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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Naranja Grand Senior, Ltd.,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-038VW
Application No. 2022-084C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.002(96), F.A.C. (5/18/21) AND THE 2021 QAP

Naranja Grand Senior, Ltd. (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida_Housing"), for a waiver of the provisions of the 2021 Qualified Allocation Plan ("2021 QAP") as incorporated and adopted by Rule 67-48.002(96), Florida Administrative Code ("F.A.C.") (5/18/21), such that Petitioner may return its 2022 Housing Credit Allocation now as opposed to waiting until after the end of the second calendar quarter of 2024. While Petitioner has diligently attempted to progress the development, delays related to an extraordinary amount of coordination and negotiation with six different County departments that went beyond the typical review timeline for projects of similar scope and size will prevent Petitioner from meeting the 10% test deadline. In support, Petitioner states as follows:

A. THE PETITIONER

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

Naranja Grand Senior, Ltd.
3225 Aviation Avenue, 6th Floor

Coconut Grove, Florida 33133
(305)-860-8188
Mattr@htgf.com

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

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
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Fax: 850-329-4844
Email: BSmitha@stearnsweaver.com

B. DEVELOPMENT BACKGROUND

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

- Development Name: Naranja Grand
- Development Address: Waldin Dr., at the intersection of Waldin Dr. and SW 147th Ave
- County: Miami-Dade
- Developers: Naranja Grand Developer, LLC
- Number of Units: 120 new construction
- Type: High Rise
- Set Asides: 15% (18 units) at or below 30% AMI; 40% (48 units) at or below 60% AMI; and 45% (54 units) at or below 70% AMI; 50% of the ELI units will be set-aside for Persons with Special Needs
- Demographics: Elderly, Non-ALF
- Funding: 9% HC request of $2,858,700 annually

C. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

D. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver of Rule 67-48.002(96), effective May 18, 2021, which provides in pertinent part:

> "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2021 Qualified Allocation Plan which is adopted and incorporated herein by reference, effective upon approval by the Governor of the State of Florida, pursuant to Section 42(m)(1)(B) of the IRC and sets forth the selection criteria and the preferences of the Corporation for Developments which will receive Housing Credits. The QAP is available on the Corporation's website under the Multifamily Programs link or by contacting the Housing Credit Program at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, or from http://www.flrules.org/Gateway/reference.asp?No=Ref-13097.

6. Subsection II.J. of the 2021 QAP, provides as follows:

> Notwithstanding any other provision of this QAP, where a Development has not been placed in service by the date required pursuant to Section 42 of the IRC, or it is apparent that a Development will not be placed in service by the date required pursuant to Section 42 of the IRC, and the Applicant has returned its Housing Credit Allocation after the end of the second calendar quarter of the year in which it was otherwise required to be placed in service pursuant to Section 42 of the IRC, the Corporation will reserve allocation in an amount not to exceed the amount of Housing Credits returned, and will issue a Carryover Allocation Agreement allocating such Housing Credits to the Applicant for either the current year or the year after the year in which the Development was otherwise required to be placed in service pursuant to Section 42 of the IRC, provided the following conditions have been met: (i) The sponsor must have provided written notice to the Corporation, describing the circumstances, all remedial measures attempted by the Applicant to mitigate the delay, and any other pertinent information, prior to returning the allocation; and (ii) A site inspection reflecting the percentage of Development completion must be completed. If the Development is at least fifty (50) percent completed, as reflected in the site inspection, the approval may be made by Corporation staff. If the Development is less than fifty (50) percent completed, as reflected in the site inspection, the approval must be made by the Board. In making such determination, the Board must find and determine that the delay was caused by circumstances beyond the Applicant's control, and that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay; and (iii) The Corporation or Board, as applicable, must find that the Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally allocated, and that the Development is still desirable in terms of meeting affordable housing needs.

E. STATUTES IMPLEMENTED BY THE RULE AND THE 2021 QAP.

7. The Rule implements Section 420.5087 (State Apartment Incentive Loan Program), Section 420.5089 (HOME Investment Partnership Program; HOME Investment Partnership Fund), and Section 420.5099 (creating the Housing Credits Program) of the Florida Housing Finance Corporation Act (the "Act").[1] The Act designates Florida Housing as the State of Florida's housing credit agency within the meaning of Section 42(h)(8)(A) of the Internal Revenue Code of 1986. As the designated agency, Florida Housing is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits ("Allocation Procedures"). *See* § 420.5099(1) and (2), Fla. Stat. Accordingly, the, Rule implements, among other sections of the Act, the statutory authorization for Florida Housing's establishment of Allocation Procedures for the HC Program. *Id*.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE.

