STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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MALIBU BAY PRESERVATION, LTD.,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-034VW
Application No. 2019-532C

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.
_____/

**PETITION FOR WAIVER OF RULE 67-21.026(13)(e), F.A.C. (07/06/2022)**

Malibu Bay Preservation, Ltd. (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of Florida Housing's general prohibition against the General Contractor ("GC") self-performing work that exceeds $350,000 or 5 percent of the construction contract. *See* Rule 67-21.026(13)(e), Florida Administrative Code ("F.A.C.") (eff. 07/06/2022) (the "Rule"). At the time of the contract signing, the GC did not intend to self-perform, and submitted pricing based upon solicited quotes with turn-key subcontractors. However, because the project involved rehabilitation of occupied units, it subsequently became necessary for the GC to supplement certain key trades in order to: (a) minimize and mitigate risk in occupied units considering the demographic level of tenants, (b) meet the accelerated project delivery timeline, and (c) maintain the budget by providing self-performing foremen with industry-specific knowledge to run division crews provided by contracted subcontractors. Because the $350,000 cap was exceeded (by less than $2k), Petitioner respectfully requests a Rule waiver. In support thereof, Petitioner states as follows:

## A. THE PETITIONER

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

Malibu Bay Preservation, Ltd.
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2. The address, telephone, and facsimile number and e-mail address of Petitioner's counsel is:

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## B. WAIVER IS PERMANENT

3. The waiver being sought is permanent in nature.

## C. DEVELOPMENT BACKGROUND.

4. Petitioner provides the following background information related to its Application submitted on June 9, 2020 and revised on July 1, 2020:

- Development Name: Malibu Bay Apartments
- Development Address: 750 Malibu Bay Drive, West Palm Beach, FL
- County: Palm Beach

- Developer: Malibu Bay Developer LLC
- Number of Units: 264 rehab
- Type: Garden Apartments
- Set Asides: 100% of units at 60% AMI or less
- Demographics: Family
- Funding: $1,676,697 Non-Competitive HC funding request (annual amount)

**D. THE RULE FROM WHICH WAIVER IS REQUESTED**

5. At the time of Petitioner's Application the Rule provide in relevant part:

(13) The General Contractor must meet the following conditions:

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(e) Ensure that no construction or inspection work that is normally performed by subcontractors is performed by the General Contractor;

*See* Rule 67-21.026(13)(e), F.A.C. (7/11/19).

6. On April 29, 202, 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 rule to be retroactively applied to developments that had previously submitted applications under prior rule versions. Thus, while the Development applied subject to the 2019-version of the Rule, the 2022-version may apply in this instances based on the Board's action.

**E. STATUTE IMPLEMENTED BY THE RULE.**

7. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), Section 420.5099, Allocation of the low-income housing tax credit. Per Section 420.5099(1)-(2), Fla. Stat., Florida Housing 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 GRANTING WAIVER OF THE RULE.**

8. When the contract was signed and the related documents assembled, the GC did not expect to self-perform various divisions. The pricing was therefore based on solicited quotes with turn-key subcontractors. Through execution of the contract, mobilization, and the buyout process, it became evident that the GC would be required to supplement certain key trades in order to: (a) minimize and mitigate risk in occupied units considering the demographic level of tenants, (b) meet the accelerated project delivery timeline, and (c) maintain the budget by providing self-performing foremen with industry-specific knowledge to run division crews provided by contracted subcontractors.

9. Via the negotiation of contracts with key subcontractors with regard to cabinets, HVAC, painting, flooring and specialties divisions, the GC was able to tap into the subcontractor's sub-level crews at a cost point that allowed the project to satisfy the contract. The negotiated arrangement of sub-level crews was presented as an option less crew foremen. The GC's company size and depth of talent allowed it to swiftly put into motion the self-performance of experienced foremen necessary to bridge the gap. The synergies created was a key factor in bringing the project together, with the least amount of impact on tenants, and at the lowest possible cost.

