STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING
FINANCE CORPORATION

WRDG T3A, LP, a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-046VW
Application No. 2018-283C/2019-424C

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.0072(17)(h) (5/24/2017)

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner WRDG T3A, LP, (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of the requirement in Rule 67-48.0072(17)(h), Florida Administrative Code ("F.A.C.") (the "Rule") that a general contractor may not subcontract to an entity that has common ownership or is an Affiliate of the General Contractor. Petitioner recently learned that two subcontractors are affiliated with the General Contractor ("GC"). The subcontracts comprise approximately 2.41% of the total actual costs of the GC's construction contract (1.61% of the total development cost). For the reasons set forth in paragraph 11 below, the GC is unaware of an unaffiliated subcontractor that could have provided the same services at a lower cost. 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:

WRDG T3A, LP, a Florida limited partnership
c/o Jerome Ryans
5301 W. Cypress St.
Tampa, FL 33607
Telephone: (813) 341-9101
Fax: (813) 367-0784
Email: JeromeR@thafl.com

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

Brian J. McDonough, Esq.
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Tallahassee, Florida 32301
Telephone: 850-329-4852
Fax: 850-329-4864
Email: BSmitha@stearnsweaver.com

B. THE DEVELOPMENT

3. The following information pertains to the development ("Development"):

- Development Name: Boulevard Tower I
- Address: 1345 W Main St, Tampa, FL 33607
- Developer: WRDG T3A Developer, LLC
- County of Development: Hillsborough
- Number of Units: 119
- Type: High Rise (new construction)
- Demographics: Family
- Set Asides: 10% of the units at or below 40% AMI, 70% at or below 60% AMI and 20% of the units at market-rate
- Funding Amounts: $2,110,000 9% housing credit (annual)

C. THE RULE FROM WHICH WAIVER IS REQUESTED

4. Petitioner requests a waiver of Rule 67-48.0072(17)(h), F.A.C. (5/24/2017), which provides:

> The General Contractor must meet the following conditions: . . . Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of the General Contractor or the Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-48.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor."

D. STATUTES IMPLEMENTED BY THE RULE

5. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statutes relating to the State Apartment Incentive Loan Program contained in Section 420.5087 of the Florida Statutes, the HOME Investment Partnership Program and HOME Investment Partnership Fund, contained in Section 420.5089 of the Florida Statutes, and the allocation of the Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes. *See* §§ 420.5087, 420.5089, and 420.5099, Fla. Stat. (the "Statutes").

E. JUSTIFICATION FOR GRANTING WAIVER

6. Petitioner timely submitted Application No. 2018-283C on December 22, 2017 in response to RFA 2017-113 for Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties (the "RFA").

7. The Development was invited to credit underwriting on August 2, 2018.

8. After completing construction of the 119 units, Petitioner learned that two subcontractors (FUSE Equipment, LLC and Fuse Builds, LLC) have common principals with the General Contractor and meet the definition of an "Affiliate" under Rule 67-48.002(5), F.A.C.

9. Accordingly, Petitioner is in need of a Rule waiver.

10. The affiliated subcontractors performed rough carpentry work equating to approximately 2.41% of the total actual costs of the GC's $25,178,297 construction contract (1.61% of the $37,613,535 total development cost). FUSE Equipment, LLC's work totaled $61,544 and FUSE Builds, LLC's totaled $545,685 (collectively "FUSE"). Specifically, FUSE performed rough carpentry work such as installing temporary doors, as well as temporary wooden handrails that were removed once the permanent aluminum balcony rails were installed. FUSE also installed the backing and blocking throughout the project, which is used within the walls for cabinetry, grab rails, closet shelving, IT equipment racks, and bathroom accessories (*e.g.*, toilet paper holders, towel bars, shelving, and mirrors).

11. When asked why the GC utilized affiliated subcontractors, the GC explained that, at that time, Tampa had a "very challenging labor market" in that many firms were unable to staff the requisite skillsets. FUSE provided the Development's requested local outreach, used to attract and hire local, skilled labor. As a Davis-Bacon Act project, the Development was subject to additional requirements (*see, e.g.*, 40 U.S.C. § 3142), and FUSE had the credentials necessary to hire, document, and pay in accordance with the Act. The GC is unaware of an unaffiliated subcontractor that could have provided the same services at a lower cost.[1]

12. 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 rules demonstrates that the

[1] The GC assured Petitioner that the bid was awarded to the lowest qualified bidder. However, due to the passage of time, the GC is unable to now locate those alternative bids.

application of the rules would: (1) create a substantial hardship or, violate principles of fairness,[2] 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.

13. In this instance, Petitioner meets the standards for a waiver of the Rules. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 119 affordable housing units will remain available for the target population in Hillsborough County, Florida. The strict application of the Rule will create substantial hardship for Petitioner because failure to satisfy the technical requirements of the Rule would result in rescission of allocation of housing credits awarded to the Development. If the requested waiver is denied, Petitioner would have to tear out the work completed by the affiliated subcontractor. Avoiding this unnecessary cost would ensure the costs for the Development are as low as possible. The waiver will therefore serve the purposes of the Statutes and the Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary low-cost housing in the State.

14. By granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing to persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable rental housing. *See* § 420.5099(2), Fla. Stat.

F. <u>WAIVER IS PERMANENT</u>

15. The waiver being sought is permanent in nature.

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[2] "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.

G. ACTION REQUESTED

16. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver of the Rule and allow the General Contractor to subcontract to two affiliates; (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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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 via CorporationClerk@floridahousing.org, with copies served U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 21st day of June, 2023.

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