STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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In re: The Village of Casa Familia, Ltd.

FHFC CASE NO. 2021-035VW
Application No. 2019-422CG
RFA No. 2019-107

_____/

PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE RULE 67-48.002(96) AND THE 2018 QAP

Petitioner, The Village of Casa Familia, Ltd. (Petitioner), pursuant to section 120.542, Florida Statutes, and chapter 28-104, Florida Administrative Code, petitions Florida Housing Finance Corporation (Florida Housing) for a waiver of the timing provisions of the 2018 Qualified Allocation Plan (2018 QAP) as incorporated and adopted Rule 67-48.002(96) (2018), Florida Administrative Code, pertaining to a tax credit exchange. Due to forces outside of Petitioner's control, Petitioner cannot meet the Placed-In-Service and the 10% Test deadlines as required by the Carryover Allocation Agreement. In support of this Petition, Petitioner states:

A. Petitioner and the Development

1. The name, address, telephone, and email address for Petitioner is:

The Village of Casa Familia, Ltd.
3 Miami Central, 161 NW 6th Street, Suite 1020
Miami, Florida 33136
Telephone: 305-357-4725
Email: lwong@apcompanies.com

The name, address, telephone and email address of Petitioner's counsel is:

Brittny Adams Long
Radey Law Firm
301 South Bronough Street, Suite 200
Tallahassee, Florida 32301
Telephone: 850-425-6654

Email: balong@radeylaw.com

2. Petitioner submitted Application No. 2019-422CG in response to Request for Applications No. 2019-107, Financing for the Development of Housing for Persons with A Disabling Condition or Developmental Disabilities (the "RFA"), for competitive housing credits to assist in the construction of a 59-unit development located in Miami-Dade County, Florida, known as The Village of Casa Familia (the "Development") to serve low-income individuals with developmental disabilities (IDD).[1]

3. The Development will be built on county-owned land. The non-profit principal of the Applicant, Casa Familia, Inc. (CFI), has a long-term ground lease with Miami-Dade County with a requirement that the community serves individuals with intellectual or developmental disabilities. Petitioner has a sublease with CFI for a portion of the site to build two residential buildings and a community center. Petitioner was awarded $1.5 million in annual 9% tax credits and a $4 million grant in RFA 2019-107. Petitioner also received a $2 million Surtax loan from Miami-Dade Public Housing and Community Development (PCHD) and a total of $5.15 million in Miami-Dade County General Obligation Bonds (GOB). The Development is also being awarded

[1] The following information regarding the Development is provided to facilitate staff's preparation of background material for the Florida Housing Board of Directors:

- Development Name: The Village of Casa Familia
- Developer, including at least one natural person Principal: Casa Familia Developer, LLC, Howard D. Cohen
- County of Development: Miami-Dade
- Number of Units: 50 (including 9 shared units)
- Type: Garden Apartments
- Set Asides: 15% of residential units at 28% of area median income and 71% of residential units at 60% of area median income
- Demographics: Special Needs-Individuals with Developmental Disabilities
- Funding Amounts: $1,500,000 in Competitive Housing Credits; $4,000,000 grant

57 Project-Based Vouchers (PBV) by PHCD and the remaining two units, not awarded vouchers, will be set aside as exempt manager units.

4. The application was assigned number 2019-422CG. Petitioner was invited into credit underwriting on May 20, 2019. On December 26, 2019, Petitioner entered into a 2019 Carryover Allocation Agreement with Florida Housing for the allocation of tax credits.

5. Pursuant to 26 U.S.C. 42(h)(1)(E)(i), the Development is required to be Placed In Service not later than the close of the second calendar year following the calendar year in which the allocation is made. Pursuant to 26 U.S.C. 42(h)(1)(E)(ii), and Florida Housing's requirements, Petitioner's deadline to meet the 10% Test was June 30, 2020. Petitioner requested, and Florida Housing granted under Rev Proc 2014-49, an extension of the 10% Test to December 26, 2020, and the Placed-In-Service date to December 31, 2022, and Florida Housing provided a further extension of the 10% Test deadline to June 26, 2021. In order to meet the 10% Test, Petitioner will need to have closed financing, which will not be completed by June 26, 2021.

