STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO.: 056-2022VW
APPLICATION NO.: 2022-022C

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FLORIDA HOUSING FINANCE CORPORATION

BDG BANYAN EAST TOWN, LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.004(3)(i)

BDG Banyan East Town, LLC, a Florida limited liability company (the "Petitioner"), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a waiver of, or variance from, Rule 67-48.004(3)(i), Florida Administrative Code (May 18, 2021) (the "Rule"), to allow Petitioner to change the "Total Number of Units" proposed in the Application. As a result of increased construction costs, Petitioner has redesigned the Development to eliminate 15 market rate units and decrease the number of affordable units by four units, which will cause a total decrease in units from 111 to 92 units. The Petitioner is also seeking Corporation approval to increase the "Total Set-Aside Percentage" to 100% resulting from the removal of the market rate units. This Petition is filed pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code. In support, the Petitioner states as follows:

A. THE PETITIONER

1. The mailing address, telephone number and email of the Petitioner is as follows:

BDG Banyan East Town, LLC
Attn: Scott Zimmerman
501 N Magnolia Ave
Orlando, Florida 32801
Telephone: (407) 447-1780 Ext. 2001
Email: szimmerman@agpmanager.com

2. The mailing address, telephone number and email of the Petitioner's legal counsel is as follows:

Yisell Rodriguez, Esq.
Nelson Mullins Riley & Scarborough LLP
390 N. Orange Ave., Suite 1400
Orlando, Florida 32801
Telephone: (407) 669-4290
Email: yisell.rodriguez@nelsonmullins.com

3. On August 25, 2021, the Petitioner timely submitted an application in response to RFA 2021-201 for Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA") (the "Application") to finance the construction of a multifamily apartment complex to be known as Banyan East Town Apartments in Altamonte Springs, Florida (the "Development"), which will serve low-income families in Seminole County. The Petitioner requested competitive housing credits in the amount of $1,700,000 (annually) ("Credits"). On May 9, 2022, Petitioner received, accepted and acknowledged its invitation to credit underwriting and soon thereafter entered into a Carryover Allocation Agreement with the Corporation. On July 5, 2022, Petitioner also applied for CHIRP funding and is currently in underwriting for this funding.

4. In the Application, the Petitioner proposed to build 111 units, of which ten percent (10%) of the total units (*i.e.*, 12 units) would be set-aside to serve tenants at or below thirty-three percent (33%) of the area median income ("AMI"), seventy-six percent (76%) of such units (*i.e.*, 84 units) would be set-aside to serve tenants at or below sixty percent (60%) AMI, and the

remaining fourteen percent (14%) of the units (*i.e.*, 15 units) would be rented to tenants at market rates. The dual hardships of limited land and substantial increase in the development costs due to several complications during the site development and permitting process have made the Development, as originally anticipated, no longer feasible. Therefore, Petitioner is requesting a Rule waiver to allow for the reduction in the total number of units provided in the Application from 111 units to 92 units. Specifically, Petitioner seeks:

AMI	CURRENT	PROPOSED
30%	12	12
60%	84	80
MARKET RATE	15	0
TOTAL UNITS	111	92

UNIT MIX	CURRENT	PROPOSED
ONE BED/ONE BATH	66	62
TWO BED/TWO BATH	45	30
TOTAL UNITS	111	92

B. THE RULE FROM WHICH WAIVER IS SOUGHT

5. The Petitioner requests a waiver of, or variance from, Rule 67-48.004(3)(i), Florida Administrative Code (effective May 18, 2021), which provides in part:

> **Rule 67-48.004(3)(i)**
>
> "(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:
>
> (i) **Total number of units**; notwithstanding the foregoing, the total number of units may be increased after the Applicant has been invited to enter credit underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation. With regard to

said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant's request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development, as well as review of 24 CFR Part 92 to ensure continued compliance for the HOME Program;"

C. RULE PURSUANT TO WHICH CORPORATION APPROVAL IS SOUGHT

6. The Petitioner request Corporation approval to change the total set-aside percentage in the Application pursuant to Rule 67-48.004(3)(j), Florida Administrative Code (effective May 18, 2021), which provides in part:

Rule 67-48.004(3)(j)

"(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:

(j) For the SAIL and HC Programs, the Total Set-Aside Percentage as stated in the total set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application. For the HOME Program, the total number of HOME-Assisted Units committed to in the Set-Aside Commitment section of the Application. **Notwithstanding the foregoing, the Total Set-Aside Percentage**, or total number of HOME-Assisted Units, as applicable, **may be increased after the Applicant has been invited to enter credit underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation**. With regard to said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant's request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development, as well as review of 24 CFR Part 92 to ensure continued compliance for the HOME Program;"

D. STATUTES IMPLEMENTED BY THE RULE

7. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute that designated the Corporation as the State of Florida's

housing credit agency and authorizes the Corporation to establish procedures for allocating and distributing low-income housing tax credits. See Fla. Stat. § 420.5099.

