STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2021-070VW

ARBOURS AT MERRILLWOOD I, LLLP,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION

Respondent.

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FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF THE 2019 QUALIFIED ALLOCATION PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS AND RULE 67-48.002(96)

Petitioner Arbours At Merrillwood I, LLLP, a Florida limited liability limited partnership ("Petitioner") submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2020 Housing Credit Allocation prior to the last quarter of 2022. The return of these Housing Credits is required before the Corporation may reserve an allocation of Housing Credits that Petitioner requests be immediately allocated. *See* Rule 67-48.002(96), Florida Administrative Code (2019) (the "Rules"), and 2019 Qualified Allocation Plan Section II.K. Due to events outside of Petitioner's control, Petitioner cannot meet the "placed in service" and "10% test" deadlines as required by the Carryover Allocation Agreement.

1. Pursuant to Section 120.542, Fla. Stat. (2019) and Rules 28-104.001 through 28-104.006, F.A.C., Petitioner requests a waiver of Rule 67-48.002(96), Florida Administrative Code

(2019), and of Section II.K of the 2019 Qualified Allocation Plan ("QAP") to allow the immediate return of its 2020 Housing Credit Allocation, and an immediate allocation of new Housing Credits (2021 or later).

2. The name, address, telephone and facsimile numbers for Petitioner and its qualified representative are:

Arbours at Merrillwood I, LLLP
c/o Arbour Valley Development, LLC
242 Inverness Center Drive
Birmingham, AL 35242
Attn: Sam Johnston
205-981-3300 (telephone)
sam@arbourvalley.com (e-mail)

3. The name, address, telephone and facsimile numbers of Petitioner's attorneys are:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, Florida 33131
305-347-7308 (telephone)
305-347-7808 (facsimile)
gcohen@shutts.com (e-mail)

4. Pursuant to RFA 2019-113, Petitioner timely submitted its application for competitive Housing Credits under the Low Income Housing Tax Credit program ("LIHTC Program" or "HC Program"). *See* Application Number 2020-304C.

5. Equity raised from Housing Credits will be used for the construction of 40 residential units (all of which will be low-income housing tax credit units) to be known as Arbours at Merrillwood I (the "Development"). The Development will serve low-income elderly tenants in the City of Alachua and Alachua County, Florida.

6. Petitioner's application was selected for funding by FHFC, and Petitioner was invited to credit underwriting.

7. Under Rule 67-48.028(1), if an applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, such applicant must enter into a "carryover allocation agreement" with the Corporation by December 31 of the year in which the preliminary allocation is issued. On November 18, 2020, Petitioner and the Corporation entered into the carryover allocation agreement for the Development. The carryover allocation may (under Section 42 of the Internal Revenue Code) allow the applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service; in the instant case the Corporation mandated in the carryover allocation agreement that the development be placed in service by December 31, 2022. The carryover allocation agreement requires satisfaction of the 10% test by May 31, 2021 (extended to November 18, 2021 upon Petitioner's request) (collectively, the "Deadlines"). In order to meet the 10% test, Petitioner will need to have closed debt and equity financing, which will not occur by November 18, 2021.

8. As explained more fully below, there is uncertainty as to whether or not the Development will be able to meet the Deadlines, and as such Petitioner is requesting an exchange of Housing Credits in order to effectuate an extension of such deadlines.

9. Since being preliminarily selected for funding and invited to credit underwriting, the Development has suffered unforeseen events outside of its control that make it clear that the Development will not be placed in service by December 31, 2022 or meet the 10% test by November 18, 2021. These challenges are set forth below:

(a) Petitioner commenced pre-development activities and entered into credit underwriting in late July 2020, after resolution of all appeals pertaining to RFA 2019-113. Shortly thereafter, Petitioner encountered delays in processing requests for site plan and related governmental approvals, due in

part to difficulties associated with the Covid-19 pandemic and cautionary measures taken in connection therewith. Petitioner's site plan was submitted to the City of Alachua on November 30, 2020, encountered a one-month delay due to neighborhood/"not in my backyard" opposition, but ultimately gained approval in February 2021.

(b) The delay in obtaining site plan approval impacted the commencement of preparation of architectural plans for the Development. 80% complete architectural plans (utilized for securing construction bids) were not finished until June 2021, due in large part to the impact of COVID-19 on the architect's ability to complete such plans.

(c) Once such 80% complete architectural plans were ready for bid, the Development's presumed general contractor informed Petitioner that it did not have the capacity to build the Development. Petitioner immediately contacted alternate general contractors with experience and capacity, occasioning a further delay in Petitioner's ability to close on debt and equity financing and commence construction.