B. Type of Waiver

6. The waiver being sought is permanent in nature.

C. Rule For Which a Variance Is Requested

7. Petitioner requests a waiver of subsection II.K. of the 2018 QAP. Rule 67-48.002(96) (2018) provided:

> QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2018 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 fromhttp://www.flrules.org/Gateway/reference.asp?No=Ref-09578.

8. Subsection II.K. of the 2018 QAP provided:

> 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.

9. The process in the 2018 QAP requires an applicant to return its allocation of housing tax credits in the last calendar year in which it was otherwise required to be Placed In Service before a tax credit exchange can be approved by the Executive Director of Florida Housing. Petitioner is requesting a waiver of this limitation on the timing of the tax credit exchange, to allow a credit exchange to be approved by the Executive Director, or the Board of Directors of Florida Housing, at this time rather than in the last calendar quarter of 2022.

D. Statutes Implemented by the Rule

10. The 2018 QAP and the Rule implement, among other sections of the Florida Housing Finance Corporation Act, the statutes relating to the allocation of Low-Income Housing Tax Credits contained in section 420.5099, Florida Statutes.

E. Justification for Granting Waiver From the Rule

11. Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to or variances from its requirements when strict application of the 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.

12. Petitioner requests a waiver of the timing requirements found in the 2018 QAP to permit Florida Housing to approve the tax credit exchange prior to the fourth quarter of 2022. Petitioner cannot satisfy the requirement in the Carryover Agreement, as extended, to spend 10% of the reasonably expected basis of the Development by June 26, 2021.

13. Over the last year, the Development has suffered unforeseen hardships that make it clear that the Development will not meet the 10% Test by June 26, 2021. These challenges are summarized as follows:

(a) A complaint has been made to the U.S. Department of Housing and Urban Development (HUD) suggesting that the Development may not comply with the Supreme Court's

decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999), which prohibits segregating individuals with development disabilities from integrated housing options. The Petitioner was only recently made aware of the complaint received by HUD and forwarded to PHCD that the Development may not comply with the Supreme Court's *Olmstead* decision. *See* **Exhibit A**, Email with Complaint. While PHCD and Miami-Dade County remain supportive of the Development, they will not issue a commitment for the PBVs or the GOB funds until they receive confirmation from HUD that the Development complies with the law. Without the rental subsidy provided by a PBV HAP contract and GOB sources to fund a portion of the construction costs, the Development will be unable to serve many individuals who would benefit from the stable supportive housing that it offers. The Petitioner cannot finalize credit underwriting, close on the financing, or start the construction until it receives the PBV and GOB commitments.

To bring resolution to the *Olmstead* complaint, Petitioner is in the process of obtaining HUD's approval of the Development. *See* **Exhibit B**, Letter to HUD. The Petitioner is seeking HUD's approval to implement a limited selection preference for households eligible for voluntary disability-specific services at the Development under section 106(a)(7) of the Housing Opportunities Through Modernization Act of 2016, Pub. L. 114-201 (July 29, 2016), 130 Stat. 782 (HOTMA). HUD's approval will confirm the Petitioner may implement the proposed limited selection preference for the anticipated PBV units under HOTMA. The Petitioner estimates that it could take up to 12 months to receive this confirmation.

