STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Federation Davie Preservation LP,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2024-068VW
Application No. 2020-510C

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FLORIDA HOUSING
FINANCE CORPORATION

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-21.027(6), F.A.C. (6/23/20)

Petitioner, Federation Davie Preservation LP, a Florida limited partnership (the "Petitioner") pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code ("F.A.C."), submits its Petition to Respondent, Florida Housing Finance Corporation (the "Corporation"), for a waiver of Rule 67-21.027(6), F.A.C., effective 06/23/20 (the "Rule"). Work on the development was substantially completed on December 15, 2021. The GC's accountant spent the next year reviewing invoices and documents necessary to complete the General Contractor Cost Certification ("GCCC") and submitted a draft on January 23, 2023. Unfortunately, that draft was not signed by the General Contractor ("GC") before it became non-responsive on or about June 1, 2023. Petitioner has been advised that the GC has discontinued its business, is in litigation over a surety bond (*Frankenmuth Mutual Ins. Co. v. J4 Development, Inc., et al.*, Case No. 3:23-cv-1440-L, filed in the Northern District of Texas on 6/28/23), and that its natural person principals declared bankruptcy (*In re: John C. Darby and Nancy Michele Darby*, Case No. 23-31991-swe7, filed in the Northern District of Texas on 9/7/23). The GC has not responded to Petitioner's inquiries related to completing the GCCC.

Despite numerous attempts, Petitioner has been unable to secure the GC's signature on the GCCC prepared by the GC's accountant and the GC's accounting firm will not finalize the certified public accountant opinion letter without the GC's cooperation. Petitioner has no control over the GC's accounting firm and cannot force it to provide the opinion letter and/or audit report required by the Rule. However, the GC's accountant cooperated with Petitioner's certified public accountant ("CPA") to provide advice regarding preparing an agreed upon procedures ("AUP") report that is based upon the GCCC that was prepared by the GC's accountant in January 2023 in accordance with the Corporation's requirements and standard accounting guidelines. Accordingly, Petitioner seeks a Rule waiver to allow the Final Cost Certification Application Package to contain only an AUP report approved the Corporation, instead of an opinion letter and audit. If this Petition is granted, and Petitioner submits an AUP, Petitioner will not be required to submit a GCCC. Regardless of whether the Petition is granted, Petitioner will submit the unqualified CPA opinion letter and unmodified audit report for the Development Final Cost Certification ("DFCC").

In support of this Petition for Rule Waiver, Petitioner states as follows:

A. Petitioner.

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

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Telephone: (704)575-1268
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Email: BHartnett@ahidevelopment.com

2. The name, address, telephone, and facsimile numbers of Petitioner's counsel are:

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Stearns Weaver Miller Weissler
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Tallahassee, Florida 32301
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B. The Development.

3. This Petition is submitted on behalf of the following development ("Development"):

- Development Name: Federation Davie Apartments
- Developer: FA Developer FL LLC
- Address: 5701 SW 82nd Avenue, Davie, FL 33328
- County: Broward
- Number of Units: 80 (Acquisition and Rehabilitation)
- Type: Garden Apartments
- Set Asides: 100% of units at 60% or lower AMI
- Demographics: Elderly, Non-ALF
- Funding Request: 4% Non-Competitive Housing Credit allocation in an annual amount of $850,217

C. Rule from which Waiver is Sought.

4. The Rule provides:

> The Final Cost Certification Application Package (Form FCCAP) shall be used by an Applicant to itemize all expenses incurred in association with construction or Rehabilitation of a Housing Credit Development, including Developer's and General Contractor's fees as described in rule 67-21.026, F.A.C. Such form package shall be completed, executed and submitted to the Corporation in both hard copy format and electronic files of the Microsoft Excel spreadsheets for the HC Development Final Cost Certification (DFCC) and the General Contractor Cost Certification (GCCC)

