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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

HTG Osprey Pointe, LLC
a Florida limited liability company,

Petitioner,

FHFC CASE NO. 2021-060VW
Application No. 2018-050BS/2016-571C

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

AMENDED PETITION FOR WAIVER OF RULE 67-48.002(9), (93) AND RULE 67-21.002(9), (85), F.A.C. (5/24/17)

Petitioner HTG Osprey Pointe, LLC (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing"), for a waiver of Rule 67-48.002(9) and (93), Florida Administrative Code ("F.A.C.") (May 24, 2017) and Rule 67-21.002(9) and (85) (May 24, 2017) ("Rules"), which require that only natural persons appear at the third principal disclosure level. The Application properly disclosed all of Petitioner's principals and the third principal disclosure level contained only natural persons. *See* Current Organizational Structure, attached as Exhibit A. For estate planning purposes, Petitioner would like to insert four trusts at the third principal disclosure level such that natural person trustees and beneficiaries appear at the fourth principal disclosure level. *See* Proposed Organizational Structure, attached as Exhibit B. While this structure is permissible under current rules,[1] it is not permissible under the version of the Rules applicable at the time the Application was submitted. Accordingly, Petitioner respectfully requests a waiver of the Rules

[1] Effective July 11, 2019, Rule 67-21.0025(7)(d) and Rule 67-48.0075(8)(d), F.A.C., allow trust beneficiaries that are natural persons to appear at the fourth principal disclosure level.

such that natural persons may appear at the fourth principal disclosure level. The requested waiver will not prejudice FHFC, nor any other applicant, because the trustees of the passive trusts were disclosed in Petitioner's Application. In support, Petitioner states as follows:

A. THE PETITIONER.

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

HTG Osprey Pointe, LLC
Attn: Matthew Rieger
3225 Aviation Avenue, Suite 602
Coconut Grove, FL 33133
Telephone: 305-860-8188
Email: mattr@htgf.com

2. The address, telephone, and facsimile number and e-mail address of Petitioner's counsel are:

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
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Tallahassee, FL 32301
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Email: BSmitha@stearnsweaver.com

B. WAIVER IS PERMANENT.

3. The waiver being sought is permanent in nature.

C. DEVELOPMENT BACKGROUND.

4. The following information pertains to the development ("Development"):

- Development Name: Osprey Pointe
- Development Address: 13021 U.S. Highway 301
- County: Pasco

- Developer: HTG Osprey Pointe Developer, LLC
- Number of Units: 110
- Type: Garden
- Set Asides:
    - 40% @ 60% AMI (MMRN & 4% HC)
    - 10% @ 40% AMI (SAIL & ELI)
    - 90% @ 60% AMI (SAIL & ELI)
- Demographics: Family
- Funding:
    - $6,000,000 SAIL
    - $556,900 ELI
    - $790,964 4% HC
    - $11,050,000 MMRN
- RFA: 2017-108 SAIL Financing Of Affordable Multifamily Housing Developments To Be Used In Conjunction With Tax-Exempt Bonds And Non-Competitive Housing Credits

D. PETITIONER'S PRINCIPAL STRUCTURE.

5. Petitioner's first principal disclosure level comprises: (1) HTG Osprey Pointe Member, LLC (Member), (2) HTG Osprey Pointe Manager, LLC (Manager) and (3) Raymond James Florida Housing Opportunities Fund II, L.L.C. (Investor Member). Petitioner is not seeking a change at this level. *See* Current Organizational Chart, attached as Exhibit A.

6. Only the second principal disclosure level flowing from HTG Osprey Pointe Member, LLC and HTG Osprey Pointe Manager, LLC are pertinent here, which consist solely of

HTG Holdings, LLC. The managers of HTG Holdings, LLC are Matthew Rieger and Randy Rieger.

7. Petitioner is seeking to change the members of HTG Holdings, LLC, which currently consist of: (1) Matthew Rieger (1/3); (2) Randy Rieger (1/3); and (3) Robert Balogh (1/3).

