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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

IN RE: SP GARDENS LLC **FHFC CASE NO.: 2021-04VW**

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PETITION FOR WAIVER OF RULES 67-48.023(5), 67-48.023(7), RFA 2015-107 EXHIBIT C PARAGRAPH 12(C) AND THE FINAL COST CERTIFICATION APPLICATION PACKAGE REQUIREMENT TO CONFIRM CERTAIN ITEMS WITH THE THREE LARGEST DOLLAR SUBCONTRACTORS

Petitioner, SP Gardens LLC ("SP Gardens"), a Florida limited liability company, pursuant to section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of (or variance from) Rules 67-48.023(5), 67-48.023(7), and RFA 2015-107 Exhibit C Paragraph 12(c), which in turn incorporate by reference the Final Cost Certification Application Package ("Form FCCAP"). Specifically, SP Gardens seeks a waiver of (or variance from) the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification confirm certain items with the general contractor's three largest dollar subcontractors. The second largest subcontractor, Silva Group Construction, Inc., has been unwilling to comply with certain requests for information from the certified public accountant. SP Gardens asks for a waiver from this requirement so that the certified public accountant may instead confirm items with the fourth largest dollar subcontractor. In support of this request, SP Gardens states:

The Petitioner

1. The name of the petitioner is SP Gardens LLC. For purposes of this petition, SP Gardens' address, telephone number, fax number, and email address are that of SP Gardens' undersigned counsel.

The Development

2. The requested background information concerning SP Gardens' application is as follows:

Application Number:	2016-137C / 2017-293C
RFA Number:	2015-107
Development name:	Laburnum Gardens
Applicant/Borrower:	SP Gardens LLC
Developer/Principal:	Southport Development, Inc., a WA corporation doing business in FL as Southport Development Services, Inc./ J. David Page
Number of Units:	81
County of Development:	Hillsborough
Development/Type:	Garden Apartments
Set Asides:	90% at 60% AMI, 10% at 40% AMI
Demographic:	Elderly Non-ALF
Funding:	• Annual Tax Credits: 1,420,000

3. The Laburnum Gardens Apartments development in Hillsborough County consists of 81 total units and was developed and continues to operate as an affordable housing community. The development serves low-income individuals and families.

4. In 2016, SP Gardens' application for the Laburnum Gardens Apartments development was selected under RFA 2015-107 for Housing Credit Financing for Affordable Housing Developments Located in Broward, Duval, Hillsborough, Orange, Palm Beach, and Pinellas Counties.

The Rule For Which the Waiver Is Sought

5. SP Gardens requests a waiver of (or variance from) Rules 67-48.023(5), 67-48.023(7), and RFA 2015-107 Exhibit C Paragraph 12(c). Specifically, SP Gardens requests a waiver of (or variance from) the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification request confirmation of certain cost-related items by the general contractor's three largest dollar subcontractors.

6. As a condition for receiving housing credits, each applicant must use the Form FCCAP to itemize all expenses incurred in association with construction or rehabilitation of a housing credit development, including expenses associated with the general contractor's use of subcontractors. *See* Fla. Admin. Code R. 67-48.023(5), 67-48.023(7), and RFA 2015-107 Ex. C ¶ 12(c). As part of the Form FCCAP, each applicant must submit, among other things, a General Contractor Cost Certification and an unqualified audit report prepared by an independent certified public accountant for the General Contractor Cost Certification. *See* Form FCCAP, pg. 1. The General Contractor Cost Certification is used to establish the actual total costs incurred by the general contractor in the delivery of the development and assists Florida Housing in determining certain development costs and the amount of subsidy to be allocated to the development. Form FCCAP, General Contractor Cost Certification Form and Instructions ("GCCC"), p. 1. Florida Housing will not issue a final housing credit allocation until all items required by a competitive solicitation are received and processed. Fla. Admin. Code R. 67-48.023(7). The underlying RFA required submission of the Form FCCAP. *See* RFA 2015-107 Ex. C ¶ 12(c).