10. The self-performed work included providing hands-on foremen to run crews in the divisions of (a) Resilient Flooring, (b) Painting, (c) Cabinetry/Countertops, (d) HVAC, and (e) Specialties; specifically:

a) Resilient Flooring: The GC's foremen managed the labor-only crews of Labor for Hire, Inc. (a subcontractor) with respect to entering occupied units to dust proof units, remove flooring, haul debris (from units through the complex to the dumpsters), and deliver new flooring material to the skilled installation subcontractor.

b) Painting: The GC's foremen managed paint subcontractor labor crews with regard to work being performed at various buildings at the same time requiring oversight of safety, logistics, material ordering/availability, equipment, and quality control.

c) Cabinetry/Countertops: The GC's foremen managed demolition and interior renovation subcontractor labor crews in accessing occupied units to dust proof units, demolish/remove cabinets and tops, haul debris (from units through the complex to the dumpsters), stage and deliver new cabinets/tops, and install drywall modifications and repairs.

d) HVAC: The GC's foremen managed Labor for Hire, Inc.'s labor-only crews regarding entering occupied units to remove uninstalled air handlers, t-stat's, and coordinate with the installation subcontractor related to the disconnection of old equipment and installation of new equipment to include drywall modifications and repairs.

e) Specialties: The GC's foremen managed interior renovation installation crews with respect to entering occupied units to demolish/remove bath hardware/accessories, and blinds, to conduct framing, drywall modifications, and repairs.

The GC did not provide labor, but rather only self-performing foremen.[1] Labor for Hire, Inc. was utilized as the labor component with specific focus on the labor-intensive scopes within the Flooring and HVAC divisions, where the demolition/debris removal, hauling, and new equipment/material delivery to the installation subcontractors was critical.

[1] Construction Management Services of Minnesota, LLC (also listed as a subcontractor in the five foregoing divisions), was subcontracted for the turn-key management and division-specific expertise of Resilient Flooring and HVAC divisions, to include complete logistics, material procurement/controls, delivery, inventory staging, security, and scheduling of removal/installation of equipment by installation crews, and coordination of inspections by the building department. In contrast, the GC's self-performance within these divisions was focused on the hands-on management of non-technical labor-intensive Labor for Hire, Inc. crews, and the access to occupied units.

11. In the process of completing the Final Cost Certification, it was determined that the GC exceeded, by less than $2k, the limit imposed by the Rule. None of the self-performed work is for general supervision or other costs that should be included within General Requirements.

12. Realizing the mistake, Petitioner offered to exclude the $1k~ overage or the entire $351k~ from eligible basis. Florida Housing indicated that a Rule waiver was necessary.

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

14. If the requested waiver is not granted, Petitioner will suffer a substantial and unnecessary economic and operational hardship. Specifically, because the work has already been completed, Petitioner will be required to tear out and redo the self-performed work in order to satisfy the technical requirements of the Rule. This will disrupt and displace up to 264 families currently residing at the Development while causing severe financial hardship to Petitioner, who likely will be unable to secure additional financing. The denial would also cause

[2] "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. § 120.542(2), Fla. Stat.

Petitioner to violate other provisions and requirements, preventing Petitioner from obtaining Form 8609, required for the allocation of low-income housing credits.

15. In this instance, Petitioner meets the standards for the requested waiver. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 264 affordable housing units will be preserved and made available for the target population in Palm Beach County, Florida. Further, the waiver will serve the purposes of the Statute and the Act, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State. Denying the waiver would unnecessarily uproot and displace tenants while the self-performed work is torn out and redone.

16. 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. ACTION REQUESTED

17. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested permanent waiver and allow the GC to exceed the $350k cap; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

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*Counsel for Petitioner*

By: */s/ Brian J. McDonough*

BRIAN J. MCDONOUGH, ESQ.

**CERTIFICATE OF SERVICE**

This Petition is being served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation, CorporationClerk@floridahousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 8th day of May, 2023.

By: */s/ Brian J. McDonough*
Brian J. McDonough, Esq.