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Osprey Sound Apartments, L.P.,
a Florida limited partnership,

Petitioner,

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

FHFC CASE NO. 2023-077VW
Application No. 2021-107B/2023-258V

PETITION FOR WAIVER OF RULE 67-21.003(8)(h), F.A.C. (5/18/21)

Osprey Sound Apartments, L.P. (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of Rule 67-21.003(8)(h), Florida Administrative Code ("F.A.C.") effective May 18, 2021 (the "Rule"), which prohibits decreasing the total number of units identified in the application. After Petitioner submitted Application No. 2021-107B (the "Application") on January 6, 2022, several events occurred outside of Petitioner's control causing construction costs to increase by approximately 20% and interest rates to nearly double. Because the estimated per unit cost has increased to nearly $200,000 per unit, it is no longer possible for Petitioner to construct 294 units of affordable housing within a single phase. Additionally, Petitioner is under time constraints related to deadlines for wetland permits and the expiration of entitlement approvals. Accordingly, Petitioner must divide the project into two phases, which requires decreasing the number of units in the Application. If this Petition is granted, and Petitioner is able to limit the Application to the first phase of development, Petitioner will return approximately $19.62 million in Multifamily Mortgage Revenue Volume Cap, thus preserving Florida Housing's bond allocation to fund additional projects. If the

Petition is denied, it is unlikely that any affordable housing units will ever be constructed on the parcel due to new and more stringent wetlands regulations. 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 are:

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B. DEVELOPMENT BACKGROUND

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

- Development Name: Osprey Sound Apartments
- Development Address: 1401 Duskin Avenue, Orlando, FL 32839
- County: Orange
- Developer: Osprey Sound Developer, LLC

- Number of Units: 294 newly constructed units were identified in the Application, but Petitioner respectfully requests approval to decrease this amount to 100 units for the first phase of construction.

- Type: Mid-Rise 5 to 6-stories

- Set Asides: in the Application, Petitioner identified a set aside of 100% at or below 60% AMI; by letter dated August 17, 2023, Petitioner submitted a formal request to change the minimum set-aside commitment from 40% at 60% AMI to the income averaging election of 30% at or below 50% AMI, 52% at or below 60% AMI, and 18% at or below 70% AMI.

- Demographics: Elderly Non-ALF

- Funding: $42,000,000 Corporation-issued Multifamily Mortgage Revenue Bond; $3,651,500 4% Non-Competitive Housing Credits (annual amount); $4,300,000 Viability Loan Funding

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 67-21.003(8)(h), F.A.C., effective May 18, 2021, which provides in pertinent part:

> (8) Notwithstanding any other provision of these rules, there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application is deemed complete. Those items are as follows:
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> (h) Total number of units; notwithstanding the foregoing, the total number of units may be increased after the Applicant has been invited to enter Credit Underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation. With regard to said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant's request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development;

Id.

E. STATUTES IMPLEMENTED BY THE RULE.

6. Rule 67-21.003(8)(h), F.A.C., implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"):

- Section 420.502, Legislative findings.
- Section 420.507, Powers of the corporation.
- Section 420.508, Special powers; multifamily and single-family projects.
- Section 420.509, Revenue bonds.
- Section 420.5099, Allocation of the low-income housing tax credit.

7. Per Section 420.5099(1)-(2), Florida Housing acts as the State's housing credit agency and is authorized to establish procedures for allocating and distributing low-income housing tax credits.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE.

8. Petitioner submitted its Application on January 6, 2022 and Florida Housing staff issued an invitation to enter credit underwriting to Petitioner dated February 16, 2022.[1]

9. Petitioner subsequently obtained a Development site and worked diligently to obtain entitlement approvals and wetlands impact permits. While the Development site comprises 15 acres, only eight of those acres are able to be developed due to wetlands. Because the Development will result in minor, isolated class III wetland impacts on the northern part of the Development site, Petitioner was required to obtain certain governmental approvals. Specifically, these wetland impacts have been approved via wetland impact permits issued by the Orange County Environmental Protection Division ("OCEPD"),[2] the South Florida Water

[1] On May 16, 2023, Petitioner also submitted application 2023-258V in response to RFA 2023-211, Construction Inflation Viability Loan Funding. On June 14, 2023, Petitioner received a Notice of Preliminary Award from Florida Housing related to RFA 2023-211.

[2] The limits of wetlands and surface waters delineated on the approved survey are only binding for a period of five years from the date of OCEPD Conservation Area Determination CAD-21-

Management District ("SFWMD")[3] and the Florida Department of Environmental Protection ("FDEP").[4] Unfortunately, those permits will begin to expire December 22, 2025 (a deadline that cannot be extended or renewed), necessitating that Petitioner commence construction and complete mass grading on the development site prior to the first permit expiration date in order to comply with the permits as issued. The state and local standards for wetland impacts and required mitigation have substantially changed since the time the wetland permits were issued. If Petitioner is unable to meet the December 22, 2025 deadline, it would be required to submit new wetland permit applications, which would be subject to new standards at both the state and local levels, resulting in a further reduction of the developable area on the subject site, potentially eliminating the ability to develop housing on the parcel. New applications for wetland permits would also further delay the delivery of affordable housing units to the community, as a result of the required review periods of OCEPD, SFWMD and FDEP.

