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FLORIDA HOUSING
FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Southwick Commons, Ltd.,
a Florida limited partnership,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

FHFC CASE NO. 2025-004VW
Application No. 2021-269SN/2020-543C/2023-248V
RFA No. 2020-205/2023-211

PETITION FOR WAIVER OF RULES 67-48.0072(12), (17)(f) F.A.C. (6-23-20) AND 67-21.026(10), (13)(e) (6-23-20)

Petitioner Southwick Commons, Ltd., a Florida limited partnership ("Petitioner") submits this Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of Rules 67-48.0072(12) and 67-21.026(10), Florida Administrative Code ("F.A.C.") (eff. 6-23-20) requiring a singular guaranteed maximum price construction contract ("GMP"), and Rules 67-48.0072(17)(f) and 67-21.026(13)(e), F.A.C. (eff. 6-23-20) requiring that no construction or inspection work that is normally performed by subcontractors is performed by the General Contractor (collectively, the "Rules"). After securing contracts and estimates for the development, including sitework, Petitioner was forced to sue the City of Apopka. Though Petitioner ultimately prevailed, the two-year delay caused by the litigation required all contracts and estimates to be renewed. Due to sky-rocketing costs and interest rates in the interim, Petitioner had to find cost-saving measures to keep the development viable. One such measure involved Petitioner directly engaging the sitework subcontractor to instead act as the sitework General Contractor ("GC"), which caused Petitioner to have two GMP contracts. Additionally, in order to secure the cost-savings, the sitework GC self-performed work that is normally

performed by subcontractors. Petitioner therefore respectfully requests a waiver of the Rules and states as follows in support:

A. THE PETITIONER

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

Jonathan L. Wolf
1105 Kensington Park Dr. Suite 200
Altamonte Springs, FL 32714
Telephone: 407.333.3233 ext 202
FAX: N/A
Email: jwolf@wendovergroup.com

2. The name, address, telephone and facsimile numbers for Petitioner's attorneys are:

Brian J. McDonough, Esq.
Stearns, Weaver, Miller, Weissler,
Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Telephone: (305) 789-3350
Facsimile: (305) 789-3395
E-Mail: bmcdonough@stearnsweaver.com

Bridget Smitha
Stearns, Weaver, Miller, Weissler,
Alhadeff & Sitterson, P.A.
106 E. College Ave. Suite 700
Tallahassee, FL 32301
Telephone: (850)329-4852
Facsimile: (850) 329-4864
E-Mail: bsmitha@stearnsweaver.com

B. THE DEVELOPMENT

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

- Development Name: Southwick Commons
- Development Address: Approximately 175ft Southeast of the intersection of E 6th St. and Alabama Ave., Apopka
- County: Orange County
- Developer: Southwick Commons Property Developer, LLC
- Number of Units: 192 Units (New Construction)

- Type: Garden Apartments
- Set Asides: 29 units @ or below 30% AMI; 120 units @ or below 60% AMI; 43 units @ or below 80% AMI, 5 units @ or below 22% AMI
- Demographics: Family
- Funding: $7,000,000 SAIL; $2,131,814 (4% HC); $1,089,548 (NHTF); $600,000 (ELI); $6,310,452 (Viability)

C. PERMANENCY

4. The waiver being sought is permanent in nature.

D. RULES FROM WHICH WAIVER IS SOUGHT

5. Petitioner requests a waiver from Rule 67-48.0072(12) and (17)(f), F.A.C. (6/23/20), which provides, in relevant part, as follows:

> (12) 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.
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> ***
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> (17) The General Contractor must meet the following conditions: . . . .
>
> (f) Ensure that no construction or inspection work that is normally performed by subcontractors is performed by the General Contractor;**
>
> ** On April 29, 2022, during the 2022 rule development process, the Board approved a change in the Rule to allow the General Contractor to self-perform a limited amount of work as follows: "Ensure that no construction or inspection work is performed by the General Contractor, with the following exceptions: (i) the General Contractor may perform its duties to manage and control the construction of the Development; and (ii) the General Contractor may self-perform work of a de minimis amount, defined for purposes of this paragraph as the lesser of $350,000 or 5 percent of the construction contract." As part of the Board's action, the Board also approved the this portion of the rule to be applied to developments that had previously submitted applications under prior rule

versions. Thus, while the Development applied subject to the 2020 version of the Rule, the 2022 version may apply in this instance based on the Board's action.