D. JUSTIFICATION FOR PETITIONER'S REQUESTED WAIVER

8. Petitioner is seeking a waiver of the Rule to decrease the number of total units from 111 units (set-aside and market rate) to 92 units (all set-aside) and Corporation approval to increase the total set-aside percentage from 86% to 100% for the reasons set forth below.

9. Since the Application, Petitioner has encountered numerous complications due to new permitting processes with the City of Altamonte Springs, Seminole County, and St. Johns River Water Management District. The site was annexed from Seminole County into the City of Altamonte Springs, and in keeping with their East Town Vision Plan the City is mandating significant improvements to the three public rights-of-way adjacent to the property which are all currently part of the County. Seminole County is in turn requiring the property to hold the improved roads' stormwater up to a one-hundred-year storm event on site, which due to the site's topographic constraints and further East Town Vision Plan Urban Design elements, needs to be next to the roads and separate from the main stormwater management system for the development. Along with these requirements, land initially planned to be used for the Development itself must be used for improvement to the adjacent rights-of-way and their stormwater management. These new requirements have led to a substantial increase in costs incurred and a decrease in the land available for development of the Development. In attempting to work within the strict adherence of the Rule, Petitioner initially developed plans using a basement parking garage podium below the 3-story wood-frame building, allowing Petitioner to accommodate all the permitting comments from the City, County, and water management district. While the plans were priced by Petitioner's

general contractor and all parties intended to execute the construction contract, pricing was prohibitive even with the maximum CHIRP funding amount.

10. 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.

11. Strict adherence to the Rule will impose a substantial financial hardship on Petitioner unless the number of units in the Development are reduced. The costs required by the City and County mandates were unforeseeable at the time of the Application and have increased total costs substantially beyond what was initially expected. Further, to date a significant amount of effort and costs have accrued in coordinating with all types of third-party professionals and jurisdictional reviewers in the development of the site to comply with all requirements. These costs are unavoidable and have now made the Development economically unfeasible without a reduction in the total number of units.

12. Further, the Development is no longer physically feasible without a reduction in the total number of units. Land is limited on this infill site and to meet the requirements for Urban Design, City and County right-of-way improvement and stormwater management, land initially

[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.

reserved for the Development is no longer available. Petitioner's only option for completing the Development, and maintaining compliance with the requirements, is to reduce the number of units and parking spaces. As the land for the Development has already been purchased, a denial of this waiver would render the Development impossible to complete and impose a substantial economic hardship on the Petitioner.

13. Petitioner seeks only to reduce the number of units in an effort to maintain the Development's viability and achieve its purpose in providing housing to low-income persons and households. Petitioner seeks to maintain as many set-aside units as possible. The reduction in set-aside units would not change the leveraging classification of the Application and thus not provide a competitive advantage compared with other applicants in the RFA, maintaining the principles of fairness.

14. A waiver of the Rule will serve the underlying purposes of Section 420.5087 and the Act that are implemented by Chapter 67-48 of the Florida Administrative Code, because one of the goals is for the proceeds of Corporation financing to be used to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households. The Act (Section 420.501, et seq.) was passed in order to create inducements and opportunities for private and public investment in rental housing to increase the supply of affordable housing for low-income persons and households. Denial of the waiver would deprive Seminole County of essential and affordable housing units within ¼ mile of a SunRail station. By granting this Petition, the Corporation would recognize the goal of increasing the supply of affordable housing units via the construction of new developments throughout Florida, particularly through Petitioner supplying 92 much needed affordable housing units in Seminole County and the Sanford-Orlando-Kissimmee MSA. A denial of this Petition (a) will result in substantial economic hardship to

Petitioner; (b) could deprive Seminole County and the Sanford-Orlando-Kissimmee MSA of essential, affordable housing, and (c) would violate principles of fairness[5]. *See §* 120.542(2), Fla. Stat.

15. The requested waiver will not adversely affect Petitioner, any other party that applied to receive funding in the RFA, or the Corporation as stated above.

E. TYPE OF WAIVER

16. The waiver being sought is permanent in nature.

F. ACTION REQUESTED

17. For the reasons set forth herein, the Petitioner respectfully requests the Corporation (i) grant a waiver of, or variance from, Rule 67-48.004(3)(i) to allow the Petitioner to reduce the total number of units in the Development from 111 units to 92 units; (ii) grant Corporation approval to increase to "Total Set-Aside Percentage" pursuant to Rule 67-48.004(3)(j), (iii) grant this Petition and all the relief requested herein; and (iv) grant such further relief as it may deem appropriate.

Respectfully submitted,

Yisell Rodriguez, Esq.
Nelson Mullins Riley & Scarborough LLP
390 N. Orange Ave., Suite 1400
Orlando, Florida 32801
Telephone: (407) 669-4290
Email: yisell.rodriguez@nelsonmullins.com
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
Email: corporationclerk@floridahousing.org

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

This 11th day of October, 2022.

By: Yisell Rodriguez
Yisell Rodriguez, Esq.
Fla. Bar No. 117915