STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. :
APPLICATION NO.: 2021-024VW

ORLANDO LEASED HOUSING ASSOCIATES XI, LLLP

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

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FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF RULE 67-21.027(6) F.A.C. AND THE FINAL COST CERTIFICATION APPLICATION PACKAGE REQUIREMENT TO CONFIRM CERTAIN ITEMS WITH THE THREE LARGEST DOLLAR SUBCONTRACTORS

Petitioner, Orlando Leased Housing Associates XI, LLLP ("**Petitioner**"), a Minnesota limited liability limited partnership authorized to conduct business in the State of Florida, pursuant to section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions respondent, Florida Housing Finance Corporation ("**Florida Housing**"), for a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, which in turn incorporates by reference the Final Cost Certification Application Package ("**Form FCCAP**"), as required pursuant to the Non-Competitive Application Package (Rev. 05-2018). Specifically, Petitioner seeks a variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification confirm certain items with the general contractor's three largest dollar subcontractors, as one of these three subcontractors is no longer in business, Petitioner asks for a variance from this requirement so that the certified public accountant may instead confirm items with the fourth largest dollar subcontractor. In support of this request, Petitioner states:

A. THE PETITIONER

1. The address, telephone number and facsimile number of the Petitioner are:

Orlando Leased Housing Associates XI, LLLP
2905 Northwest Blvd. Suite 150
Plymouth, Minnesota 55441
Attention: Owen Metz
Phone: (623) 265-6828
Email: ometz@dominiuminc.com

2. The address and telephone number of Petitioner's counsel are:

David F. Leon, Esq.
Nelson Mullins Broad and Cassel
390 N. Orange Ave., Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4200
Facsimile: (407) 650-0918
Email: David.Leon@nelsonmullins.com

B. THE DEVELOPMENT

3. On August 28, 2018, Petitioner submitted a Multifamily Revenue Bond Program Application to the Orange County Housing Finance Authority requesting $34,000,000 in tax exempt bonds (the "**Bonds**"). Petitioner thereafter acquired Chapel Trace Apartments in order to rehabilitate it by utilizing the Bonds and 4% low-income housing tax credits ("**Housing Credits**"), to preserve and expand the affordable units at Chapel Trace Apartments. Petitioner will be using the Freddie Mac Tax Exempt Loan Program ("**Freddie TEL**") and the Bonds that were issued in the structure of a tax-exempt note in the maximum principal amount of $25,610,000. Petitioner applied for Non-Competitive Housing Credits and requested an annual amount of $1,733,550 in Housing Credits to assist in financing the rehabilitation of the 312-unit family development, known

as Chapel Trace Apartments (the "**Development**"). One hundred percent of the units of the Development will be restricted to 60 percent AMI for 30 years.

C. THE RULE FROM WHICH WAIVER IS SOUGHT

4. Petitioner requests a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, which adopts and incorporates the Form FCCAP. Specifically, Petitioner requests a waiver of or variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification request confirmation of certain cost-related items by the general contractor's three largest dollar subcontractors.

5. As a condition for receiving housing credits, each applicant must use the Form FCCAP to itemize all expenses incurred in association with construction or rehabilitation of a housing credit development, including expenses associated with the general contractor's use of subcontractors. *See* Rule 67-21.027(6) F.A.C. As part of the Form FCCAP, each applicant must submit, among other things, a General Contractor Cost Certification and an unqualified audit report prepared by an independent certified public accountant for the General Contractor Cost Certification. *Id*. The General Contractor Cost Certification is used to establish the actual total costs incurred by the general contractor in the delivery of the development and assists Florida Housing in determining certain development costs and the amount of subsidy to be allocated to the development. Form FCCAP, General Contractor Cost Certification Form and Instructions, p. 1. Florida Housing will not issue a final housing credit allocation until all required items in the Form FCCAP are received and processed. Rule 67-21.027(6) F.A.C. Rule 67-21.027(6) adopts and incorporates the Form FCCAP by reference. *Id.* ("The Final Cost Certification Application Package (Form FCCAP) is adopted and incorporated herein by reference, effective 05-2018 …").

