STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Oasis at Renaissance Preserve I LP
a Florida limited partnership,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

CASE NO. 2021-022VW

Application No. 2019-197C

RECEIVED
MAR 16 2021 1:41 PM
FLORIDA HOUSING FINANCE CORPORATION

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

Oasis at Renaissance Preserve I, L.P., 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 2019 Housing Credit Allocation now as opposed to waiting until the last quarter of 2021. While Petitioner has expended approximately $1.2m to diligently progress the development to the construction phase, delays related primarily to the COVID-19 pandemic have extended the anticipated construction period 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:

Egbert LJ Perry
Integral Development LLC

191 Peachtree Street, Suite 4100
Atlanta, GA 30303
Telephone: (404) 224-1861
Facsimile: N/A
E-Mail: eperry@integral-online.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: 305-789-3395
Email: BSmitha@stearnsweaver.com

B. THE DEVELOPMENT

3. On December 4, 2018, Petitioner submitted application number 2019-197C (the "Application") in response to RFA 2018-110 (Housing Credit Financing for Affordable Housing Developments Located in Medium Counties) and was awarded funding.

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

- Development Name: Oasis at Renaissance Preserve
- Developers: Integral Development, LLC & Housing for Urban Communities, LLC
- County of Development: Lee
- Number of Units: 124
- Type: Garden Apartments (new construction)
- Demographics: Elderly Assisted Living Facility
- Funding Amounts: $1,700,000 9% Housing Credits (annual allocation)

- Set Asides: 22 units @ 30% AMI; 54 units @ 60% AMI; 30 units @ 80% AMI; and 18 Market Rate Units

5. The Development received an allocation of the 2019 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 on August 6, 2019.

6. Florida Housing staff executed a 2019 Carryover Allocation Agreement on December 20, 2019 for the allocation of its Tax Credits.

7. By letter dated October 4, 2019, Petitioner requested Board approval to allow a change to the Manager and Board Member of the Co-Developer Entity, Housing for Urban Communities, LLC (the instrumentality of the Housing Authority of the City of Fort Myers), which was approved by the Board at its October 31, 2019 meeting. Specifically, Sherri Campanale was replaced by Marcia Davis as a Manager and Peter Routsis Arroyo was replaced with Richard Fain as a Board Member. In the original Application, the Principal with the required Developer experience was Egbert Perry, who remains as a Principal of the Co-Developer, Integral Development, LLC.

8. 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, 2021. However, in accordance with Rev. Proc. 2014-49, Florida Housing granted an extension of the 10% Test deadline to June 20, 2021 and an extension of the placed-in-service date to December 31, 2022 (the "Placed-In-Service Date") due to COVID-related impacts on the Development.

9. Florida Housing also granted an extension of the deadline for submission of the Credit Underwriting Report and Tax Agreement Partnership to June 30, 2021 and an extension of the deadline for submission of the Notice of Commencement to September 30, 2021.

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. For the reasons discussed below, Petitioner anticipates the Development will be placed in service in the second quarter of 2023. Because Petitioner will not be able to meet the Placed-In-Service Date, Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2021.

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.

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 presently knows that it will not be able to meet the Placed-In-Service Date, Petitioner respectfully requests a waiver to allow the credit swap now as opposed to waiting until the last quarter of 2021. 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").[1] 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 2021. It is not possible for Petitioner to meet the required Placed-In-Service Date for reasons that are outside of Petitioner's control. The following timeline demonstrates Petitioner's efforts to expeditiously move the Development forward despite significant delays experienced in relation to the COVID-19 pandemic:

- Petitioner has been pursuing an innovative Assisted Living Facility ("ALF") concept in Florida for the past eight years.
- On October 15, 2018, Petitioner executed a long-term ground lease for the Development with the Housing Authority of the City of Fort Myers.
- Petitioner's potential investor and lender required that issues related to the economic viability and licensing of the Development be resolved prior to making a firm financial commitment to the Development. Thus, Petitioner had to first work through various issues with the Agency for Healthcare Administration

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

("AHCA"), and then with at least one major managed care operator (Petitioner chose Centene Corporation, which does business in Florida as "Sunshine Health" and is hereinafter referred to as "Centene"). As the managed care operator contracted by AHCA to oversee the service delivery, negotiate reimbursement rates with assisted living providers, etc., Centene is a critical component of this process. Among other issues, Petitioner's progress was delayed by Centene's practice of only negotiating with service providers having a provider number as Petitioner could not obtain a provider number until construction is complete. Accordingly, Petitioner needed AHCA to approve Centene to negotiate with Petitioner significantly in advance of Petitioner obtaining a provider number.