(b) Though the Petitioner vehemently believes the Development complies with all laws, the resolution to the complaint from HUD could result in a complete restructuring of the deal with Miami-Dade County and Florida Housing. For example, the ground lease with Miami-Dade County requires 100% of the units to be set aside for tenants with IDD and the Florida Housing

RFA requires 50% of the units to be set aside for tenants with IDD. HUD's response on the *Olmstead* issue could result in us only being allowed to have a preference for a much lower percentage and as a result would require restructuring the ground lease with the County, obtaining an RFA waiver from the Florida Housing Board, and amending the programming of the clubhouse and design of the units based on this lower percentage set aside for IDD. In addition, under a worst-case scenario HUD could determine that they agree with the complaint and do not grant us approval for our tenant selection preference. This unfortunate result would mean the Development is no longer viable. Because of the potential need to restructure the Development under the ground lease and the RFA, Petitioner cannot purchase and store materials or make a capitalized ground lease payment to meet the 10% Test.

(c) Further, the COVID-19 pandemic and associated precautionary measures had a significant impact on daily life and the industry as a whole. Most of Petitioner's project team members were working from home and many government agencies have been working remotely. Document signatures, plan coordination, and the entitlement process have been hindered by challenges to complete previously seamless tasks with the new virtual work environment, which caused significant delays.

14. Despite these delays, Petitioner has been working diligently to complete pre-development activities and has to date completed the construction drawings and has obtained an expedited permitting process. The permits are expected by the Fall of 2021. Moreover, Petitioner is working to address the *Olmstead* issue with HUD as quickly as possible. Immediately upon receipt of the PBV and GOB commitments, Petitioner will close on the financing and commence construction. Though there is uncertainty surrounding the timeline to resolve the *Olmstead*

complaint, the Petitioner hopes to close by May of 2022, with construction completed by June 2023.

15. With these delays, it is evident that Petitioner will not meet a placed-in-service deadline of December 31, 2022. With a credit exchange, Petitioner is confident that it will be able to meet the 10% Test and Placed-In-Service deadline, as extended due to the credit exchange. Therefore, the requested 2021 credit exchange would extend the Development's Placed-In-Service date to December 31, 2023.

16. Under section 120.542(1), Florida Statutes, and chapter 28-104, Florida Administrative Code, 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, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. § 120.542(2), Fla. Stat. (2018).

17. In this instance, Petitioner meets the standards for a waiver of the Rule and timing limitations in the 2018 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 59 much needed affordable housing units will be made available for a vulnerable segment of the population in Miami-Dade County, Florida. Specifically, 57 units in the Development (of 59 units) will be set aside for individuals with IDD. The 57 units will be rented on a preferential basis to households eligible for voluntary services appropriate for individuals with IDD. Supportive services available at the Development will be coordinated by United Community Options, an experienced, professional community-based support and service coordinator, which will serve as the Services Coordinator and will ensure residents' have the tools

they need to live independent, self-determined lives. On-site resource counselors will be available to help residents connect with resources in the community and to empower them to do so. An on-site community center will welcome the participation of people from the neighborhood and greater community alongside the residents of the Development.

18. This Development will assist Florida Housing with fulfilling its statutory mandate to provide safe, sanitary, and affordable housing to the citizens of Florida. *See* § 420.502(2), Fla. Stat. Florida Housing is required by section 420.507(48), Florida Statutes, to reserve up to 5% of its annual allocation of low-income housing tax credits to allocate by competitive solicitation for high-priority affordable housing developments, such as housing for Persons with a Disabling Condition and their families or Persons with Developmental Disabilities, in communities throughout the state. The strict application of the 2018 QAP and the credit exchange requirements will create substantial hardship for Petitioner because it likely will not be able to satisfy the 10% Test or Placed-In-Service deadlines.

19. The requested waiver further 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 of Florida for low-income households. *Id.* By granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing in persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable rental housing. *See* § 420.5099(2), Fla. Stat.

F. <u>Action Requested</u>

WHEREFORE, Petitioner respectfully requests that Florida Housing:

(i) Grant the requested waiver of the timing requirements found in the 2018 QAP to allow the requested credit exchange to be approved before the fourth calendar quarter of 2022;

(ii) Grant this Petition and all of the relief requested herein; and

(iii) Grant such further relief as may be deemed appropriate

Respectfully submitted this 1st day of June, 2021.

