017.

7. Florida Housing staff executed a 2017 Carryover Allocation Agreement on December 22, 2017 for the allocation of its Tax Credits.

8. An exchange of credits was approved by a final order executed on November 6, 2018, which allowed the Applicant to exchange its 2017 tax credits for an allocation of 2018 tax credits, and a 2018 Carryover Allocation Agreement was executed on November 13, 2018. In addition, a Notice of Preliminary Award for the Viability Loan Funding was issued to Petitioner on June 6, 2018. A credit underwriting report was approved by the Board on December 13, 2019,

recommending an allocation of $1,400,000 in 9% Housing Credits and $1,250,000 in Viability Loan Funding.

9. By letter dated August 7, 2020, Petitioner requested Board approval to allow a Developer Principal change, which was approved by the Board at its September 4, 2020 meeting. Specifically, Joe Chambers and Martin Moore were removed from the Developer's ownership structure. The letter also requested an immaterial change to Petitioner's structure, which was approved by Florida Housing staff.

10. 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, 2020. However, that date was extended to December 31, 2021 (the "Placed-In-Service Date") pursuant to Rev. Proc. 2014-49 due to COVID-related effects on the Development.

11. For the reasons discussed below, Petitioner anticipates the Development will be placed in service in February of 2023. Because Petitioner will not be able to meet the Placed-In-Service Date, Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2021.

C. WAIVER IS PERMANENT

12. The waiver being sought is permanent in nature.

D. THE RULE FROM WHICH WAIVER IS REQUESTED

13. Petitioner requests a waiver of Rule 67-48.002(95), F.A.C. (September 15, 2016), which defines "QAP" with reference to the 2016 QAP and which adopts and incorporates the 2016 QAP by reference:

> "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2016 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-07355.

14. Petitioner further requests a waiver of Subsection II.K. of the 2016 QAP, which provides as follows:

> K. Notwithstanding any other provision of this QAP, 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, the Corporation may reserve allocation in an amount not to exceed the amount of Housing Credits returned, and may allocate such Housing Credits to the Applicant for the year after the year in which the Development was otherwise required to be placed in service, 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) the Executive Director must find and determine that the delay was caused by circumstances beyond the Applicant's control, that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay, 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.

(emphasis added).

15. The process found in the 2016 QAP allows an applicant to return its allocation of housing tax credits in the last calendar quarter of the year in which it was otherwise required to be placed in service. The tax credit exchange request may only be approved by the Executive Director of Florida Housing under the conditions identified in the 2016 QAP. Because Petitioner knows now that it will not be able to meet the Placed-In-Service Date, Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of

2021. As demonstrated below, the delay was caused by circumstances beyond Petitioner's control, due diligence was employed in an attempt to resolve those circumstances, the Development in all respects, except time placed in service, 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.

E. THE RULE AND RFA PROVISION PURSUANT TO WHICH BOARD APPROVAL IS REQUESTED

16. Petitioner seeks Board approval to change the applicant name, applicant principals, and developer principals pursuant to Rule 67-48.004(3)(a)-(b) (9/15/16), which provides:

> (3) For the SAIL, HOME and Housing Credit Programs, notwithstanding any other provision of these rules, the following items as identified by the Applicant in the Application **must be maintained and cannot be changed** by the Applicant after the applicable submission, unless provided otherwise below:
> (a) **Name of Applicant entity**; notwithstanding the foregoing, the name of the Applicant entity may be changed only by written request of an Applicant to Corporation staff and approval of the Board after the Applicant has been invited to enter credit underwriting. With regard to said approval, the Board shall consider the facts and circumstances of each Applicant's request, inclusive of validity and consistency of Application documentation;
> (b) **Principals of each Developer, including all co-Developers**; notwithstanding the foregoing, the Principals of the Developer(s) may be changed only by written request of an Applicant to Corporation staff and approval of the Board after the Applicant has been invited to enter credit underwriting. With regard to said approval, the Board shall consider the facts and circumstances of each Applicant's request, inclusive of validity and consistency of Application documentation. . . .

Id. (emphasis added). RFA 2016-110, Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties similarly provides for Board approval of the requested changes to the principals and applicant name:

> Applicant Certification and Acknowledgement Form . . . .
> 3.c. **The name of the Applicant entity** stated in the Application may be changed only by written request of an Applicant to Corporation staff and approval of the Board after the Carryover Allocation Agreement is in effect. In addition, as further outlined in Item 2 of Exhibit C of the RFA the Applicant entity shall be

the recipient of the Housing Credits and **may not change in any way until after the Carryover Allocation Agreement is in effect**. . . .

f. **The Principals of each Developer identified in the Application, including all co-Developers, may be changed only** by written request of an Applicant to Corporation staff and approval of the Board **after the Applicant has been invited to enter credit underwriting**. In addition, any allowable replacement of an experienced Principal of a Developer entity must meet the experience requirements that were met by the original Principal. . . .

