STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING FINANCE CORPORATION

INNOVARE, LP,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2021-075VW
Application No. 2020-478CSN

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.002(96), F.A.C. (7/11/19) AND THE 2019 QAP

Petitioner Innovare, LP (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 2019 Qualified Allocation Plan ("2019 QAP") as incorporated and adopted by Rule 67-48.002(96), Florida Administrative Code ("F.A.C.") (July 11, 2019), such that Petitioner may return its 2020 Housing Credit Allocation now as opposed to waiting until the last quarter of 2022. While Petitioner has expended approximately $991,000 to diligently progress the development, delays related to establishing a land trust, as well as increases in construction costs, necessitate this request for waiver. 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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Innovare, LP
405 Central Ave., Suite 100
St. Petersburg, FL 33705
Telephone: (727)369-8500
Fax: N/A

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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.
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B. DEVELOPMENT BACKGROUND

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

- Development Name: Innovare
- Development Address: 5th Ave S, SE of the intersection of 5th Ave S. & Dr. Martin Luther King Jr. St. S., St. Petersburg AND 5th Ave S, SW of the intersection of 5th Ave S. & Highland Court S., St. Petersburg
- County: Pinellas
- Developers: Volunteers of America of Florida, Inc.; Gorman and Company
- Number of Units: 51 new construction
- Type: Garden was indicated in the Application, but a Rule waiver was subsequently granted to change to Mid-Rise 5 stories for one building and mid-rise 6 stories for the other building.
- Set Asides: 85% of units at or below 60% AMI and 15% at or below 33%.
- Demographics: Innovare will set aside at least 50 percent of the total units (51) for Homeless individuals and families as defined in Section 420.621(5), F.S. and at least 15 percent of the total units for Persons with Special Needs as defined in Section 420.0004(13), F.S. The remaining 50 percent of the units will be affordable housing reserved for income qualifying individuals and families, with

preference given to formerly homeless households who may no longer need supportive housing.

- Funding: HC request of $1,165,367 annually; ELI Loan request of $205,600; and SAIL request of $3,500,000.

4. The Development received an allocation of the 2020 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.

5. Florida Housing staff executed a 2020 Carryover Allocation Agreement on or about November 13, 2020 for the allocation of its Tax Credits.

6. 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, 2022.

7. Petitioner experienced delays beyond its control, stemming from an increase in construction costs due to the volatility of the industry related to labor and supply chain disruptions related to the COVID-19 pandemic. Petitioner was forced to secure additional financing to cover the increased costs. After much time and effort, Petitioner was able to identify, and secure, funds through Pinellas County. However, in order to access those funds, Petitioner was required to place the land underlying the Development in a land trust. The trust ensures the land will provide affordable housing for 99 years. Additional time and expense was invested in drafting the documents and completing the steps necessary for the land trust. Because that delay prevented Petitioner from closing on all of the financing and the land acquisition costs were no longer counted as part of the project, Petitioner was not able to meet the 10% threshold and site control requirements of the Carryover Agreement. Petitioner

requested a six-month extension of the Site Control and 10% Test deadline. Florida Housing approved the request and extended the Site Control and 10% Test deadline to November 13, 2021 (the "10% Deadline").

8. The delays have also prevented Petitioner from commencing construction.

9. Florida Housing approved Petitioner's request for an extension of the loan closing deadline to January 17, 2022.

10. Because Petitioner has been prevented by circumstances outside of its control from closing on all of the financing and land acquisition necessary to satisfy the 10% Test Deadline, Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2022.

C. WAIVER IS PERMANENT

11. The waiver being sought is permanent in nature.

D. THE RULE FROM WHICH WAIVER IS REQUESTED

12. Petitioner requests a waiver of Rule 67-48.002(96), effective July 11, 2019, which provides in pertinent part:

> "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2019 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-10769.

13. Subsection II.K. of the 2019 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 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 pursuant to Section 42 of the IRC, the Corporation may reserve allocation in an amount not to exceed the amount of Housing Credits returned, and may 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) 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. A Development located in a HUD designated DDA or QCT at the time of original allocation may retain its designation as such.

14. The process found in the 2019 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 2019 QAP. Because the land underlying the Development is being placed in a land trust, Petitioner will not be able to count the purchase price towards the 10% Test and Petitioner will not be able to meet the 10% Test Deadline. Petitioner therefore respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2022. 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. <u>STATUTES IMPLEMENTED BY THE RULE AND THE 2019 QAP.</u>

15. 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").[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, Rule implements, among other sections of the Act, the statutory authorization for Florida Housing's establishment of Allocation Procedures for the HC Program. *Id*.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE AND BOARD APPROVAL.

16. Petitioner timely submitted Application No. 2020-478CSN for the Development on March 31, 2020 ("Application").

17. Petitioner requests a waiver of the 2019 QAP to permit Florida Housing to approve the tax credit exchange now as opposed to waiting until the last quarter of 2022. It is not possible for Petitioner to meet the required 10% Test Deadline for reasons that are outside of Petitioner's control. Petitioner has used its best efforts to move the Development forward. The Land Trust will receive Board approval in October 2021. Closing on the land and with funders will occur in November 2021. The 10% Test will be met by the December 2021 General Contractors Draw.

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

18. Because Petitioner presently knows that it will not be able to meet the 10% Test Deadline, Petitioner requests the credit swap now as opposed to waiting until the last quarter of 2022.

19. 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. In fact, approximately $991,000 has been expended to date in relation to the Development.

20. Based on delays in establishing the land trust and the inability to include the land's purchase price for purposes of the 10% Test, Petitioner knows that it will not be able to meet the 10% Test Deadline. If the Petition is denied, Petitioner will be unable to complete the credit swap. Without the credit exchange, the Development cannot move forward because Petitioner will not have sufficient time to secure an investor and Pinellas County will thus be denied these 51 affordable housing units.

21. This Petition should be granted, as opposed to de-obligating the award, because Pinellas County is currently experiencing a shortage of affordable housing units for persons with special needs experiencing homelessness. The Guarantor is a non-profit that has already committed a substantial amount of funds towards the Development, which costs would not be reimbursed if the award is de-obligated. The loss of funds already invested would jeopardize the non-profit's financial future. Granting the Petition will result in the delivery of 51 affordable housing units much faster than would reallocating the funding to a new development.

22. 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,[2] 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.

23. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2019 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 51 affordable housing units will be preserved and made available for the target population in Pinellas County, Florida. The strict application of the 2019 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for Petitioner because it cannot – due to no fault of its own – meet the 10% Test 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.

24. 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 51 affordable housing units in Pinellas 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

[2] "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.

realities and principles of fundamental fairness in developing affordable housing. *See* § 420.5099(2), Fla. Stat.

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

26. 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

27. 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 2020 Housing Credit Allocation, and an immediate allocation of new Housing Credits; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

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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 5th day of October, 2021.

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