8. Petitioner timely submitted Application No. 2022-084C on August 24, 2021 in response to RFA 2021-203 Housing Credit Financing For Affordable Housing Developments Located In Miami-Dade County (the "RFA").

9. The Development received an allocation of the 2022 Housing Credit dollar amount meeting the requirements of Section 42(h)(1)(E) and (F) of the Internal Revenue Code of 1986 as amended ("Tax Credits") and was invited to credit underwriting.

10. The Development was preliminarily selected for funding by the Florida Housing Board on October 22, 2021. After all issues within subsequently filed notices of intent were resolved, Petitioner submitted a signed acknowledgement accepting the invitation to credit underwriting on December 17, 2021.

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[1] The Act is set forth in Sections 420.50 through 420.55 of the Florida Statutes.

11. Florida Housing staff executed a 2022 Carryover Allocation Agreement ("CAA") on or about July 19, 2022 for the allocation of its Tax Credits. The CAA required Petitioner to incur at least ten percent of the reasonably expected basis of the Development (the "10% Test") and meet the Site Control requirement on or before January 31, 2023 (the "CAA Deadline").[2] Failure to comply with the CAA Deadline will cause the Housing Credits allocated within the CAA to be deemed returned to Florida Housing under 26 U.S.C. § 42(h)(3)(C).

12. Pursuant to 26 U.S.C. § 42(h)(1)(E)(i), the Development must be placed in service no later than the close of the second calendar year following the calendar year in which the allocation is made; in this case, the federally-mandated placed-in-service date would be December 31, 2024.

13. Due to delays beyond Petitioner's control, described herein, the 10% Test cannot be met. First, during the design and planning process, HTG learned for the first time that, because this site was previously owned by Miami-Dade County (the "County") and it abuts both the Miami-Dade Naranja Branch Library ("Naranja Library") and a property owned by Miami-Dade County Parks and Recreation, the Administrative Site Plan Review Process ("ASPR") would require an extraordinary amount of coordination and negotiation with six different County departments that went beyond the typical review timeline for projects of similar scope and size. One of the major hurdles was that the only access to the Naranja Library occurs through Petitioner's site, and as such, the County's interests were intricately vested in our design and engineering. Addressing these issues required a number of zoom meetings with different departments, which could take weeks to be accommodated, especially since this all took place prior to the County's new expediting policies released in March 2023. Petitioner realized that it

[2] This deadline was extended to July 19, 2022. *See* ¶ 14, below.

would not have a complete credit underwriting report to submit to Florida Housing by April 30, 2023.

14. Anticipating this delay, on January 13, 2023, Petitioner requested an extension to the CAA deadlines. Subsequently, on March 17, 2023, Petitioner requested an extension to the notice of commencement, credit underwriting report and tax credit partnership agreement deadlines. On February 1, 2023, the Corporation approved extensions to the CAA Deadline to July 19, 2023. On April 21, 2023 the Corporation also approved extensions to the deadline for the notice of commencement, credit underwriting report and tax credit partnership agreement to December 31, 2023. However the placed in service deadline remained December 31, 2024.

15. As of May 4th, 2023, Petitioner has cleared all issues with the different County departments and has received the final turn of comments for its ASPR. Petitioner also began production of its full set of construction documents for permitting in February 2023 and is in receipt of such sets. As such, submittal to the County for permitting will occur in May 2023 and a request for bids for a General Contractor will be sent out on May 10th, 2023. Based on this progress and the typical timeline to obtain County approvals, Petitioner expects to close in December 2023. However, Petitioner's 10% Test deadline of July 19, 2023 is unachievable despite all best efforts due to the fact that the land is being conveyed via a long-term ground lease at below-market value, which is one of the major cost components needed to meet this test.[3]

[3] Other costs, such as purchasing materials or paying the developer fee, could not be incurred in an amount sufficient to satisfy the 10% Test prior to the deadline. While Petitioner must spend roughly $3.5 Million in additional costs to meet the 10% Test, the accrual for the developer fee during pre-construction is limited to 20% of total fees, which is slightly more than $1 Million for the Development. Moreover, Petitioner was not able to request bids until this month due to delays during its site plan review process, which delayed the production of full construction documents necessary to obtain pricing. The volatility of material pricing and construction costs

16. Because Petitioner knows that circumstances outside of its control will prevent it from satisfying the 10% Test deadline, Petitioner respectfully requests a waiver of the 2021 QAP to permit Florida Housing to approve the tax credit exchange now as opposed to waiting until after the end of the second calendar quarter of 2024.