8. For estate planning purposes, Petitioner would like to insert trusts (*i.e.*, Matthew A. Rieger Trust dtd 02/28/2017. (33.3334%); Randy Rieger Revocable Trust (33.3333%); Alexandra B. Balogh Irrevocable Ins Trust (16.6666%); and Andrew C. Balogh Irrevocable Ins Trust (16.6667%)) into the third level of Petitioner's Organizational Structure. *See* Proposed Organizational Structure, attached as Exhibit B. If this Petition is granted, the beneficiaries of the trusts would appear at the fourth disclosure level. Specifically, the trustee and beneficiary of the Matthew A. Rieger Trust dtd 02/28/2017 is Matthew Rieger, who was disclosed in the Application; the trustee and beneficiary of the Randy Rieger Revocable Trust is Randy Rieger, who was disclosed in the Application; the trustee of the Alexandra B. Balogh Irrevocable Ins Trust is Robert Balogh, who was disclosed in the Application and the beneficiary is his daughter, Alexandra B. Balogh; the trustee of the Andrew C. Balogh Irrevocable Ins Trust is Robert Balogh, who was disclosed in the Application and the beneficiary is his son, Andrew C. Balogh. No other change to Petitioner's organizational structure is requested.

E. <u>THE RULES FROM WHICH WAIVER IS REQUESTED.</u>

4. To change Petitioner's principals, Petitioner requests a waiver of Rule 67-48.002(9) and (93), F.A.C. (May 24, 2017), which provides in pertinent part:

> (9) "Applicant" means any person or legal entity of the type and with the management and ownership structure described herein that is seeking a loan or funding from the Corporation by submitting an Application or responding to a competitive solicitation pursuant to Rule Chapter 67-60, F.A.C., for one or more of the Corporation's programs. For purposes of Rules 67-48.0105, 67-48.0205

and 67-48.031, F.A.C., Applicant also includes any assigns or successors in interest of the Applicant. Unless otherwise stated in a competitive solicitation, as used herein, a 'legal entity' means a legally formed corporation, limited partnership or limited liability company with a management and ownership structure that **consists exclusively of all natural persons by the third principal disclosure level.** For Applicants seeking Housing Credits, the Housing Credit Syndicator/Housing Credit investor need only be disclosed at the first principal disclosure level and no other disclosure is required. The terms 'first principal disclosure level' and 'third principal disclosure level' have the meanings attributed to them in the definition of "Principal."

***

(93) "Principal" means:

(a) With respect to an Applicant that is: . . . .

3. A limited liability company, at the first principal disclosure level, any manager or member of the Applicant limited liability company, and, unless otherwise excluded at subsection 67-48.002(9), F.A.C., with respect to any manager or member of the Applicant limited liability company, at the second principal disclosure level, that is:

a. A corporation, any officer, director, executive director, or shareholder of the corporation,

b. A limited partnership, any general partner or limited partner of the limited partnership,

c. A limited liability company, any manager or member of the limited liability company, or

d. A trust, any trustee of the trust and all beneficiaries of majority age (i.e.; 18 years of age) as of Application deadline, each of whom must be a natural person. Such trust shall be comprised only of trustee(s) and beneficiaries who are natural persons; and

with respect to any entity identified at the second principal disclosure level that is:

e. A corporation, by the third principal disclosure level, any officer, director, executive director, or shareholder of the corporation, each of whom must be a natural person,

f. A limited partnership, by the third principal disclosure level, any general partner or limited partner of the limited partnership, each of whom must be a natural person,

g. A limited liability company, by the third principal disclosure level, any manager or member of the limited liability company, **each of whom must be a natural person**, or

h. A trust, any trustee of the trust and all beneficiaries of majority age (i.e.; 18 years of age) as of Application deadline, each of whom must be a natural person. Such trust shall be comprised only of trustee(s) and beneficiaries who are natural persons.

