STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

ISLAND COVE, LLC,
a Florida limited liability company,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

CASE NO. 2025-026VW

Application Nos. 2020-533C and 2021-225S

RFA 2020-205

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FLORIDA HOUSING FINANCE CORPORATION

PETITION FOR WAIVER OF RULES 67-48.0072(12) and 67-21.026(10), F.A.C. (06/23/2020)

The petitioner, Island Cove, LLC, a Florida limited liability company (the "Petitioner"), hereby petitions the Florida Housing Finance Corporation (the "Corporation") for a waiver of Rules 67-48.0072(12) and 67-21.026(10) of the Florida Administrative Code (effective June 23, 2020) pertaining to the requirement that there be a singular guaranteed maximum price construction contract governing the construction of the Development (collectively, the "Singular GMP Rules"). Accordingly, pursuant to Section 120.542 of the Florida Statutes (2020) and Rules 28-104.001 through 28-104.006 of the Florida Administrative Code (2020), the Petitioner hereby requests a waiver of the Singular GMP Rules to allow for certain construction work, in connection with the Development, to be performed and completed (and for the related construction costs accruing in connection with such certain construction work to be paid) outside the singular guaranteed maximum price construction contract governing the construction of the Development.

In support of this Petition, the Petitioner states the following:

A. <u>THE PETITIONER</u>

1. The name, mailing address, telephone number and email address for the Petitioner and its qualified representative are:

Island Cove, LLC
Attention: Darren Smith
1100 N.W. 4th Avenue
Delray Beach, Florida 33444
Telephone: (561) 859-8520
E-mail: dsmith@smithhenzy.com

2. For purposes of this Petition, the name, mailing address, telephone number and email address of the Petitioner's attorney are:

Bilzin Sumberg Baena Price & Axelrod LLP
Attention: Terry M. Lovell, Esquire
1450 Brickell Avenue, 23rd Floor
Miami, Florida 33131
Telephone: (305) 350-2428
E-mail: tlovell@bilzin.com

B. THE DEVELOPMENT

3. The Petitioner timely submitted its Application No. 2021-225S (the "Application") on November 18, 2020 in response to the Corporation's RFA 2020-205 (SAIL Financing of Affordable Multifamily Housing Developments to be Used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits) issued on October 15, 2020 (the "RFA") for the development named Island Cove Apartments (the "Development").

4. The Application was submitted by the Petitioner for (i) competitive Housing Credits under the Corporation's Housing Credit Program (the "Housing Credits"), and (ii) loan funding under the Corporation's State Apartment Incentive Loan Program (the "SAIL Loan").

5. Equity raised from the Housing Credits, and loan proceeds generated from the SAIL Loan, were (and will continue to be) used by the Petitioner for the development, construction and operation of the Development.

6. The following information pertains to the Development:

- Development Name: Island Cove Apartments
- Development Location: City of Delray Beach, Palm Beach County, State of Florida
- Type of Construction: New Construction
- Number of Total Units: 60
- Number of Residential Buildings: 5
- Development Type: Garden Style (1 – 3 Stories)

- Demographics: Family
- Set-Asides: 41% (25 units) at or below 30% AMI, and 100% (60 units) ranging from 20% AMI to 80% AMI provided the average AMI for such units is 60% AMI; plus 50% of ELI Units (13 units) for Persons with Special Needs
- Funding: 4% Housing Credits at an annual amount of $1,262,769; a $3,000,000 SAIL Loan; and a $600,000 ELI Loan

7. The Application was preliminarily selected for funding by the Corporation, the Petitioner was invited by the Corporation to enter into credit underwriting for the Development, the Petitioner accepted the invitation for credit underwriting, and the final Credit Underwriting Report for the Development was issued by AmeriNat Loan Services on May 31, 2022.

8. On March 15, 2022, the Petitioner engaged Lecesse Construction Services, LLC to serve as the General Contractor for the Development (the "GC"). The Petitioner and the GC executed a guaranteed maximum price construction contract governing the construction of the Development in the fixed amount of $17,357,731.00 (the "GMP Contract").

9. The Petitioner commenced construction of the Development on June 23, 2022. The endmost building within the Development achieved substantial completion on September 20, 2023. The Development received its last certificate of occupancy on November 17, 2023.

