

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2019-026VW

LAKE BEULAH, LTD.

Petitioner,

vs.

FHFC APPLICATION: 2016-369BS
REQUEST FOR APPLICATIONS: 2016-109

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

PETITION FOR WAIVER OF RULE 67-48.0072(4)(c), (26), F.A.C., (2016)

Pursuant to Section 120.542, Florida Statutes (“Fla. Stat.”), and Rule 28-104.002, Florida Administrative Code (“F.A.C.”), Petitioner Lake Beulah, Ltd., a Florida limited partnership, submits its Petition to Respondent Florida Housing Finance Corporation (“Florida Housing”) for a waiver of Rule 67-48.0072(4)(c), (26), F.A.C., effective September 15, 2016 (the “Rule”) and an extension of the loan closing deadline through and including November 30, 2019. In support thereof, Petitioner states:

A. THE PETITIONER

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

Matthew Rieger
Lake Beulah, LTD
3225 Aviation Ave.
Suite 602
Coconut Grove, FL 33133
Tel: 305-537-4704
Fax: N/A
E-mail: MattR@htgf.com

2. The name, address, telephone and facsimile numbers, and email address for Petitioner's attorney are:

Brian J. McDonough
Stearns Weaver Miller Weissler Alhadeff & Sitterson
150 West Flagler Street
Suite 2200
Miami, FL 33130
bmcdonough@stearnsweaver.com
Tel: (305) 789-3350
Fax: (305) 789-3395

B. THE DEVELOPMENT AND ITS FINANCING

3. Florida Housing issued RFA 2016-109 ("SAIL Financing of Affordable Multifamily Housing Developments to be used in conjunction with Tax-Exempt Bonds and Non-Competitive Housing Credits") on September 19, 2016.

4. Petitioner timely submitted its Application in response to the RFA for the development named "Lake Beulah View," which later received an approval to change the development name to "Twin Lakes Estates – Phase II" (the "Development"). *See* Application No. 2016-369BS. The Development will provide Polk County with 132 new construction family garden apartments with set asides of: 100% at 60% AMI (MMRB, and HC), 10% at 40% AMI (SAIL and ELI), and 90% at 60% AMI (SAIL). Petitioner requested: \$11,100,000 MMRB, \$6,000,000 SAIL, \$600,000 ELI, and \$875,090 4% HC. The developers are HTG Lake Beulah Developer, LLC and Polk County Housing Developers, Inc. and the developer principal is Matthew Rieger.

5. Petitioner received an Invitation to Enter Underwriting dated March 31, 2017 and accepted the invitation on April 5, 2017.

6. The Petitioner – a joint venture with a public housing authority – previously requested of the Florida Housing Board, by letter dated November 14, 2017, to extend the 9-month period to secure a firm commitment for the SAIL and ELI Loan.

7. On December 8, 2017, the Florida Housing Board approved the Firm Loan Commitment Issuance Extension for six months, extending the deadline from January 5, 2018 to July 5, 2018 and Petitioner paid the \$66,000 extension fee required by the Rule.

8. The extension was requested due to delays in achieving commitments for equity and final construction documents, as well as potential additional gap sources to be allocated. More specifically, the extension was necessitated by a substantial reduction on Low-Income Housing Tax Credit (“LIHTC”) pricing experienced after the RFA deadline (October 2016), which essentially stalled the LIHTC market for several months, and – in turn – delayed the feasibility of the assumptions taken at the time of closing, necessitating a conceptual redesign of the development proposal. The foregoing factors delayed commitment for the equity and final construction documents necessary for issuance of the credit underwriting report. During the extension period, Petitioner applied for other gap sources of funding to complement the reduction on tax credit pricing.

9. Petitioner obtained a 75-day extension of the credit underwriting period through and including September 18, 2018, in order for: (1) the developer to update the rents and change the unit mix in the third party due diligence reports ordered by the underwriter (AmeriNat); and (2) to give the underwriter sufficient time to finalize the Credit Underwriting Report based on those updated reports.

10. The Board approved the credit underwriting report on July 27, 2018 and directed staff to proceed with loan closing activities. The CUR underwrote the Development with the 2018 Rent Limits for Polk County.

11. Petitioner, upon payment of the required non-refundable extension fee of one percent of the loan amount, also obtained an extension of the loan closing deadline from January 8, 2019 to April 29, 2019 to allow additional time to obtain HUD's Mixed Finance approval. Petitioner cannot close and begin construction without HUD's approval. This approval is beyond Petitioner's control and, to date, has not been received.

12. HUD was closed during the Federal government shutdown, which occurred from December 22, 2018 until January 25, 2019.

13. On April 3, 2019, HUD approved the Demolition and Disposition of the existing public housing structures. HUD's Mixed Finance approval is still pending.

14. The Development's Construction Contract ("GC Contract") was originally executed on March 23, 2018. Because of the delay in obtaining HUD's approvals, the GMP price on the GC Contract can no longer be maintained. Petitioner was therefore forced to re-bid the Development to the original general contractor and another contractor. Both bids were significantly higher, with more than a 15% increase over the underwritten Construction Cost of the original GC Contract. Petitioner is still working with other contractors and estimates that, after value-engineering, the increase will be reduced to 10%.