Id. (emphasis added).

9. Petitioner also seeks a waiver of Rule 67-21.002(9) and (85) (May 24, 2017), which provides:

(9) "Applicant" means any person or legal entity of the type and with the management and ownership structure described herein that is seeking a loan or funding from the Corporation by submitting an Application or responding to a competitive solicitation pursuant to Rule Chapter 67-60, F.A.C., for one or more of the Corporation's programs. For purposes of Rule 67-21.031, F.A.C., Applicant also includes any assigns or successors in interest of the Applicant. Unless otherwise stated in a competitive solicitation, as used herein, a 'legal entity' means a legally formed corporation, limited partnership or limited liability company with a management and ownership structure that **consists exclusively of all natural persons by the third principal disclosure level**. For Applicants seeking Housing Credits, the Housing Credit Syndicator/Housing Credit investor need only be disclosed at the first principal disclosure level and no other disclosure is required. The terms 'first principal disclosure level' and 'third principal disclosure level' have the meanings attributed to them in the definition of "Principal."

***

(85) "Principal" means:

(a) With respect to an Applicant that is: . . . .

3. A limited liability company, at the first principal disclosure level, any manager or member of the Applicant limited liability company, and, unless otherwise excluded at subsection 67-21.002(9), F.A.C., with respect to any manager or member of the Applicant limited liability company, at the second principal disclosure level, that is:

a. A corporation, any officer, director, executive director, or shareholder of the corporation,

b. A limited partnership, any general partner or limited partner of the limited partnership,

c. A limited liability company, any manager or member of the limited liability company, or

d. A trust, any trustee of the trust and all beneficiaries of majority age (i.e.; 18 years of age) as of Application deadline, each of whom must be a natural person. Such trust shall be comprised only of trustee(s) and beneficiaries who are natural persons; and with respect to any entity identified at the second principal disclosure level that is:

e. A corporation, by the third principal disclosure level, any officer, director, executive director, or shareholder of the corporation, each of whom must be a natural person,

f. A limited partnership, by the third principal disclosure level, any general partner or limited partner of the limited partnership, each of whom must be a natural person,

g. A limited liability company, by the third principal disclosure level, any manager or member of the limited liability company, **each of whom must be a natural person**, or

A trust, any trustee of the trust and all beneficiaries of majority age (i.e.; 18 years of age) as of Application deadline, each of whom must be a natural person. Such trust shall be comprised only of trustee(s) and beneficiaries who are natural persons.

Id. (emphasis added).

10. Petitioner is requesting waiver of the foregoing Rules so that it may amend its organizational structure such that trusts may appear at the third disclosure level with their natural person beneficiaries appearing at the fourth level.

F. STATUTES IMPLEMENTED BY THE RULES.

11. The Rules implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"):

- Section 420.502, Legislative findings.
- Section 420.503, Definitions.
- Section 420.507, Powers of the corporation.
- Section 420.508, Special powers; multifamily and single-family projects.

- Section 420.5087, State Apartment Incentive Loan Program.
- Section 420.509, Revenue bonds.
- Section 420.5089, HOME Investment Partnership Program; HOME Investment Partnership Fund.
- Section 420.5099, Allocation of the low-income housing tax credit.

12. Per Section 420.5099(1),(2), Florida Housing acts as the State's housing credit agency and is authorized to establish procedures for allocating and distributing low-income housing tax credits.

G. JUSTIFICATION FOR GRANTING WAIVER OF THE RULES.

13. Petitioner timely submitted an application for the Development and received an invitation to credit underwriting.

14. After loan closing, the members of HTG Holdings, LLC determined, for estate planning purposes, that their membership interests should be held by a trust instead of directly by the natural persons. Accordingly, Petitioner respectfully requests a waiver to make the following changes:

- At the third level, the following substitutions would occur:
    - Matthew Rieger's 1/3 interest in HTG Holdings, LLC would be transferred to the Matthew A. Rieger Trust dtd 02/28/2017.
    - Randy Rieger's 1/3 interest in HTG Holdings, LLC would be transferred to the Randy Rieger Revocable Trust.
    - Robert Balogh's 1/3 interest in HTG Holdings, LLC would be transferred in equal halves to the Alexandra B. Balogh Irrevocable Ins Trust and the Andrew C. Balogh Irrevocable Ins Trust.