Exhibit C . . . .
2. Applicant Requirements:
For purposes of the following, a material change shall mean 33.3 percent or more of the Applicant, a general partner of the Applicant, or a non-investor member of the Applicant, and a non-material change shall mean less than 33.3 percent of the Applicant, a general partner of the Applicant, or a non-investor member of the Applicant. **The Applicant entity shall be the recipient of the Housing Credits and cannot be changed in any way (materially or non-materially) until after the Carryover Allocation Agreement is in effect**. Once the Carryover Allocation Agreement has been executed by all parties, (i) replacement of the Applicant or a material change in the ownership structure of the named Applicant will require Board approval prior to the change, and (ii) any non-material change in the ownership structure of the named Applicant will require Corporation approval prior to the change. The Applicant entity may be changed without Board approval after a Final Housing Credit Allocation Agreement has been approved and the IRS Forms 8609 have been issued; however, the Corporation must still be notified in writing of the change. Changes to the Applicant entity prior to the execution of a Carryover Allocation Agreement or without Board approval or Corporation approval, as applicable, prior to the approval of the Final Housing Credit Allocation and issuance of the IRS Forms 8609 shall result in a disqualification from receiving funding and shall be deemed a material misrepresentation. Changes to the investor limited partner of an Applicant limited partnership or the investor-member of an Applicant limited liability company owning the syndicating interest therein will not result in disqualification.

Id. (emphasis added).

F. STATUTES IMPLEMENTED BY THE RULES AND THE 2016 QAP

17. The Rules implement 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").[1] The Act designates FHFC 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, FHFC 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, Rules subject to Petitioner's waiver requests are implementing, among other sections of the Act, the statutory authorization for the Corporation's establishment of Allocation Procedures for the HC Program. *Id*.

G. JUSTIFICATION FOR GRANTING WAIVER AND BOARD APPROVAL

18. The Petitioner no longer has the ability to obtain competitive equity commitments for the deal since losing their senior level staff member for the state of Florida (*i.e.*, Joe Chambers). Developer's current senior staff is located out of state and does not have the necessary institutional knowledge of the Development to source and secure equity commitments. The previous equity partner backed out of the deal just prior to closing after learning of the departure of Joe Chambers and Developer experienced similar reluctance from other equity providers without a senior level staff member on the ground in Florida. .

19. To mitigate further delay in construction of the Development, Petitioner has an agreement in place with a qualified and experienced development team to convey the Development, including land and all work completed to date.

20. The Petitioner would suffer substantial hardship if denied the ability to make the requested changes to the Applicant and Developer entities which are necessary to convey the Development such that it may continue through the development process. The Petitioner has

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

spent over $2,000,000 for the purchase of the land, third party reports, engineering and architectural drawings, and other costs associated with the Development.

21. To proceed, Petitioner must be able to change the applicant name, applicant principals, and developer principals. Specifically, the applicant name would change from Silver Pointe Development Partners, LLC to Silver Pointe, Ltd. Additionally, all of the applicant's principals, and all of the Developer's principals,[2] would change. *See* Current Applicant Principal Structure, attached as Exhibit A; Current Developer Principal Structure, attached as Exhibit B; Proposed Applicant Principal Structure, attached as Exhibit C; and Proposed Developer Principal Structure, attached as Exhibit D. As discussed above, Petitioner has already been invited to credit underwriting and the 2018 Carryover Allocation Agreement was executed on November 13, 2018. Accordingly, Petitioner is permitted under Rule 67-48.004(3)(a)-(b), as well as the applicable RFA provisions, to change the principals and applicant name upon this written request and Board approval. If this request is denied, Petitioner will not be able to transfer the Development to the new owner.

22. The new applicant will be Silver Pointe, Ltd. Silver Pointe, Ltd. is a single purpose newly formed Florida limited partnership established for the purpose of being the owner and operator of the Silver Pointe project. The sole member of Silver Pointe, Ltd is MW5 Holdings, LLC whose sole member is Martin Wohl. Martin Wohl has been an owner and developer of affordable housing in Florida since 2010 while developing his first 9% LIHTC project.

[2] If the Petition is granted, the single developer would be replaced by two co-developers. As required by RFA 2016-110, the replacement of the experienced Principal of the Developer entity will meet the experience requirements that were met by the original Principal.

23. The new co-developers are affiliated entities of Marmer Construction and McDowell Housing Partners (the "Replacement Developers"). Principals and staff of the Replacement Developers maintain an established track record of successfully completing developments that utilize Florida Housing funding programs including Housing Credits, SAIL, and HOME. Through more favorable financing terms and reduction in construction hard costs, the co-developers are confident in their ability to close and complete construction of the Development.

