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FLORIDA HOUSING
FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Ambar Riverview, Ltd.
a Florida limited partnership,

Petitioner,

CASE NO. 2021-064VW

vs.

Application No. 2019-035C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

PETITION FOR WAIVER OF RULE 67-48.002(96), F.A.C. (7/8/18) AND THE 2018 QAP

Ambar Riverview, Ltd., a Florida limited partnership (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 2018 Qualified Allocation Plan ("2018 QAP") as incorporated and adopted by Rule 67-48.002(96), Florida Administrative Code ("F.A.C.") (July 8, 2018) such that Petitioner may return its 2020 Housing Credit Allocation now as opposed to waiting until the last quarter of 2022. While Petitioner has expended approximately $4.9 million to diligently progress the development to the construction phase, delays related primarily to the COVID-19 pandemic have extended the anticipated construction completion date beyond the Placed-in-Service date; necessitating this request for 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:

Elena M. Adames
Ambar Riverview, Ltd.

3030 Hartley Rd., Ste. 310
Jacksonville, FL 32257
Telephone: (305) 216-1894
Facsimile: N/A
E-Mail: eadames@ambarco.com

2. The address, telephone and facsimile number and e-mail address of Petitioner's counsel are:

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
150 West Flagler Street
Suite 2200
Miami, Florida 33130
Telephone: 305-789-3350
Fax: 305-789-3395
Email: Bmcdonough@stearnsweaver.com

Bridget Smitha, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
106 E. College Ave
Suite 700
Tallahassee, Florida 32301
Telephone: 850-329-4852
Fax: 850-329-4844
Email: BSmitha@stearnsweaver.com

B. THE DEVELOPMENT

3. On November 4, 2018, Petitioner submitted application number 2019-035C (the "Application") in response to RFA 2018-111 (Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County).

4. The Application pertains to the following development (the "Development"):

- Development Name: The Ambar
- Developer: Ambar3, LLC
- County of Development: Miami-Dade
- Number of Units: 105
- Type: High Rise (new construction)
- Demographics: Elderly, Non-ALF
- Funding Amounts: $2,700,000 9% Housing Credits (annual allocation)

- Set Asides: 16 units (15%) @ 30% AMI; 65 units (62%) @ 60% AMI; 24 units (23%) @ 80% AMI; and 0 Market Rate Units

5. The Development received an allocation of the 2020[1] 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") and was invited to credit underwriting.

6. Florida Housing staff executed a 2020 Carryover Allocation Agreement on or about September 22, 2020 for the allocation of its Tax Credits.

7. 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, 2022.

8. Petitioner experienced delays beyond its control, stemming from the fact that the City of Miami continuously operated at less than 100% capacity and was not open to the public for meetings for several months due to the COVID-19 pandemic. Although Petitioner requested building permit approval in December 2020, the request has not yet been approved as of the date of this Petition. Because the delay in permit approval prevented Petitioner from closing on all of the financing and land acquisition necessary to meet the 10% threshold and site control requirements of the Carryover Agreement, Petitioner requested a six-month extension of the Site Control and 10% Test deadline on March 15, 2021. Florida Housing approved the request and extended the Site Control and 10% Test deadline to September 22, 2021 (the "10% Deadline").

[1] While Florida Housing issued RFA 2018-111 in September 2018, the protest related to same was not resolved until March 26, 2020 and Petitioner was not awarded funding until April 17, 2020.

9. The delays in obtaining permit approval have also prevented Petitioner from commencing construction. Accordingly, Florida Housing approved Petitioner's request for an extension of the deadline for closing the partnership and recording the notice of commencement to October 31, 2021 with the understanding that an additional extension would be granted as needed.

10. The foregoing extensions did not constitute a waiver or an extension of any other requirements of IRC Section 42 or Chapter 67-48, F.A.C.

11. Because Petitioner has been prevented by circumstances outside of its control from closing on all of the financing and land acquisition necessary to satisfy the 10% Test Deadline, Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2022.

C. WAIVER IS PERMANENT

12. The waiver being sought is permanent in nature.

D. THE RULE FROM WHICH WAIVER IS REQUESTED

13. Petitioner requests a waiver of Rule 67-48.002(96), F.A.C. (July 8, 2018), which defines "QAP" with reference to the 2018 QAP and which adopts and incorporates the 2018 QAP by reference:

> "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 from http://www.flrules.org/Gateway/reference.asp?No=Ref-09578.

14. Subsection II.K. of the 2018 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 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.

