STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO.: 2023-032VW
APPLICATION NO.: 2022-022C

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FLORIDA HOUSING FINANCE CORPORATION

BDG BANYAN EAST TOWN, LLC,

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-48.002(96) AND THE CHIRP ITP

BDG Banyan East Town, LLC, a Florida limited liability company (the "Petitioner"), by and through its undersigned counsel, hereby petitions the Florida Housing Finance Corporation (the "Corporation") for (i) a waiver of the timing provisions of the 2021 Qualified Allocation Plan ("2021 QAP") as incorporated and adopted by Rule 67-48.002(96), F.A.C. (2021), pertaining to a tax credit exchange and certain other matters as further set forth herein (the "Rule") to allow a credit exchange to be approved by the Executive Director, or the Board of Directors of the Corporation, at this time rather than at the end of the second calendar quarter of 2024; and, (ii) a waiver of the CHIRP ITP deadline to close on the limited partnership agreement by April 28th, 2023. In support, the Petitioner states as follows:

A. THE PETITIONER

1. The mailing address, telephone number and email of the Petitioner is as follows:

BDG Banyan East Town, LLC
Attn: Scott Zimmerman
501 N Magnolia Ave

Orlando, Florida 32801
Telephone: (407) 447-1780 Ext. 2001
Email: szimmerman@agpmanager.com

2. The mailing address, telephone number and email of the Petitioner's legal counsel is as follows:

Yisell Rodriguez, Esq.
Nelson Mullins Riley & Scarborough LLP
390 N. Orange Ave., Suite 1400
Orlando, Florida 32801
Telephone: (407) 669-4290
Email: yisell.rodriguez@nelsonmullins.com

3. On August 25, 2021, the Petitioner timely submitted an application in response to RFA 2021-201 for Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the "RFA") (the "Application") to finance the construction of a multifamily apartment complex to be known as Banyan East Town Apartments in Altamonte Springs, Florida (the "Development"), which will serve low-income families in Seminole County. Petitioner requested housing tax credits in the amount of $1,700,000.00 and Construction Housing Inflation Response Program ("CHIRP") financing in the amount of $500,000.00. The Development received an allocation of 2022 Low-Income Housing Tax Credits ("Tax Credits") and Petitioner accepted its invitation to enter credit underwriting on May 9, 2022. On December 28, 2022, Petitioner entered into a Carryover Agreement for allocation of 2022 Tax Credits. The "placed in service" ("PIS") date for the Development is December 31, 2024.

4. On May 9, 2022, the Corporation issued the 2022 Construction Housing Inflation Response Program (CHIRP) Invitation to Participate (ITP) (the "ITP") to fill the funding gap experienced competitive developments in the pipeline due to costs increases related to market inflation including increased construction costs. The Applicant filed its application for CHIRP

funds on July 5, 2022. On December 16, 2022, the credit underwriting report was finalized. Per the ITP, the deadline for closing the Limited Partnership Agreement or Limited Liability Operating Agreements (LPA) was January 31, 2023 (hereinafter, the "LPA Closing Deadline"). At the January 27, 2023 meeting of the board of directors of the Corporation ("Board Meeting), the Board approved an extension of the LPA Closing Deadline to March 10, 2023. At the March 10, 2023 Board Meeting, the Board again approved an extension of the LPA Closing Deadline until April 28, 2023 and at the meeting it was noted that the April 28th deadline is the last global extension and any further extension requests would be reviewed on a case-by-case basis. The Development is seeking an extension of the LPA Closing Deadline to close on the limited partnership agreement by July 21, 2023.

B. WAIVER IS PERMANENT

5. The waiver being sought is permanent in nature.

C. THE RULE FROM WHICH WAIVER IS SOUGHT

6. Petitioner requests a waiver of Rule 67-48.002(96), F.A.C. (2021) and Subsection II.J. of the 2021 QAP, which provides as follows:

> "J. 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."

7. The process found in the 2021 QAP requires an applicant to return its allocation of housing tax credits at the end of the second calendar quarter of the year in which it was otherwise required to be placed in service before a tax credit exchange request can be approved by the Executive Director of the Corporation. Petitioner is requesting a waiver of this limitation on the timing of the tax credit exchange, to allow a credit exchange to be approved by the Executive Director, or the Board of Directors of the Corporation, at this time rather than at the end of the second calendar quarter of 2024.

D. STATUTES IMPLEMENTED BY THE RULE

8. The 2021 QAP and the Rules implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute that designated the Corporation as the State of Florida's housing credit agency and authorizes the Corporation to establish procedures for allocating and distributing low-income housing tax credits. See Fla. Stat. § 420.5099.

E. JUSTIFICATION FOR PETITIONER'S REQUESTED WAIVER

9. Petitioner is seeking an extension of the LPA Closing Deadline in the CHIRP ITP to allow Petitioner additional time to close on the limited partnership agreement and a credit swap for the reasons set forth below.