10. As of the date hereof, the Petitioner seeks and desires to complete and finalize the cost certification for the Development (the "Cost Certification").

11. Under the Singular GMP Rules, the construction work for the Development is required to be performed and completed (and the related construction costs accruing in connection with such construction work for the Development are required to be paid) under and pursuant to the GMP Contract.

12. The Petitioner had to perform and complete some construction work, in connection with the Development, outside the GMP Contract, including work related to low-voltage cabling and installation of a city-required bus shelter and crosswalk (the "Outside Contractual Work"); and therefore, the Petitioner is requesting a waiver of the Singular GMP Rules, in connection with the Development, in order for the related construction costs, accruing in connection with the Outside Contractual Work, to be paid outside the GMP Contract.

13. In order to complete and finalize the Cost Certification, the Petitioner needs to calculate and finalize the aggregate construction costs associated with, and arising from, the

construction work completed for the Development, including those certain construction costs incurred and paid by the Petitioner for the Outside Contractual Work. As such, the Corporation has invited the Petitioner to file this Petition with the Corporation in connection with the completion and finalization of the Cost Certification.

14. The requested waiver and relief set forth in this Petition will not adversely affect the Development or the Corporation because the Development has already achieved substantial completion and is occupied by residential tenants. However, a denial of this Petition: (i) would result in substantial hardship to the Petitioner,[1] (ii) would prevent or hinder the implementation of the Corporation's Housing Credit Program (HC Program) and the Corporation's State Apartment Incentive Loan Program (SAIL Program), and (iii) would violate principles of fairness.[2]

C. RULES FROM WHICH WAIVER IS REQUESTED

15. The Petitioner hereby requests a waiver from the Singular GMP Rules.

16. Rule 67-48.0072(12) of the Florida Administrative Code (effective June 23, 2020) provides for the following:

> For Competitive HC, SAIL, and HOME, the Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant's sole expense, and review a pre-construction analysis for all new construction units and a CNA for rehabilitation units and review the Development's costs. If an EHCL Development has a General Contractor, the preceding requirement will also apply to the EHCL Development.

17. Rule 67-21.026(10) of the Florida Administrative Code (effective June 23, 2020) provides for the following:

> The Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, acceptable to the Corporation, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant's sole expense, and review a pre-construction analysis for all new construction units or a CNA for rehabilitation units and review the Development's costs.

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[1] "Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. *See* Section 120.542(2) of the Florida Statutes (2020).

[2] "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. *See* Section 120.542(2) of the Florida Statutes (2020).

D. STATUTES IMPLEMENTED BY THE RULES

18. The Singular GMP Rules are implementing the Florida Housing Finance Corporation Act (the "Act"),[3] the statute that designates the Corporation as the administrator of the Housing Credit Program (HC Program) and the State Apartment Incentive Loan Program (SAIL Program) for the purposes of providing equity financing and debt financing to sponsors (including the Petitioner) to promote and support affordable housing to low-income persons throughout the State of Florida. Accordingly, the Corporation is responsible for, and is authorized by statutory law to establish and implement, the practices and procedures for the Housing Credit Program (HC Program) and the State Apartment Incentive Loan Program (SAIL Program).

E. JUSTIFICATION FOR GRANTING THE REQUESTED WAIVER

19. Under Section 120.542(1) of the Florida Statutes (2020) and Chapter 28-104 of the Florida Administrative Code (2020), the Corporation has the power and authority to grant waivers to its rule requirements when strict application of such rules or requirements would lead to unreasonable, unfair and unintended consequences in particular instances. Pursuant to Section 120.542(2) of the Florida Statutes (2020), a waiver shall be granted when: (i) the person subjected to the rule demonstrates that application of the rule would either create a substantial hardship or violate principles of fairness; and (ii) the purpose of the underlying statute has been, or otherwise will be, achieved by other means by the person.

20. Prior to today's date, the Petitioner has caused the Development to achieve substantial completion, receive its certificates of occupancy, and be placed-in-service. Thus, the Petitioner has commenced the Cost Certification process with the Corporation.

21. Pursuant to the Singular GMP Rules, the construction work for the Development is to be performed and completed (and the related construction costs in connection with such construction work for the Development are to be paid) under and pursuant to the GMP Contract. Consequently, construction costs paid by the Petitioner in connection with construction work for the Development which are paid outside the GMP Contract are not (and cannot) be included within the Cost Certification, unless the Petitioner's relief and requests set forth in this Petition are granted by the Corporation.