/s/ Brittany Adams Long
Brittany Adams Long, FBN 504556
Radey Law Firm
301 South Bronough, Suite 200
Tallahassee, Florida 32301
Telephone: (850) 425-6654
E-mail: balong@radeylaw.com
Secondary: lmcelroy@radeylaw.com
Counsel for The Village of Casa Familia, Ltd.

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

This 1st day of June, 2021.

/s/ Brittany Adams Long
Brittany Adams Long

EXHIBIT A

Brian Jaffe

From: Brown, Clarence D. (PHCD) <Clarence.Brown@miamidade.gov>
Sent: Thursday, February 4, 2021 6:48 PM
To: dlawrence@casafamiliainc.org
Cc: Brian Jaffe; Greg Griffith; White, Tangie (PHCD)
Subject: FW: Miami Dade and Casa Familia, Inc.

Good Evening Ms. Lawrence. See below. I received this email today and want to share it with you and your partners. As I learn more I will keep you apprised. Have a good evening.

From: Chavis, Ann D [mailto:ann.d.chavis@hud.gov]
Sent: Thursday, February 04, 2021 11:35 AM
To: Brown, Clarence D. (PHCD) <Clarence.Brown@miamidade.gov>; White, Tangie (PHCD) <Tangie.White@miamidade.gov>
Subject: FW: Miami Dade and Casa Familia, Inc.

He will be calling you

From: President, Charles E <Charles.E.President@hud.gov>
Sent: Thursday, February 04, 2021 11:07 AM
To: Bustamante, Fiordaliza <fiordaliza.bustamante@hud.gov>; Chavis, Ann D <ann.d.chavis@hud.gov>
Cc: Chatman, Krysha R <Krysha.R.Chatman@hud.gov>; Levine, Aaron D <aaron.d.levine@hud.gov>
Subject: Miami Dade and Casa Familia, Inc.

Good Morning,

It has been brought to FHEO's attention that Miami-Dade County has leased County-owned land to Casa Familia, Inc. for the construction of The Village of Casa Familia (Casa Familia), an affordable housing community reserved for individuals with intellectual and developmental disabilities. Additionally, On January 20, 2021, the Miami-Dade County Board of County Commissioners voted unanimously to allocate $1,655,028 of Affordable Housing General Obligation Bonds to the development of the Village of Casa Familia.

Because Miami-Dade County is a recipient of federal financial assistance, it is subject to Section 504 of the Rehabilitation Act of 1973 (Section 504). Miami-Dade County also must comply with the Fair Housing Act (FHA) and Title II of the Americans with Disabilities Act (ADA).

On its face, the type of segregated housing which Casa Familia envisions could constitute unlawful discrimination under the Supreme Court's Olmstead decision (*Olmstead v. L.C.,* 527 U.S. 581 (1999)), which requires that "individuals with disabilities be given meaningful opportunities to live, work, and receive services in integrated settings." (See "Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead", attached to this letter.)

Such a determination would place the County in violation of multiple governing laws, including Section 504, the FHA, and Title II of the Americans with Disabilities Act.

While it doesn't appear any of the funds and land lease involved CDBG funds. Can you confirm the project does not involve any HUD funds? Also, if necessary can you assist FHEO with enforcing the aforementioned civil right violations with Miami -Dade?

Are you available to meet today for a brief discussion and to answer any questions?

Thank you,

Charles President
Director, FHEO Programs and Compliance, Florida & Kentucky
Office of Fair Housing & Equal Opportunity
Phone: (904) 208-6186 or (202) 975-5030

EXHIBIT B

Klein Hornig LLP
COUNSELORS AT LAW

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Emily Blumberg
202.926.3409
eblumberg@kleinhornig.com

May 17, 2021

Via Email to Carlos.Osegueda@hud.gov

Carlos Osegueda, Region IV FHEO Director
U.S. Dept. of Housing and Urban Development
Atlanta Regional Office of FHEO
Five Point Plaza
40 Marietta Street, 16th Floor
Atlanta, Georgia 30303-2806

