STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING
FINANCE CORPORATION

KEYS AFFORDABLE
DEVELOPMENT IV, LLC.
Petitioner,
vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

FHFC Case No. 2024-014VW
APPLICATION No. 2019-394CS

PETITION FOR WAIVER OF RULE 67-48.0072 (12) and (17)(h)
FLORIDA ADMINISTRATIVE CODE (July 2018)

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code ("F.A.C".) Petitioner, Keys Affordable Development IV, LLC ("Keys Affordable" or "Petitioner") submits this Petition to Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of Rules 67-48.0072 (12) and (17) (h), F.A.C., (July 2018) (the "Rule") to allow for the General Contractor's use of an affiliated subcontractor under certain specified conditions herein described and to allow for costs for work which was completed outside of the Guaranteed Maximum Price contract. In support Keys Affordable states:

PETITIONER

1. The name, address, telephone number and email address for Petitioner is Keys Affordable Development IV, LLC; 501 N. Magnolia Avenue, Orlando, Fl 32801, (407)-257-1418. For this proceeding, the contact information for the Petitioner shall be that of the undersigned counsel.

2. The name, address, telephone number, and email address for Petitioner's attorney is: Maureen McCarthy Daughton, Maureen McCarthy Daughton, LLC, 1400 Village Square Blvd., Ste 3-231, Tallahassee, Florida 32312; 850-345-8251; mdaughton@mmd-lawfirm.com.

BACKGROUND

3. Keys Affordable applied (*Application No. 2019-394CS*) for SAIL and Housing Credit financing in response to *Request for Application 2019-110, SAIL and Housing Credit Financing for the Construction of Workforce Housing for Hurricane Recovery in Monroe County.*

4. On February 20, 2019, Keys Affordable submitted an application in response to the RFA which was specifically targeted to provide much needed workforce housing in Monroe County, Florida. Keys Affordable requested an allocation of $5,000,000.00 in Workforce SAIL funding and $925,344 in Housing Credit funding for its proposed fifty-two (52) unit Workforce affordable housing development, Boatworks Residences in Monroe County.

5. Keys Affordable was funded pursuant to a Consent Agreement on or about May 10, 2019. Keys Affordable was subsequently invited into credit underwriting and submitted a signed acknowledgement accepting the invitation.

6. The General Contractor for Keys Affordable is Sherwood Construction, Inc. ("Sherwood"). On January 21, 2020, Keys Affordable executed a Guaranteed Maximum Price ("GMP") contract with Sherwood in the amount of $11,500,401. As explained below, additional construction costs were incurred; these costs were for work which was completed outside of the

GMP by $1,114,383.[1] The Petitioner does not seek funding from Florida Housing for the construction costs which exceeded the GMP contract.[2]

7. Sherwood struggled to find a shell contractor willing and able to build the shell for the proposed development due to the limited number of available contractors in proximity to the Florida Keys and the extraordinary conditions caused by the pandemic. Specifically, the challenge posed by the pandemic, made it difficult to find an acceptable contractor to perform the work within the proposed budget and per the subcontractor limitations required by Florida Housing.[3] Keys Affordable obtained bids from two companies to provide the Shell for the proposed development. The first bid from 748 Development, a Miami-based company was $7,453,950.00. The second bid was from Bell Construction Company in Melbourne, Florida in the amount of $5,705,580.00. These proposals exceeded the required limitation of the shell subcontract not exceeding 31% of the construction cost. (the "31% limitation") [4]

8. Yann LeLourec, the General Contractor Qualifier for Sherwood Construction, Inc., through his construction Company, Lenken Consultants, LLC, based in Miami, had both the experience and willingness to build the shell through his Company.

9. Mr. LeLourec has no current ownership interest in and has *never* had an ownership interest in Sherwood Construction, Inc.

10. In March of 2020, trying to avoid the need for a waiver, Petitioner replaced Mr. LeLourec with Mr. Juan Calero as the Qualifier for Sherwood Construction, Inc.