24. In addition to being a co-developer, Marmer Construction will also act as a general contractor. Marmer Construction is an established builder with a sub-contractor relationship base in the Development's market. Marmer is working through redesign and value engineering of the Development to resolve construction cost issues that impeded Petitioner. To the extent necessary, Marmer Construction, acting as both general contractor and co-developer, has the ability to reduce their overhead and fees as general contractor to further ensure viable economics for the Development.

25. McDowell Housing Partners' ("MHP") principals include Mario Sariol ("CFO") and Christopher Shear ("COO"), who have been developing affordable housing since 2008 utilizing Florida Housing administered funding programs. Combined, they have completed the construction of more than 3,000 affordable housing units utilizing low-income housing tax credits, primarily within the State of Florida. In addition to the COO and CFO, MHP has dedicated extensive staff to work on the Development including development/project managers, construction manager, finance manager, project accountant, and asset manager. MHP shall utilize their relationships and technical expertise in securing new debt and equity commitments with more favorable financing terms for the Development.

26. Additionally, Petitioner requests a waiver of the 2016 QAP to permit Florida Housing to approve the tax credit exchange now. It is not possible for Petitioner to meet the required Placed-In-Service Date for reasons that are outside of Petitioner's control. Specifically, the new owners and Developers of the Development anticipate a 14-month construction period with the Development placed in service in February of 2023. Because Petitioner knows that it will not be able to meet the Placed-In-Service Date (*i.e.*, December 31, 2021), Petitioner requests the credit swap now as opposed to waiting until the last quarter of 2021.

27. Petitioner exercised due diligence in seeking to commence construction:

- Petitioner closed on the land purchase for the Development on September 28, 2018.
- Developer and its affiliates have spent approximately $2 million to date moving the Development towards the construction phase.
- The Development satisfied the 10% Housing Credit Test in June 2019.
- The City of Ocala granted site plan approval for the Development in December 2019.
- Petitioner submitted building and civil plans to the applicable permitting agencies in October 2018.
- The Development has obtained Water and Sewer approvals and anticipates obtaining all development approvals and permit approvals upon payment of permit fees. Impact fees and permit fees are anticipated to be paid in November 2021, after closing of construction financing.

28. A 14-month construction period is anticipated. Based on the closing date, and construction period, the Development is anticipated to be placed in service in February of 2023. Accordingly, it is presently known that there is insufficient time to meet the Placed-In-Service Date deadline. Without the waiver, Petitioner will be unable to complete the credit swap. As

discussed above, the delays have been caused by circumstances outside of the Petitioner's control and despite Petitioner's diligent efforts to move the Development forward.

29. This Petition should be granted, as opposed to deobligating the award, because Marion County is currently exhibiting a shortage of affordable housing units. The Development is "shovel-ready" – the architecture and engineering is complete and all major due diligence has been performed. Accordingly, granting the Petition will result in the delivery of 90 desperately needed affordable housing units much faster than would reallocating the funding to a new development.

30. 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,[3] 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.

31. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2016 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 90 affordable housing units will be preserved and made available for the target population in Marion County, Florida. The strict application of the 2016 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for

[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.

Petitioner because the new owner and Developer cannot complete construction in one year, as necessary to meet the current placed-in-service date. 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.

32. As mentioned above, the requested waiver serves the purpose of the Statute because one of the primary goals of the Statute is to facilitate the availability of decent, safe, and sanitary housing in the State for low-income households. 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 ninety (90) affordable housing units in Marion 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.

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

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

H. ACTION REQUESTED

35. For the reasons set forth herein, Petitioner respectfully requests that the Board: (i) approve Petitioner's request to change the applicant name, applicant principals, and Developer principals; (ii) grant the requested waiver to permit the requested credit exchange, immediate return of Petitioner's 2018 Housing Credit Allocation, and an immediate allocation of new Housing 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,

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Counsel for Petitioner

By: *Brian J. McDonough*
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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 at Corporation.Clerk@FloridaHousing.org and a hard copy is being mailed via U.S. Mail to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 21st day of December, 2020.

By: *Brian J. McDonough*
Brian J. McDonough, Esq.