Re: The Village at Casa Familia
Request for Approval of Tenant Selection Preference

Dear Director Osegueda:

Please accept this letter as a request on behalf of The Village of Casa Familia, Ltd. (the "**Owner**") for confirmation that, should it receive an award of Section 8 Project-Based Vouchers ("**PBV**") from Miami-Dade Public Housing and Community Development ("**PHCD**"), the Owner may implement a limited selection preference for households eligible for voluntary disability-specific services at The Village at Casa Familia (the "**Project**") under Section 106(a)(7) of the Housing Opportunities Through Modernization Act of 2016, Pub. L. 114-201 (July 29, 2016), 130 Stat. 782 ("**HOTMA**"). The Owner, a partnership between Atlantic Pacific Communities, LLC, and Casa Familia, Inc. (the "**Co-Developers**"), desires to offer in 57 of 57 rental units a proposed selection preference for households eligible for voluntary services that are designed to be beneficial to individuals with "Developmental Disabilities" as that term is described in Florida Statute Section 393.063(12) ("**ID/DD**"). This selection preference is mandated by the Florida Housing Finance Corporation ("**FHFC**") in connection with a reservation of Low-Income Housing Tax Credits ("**LIHTC**") to the Project awarded under RFA 2019-107 Financing to Develop Housing for Persons with a Disabling Condition or Developmental Disabilities, Issued by Florida Housing Finance Corporation, February 26, 2019 ("**FHFC RFA**").

PHCD has indicated it intends to award PBVs to the Project non-competitively if HUD permits PHCD and the Owner to implement this proposed preference. Accordingly, the Owner respectfully seeks confirmation that it may implement this proposed preference as permitted by HOTMA. It is our understanding that the Office of General Counsel previously advised public housing authorities ("**PHAs**") that they are not required to request waiver of 24 C.F.R. §983.251(d) in order to implement such a preference because it is permitted under HOTMA. In the alternative, kindly consider this letter as a request for waiver of 24 C.F.R.

§983.251(d) and 24 CFR § 982.207(b)(3) and a request for approval of a remedial action directed to the Office of General Counsel ("**OGC**") under the *Statement of the Department of Housing and Urban Development on the Role of Housing in Accomplishing the Goals of Olmstead* ("**HUD Olmstead Statement**").

1. Background.

(a) Requirements of the FHFC RFA. FHFC, Florida's state allocating agency for LIHTC, is required by Florida Statute Section 420.507(48) to reserve a certain part of its annual LIHTC allocation to be distributed by competitive solicitation for high-priority affordable housing developments, such as housing for persons with Developmental Disabilities. The FHFC RFA under which the Project applied fulfills this statutory mandate by awarding LIHTC for applicants proposing the development of independent supportive housing for persons with Developmental Disabilities. The intent of the RFA is to ensure that people with Developmental Disabilities are not living in unnecessarily restrictive settings due to insufficient stable housing options or coordinated access to appropriate community-based healthcare and supportive services.

(b) The Village at Casa Familia. The Project was awarded an allocation of LIHTC under the FHFC RFA, and its approved application proposed that all but two manager units would serve individuals with Developmental Disabilities. Upon completion, the Project will consist of 59 residential rental units in two (2) new construction buildings located in the Kendall neighborhood of Unincorporated Miami-Dade County. Casa Familia, Inc. has entered into a ground lease with Miami-Dade County for the site on which the Project will be located; this ground lease requires that the Project serve individuals with Developmental Disabilities. Of the 59 Project units, 57 will be low-income, rent restricted units for purposes of the LIHTC program and two will be manager units; nine units will be Individual Room Occupancy ("**IRO**") units. It is hoped that fifty-seven units will be assisted through a PBV HAP contract for the Project, with PHCD selecting the Project pursuant to 24 C.F.R. §983.51(b)(2), and subsequent approval by HUD. Without the rental subsidy provided by a PBV HAP contract, the Project will be unable to serve many individuals who would benefit from the stable supportive housing that it offers. The 57 PBV units will be rented on a preferential basis to households eligible for voluntary services appropriate for ID/DD individuals. The supportive services available at the Project will be coordinated by United Community Option, an experienced provider of supported living services for individuals with ID/DD in Miami-Dade County. The Project will be located in a residential neighborhood, across the street from other apartment complexes and in close proximity to public transportation, shopping, restaurants, parks and healthcare providers. On-site resource counselors will be available to help residents connect with resources in the community and to empower them to do so. An on-site community center will welcome the participation of people from the neighborhood and greater community alongside the residents of the Project. The Project will provide individuals with ID/DD a community-based housing option that, for many, represents the most integrated setting appropriate to their needs.

