STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2023-045VW
APPLICATION NO. 2021-552C

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MAY 22 2023 8:00 AM
FLORIDA HOUSING FINANCE CORPORATION

FAIRFIELD CEDAR GROVE LP,

Petitioner

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.
_____/

PETITION FOR WAIVER OF RULE 67-21.0025(7)(c) and 67-21.026(10)

FAIRFIELD CEDAR GROVE LP, a Florida limited partnership ("Petitioner"), by and through its undersigned counsel, hereby petitions Respondent, the FLORIDA HOUSING FINANCE CORPORATION (the "Corporation") for a waiver of the Corporation's rule which requires that all natural persons that constitute the ownership of a principal be disclosed. Petitioner further petitions the Corporation for a waiver of the rule which requires a guaranteed maximum price construction contract (a "GMP Contract") for all of the rehabilitation work. This Petition is filed pursuant to Section 120.542 of the Florida Statutes (2021) and Chapter 28-104 of the Florida Administrative Code (2021). In support of its Petition, the Petitioner states:

A. PETITIONER AND DEVELOPMENT

1. The address, telephone number, facsimile number and e-mail address of the Petitioner are:

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5355 Mira Sorrento Place, Suite 100
San Diego, California 92121
Attn: Richard Boynton
Telephone: (858) 824-6424
Facsimile: (858) 625-6047
Email: rboynton@ffres.com

2. For purposes of this Petition, the address, telephone number, facsimile number and e-mail address of Petitioner's counsel is:

Hollie A. Croft, Esq.
Nelson Mullins Riley & Scarborough
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
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3. Petitioner previously submitted an application to the Housing Finance Authority of Miami-Dade County, Florida for an issuance of multifamily housing revenue bonds (the "Bonds") to be used for the rehabilitation of that certain 288-unit multifamily housing development commonly known as the Cedar Grove Apartments, located at 20601 NW 17th Avenue, Miami Gardens, Florida 33056 (the "Development"). Petitioner has also submitted an application to the Corporation for an allocation of Non-Competitive Housing Credits to fund a portion of the acquisition or rehabilitation of the Development.

B. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

C. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver from Rule 67-21.0025(7)(c), F.A.C. (2021) which requires the Petitioner to disclose all natural persons that constitute the ownership of a Principal, Rule 67-21.026(10), F.A.C. (2021) which requires the Petitioner to enter into a GMP Contract for the intended rehabilitation work for the Development that is acceptable to the Corporation

(collectively, the "Rule"). The specific provisions of the Rule from which Petitioner is seeking a waiver are as follows:

> Rule 67-21.0025(7)(c), F.A.C (2021), which provides in relevant part:
>
> (7) Disclosure of the Principals of the Applicant must comply with the following:
>
> (a) The Applicant must disclose all of the Principals of the Applicant (first principal disclosure level). For Applicants seeking Housing Credits, the Housing Credit Syndicator/Housing Credit investor need only be disclosed at the first principal disclosure level and no other disclosure is required;
>
> (b) The Applicant must disclose all of the Principals of all the entities identified in paragraph (a) above (second principal disclosure level);
>
> (c) The Applicant must disclose all of the Principals of all of the entities identified in paragraph (b) above (third principal disclosure level). Unless the entity is a trust, **all of the Principals must be natural persons**; and
>
> (d) If any of the entities identified in paragraph (c) above are a trust, the Applicant must disclose all of the Principals of the trust (fourth principal disclosure level), all of whom must be natural persons.
>
> (emphasis added)

> Rule 67-21.026(10), F.A.C. (2021), which provides in relevant part:
>
> (10) The Corporation's assigned Credit Underwriter **shall require a guaranteed maximum price construction contract, acceptable to the Corporation**, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant's sole expense, and review a pre-construction analysis for all new construction units or a CNA for rehabilitation units and review the Development's costs.
>
> (emphasis added)

D. STATUTES IMPLEMENTED BY THE RULE

6. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, the statute that created the Housing Tax Credit Program and the Multifamily Mortgage Revenue Bonds Program. *See* §§ 420.509, 420.5099, *Fla. Stat.* (2021) (the "Statute").

7. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, and Chapter 28-104, F.A.C., to grant waivers to its rule requirements when strict application of such rules would lead to unreasonable, unfair and unintended results in particular instances. Waivers shall be granted when the person subject to the rule demonstrates that the application of the rule would (1) create a substantial hardship or violate principals of fairness, 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.*

E. JUSTIFICATION FOR GRANTING THE WAIVER OF THE RULE

8. Petitioner previously sought and was granted by the Board a waiver of Rule 67-21.0025(7)(c) and 67-21.003(1)(b), F.A.C. (2021), pursuant to FHFC Case No. 2022-041VW (the "Prior Waiver"). Under the Prior Waiver, Petitioner was permitted to (i) submit its application prior to completion of bond credit underwriting, so as to allow earlier consideration of the waiver itself, (ii) submit the Principal Disclosure Form (as defined in Section A.6.a. of the Non-Competitive Application Package (Rev. 03-2021)) included in its application without disclosing all natural person principals by the third level, in order to allow for a public pension fund to be included in Petitioner's ownership structure, and (iii) subsequently change its ownership structure prior to issuance of the Preliminary Determination (as defined by Rule 67-21.002(84), F.A.C. (2021)) or after such issuance but before a Final Housing Credit Allocation Agreement has been approved and the IRS Forms 8609 have been issued with just staff approval,

to allow Petitioner to change from its bridge ownership structure to a revised ownership structure (which is substantially the same as the bridge ownership structure) in connection with the closing of Petitioner's re-syndication (the "Structure Change").