15. The process found in the 2018 QAP allows an applicant to return its allocation of housing tax credits in the last calendar quarter of the year in which it was otherwise required to be placed in service. The tax credit exchange request may only be approved by the Executive Director of Florida Housing under the conditions identified in the 2018 QAP. Because Petitioner cannot close without the permits, which remain pending City approval, Petitioner will not be able to meet the 10% Test Deadline. Petitioner therefore respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2022. As demonstrated below, 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 time placed in service, 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.

E. STATUTES IMPLEMENTED BY THE RULES AND THE 2018 QAP

16. The Rule implements Section 420.5087 (State Apartment Incentive Loan Program), Section 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund), and Section 420.5099 (creating the Housing Credits Program) of the Florida Housing Finance Corporation Act (the "Act").[2] 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"). *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*.

F. JUSTIFICATION FOR GRANTING WAIVER AND BOARD APPROVAL

17. Petitioner requests a waiver of the 2018 QAP to permit Florida Housing to approve the tax credit exchange now as opposed to waiting until the last quarter of 2022. It is not possible for Petitioner to meet the required 10% Test Deadline for reasons that are outside of Petitioner's control. The following timeline demonstrates Petitioner's efforts to expeditiously move the Development forward and obtain the necessary permits despite significant delays experienced in relation to the COVID-19 pandemic:

- Petitioner submitted its request for building permit approval in December 2020.
- Due to the COVID-19 pandemic, the City of Miami was not operating at 100% capacity and was not open to the public for meetings until June 2021.

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

- Petitioner nonetheless remained in regular contact with the City, requesting updates and attempting to shepherd the approval process forward.
- Petitioner also retained a plan and cost review consultant to expedite the process and ensure compliance with the Carryover Agreement.
- By July 26, 2021 Petitioner obtained plan approvals regarding Public Work BBL, Roofing, Flood Plain, Mechanical and Plumbing. However, eleven approvals remained pending.
- Petitioner has proactively prepared for the building permit approval, including drafting construction loan documents, obtaining credit approval with the permanent loan lender for a Freddie Mac Forward, and providing a substantial final form of the Limited Partnership Agreement to Seltzer Management.
- Petitioner also obtained the demolition permit, and has control of the property through an affiliated entity.
- Petitioner met with a City of Miami Building Official by Zoom on August 13, 2021, and secured his commitment to do everything in his power to get the permit ready letter needed for closing. Petitioner followed up with several reviewers to obtain their sign-offs, but has been unable to obtain all necessary signatures despite its best efforts.

18. Because Petitioner presently knows that it will not be able to meet the 10% Test Deadline, Petitioner requests the credit swap now as opposed to waiting until the last quarter of 2022.

19. As set forth above, this request was not necessitated through any fault of Petitioner. Rather, Petitioner exercised due diligence in attempting to obtain the necessary

permits and move the Development towards construction. In fact, approximately $4.9 million has been expended to date in relation to the Development.

20. Based on the present inability to set a closing date due to the inability to obtain the necessary permits, Petitioner knows that it will not be able to meet the 10% Test Deadline. If the Petition is denied, Petitioner will be unable to complete the credit swap. Without the credit exchange, the Development cannot move forward because Petitioner will not have sufficient time to secure an investor and Miami-Dade County will thus be denied these 105 affordable housing units.

21. This Petition should be granted, as opposed to deobligating the award, because Miami-Dade County is currently experiencing a shortage of affordable housing units. Granting the Petition will result in the delivery of 105 affordable housing units much faster than would reallocating the funding to a new development.

22. 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,[3] 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.

[3] "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.

23. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2018 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 105 affordable housing units will be preserved and made available for the target population in Miami-Dade County, Florida. The strict application of the 2018 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for Petitioner because it cannot – due to no fault of its own – close in sufficient time to satisfy the 10% Test 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.

24. As mentioned above, the requested waiver 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 for low-income households. 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 105 affordable housing units in Miami-Dade County, Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable housing. *See* § 420.5099(2), Fla. Stat.

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

26. 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

27. For the reasons set forth herein, Petitioner respectfully requests that the Board:

a) grant the requested waiver to permit the requested credit exchange, immediate return of Petitioner's 2020 Housing Credit Allocation, and an immediate allocation of new Housing Credits;

b) grant this Petition and all of the relief requested herein; and

c) grant such further relief as it may deem appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
150 West Flagler Street, 22nd Floor
Miami, Florida 33131
Tel: (305) 789-3350
Fax: (305) 789-3395
E-mail: bmcdonough@stearnsweaver.com

Counsel for Petitioner

By: *Brian J. McDonough*
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition for Rule Waiver is being served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation at Corporation.Clerk@FloridaHousing.org and a hard copy is being mailed via U.S. Mail to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 24th day of August, 2021.

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