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FLORIDA HOUSING FINANCE CORPORATION

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CASE NO. 2019-101VW

HTG RAINBOW HOUSING, Ltd.

Petitioner,

vs.

FHFC Application No. 2018-320C
REQUEST FOR APPLICATIONS:2018-102

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

**PETITION FOR WAIVER OF THE QUALIFIED ALLOCATION PLAN'S
REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS
AND
RULE 67-48.002(95), FLORIDA ADMINISTRATIVE CODE (2017)**

Pursuant to section 120.542, Florida Statutes, and rule 28-104.002, Florida Administrative Code, Petitioner, HTG Rainbow Housing, Ltd. ("HTG Rainbow" or "Petitioner") submits this Petition to Respondent Florida Housing Finance Corporation ("Florida Housing") for a waiver of Subsection II. K of the 2016 Qualified Allocation Plan ("2016 QAP"), which was incorporated by reference in rule 67-48.002 (95) (2017). Subsection II.K of the QAP prohibits the return of HTG Rainbows' 2018 Housing Credits before the last quarter of 2020. HTG Rainbow seeks to return the 2018 credits now in exchange for an immediate allocation of 2020 Housing Credits. This would result in an extension to the placed-in-service date from December 31, 2020 to December 31, 2021. In support of this Petition, HTG Rainbow states as follows:

PETITIONER AND ATTORNEY

1. The name, address, telephone number and email address for Petitioner is HTG Rainbow Housing, Ltd., 3225 Aviation Avenue, 6th floor Coconut Grove, 33133, (305) 860-8188, mattr@htgf.com. For purposes of this proceeding, the contact information for Petitioner is that of the undersigned counsel.

2. The name, address, telephone number, and email address for Petitioner's attorney is Maureen McCarthy Daughton, Maureen McCarthy Daughton, LLC, 1725 Capital Circle NE, Ste 304, Tallahassee, Florida 32308; 850-345-8251; mdaughton@mmd-lawfirm.com.

BACKGROUND

3. HTG Rainbow submitted an application in response to, *RFA 2018-102 Housing Credit Financing to Provide Affordable Multifamily Rental Housing That is Part of Local Revitalization Initiatives* (the "RFA") HTG Rainbow proposes to build 60 Garden Apartment units in Miami-Dade County to serve the Elderly Non-ALF demographic.

4. On June 15, 2018, HTG Rainbow was preliminarily selected for funding by Florida Housing's Board of Directors. Litigation was commenced by other applicants and was not resolved until September 14th. HTG Rainbow was invited into credit underwriting on September 19, 2018.

5. If an Applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, the applicant must enter into a "Carryover Allocation Agreement" ("Carryover Agreement") with Florida Housing by December 31 of the year in which the preliminary allocation is issued.¹ HTG Rainbow and Florida Housing entered into the carryover allocation agreement on December 17, 2018. The

¹ Rule 67-48.028(1), F.A.C.

Carryover Agreement allows (pursuant to Section 42 of the Internal Revenue Code) the applicant until the end of the second year in which the carryover allocation is issued to place the development in service. HTG Rainbow's Carryover Agreement required that the Development be placed in service by December 31, 2020.

6. Due to delays beyond the control of HTG Rainbow, described herein, the December 31, 2020, placed-in-service deadline cannot be met. During the design and planning process, HTG Rainbow became aware of some title and site-related matters which required the involvement of Miami-Dade County, FPL and the U.S. Department of Housing and Urban Development. Miami-Dade County was involved in the release of a declaration of restrictive covenants that involved a dissolved homeowners association and Miami-Dade water and sewer department, which took over one year to get released from title. Additionally, FPL has multiple recorded easements on the property which required numerous meetings and site visits to obtain partial releases for the building to be developed. HUD had multiple declaration of trusts on the property that needed to be revised and updated through coordination with PHCD and took over six months to resolve. The coordination required for these parties caused unexpected delays in design and planning. Currently the City of Miami is on their fourth review of permitting documents due to changes caused from coordination between all stakeholders.² Additional delays were caused by the fact that Site Control is evidenced by a ground lease with the County which required their participation and approval for any modifications, including removal of a declaration of trust from the site. Currently, HTG Rainbow is negotiating a new ground lease to extend the time for closing.

² The City is also using a new online system for variance review which is causing significant delays.

