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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

PLATFORM 3750 II, LLC

Petitioner,

FHFC Case No.: 2025-046VW

v.

APPLICATION NO. 2020-504C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULES 67-21.026(13)(f) and (h), AND 67-21.027(6), F.A.C. (6/23/2020)

Petitioner, Platform 3750 II, LLC, a Florida limited liability company (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 June 23, 2020. The development was completed last year. Unfortunately, Petitioner had to terminate its General Contractor ("GC") for cause and the GC is no longer in business. Due to the General Contractor's lack of responsiveness, Petitioner is unable to complete the General Contractor Cost Certification ("GCCC") and Petitioner's certified public accountant ("CPA") is unable to provide an opinion letter or audit report for the GCCC without any modifications. Accordingly, Petitioner seeks a waiver to allow the Final Cost Certification Application Package to contain only a CPA agreed upon procedures ("AUP") report, instead of an audit. The AUP report provides stronger assurances than would be provided via an audit. If this Petition is granted, Petitioner will not be required to submit a GCCC.

Separately, Petitioner seeks a waiver of Rules 67-21.026(13)(f) and (h), F.A.C., (6/23/20) and Board approval to amend the conditions under which it was previously granted approval to exceed by approximately 5.44% the 31% cap imposed on the percentage of construction costs that may be subcontracted pursuant to Rule 67-21.026(13)(f)2., F.A.C. (6/23/20). After the Board granted such approval, the GC was terminated for cause and – due to the GC's lack of responsiveness – Petitioner is no longer able to satisfy the conditions for approval of the waiver. Petitioner therefore requests that the AUP instead address information typically confirmed by the GC with respect to the Development Final Cost Certification ("DFCC") and the DFCC audit process. In support of this Petition for Rule Waiver, Petitioner states as follows:

A. THE PETITIONER.

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

Mara Mades
2100 Hollywood Blvd.
Hollywood, FL 33020
Telephone: 305-443-8288
Facsimile: N/A
Email: Mara.Mades@Cornerstonegrp.com

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

Brian J. McDonough, Esquire
Stearns Weaver Miller Weissler
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B. DEVELOPMENT BACKGROUND.

3. Petitioner applied for non-competitive housing credits to assist in the construction

of Platform 3750, a mixed-income, mixed-use, transit oriented affordable housing development (the "Development").

4. The following information pertains to the Development:

- Development Name: Platform 3750
- Development Address: 3750 Dixie Hwy., Miami, FL 33133
- Developer: Cornerstone Group Partners, LLC
- County of Development: Miami-Dade
- Number of Units: 191 units (new construction)
- Type: High Rise
- Set Asides: 77 units at or below 60% AMI; 114 non-tax credit units
- Demographics: Family
- Funding: 4% Non-Competitive Housing Credit annual allotment of $1,163,219

C. RULES FROM WHICH WAIVER IS SOUGHT.

5. Rule 67-21.026(13)(f) and (h), F.A.C. (6/23/2020) provides:

> (13) The General Contractor must meet the following conditions: . . .
> (f) For Developments with a Development category of new construction, unless otherwise approved by the Board for a specific Development, ensure that not more than 20 percent of the construction cost, not to include the General Contractor fee or pass-through fees paid by the General Contractor, is subcontracted to any one entity or any group of entities that have common ownership or are Affiliates of any other subcontractor, with the exception of a subcontractor (or any group of entities that have common ownership or are Affiliates of any other subcontractor): . . .
> 2. Contracted to deliver the building shell of a building of at least five (5) stories which may not have more than 31 percent of the construction cost in a subcontract, unless otherwise approved by the Board for a specific Development; . . . . For purposes of paragraph (f), "Affiliate" has the meaning given in subsection 67-21.002(5), F.A.C., except that the term "Applicant" therein shall mean "subcontractor";
> ***

(h) Ensure that no construction cost is subcontracted to any entity that has common ownership or is an Affiliate of with the General Contractor or the Developer. For purposes of this paragraph, "Affiliate" has the meaning given it in subsection 67-21.002(5), F.A.C., except that the term "Applicant" therein shall mean "General Contractor."

6. Rule 67-21.027(6), F.A.C. (6/23/2020) provides:

> (6) 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. (6/23/2020).