> included in the form package, along with the executed Extended Use Agreement and appropriate recording fees, IRS Tax Information Authorization Form 8821 for all Financial Beneficiaries if requested by the Corporation, a copy of the syndication agreement disclosing the rate and all terms, the required certified public accountant opinion letter for both the DFCC and GCCC, an unmodified audit report prepared by an independent certified public accountant for both the DFCC and GCCC, photographs of the completed Development, the monitoring fee, and documentation of the placed-in-service date as specified in the Form FCCAP instructions. The Final Housing Credit Allocation will not be issued until such time as all required items are received and processed by the Corporation. The Final Cost Certification Application Package (Form FCCAP) is adopted and incorporated herein by reference, effective 04-2020, and is available on the Corporation's website under the Multifamily Programs link labeled Non-Competitive Funding Programs or from http://www.flrules.org/Gateway/reference.asp?No=Ref-12017, or by contacting the Housing Credit Program at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1321.

See Rule 67-21.027(6), F.A.C. (06/23/20).

D. Statute Implemented.

5. The Rule from which waiver is sought implements the statute governing the allocation of federal low-income housing tax credits (Section 420.5099, Florida Statutes).

E. Justification for the Requested Waiver

6. Petitioner submitted its Non-Competitive Application Form, Application No. 2020-510C (the "Application"), to the Corporation on September 10, 2020.

7. J4 Development, Inc. (a Texas corporation f/k/a J4 Development, LP.) served as the GC for the Development. The GC was created in February 2004 as a multifamily construction firm to specialize in large-scale asset renovation and repositioning, including Affordable Housing, Marketrate, Historic, Student, Military and Senior Housing. Around the time of the Application, J4 had built in excess of 15 LITHC multifamily developments in 14 states representing more than $400,000,000 in completed projects.

8. The renovation of the Development was substantially complete on December 15, 2021 and Petitioner has no new business with the GC. Unfortunately, Petitioner was advised that

the GC subsequently discontinued its business and its natural person principals declared bankruptcy. The GC has not responded to Petitioner's communications since approximately June 1, 2023. Despite multiple requests, the GC has failed to provide the information necessary to complete the Final Cost Certification Application Package ("FCCAP").

9. Pursuant to the Rule, Petitioner must submit the FCCAP to itemize the costs and expenses incurred with the Development. Because the Rule incorporates the FCCAP by reference, both the Rule and FCCAP require: (a) completion and inclusion of a GCCC, and (b) a CPA opinion letter and audit report for the GCCC without any modifications.

10. The FCCAP provides the GCCC instructions, which identify the requirements and audit procedures for the GCCC audit.

11. The FCCAP also includes a form, entitled "General Contractor Costs Certification - GC Certification," that must be executed by the GC and the CPA ("GC Certification"). The GC Certification certifies the accuracy of the GC's costs.

12. Receipt by Petitioner of the remaining portion of the tax credit investor's capital contributions are dependent upon the issuance of the Form 8609. The Corporation cannot issue Form 8609 until it has reviewed the FCCAP.

13. Despite numerous requests, the GC has failed to execute the GC Certification, and other certificates and affidavits that must be provided to the GC's accountant in order to enable the CPA to issue its opinion letter and audit report for the GCCC. Accordingly, the GC's accountant has refused numerous requests to provide the opinion letter and audit report. Absent same, the Corporation has not, and cannot, issue Form 8609. To be clear, neither the GC, nor the GC's accountant, have refused to sign the GCCC based upon any information, or lack of information in the GCCC that was prepared by the GC's accountant. Rather, because the GC has

dissolved, no one can, or is willing to, act on the GC's behalf. Moreover, the GC's accountant initially agreed to prepare the AUP based upon his draft GCCC, but was prevented by a subsequent lapse in his assurance licensure.

14. The FCCAP is substantially complete and Petitioner is aware of no disputes or disagreements regarding the costs to be reported. Nonetheless, Petitioner cannot satisfy the technical requirements of the Rule as it is unable to obtain the GC's signature for the GC Certification. Additionally, the GC's accounting firm will not finalize the CPA opinion letter without the GC's cooperation. Thus, Petitioner cannot obtain an unqualified CPA opinion letter or audit report with respect to the GCCC because it cannot obtain the requested documentation from the GC.

15. Petitioner respectfully requests that the Corporation waive the requirement that the GC execute the GC Certification, and that the GC's CPA provide an opinion letter and audit report for the GCCC. Instead, if this Petition is granted, Petitioner will provide the AUP report.

