STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING
FINANCE CORPORATION

HFH FOX POINTE, LLC
a Florida limited liability company,

Petitioner,

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

FHFC CASE NO. 2024-040VW
Application No. 2023-192CRA
RFA 2023-108

**PETITION FOR WAIVER OF RULE 67-48.002(96), F.A.C. (7/6/22) AND THE 2022 QAP**

HfH Fox Pointe, LLC (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 2022 Qualified Allocation Plan ("2022 QAP") as incorporated and adopted by Rule 67-48.002(96), Florida Administrative Code ("F.A.C.") (7/6/22), such that Petitioner may return its 2023 Housing Credit Allocation now as opposed to waiting until after the end of the second calendar quarter of 2025. Due to forces outside of Petitioner's control, particularly because a Rental Recovery Loan Program (RRLP) loan, an Extremely Low Income (ELI) loan, and Home Investment Partnership Program assistance from the American Rescue Plan Act (HOME-ARP) loan funds are all a crucial component of this 2023 Housing Credit Allocation's overall financial structure, and given the requirements of those funding sources along with the processes mandated by Florida Housing—namely Board meetings for approval, issuance of documents from the Florida Housing Council, and final closing—the Petitioner believes it will be unable to incur the costs necessary to meet the Site Control and 10% Test by the October 9,

2024, deadline.[1] Thus, in an abundance of caution, and in an effort to remain at all times in compliance with Florida Housing's requirements, Petitioner respectfully requests a Rule 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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2. The address, telephone and facsimile number and e-mail address of Petitioner's counsel is:

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## B. DEVELOPMENT BACKGROUND

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

- Development Name: Fox Pointe

[1] By letter dated April 24, 2024, Petitioner requested an extension of the April 30, 2024 Site Control and 10% Test deadline, which was granted on April 25, 2024. The request was necessitated because the Applicant was pursuing additional funding sources from Volusia County.

- Development Address: 1088 10th St., Holly Hill, FL
- County: Volusia
- Developer: HTG Fox Pointe Developer, LLC and HfH Fox Pointe Developer, LLC
- Number of Units: 70 new construction
- Type: Garden Apartments
- Set Asides: 20.000% (14 units) at or below 30% AMI; 50.000% (35 units) at or below 60% AMI; 30.000% (21 units) at or below 80% AMI
- Demographics: Homeless
- Funding: 9% HC request of $2,040,000 annually; Total RRLP loan in an amount up to $4,200,000 (RRLP Base Loan $3,964,500 plus ELI Loan $235,500) and a HOME-ARP loan in an amount up to $1,392,300.

## C. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

## D. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver of Rule 67-48.002(96), effective July 6, 2022, which provides in pertinent part:

> "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2022 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-14429.

6. Subsection II.J. of the 2022 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 the Applicant has returned its Housing Credit Allocation after the end of the second 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 will reserve allocation in an amount not to exceed the amount of Housing Credits returned, and will 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) A site inspection reflecting the percentage of Development completion must be completed. If the Development is at least fifty (50) percent completed, as reflected in the site inspection, the approval may be made by Corporation staff. If the Development is less than fifty (50) percent completed, as reflected in the site inspection, the approval must be made by the Board. In making such determination, the Board must find and determine that the delay was caused by circumstances beyond the Applicant's control, and that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay; and (iii) The Corporation or Board, as applicable, must find 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.

## E. STATUTES IMPLEMENTED BY THE RULE AND THE 2022 QAP.

7. The Rule implements Section 420.5087 (State Apartment Incentive Loan Program), and Section 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund) of the Florida Housing Finance Corporation Act (the "Act").[2] The Act designates Florida Housing 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, Florida Housing 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.*

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

## F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE.

8. Petitioner timely submitted Application No. 2023-192CRA on April 27, 2023 in response to RFA 2023-108 (RFA 2023-108 Housing Credit and RRLP Financing for Homeless Housing Developments Located in Medium and Large Counties Affected by Hurricane Ian and Nicole) (the "RFA").

9. The Development was selected for funding and invited to credit underwriting on June 20, 2023.

10. The Development received an allocation of the 2023 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").

11. Florida Housing staff executed a 2023 Carryover Allocation Agreement ("CAA") on or about October 9, 2023 for the allocation of its Tax Credits. The CAA required Petitioner to incur at least ten percent of the reasonably expected basis of the Development (the "10% Test") and meet the site control requirement ("Site Control") on or before April 30, 2024 (the "CAA Deadline"). By letter dated April 24, 2024, Petitioner requested an extension of the CAA Deadline. On April 25, 2024, Florida Housing granted that request and extended the CAA Deadline to October 9, 2024.