D. <u>STATUTES IMPLEMENTED</u>.

7. The Rules from which waiver is sought implement the statute governing the allocation of federal low-income housing tax credits (Section 420.5099, Florida Statutes), as well as the statute governing revenue bonds (Section 420.509, Florida Statutes).

E. JUSTIFICATION TO PERMIT SUBMISSION OF THE FINAL COST CERTIFICATION APPLICATION PACKAGE WITH AN AUP REPORT.

8. Petitioner submitted its Non-Competitive Application Form, Application No. 2020-504C (the "Application"), to the Corporation on August 13, 2020 and received an invitation to credit underwriting on February 5, 2021.

9. With Petitioner's assistance, the GC was able to achieve a certificate of occupancy ("CO") for the Development. However, due to delays caused by the GC, the CO was issued ten months late.

10. Current Builders, Inc. served as the GC for the Development until it was terminated for cause. The notice of termination was served on March 12, 2024 and became effective seven (7) days later (*i.e.*, March 19, 2024). The GC was terminated for its breach of contract, including: causing delays, being unable to provide the documentation required to close out the Development, and failing to timely pay it subcontractors.

11. The GC assigned it rights, including its right to final payment, to its bonding company, The Travelers Indemnity Company ("Travelers"). Travelers demanded that Petitioner make final payment. However, the GC was not entitled to final payment because the GC was terminated before completing all of the work required under the contract. In response, Travelers filed suit on February 16, 2024. *See Travelers Casualty and Surety Company of America v. Platform 3750II LLC*, Case No. 9:24-cv-80172-AMC (United States District Court for the Southern District of Florida, West Palm Beach Division) (the "Case"). Petitioner filed its counterclaim on April 9, 2024.

12. In the course of litigation, Petitioner and Travelers entered into a settlement

agreement at mediation that resolved the Case.[1] Final payments have been made to Travelers less a set off for the delays to the project and cost incurred by Petitioner. In turn, Travelers paid all of the subcontractors. As part of the settlement of the Case, Petitioner secured from Travelers the following documents: final releases from all subcontractors and internal job cost report.[2]

13. The GC is no longer in business.

14. The GC has not responded to any of Petitioner's efforts to obtain additional documents. Despite multiple requests, the GC has failed to provide the information necessary to complete the Final Cost Certification Application Package ("FCCAP").

15. 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.

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

17. 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.

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[1] At the time the GC was terminated, it owed the Owner for liquidated damages and other costs incurred by the Owner as a result of the GC's breaches and delays. No payments were due to Travelers until this issue was resolved. The parties were able to negotiate a settlement that took this into account.

[2] Travelers did not provide invoices, but rather only the job cost detail. However, based on the confirmations and verifications completed within the AUP procedures and the percentage converge obtained, CohnReznick does not believe such invoices are necessary. CohnReznick received confirmations directly from the subcontractors, and received other information from third-party counsel, and therefore did not need to contact any subcontractors for verification.

18. Petitioner completed construction of the Development and received a CO on October 19, 2023.[3] At present, approximately 98% of the units are occupied.

19. While the closing of the permanent HUD loan financing has already occurred, receipt by Petitioner of the remaining portion of the tax credit investor's capital contributions is dependent upon the issuance of the Form 8609. The Corporation cannot issue Form 8609 until it has reviewed the FCCAP.

20. The costs used in the DFCC and AUP are the sum of the original contract with the GC, plus approved change orders.

21. Despite numerous requests, the GC has failed to execute the GC Certification, and other certificates and affidavits that must be provided to the CPA in order to enable the CPA to issue its opinion letter and audit report. Accordingly, the Corporation has not, and cannot, issue Form 8609.

22. After conferring with the Corporation, Petitioner reached out to Petitioner's independent CPA (CohnReznick LLP) to obtain the subcontractor information necessary to provide a modified contractor cost certification. Since the GC was unwilling to provide access to their accounting records, CohnReznick was unable to prepare an audit of the GCCC. Alternately, an AUP report was deemed to be the best option to provide the Corporation with subcontractor and vendor costs and expenses incurred for the construction of the project. In addition, the procedures calculate the percentage of General Conditions and Contractor profit and overhead charged to the project to ensure they did not exceed the allowable limits established by the

[3] Temporary CO's were issued for the first and second floors on March 30, 2023; for the third and fourth floors on May 5, 2023; for the fifth and sixth floors on May 10, 2023; for the seventh floor on June 19, 2023, and for the eight floor on July 7, 2023.

