STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In re: COCOA HOUSING
PRESERVATION II, LLC

Petitioner.
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FHFC File No.: 2017-046 VW
Application No.: 2016-293C

PETITION FOR WAIVER OF PROVISION OF RULE 67-48.004(2), FLORIDA ADMINISTRATIVE CODE

Petitioner, COCOA HOUSING PRESERVATION II, LLC ("Cocoa Housing"), submits this Petition to the Florida Housing Finance Corporation ("Florida Housing"), for a waiver of Rule 67-48.004(2), Florida Administrative Code. In support of this Petition, Petitioner states as follows:

1. Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner requests a waiver of a provision of Rule 67-48.004(2), Florida Administrative Code, in order to allow Petitioner's proposed affordable development project to proceed.

Petitioner

2. Cocoa Housing submitted an application (Application Number 2016-293C) and has been awarded funding pursuant to Request for Application No. 2015-111 (the "RFA"). The Application complies in all respects with the applicable statutory and rule requirements as well as the provisions of the RFA. Cocoa Housing is prepared to proceed with the project which will provide needed affordable housing to the community in accordance with the priorities and goals set forth in the RFA.

3. In submitting its Application for funding and in pursuing the actual construction and development of the project, Cocoa Housing has expended numerous man hours and incurred significant expenses.

4. As set forth in more detail below, Cocoa Housing is uncertain of its rights to proceed with the development of its approved affordable housing project as some of Cocoa Housing's principals and affiliates were served on May 1, 2017 with an Administrative Complaint ("AC"). Florida Housing subsequently entered a Temporary Order of Suspension ("Temporary Order") against those same principals and affiliates. Both the Administrative Complaint and the Temporary Order are for alleged actions unrelated to Cocoa Housing's Application.

Background

5. Prior to the issuance of the AC, the Florida Housing Board, at a meeting on March 24, 2017, addressed the implications of the potential issuance of the AC on pending applications ("Pipeline Deals") as well as the recommended sanctions to be sought through the AC. The Board discussed that a suspension of approved projects in which one or more of the principals are involved would negatively effect the effort to increase the amount of affordable housing available and potentially result in the loss of federal housing credits. Ultimately, the Board voted to recommend issuance of the AC against certain named respondents and to impose a prospective two-year ban with no effect on the current "pipeline" deals which includes Cocoa Housing. At the March 24, 2017, Board meeting, the Board decided, after considerable discussion of the Pipeline Deals, specifically including Cocoa Housing, that the issuance of the AC would not impact these deals.

6. The AC was subsequently filed naming Pinnacle Housing Group, LLC, PHG Builders, LLC, Felix Braverman, David O. Deutch, Mitchell M. Friedman, Michael D. Wohl, and

Louis Wolfson, III ("Respondents"). The Respondents filed a Response to the AC denying the allegations and requesting a formal administrative hearing to address the issues. The allegations in the AC are unrelated to Cocoa Housing's affordable housing development.

7. On May 2, 2017, Florida Housing issued the Temporary Order suspending activity related to developments involving the respondents named in the AC. The Temporary Order provides:

> Pursuant to Fla. Admin. Code R. 67-48.004(2)(b), all pending transactions under any program administered by Petitioner involving the Respondents are suspended until a Final Order is issued in this matter, or the Administrative Complaint is dismissed.

The Rule From Which Relief is Requested

8. At the outset, Petitioner is compelled to point out that the attempt to apply the Temporary Order to Petitioner is contrary to the specific language in the Rule.

9. Rule 67-48.004(2), provides, in pertinent part:

> (2) An Applicant shall be ineligible for funding or allocation in any program administered by the Corporation for a period of time as determined in paragraph (c) below, if:
> (a) The Board determines that the Applicant or any Principal, Financial Beneficiary, or Affiliate of the Applicant has made a material misrepresentation or engaged in fraudulent actions in connection with any Application for a Corporation program. . . .
> (b) Before any such determination can be final or effective, **the Corporation must serve an administrative complaint that affords reasonable notice to the Applicant** of the facts or conduct that warrant the intended action, specifies a proposed duration of ineligibility, and **advises the Applicant** of the opportunity to request a proceeding pursuant to Sections 120.569 and 120.57, F.S. Upon service of such complaint, all pending transactions under any program administered by the Corporation involving the Applicant, or any Principal, Financial Beneficiary or Affiliate of the Applicant shall be suspended until a final order is issued or the administrative complaint is dismissed.
> (c) The administrative complaint will include a proposed duration of ineligibility, which may be either a specific period of time or permanent in nature. With regard to establishing the duration, the Board shall consider the facts and circumstances, inclusive of each **Applicant's compliance history**, the type of misrepresentation or fraud committed, and the degree of harm to the Corporation's programs that has

been or may be done. [Emphasis added.]

10. The clear language of the Rule predicates suspension of "pending transactions" on the service of an administrative complaint on the "Applicant."[1]

11. No administrative complaint has been issued or authorized to be issued by the Florida Housing Board against Cocoa Housing. There have been no allegations against Cocoa Housing, nor any claim that Cocoa Housing has made any material representation or engaged in fraudulent actions in connection with an application for funding from a Florida Housing administered program. The decision of the Florida Housing Board at the March 24, 2017, Board meeting to protect the "pipeline" deals is entirely consistent with the specific language in the Rule.