7. To assist the certified public accountant in completing an audit of the General Contractor Cost Certification, each applicant's general contractor must provide a list of all

subcontractors to be used on the job, with amounts paid or to be paid. GCCC, p. 2. The certified public accountant must ask the three largest dollar subcontractors to confirm the following:

1) Confirm the construction contract amount;

2) Confirm any change orders;

3) Confirm what additional costs were incurred outside of the contract, if any;

4) Confirm the type of services provided (trade breakdown);

5) Confirm amounts paid to date and balance(s), if any, to be paid;

Id., pp. 2-3. In addition, the certified public accountant must randomly select other subcontractors sufficient in number (but in no event less than five) that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total construction cost, and review certain documentation to verify the amounts paid to each subcontractor. *Id.*, p. 3.

8. SP Gardens requests a waiver of or variance from the requirement in the Form FCCAP that the certified public accountant send the required confirmation requests to the three largest dollar subcontractors. One of the three largest dollar subcontractors proposed to be used for the Laburnum Gardens Apartments development, Silva Group Construction, Inc., is unwilling to comply with these request(s). Thus, the certified public accountant cannot receive the required confirmation requests for this entity and seeks to send these confirmation requests instead to the fourth largest dollar subcontractor.

Statutes Implemented By The Rule

9. Rules 67-48.023(5) and 67-48.023(7) implement the statutes governing the allocation of low-income housing tax credits. *See* § 420.5099, Fla. Stat. Florida Housing is designated as the State of Florida's housing credit agency, and as the State's designated agent, Florida Housing is responsible for and is authorized to establish procedures for the allocation and

distribution of low-income housing tax credits and to request certain information as a condition of receiving such credits. § 420.5099(1), (2), (3), Fla. Stat.

Justification For The Requested Waiver

10. SP Gardens requests a waiver of (or variance from) the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification send confirmation requests on certain cost-related items to the three largest dollar subcontractors used by the general contractor on the project.

11. As required by the Form FCCAP, SP Gardens' general contractor submitted a list of all subcontractors used on the job, with amounts paid or to be paid. The three largest dollar subcontractors (with the associated amounts paid or to be paid) are Nice Services, Inc. ($1,366,313), Silva Group Construction, Inc. ($780,892), and Pave-it Construction Services LLC ($678,505). Thus, under the rule, the certified public accountant was required to send confirmation requests to Nice Services, Inc., Silva Group Construction, Inc., and Pave-it Construction Services LLC.

12. The certified public accountant performing the audit of SP Gardens' General Contractor Cost Certification was able to confirm those items outlined in the Form FCCAP with two of the three largest dollar subcontractors, Nice Services, Inc. and Pave-it Construction Services LLC. However, when the certified public accountant attempted to obtain the required confirmation requests from the second subcontractor, Silva Group Construction, Inc., refused to comply with the request. Silva Group Construction, Inc. is currently in active litigation with the general contractor regarding the final subcontract amount and payment. Legal counsel for both parties have advised that there should be no communication, and, as such, Silva Groups Construction, Inc. has been unwilling to communicate with the certified public accountant. Consequently, the

certified public accountant cannot perform the required confirmation procedure with Silva Group Construction, Inc.

13. The certified public accountant did, however, include Silva Group Construction, Inc. in her review of subcontractors under the Form FCCAP's requirement to select other subcontractors that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total contract construction cost, and verify the amounts paid to each subcontractor by reviewing check copies, contract documents, change orders, and other supporting information to verify amounts included within the cost certification for each subcontractor listed. Consequently, despite the fact that Silva Group Construction, Inc. has been unresponsive to the confirmation requests, the certified public accountant did verify the amounts paid to this subcontractor in support of the project.