05-105 issuance (*i.e.*, August 3, 2021) provided physical conditions on the property do not change so as to alter the boundaries of surface waters or wetlands during that period. The limitations of this permit condition cannot be modified to allow for a longer duration without a complete reassessment of the limits of surface waters and wetlands occurring on the project, which could increase the wetlands, change the wetland Classification, or otherwise prevent development on the property. OCEPD Conservation Area Impact Permit CAI-21-10-065 allows 0.63 acre of direct impacts of Class III wetlands and 0.04 acre of secondary wetland impacts and expires January 24, 2027. Special Condition 2 states that construction must be completed within five years from issuance unless extended in writing, which extension could expand the wetlands limits, change the wetland Classification, etc.

[3] SFWMD Environmental Resource Permit 48-106023-P/Application 211019-31901 allows 0.628 acre of direct impacts of Class III wetlands and 0.04 acre of secondary wetland impacts. The permit expires February 28, 2027. Because a formal determination has not been issued for this project, if the permit needs to be extended, the SFWMD could re-evaluate the wetland delineation and expand the wetland limits.

[4] FDEP State 404 General Permit 0411390-001-SFG allows 0.122 acre of direct wetlands impacts and 0.04 acre of secondary wetland impacts. The permit expires December 22, 2025 and cannot be extended or renewed.

10. Petitioner must also begin construction before its entitlement approvals expire. The Orange County Board of County Commissioners approved a Future Land Use Map Amendment for the project, changing the project's designation from MDR (*i.e.*, medium density residential) to HDR – senior housing (*i.e.*, high density residential – senior housing) on January 25, 2022. In addition, the Orange County Board of Zoning Adjustment approved zoning variances for height, parking ratio, and parking space size requirements for the proposed project on April 26, 2022. If building permits are not issued within five years (*i.e.*, by April 26, 2027), the approval will become null and void. If the approval is nullified, Petitioner would have to redesign the Development, which would trigger new wetlands permitting that, for the reasons discussed above, would likely prevent any development on the site.

11. Petitioner reflected 294 units in the Application, which was achievable at that time. However, in the more than 20 months that subsequently elapsed, construction costs have increased by approximately 20%[5] and both the construction and permanent loan interest rates have approximately doubled.[6] Coupled with the $4.3 million cap on the Viability Loan Funding,[7] it is no longer financially feasible for Petitioner to construct 294 units within a single phase.

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[5] At the time the Application was submitted (*i.e.*, January 6, 2022), Petitioner budgeted for $162,875 per unit. However, by the time of Petitioner's RFA 2023-211 application (*i.e.*, May 17, 2023), construction costs increased by 19.74% such that each unit is estimated to now cost $195,029.

[6] The Permanent Loan Interest Rate Index (10-year Treasury) increased by 99.16% between Petitioner's initial Application (at which time it was 1.792%) and Petitioner's RFA 2023-211 application (at which time it rose to 3.569%). Similarly, for that same period, the Construction Loan Interest Rate Index (One Month Secured Overnight Financing Rate) increased by 96.33% (*i.e.*, from 2.450% to 4.810%).

[7] This cap had the unintended consequence of making larger projects less feasible because the same amount of money would be divided amongst a greater number of units. Specifically, the maximum funding award under RFA 2023-211 of $4,300,000 amounts to only $14,626 per unit

12. Due to prevailing market conditions and availability of gap financing/funding sources, Petitioner found it necessary to break the project into two phases of development. Petitioner determined that limiting the first phase to 100 units would maximize the available funding on a per-unit basis and make the Development viable.

13. If this Petition is granted, and Petitioner is able to decrease the total number of units in the Application for the first phase to 100 units, no prejudice would occur. Petitioner's bond request will be reduced from $42 million to $22.38 million, thereby returning $19.62 million of bonds to Florida Housing for use in relation to other projects. Moreover, if the Petition is granted, developer will seek to maximize the total units of affordable housing delivered between the two phases of development, subject to funding availability and obtaining necessary governmental approvals.[8] Upon completing the wetlands mitigation work for the first phase, the permits will be satisfied, the expiration deadline will be removed, and the second phase can proceed without being subject to the more stringent wetlands regulations.

14. In contrast, if the Petition is denied, the wetland permits deadlines and entitlement approvals will likely expire before construction can begin. For the reasons set forth above, this would likely result in no affordable housing units being constructed on the site by anyone, not just Petitioner. Orange County has expressed support not only for the Development, but for the location as well since it will promote urban infill. Indeed, the Orange County Housing and Community Services Division has issued an Affordable Housing Certification to the

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for a 294-unit project. However, for a smaller 100-unit project, the same award of $4,300,000 amounts to $43,000 per unit; *i.e.*, nearly three times more per unit.

[8] Because Petitioner's mission is driven by affordable housing, Petitioner is committed to developing both phases of the site as affordable housing, even if the Application is decreased to 100 units. In fact, if requested, Petitioner would record a restrictive covenant on the property necessitating that Petitioner construct all units on the property, including all future phases of development, subject to income restrictions of at least 40% at or below 60% average median income.

Development, making the Development eligible for abatement of certain development impact fees and expedited permit review. The County may also contribute gap funding.[9]

15. 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,[10] 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.

16. If the Rule is imposed, Petitioner will suffer the substantial and unnecessary economic and operational hardship described above.

17. As discussed above, Petitioner meets the standards for granting the requested waiver. The requested waiver will ensure that 294 affordable housing units will eventually be made available for the target population in Orange County, Florida. Granting the waiver will serve the purposes of the Rule 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. Denying the waiver would deny Orange County these much-needed affordable housing units.

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[9] Petitioner is applying for Orange County's Affordable Housing Trust Funds (the only other available funding source) and anticipates a contribution of $7-8 million.

[10] "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. § 120.542(2), Fla. Stat.

G. ACTION REQUESTED

18. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested permanent waiver of the Rule such that Petitioner may decrease the total units identified in the Application; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

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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 25th day of September, 2023.

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