- Since July 2019, Petitioner has communicated by phone and email on a monthly basis with Florida Housing regarding its progress with resolving such issues.
- In October 2019, Petitioner retained a consultant to assist with access to leadership at AHCA to expedite resolution of the aforementioned issues.
- Prior to execution of the Carryover Allocation Agreement on December 20, 2019, Petitioner began working through the ALF licensing issues with the AHCA.
- By March of 2020, Petitioner had begun communications with Centene and was within a few months of resolving all economic viability and licensing issues necessary to move forward with the Development. Unfortunately, the pandemic, which disproportionately impacted the senior population and others under the care of the managed care operators, consumed so much of Centene's focus and manpower that Petitioner was unable to obtain responses to its queries for approximately five months.

- Petitioner resumed communications with Centene during the summer of 2020. In the interim, some of the Centene personnel that had been integral to Petitioner's discussions either changed responsibilities or left the company, further delaying resolution.
- As a result of post-COVID changes to the economy (*e.g.*, higher construction costs, higher nursing wages, etc.), Petitioner was forced to redesign its building to be more compact and efficient, which resulted in delays related to obtaining the necessary entitlement and changing the physical location of the building. New schematics should be completed in the next two weeks.
- By November 2020, Petitioner believed the lender and investors' concern regarding clarity of state payments for healthcare services and other issues had been sufficiently resolved. The Petitioner then presented the proposal to potential investors for consideration and to the lender for evaluation.
- Petitioner presented the economics to the HUD-approved lender, Walker & Dunlop, Inc. ("W&D") at the end of November 2020. In December 2020, W&D indicated that, due to HUD's volume of transactions and focus on year-end closings, W&D would not be able to begin Petitioner's application process until January 2021.
- In January 2021, W&D stated that HUD's timeline to close Petitioner's requested health care product ("232 LEAN"), had increased significantly. From the beginning of the pandemic (*i.e.*, March 2020) to the end of 2020, HUD's timeline to close a 232 LEAN transaction increased from approximately seven months to

eleven months. Petitioner attempted for multiple weeks to accelerate the schedule, but was ultimately unsuccessful.

- Petitioner requested that its lender provide a new schedule that could be committed to in writing. The lender responded with a schedule that resulted in a December 2021 closing. Because HUD is traditionally slower in December, Petitioner believes closing could not be achieved before January 2022.

18. Petitioner anticipates a 14-month construction period with the Development placed in service in the second quarter of 2023. Because Petitioner presently knows that it will not be able to meet the Placed-In-Service Date (*i.e.*, December 31, 2022), Petitioner requests the credit swap now as opposed to waiting until the last quarter of 2021.

19. 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 despite delays outside of its control. In fact, approximately $1.2 million[2] has been invested to date for:

- Architectural and engineering services (approximately $470k)
- Permits (approximately $15k)
- Loan fees (approximately $115)
- Appraisal (approximately $17k)
- Legal fees (approximately $150k)
- FHFC fees (approximately $332k)
- Other costs (approximately $84k)

[2] This amount does not include approximately $600k in developer fees and overhead expenses, nor approximately $750k in costs invested to develop this concept in Florida.

20. Based on the estimated closing date, and a 14-month construction period, the Development is anticipated to be placed in service in the second quarter of 2023. Accordingly, it is presently known that there is insufficient time to meet the Placed-In-Service Date 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 Lee County will thus be denied these 124 ALF units.

21. This Petition should be granted, as opposed to deobligating the award, because Lee County is currently exhibiting a shortage of affordable housing units, especially with regard to ALF units. Granting the Petition will result in the delivery of 124 desperately needed affordable ALF units much faster than would reallocating the funding to a new development. Combining Housing Credits with ALF presents unique challenges. Developing this much needed housing solution required Lee County, the Housing Authority of the City of Fort Myers, and Petitioner to work diligently prior to, and throughout the pandemic, undertaking careful planning with a full understanding of the market needs to successfully combine Housing Credits with assisted housing and to expeditiously deliver a housing solution for Floridians in need. This innovative concept will be the first of its kind in Florida in more than 20 years and will provide a model for similar developments in the future.

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.

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 124 affordable housing units will be preserved and made available for the target population in Lee 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 complete construction in the timeframe necessary to meet the current placed-in-service date. 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 124 affordable housing units in Lee 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

[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.

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 2019 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 16th day of March, 2021.

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