STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In re: Ambar Key Homes, Ltd.

FHFC CASE NO. 2019-004VW
Application No. 2016-167BS

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PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE RULES 67-21.027(1), 67-21.003(1)(b) AND 67-48.023(2), F.A.C. (2016)

Petitioner, Ambar Key Homes, Ltd. ("Petitioner"), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation ("Florida Housing") for a variance from the provisions of Rules 67-21.027(1), 67-21.003(1)(b) and 67-48.023(2), F.A.C. (2016) to allow it to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C). In support, Petitioner states as follows:

I. Petitioner and the Development

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

   Jason Floyd
   3030 Hartley Road
   Suite 310
   Jacksonville, FL 32257
   Telephone: 904-288-7822
   Fax: 904-260-9031
   E-mail: jfloyd@vestcor.com

2. The name, address, telephone and facsimile numbers of Petitioner's counsel are:

   Brian J. McDonough, Esq.
   Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
   150 West Flagler Street
   Suite 2200
   Miami, Florida 33130

Telephone: 305-789-3350
Fax: 305-789-3395
Email: Bmcdonough@stearnsweaver.com

On or about January 6, 2017, Petitioner submitted Application No. 2017-167BS in response to RFA 2016-112 (SAIL Financing for the Construction of Workforce Housing in Miami-Dade County and Monroe County) seeking a Multifamily Mortgage Revenue Bonds first mortgage construction/permanent loan in the amount of $16.5 million, a State Apartment Incentive Loan in the amount of $8.5 million, and a 4% Non-Competitive Housing Credit allocation in the annual amount of $287,322 for development of Ambar Key Homes (the "Development"). Although the Development category is listed as "New Construction," the development consists of 77 rehabilitation units located in 13 residential buildings as well as 78 new construction units to be located in 15 residential buildings in Miami-Dade County.

II. Type of Waiver

The waiver being sought is permanent in nature.

III. Rules For Which a Variance Is Requested

Petitioner seeks a variance in relation to Rules 67-21.027(1), 67-21.003(1)(b) and 67-48.023(2), F.A.C. (2016), which provide:

- "Each Housing Credit Development shall comply with the minimum Housing Credit Set-Aside provisions, as specified in Section 42(g)(1) of the IRC, with respect to the reservation of 20 percent of the units for occupancy by persons or families whose income does not exceed 50 percent of the area median income, or the reservation of 40 percent of the units for occupancy by persons or families whose income does not exceed 60 percent of the area median income. Further, each Housing Credit Development shall comply with any additional Housing Credit Set-Aside chosen by the Applicant in the Application." *See* Rule 67-21.027(1), F.A.C. (2016).

- "Applicants shall apply for MMRB, Non-Competitive HC, or a combination of MMRB and Non-Competitive HC as set forth below. For purposes of this subsection only, the term NC Award shall refer to MMRB, Non-Competitive HC, or a combination of MMRB and Non-Competitive HC, and funding from the following Corporation programs will not be considered to be other Corporation funding: Predevelopment Loan Program (PLP) and

Elderly Housing Community Loan (EHCL) Program. . . . (b) If the NC Award will not be in conjunction with other Corporation funding made available through the competitive solicitation funding process outlined in Rule Chapter 67-60, F.A.C., the Applicant shall utilize the Non-Competitive Application Package in effect at the time the Applicant submits the Application. The Non-Competitive Application Package or NCA (Rev. 08-2016) is adopted and incorporated herein by reference and consists of the forms and instructions available, without charge, on the Corporation's website under the Multifamily Programs link labeled Non-Competitive Programs or from http://www.flrules.org/Gateway/reference.asp?No=Ref-07356, which shall be completed and submitted to the Corporation in accordance with this rule chapter." *See* Rule 67-21.003(1)(b), F.A.C. (2016).

- "Each Housing Credit Development shall comply with the minimum Housing Credit Set-Aside provisions, as specified in Section 42(g)(1) of the IRC, with respect to the reservation of 20 percent of the units for occupancy by persons or families whose income does not exceed 50 percent of the area median income, or the reservation of 40 percent of the units for occupancy by persons or families whose income does not exceed 60 percent of the area median income. Further, each Housing Credit Development shall comply with any additional Housing Credit Set-Aside committed to by the Applicant in the Application." *See* Rule 67-48.023(2), F.A.C. (2016).

Prior to March 23, 2018, the Section of the IRC referenced above did not allow income averaging, and therefore Rules 67-21.027(1), 67-21.003(1)(b) and 67-48.023(2), F.A.C. (2016) also did not allow income averaging.

IV. Statutes Implemented by the Rules

The Rules implement, among other sections of the Florida Housing Finance Corporation Act, the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes.

V. Justification for Granting Waiver of the Rules

During its 2018 session, the United States Congress passed the "Consolidated Appropriations Act, 2018" ("H.R. 1625"), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

"(C) AVERAGE INCOME TEST. –

(i) IN GENERAL. – The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

(ii) SPECIAL RULES RELATING TO INCOME LIMITATION. -
For Purposes of clause (i)

(I) DESIGNATION. - The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

(II) AVERAGE TEST.- The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

(III) 10-PERCENT INCREMENTS. - The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income." Section 42(g)(1)(C), I.R.C. (2018)

Rules 67-21.027(1) and 67-48.0023(2) F.A.C. were revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. As a result, any applications for housing tax credits submitted to Florida Housing after July 8, 2018 are allowed to use the income averaging provisions of the IRC.

Petitioner's application was submitted prior to the July 8, 2018 rule revisions and was therefore not allowed to take advantage of the average income test. It would violate principles of fairness and put Petitioner at a competitive disadvantage with other developments if it was not allowed to use the average income test solely because of its application submission date.

Under Section 120.542(1), Florida Statutes, 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 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.

Granting the requested variance in this instance would allow Petitioner to utilize the average income test as permitted pursuant to the Internal Revenue Code. The controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results.

Additionally, by granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing. The purpose of the underlying statute, which is to "encourage development of low-income housing in the state" as identified in §420.5099(2), Fla. Stat., would still be achieved if the variance is granted.

In this instance, Florida Housing has jurisdiction to grant a waiver of the Rules and Petitioner meets the standards for a waiver of the Rules.

VI. Action Requested

WHEREFORE, Petitioner respectfully requests that Florida Housing:

a. Grant this Petition and all relief request therein;

b. Grant a variance from Rules 67-21.027(1), 67-21.003(1)(b) and 67-48.023(2), F.A.C. (2016) and allow for calculation of the minimum set aside percentage based on income averaging; and

c. Grant such further relief as may be deemed appropriate

Respectfully submitted this 29th day of January, 2019.

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
Counsel for Petitioner
150 West Flagler Street, Suite 150
Miami, Florida 33131
Tel: (305) 789-3350
Fax: (305) 789-3395
E-mail: bmcdonough@swmwas.com

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

CERTIFICATE OF SERVICE

The Petition is being served by electronic mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, with copies served via hand-delivery on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 29th day of January, 2019, and electronic delivery to: CorporationClerk@floridahousing.org and Joint.admin.procedures@leg.state.fl.us

s/ Brian J. McDonough
BRIAN J. MCDONOUGH, ESQ.