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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

IN RE: CASA DEVON VENTURE LP

FHFC CASE NO. 2022-042VW
Application No. 2019-507C

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PETITION FOR WAIVER OF
FLORIDA ADMINISTRATIVE CODE RULE 67-21.026(13)(e)

Petitioner, Casa Devon Venture LP, as Applicant/Owner, pursuant to section 120.542, Florida Statutes, ("F.S.") and chapter 28-104, Florida Administrative Code, ("F.A.C."), petitions the Florida Housing Finance Corporation ("Florida Housing") for a waiver of Rule 67-21.026(13)(e), F.A.C., relating to the work that a General Contractor may perform. In support of this Petition, Petitioner states:

A. Petitioner and the Development

1. The name, address, telephone, and email address for Petitioner are:

Casa Devon Venture LP
c/o Bryan Hartnett
2711 N. Sepulveda Blvd. #526
Manhattan Beach, CA 90266
Telephone: (424) 999-4588
Email: bHartnett@ahidevelopment.com

2. The contact information for Petitioner's counsel is:

Lawrence E. Sellers, Jr.
Holland & Knight LLP
315 S Calhoun Street
Tallahassee, Florida 32301
Telephone: 850-425-5670
Email: larry.sellers@hklaw.com

3. On May 13, 2020, Petitioner received a Preliminary Determination for Housing Credits in the amount of $2,385,068.

4. Here is the requested background information regarding the Development:

Application Number:	2019-507C
Development Name:	Casa Devon Apartments
Applicant/Borrower:	Casa Devon Venture LP
Developer/Principal:	MRK Partners Inc. (Sydne Garchik)
Number of units:	210
County of Development:	Miami-Dade
Development/Type:	Mid Rise
Set Asides:	100% of residential units at 60% of AMI,
Demographics:	Elderly/Acquisition and Rehabilitation
Funding Amounts:	Housing Credits in the amount of $2,385,068.

B. Type of Waiver

5. The waiver being sought is permanent in nature.

C. Rule For Which a Waiver Is Requested

6. Petitioner requests a waiver from Rule 67-21.026(13)(e), F.A.C., ("Rule") which requires the General Contractor to meet the following condition:

> Ensure that no construction or inspection work that is normally performed by subcontractors is performed by the General Contractor.

7. To the extent necessary under the rules and Florida law, Applicant also requests a waiver for the comparable language set forth in the Applicant's certification and acknowledgement form.

D. Statutes Implemented by the Rule

8. The Rule implements, among other sections of the Florida Housing Finance Corporation Act, section 420.5089, F.S., relating to the State Apartment Incentive Loan Program, and section 420.5099, F.S., relating to the allocation of Low-Income Housing Tax Credits.

E. Justification for Granting the Requested Waiver from the Rule

9. Under Section 120.542(1), F.S., Florida Housing has the authority to grant waivers to or variances from its requirements when strict application of the requirements would lead to

unreasonable, unfair, and unintended consequences in particular instances. Specifically, section 120.542(2) states:

> Variances and waivers shall be granted when ***the person subject to the rule demonstrates*** that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, ***"substantial hardship" means a demonstrated economic***, technological, legal, or other type of ***hardship to the person requesting the variance or waive***r. 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.

10. Petitioner is the Applicant for the Casa Devon Apartments ("Project") and is subject, along with its General Contractor, NEI General Contracting, Inc. ("NEI"), to the Rule.

11. Petitioner on December 17, 2019, entered into a Standard Form Construction Contract Agreement with NEI, where the basis of the payment is the Cost of the Work Plus a Fee with a Guaranteed Maximum Price ("Casa Devon Apartments Contract").

12. Applicant issued the Notice To Proceed to NEI on February 26, 2020. As NEI was just about to mobilize and begin work, the COVID-19 Pandemic began. Due to the Pandemic, NEI was not able to mobilize to the Project until May 14, 2020, two and a half months later than the original schedule. The Pandemic had an immediate, negative impact on the construction industry and this Project. Such impacts included, but were not limited to, labor shortages and supply chain disruptions. Occupied renovations, such as the Casa Devon Apartments Project (which houses the elderly, a particularly vulnerable segment of the population in Miami-Dade County), were significantly affected more than unoccupied projects, as the work had to be performed with limited, if not no, contact with the existing elderly residents. In addition, COVID-19 protocols were required to be developed and implemented to prevent the spread of the disease between NEI employees, NEI's subcontractor, and the existing elderly residents.

13. In an attempt to make up time lost on the schedule as a result of the COVID-19 Pandemic, and to reduce the increased costs associated with material and labor shortages, NEI was required to self-perform a small percentage (6.9%) of the overall value of the work associated with the Project. The total cost of the required self-perform work was $677,084. This work was completed within the Guaranteed Maximum Price (GMP) value and no increased costs to the Project were incurred. In fact, as a result of the Pandemic, the Applicant had significant increases in hotel costs utilized to move existing residents out of their units to allow for the renovations to occur. In order to assist the Applicant with the increased costs, NEI agreed to credit the Applicant $150,000, which included a voluntary reduction by NEI of $18,041.24 of its General Conditions, Overhead and Profit.