7. As a result, on May 14, 2019, HTG Rainbow requested an extension to the site control, 10% test, notice of commencement, credit underwriting report and tax credit partnership agreement. In addition, HTG Rainbow requested an applicant entity change from HTG Rainbow, LLC to HTG Rainbow Housing, Ltd.³. On May 21, 2019, the Corporation approved extensions to the site control and 10% test deadline to December 17, 2019. The Corporation also approved extensions to the deadline for the notice of commencement, credit underwriting report and tax credit partnership agreement to December 31, 2019, while the placed-in-service deadline remained December 31, 2020. The change in entity structure was approved by the Florida Housing Board on June 21, 2019.

8. Since submitting the initial application, the construction costs for the Development have increased by approximately 7 million dollars. The only funding source provided by Miami-Dade County in 2018 to offset the increase was through the HOME Investment Partnerships Program. Miami-Dade County issued a HOME RFA on October 1, 2018 with a deadline of November 16, 2018. The award results were announced on March 1, 2019. HTG Rainbow applied for and was awarded funding however, the process took longer than usual because of the high number of applicants and the fact that the County reallocated funds from other projects that had not met their commitments in order to fund as many applicants as possible. The initial award of funds to HTG Rainbow was approved through a Resolution approved by the Miami-Dade County Board of County Commissioners on July 23, 2019. The Conditional Loan Commitment was issued on September 4, 2019. The typical time frame to award projects an allocation is 6 to 9 months, this allocation took almost a full year.

³ The change was for the Applicant entity to become a limited partnership as opposed to a limited liability company.

9. The delay in the County's award of funding to HTG Rainbow delayed the commencement of the County's HUD-compliant environmental review ("ER") process. Since HOME funds are federally sourced, Miami-Dade County's Department of Public Housing & Community Development is performing a HUD-Compliant ER of the Development. This cannot be completed until the Miami-Dade County Department of Environmental Resource Management ("DERM") issues its approval of certain site environmental remediation measures for the Development. This is currently in process and HTG Rainbow anticipates the Development will have the ER clearance by January 2020.

10. Construction cannot commence until the Development obtains ER clearance and achieves finalization of a new ground lease. Given the current circumstances as described above, the Development will not meet their placed in-service date.

11. The above described delays have resulted in a significant hardship in that HTG Rainbow was not able to obtain its fully permitted construction documents in a timely manner to meet the existing placed in-service deadline.

12. HTG Rainbow proposes to exchange its 2018 Housing Credits for an allocation of 2020 Housing Credits now rather than wait until the last quarter of 2020, which would effectively extend the placed-in-service deadline of the Development until December 31, 2021.

This exchange will require a waiver of Subsection II.K of the QAP, which provides:

Notwithstanding any other provision of this QAP, where a Development has not been placed in service by the date required or it is apparent that a Development will not be placed in service by the date required, and such failure is due to circumstances beyond the Applicants 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**, the Corporation may reserve allocation in an amount not to exceed the amount of Housing Credits to the Applicant for the year after the year in which the Development was otherwise required to be placed in service, provided the following conditions have been met: (1) the sponsor must have provided written notice to the Corporation, describing

the circumstances, all remedial measures attempted by the Applicant to mitigate the delay, and any other pertinent information, prior to returning the allocation; and (ii) the Executive Director must find and determine that the delay was caused by circumstances beyond the Applicant's control, that the sponsor exercised due diligence in seeking to resolve the circumstances causing the delay, that the Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally, allocated, and that the Development is still desirable in terms of meeting affordable housing needs.

(Emphasis Supplied)

13. The requested waiver is permanent in nature.

RULE FOR WHICH WAIVER IS SOUGHT

14. HTG Rainbow seeks a waiver from Subsection II.K of the 2016 QAP, which was incorporated by reference into Rule 67-48.0002(95) (2017). The current version of the rule incorporating a later QAP, is numbered as 67-48.002 (96).

STATUTES IMPLEMENTED BY RULE

15. Pursuant to section 420.5099(1), Florida Statutes, Florida Housing is designated as the "housing credit agency" for Florida within the meaning of section 42 of the Internal Revenue Code. Florida Housing is responsible for the allocation plan that includes priorities and selection criteria. Section 420.5099(2) also requires Florida Housing to "adopt allocation procedures that will ensure the maximum use of available tax credits in order to encourage development of lo the a of the applicant to proceed to competition of the project in the calendar year for which the credit is sought." Thus, the rules subject to this waiver request implement sections 420.5099(1) and (2), Florida Statutes, as well as other provisions of Part V of chapter 420, Florida Statutes, the Florida Housing Finance Corporation Act.