2. Justification for Confirmation Request.

The Owner respectfully requests confirmation that it may implement the proposed limited selection preference for the anticipated PBV units under HOTMA. The proposed selection preference falls squarely within the bounds permitted by HOTMA: the preference will apply to households who qualify for voluntary services that are designed to serve individuals with ID/DD and are offered in conjunction with the assisted units. The selection preference will be consistent with the PHA Plan. Although the voluntary services provided will be designed for individuals with ID/DD, the preference will apply to any individual eligible for the voluntary services. Such a preference is permitted by Section 106(a)(7) of HOTMA, which permits a PHA (or owner, if the owner maintains a site-based waiting list when this provision of HOTMA is implemented) to establish a selection preference for households who qualify for voluntary services, including disability-specific services, offered in conjunction with assisted units, provided that the preference is consistent with the PHA Plan. This provision was implemented in the HOTMA Implementation Notice. See 82 Fed. Reg. 5438, 5471 (January 18, 2017) (HOTMA Implementation Notice) and 85 Fed Reg. 63664 (October 8, 2020) (HOTMA HCV and PBV Implementation Notice of Proposed Rulemaking).

The Project will comply with all applicable fair housing and civil rights requirements, including the requirement to administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities under section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act. See 24 C.F.R. §8.4(d) and 28 C.F.R. §35.130(d). It will provide a community-based housing option which for many individuals with disabilities will be the most integrated setting appropriate to their needs. Further, the Project will fully comply with the federal home and community-based settings requirements of 42 C.F.R. § 441.301(c)(4), (5) since an individual living in the Project could choose the "disability-specific services" available at the Project as their Medicaid-funded home and community-based services ("**HCBS**"). The Owner urges HUD to confirm that no waiver or remedial action approval is needed to permit the use of the proposed selection preference for the Project under HOTMA.

3. Alternative Request for Waivers.

This section of the letter describes the bases for the Owner's alternative request for a waiver of 24 C.F.R. §982.207(b)(3) and §983.251(d) and approval of a remedial action under the HUD Olmstead Statement in the event the proposed selection preference is not confirmed as permitted under HOTMA Section 106(a)(7).

(a) Achieving Olmstead Goals by Providing the "Most Integrated Setting". An overarching principle of Section 504 and the ADA is the obligation to provide housing and services "in the most integrated setting appropriate to the needs of qualified" people with disabilities. 24 C.F.R. §8.4(d); 28 C.F.R. §35.130(d). "Integrated settings are located in mainstream society; offer access to community activities and opportunities at times, frequencies and with persons of an individual's choosing; afford individuals choice in their daily life activities; and provide individuals with disabilities the opportunity to interact with non-disabled persons to the fullest extent possible." HUD Olmstead Statement, question 1, quoting *Statement*

of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and Olmstead v. L. C. (2011) (the "**DoJ Olmstead Statement**"). The determination of whether a particular setting provides the "most integrated setting" is made primarily with respect to the needs and choices of the individual and the characteristics of the place where the person chooses to live and receive long term supports. DoJ Olmstead Statement, questions 1 and 4. HUD guidance goes on to say that a setting serving individuals within a category of disability may be permissible when it is part of a state or local plan to implement affirmative efforts to comply with the integration mandate of Section 504 and the ADA. HUD Olmstead Statement, question 3.

