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FLORIDA HOUSING FINANCE CORPORATION

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Osprey Sound Apartments, L.P.,
a Florida limited partnership,

Petitioner,

vs.

FHFC CASE NO. 2025-001VW
Application No. 2021-107B/2023-258V

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-21.003(8)(i), F.A.C. (05/18/21)

Petitioner, Osprey Sound Apartments, L.P. ("Petitioner"), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code ("F.A.C."), hereby petitions Florida Housing Finance Corporation ("Florida Housing") for a waiver from the provisions of Rule 67-21.003(8)(i), F.A.C. (05/18/2021) (the "Rule") to revise the Total Set-Aside Percentage reflected in the Application for the Multifamily Mortgage Revenue Bond ("MMRB") program from 100% of the total units at or below 60% of the area median income ("AMI") to 40% of the total units at or below 60% AMI so Petitioner may adopt the Average Income Test for the Development. In support, Petitioner states as follows:

I. Petitioner

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

Jonathan Gruskin
Osprey Sound Apartments, L.P.
210 University Blvd, Suite 460
Denver, CO 80206
Phone: 303-489-7187
Fax: n/a

Email: yoni.gruskin@ulyssesdevelopment.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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II. The Development

3. The following information pertains to the development ("Development") underlying Petitioner's non-competitive application number 2021-107B/2023-258V ("Application"):

- Development Name: Osprey Sound Apartments
- Development Address: 1401 Duskin Avenue, Orlando, FL 32839
- County: Orange
- Developer: Osprey Sound Developer, LLC
- Number of Units: 294 newly constructed units were identified in the Application, but, by Order dated October 27, 2023, Florida Housing's Board approved a decrease to 100 units for the first phase of construction.
- Type: Mid-rise 4 stories
- Set Asides: in the Application, Petitioner identified a set aside of 100% at or below 60% AMI under the MMRB and Housing Credits programs. Petitioner submitted a formal request to change the minimum Federal set-aside commitment from 40% @ 60% AMI to Average Income Test election. Under the Average Income Test, the set-asides are 30 Units @ 50% AMI, 52 Units @ 60% AMI, and 18 Units @ 70% AMI. This Petition respectfully requests a Rule waiver to reduce the total MMRB set-aside commitment from 100% @ 60% AMI to 40% at or below 60% AMI to allow for Average Income Test under the Housing Credits program.
- Demographics: Elderly Non-ALF

- Funding: $22,380,000 Corporation-issued Multifamily Mortgage Revenue Bond; $2,506,340 4% Non-Competitive Housing Credits (annual amount); $4,300,000 Viability Loan Funding[1]

III. Type of Waiver

4. The waiver being sought is permanent in nature.

IV. Rule From Which a Waiver is Requested

5. Petitioner seeks a waiver in relation to Rule 67-21.003(8)(i), F.A.C. (5/18/21)

which provides:

> (8) Notwithstanding any other provision of these rules, there are certain items that must be included in the Application and cannot be revised, corrected or supplemented after the Application is deemed complete. Those items are as follows: . . .
>
> (i) The Total Set-Aside Percentage as stated in the total set-aside breakdown chart for the program(s) applied for in the Set-Aside Commitment section of the Application; notwithstanding the foregoing, the Total Set-Aside Percentage may be increased after the Applicant has been invited to enter Credit Underwriting, subject to written request of an Applicant to Corporation staff and approval of the Corporation. With regard to said approval, the Corporation shall consider the facts and circumstances, inclusive of each Applicant's request, in evaluating whether the changes made are prejudicial to the Development or to the market to be served by the Development;

V. Statutes Implemented by the Rule

6. The Rule implements sections of the Florida Housing Finance Corporation Act; specifically:

- § 420.502 (Legislative findings)
- § 420.507 (Powers of the corporation)
- § 420.508 (Special powers; multifamily and single-family projects)
- § 420.509 (Revenue bonds)

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[1] ***The final annual credit amount is subject to change pending issuance of the final credit underwriting report anticipated January 3, 2025.***

- § 420.5099 (Allocation of the low-income housing tax credit)

VI. Justification for Granting Waiver of the Rule

7. During its 2018 session, the United States Congress passed the "Consolidated Appropriations Act, 2018" ("H.R. 1625"), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

> (C) Average income test
>
> (i) In general
> The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.
>
> (ii) Special rules relating to income limitation
>
> For Purposes of clause (i)—
>
> (I) Designation.
> The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause
>
> (II) Average test
> The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income
>
> (III) 10-percent increments
> **The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income**.

Section 42(g)(1)(C), I.R.C. (2018) (emphasis added). This subsection remains in effect today. *See* 26 U.S.C. § 42(g)(1)(c).

8. Rule 67-21.027(1), F.A.C., was revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. At the time of the Application and at present, Rule 67-21.027(1), F.A.C., continues to provide: "Each Housing Credit Development shall comply with

the minimum Housing Credit Set-Aside provisions, as specified in Section 42(g)(1) of the IRC. Further, each Housing Credit Development shall comply with any additional Housing Credit Set-Aside chosen by the Applicant in the Application." As a result, any applications for housing tax credits submitted to Florida Housing after July 8, 2018 are allowed to use the average income test provisions of the IRC.

9. In the Application, Petitioner identified a set aside of 100% at or below 60% AMI. By this Petition, Petitioner seeks to change the minimum set-aside commitment from 40% at 60% AMI to the Average Income Test. Because this request would decrease the total set-aside percentage committed to in the Application under the MMRB program, Petitioner is in need of a Rule waiver to allow the Petitioner to elect the Average Income test under the Housing Credits program.

10. It would violate principles of fairness and put Petitioner at a competitive disadvantage with other developments if it is not allowed to use the average income test permitted by Section 42(g)(1) of the IRC and Rule 67-21.027(1), F.A.C.

11. 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.

12. Granting the requested waiver in this instance would allow Petitioner to utilize the average income test as permitted pursuant to the Internal Revenue Code and Rule 67-21.027(1), F.A.C. The controlling statutes and Florida Housing'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.

13. Additionally, by granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing and recognize the economic realities and 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 §420.5099(2), Fla. Stat., would still be achieved if the waiver is granted.

14. In this instance, Florida Housing has jurisdiction to grant a waiver of the Rule and Petitioner meets the standards for a waiver of the Rule.

VII. Action Requested

15. WHEREFORE, Petitioner respectfully requests that Florida Housing:

a. Grant this Petition and all relief request therein;

b. Grant a waiver from Rule 67-21.003(8)(i), F.A.C. (05/18/21) and allow for the MMRB set-aside commitment to be decreased from 100% of the total units at or below 60% AMI to 40% of the total units at or below 60% AMI to allow utilization of the average income test for the 4% Housing Credits; and

c. Grant 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 3rd day of January, 2025.

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