JUSTIFICATION FOR REQUESTED WAIVER

16. Section 120.542(1), Florida Statutes, provides that [s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular

instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.” That procedure requires those seeking a variance of, or waiver from, a rule to demonstrate that application of the rule would create a substantial hardship or would violate principles of fairness.⁴ §120.542(2), Fla. Stat. Petitions for variances and waivers are also required to demonstrate the purposes of the underlying statute will be achieved.

17. Strict adherence to Subsection II.K. of the QAP would create a substantial hardship for HTG Rainbow. Without the requested credit swap, the previously awarded Housing Credits will be unavailable, which means the Development cannot be completed. That would deprive low-income residents of Miami-Dade County of much needed affordable housing. As illustrated above, issues relating to the development of the site of the proposed Development were beyond the Applicant’s control.

18. Strict adherence to Subsection 11.K. of the QAP also would violate principles of fairness, as Florida Housing has granted similar waivers to other Developments facing similar circumstances (West River-granted credit swap in November 2019; Cathedral Townhouse, LLC-granted credit swap in October 2019; Lofts at Lemon-granted credit swap in October 2019; Residences at Dr. King Boulevard, Ltd.-granted credit swap in December 2019)⁵

⁴ “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 rule.

⁵ The reasons that precipitated the credit swaps include but are not limited to, need for off-site improvements which required negotiation with neighboring property owners; revision to construction plans due to increased construction costs which required securing of additional funds; replacement of key development team members; delay in obtaining HUD approvals; title issues which only became known after the design process.

19. The requested waiver will not adversely affect any party, including any other party that applied to receive an allocation of Housing Credits in RFA 2017-113, or Florida Housing. A denial of the requested waiver, however, would result in substantial economic hardship to HTG Rainbow as it will be unable to complete the Development, which will only contribute further to the shortage of affordable housing in Miami-Dade County. Additionally, denial of the waiver request would violate principles of fairness, as other similarly situated Developments have been granted waivers to Subsection IIK of the QAP and the rule that incorporates it by reference.

20. The statutes underlying the QAP and the rule will be served by the approval of HTG Rainbows' waiver request. Section 420.504(4), Florida Statutes, states that Florida faces "a serious shortage of decent, safe, and sanitary housing in the state available to persons and families of low, moderate, and middle income..." One of the primary purposes of the Act is to facilitate the availability of affordable housing. Granting the waiver request will further these goals, as HTG Rainbow, will not be able to build the proposed development if the waiver is not granted.

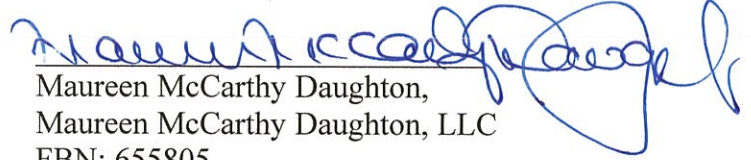
ACTION REQUESTED

21. For the above stated reasons, HTG Rainbow, respectfully requests that the Florida Housing Board of Directors:

- Grant the requested waiver of Subsection II.K of the 2016 QAP and rule 67-48.002(95);
- Allow the immediate return of HTG Rainbow's 2018 Housing Credit Allocation; and
- Immediately allocate new Housing Credits to HTG Rainbow with a later placed in service date of December 31, 2021.

Dated this 20th day of December 2019.

Respectfully submitted,



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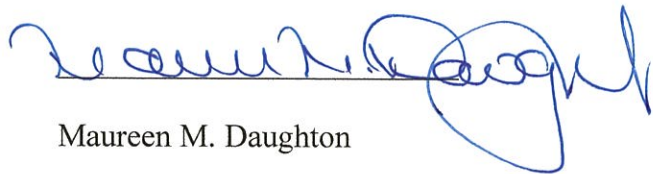
CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document was filed this 20th day of December 2019,

by electronic delivery to:

Florida Housing Finance Corporation
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
Corporationclerk@floridahousing.org

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Joint.admin.procedures@leg.state.fl.us



Maureen M. Daughton