STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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In re: Harper's Pointe, L.P.,

Petitioner.
_____/

FHFC Case No.: 2023-033VW
FHFC File No: 2018-105C

PETITION FOR WAIVER OF RULE 67-48.0072(17)(f)2 TO ALLOW MINOR EXCEEDANCE OF GENERAL CONTRACTOR SELF-PERFORMANCE OF WORK

Pursuant to Section 120.542, Fla. Stat., Petitioner, HARPER'S POINTE, L.P., a Florida limited partnership ("Harper's Pointe"), hereby submits this Petition to the Florida Housing Finance Corporation ("FHFC") for a waiver of Rule 67-48.0072 (17)(f)2, Fla. Admin. Code, which limits the amount of work a General Contractor may self-perform on a development to the lessor of $350,000 or 5 percent of the construction contract, which ever is less. The General Contractor for Harper's Pointe self-performed work in the amount of $359,410, or $9,140 over the limit. Construction of the Development has been completed, and it was placed in service in March 2021. A waiver is needed in order for Form 8609s to issue for the two buildings.

In support of this petition, Petitioner states as follows:

NATURE OF REQUEST

1. Pursuant to Section 120.542, Fla. Stat. (2017), and Rules 28-104.001 through 28-104.006, Fla. Admin. Code, Petitioner requests a waiver of Rule 67-48.0072 (17)(f)2, Fla. Admin. Code, which limits the amount of construction work a General Contractor may self-perform. That rule allows a General Contract to self-perform work up to a maximum of $350,000 or 5 percent of the construction contract, whichever is less. Petitioner requests that the limit for self-performance of construction work by the General Contractor be increased to $360,000 (less than a 3 percent increase over the limit in the rule), to accommodate the $359,410 amount that Petitioner's General Contractor self-performed.

THE PETITIONER

3. As explained in this Petition, Petitioner was the recipient of Housing Credits from FHFC for a 66 unit elderly development in Alachua County in RFA 2017-111, Housing Credit Financing for Affordable Housing Developments in Medium and Small Counties. For purposes of this petition, Petitioner's address is that of its undersigned attorney, M. Christopher Bryant, Oertel, Fernandez, Bryant & Atkinson, P.A., 2060 Delta Way, Tallahassee, Florida 32303 (telephone (850) 521-0700, fax (850) 521-0720, E-mail: cbryant@ohfc.com)

FUNDING AWARDED

4. Through Request for Applications (RFA) number 2017-111, FHFC sought to allocate federal low-income housing tax credits ("Housing Credits") to applicants for the development of affordable housing in the Medium and Small counties. Florida Housing received 167 applications in response to RFA 2017-111, nine (9) of which were selected for funding, including Harper's Pointe. Awards of Housing Credit funding are subject to FHFC Rule Chapter 67-48, Fla. Admin. Code.

5. Harper's Pointe applied in RFA 2017-111 for an award of Housing Credits for the construction of a 66 unit development for elderly tenants in Alachua County. Its application was assigned Application No. 2018-105C. Harper's Pointe was preliminarily selected to receive an annual award of Housing Credits in the amount of $1.015 million. The selection of Harper's Pointe, and of other applicants in RFA 2017-111, was challenged through the protest process. The award to Harper's Pointe was ultimately upheld by final order entered by Florida Housing in September 2018, and Harper's Pointe was invited to Credit Underwriting at that time.

6. For purposes of Section 42 of the Internal Revenue Code, Harper's Pointe proposed to set aside 40% of the units for residents earning 60% or less of Area Median Income. In the

Total Set-Aside Breakdown Chart included in the Harper's Pointe application, Harper's Pointe committed to set aside 10% of the units for tenants at or below 33% of AMI (the Extremely Low Income level for Alachua County in RFA 2017-111) and the remaining 90% of the units for tenants at or below 60% of AMI.