14. SP Gardens asks that Florida Housing grant a variance and allow the certified public accountant to submit the required confirmation requests to the fourth largest dollar subcontractor instead of Silva Group Construction, Inc. The fourth largest dollar subcontractor is ACE Electrical Service of N. Florida ($644,306). There is a relatively modest difference in costs for the two subcontractors, around $136,000. With the substitution of ACE Electrical Service of N. Florida for Silva Group Construction, Inc., the certified public accountant will still confirm the various cost-related items outlined in the Form FCCAP with subcontractors representing a similar percentage of the total construction cost (33.1 percent as compared to 33.5 percent of the total construction cost when including Silva Group Construction, Inc.). In addition, in accordance with the Form FCCAP's requirement to verify the amounts paid to the subcontractors accounting for at least 40 percent of the total construction cost, the certified public accountant has still been able to

verify a substantial portion (approximately 51 percent) of the costs for subcontractors for the project, including amounts paid to Silva Group Construction, Inc..

15. Without the grant of a waiver (or variance), the certified public accountant will not be able to complete the required audit and SP Gardens will not be able to submit a complete Form FCCAP, jeopardizing its housing credit allocation and its ability to offer the housing as affordable housing (i.e., at substantially less than AMI).

16. Under section 120.542(1), Florida Statutes, and Chapter 28-104, Florida Administrative Code, Florida Housing has the authority to grant waivers to or variances from its rule requirements when strict application would lead to unreasonable, unfair, and unintended consequences in particular instances. A waiver or variance shall be granted when the person who is subject to the rule demonstrates that application of the rule would: (1) 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), Fla. Stat.

17. Here, SP Gardens meets the requirements for a waiver (or variance). The requested waiver (or variance) will not adversely impact the development or Florida Housing and will ensure that 81 affordable family housing units will be preserved and made available for the target population in Hillsborough County. The strict application of the rule and Form FCCAP will create substantial hardship for SP Gardens because completion of the Form FCCAP is a condition for receiving a final housing credit allocation.

18. The waiver (or variance) will still serve the underlying purposes of the rule. Even with substituting the fourth largest dollar subcontractor for Silva Group Construction, Inc., in her review, the certified public accountant will be able to confirm the required cost-related items under the Form FCCAP with subcontractors whose costs represent a similar percentage of the total

construction cost. The requested waiver (or variance) will also not hinder the certified public accountant in verifying the costs of subcontractors representing more than 50 percent of the total construction cost.

19. Further, the waiver (or variance) will serve the purposes of the statute and the Florida Housing Finance Corporation Act because one of the Act's primary purposes is to facilitate the availability of decent, safe, and sanitary housing in this state. *See* § 420.5099(2), Fla. Stat. Denial of the waiver would deprive Hillsborough County of essential and affordable housing units.

20. Florida Housing previously has approved a similar request for waiver. *In re: SP Park LLC*, FHFC Case No. 2019-057VW (Aug. 2, 2019). *See also In re: Houston Street Manor Limited Partnership,* FHFC Case No 2020-001VW (Mar. 6, 2020).

Petitioner Requests A Permanent Waiver

21. SP Gardens requests a permanent waiver (or variance).

Action Requested

WHEREFORE, SP Gardens respectfully requests that Florida Housing:

A. Grant this petition and all of the relief requested herein;

B. Grant a waiver of (or variance from) Rules 67-48.023(5) and 67-48.023(7), Florida Administrative Code, Request for Application Exhibit C Paragraph 12(c), and the requirement of the Final Cost Certification Application Package, which requires that the certified public accountant performing the audit of the General Contractor's Cost Certification send confirmation requests to the general contractor's three largest dollar subcontractors, and authorize sending those confirmation requests to the general contractor's first, third, and fourth largest dollar subcontractors instead; and

C. Grant such further relief as it may deem appropriate.

Respectfully submitted on January 28, 2021.

/s/Lawrence E. Sellers
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Attorney for Petitioner SP Gardens LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing petition for waiver was filed by email with Florida Housing Finance Corporation, Corporation Clerk, CorporationClerk@floridahousing.org; that a true and correct copy was provided by email to Hugh Brown, hugh.brown@floridahousing.org, General Counsel, Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, and that a true and correct copy was provided to the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, all on January 28, 2021.

/s/ Lawrence E. Sellers
Lawrence E. Sellers