12. Because the AC and the associated Temporary Order are not directed to, and do not specifically involve, any allegations against Cocoa Housing, the provisions of Rule 67-48.004(2) do not apply and cannot support a suspension of Cocoa Housing's pending affordable housing development.[2] Until there is resolution of the AC, the allegations against the Respondents are not final and cannot be used to deem affiliated applications to be ineligible. Cocoa Housing is authorized to continue and the "pipeline" transactions of the Respondents should not be suspended.

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[1] This requirement is in accordance with Section 420.507(35), Florida Statutes, which states that Florida Housing may "preclude from further participation in any of the corporation's programs, any applicant or affiliate of an applicant which has made a material misrepresentation or engaged in fraudulent actions in connection with any application for a corporation program." There have been no allegations that Cocoa Housing, as an Applicant for funding under a Florida Housing program, has made any material representations or engaged in fraudulent actions.

[2] Florida Housing has expressly drawn distinctions between an "Applicant," a "Developer," a "General Contractor," and other corporate affiliates, even when there are common officers and principals. See Arbours at Ambassador Place, LLC v. Florida Housing Final Order, March 14, 2014, FHFC Case No. 2013-041BP and The Villages Miami Phase II, Ltd. v. Florida Housing, June 16, 2016 Order Dismissing Petition, FHFC Case No. 2016-017BP, FHFC RFA No. 2015-108.

Justification for Requested Waiver

13. Cocoa Housing files this Petition for Waiver because of the doubt the Temporary Order has cast over the ability to proceed as contemplated by the Board at the March 24, 2017, meeting.

14. Pursuant to Section 120.542(1), Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Florida Housing has the authority to grant waivers from its rules when strict application of the rules would lead to unreasonable, unfair and/or unintended consequences in particular instances. Waivers are warranted when the person who is subject to the rule demonstrates that the application of the rule would (1) create a substantial hardship or violate the 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.

15. Even though Rule 67-48.004(2) on its face does not apply to Cocoa Housing because there are no allegations that Cocoa Housing has made any material misrepresentations or engaged in any fraudulent activity, the Temporary Order cites to the Rule as a basis for suspending activity on Cocoa Housing's Application. Petitioner is seeking this waiver as means to clarify that its project can move forward. Cocoa Housing meets the standards for a rule waiver which would further the directives approved by the Board on March 24, 2017.

Substantial Hardship and Statutory Purpose

16. Section 420.5099(2), requires the adoption of allocation procedures that "will ensure the maximum use of available tax credits in order to encourage development of low-income housing in the state." Florida Housing's statutory purpose of financing the development of affordable housing for low income and very low income persons will be furthered by allowing Petitioner's approved application to continue.

17. Even if Rule 67-48.004(2) is deemed applicable to Cocoa Housing, a waiver of the Rule and lifting of the Temporary Order to allow Cocoa Housing's pending project to continue, furthers the statutory intent for Florida Housing to ensure the availability of affordable housing. Moreover, such a waiver implements the Florida Board's directive that the pipeline deals involving the Respondents named in the AC be able to proceed.

18. Allowing Cocoa Housing to proceed will ensure that affordable tax credits are not lost and affordable housing will be provided to the citizens to address the needs identified by Florida Housing in the RFA.

Conclusion

19. The controlling statutes and Florida Housing's Rules are designed to allow flexibility necessary to provide relief from rule requirements when strict application would lead to unreasonable, unfair or unintended results in particular circumstances. Waivers should be granted when the applicant subject to the rule demonstrates that strict application would: (a) create a substantial hardship or violate principles of fairness; and (b) the purpose of the underlying statute has been or will be achieved. See §120.542(2), Fla. Stat.

20. Here, a waiver will benefit the citizens and further the statutory intent of providing safe, sanitary, and affordable housing units to those in need. Denial of the requested waiver would result in a substantial hardship for the Petitioner which has already expended considerable time and expense on the proposed development.

21. Petitioner is available to provide any information necessary or to address any questions related to this Petition.

WHEREFORE, Petitioner respectfully requests that the Florida Housing Finance Corporation provide the following relief:

A. Grant the Petition for Waiver and all the relief requested herein;

B. Enter an order waiving the requirements of Rule 67-48.004(2), Florida Administrative Code, on a permanent basis; and

C. Confirm that pipeline deals for approved applicants that have not engaged in fraudulent activity or made any material misrepresentations be allowed to proceed to closing in accordance with the Board's March 24, 2017, decision.

D. Grant such further relief as may be deemed appropriate.

Respectfully submitted this 26th day of May, 2017.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this Petition has been filed with Kate Flemming, Agency Clerk, Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000 Tallahassee, Florida 32301 and that a true and correct copy has been provided, via hand delivery, to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, and an electronic copy provided, via email, to Hugh Brown, General Counsel, Florida Housing Finance Corporation (Hugh.Brown@floridahousing.org) this 26th day of May, 2017.

Attorney