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[1] The categories for which hard costs were paid by Sherwood outside of the GMP contract included, Exterior Property work ($54,387), Interior Work ($488,832), Site Work ($208,178) and Structural & Exterior Work of Buildings ($362,986)

[2] The excess construction costs were not needed to achieve the costs to cover the tax credits.

[3] A subcontractor contracted to deliver the building shell of a Development located in the Florida Keys area may not have more than 31 percent of the construction cost in a subcontract. Rule 67-48.0072(17)(g), FAC. (July 2018)

[4] See Rule 67-48.002(17)(g)

11. The fixed price for the shell construction by Lenken Consultants was less than the other proposals received at $2,942,729.00, of which $2,767,100 was for concrete and the remaining $175,629 was made up of other trade categories including metals and sheet metal. Notably, the fixed price for the shell construction did not exceed the 31% limitation. The contract between Sherwood and Lenken Consultants was executed on August 21, 2020.[5]

12. Construction of the shell was completed in March of 2021.

13. Most of the construction of the Development was performed during the height of the COVID pandemic. As with most developments during this time health and safety protocols had a negative impact on the availability of skilled labor and materials and the speed with which work was completed which inevitably resulted in increased costs. Mr. Lelourec in addition to overseeing the shell construction also coordinated with other subcontractors performing work on the proposed site during the same time, specifically paying for materials, at a higher cost, up front to avoid delays or the unavailability of materials, as construction and groundwork commenced. These issues were exacerbated given that the location of the proposed development was in the Florida Keys.

14. Lenken Consultants was reimbursed from Sherwood Construction for non-shell related building costs and materials. The total reimbursements to Lenken Consultants for payment of non-shell related costs and materials are $1,674,710.00 (the "Reimbursement Amount"). This Reimbursement Amount does not include any additional mark-up, profit, or fee. Attached hereto as Exhibit "A" is the listing of subcontractors and vendors along with the amounts that make up the Reimbursement Amount.[6]

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[5] The total amount for the Shell-related construction was $3,028,788, which includes $86,060.88 paid to Mr. LeLourec for concrete.

[6] The Building Costs in the Development Final Cost Certification have been reduced by $344,783, which represents untested reimbursed costs on the General Contractor Cost Certification.

15. The decision to make these payments was all geared toward securing the materials and labor needed while they were available. During the height of the pandemic there was a real sense of uncertainty as to the ability to acquire materials later in the process due to supply chain issues. There was also no "rhyme or reason" to when supplies or laborers would be available so planning these expenditures was not feasible.

16. The total amount of Shell-related construction work performed by Lenken Consultants was $3,028,789.88, which includes $86,060.88 to Mr. Lelourec for concrete.

17. In March of 2022, Mr. Lelourec replaced Mr. Calero as Qualifier for Sherwood Construction.

18. The Placed in-Service date is April 22, 2022, which is the date the Temporary Certificate of Occupancy was issued. The Certificate of Occupancy was recorded on June 16, 2022.

19. This Rule Waiver will not result in delays to construction since construction is complete, and the Development is fully leased. During the process of completing the final Cost Certification, Florida Housing has requested the filing of this Petition for Waiver as to Rules 67-48.0072 (12) and (17)(h), FAC.

RULES FOR WHICH WAIVER IS SOUGHT

20. Rule 67-48.0072(12) and (17) (h) provide:

> (12) For Competitive HC, SAIL, and HOME, the Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order at the Applicant's sole expense, and review a pre-construction analysis for all new construction units and a capital needs assessment for rehabilitation units and review the Developments costs.
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> (17) The General Contractor must meet the following conditions:
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> (h) Ensure that no construction cost is subcontracted to any entity that has common

ownership or is an Affiliate of the General Contractor or the Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-48.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor."[7]

STATUTES IMPLEMENTED BY RULE

21. The Rule is implementing, among other sections of the Florida Housing Finance Act (the "Act")[8] the statute that created the Housing Tax Credit Program.