14. The required work that makes up the $677,084, in order to reduce delays, address COVID protocols and save money in order to fund hotel stays, is described below:

a. COVID 19 Protocol – as part of its General Contractor duties to manage and control the construction of the Development and in an effort to get the job restarted, to maintain a level of separation, to limit the spread of COVID and to sanitize, NEI was forced to dedicate a worker to setup and clean sanitation stations, perform temperature screening, install additional signage, perform cleaning and build temporary separation walls.

b. Further, to perform its duties to manage and control the construction of the Development and to protect residents and workers (NEI and subcontractors) performing the rehabilitation via social distancing protocols, it was agreed that NEI would staff the project elevator for the duration of the Project with an elevator operator. As the General Contractor, the use of an NEI controlled elevator operator would ensure social distancing from the elderly residents while maintaining the ability for staffing and material distribution. It was critical that NEI as the General Contractor hire the elevator operator, and not subcontract out this task, because as the General Contractor, NEI is directly responsible for the safety of its workers and the residents. NEI is also directly responsible

to manage and control the overall Project construction schedule, to which an elevator operator, especially under a pandemic scenario, is critical. As the General Contractor controlling the elevator, NEI was able to properly control and manage the construction to ensure that all subcontractor trades had equal use of the elevator, to ensure that the trades with impending construction schedule deadlines had priority elevator access, and ensure that the residents living at the Casa Devon Apartments were able to freely enter and exit their residences.

c. Due to labor shortages and the need to quickly return the most vulnerable elderly residents to their units so as to avoid project delays, NEI was required to self-perform punch list and cleaning activities that a General Contractor would often self-perform.

d. Also necessary to reduce costs, save time and return the elderly to their units as soon as possible, NEI had to complete the following items defined as de minimis: installation of wire shelving, which was a small scope of work that was added to the contract during the course of the Project, removal and replacement of small areas of base board and flooring punch list in between turns, and stocking, handling and sorting floor material on floors as needed.

e. NEI also provided labor associated with demolition for general labor and clean up in support of multiple trades, small demolition scope to remove wire shelving added to the scope after contract and removal of miscellaneous doors.

f. Due to COVID 19, the Miami-Dade County building department was not performing/completing building inspections. This required the Applicant to incur the cost of hiring a third party licensed inspection company to provide inspections. Unfortunately, with the building department closed there was an error in processing the third party inspector's paperwork. As a result, Miami-Dade County required re-inspection of almost all units. As a result of this re-inspection process, NEI was required to reopen walls, perform drywall cuts and patches, and perform needed paint touch ups. This work was

completed by NEI labor to avoid additional lost time, multiple entries into units and significant additional costs to the Applicant.

15. The delays associated with requiring NEI to hire subcontractors to perform the above tasks would have delayed the Project, causing a substantial economic hardship to the Applicant, NEI, and the elderly residents of the Casa Devon Apartments.

16. Under section 120.542(1), F.S., 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: (l) 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. § 120.542(2), F.S. (2018).

17. In this instance, Petitioner meets the standards for a waiver of the Rule and its prohibition against GC Self-Performance provided in the Rule. The requested waiver will not adversely affect the Development or Florida Housing and will ensure that 210 much needed affordable housing units will be made available for a vulnerable segment of the population in Miami-Dade County, Florida. The strict application of the Rule and the prohibition against GC Self-Performance will create a substantial hardship for Petitioner because it would have increased the cost of the Project, would have delayed the delivery of these much-needed units in Miami-Dade County and would have increased the risk of exposing elderly residents to COVID-19 if additional subcontracted labor were required to be hired.

18. 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, and particularly the development of low-income housing. See s. 420.5099(2), F.S.

19. Petitioner and NEI have been working together with FHFC staff and intend to comply with the purpose of the Rule in question and agree to the following conditions:

A. All cost for NEI Self-Perform Labor attributable to affordable units will be at cost with no built in profit;

B. The GC Fee on the Self-Perform labor scope identified in the Petition will be capped at 14% on the first $350,000; and

C. The GC Fee on the Self-Perform labor scope identified in the Petition over and above $350,00 (i.e., $317,084) shall be limited to 10 percent.

F. Action Requested

WHEREFORE, Petitioner respectfully requests that Florida Housing:

(i) Grant the requested waiver of Rule 67-21.026(13)(e), and to the extent required, the Applicant's certification and acknowledgement form, for the amount identified herein, as applicable;

(ii) Grant this Petition and all of the relief requested herein, and all costs allowed by Rule 67-21.026(13)(e), F.A.C., and the Casa Devon Contract; and

(iii) Grant such further relief as may be deemed appropriate.

Respectfully submitted this 13th day of July, 2022.

/s/Lawrence E. Sellers, Jr.
Lawrence E. Sellers, Jr.
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed on this 13th day of July, 2022 by electronic delivery to:

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

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

Lawrence E. Sellers, Jr.
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