Petitioner also seeks a waiver of Rule 67-21.026(10) and (13)(e), F.A.C. (6-23-20), which states in pertinent part:

> (10) 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.
>
> ***
>
> (13) The General Contractor must meet the following conditions: . . . .
>
> (e) Ensure that no construction or inspection work that is normally performed by subcontractors is performed by the General Contractor;**
>
> ** On April 29, 2022, during the 2022 rule development process, the Board approved a change in the Rule to allow the General Contractor to self-perform a limited amount of work as follows: "Ensure that no construction or inspection work is performed by the General Contractor, with the following exceptions: (i) the General Contractor may perform its duties to manage and control the construction of the Development; and (ii) the General Contractor may self-perform work of a de minimis amount, defined for purposes of this paragraph as the lesser of $350,000 or 5 percent of the construction contract." As part of the Board's action, the Board also approved the this portion of the rule to be applied to developments that had previously submitted applications under prior rule versions. Thus, while the Development applied subject to the 2020 version of the Rule, the 2022 version may apply in this instance based on the Board's action.

E. STATUTES IMPLEMENTED BY THE RULES

6. The Rules implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"), Section 420.5087 (State Apartment Incentive Loan Program), Section 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund), and Section 420.5099 (Allocation of the low-income housing tax credit, Florida Statutes. Per Section 420.5099(1)-(2), Fla. Stat., the Corporation acts as the State's housing credit agency

and is authorized to establish procedures for allocating and distributing low-income housing tax credits.

F. JUSTIFICATION FOR WAIVER

7. After Petitioner secured contracts and estimates for the Development, the City of Apopka ("City") unlawfully attempted to block the Development in violation of the Florida Fair Housing Act.

8. The City originally supported the Development as evidenced by the City signing the *Florida Housing Financing Corporation Local Government Verification that Development is Consistent with Zoning and Land Use Regulations* (the "Verification"), on November 4, 2020. In the Verification, the City certified that the Development's "proposed number of units, density and intended use are consistent with current land use regulations and zoning designations." The Verification also provided that the Property could be developed with 195 units pursuant to the City's land development regulations. The Verification was provided by the City and submitted as part of Petitioner's Application for funding. As a result, Petitioner expected the City to fully cooperate with the approvals necessary for the Development.

9. Instead, the City turned against the Development for unlawful reasons and refused to provide the necessary approvals. On June 16, 2022, Petitioner filed an action in the Ninth Judicial Circuit Court seeking injunctive relief and damages against the City for violations of the Florida Fair Housing Act, Florida Statutes §§760.26 and 760.35.

10. On November 28, 2022, a Final Judgment was entered in favor of Petitioner and against the City. The Final Judgment found that the City was in violation of Section 760.26, Florida Statutes (2022) and permanently enjoined the City from the restrictions on the Development.

11. In the interim while litigation was pending, Petitioner's contracts and estimates became outdated and had to be refreshed. Unfortunately, because costs and inflation significantly increased, in part due to reverberations from the COVID pandemic, the Development was no longer viable and Orange County was at substantial risk of losing the 192 affordable housing units that the Development would provide. Accordingly, in order to balance the deal and get through credit underwriting, Petitioner was forced to implement cost saving measures.

12. One such measure was to contract directly with the sitework subcontractor. The GC for the Development is VCC, LLC ("VCC"). VCC originally contracted with Jon M. Hall Company, LLC ("JMHC") on October 13, 2023, to perform the necessary sitework for the Development as a subcontractor. On April 15, 2024, Petitioner contracted directly with JMHC. By Petitioner subsequently contracting directly with JMHC, Petitioner obtained a savings of $677,223.00, but JMHC was converted from a subcontractor into a GC. JMHC performed the same scope and work that it would have performed as a subcontractor of VCC. However, by instead being engaged as a separate GC, Petitioner was able to eliminate VCC's 14% markup for contractor overhead, conditions and profits on the sitework line item in the construction contract with VCC. Put simply, the only difference between JMHC contracting directly with Petitioner as opposed to VCC is that Petitioner recognized a cost savings of $677,223.00 instead of paying it to VCC. But for this cost-saving, the Development would not have survived the credit underwriting process and would not have been constructed.