EXHIBIT A -Current Applicant Principal Structure



EXHIBIT B - Current Developer Principal Structure

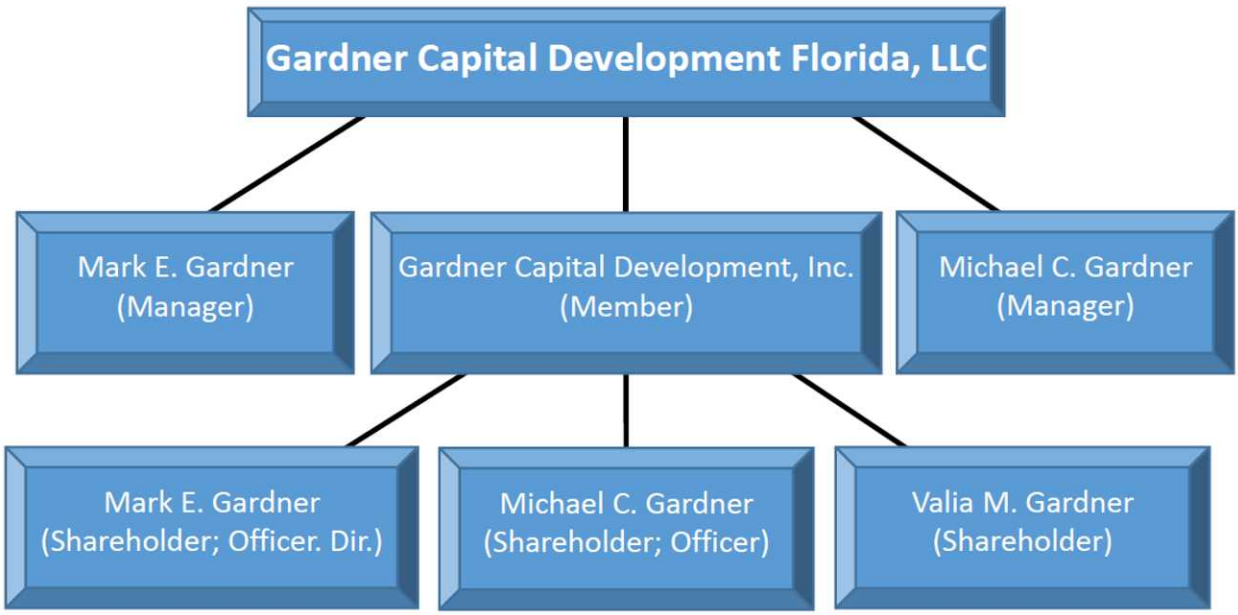


EXHIBIT C – Proposed Applicant Principal Structure

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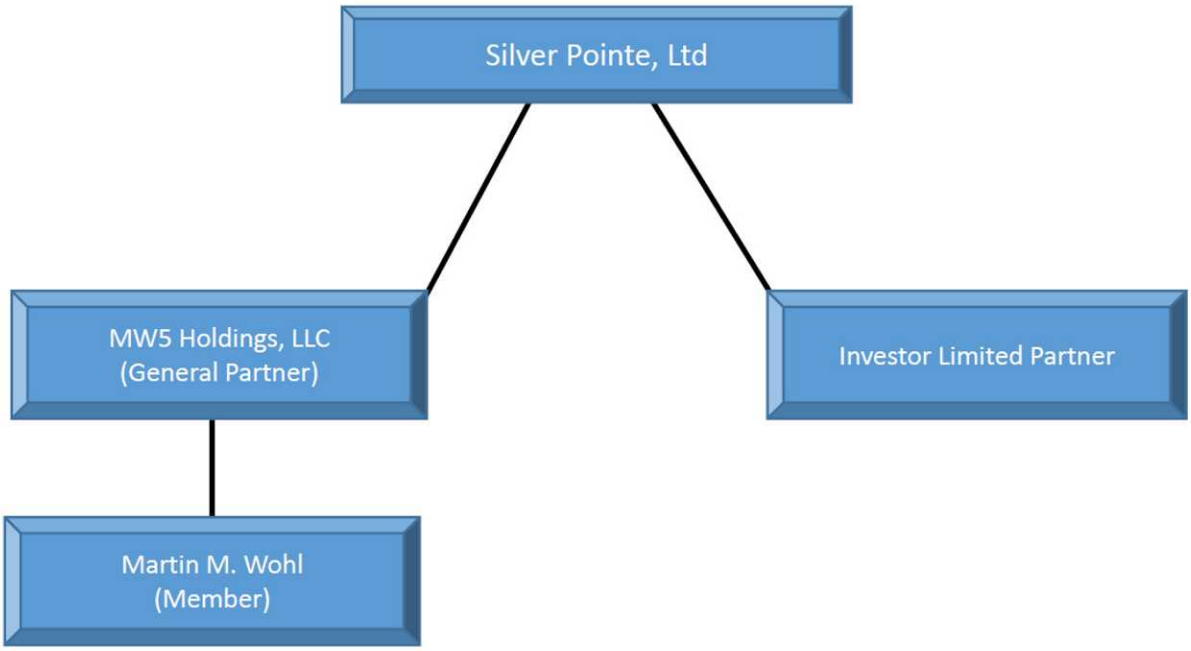


EXHIBIT D - Proposed Developer Principal Structure