6. To assist the certified public accountant in completing an audit of the General Contractor Cost Certification, each applicant's general contractor must provide a list of all subcontractors to be used on the job, with amounts paid or to be paid. GCCC, p. 2. The certified public accountant must ask the three largest dollar subcontractors to confirm the following:

1) Confirm the construction contract amount;
2) Confirm any change orders;
3) Confirm what additional costs were incurred outside of the contract, if any;
4) Confirm the type of services provided (trade breakdown);
5) Confirm amounts paid to date and balance(s), if any, to be paid;
6) Request to clarify if it is related to the General Contractor; and
7) Request to clarify if it is related or affiliated to any other subcontractor used on the job. *Id.,* pp. 2-3.

7. In addition, the certified public accountant must randomly select other subcontractors sufficient in number (but in no event less than five) that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total construction cost, and review certain documentation to verify the amounts paid to each subcontractor. *Id.*, p. 3.

8. Petitioner requests a waiver of or variance from the requirement in the Form FCCAP, incorporated by reference into Rule 67-21.027(6), that the certified public accountant send the required confirmation requests to the three largest dollar subcontractors. One of the three largest dollar subcontractors proposed to be used for the Development, Global Cross Sourcing, Inc. ("**Global Cross**"), is no longer in business. Thus, the certified public accountant cannot send

the required confirmation requests to this entity and seeks to send these confirmation requests instead to the fourth largest dollar subcontractor.

D. STATUTES IMPLEMENTED BY THE RULES

9. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act (the "**Act**"), the statute that designated the Corporation as the housing credit agency and created the Housing Tax Credit Program. *See* § 420.5099, *Fla. Stat.*

E. WAIVER WILL SERVE THE UNDERLYING PURPOSE OF THE STATUTE

10. Petitioner requests a waiver of or variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification send confirmation requests on certain cost-related items to the three largest dollar subcontractors used by the general contractor on the project.

11. As required by the Form FCCAP, Petitioner's general contractor submitted a list of all subcontractors used on the job, with amounts paid or to be paid. The three largest dollar subcontractors (with the associated amounts paid or to be paid) are Viking Builders of SW Florida ($1,762,452) ("**Viking**"), MJ Landscaping and Irrigation ($961,510) ("**MJ Landscaping**"), and Global Cross ($807,117). Thus, under the rule, the certified public accountant was required to send confirmation requests to Viking, MJ Landscaping, and Global Cross.

12. The certified public accountant performing the audit of Petitioner's General Contractor Cost Certification was able to confirm those items outlined in the Form FCCAP with two of the three largest dollar subcontractors, Viking and MJ Landscaping. However, when the certified public accountant attempted to send the required confirmation requests to the third

subcontractor, Global Cross, the certified public accountant learned that this company is no longer in business. The certified public accountant sent, via email, confirmation requests to the email address included in Global Cross subcontract three times over the course of two months. When Global Cross did not respond, the certified public accountant called the Vice President and Chief Financial Officer of the general contractor to discuss the issue of why Global Cross was not responding to the confirmation requests. Following the discussion, the Vice President of general contractor reached out to his contact at Global Cross and was informed that Global Cross was no longer in business and that the contract at Global Cross did not have access to the accounting system. Consequently, the certified public accountant cannot perform the required confirmation procedure with Global Cross.

13. The certified public accountant did, however, include Global Cross in its review of subcontractors under the Form FCCAP's requirement to select other subcontractors that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total contract construction cost, and verify the amounts paid to each subcontractor by reviewing check copies, contract documents, change orders, and other supporting information to verify amounts included within the cost certification for each subcontractor listed. Consequently, despite the fact that Global Cross is no longer in business, the certified public accountant did materially verify the amounts paid to this subcontractor in support of the project.