13. Petitioner thereafter submitted a formal request letter to the Corporation dated August 28, 2024 to add JMHC as the sitework contractor, separate from VCC's executed Form of Agreement Between Owner and Contractor.

14. Because this occurred after the transaction closed on March 19, 2024, AmeriNat provided the Corporation with a first draft of a Credit Underwriting Report Update Letter ("CUL") dated December 18, 2024 and related to underwriting JMHC.

15. The CUL relied in part on a report prepared by GLE Associates, Inc. ("GLE") outlining GLE's review of documentation related to the sitework completed by JMHC at the Development. GLE opined, based on their review of the change orders and documents listed in the CUL, that the scope and cost of the sitework performed by JMHC at the Development was reasonable.

16. AmeriNat recommended that the Corporation consent to and approve the use of JMHC for the sitework performed at the Development, subject to the conditions set forth in the CUL and Board approval.

17. Because the contract with JMHC is considered to be a second GMP contract, Petitioner respectfully requests a waiver of Rules 67-48.0072(12) and 67-21.026(10), F.A.C. (eff. 6-23-20).

18. In order to obtain the cost-savings necessary to make the Development viable, JMHC was converted from the sitework contractor to the sitework GC (*i.e.*, it was the removal of VCC's contractor overhead, general conditions, and profit costs in the construction contract that created the cost-savings). The sitework comprised 10.19% of the entire contract and JMHC performed approximately 69.1% of the sitework. Due to the nature of sitework and the nuances involved, sitework contracts self-perform most of the work. For example, JMHC owns the heavy equipment needed for the horizontal work, and employs experienced professionals licensed to use such equipment. JMHC therefore recognizes a substantial cost-savings for the Development by self-performing the sitework. Additionally, JMHC was able to prevent

scheduling delays by using its own equipment and employees.[1] If JMHC had remained a subcontractor, it would not have been a problem for it to self-perform 69.1% of the sitework because the sitework comprised such a small percentage of the total costs. It was only by breaking out the sitework into a separate contract – as necessary for the Development to remain viable – that the percentage increased. The sitework is now complete. The total amount being contracted to JMHC was $4,005,733.90, of which $2,493,011 was self-performed. All profit and administration fees are built into the per unit cost of JMHC's contract.

19. Because the contract with JMHC is self-performing the site work, Petitioner respectfully requests a waiver of Rules 67-48.0072(17)(f) and 67-21.026(13)(e), F.A.C. (eff. 6-23-20).

20. Under Section 120.542(1), Florida Statutes, and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers must be granted when: (1) the person who is subject to the rule demonstrates that the application of the rule would create a substantial hardship or violate principles of fairness, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. *See* Section 120.542(2), Florida Statutes.

21. In this instance, Petitioner meets the standards for the requested waiver. The requested waiver will not adversely impact the Development or the Corporation and will ensure that 192 affordable housing units will be preserved and made available for the target population in Orange County, Florida. Further, the waiver will serve the purposes of the Statute and the

[1] Where the GC controls its own labor pool, there is no downtime or scheduling gaps as the GC's labor can immediately flow from one project to the next within the same development. In contrast, where the work is subcontracted, the GC must wait for the subcontractor to have room in its schedule to come to the development.

Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State.

22. Should the Corporation require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

G. RELIEF REQUESTED

WHEREFORE, Petitioner Southwick Commons, Ltd. respectfully requests that the Corporation:

a. Grant Petitioner the requested permanent waiver from Rules 67-48.0072(12), (17)(f) F.A.C. (6-23-20) and 67-21.026(10), (13)(e) (6-23-20) such that Petitioner may have two GMP contracts and the General Contractor is permitted to perform work that is ordinarily performed by subcontractors;

b. Grant the Petition and all the relief requested therein; and

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

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
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By: *s/ Brian J. McDonough*
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition is being served via e-mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with copies served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 8th of January, 2025.

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