PRINCIPALS INVOLVED

7. The Applicant entity is Harper's Pointe, L.P., a Florida limited partnership. The General Partner of the Applicant is JES Partnership-Harper's Pointe, L.L.C., a Florida Limited Liability Company, whose managing member is JES Florida Partnerships Member, L.L.C. The Principal of that entity is a natural person, Jeffrey Walker Smith. The 99.99% Investor Limited Partner is Tax Credit Holdings – Harper's Pointe, LLC, an Affiliate of Affordable Equity Partners, Inc.

8. The Developer Entity for Harper's Pointe is JES Dev Co, Inc., a Missouri Corporation, whose officers and directors are Jeffrey W. Smith and William A. Markel. The sole shareholder of JES Dev. Co., Inc., is a Trust (Peach Way Development Trust), whose beneficiary is Jeffrey Walker Smith and whose Trustee at the time of Application was Richard Otto Maly. The Trustee was subsequently changed to Carleen Schreder in the course of routine estate planning activities, and a separate request for approval of the trustee change pursuant to Rule 67-48.004(3)(b) will be promptly submitted.

PROGRESS OF THE DEVELOPMENT

9. Harper's Pointe was invited into credit underwriting in September 2018. It successfully completed credit underwriting in January 2020. Construction commenced in September 2019. Construction was completed and final certificates of occupancy were issued in March 2021. The two buildings that make up Harper's Pointe were placed in service in March

2021.

10. A significant portion of the construction activity on Harper's Pointe was performed during the height of the COVID pandemic. As with many developments, social distancing and additional health and safety precautions resulting from the pandemic threatened to delay construction and the timely completion of the development. In order to avoid such delays, and delay the limited availability of subcontractors and their employees as construction commenced and progressed, the General Contractor performed some work that might otherwise have been assigned to a subcontractor, such as rough carpentry.

11. The total amount of construction work performed by the General Contractor was $359,410. This represents approximately 4.14% of the final construction contract price of $8,685,253.

12. Form 8609s have not been issued yet for the Harper's Pointe development due to the General Contractor's self-performed work very slightly exceeding Florida Housing's definition of a "de minimis" amount to be $350,000.

RULE PROVISIONS

13. The portion of Rule Chapter 67-48, Fla. Admin. Code, of relevance to this request is Rule 67-48.0072, Fla. Admin. Code. Credit Underwriting and Loan Procedures. Paragraphs (17)(f) of Rule 67-48.0072 reads, in pertinent part:

> (17) The General Contractor must meet the following conditions:
>
> (f) Ensure that no construction or inspection work is performed by the General Contractor, with the following exceptions:
>
> 1. The General Contractor may perform its duties to manage and control the construction of the Development; and
>
> 2. The General Contractor may self-perform work of a de minimis amount, defined for purposes of this subparagraph as the lesser

of $350,000 or 5 percent of the construction contract.

This rule provision, allowing the General Contractor to self-perform a de minimis amount of work, and defining the monetary limit on such de minimis work, was added to Rule 67-48.0072(17)(f) effective July 6, 2022, and was expressly made retroactive to applications then in credit underwriting.

JUSTIFICATION FOR REQUESTED WAIVER

14. Florida Housing's rule 67-48.0072(17)(f) acknowledges and accepts that the self-performance of some work by a General Contractor is permissible and has set a limit on such self-performed work at $350,000, or 5% of the construction contract, whichever is less. (The construction contract was for $8,685,253, and 5% of that figure is slightly over $434,000, so the $350,000 limit applies.) The work performed by Harper's Pointe's General Contractor was $359,410, or $9,410 over the allowable amount.

15. The $359,410 in self-performed work did not include any profit or overhead for the General Contractor. The total General Contractor Fee on this Development was $470,455, which is less than 5.8% of Total Actual Construction Costs – far below the 14% allowed by the rule. The General Contractor fee included only $57,289 in Contractor Profit, or 0.7% of Total Actual Construction Costs.

16. During the construction of Harper's Pointe, a subcontractor retained for framing and exterior siding installation failed to meet the Developer's and the General Contractor's needs for scheduling and quality of work. Some of the subcontractor's work had difficulty passing inspections by the City of Gainesville. Since a portion of the work involved framing, timely performance of this work is essential to allow other subcontractors and laborers to begin their work.

