STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2023-041VW

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FLORIDA HOUSING
FINANCE CORPORATION

PINNACLE AT LA CABANA, LLLP,

Petitioner,

v.

FLORIDA HOUSING FINANCE CORPORATION

Respondent.

PETITION FOR WAIVER OF RULE 67-48.002(96) AND THE 2021 QUALIFIED ALLOCATION PLAN'S REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS

Pinnacle at La Cabana, LLLP, a Florida limited liability limited partnership ("Petitioner"), submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's Qualified Allocation Plan's prohibition from returning its 2022 Housing Credit Allocation prior to the third quarter of 2024. The return of these Housing Credits is required before the Corporation may reserve an allocation of Housing Credits that Petitioner requests be immediately allocated. *See* Rule 67-48.002(96), Florida Administrative Code (2021) (the "Rules"), and 2021 Qualified Allocation Plan Section II.J. Due to events outside of Petitioner's control, Petitioner cannot meet the "placed in service" and "10% test" deadlines as required by the Carryover Allocation Agreement.

1. Pursuant to Section 120.542, Fla. Stat. (2021) and Rules 28-104.001 through 28-104.006, F.A.C., Petitioner requests a waiver of Rule 67-48.002(96), Florida Administrative Code (2021), and of Section II.J of the 2021 Qualified Allocation Plan ("QAP") to allow the immediate return of its 2022 Housing Credit Allocation, and an immediate allocation of new Housing Credits (2023 or later).

2. The name, address, telephone and facsimile numbers for Petitioner and its qualified representative are:

Pinnacle at La Cabana, LLLP
9400 South Dadeland Blvd., Suite 100
Miami, FL 33156
Attn: David O. Deutch
305-854-7100 (telephone)
david@pinnaclehousing.com (e-mail)

3. The name, address, telephone and facsimile numbers of Petitioner's attorneys are:

Gary J. Cohen, Esq.
Shutts & Bowen LLP
200 S. Biscayne Blvd., Ste. 4100
Miami, FL 33131
305-347-7308 (telephone)
305-347-7808 (facsimile)
gcohen@shutts.com (e-mail)

4. Pursuant to RFA 2021-202, Petitioner timely submitted its application for competitive Housing Credits under the Low Income Housing Tax Credit program ("LIHTC Program" or "HC Program"). *See* Application Number 2022-131C.

5. Equity raised from Housing Credits will be used for the construction of 110 residential units (all of which will be low-income housing tax credit units) to be known as Pinnacle at La Cabana (the "Development"). The Development will serve low-income elderly tenants in the City of Miramar and Broward County, Florida.

6. Petitioner's application was selected for funding by FHFC, and Petitioner was invited to credit underwriting.

7. Under Rule 67-48.028(1), if an applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, such applicant must enter into a "carryover allocation agreement" with the Corporation by December 31 of the year in which the preliminary allocation is issued. On July 21, 2022, Petitioner and the Corporation

entered into the carryover allocation agreement for the Development. The carryover allocation may (under Section 42 of the Internal Revenue Code) allow the applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service; in the instant case the Corporation mandated in the carryover allocation agreement that the development be placed in service by December 31, 2024. The carryover allocation agreement requires satisfaction of the 10% test by January 31, 2023 (extended to July 21, 2023 upon Petitioner's request) (collectively, the "Deadlines"). In order to meet the 10% test, Petitioner will need to have closed debt and equity financing, which will likely not occur by July 21, 2023.

8. As explained more fully below, there is uncertainty as to whether or not the Development will be able to meet the Deadlines, and as such Petitioner is requesting an exchange of Housing Credits in order to effectuate an extension of such deadlines.

9. Since being preliminarily selected for funding and invited to credit underwriting, the Development has suffered unforeseen events outside of its control that make it clear that the Development may not be able to meet its December 31, 2024 deadline, or meet the 10% test by July 21, 2023. These challenges are set forth below:

(a) Petitioner commenced pre-development activities in January 2022 upon receipt of its invitation to credit underwriting from the Corporation, after resolution of all appeals pertaining to RFA 2021-202. Petitioner has been processing all necessary pre-development and development approvals diligently since that time. Petitioner received final site plan approval from the City of Miramar in November 2022, secured plat approval from both the City of Miramar and Broward County, and has submitted for all permits required to construct the Development, except for building permits with the City of Miramar which Petitioner anticipates submitting within the next 15

days. Petitioner anticipates placing the construction contract for the Development out to bid within the next 15 days.