As described above, the Project meets all of these standards. The selection preference proposed for the Project is intended to serve a critical civil rights interest by ensuring that individuals with ID/DD receive services in the most integrated setting appropriate to their needs, consistent with the ADA and *Olmstead*. The services are voluntary, and the Project will offer individuals with ID/DD eligible for the services provided a community-based housing option that, for many, represents the most integrated setting appropriate to their needs. For those desiring the opportunity to live independently within a community designed to serve them, with appropriate services and supports provided by their chosen provider, the Project will be the only such choice in South Florida. The selection preference effectuates the mandate of the Florida legislature regarding LIHTC allocation that is designed to guarantee that individuals with Developmental Disabilities do not live in unnecessarily restrictive settings and instead have access to stable affordable housing options located in community settings with coordinated access to appropriate community-based healthcare and supportive services. As described below, financial support for the services derives in part from Florida's Medicaid HCBS waiver, which is another integral part of Florida planning to comply with the integration mandate of Section 504 and the ADA. The requested program waiver and remedial action approval are required to realize the promise of *Olmstead* – providing housing and supports in the most integrated setting appropriate to an individual's needs and choices in accordance with Florida's planning to implement affirmative efforts to comply with the integration mandate.

(b) The Proposed Preference is Authorized by Federal Statute. HUD's Section 504 regulations recognize that persons without disabilities may be excluded from the benefits of a program if the program is limited by Federal statute or executive order to individuals with disabilities. A specific class of individuals with disabilities may be excluded from a program if the program is limited by Federal statute or Executive order to a different class of individuals. See 24 CFR § 8.4(c). In this case, we have two relevant federal statutes that require the selection preference proposed for the Project.

First, many of the individuals with disabilities expected to seek to live at the Project receive long-term services and supports through HCBS programs funded by the federal Medicaid program administered by the Centers for Medicare and Medicaid Services ("**CMS**") under Florida's HCBS Developmental Disabilities Individual Budgeting Waiver program authorized under Section 1915(c) of the Social Security Act (the "**HCBS Waiver**"). HCBS must be delivered in community-based settings, rather than in institutional settings, to ensure that these individuals have full access to the benefits of community living and the opportunity to receive services in the most integrated setting appropriate to their needs and choices.

A community-based setting is a place that is "integrated in and supports full access of individuals receiving Medicaid HCBS to the greater community, including opportunities to seek employment and work in competitive integrated settings, engage in community life, control personal resources, and receive services in the community, to the same degree of access as individuals not receiving Medicaid HCBS." 42 C.F.R. §441.301(c)(4). Florida's HCBS waivers are limited to specific target populations of people with disabilities, such as people with mental illnesses, people with ID/DD, or groups of people identified by age, diagnosis, or disability. See 42 C.F.R. §441.301 (b)(2) and (6). The Project is anticipated to be an accepted residential setting under the federal home and community-based settings requirements where individuals who receive the HCBS Waiver can utilize their funding to receive needed personal supports and services in their own home. See 42 C.F.R. § 441.301(c)(4), (5). Medicaid does not, however, pay for housing, though it does pay for housing related services. For HCBS, housing related services may include an extensive array of "housing transition and tenancy sustaining services, such as: assessing the participant's housing needs and presenting options, assisting in securing housing, including the completion of housing applications and securing required documentation (e.g., Social Security card, birth certificate, prior rental history), searching for housing, communicating with landlords, coordinating the move, providing training on how to be a good tenant, and establishing procedures and contacts to retain housing" and "environmental modifications to install necessary accommodations for accessibility." CMCS Informational Bulletin, Coverage of Housing-Related Activities and Services for Individuals with Disabilities (Center for Medicaid and CHIP Services, June 26, 2015). The statutorily-authorized HCBS Waiver limits its program to a class of individuals with a specific disability. The requested waiver of 24 C.F.R. §982.207(b)(3) and §983.251(d) and remedial action approval are necessary in order to effectively use PBVs to collaborate with this system of care to offer community-based services in an integrated setting in compliance with *Olmstead*.