9. It is in connection with the Structure Change, that Petitioner is seeking a further waiver from Rule 67-21.0025(7)(c), F.A.C. (2021), which requires that the Petitioner disclose all natural persons that constitute the ownership of a principal. Petitioner's ownership structure includes multiple employee profit sharing entities, specifically FRH CI LLC – AHF GP3 Series, a Delaware Series limited liability company and FRH CI LLC – AHF LP3 Series, a Delaware Series limited liability company (collectively, the "Profit-Sharing Entities"), which entities own, collectively, less than a 3% ultimate interest in the general partner of Petitioner, with ownership of the Profit-Sharing Entities made up completely by employees (or trusts established by an employee). As the Profit-Sharing Entities are utilized to provide compensation to employees, changes in ownership of the Profit-Sharing Entities are intrinsically tied to changes to the employees, and therefore it would not be practical or reasonable for them to be included in the Principal Disclosure Form as principals of the Petitioner. To do so would require Petitioner to effectively consult with the Corporation on its hiring, firing and other employment practices on an ongoing basis. Further the ultimate owners of the Profit-Sharing Entities, explicitly have no ability to control the investments or to exercise meaningful control of the Profit-Sharing Entities, such control being vested in the manager of the Profit-Sharing Entities, the natural person principals of which are still fully disclosed to the Corporation. The only role these members serve is to passively receive any cash flow that passes through the Profit-Sharing Entities as additional compensation for their employment.

10. Petitioner is seeking a waiver from Rule 67-21.026(10), F.A.C. (2021), which requires the Petitioner to enter into a GMP Contract for the intended rehabilitation work for the Development that is acceptable to the Corporation. When Petitioner initially acquired the Development, in April of 2022, the Development required a number of immediate repairs, which involved life and safety matters, deferred maintenance at the Project which could not be further deferred and design and preparatory work in connection therewith, that Petitioner needed to address promptly to ensure the well being of the Development and its residents (the "Immediate Repair Work"). More specifically, the Immediate Repair Work involved:

a. Securing bids for new fire sprinklers;
b. Backflow prevention work;
c. Pest control for termites;
d. Replacement of water shut off and water connection valves;
e. Replacement of gutters/downspouts and roofing shingles
f. Repairs to the chain link, sidewalk/concrete, fire alarms, landscape irrigation, units and maintenance shop golf carts;
g. Initial deposits for ESG LED exterior/common areas and permanent signage;
h. Installation of new Keytrac system and Flock cameras;
i. Exterior paint mockups;
j. Asbestos and lead paint abatement;
k. Installation of new fire stops, fire extinguishers, plumbing fixtures, water heaters, AC units, cabinets, countertops (including back splashes) and PLANK Vinyl flooring;
l. Painting of units;
m. Ordering of new ESG dishwashers, ranges, ESG range hoods and ESG refrigerators;
n. Storage of construction materials;
o. Upfront design costs for the leasing office/clubhouses; and

p. General & administrative expenses and overhead in connection with the foregoing.

The state of the market is such that it is common practice for purchasers to acquire a given property without bond-financing in place and to subsequently re-syndicate thereafter, as few sellers will accommodate the long escrow period that would be necessary for a purchaser to close directly on bond-financing. The current re-syndication under consideration is expected to close in August 2023 and a GMP for the rehabilitation work associated therewith in the amount of approximately $13,500,000 will be executed at that time. Between the date of acquisition of the Project in April 2022 and August 2023, Petitioner will have incurred approximately $2,500,000 in performing the Immediate Repair Work out of the total budget of approximately $16,000,000, which costs would otherwise be eligible for reimbursement under Treas. Reg. 1.150-2 but for the Rule which requires such costs be under a GMP Contract.