17. In order to keep the development on schedule, the General Contractor had to self-perform the necessary work to bring the project into compliance while seeking out another subcontractor who eventually completed the project. The self-performance of work did not increase the General Contractor's contract price, and did not result in any increased General Contractor fees or General Contractor profit. Had this construction been ongoing during normal times, unaffected by the constraints that COVID placed on virtually all aspects of life, including construction, most or all of this work would have been performed by a subsequent subcontractor who could have been more quickly mobilized for that purpose.

18. This rule waiver will not result in delays to the construction or completion of the housing. The construction was completed two years ago, and the Development is fully leased up. The rule waiver is necessary simply to allow issuance of Form 8609s so the limited partner can receive the benefit of its investment in the Development of this affordable housing.

RELIEF REQUESTED

19. Harper's Pointe seeks to have the dollar value limitation on construction work self-performed by the general contractor increased from $350,000 to $360,000, an increase of less than 3%.

20. Granting the requested waiver would not adversely affect any required set-asides or points considered by Florida Housing in the scoring of the Harper's Pointe application, and would not alter the scoring by Florida Housing that qualified Harper's Pointe for Housing Credit financing. The change would also not provide Harper's Pointe with an unfair competitive advantage over other applicants. All scoring would have been the same.

21. The requested Rule waivers or variances will not adversely impact the Harper's Pointe development or the Florida Housing funding processes, and will serve the statutory

purposes of the Florida Housing process. A denial of this Petition, however, to refuse issuance of the Form 8609s would result in substantial economic hardship to Harper's Pointe, and could result in Harper's Pointe investor limited partner seeking to withdraw from the partnership and recapture its investment.

STATUTORY PURPOSE SERVED

22. Section 420.5099, Fla. Stat., designates Florida Housing as the housing credit agency, pursuant to the Internal Revenue Code, and assigns Florida Housing the responsibility to allocate and distribute low-income housing tax credits. The statute also instructs Florida Housing to adopt procedures to ensure the maximum use of housing credits to encourage the development of low-income housing.

23. Florida Housing recognizes that on occasion General Contractors may need to self-perform "de minimis" levels of construction work in order for developments to stay on schedule. Florida Housing's statutory purpose of financing the development of affordable housing for low income and very low income persons, in a timely manner and within budget, will still be served by approving after the fact a very minor exceedance of the $350,000 limit on self-performed work of the General Contractor.

SUBSTANTIAL HARDSHIP AND PRINCIPLES OF FAIRNESS

24. Harper's Pointe would suffer substantial economic hardship if the requested waiver is not granted so that Form 8609s can issue. Harper's Pointe investor limited partner joined the partnership, and provided substantial financing for construction, in order to receive the benefit of the low income housing tax credits. If Form 8609s are not issued, the investor partner could seek to find the general partner in material default of the Limited Partnership Agreement and seek to recover its investment.

25. The waiver being sought is permanent in nature.

WHEREFORE, Petitioner Harper's Pointe respectfully requests that the Florida Housing Finance Corporation provide the following relief:

A. Grant the Petition for Waiver and all the relief requested herein;

B. Grant a waiver of the provisions of Rule 67-48.0072(17)(f)2 to authorize the self-performance of work by the General Contractor of Harper's Pointe in an amount up to $360,000; and

C. Grant such further relief as may be deemed appropriate.

RESPECTFULLY SUBMITTED this 3rd day of May, 2023.

/s/ M. Christopher Bryant
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Counsel for Harper's Pointe, L.P.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Petition for Waiver is being filed by electronic filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Fifth Floor, Tallahassee, Florida 32301, CorporationClerk@floridahousing.org, with copies served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, and by electronic transmission to Betty Zachem, Interim General Counsel, Florida Housing Finance Corporation, 227 North Bronough Street, Fifth Floor, Tallahassee, Florida 32301, betty.zachem@floridahousing.org, this 3rd day of May, 2023.

/s/ M. Christopher Bryant
ATTORNEY