17. As set forth above, this request was not necessitated through any fault of Petitioner. Rather, Petitioner exercised due diligence in attempting to move the Development towards construction.

18. If the Petition is denied, the Development will be abandoned because Petitioner will not have sufficient time to satisfy the 10% Test deadline and will lose the allocated Housing Credits. Without this funding source, Miami-Dade County will lose these 120 affordable housing units.

19. This Petition should be granted, as opposed to de-obligating the award, because Miami-Dade County is currently experiencing a shortage of affordable housing units for the elderly (non-ALF) and Persons with Special Needs. Granting the Petition will result in the delivery of 120 new affordable housing units much faster than would reallocating the funding to a new development.

20. 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.

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over the last year, particularly the increase in concrete and cement pricing, makes buying materials 6+ months in advance of construction commencement very risky and could potentially result in increased project costs. Indeed, based on some projections, it seems likely that concrete pricing could stabilize by the first quarter of 2024, making material buyout at that time more cost efficient. In the current environment, aggressive buyout for materials across labor divisions has the best results when carried out at a point where all stakeholders, including the General Contractor and their sub-contractors, have complete certainty on the construction commencement and actual mobilization dates.

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,[4] and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. *See* § 120.542(2), Fla. Stat.

21. Strict adherence to Subsection II.J. of the QAP would violate principles of fairness, as Florida Housing has granted similar waivers to other Developments facing similar circumstances (*e.g.,* Arbor Village- granted credit swap in November 2019; Georgian Gardens- granted credit swap in November 2019; Luna Trails- granted credit swap in 2019; Northside Transit Village- granted credit swap in November 2019; Residences at Dr. King Boulevard, Ltd.- granted credit swap in 2019).[5]

22. In this instance, Petitioner meets the standards for a waiver of the Rule and the 2021 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 120 affordable housing units will be made available for the target population in Miami-Dade County, Florida. The strict application of the 2021 QAP would prevent Petitioner from completing the swap now and will create a substantial hardship for Petitioner because it cannot – due to no fault of its own – meet the 10% Test deadline. 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. Moreover, the Statute

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[4] "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. *See* § 120.542(2), Fla. Stat.

[5] The reasons that precipitated the credit swaps include but are not limited to: need for off-site improvements, which required negotiation with neighboring property owners; revision to construction plans due to increased construction costs, which required the securing of additional funds; redesign requirements due to a fire code violation in the design of a staircase; post-Hurricane clean up; and title issues, which only became known after the design process.

was enacted, in part, to encourage private and public investment in facilities for persons of low-income. By granting this waiver, and further ensuring the development of 120 affordable housing units in Miami-Dade County, Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable housing. *See* § 420.5099(2), Fla. Stat.

23. The foregoing demonstrates the hardship and other circumstances justifying this Petition.

24. The requested waiver should be granted because, as demonstrated above, the delay was caused by circumstances beyond Petitioner's control, due diligence was employed in an attempt to resolve those circumstances, the Development in all respects, except timing, still meets the conditions upon which the Housing Credits were originally allocated, and the Development is still desirable in terms of meeting affordable housing needs.

25. Should Florida Housing require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

G. <u>ACTION REQUESTED</u>

26. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested waiver to permit the requested credit exchange, immediate return of Petitioner's 2022 Housing Credit Allocation, and an immediate allocation of new Housing Credits; (ii) grant a corresponding extension of deadlines relative to those credits; (iii) grant this Petition and all of the relief requested herein; and (iv) grant such further relief as it may deem appropriate.

Respectfully submitted,

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Counsel for Petitioner

By: */s/ Brian J. McDonough*
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CERTIFICATE OF SERVICE

This Petition is being served by electronic transmission for filing with the 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 11th day of May, 2023.

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