- At the fourth level, the beneficiaries and trustees of the foregoing trusts would appear as:
    - Matthew A. Rieger Trust dtd 02/28/2017's trustee and beneficiary would be Matthew Rieger (33.3334%).
    - Randy Rieger Revocable Trust's trustee and beneficiary would be Randy Rieger (33.3333%).
    - Alexandra B. Balogh Irrevocable Ins Trust's trustee would be Robert Balogh and its beneficiary would be Alexandra B. Balogh (16.6666%).
    - Andrew C. Balogh Irrevocable Ins Trust's trustee would be Robert Balogh and its beneficiary would be Andrew C. Balogh (16.6667%).

15. If this request for waiver is denied, the members of HTG Holdings, LLC will be required to form an entity specifically for this Development, which will not ultimately roll up to a trust. This will create an immense administrative burden upon each member's passing as the entities created if this Petition is denied will have to pass through probate rather than be governed by trusts.

16. If the Petition is granted, the natural persons disclosed as trustees at the third level will be the same natural persons identified in the Application. Moreover, half of the beneficiaries would likewise be the same natural persons disclosed in the Application with the exception of the addition of one member's children (*i.e.,* the children of Robert Balogh).

17. FHFC would not be prejudiced by the addition of the passive trusts. Indeed, effective July 11, 2019, Rule 67-21.0025(7)(d) and Rule 67-48.0075(8)(d), F.A.C., expressly permit the structure sought here. Upon information and belief, the purpose of the requirement to identify all natural persons by or at the third level is to ensure all persons that might exert control

over the Development are disclosed. Upon further information and belief, FHFC provided the exception for trusts to appear at the third level under Rule 67-21.0025(7)(d) and Rule 67-48.0075(8)(d), F.A.C., because FHFC recognized the unique purpose and properties of trusts and understood that disclosing a trust at the third level provides the same degree of comfort as disclosing a natural person (so long as that trust only has natural person principals). Here, all of the principals of the trusts are natural persons – no fictitious entities will be disclosed beyond the third level if the Petition is granted. Additionally, all of the trustees were previously disclosed in the Application. Accordingly, granting the Petition – and allowing the trusts to be inserted into the third level – should not impact FHFC's confidence in the Development, Petitioner or its principals.

18. 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 the rules would lead to unreasonable, unfair and unintended consequences, in particular instances. Waivers shall be granted when the person who is subject to the rule demonstrates that the application of the rule would: (1) create a substantial hardship or, violate principles of fairness,[2] and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. § 120.542(2), Fla. Stat.

19. If the Rules are imposed, Petitioner's principals will suffer a substantial and unnecessary operational hardship. Granting the requested waiver will prevent a substantial and

[2] "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. § 120.542(2), Fla. Stat.

unfair hardship from being imposed on Petitioner while still achieving the underlying purpose of the Rules.

20. For the foregoing reasons, Petitioner meets the standards for the requested waiver.

21. The requested waiver will not adversely impact the Development or Florida Housing.

H. ACTION REQUESTED.

22. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested permanent waiver such that Petitioner may insert four trusts at the third principal disclosure level and disclose such trusts' beneficiaries and trustees at the fourth level; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

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Counsel for Petitioner

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

CERTIFICATE OF SERVICE

This Petition is being served by electronic transmission for filing with the Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with copies served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 24th day of August, 2021.

By: */s/ Brian J. McDonough*
Brian J. McDonough, Esq.