Corporation. Petitioner submitted a draft of the AUP report detailing costs and expenses incurred under the construction contract to the Corporation. CohnReznick independently verified the costs and expenses incurred by the GC using the procedures outlined in their report. A description of the information CohnReznick was able to verify and how CohnReznick was able to verify the costs to each subcontractor is contained within the AUP report.

23. CohnReznick was able to satisfy Florida Housing's AUP report requirements, as set forth below:

(a) Calculate percentage of costs to GC Costs and Fees to confirm it is at or below 14%

- Procedure # 8 in AUP Draft V.4

(b) Agree the total construction cost in the contract cost schedule to the original contract plus approved change order

- Procedure # 1 in AUP Draft V.4
- This will not agree because of the Settlement Reduction[4]

(c) Test all payments made by owner to contractor

- Procedure # 3 in AUP Draft V.4

(d) Obtain written confirmation of construction amounts from as many subcontractors as possible and report the amount - and compare those amounts to the cost schedule

- Procedure # 4 in AUP Draft V.4

(e) Obtain other documentation of construction amounts for any remaining subcontractors not confirmed and compare those amounts to the cost schedule

- Procedure # 5 in AUP Draft V.4

[4] CohnReznick attempted to essentially agree the costs per the cost contract schedule to the Final AIA pay application, but it would not agree because there was never a final pay application received from the GC for the reasons stated in footnote 1, *supra*. Instead, CohnReznick relied on the fact that the payments made to the GC (via Travelers) equaled the contract cost schedule, which factors in the settlement reduction referenced in footnote 1.

(f) Identify the three largest dollar amount subcontractors based on amounts and confirm those amounts and if they cannot be confirmed, identify how the costs were verified

- Procedure # 6 in AUP Draft V.4

(g) Confirm that the total costs confirmed/verified were at least 40% of the total construction costs

- Procedure # 7 in AUP Draft V.4

(h) Through the confirmations, report how many reported an identity of interest between the subcontractor and the contractor

- Procedure # 9 in AUP Draft V.4
- Note 2 on Page 9 in AUP Draft V.4 also provides additional disclosure.

24. CohnReznick 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. To compensate for this fact, the AUP report provides stronger assurances than an audit would. 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.

25. Due to the GC's refusal to provide the requested documentation and/or cooperate, CohnReznick cannot issue an opinion letter or unmodified audit report and Petitioner is unable to complete the GCCC, much less obtain the GC's signature on the GCCC or other requisite certificates and affidavits; thereby necessitating this Petition for Rule waiver.

26. 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. CohnReznick 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.

27. 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 CohnReznick detailing the costs and expenses incurred by the GC, as presented in the schedule attached to the AUP report.

28. 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.

29. 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.

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

31. 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 a CPA opinion letter and an audit report), much less obtain the GC's execution of the GCCC. Accordingly, absent the Corporation granting this Petition, it cannot issue Form 8609 to Petitioner.

32. 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. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable rental housing.

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

F. JUSTIFICATION FOR ALLOWING AN AFFILIATED SUBCONTRACTOR TO EXCEED THE 31% CAP.

34. The Rules required the GC to ensure that not more than 20 percent of the construction cost was subcontracted to any one entity or any group of entities that had common ownership or were Affiliates of any other subcontractor, with the exception of a subcontractor contracted to "deliver the building shell of a building of at least five (5) stories which may not have more than 31 percent of the construction cost in a subcontract." Here, the subcontractor at issue, CB Structures, Inc. (the "Subcontractor"), which is an affiliate of the GC, was contracted to deliver the concrete shell of a high-rise (*i.e.*, 8-story building) and therefore subject to the 31% cap.

35. On August 18, 2020, the Corporation received a Petition for Waiver of Rules 67-21.003(1)(b), 67-21.026(13)(f) and 67-21.026(13)(h). The Petition requested the Corporation's approval for Petitioner to apply for the non-competitive housing credits early, to allow the GC to contract the shell work to an affiliated Subcontractor,[5] and for the costs of the shell work to exceed the 31% limitation. The request was approved at the Corporation's September 4, 2020 Board Meeting. The Corporation's Board approved the request for the affiliated Subcontractor to perform the shell work and to exceed the 31% limitation, under the following conditions:

(a) All costs for the affiliated work attributable to the affordable units will be at cost with no profit or other fees built in ("Requirement A");

(b) The General Contractor Fee on the affiliated costs attributable to the affordable units will be capped at 10% ("Requirement B");

[5] CB Structures is an affiliate of Current Builders and is the only subcontractor that exceeded the cap.