11. But for the Immediate Repair Work being performed outside the purview of a GMP Contract, the Immediate Repair Work would otherwise constitute eligible rehabilitation costs that Petitioner could include in its basis for the Development. While the Immediate Repair Work was not performed under a GMP Contract, there are a number of mitigating factors that should nonetheless adequately assure the Corporation that the Immediate Repair Work was otherwise performed in accordance with the Corporation's rules. Specifically, (i) the Immediate Repair Work, on its own, is not of the type of work that would typically warrant entering a separate GMP contract and is customarily contracted directly by a purchaser in connection with the acquisition of a property and as such the contractors to perform the Immediate Repair Work have been directly hired by Petitioner, which includes subcontractors, trade contractors and architects; (ii) Petitioner (nor the general contractor under the GMP Contract or Developer) has no common ownership with, nor is it an affiliate of, the contractors hired to perform the

Immediate Repair Work; (iii) Petitioner (nor the general contractor under the GMP Contract or Developer) has not directly performed any of the Immediate Repair Work, Petitioner representatives only oversee completion of the Immediate Repair Work by the hired contractors; (iv) the costs incurred for the Immediate Repair Work, which Petitioner bids out and oversees, do not exceed the subcontractor limitations imposed by the Corporation and have been evaluated by the plan and cost reviewer and have been deemed reasonable; (v) no additional fees were charged or received by the Petitioner or Developer, the only cost incurred by Petitioner directly for the work being the salaries paid by Petitioner to its construction management representatives for overseeing completion of the Immediate Repair Work by the hired contractors; and (vi) Petitioner will cause its accountant to submit Agreed Upon Procedures outlining all costs and contractors and certifying same are in accordance with the Corporation rules, with regards to the Immediate Repair Work.

12. A waiver of the Rule will permit Petitioner to continue its application for non-competitive tax credits to finance a portion of the rehabilitation of the Development. Without this additional source of investor equity, the Petitioner will not have enough funds to preserve and rehabilitate these much needed 288 affordable units in Miami Gardens, Florida. Petitioner acquired the Development on April 28, 2022. While the Development is currently encumbered by certain rent restrictions, the Petitioner intends to pursue re-syndication with respect to the Development, which re-syndication will result in rent restrictions at the Development being extended.

13. In this instance, Petitioner meets the standards for a waiver of the Rule. The Corporation has the authority pursuant to Section 120.542(1), Florida Statutes, to provide relief from its rules if strict application of those rules will lead to unreasonable, unfair or unintended

results in particular instances. Unless the Rule is waived to allow the Petitioner to continue its application for non-competitive housing credits, certain unreasonable, unfair and unintended results will occur, resulting in a substantial hardship to the Petitioner and the Development. Specifically, the purpose of the Rule was for the Corporation to ensure the rehabilitation costs included in a petitioner's basis are reasonable and incurred in accordance with the Corporation's rules and to know who is actively participating in its programs. However, strict application of the Rule would lead to the unintended result that a petitioner that incurred valid rehabilitation costs is unable to include them in its basis and an employer utilizing employee-profit sharing entities in its deal structure as a means by which to compensate its employees would make their general employment practices subject to Corporation consent in order to participate in the Corporation's programs, as well as result in a substantial hardship to the Petitioner. In this specific instance, the Corporation's failure to grant the waiver requested will result in a substantial hardship to Petitioner, as Petitioner will not be able to continue its application for and obtain 4% housing credits and, as such, will not be able to complete the much-needed rehabilitation of the Development. The Corporation will not be harmed by granting this Petition as the intent of the Rule will not be violated. The Rule was implemented to allow the Corporation to ensure eligible basis costs were incurred in accordance with Corporation's rules and permit the Corporation to ascertain the parties actively involved in its programs. Petitioner is able to provide assurances to the Corporation that the costs of the Immediate Repair Work were reasonable and otherwise incurred in accordance with the Corporation's rules. Petitioner is still able to provide to the Corporation disclosure all principals (except with regards to the CalSTRS public pension in connection with the Prior Waiver, and the requested waivers for the Profit-Sharing Entities herein).

14. The requested waiver of the Rule serves the purpose of the Statute that is implemented by the Rule. The Florida Housing Finance Corporation Act (Section 420.501, *et seq*.) was passed in order to encourage private and public investment in facilities for persons of low-income. The purpose of the creation of the Housing Tax Credit Program and Multifamily Mortgage Revenue Bonds Program is to stimulate creative private sector initiatives to increase the supply of affordable housing. By granting the waiver of the Corporation's requirement that all natural persons that constitute the ownership of a principal be disclosed and the Corporation's requirement that eligible rehabilitation work for the Development be conducted under a GMP Contract, Petitioner will be able to continue its application for non-competitive housing credits with all of its eligible rehabilitation costs accounted for, as requested in this Petition, the Corporation would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income.

F. ACTION REQUESTED

15. For the reasons set forth herein, Petitioner respectfully requests the Board (i) grant the requested waiver of the Corporation's rule which requires that all natural persons that constitute the ownership of a principal be disclosed; (ii) grant the requested waiver of the Corporation's rule which requires eligible rehabilitation work be performed under a GMP Contract; (iii) grant the 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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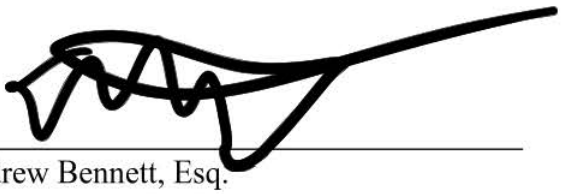
CERTIFICATE OF SERVICE

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
CorporationClerk@floridahousing.org

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

This 22nd day of May, 2023.



Andrew Bennett, Esq.
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