STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2021-071VW

WESTSIDE PHASE I, LLLP,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION

Respondent.

RECEIVED
SEPT 22 2021 1:35 PM
FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF THE 2019 QUALIFIED ALLOCATION PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS AND RULE 67-48.002(96)

Petitioner Westside Phase I, LLLP, a Florida limited liability limited partnership ("Petitioner") submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2020 Housing Credit Allocation prior to the last quarter of 2022. The return of these Housing Credits is required before the Corporation may reserve an allocation of Housing Credits that Petitioner requests be immediately allocated. *See* Rule 67-48.002(96), Florida Administrative Code (2019) (the "Rules"), and 2019 Qualified Allocation Plan Section II.K. Due to events outside of Petitioner's control, Petitioner cannot meet the "placed in service" and "10% test" deadlines as required by the Carryover Allocation Agreement.

1. Pursuant to Section 120.542, Fla. Stat. (2019) and Rules 28-104.001 through 28-104.006, F.A.C., Petitioner requests a waiver of Rule 67-48.002(96), Florida Administrative Code (2019), and of Section II.K of the 2019 Qualified Allocation Plan ("QAP") to allow the immediate return of its 2020 Housing Credit Allocation, and an immediate allocation of new Housing Credits (2021 or later).

2. The name, address, telephone and facsimile numbers for Petitioner and its qualified representative are:

Westside Phase I, LLLP
198 NE 6th Avenue
Delray Beach, FL 33483
Attn: Darren Smith
561-859-8520 (telephone)
dsmith@smithhenzy.com (e-mail)

3. The name, address, telephone and facsimile numbers of Petitioner's attorneys are:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, Florida 33131
305-347-7308 (telephone)
305-347-7808 (facsimile)
gcohen@shutts.com (e-mail)

4. Pursuant to RFA 2019-113, Petitioner timely submitted its application for competitive Housing Credits under the Low Income Housing Tax Credit program ("LIHTC Program" or "HC Program"). *See* Application Number 2020-311C.

5. Equity raised from Housing Credits will be used for the construction of 80 residential units (all of which will be low-income housing tax credit units) to be known as Greenlawn Manor (the "Development"). The Development will serve low-income elderly tenants in the City of New Smyrna Beach and Volusia County, Florida.

6. Petitioner's application was selected for funding by FHFC, and Petitioner was invited to credit underwriting.

7. Under Rule 67-48.028(1), if an applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, such applicant must enter into a "carryover allocation agreement" with the Corporation by December 31 of the year in which the preliminary allocation is issued. On November 13, 2020, Petitioner and the

Corporation entered into the carryover allocation agreement for the Development. The carryover allocation may (under Section 42 of the Internal Revenue Code) allow the applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service; in the instant case the Corporation mandated in the carryover allocation agreement that the development be placed in service by December 31, 2022. The carryover allocation agreement requires satisfaction of the 10% test by May 31, 2021 (extended to November 13, 2021 upon Petitioner's request) (collectively, the "Deadlines"). In order to meet the 10% test, Petitioner will need to have closed debt and equity financing, which will not occur by November 13, 2021.

8. As explained more fully below, there is uncertainty as to whether or not the Development will be able to meet the Deadlines, and as such Petitioner is requesting an exchange of Housing Credits in order to effectuate an extension of such deadlines.

9. Since being preliminarily selected for funding and invited to credit underwriting, the Development has suffered unforeseen events outside of its control that make it clear that the Development will not be placed in service by December 31, 2022 or meet the 10% test by November 13, 2021. These challenges are set forth below:

(a) Petitioner commenced pre-development activities and entered into credit underwriting in late July 2020, after resolution of all appeals pertaining to RFA 2019-113. Shortly thereafter, Petitioner encountered delays in processing requests for site plan and related governmental approvals, due in part to difficulties associated with the Covid-19 pandemic and cautionary measures taken in connection therewith. Governmental agencies were significantly impacted by the health crisis by way of reduced operating hours, staffing and limits on in-person meetings. Business operations at

third-party partners (appraisers, environmental engineers, geotechnical engineers, surveyors, etc.) were also impacted by the pandemic. These entities were unable to access the Development site due to risk of experience of their key staff to COVID-19.

(b) Although Petitioner has continued to work through and around the aforementioned COVID issues to the best of its ability, the pandemic has had a direct impact to the completion of key milestones necessary during the pre-development process; in particular, finalization of survey, environmental site assessments, geotechnical survey and (most importantly) the completion of required building plans and specifications.