16. Because the GC's accountant was unable to provide the opinion letter and audit report required by the Rule for the reasons described above, Petitioner reached out to Petitioner's independent CPA to prepare the audit of the GCCC. In an effort to provide records to Petitioner's CPA to perform the audit, Petitioner reached out to the GC for records and then directly to past vendors to provide records. The vendors either no longer have the records, or failed to respond despite multiple requests. Since the GC and vendors did not provide requisite access to their accounting records, Petitioner's CPA was unable to prepare an audit of the GCCC. An AUP report was therefore deemed to be the best option to provide the Corporation with subcontractor and vendor costs and expenses incurred for the Development. In addition, the

AUP calculated the percentage of General Conditions and Contractor profit and overhead charged to the project to ensure the allowable limits established by the Corporation were not exceeded.

17. All of the invoices in the AUP were successfully vouched by the GC's CPA, Adam Childers, who submitted a GCCC on January 23, 2023 (the "Childers GCCC"), as signed and certified by him in the statement of fact attached as Exhibit C to the AUP report. Put simply, the AUP report contains the information from the Childers GCCC that vouched all of the invoices in accordance with the Corporation's procedures **after** the development was substantially complete and no subsequent costs were incurred.[1] The AUP report also relies upon Mr. Childers' draft Independent Auditors' Report, which states: "In my opinion, the Federation Davie project costs present fairly, in all material respects, the actual costs of J4 Development, LP through June 5, 2022 on the basis of accounting described above." *See* AUP report, Exhibit B. Mr. Childers described that accounting as: "auditing standards generally accepted in the United States of America and the standards applicable to financial audits contained in Government Auditing Standards, issued by the Comptroller General of the United States. Those standards require that I plan and perform the audit to obtain reasonable assurance about whether the project costs are free of material misstatement. An audit includes examining, on a test basis, evidence

[1] As attested to by Mr. Childers in the statement of fact attached as Exhibit C to the AUP report, Mr. Childers reviewed the physical invoices at the GC's office to prepare the GCCC, but did not retain copies of same. For preparation of the AUP report, Mr. Childers met with Petitioner and the CPA to discuss completion of the GCCC and GC invoice vouching. Mr. Childers agreed to complete the AUP report, but subsequently learned that his license for assurance work had lapsed in the interim, preventing him from completing the AUP report. Mr. Childers was nonetheless able to provide: Job Cost Details, Job Cost Overviews, Job Cost Detail by Subcontractors, and template spreadsheets required by the Corporation for completing the GCCC.

supporting the amounts. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. I believe that the overall audit provides a reasonable basis for our opinion." *Id.*

18. Petitioner submitted a draft of the AUP report detailing costs and expenses incurred under the construction contract to the Corporation. As set forth in the AUP report, the CPA took steps to independently verify the costs and expenses incurred by the GC. For example, to arrive at their conclusions, the CPA:

- Obtained from the GC, and recomputed the mathematical accuracy of, the Childers GCCC, which was prepared by the GC using the accrual method of accounting. The CPA examined the mathematical accuracy of the Childers GCCC and found no exceptions.
- Obtained from the Owner a detailed listing of costs incurred by the Project as of December 31, 2021 that are included in the AUP. Using a sampling method, the CPA vouched a sample of costs supporting evidence to verify that the costs were incurred by the Project and the amount, date, and classification of the cost were accurately recorded in the Childers GCCC.
- Obtained from the Owner a detailed listing of costs incurred by the Project as of December 31, 2021 that are included in the AUP. The CPA selected the three largest subcontractors to send direct confirmations to verify that the costs were incurred by the Project and the amount, date, and classification of the cost were accurately recorded in the Childers GCCC. The CPA found no exceptions.

Additional detail regarding the information the CPA was able to verify and how the CPA was

able to verify the costs is contained within the AUP report.