(d) Petitioner is utilizing FHA Section 221(d)(4) financing to maximize debt financing. Petitioner's lender is processing the mortgage under HUD's accelerated pilot program. Notwithstanding the foregoing "accelerated" nature of such program, the regimented HUD process takes time, particularly in light of the backlog in processing affordable and market-rate loan applications currently being experienced in the HUD Southeast office. Petitioner is advised by its lender that the HUD office is experiencing acute underwriting delays and estimates a closing in the first quarter of 2022.

(c) Petitioner's development partner (Alachua County Housing Authority) has been processing demolition approvals from HUD, pursuant to which 17 aged public housing units will be razed in order to make way for the Development. It is anticipated that it will take another four months to gain the necessary HUD approvals for demolition.

10. Despite these delays, petitioner has been working diligently to complete pre-development activities and has, to date, completed the preparation of building drawings and started the bidding process. The remaining permits and approvals are expected to be obtained by the end of the first quarter of 2022, with construction estimated to be completed by the end of the third quarter of 2023.

11. As discussed above, the delays have been caused by circumstances outside Petitioner's control. As a result, the delay makes it impossible to meet the December 31, 2022 placed in service deadline or the November 18, 2020 10% test deadline.

12. As set forth more fully below, Petitioner seeks to return its 2020 Housing Credit allocation now, rather than wait for the last calendar quarter of 2022 as required under the QAP, and obtain from the Corporation an immediate allocation of new Housing Credits with a later required 10% test date and placed in service date.

13. The requested waivers and variance will not adversely affect the Development. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner as set forth herein, (b) deprive the City of Alachua and Alachua County of new constructed rental units set aside for low-income and very low-income elderly tenants, and (c) violate principles of fairness. Petitioner has invested over $250,000 to date in the development, and respectfully requests the relief sought herein in order to keep Development of this badly needed new construction of affordable housing for seniors moving forward. The Development is a re-

development of HUD housing currently owned by the Alachua County Housing Authority, and is a City of Alachua Strategic Initial Plan Priority Housing Goal addressed by the Alachua County Housing Authority to provide safe and affordable senior housing, as there is no dedicated publicly-supported senior accessible housing in the City of Alachua. It is Petitioner's absolute and fervent desire and focus as co-developer of the Development to see that this goal is accomplished.

14. Section 42(m) of the Internal Revenue Code requires each state allocating agency to adopt an allocation plan for the allocation and distribution of federal low income housing tax credits. The Corporation, as the allocating agency for the State of Florida, must distribute housing credits to applicants pursuant to its qualified allocation plan.

15. The Corporation's 2019 Qualified Allocation Plan (Section II.K) provides that Housing Credits may be returned only in the last calendar quarter of the year in which a development is required to be placed in service:

> ...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..."

QAP at Section II.K.

16. The applicable Rules for which waivers are requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),[1] the statute that created

[1] The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.55 of the Florida Statutes (the "Act").

the Housing Credits Program. *See* § 420.5099, Fla. Stat. (2019). 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"). §§ 420.5099(1) and (2), Fla. Stat. (2019). 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. §§ 420.5099(1) and (2), Fla. Stat. (2019).

17. The requested waivers will ensure the availability of Housing Credits which might otherwise be lost as a consequence of development delays described herein.

18. The facts set forth in Sections 9 through 13 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for Rule waiver.

19. As demonstrated above, the requested waiver serves the purposes of Section 420.5099 and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households by ensuring:

> The maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.

§ 420.5099(2), Fla. Stat. (2019).

20. Further, by granting the requested waiver, FHFC would recognize principles of fundamental fairness in the development of affordable rental housing. In addition, grant of the

requested waiver will permit the construction of much needed housing for low-income and very low-income elderly tenants. Finally, grant of the request to waiver will enable Petitioner to utilize (and not lose) its significant investment in due diligence expenses that cannot be recouped if the requested waiver is not granted.

21. The requested waiver will not adversely impact the Development or the Corporation.

22. The waiver being sought is permanent in nature.

Should the Corporation require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver.

WHEREFORE, Petitioner Arbours at Merrillwood I, LLLP, respectfully requests that the Corporation:

A. Grant the Petition and all the relief requested therein;

B. Waive the Qualified Allocation Plan's prohibition from returning Housing Credit Allocations prior to the last quarter of 2022;

C. Allow the immediate return of Petitioner's 2020 Housing Credit Allocation;

D. Immediately allocate new Housing Credits to Petitioner with a later placed in service date, in an amount equal to the amount of its 2020 Housing Credit Allocation; and

E. Award such further relief as may be deemed appropriate.

GARY J. COHEN
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Miami, Florida 33131
(305) 347-7308
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The Original Petition is being served by email and overnight delivery for filing with the Corporation Clerk of the Florida Housing Finance Corporation, 227 North Bronough Street, City Centre Building, Room 5000, Tallahassee, Florida 32399, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 22nd day of September, 2021.

GARY J. COHEN