22. Under Section 120.542(1), Florida Statutes, and Chapter 28-104, F.A.C., Florida Housing has the authority to grant waivers to its rule requirements when strict application of these rule would lead to unreasonable, unfair, and unintended results in particular instances. Waivers must be granted when : (1) the person who is subject to the rule demonstrates that the application of the rule would create a substantial hardship or violate principles of fairness[9], 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. Strict adherence to rule 67-48.0072 (17)(h) would create a substantial economic hardship for Keys Affordable.

JUSTIFICATION FOR REQUESTED WAIVER

Affiliated Entity

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[7] (5) "Affiliate" means any person that:

(a) Directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the Applicant or Developer;

(b) Serves as an officer or director of the Applicant or Developer or of any Affiliate of the Applicant or Developer;

(c) Directly or indirectly receives or will receive a financial benefit from a Development except as further described in rule 67-48.0075, F.A.C., or

(d) Is the spouse, parent, child, sibling, or relative by marriage of a person described in paragraph (a), (b) or (c), above.

[8] The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.517 of the Florida Statutes.

[9] "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 others similarly situated persons who are subject to the rule. §120.542(2), Fla. Stat.

23. When the Petitioner initially began this Development, the General Contractor did not intend to utilize Lenken Consultants, and in fact sought and received other bids. As described herein the costs of the other bids received, which were double the bid from Lenken Consultants, would have resulted in additional waivers. Mr. Lelourec was removed as the Qualifier for the General Contractor during the construction of the Shell to minimize the eventual need for a waiver. The need to use Lenken Consultants arose due to the COVID – 19 Pandemic which could not have been anticipated. The pandemic brought with it labor and material shortages, which wreaked havoc on budgets and constructions schedules. To keep the development on schedule, it was necessary to use Lenken Consultants for Shell Construction. Additionally, the decision to obtain some of the concrete for construction of the shell from Yann Lelourec was the direct result of material shortages.

24. The General Contractor has agreed to a 10% limitation of the General Contractor's fee for the shell contract with Lenken Consultants. Additionally, there is no fee allowed on the untested portion of the reimbursement.

25. Petitioner meets the standards for the requested waiver. The granting of this waiver will not adversely impact the Development, Florida Housing or any other party that applied to receive an allocation of Housing Credits in RFA 2019-110, or Florida Housing.[10] Denying the waiver would unnecessarily cause economic hardship to the Petitioner and possibly result in displacement of residents while the work performed by Lenken Consultants is dismantled and rebuilt.

26. The statute underlying the rule will be served by the approval of Keys Affordable' waiver request. Section 420.504(4), Florida Statutes, states that Florida faces "a serious shortage of decent, safe, and sanitary housing in the state available to persons and families of low, moderate,

[10] All applications that applied for funding in RFA 2019-110 received funding.

and middle income..." One of the primary purposes of the Act is to facilitate the availability of affordable housing. Granting the waiver request will further these goals, as Keys Affordable has constructed these units and fulfilled the purpose of the Act.

Guaranteed Maximum Price Contract

27. The Covid-19 pandemic was in full swing at the time that the Shell contract was executed, and work was being performed under the GMP contract. As a result, pandemic related price increases of 15 to 20% for materials and a scarcity of needed materials were everyday challenges. This led Petitioner to a strategy of purchasing materials whenever possible even if the costs were much more than budgeted and not taking a chance that materials could not be purchased, or found for that matter, in the future. The direct result of this was exceeding the Guaranteed Maximum Price. Sherwood paid the excess increased costs with no fees, profit or mark-up in the amount of $1,114,383.00.

28. The increased costs were in four categories as stated herein, and were for things such as landscaping, painting, carpentry, windows, plumbing and equipment rentals.