15. To address this increase in cost, Petitioner must: underwrite the increased rents; update the appraisal and the Plan & Cost Review report; obtain a new Credit Underwriting

Report reflecting these changes; obtain FHFC Approval of the new CUR report; and obtain a new SBA approval of the bond amounts.¹

16. Accordingly, on April 5, 2019, Petitioner requested approval to obtain a new or updated Appraisal and Plan & Cost Review for the Development.

17. Despite proceeding as expeditiously as possible, Petitioner must also obtain a waiver to extend the closing date.

18. The requested waiver is permanent in nature.

19. If the waiver is not granted, the lack of an extension will prevent Petitioner from being able to close on the loan, preventing Petitioner from being able to complete the Development (and causing Petitioner to lose all of the funds it has invested in the Development to date).

C. RULE FROM WHICH WAIVER IS SOUGHT

20. Petitioner requests a waiver from the Rule, which provides:

(4) If the invitation to enter credit underwriting is accepted: . . .

(c) **For SAIL, EHCL, and HOME that is not in conjunction with Competitive HC**, the credit underwriting process must be completed within the time frame outlined in subsection 67-48.0072(21), F.A.C., below and the loan must close within the time frame outlined in subsection 67-48.0072(26), F.A.C., below. . . .

(26) For SAIL, EHCL, and HOME, that is **not in conjunction with Competitive HC**, these Corporation loans and other mortgage loans related to the Development must close within 120 Calendar Days of the date of the firm loan commitment(s), unless the Development is a **Tax-Exempt Bond-Financed Development** which then the **closing must occur within 180 Calendar Days of the firm loan commitment(s)**. Unless an extension is approved by the Board, failure to close the loan(s) by the specified deadline outlined above shall result in the firm loan commitment(s) being deemed void and the funds shall be de-obligated.

¹ The amount of the Construction and Permanent Bond Loan amounts must increase, as well as the amount of 4% Tax Credits, to overcome the financing shortfalls.

Applicants may request one (1) extension of the loan closing deadline outlined above for a term of up to 90 Calendar Days. . . . The Corporation shall charge an extension fee of one (1) percent of each Corporation loan amount if the Board approves the request to extend the loan closing deadline beyond the applicable 120 Calendar Day or 180 Calendar Day period outlined above. **In the event the Corporation loan(s) does not close by the end of the extension period, the firm loan commitment(s) shall be deemed void and the funds shall be de-obligated.**

See Rule 67-48.0072, F.A.C., effective September 15, 2016 (emphasis added).

D. STATUTES IMPLEMENTED BY THE RULE

21. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, Sections 420.5087 (State Apartment Incentive Loan Program), 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund), and 420.5099 (Allocation of the low-income housing tax credit), Fla. Stat.

E. JUSTIFICATION FOR REQUESTED WAIVER

22. 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 these rules would lead to unreasonable, unfair, and unintended consequences in particular instances. Waivers shall be granted when: (1) the person who is subject to the rule demonstrates that the application of the rule would 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. *See* § 120.542(2), Fla. Stat.

23. Strict application of the Rule would lead to the unreasonable, unfair and unintended consequence that Petitioner would be unable to close and would thus be unable to complete the Development. This strict application would create a substantial hardship because Petitioner would lose the more than \$ 767,225 it already invested in the Development.

24. The purpose of the underlying statute will be achieved if the extension is granted because it will ensure that affordable family housing is made available in Polk County.

25. Moreover, strict application of the Rule would violate principles of fairness. The delay necessitating the extension was not caused by Petitioner. Transactions involving HUD are, by their nature, very hard to manage in terms of timing of closing.

26. The extension will neither prejudice Florida Housing nor the Development.

27. Denial of the Rule waiver would have a material adverse effect on the Development's viability.

28. Absent the waiver, the firm loan commitments will be deemed void, the funds will be de-obligated, and the Development will not be constructed. Denial of the requested waiver would deprive Polk County of essential affordable rental units set aside for persons of limited means who desperately need the housing, as well as other amenities and services which the Development will offer. Denial will also cause Petitioner to suffer a substantial and unnecessary economic and operational hardship as it has incurred significant costs to date in an effort to ensure that the Development proceeds to completion.

29. A waiver of the Rule's requirements would serve the purposes of Sections 420.5087, 420.5089, 420.5099, Fla. Stat., and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe, and sanitary housing in the State of Florida to households of limited means.

30. Should Florida Housing require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

F. ACTION REQUESTED

31. Petitioner requests the following:
- a. That Florida Housing grant Petitioner a permanent waiver from Rule 67-48.0072(4)(c) and (26), F.A.C., effective September 15, 2016, and extend the Closing Deadline to November 30, 2019;
 - b. That Florida Housing grant the Petition and all the relief requested therein; and
 - c. That Florida Housing grant such further relief as may be deemed appropriate.

Respectfully submitted,

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

*/s 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 Corporation Clerk for the Florida Housing Finance Corporation at CorporationClerk@floridahousing.org, with a hard copy being served by hand-delivery to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 5th day of April, 2019.

*/s Brian J. McDonough*_____

Brian J. McDonough, Esq.