12. Failure to comply with the CAA Deadline will cause the Housing Credits allocated within the CAA to be deemed returned to Florida Housing under 26 U.S.C. § 42(h)(3)(C).

13. 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, 2025.

14. After being selected for funding and invited to credit underwriting, Petitioner took all steps within its power to move the Development forward toward a successful groundbreaking.[3] Petitioner began predevelopment activities immediately upon accepting its invitation to enter credit underwriting. Since that time, Petitioner has been engaged in the pursuit of all necessary development approvals; specifically:

- Petitioner applied for Final Site Plan approval (i.e. a site development permit) on October 5, 2023, which permit is still under review.
- Petitioner applied for a Water Management District ERP Permit on December 9, 2023, which permit is still under review.
- Petitioner submitted a building permit application on January 16, 2024.

Unfortunately, Petitioner's progress has been stalled by civil plan design requirements and ongoing discussion with the Water Management District. Petitioner believes a cost effective civil plan design standard has been agreed upon and is moving forward in the ERP Permit process. Petitioner believes a permit ready letter will be issued by mid-October, 2024 and anticipates that closing will occur by October 15, 2024. Petitioner has been actively engaged with the Credit Underwriter for the Development and the Credit Underwriting Report ("CUR") was submitted to Florida Housing on July 16, 2024. Petitioner anticipates that the CUR will be approved at the August 23, 2024 Florida Housing Board meeting. While Petitioner believes it has a path forward to resolving the issues, it will cause a significant amount of delay. Petitioner therefore knows now that it will be unable to move forward in sufficient time to allow Petitioner to incur the costs necessary to meet the Site Control and/or 10% Test by the CAA Deadline.

[3] The speed at which Petitioner is able to move towards closing is dependent upon Florida Housing's process for completing the Plan and Cost Review and Credit Underwriting Report, and issuing documents.

15. Because Petitioner believes that circumstances outside of its control will prevent it from satisfying the Site Control and 10% Test by the CAA Deadline, Petitioner respectfully requests a waiver of the 2022 QAP to permit Florida Housing to approve the tax credit exchange now as opposed to waiting until after the end of the second calendar quarter of 2025.

16. 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.

17. If the Petition is denied, and Petitioner loses the allocated Housing Credits as a result of insufficient time to satisfy the Site Control and 10% Test, Petitioner will be forced to abandon the Development. Stated differently, losing this funding source will cause Volusia County to lose the Development's 70 affordable housing units.

18. This Petition should be granted, as opposed to de-obligating the award, because Volusia County is currently experiencing a shortage of affordable housing units. Granting the Petition will result in the delivery of 70 new affordable housing units much faster than would reallocating the funding to a new development.

19. 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,[4]

[4] "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.

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.

20. Strict adherence to Subsection II.J. of the QAP would violate principles of fairness, as Florida Housing has granted waivers to other Developments similarly facing unforeseen delays beyond their control (*e.g.,* Arbor Village- granted credit swap in November 2019; Georgian Gardens- granted credit swap in November 2019; Luna Trails- granted credit swap in 2019; Northside Transit Village- granted credit swap in November 2019; Residences at Dr. King Boulevard, Ltd.- granted credit swap in 2019).[5]

21. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2022 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 70 affordable housing units will be made available for the target population in Volusia County, Florida. The strict application of the 2022 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for Petitioner because it likely cannot – due to no fault of its own – meet the Site Control and 10% Test by the CAA 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. 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 70 affordable housing units in Volusia County, Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in persons of

[5] The reasons that precipitated the credit swaps include, but are not limited to: need for off-site improvements, which required negotiation with neighboring property owners; revision to construction plans due to increased construction costs, which required the securing of additional funds; redesign requirements due to a fire code violation in the design of a staircase; post-Hurricane clean up; and title issues, which only became known after the design process.

low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable housing. *See* § 420.5099(2), Fla. Stat.

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

23. The requested waiver should be granted because, as demonstrated above, 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 timing, 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.

24. 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

25. 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 2023 Housing Credit Allocation, and an immediate allocation of new Housing Credits; (ii) grant a corresponding extension of deadlines relative to those credits; (iii) grant this Petition and all of the relief requested herein; and (iv) grant such further relief as it may deem appropriate.

Respectfully submitted,

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*Counsel for Petitioner*

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 30th day of July, 2024.

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