Second, Section 42(m) of the Internal Revenue Code requires that each state allocating agency responsible for the allocation and distribution of LIHTC in that state adopt a qualified allocation plan ("**QAP")** that includes certain priorities and selection criteria. FHFC, as Florida's statutorily-designated allocating agency, has adopted a QAP that includes priorities for high-priority affordable housing project and projects targeting persons who have a disabling condition and implements these priorities through competitive processes to issue and allocate LIHTC, such as the FHFC RFA. As discussed above, under the FHFC RFA, LIHTC and other sources are awarded to applicants proposing the development of independent supportive housing for persons with Developmental Disabilities. But in order to carry out this goal, which aligns with the goals of *Olmstead*, rental subsidies such as PBVs are generally required in order to create permanent supportive housing opportunities for the target population of the QAP and FHFC RFA. Again, here, the requested waiver and remedial action approval are necessary to successfully combine PBVs with the capital sources provided under the RFA to create the housing contemplated by the QAP.

(c) Approval of the Waiver and Remedial Action is Necessary to Assure Qualified People with Disabilities Equally Effective Access to Assisted Housing. The purpose of the proposed selection preference is to facilitate access to stable affordable housing and coordinated services for individuals who, because of their disabilities, experience difficulty locating a housing choice that provides them with the most integrated setting appropriate to their needs. The Section 504 rules allow that a housing provider may, solely on the

basis of disability, provide separate housing to individuals with disabilities or to any class of individuals with disabilities from that provided to others if such housing "is necessary to provide qualified individuals with" disabilities "with housing, aid, benefits, or services that are as effective as those provided to others." 24 CFR § 8.4(b)(1)(iv). The HUD Olmstead Statement is based in part on Title II of the ADA. ADA regulations are themselves derived from Section 504. They permit "services or advantages" to "a particular class of individuals." 28 C.F.R. §35.130(c). The purpose of the ADA rule is "to clarify that State and local governments may provide special benefits beyond those required by" disability discrimination laws "that are limited to individuals with disabilities or a particular class of individuals with disabilities." 56 Fed. Reg. 35694, 35705 (July 26, 1991) (preamble to ADA regulations). Using funding targeting individuals with Developmental Disabilities originating under Florida's QAP and the FHFC RFA, as well as Florida's HCBS Waiver, in conjunction with the ground lease from the County requiring that the Project serve individuals with Developmental Disabilities, the Project provides "special benefits" to people with disabilities that are "necessary" to provide "housing, aid, benefits or services that are as effective as those provided to others."

The Project will provide many individuals with disabilities a community-based housing option that represents the most integrated setting appropriate to their needs. The Project, located in the Kendall neighborhood, will provide opportunities for residents to be integrated into the community, offering growth, socialization and independence. Choice is at the heart of *Olmstead*, recognizing that different people will require or prefer different housing settings. For many, the Project, and its proposed tenant selection preference, is necessary to provide them with a choice of housing that is as effective as that provided to others and with the opportunity to receive services that are as effective as those provided to others.

As demonstrated above, if necessary, good cause exists to waive the rules. There is no statutory bar to a waiver. The Owner therefore respectfully requests a waiver of 24 C.F.R. §982.207(b)(3) and §983.251(d) and a remedial action approval as contemplated under the HUD Olmstead Statement.

4. Conclusion.

The financial closing for the Project is expected to occur in the summer of 2021. Adoption of the selection preference is anticipated to be a closing requirement for both FHFC and Miami-Dade County. We greatly appreciate your attention to this request. Please do not hesitate to contact me at (202) 926-3409 or eblumberg@kleinhornig.com if we can address any questions or concerns. Thank you in advance for your assistance.

Respectfully yours,

Emily Blumberg

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