10. The Development timeline has been severely impacted by permitting delays. Plan development and local government plan review began prior to the invitation to enter credit underwriting almost a year ago and the pursuit of permits needed to close the LPA has been continuous and ongoing.

a. A this time, the "Preliminary Site Plan" and "Preliminary Plat" have been approved by the City Commission at the March 15, 2023 meeting, with the final site and building plans and final plat to be submitted on April 20, 2023 for staff approval. Following the final approval on April 20th, a plan-specific developer's agreement will be prepared by the City and is required to be executed before the permits can be approved. Once the agreement is executed and permits approved, then Petitioner can proceed to close on the limited partnership agreement.

b. For background, prior to these approvals, the Development experienced significant delays in pursuit of permit-readiness. The City of Altamonte ("City") required coordination and approval from Seminole County ("County") for improvements the City is requiring to the County roads bordering the Development site on three sides of the property. The required right-of-way improvements include the addition of parallel parking and other improvements which requires additional right-of-way dedication to the County. The County was initially opposed to the City's

requirements and suggested the City take ownership of the roads, which the City declined. This intergovernmental disagreement delayed the plan development and permitting from November 15, 2022 until the County agreed to the City's requirements on February 9, 2023, a period of almost 90 days.

c. Once the County agreed to the City's requirements and provided guidance as to the stormwater management requirements to obtain their permit for these improvements, we were able to finalize the plans and calculations. An additional permit to improve the roads via a separate set of roadway plans and approval by the County Commission will also be required. These road plans are scheduled to be submitted to the County the week of April 20, 2023.

11. Petitioner anticipates a 90 to 150 days from final plan and plat submittal for permits to be approved by both the City and County (in parallel), extending the closing of the limited partnership agreement between July and September of 2023. Based on these estimates, Petitioner is seeking a waiver of the LPA Closing Deadline from April 28, 2023 until **July 21, 2023**.

12. In addition, the investor limited partner requires the expected placed in service ("PIS") date of the buildings to be at least three (3) months before the PIS deadline of December 31, 2024. As such, the Development must be expected to place in service no later than September 30, 2024 in order for the investor limited partner to close on the limited partnership agreement now. Given the Development's permitting, closing, and construction timeline, it is not feasible for the Development to be placed in service within the time required by the investor limited partner. Accordingly, Petitioner is seeking a credit swap to extend the PIS date from December 1, 2024 to December 31, 2025. As the investor limited partner will not close without the three-month cushion

on the PIS date, Petitioner is seeking a waiver of the Rule to allow the Corporation to swap the credits at this time instead of in the second calendar quarter of 2024.

13. Under Section 120.542(1), Fla. Stat., and Chapter 28-104, F.A.C., the Corporation has the power and 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. A waiver 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[1] or violate principles of fairness, 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.

14. A waiver of these Rules will serve the underlying purposes of Section 420.5087 and the Act that are implemented by Chapter 67-48 of the Florida Administrative Code, because one of the goals is for the proceeds of Corporation financing to be used to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households. The Act (Section 420.501, et seq.) was passed in order to create inducements and opportunities for private and public investment in rental housing to increase the supply of affordable housing for low-income persons and households. Denial of the waiver would deprive Central Florida, Seminole County and Altamonte Springs of essential and affordable housing units within ¼ mile of a SunRail station. By granting this Petition, the Corporation would recognize the goal of increasing the supply of affordable housing units via the construction of new developments throughout Florida, particularly through Petitioner supplying 92 much needed affordable housing

[1] "Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. Further, "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* Fla. Stat. § 120.542.

units in a FHFC Geographic Area of Opportunity (GAO) in Central Florida area. A denial of this Petition (a) will result in substantial economic hardship to Petitioner; (b) could deprive Seminole County and the Sanford-Orlando-Kissimmee MSA of essential, affordable housing, and (c) would violate principles of fairness. See § 120.542(2), Fla. Stat.

15. The requested waiver will not adversely affect Petitioner, any other party that applied to receive funding in the RFA, or the Corporation as stated above.

F. ACTION REQUESTED

16. For the reasons set forth herein, the Petitioner respectfully requests the Corporation (i) grant the requested waiver of the timing requirements found in the 2021 QAP, as incorporated by Rule 67-48.002(96) and allow the requested credit exchange to be approved before the second calendar quarter of 2024; (ii) waiver of the CHIRP ITP deadline to close on the limited partnership agreement by April 28, 2023 to allow Petitioner to close by July 21, 2023; (iii) grant this Petition and all the relief requested herein; and (iv) grant such further relief as it may deem appropriate.

Respectfully submitted,

Yisell Rodriguez

Yisell Rodriguez, Esq.
Nelson Mullins Riley & Scarborough LLP
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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition was filed by electronic delivery to:

Florida Housing Finance Corporation
Attn: Corporation Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
Email: corporationclerk@floridahousing.org

Joint Administrative Procedures Committee
680 Pepper Building
111 W. Madison Street
Tallahassee, Florida 32399
Email: joint.admin.procedures@leg.state.fl.us

This 7th day of April, 2023.

By: Yisell Rodriguez
Yisell Rodriguez, Esq.
Fla. Bar No. 117915