STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

In re: OVATION HOUSING, LLLP

FHFC CASE NO. 2019-003VW
Application No. 2016-517C

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PETITION FOR VARIANCE FROM FLORIDA ADMINISTRATIVE CODE RULE(S) 67-21.027(1) AND 67-21.003(1)(b)

Petitioner, Ovation Housing, LLLP, a Florida limited liability limited partnership ("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 Rule 67-21.027(1), F.A.C. (2016) and Rule 67-21.003(1)(b), F.A.C (2016) (collectively, the "Rules") 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 of this Petition, Petitioner states as follows:

Petitioner and the Development

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

Ovation Housing, LLLP
390 N. Bumby Ave
Orlando, Florida 32803
Telephone: (407) 895-3300
Facsimile: (407) 895-0820

The name, address, telephone and facsimile numbers of Petitioner's counsel is:

Bernice S. Saxon, Esq
Saxon Gilmore & Carraway, P.A.
201 E. Kennedy Boulevard, Suite 600
Tampa, FL 33602

Telephone: (813) 314-4501
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On January 18, 2017, Petitioner submitted Application No. 2016-517C for non-competitive housing credits to assist in the rehabilitation of an 87-unit development located in Orange County, Florida, known as Citrus Square Apartments (the "Development").

Type of Waiver

The waiver being sought is permanent in nature.

Rules for Which a Variance is Requested

The Rules required that each development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code ("IRC") that was in effect at the time the Rules were adopted. Prior to March 23, 2018, this Section of the IRC did not allow income averaging, and therefore the Rules also did not allow income averaging.

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.

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), 67-21.003(1)(b), 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 the Development at a competitive disadvantage with other developments if Petitioner is not allowed to use the average income test solely because of when its application was submitted.

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 allowed by the IRC. 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" (§420.5099, 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.

Action Requested

WHEREFORE, Petitioner respectfully requests that Florida Housing:

Grant this Petition and all relief request therein;

Grant a variance from the Rules and allow for calculation of the minimum set aside percentage based on income averaging; and

Grant such further relief as may be deemed appropriate

Respectfully submitted this 28th day of January, 2019.

SAXON GILMORE & CARRAWAY, P.A.
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By: _____
Bernice S. Saxon, Esq.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed 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

this 28th day of January, 2019

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Bernice S. Saxon, Esq.