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[3] The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.55 of the Florida Statutes (2020).

22. After substantial completion and placement-in-service of the Development, the Petitioner had to perform and complete a limited amount of additional construction-related work, in the amount of $105,915.00, outside of the GMP Contract. Such additional construction-related work represents the Outside Contractual Work.

23. The Petitioner, in connection with the Outside Contractual Work, then directly engaged third-party vendors and contractors to perform and complete the Outside Contractual Work for the benefit of the Development (the "Third-Party Providers").

24. As such, the Petitioner hired the Third-Party Providers to perform and complete the Outside Contractual Work outside of the GMP Contract. As of the date hereof, (i) the GC has fully performed and completed all of the construction work covered by the GMP Contract and (ii) the Third-Party Providers have fully performed and completed all of the Outside Contractual Work; and in connection therewith, the Petitioner incurred and paid all amounts due and owed to (a) the GC under and pursuant to the GMP Contract and (b) the Third-Party Providers for the Outside Contractual Work.

25. As of today's date, the Petitioner continues to progress through the Cost Certification process with the Corporation. Due to the fact that the Outside Contractual Work could be considered a second guaranteed maximum price construction contract governing the construction of the Development, the Petitioner respectfully requests a waiver of the Singular GMP Rules so that the Petitioner is able to proceed with the Cost Certification process with the Corporation and include the construction costs incurred and paid by the Petitioner to the Third-Party Providers, for the Outside Contractual Work, within the Cost Certification.

26. As demonstrated above, the Petitioner meets the standards for a waiver of the Singular GMP Rules because the Petitioner has demonstrated hardships and other circumstances which justify the Petitioner's relief and requests set forth in this Petition. The granting of this Petition will not adversely impact the Development or the Corporation; and rather, the granting of this Petition will ensure that much needed affordable housing units remain available and preserved for low-income persons within the City of Delray Beach, Palm Beach County.

27. If this Petition is not granted, then the Petitioner and the Development will suffer substantial and irrevocable hardship because the Petitioner will have incurred and paid $105,915.00 for certain construction work for the Development, yet such related construction costs will not be included within the Cost Certification (causing an economic loss to the Petitioner). Consequently, granting this Petition will (i) promote principles of fundamental fairness in the development of affordable housing, (ii) support the availability and preservation of affordable housing units via the Development, (iii) enable the Petitioner to properly account for the construction costs, incurred and paid through the current date, in connection with the Development during the Cost Certification process, (iv) allow the Petitioner to complete and finalize the Cost Certification in connection with the Development, and (v) promote the goal of increasing the supply of affordable housing through private investment through the Corporation's Housing Credit Program (HC Program) and the Corporation's State Apartment Incentive Loan Program (SAIL Program). As such, the granting of this Petition would serve the purposes of the Act and the RFA.[4]

28. Should the Corporation require any additional information, a representative of the Petitioner is available to answer questions and to provide information necessary for the Corporation's review and consideration of this Petition.

F. PERMANENCY OF WAIVER

29. The waiver being sought is permanent in nature.

G. ACTIONS REQUESTED

For the reasons set forth in this Petition, the Petitioner respectfully requests that the Corporation:

[4] One of the primary goals of the Act is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income individuals and households by ensuring: "the maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought." *See* Section 420.5099(2) of the Florida Statutes (2020).

a. Grant this Petition and all of the relief requested herein;

b. Grant the waiver of the Singular GMP Rules such that the Petitioner is permitted to include $105,915.00 within the Cost Certification, representing certain construction costs incurred and paid by the Petitioner, for the Outside Contractual Work by the Third-Party Providers, in connection with the Development; and

c. Award or grant such further relief as may be deemed appropriate.

Respectfully submitted,

Bilzin Sumberg Baena Price & Axelrod LLP
1450 Brickell Avenue, 23rd Floor
Miami, Florida 33131
Tel: (305) 350-2428
Fax: (305) 351-2126
E-mail: tlovell@bilzin.com

/s/ Terry M. Lovell

CERTIFICATE OF SERVICE

This Petition is being served via electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation (CorporationClerk@FloridaHousing.org), with a copy being served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, as of this 28th day of May, 2025.

/s/ Terry M. Lovell

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