14. In the absence of Global Cross's confirmation, the certified public accountant did, however, send confirmation requests to KnR Electrical Services, Inc. ($700,725), Janney Construction Services ($603,100) and MPA Plumbing, Inc. ($447,146) (*i.e.*, the fourth, fifth, and sixth highest dollar amount subcontractors). As of March 30, 2021, KnR Electrical Services, Inc., Janney Construction Services, and MPA Plumbing, Inc. have all returned the confirmations.

15. Petitioner asks that Florida Housing grant a variance and allow the certified public accountant to submit the required confirmation requests to the fourth largest dollar subcontractor, instead of Global Cross. The fourth largest dollar subcontractor is KnR Electrical Services Inc. ($700,725). With the substitution of KnR Electrical Services Inc. for Global Cross, certified public accountant was able to confirm the various cost-related items outlined in Form FCCAP with Viking, MJ Landscaping, KnR Electrical Services, Inc., Janney Construction Services, MPA Plumbing Inc, along with three other subcontractors, which represent an overall percentage of 44.24 percent of the total cost construction costs of the Development. In addition, the certified public accountant traced the costs stated to be attributable to Global Cross to the source documents, which would bring the total percentage of total construction costs either confirmed or tested to 51.95 percent. As such, in accordance with the Form FCCAP's requirement to verify the amounts paid to the subcontractors accounting for at least 40 percent of the total construction costs, the certified public accountant was still able to verify a substantial portion (more than 40 percent) of the costs for subcontractors for the project, including the amounts paid to Global Cross.

16. Without the grant of a waiver or variance, the certified public accountant will not be able to complete the required audit and Petitioner will not be able to submit a complete Form FCCAP, jeopardizing its housing credit allocation and its ability to move forward with rehabilitating the Development.

17. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the power and 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. A waiver 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[1] *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.

18. Here, Petitioner meets the requirements for a waiver or variance. The requested variance will not adversely impact the Development or Florida Housing and will ensure that 312 affordable family housing units will be preserved and made available for the target population in Orange County. The strict application of the rule and Form FCCAP will create substantial hardship for Petitioner because completion of the Form FCCAP is a condition for receiving a final housing credit allocation.

19. The variance will still serve the underlying purposes of the rule. Even with substituting the fourth largest dollar subcontractor for Global Cross in its review, the certified public accountant will be able to confirm the required cost-related items under the Form FCCAP with subcontractors whose costs represent a similar percentage of the total construction cost. The requested waiver or variance will also not hinder the certified public accountant in verifying the costs of subcontractors representing more than 40 percent of the total construction cost.

20. Further, a waiver of this Rule will serve the purposes of Section 420.5099 and the Act that are implemented by Chapter 67-21 of the Florida Administrative Code, because one of the goals of the Corporation is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households. Denial of the waiver would deprive Orange County of essential and affordable housing units.

[1] "Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. Further, "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* Fla. Stat. § 120.542.

E. TYPE OF WAIVER

21. The waiver or variance being sought is permanent in nature.

F. ACTION REQUESTED

22. For the reasons set forth herein, Petitioner respectfully requests the Corporation (*i*) grant the requested waiver of or variance from Rule 67-21.027(6), F.A.C, and the requirement of the Final Cost Certification Application Package, incorporated by reference, which requires that the certified public accountant performing the audit of the General Contractor's Cost Certification send confirmation requests to the general contractor's three largest dollar subcontractors, and authorize sending those confirmation requests to the general contractor's first, second, and fourth largest dollar subcontractors instead; (*ii*) grant the Petition and all the relief requested herein; and (*iii*) grant such further relief as it may deem appropriate.

Respectfully submitted on the 12th day of April, 2021.

Respectfully submitted,

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation,
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
CorporationClerk@floridahousing.org,

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us

The 12th day of April, 2021.

NELSON MULLINS BROAD & CASSEL

By: _____
David F. Leon, Esq.
Fla. Bar No. 53929