STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING FINANCE CORPORATION

EHDOC Council Towers Limited Partnership,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2028-055VW
Application No. 2018-516C

v.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-21.027(6), F.A.C. (eff. 7/8/18) AND THE CORPORATION BOARD'S ORDER OF JANUARY 27, 2023

Petitioner, EHDOC Council Towers 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), effective July 8, 2018 ("Rule"). Upon the enactment of COVID-related local ordinances and restrictions, Petitioner determined that its general contractor at the time (the "Original GC") had to be replaced. Though the Original GC was required to complete a cost certification as part of the severance agreement, it unfortunately used Form HUD-92330-A ("HUD Cost Certification") instead of the General Contractor Cost Certification ("GCCC") and the Original GC is no longer in existence (and therefore cannot execute a GCCC). Nonetheless, the HUD Cost Certification has been audited by a certified public accountant ("CPA") and otherwise complies with the spirit and intent of the Rule. Because the cost certification was not completed on the form required by the Rule and by the Corporation Board's

Order of January 27, 2023,[1] Petitioner respectfully seeks a waiver with respect to a relatively small portion (*i.e.*, 7%) of the project's overall costs. If this Petition is granted, Petitioner will be permitted to rely upon the HUD Cost Certification and an Agreed-Upon Procedures Report ("AUP") instead of submitting a separate GCCC.

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:

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President and CEO
Elderly Housing Development and Operations Corporation
1200 S. Pine Island Road, Ste 300
Plantation, FL 33324
Phone: 954-835-9200
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mribeiro@ehdoc.org

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. The following information pertains to the development underlying Petitioner's

[1] The HUD Cost Certification was completed by the Original GC on March 24, 2021. Petitioner has been unable to subsequently obtain a GCCC from the Original GC as required by the Rule and January 27, 2023 Order because the Original GC is no longer in business.

application ("Development"):

- Development Name: Council Towers North & South
- Development Address: 533 & 1040 Collins Ave., Miami Beach, FL 33139
- County: Miami-Dade
- Developers: EHDOC Development Services, LLC and SCG Development Partners, LLC
- Number of Units: 250 acquisition/rehab
- Type: High Rise
- Set Asides: 100% of units at 60% AMI or lower
- Demographics: Elderly; Non-ALF
- Funding: $4,500,000 (Completion Bonds) ($3,646,146 in 4% Housing Credit)

C. RULE FROM WHICH WAIVER IS SOUGHT.

4. Rule 67-21.027 (6), F.A.C. (7/8/18) 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, 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 unqualified 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 05-2018, 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-09540, or by contacting the Housing Credit Program at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1321.

Id. (emphasis added).

D. STATUTES IMPLEMENTED.

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

E. JUSTIFICATION.

6. Petitioner submitted a non-competitive application for the Development in May 2019.

7. The financial closing on the Property occurred on June 4, 2020, with renovation commencing shortly thereafter.

8. Almost immediately after commencement of renovation, the Development began to experience substantial timing delays because of COVID-related local ordinances and restrictions enacted by the City of Miami Beach relating to construction and renovation protocols, specifically for in-place renovations like the Development.

9. As a result of these restrictions, it was determined that the Original GC, who was based in California, would not be able to perform its duties as planned under the contract and was replaced with a more qualified general contractor who had offices in Florida, and significant experience with both the Corporation and the U.S. Department of Housing and Urban Development ("HUD").

10. Petitioner began working with HUD to replace the Original GC in January of 2021, which process took approximately six months.

11. In order to remove the Original GC, and as part of severance negotiations, Petitioner

had to pay various fees, expenses, etc., to the Original GC, which ended up totaling more than 14% of the cost incurred by the Original GC. The severance costs were all billed against the Contractor's and/or Mortgagor's Cost Breakdown form (form HUD-2328) for HUD's purposes (amongst the General Contractor Fees), which resulted in these line items totaling substantially above the 14% cap. This was necessary to allow the renovation to move-forward.

12. The new general contractor was able to "step-into-the-shoes" of most of the previously incurred subcontractor costs but, due to the nature of the General Contractor Fees billed by the Original GC as part of the severance, the new general contractor was not able to absorb most or all of these costs. This duplicative billing of General Contractor Fees (to separate general contractors) required Petitioner to submit, on January 20, 2023, a petition for waiver of Rules 67-21.003(1)(B) and 67-21.026(12)(B), F.A.C. (eff. 7/8/18) and the Non-Competitive Application Instructions (Rev. 05-2018) to allow the maximum combined General Contractor Fees to exceed 14% of the actual construction cost.