29. The Petitioner intended all the work and materials to be paid for under the GMP contract. The Petitioner has provided a cost certification in accordance with the Corporation rules, regarding the work that was performed outside the GMP contract.

30. The Petitioner (nor the general contractor under the GMP contract or the Developer) has no common ownership with, nor is it an affiliate of, the contractors hired to perform the work outside the GMP contract.

31. The Petitioner (nor the general contractor under the GMP contract or Developer) has not directly performed any of the work outside of the GMP contract, Lenken Consultants only purchased materials when available and oversaw limited work that was done by the hired

contractors. The monies paid to the hired contractors did not exceed the subcontractor limitations imposed by the Corporation and the Petitioner has provided a cost certification in accordance with the Corporation rules, about this work.

32. Petitioner meets the requirements for a waiver or variance. The work that was performed outside of the GMP contract and the associated increased costs could not have been avoided under Covid-19.

33. 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 an unfavorable, 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 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. Section 120.542(2), Fla. Stat.

34. While admittedly Petitioner exceeded the GMP Contract, its goal in doing so was to complete the development in a timely fashion and deliver units. The increased costs contained no profit or mark up. Specifically, the purpose of the Rule was for the Corporation to ensure that the Petitioner's construction costs are reasonable and incurred in accordance with the Corporation's rules. However strict application of the Rule would lead to the result that a Petitioner that incurred valid increased costs is unable to include them in its basis. Moreover, the requested waiver will not adversely impact Florida Housing and will ensure that the 52 units are available in Monroe County where they are desperately needed.

TYPE OF WAIVER

35. The waiver being sought is permanent in nature.

ACTION REQUESTED

36. For the above stated reasons, Keys Affordable respectfully requests that the Florida Housing Board of Directors grant the requested waiver of rule 67-48.0072 (12) and (17)(h) Florida Administrative Code.

DATED March 4, 2024.

Respectfully submitted.

Maureen M. Daughton
FBN 655805

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1400 Village Square Blvd., Ste 3-231
Tallahassee, Florida 32312
Mdaughton@mmd-lawfirm.com
Counsel for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed this 4th day of March 2024, by electronic mail to:

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

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

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Counsel for Petitioner

KEYS AFFORDABLE DEVELOPMENT IV, LLC

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	Total Amount	Trade Item
Construction Materials Inc.	$404,083	Concrete
All Keys Concrete LLC	$41,251	Concrete
The Home Depot	$106,775	Sheet Metal
John Abell Corporation	$33,225	Insulation
JCA CAD LLC	$7,883	Roofing
Jiangmen OGJG Lighting and Electronic Co., Ltd.	$25,311	Site Improvements
Structural Prestressed Industries, Inc.	$29,021	Concrete
Foshan Lusso Home Co., Ltd.	$38,632	Tile Work and Wood Flooring
L & W Supply Corporation	$12,984	Insulation/Plumbing
Shaoxing Singate Electric Co., LTD	$2,285	Site Improvements
Hilti, Inc.	$3,497	Fire Suppression
eBay Inc.	$2,860	Doors/Finish Carpentry
JCB Trucking Inc	$38,400	Sheet Metal
Sunbelt Rentals, Inc.	$152,242	Sheet Metal
Structural and Metal Services LLC	$2,900	Metals
AC/DC Crane Service	$2,100	Sheet Metal
Ichabod Crane Service, Inc	$2,300	Sheet Metal
ABC Supply Co., inc.	$179,785	Roofing
Guangzhou Kind Architecture Material Technology Co., LTD	$181	Roofing
E.S. Windows, LLC	$50,507	Windows
A.G. Montaggi Di Aloisi Guido	$17,448	Cabinets
AR Carpentry Services, Inc.	$487,637	Roofing/Sheet Metal/Painting and Decorating
		Doors/Windows/Cabinets
Garcia Brothers Construction Inc	$33,403	Rough Carpentry/Finish Carpentry/Appliances
	$1,674,710	

- Exh A -