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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Heritage Oaks, LLLP,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2023-037VW
Application No. 2022-120C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

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

Petitioner Heritage Oaks, LLLP (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 expended more than $1 million to diligently progress the development, delays related to obtaining U.S. Department of Housing and Urban Development ("HUD") approval of Petitioner's Disposition of Public Housing units and dramatic construction cost increases will prevent Petitioner from closing until after the deadline for satisfaction of the 10% test and Site Control. 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:

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Heritage Oaks, LLLP
3629 Madaca Lane
Tampa, FL 33618
Telephone: (813)933-0629
Fax: N/A
Email: BEvjen@norstarus.com

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

Brian J. McDonough, Esq.
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B. DEVELOPMENT BACKGROUND

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

- Development Name: Heritage Oaks
- Development Address: Washington Dr, NW of the intersection of Washington Dr and 130th Avenue N a/k/a Wilcox Rd; Washington Dr, NE of the intersection of Washington Dr and Jefferson Circle; Washington Dr, SE of the intersection of Washington Dr and Jefferson Circle; Washington Dr, E of the intersection of Washington Dr and Jefferson Circle
- County: Pinellas
- Developers: Norstar Development USA, LP; PCHA Development, LLC; and Newstar Development, LLC
- Number of Units: 80 new construction
- Type: Garden Apartments
- Set Asides: 10% (8 units) at or below 33% AMI and 90% (72 units) at or below 60% AMI; 50% of the ELI units will be set-aside for Persons with Special Needs

- Demographics: Elderly, Non-ALF

- Funding: 9% HC request of $ 1,868,000 annually; $2.75 million Pinellas County gap funding; $610,000 Local Government Area of Opportunity Funding; $22,500,000 Construction Loan; $6,700,000 Permanent Loan; $1,700,000 PCHA Funds

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. 2022-120C on August 28, 2021 in response to RFA 2021-202 (Housing Credit Financing For Affordable Housing Developments Located In Broward, Duval, Hillsborough, Orange, Palm Beach, And Pinellas Counties).

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

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. Florida Housing staff executed a 2022 Carryover Allocation Agreement ("CAA") on or about July 20, 2022 for the allocation of its Tax Credits. The CAA required[2] 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"). This CAA Deadline was extended to July 20, 2023. 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).

11. 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.

12. The requested waiver is necessitated by cost overruns, and the concomitant substantial gap that had to be covered, which caused Petitioner to take longer to get through credit underwriting than originally contemplated. The overruns could not be foreseen because the cost estimates for the Development were established in August of 2021, prior to the RFA application deadline. Within the following six months, construction costs increased statewide by 25-30%, which had a cascading effect that caused other increases. At the same time, interest rates and insurance costs also skyrocketed. Petitioner commenced design work shortly after

[2] The CAA also required Petitioner to provide the Tax Credit Partnership Agreement, Credit Underwriting Report, and Notice of Commencement by April 30, 2023. Florida Housing recently approved Petitioner's extension request to October 30, 2023.

receiving its invitation to credit underwriting in March 2022. Because Petitioner's site and building plans were not yet complete, it did not have updated pricing prior to the deadline for CHIRP funding applications. When Petitioner finally received its designs and construction pricing in the fourth quarter of 2022, Petitioner realized that it had substantial construction cost overruns, as well as substantial increases in insurance and interest rates.

13. To cover the construction cost increases, and mitigate the associated delay, Petitioner took remedial action, such as securing additional funding from Pinellas County. However, Petitioner does not anticipate that it will be able to satisfy the CAA Deadline, namely because it cannot close until HUD approves removal of a deed restriction. Specifically, the Development involves the redevelopment of public housing, which requires HUD to terminate a Declaration of Trust. Before Petitioner could request such termination, it was required to perform an environmental review pursuant to 24 C.F.R. Part 58 and a Capital Needs Assessment for inclusion. As a result of this delay, Petitioner was not able to request the termination until November 2022. For the last month, such approval has been expected imminently, but has yet to occur. Petitioner cannot begin relocating current residents on the property until 90 days after obtaining that HUD approval and all residents must be relocated off site prior to closing per HUD requirements. Petitioner hopes to receive HUD approval of the disposition in mid-May, such that it may complete relocation and close by August 2023.[3] Accordingly, Petitioner cannot meet the CAA Deadline for satisfaction of the 10% test or Site Control.

14. Because Petitioner knows that circumstances outside of its control will prevent it from satisfying the CAA Deadline, Petitioner respectfully requests a waiver of the 2021 QAP to

[3] Petitioner estimates that the construction schedule, which includes major infrastructure improvements, will likely take approximately 18 months to complete. Thus, the Development is estimated to be placed in service in the first quarter of 2025.

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. Petitioner has used its best efforts to move the Development forward, but cannot take any further action until HUD approves termination of the Declaration of Trust.

15. 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. In fact, more than $1 million has been expended to date in relation to the Development.

16. If the Petition is denied, the Development will be abandoned because Petitioner will not have sufficient time to satisfy the CAA Deadline and will lose the allocated Housing Credits. Without this funding source, Pinellas County will lose these 80 affordable housing units.

17. This Petition should be granted, as opposed to de-obligating the award, because Pinellas County is currently experiencing a shortage of affordable housing units for the elderly (non-ALF) and Persons with Special Needs. Indeed, the County stands so firmly behind the Development that, in April 2023, Petitioner received a conditional commitment from the County to provide gap funding of $2.75 million in addition to $610,000 in Local Government Area of Opportunity Funding committed in 2021. Granting the Petition will result in the delivery of 80 affordable housing units much faster than would reallocating the funding to a new development.

18. 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,[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.

19. 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 80 affordable housing units will be made available for the target population in Pinellas 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 CAA 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 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 80 affordable housing units in Pinellas 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.

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

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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.

21. 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.

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

G. ACTION REQUESTED

23. 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 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 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.