13. The requested waiver was granted by the Corporation's Board on January 27, 2023 ("Order") on the condition that, among other things, the Original GC complete and execute the GCCC for the work that it completed.

14. The Corporation has completed its review of Petitioner's second draft Final Cost Certification Application Package ("FCCAP"), but is unable to move forward because the Original GC submitted its cost certification using the HUD Cost Certification instead of the GCCC required by the Rule and Order.

15. When the Original GC completed the cost certification (nearly two years prior to the Order), it used the HUD Cost Certification because the majority of the payments were part of the HUD draws. In fact, of the $1.59M incurred under the agreement with the Original GC,

approximately $1.1M were HUD draws for HVAC and electrical.

16. The Original GC completed the HUD Cost Certification on March 24, 2021 in conjunction with the severance agreement, which involved many lawyers and months of back and forth. To date, Petitioner has been unable to obtain a GCCC from the Original GC as the Original GC is no longer in business. Accordingly, Petitioner is in need of a Rule waiver to allow use of the HUD Cost Certification to satisfy the general contractor cost certification requirement of the Rule and Order.

17. The HUD Cost Certification has been audited by a CPA and otherwise complies with the purpose of the Rule. Petitioner's CPA prepared an AUP report to satisfy comments received from the Corporation during the second review of the FCCAP. Specifically, the CPA:

a. obtained the following documents related to the construction contract: a summary of total construction costs incurred (the Construction Cost Schedule), the construction contract dated June 4, 2020 between T. Morrissey Corporation and EHDOC Council Towers Limited Partnership (the Construction Contract), all approved change order forms (Approved Change Orders), and final Form AIA G702 -Application for Payment (Final Payment Application), and found no exceptions as a result of the procedures performed.

b. agreed the costs reported in the Construction Cost Schedule to the Construction Contract plus Approved Change Orders, and to the Final Payment Application, and found no exceptions as a result of the procedures performed.

c. recalculated the percentage of General Requirements, Overhead and Profit to Total Actual Construction Costs reported in the Construction Cost Schedule, and found no exceptions as a result of the procedures performed.

d. obtained a summary of all payments made by the Partnership under the terms of the Construction Contract (Payment Summary Schedule); for each payment, the CPA agreed the vendor and amount to underlying payment support, including check copy, bank statement(s), escrow disbursement schedule(s), and/or the executed closing statement, and noted a difference of $41 between the Payment Summary Schedule and Construction Cost Schedule.

e. obtained a summary of all subcontractor costs incurred in connection with the contract (Subcontractor Summary Schedule); the CPA selected the three largest subcontractors listed in the Subcontractor Summary Schedule and sent a written confirmation request to each. For each returned confirmation, the CPA agreed the amount reported in the written confirmation to the Subcontractor Summary Schedule. For any selected subcontractor that did not return a written confirmation, the CPA obtained the final executed payment application and final release of lien. The CPA noted a difference of $504 between the Payment Summary Schedule and Subcontractor Summary Schedule. Confirmation requests were sent to Electric Company of S. Florida Inc. and Monogram Windows and Doors, but were not returned.

f. will recalculate the percentage of confirmed costs as a percentage of total construction costs; the CPA found no exceptions as a result of the procedures performed.

g. will inspect the returned subcontractor confirmations to identify if the confirmation reported an identity of interest between the subcontractor and the contractor. The CPA found no exceptions as a result of the procedures performed.

18. The costs certified under the HUD Cost Certification comprise a mere 7% of the total amount paid for construction. Specifically, the total amount of costs incurred under the agreement with the Original GC (paid to third parties, and not directly to the Original GC for overhead, fee, etc.) is approximately $1.59M and the total cost of construction was approximately $23.2M.

19. 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.

20. 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.

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

22. 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 to obtain a GCCC executed by the Original GC necessary to complete the FCCAP. Accordingly, absent the Corporation granting this Petition, it cannot issue Form 8609 to Petitioner.

23. 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.

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

F. <u>WAIVER IS PERMANENT</u>.

25. The waiver being sought is permanent in nature.

G. <u>ACTION REQUESTED</u>.

26. 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. (7/8/2018), and the Corporation Board's Order of January 27, 2023, to permit submission of the HUD Cost Certification form instead of the General Contractor Cost Certification form; 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 17th of November, 2025.

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