(c) An independent CPA will confirm/audit all payments between the Affiliate entities and will verify 100% of the work performed by the Affiliate entity ("Requirement C"); and

(d) As part of the cost certification process, in addition to confirming/auditing all payments between the Affiliate entities, an independent CPA will confirm and/or verify an additional 40% of the Development's costs per the Final Cost Certification Application Package ("Requirement D").

Because the GC has become non-responsive, Petitioner seeks relief from the bolded requirements so that it may instead rely upon the AUP. CohnReznick was able to confirm the subcontract attributes with the Subcontractor, which would be addressed as part of the of AUP. However, because CohnReznick could not confirm with the GC the totality of the GC's contract (including subcontractors) with regard to the DFCC, the AUP will rely on the accumulation of all subcontractor confirmations, lien claim releases, etc., obtained as part of the AUP process. While CohnReznick will seek to achieve the highest percentage possible for DFCC audit purposes, it will ensure at least 40% coverage in excess of the affiliate entities as part of the AUP. The following specifically addresses each of the conditions of the Board's prior approval of the requested waiver:

(a) with respect to Requirement A, CohnReznick is unable to verify the cost for affiliated work attributable to the affordable units were "at cost."

(b) Because the overall GC fees are below 10%, CohnReznick believes this should be sufficient to satisfy the Requirement B.

(c) CohnReznick believes Procedure (c) in Paragraph 23, *supra* (*i.e.*, "(3) Test all payments made by owner to contractor") satisfies Requirement C.

(d) CohnReznick similarly believes that Procedure (g) of paragraph 23 (*i.e.*, "(7) Confirm that the total costs confirmed/verified were at least 40% of the total construction costs") satisfies Requirement D.[6]

[6] As part of the mediation process, the owner was able to get the Subcontractor to comply and respond to CohnReznick's confirmation inquiry. CohnReznick received the Subcontractor's response, which was limited to the total amount of the subcontract (including change orders) and payments made thereof. CohnReznick was able to see payments made to the general contractor in amounts equaling the final agreed upon contract amount. However, CohnReznick could not verify that those payments were made to the subcontractors because CohnReznick was unable to gain

To the extent the foregoing does not satisfy the terms under which the Board previously approved the requested waiver, Petitioner seeks Board approval to amend the terms under which the Rule waiver was granted.

36. The AUP report reflects that the construction contract costs for the Subcontractor totaled approximately $17,005,105. The AUP also reflects the total subcontractor costs are approximately $46,620,875.[7] Accordingly, the affiliated subcontractor exceeded the 31% Subcontractor Cap by approximately 5.44%[8] and Petitioner respectfully requests Board approval as contemplated by Rule 67-21.026(13)(f)2., F.A.C. with the foregoing amended conditions.

G. WAIVER IS PERMANENT.

37. The waiver being sought is permanent in nature.

H. ACTION REQUESTED.

38. 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. (6/23/2020) to permit submission of the Final Cost Certification Application Package with an Agreed Upon Procedures Report 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;

c. Petitioner also requests Board approval to amend the terms under which the requirements of Rule 67-21.026(13)(f)2. and (h), F.A.C. (6/23/20) were waived such that the affiliated subcontractor may exceed the 31% Subcontractor Cap with reference to the AUP; and

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access to any records of the general contractor. Nonetheless, all subcontractors have presumably been paid based upon lien releases/confirmations CohnReznick was able to receive and the presumption that there are no current outstanding claims.

[7] This amount reflects the total costs excluding GC Costs and Fees in the Contract Cost Schedule.

[8] This percentage was calculated based upon the most recent draft AUP report provided to FHFC and will not change substantially between now and FHFC's final approval of the AUP report.

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

39. Petitioner recognizes that the foregoing request would be granted subject to the following conditions:

a) All costs for the affiliated work attributable to the affordable units will be at cost with no profit or other fees built in.

b) The General Contractor Fee on the affiliated costs attributable to the affordable units will be capped at 10%.

c) No developer fee will be allowed on the amount paid to the affiliated subcontractor.

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 7th of October, 2025.

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