(c) The New Smyrna Beach Housing Authority (the "NSBHA") originally committed forty (40) project based vouchers ("PBV's") to the Development. However, as a result of significantly higher construction costs than originally anticipated, NSBHA has committed an additional twenty (20) PBV's (for a total of sixty (60) PBV's) to the Development. The additional vouchers will generate additional revenue for the Development, in the form of federal rental subsidy, which in turn will allow an increase in the amount of first mortgage permanent financing which will help alleviate the hardship and offset the increase in total development cost created by increased construction costs. The additional PBV's require a re-submission of the subsidy layering review ("SLR") to the HUD Jacksonville office. The original SLR submission (that included 40 PBV's) was submitted to the HUD Jacksonville office, but was terminated prior to the forwarding of such submission to HUD headquarters due to the additional

requested PBV's. Petitioner is currently preparing the revised SLR for submission to HUD, and approval of the revised submission is anticipated to take a minimum of 90 days. As such, under a best-case scenario construction commencement cannot occur until the end of the first quarter of 2022.

(d) As a result of the foregoing delays which occurred outside of Petitioner's control, it is not anticipated that the Development will be placed in service until 15 to 19 months after construction commencement and, in any event, not by December 31, 2022, the date currently required by the Carryover Allocation Agreement.

10. Despite these delays, petitioner has been working diligently to complete pre-development activities and has, to date, completed the preparation of building drawings and started the bidding process. The remaining permits and approvals are expected to be obtained by the end of the first quarter of 2022, with construction estimated to be completed by the end of the third quarter of 2023.

11. As discussed above, the delays have been caused by circumstances outside Petitioner's control. As a result, the delay makes it impossible to meet the December 31, 2022 placed in service deadline or the November 13, 2020 10% test deadline.

12. As set forth more fully below, Petitioner seeks to return its 2020 Housing Credit allocation now, rather than wait for the last calendar quarter of 2022 as required under the QAP, and obtain from the Corporation an immediate allocation of new Housing Credits with a later required 10% test date and placed in service date.

13. The requested waivers and variance will not adversely affect the Development. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner as

set forth herein, (b) deprive the City of New Smyrna Beach and Volusia County of new constructed rental units set aside for low-income and very low-income elderly tenants, and (c) violate principles of fairness. Petitioner has invested over $498,000 to date in the development, and respectfully requests the relief sought herein in order to keep Development of this badly needed new construction of affordable housing for seniors moving forward.

14. Section 42(m) of the Internal Revenue Code requires each state allocating agency to adopt an allocation plan for the allocation and distribution of federal low income housing tax credits. The Corporation, as the allocating agency for the State of Florida, must distribute housing credits to applicants pursuant to its qualified allocation plan.

15. The Corporation's 2019 Qualified Allocation Plan (Section II.K) provides that Housing Credits may be returned **only** in the last calendar quarter of the year in which a development is required to be placed in service:

> ...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..."

QAP at Section II.K.

16. The applicable Rules for which waivers are requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),[1] the statute that created

[1] The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.55 of the Florida Statutes (the "Act").

the Housing Credits Program. *See* § 420.5099, Fla. Stat. (2019). 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"). §§ 420.5099(1) and (2), Fla. Stat. (2019). Accordingly, the Rules subject to Petitioner's waiver requests are implementing, among other sections of the Act, the statutory authorization for the Corporation's establishment of Allocation Procedures for the HC Program. §§ 420.5099(1) and (2), Fla. Stat. (2019).

17. The requested waivers will ensure the availability of Housing Credits which might otherwise be lost as a consequence of development delays described herein.

18. The facts set forth in Sections 9 through 13 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for Rule waiver.

19. As demonstrated above, the requested waiver serves the purposes of Section 420.5099 and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households by ensuring:

> The maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.

§ 420.5099(2), Fla. Stat. (2019).

20. Further, by granting the requested waiver, FHFC would recognize principles of fundamental fairness in the development of affordable rental housing. In addition, grant of the

requested waiver will permit the construction of much needed housing for low-income and very low-income elderly tenants. Finally, grant of the request to waiver will enable Petitioner to utilize (and not lose) its significant investment in due diligence expenses that cannot be recouped if the requested waiver is not granted.

21. The requested waiver will not adversely impact the Development or the Corporation.

22. The waiver being sought is permanent in nature.

Should the Corporation require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver.

WHEREFORE, Petitioner Westside Phase I, LLLP, respectfully requests that the Corporation:

A. Grant the Petition and all the relief requested therein;

B. Waive the Qualified Allocation Plan's prohibition from returning Housing Credit Allocations prior to the last quarter of 2022;

C. Allow the immediate return of Petitioner's 2020 Housing Credit Allocation;

D. Immediately allocate new Housing Credits to Petitioner with a later placed in service date, in an amount equal to the amount of its 2020 Housing Credit Allocation; and

E. Award such further relief as may be deemed appropriate.

GARY J. COHEN
Shutts & Bowen LLP
200 S. Biscayne Blvd., Suite 4100
Miami, Florida 33131
(305) 347-7308
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The Original Petition is being served by email and overnight delivery for filing with the Corporation Clerk of the Florida Housing Finance Corporation, 227 North Bronough Street, City Centre Building, Room 5000, Tallahassee, Florida 32399, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 22nd day of September, 2021.

GARY J. COHEN