Exhibit A - Current Organizational Structure

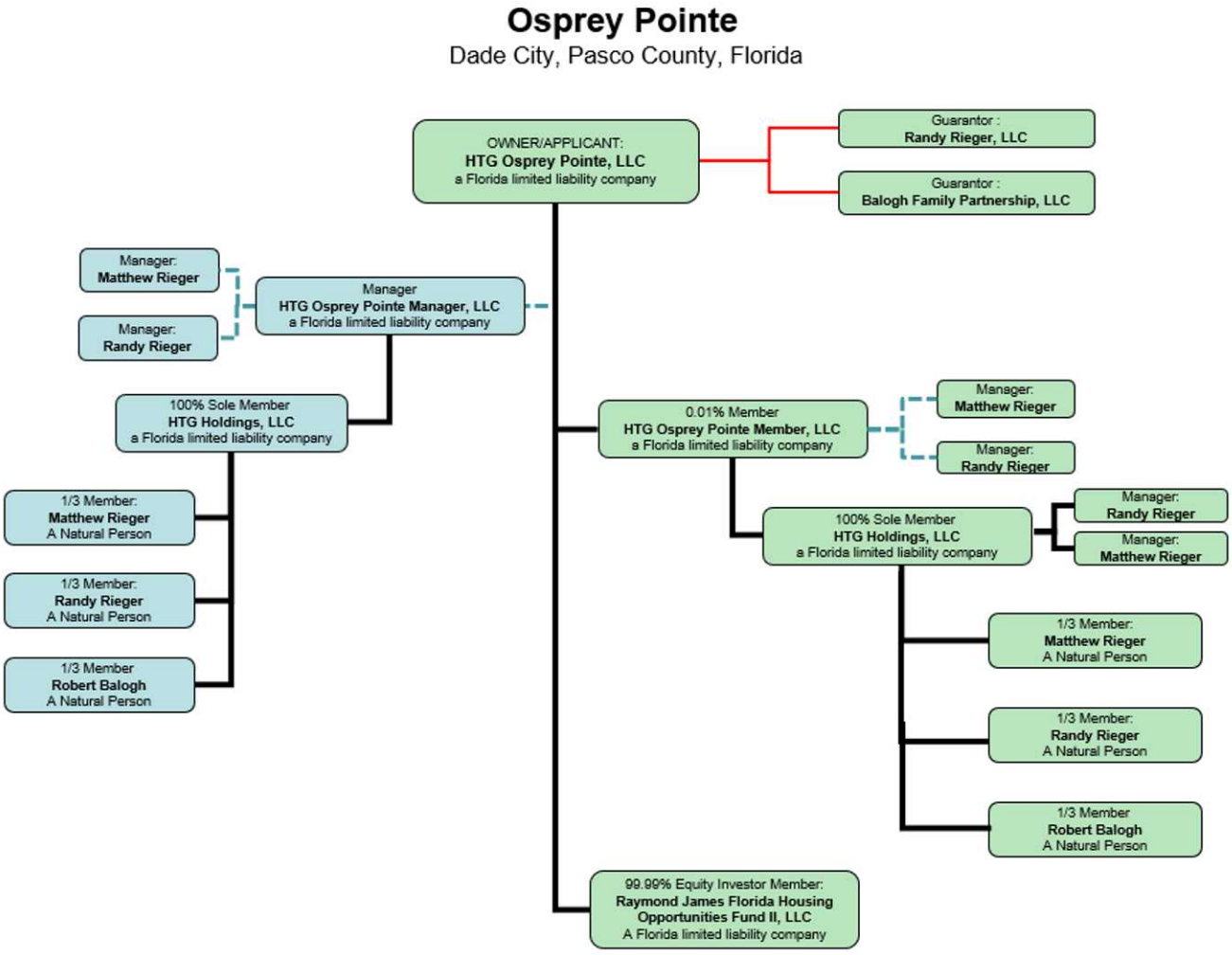


Exhibit B - Proposed Organizational Structure