19. The CPA cannot issue an audit opinion here since an audit entails more than simply verifying numbers (*e.g.*, testing internal controls, testing journal entries, performing cash disbursement tests, performing interviews with the GC for fraud and gaining an understanding of their accounting system, obtaining representations from the GC, etc.) and is not possible here. Accordingly, an audit report would violate professional standards and cannot be issued. The GCCC forms contain contractor trade categories that require a level of detail that is not available. No assurances can be provided for the sub-categories because no documentation exists with which to agree the numbers to. Because the Childers GCCC was prepared in conformance with the Corporation's procedures based upon Mr. Childers's personal review of the underlying documentation, and the only thing that has changed is that the underlying documentation is no longer available due to the bankruptcy of the GC and the unresponsiveness of the subcontractors, the AUP – which is based on the Childers GCCC – should be accepted with the same confidence as though the GC had signed the Childers GCCC.

20. Petitioner believes that the procedures performed in conjunction with the AUP report are sufficient to allow completion of the cost certification process and issuance of the Form 8609. Any deficiencies caused by the GC's failure to cooperate would likely only understate the eligible costs and credits. Petitioner's CPA will be issuing an AUP report on the final construction costs of the Development, along with amounts incurred by each subcontractor/vendor by trade line item.

21. Petitioner requests via this Petition that the Corporation waive the requirement that the Final Cost Certification Application Package contain a GCCC and/or CPA opinion letter

and audit report for the GCCC. By granting the Petition, Petitioner will be permitted to instead satisfy the Rule by providing the AUP report prepared by the CPA detailing the costs and expenses incurred by the GC, as presented in the schedule attached to the AUP report.

22. 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.

The controlling statutes and the Corporation'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. Granting the requested variance in this instance would allow Petitioner to finalize the cost certification process and pursue issuance of the housing credits.

23. Additionally, by granting this waiver, the Corporation would recognize the goal of increasing private investment and participation in increasing the supply of affordable housing and promote the 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" as identified in Section 420.5099(2), Fla. Stat., would still be achieved if the variance is granted. The requested waiver serves the purpose of the Statutes that are implemented by the

Rule. The Florida Housing Finance Corporation Act, Section 420.501, *et seq*. ("Act") was passed in order to encourage private and public investment in facilities for persons of low-income. The purpose of the creation of the Housing Tax Credit Program is to stimulate creative private sector initiatives to increase the supply of affordable housing. By granting this waiver, the Corporation would recognize the principles of fundamental fairness in the development of affordable housing.

24. The Corporation has jurisdiction to grant a waiver of the Rule and Petitioner meets the standard for a waiver of the Rule.

25. Petitioner would suffer a substantial hardship if this Petition is denied. Specifically, Petitioner will lose the opportunity to access a large portion of the tax credit equity financing available to the Development if the Petition is not granted. Further, Petitioner would be required to repay all of the capital contribution previously made by the tax credit investor, with interest and penalties, thus causing the Development to fail and for the lender to likely foreclose. Petitioner is unable, through no fault of its own, to obtain the information necessary to complete the FCCAP (*i.e.*, Petitioner cannot provide all of the information required by the GCCC nor obtain an opinion letter or an audit report from the GC's accounting firm), much less obtain the GC's execution of the GCCC. Accordingly, absent the Corporation granting this Petition, it cannot issue Form 8609 to Petitioner.

26. As demonstrated above, the requested waiver serves the purposes of Section 420.5099, Florida Statutes, and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe, and sanitary housing in the State of Florida to low income persons and households.

27. A representative of Petitioner is available to answer any questions should the Corporation require additional information.

G. Type of Waiver.

28. The waiver being sought is permanent in nature.

H. Action Requested.

29. Petitioner respectfully requests that the Corporation:

a. Grant this Petition and all the relief requested therein;

b. Grant a waiver of Rule 67-21.027(6), F.A.C. (06/23/20) to permit submission of the Final Cost Certification Application Package with an Agreed Upon Procedures Report approved by the Corporation instead of: (i) the General Contractor Cost Certification; (ii) a certified public accountant opinion letter; and/or (iii) an audit report prepared by an independent certified public accountant; and

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

Respectfully submitted,

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

CERTIFICATE OF SERVICE

This Petition is being served via e-mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 4th of October, 2024.

*s/ Brian J. McDonough*_____
BRIAN J. MCDONOUGH, ESQ.