(b) However, in the second quarter of 2022, it became obvious (due to the significant increase in construction costs encountered throughout the affordable housing industry) that a budgetary gap existed that could not be bridged without further assistance from FHFC. Without additional assistance, Petitioner was unable to proceed towards closing the financing for the Development.

(c) On May 9, 2022, the Corporation issued the 2022 Construction Housing Inflation Response Program ("CHIRP") Invitation to Participate ("ITP"). The purpose of ITP is to fill the funding gap experienced due to increased construction costs, such as those currently encountered by Petitioner. However, Petitioner was unable to participate in the CHIRP funding cycle because it could not meet the construction commencement deadlines contained therein, due to the amount of time necessary to complete the entitlement process in Broward County (particularly with respect to the platting of the Development).

(d) Petitioner will submit an application pursuant to RFA 2023-211 (Construction Inflation Response Viability Funding) and has been deemed eligible by the Corporation to do so. RFA 2023-211 anticipates that the participants therein which have already received an allocation of 9% housing credits will return such credits in exchange for a new award of 9% credits pursuant to the terms of such RFA.

(e) Based upon Petitioner's current construction schedule for the Development, construction completion is scheduled to occur late in the fourth quarter of 2024. The tax credit investor for the transaction requires a cushion of three months between scheduled construction completion and the required placed in service date (December 31, 2024) in order to proceed to closing on the equity financing.

(f) Due to the delays described above, the estimated completion date for the Development does not fall within the tax credit investor's required scheduling parameters. As such, the tax credit investor will not close on the agreed funding unless Petitioner obtains an exchange of 2022 Housing Credits for later Housing Credits (2023 or later).

(g) As noted above, Petitioner is required to satisfy the 10% test by July 21, 2023. Petitioner has been advised by its tax accountants that the capital lease payment provided for in Petitioner's ground lease will no longer be considered as includable in basis for purposes of satisfaction of the 10% test. As such, even if Petitioner was to make the capital lease payment by July 21, 2023, such payment would not cause the Partnership to satisfy the 10% test by such date. Even if Petitioner purchases materials, accrues a portion of developer fee and accrues or prepays other fees, such amounts would not be sufficient to meet the 10% test. As such, Petitioner will be unable to satisfy the 10% test, further giving rise to the necessity of exchanging the 2022 Housing Credits for later Housing Credits (2023 or later) in order to obtain a later date for satisfaction of the 10% test.

(h) Petitioner acknowledges that, if it is successful in receiving an award of funds under RFA 2023-211, the exchange of Housing Credits requested herein will occur pursuant to the provisions of that RFA. In an abundance of caution, Petitioner is submitting this Petition in the event the RFA does not actually move forward or if Petitioner is not awarded funds under that RFA.

10. As discussed above, the delays have been caused by circumstances outside Petitioner's control. As a result, such delays make it difficult to meet the July 21, 2023 10% test deadline, and places in jeopardy Petitioner's ability to meet the December 31, 2024 placed in service deadline.

11. As set forth more fully below, Petitioner seeks to return its 2022 Housing Credit allocation now, rather than wait for the third calendar quarter of 2024 as required under the QAP, and obtain from the Corporation an immediate allocation of new Housing Credits with a later required 10% test date and placed in service date.

12. The requested waivers and variance will not adversely affect the Development. A denial of the Petition, however, would (a) result in substantial economic hardship to Petitioner as set forth herein, (b) deprive the City of Miramar and Broward County of new constructed rental units set aside for low-income and very low-income tenants, and (c) violate principles of fairness. Petitioner has invested over $900,000 to date in the development, and respectfully requests the relief sought herein in order to keep Development of this badly needed new construction of elderly affordable housing moving forward.

13. Section 42(m) of the Internal Revenue Code requires each state allocating agency to adopt an allocation plan for the allocation and distribution of federal low income housing tax

credits. The Corporation, as the allocating agency for the State of Florida, must distribute housing credits to applicants pursuant to its qualified allocation plan.

14. The Corporation's 2022 Qualified Allocation Plan (Section II.J) (incorporated by Rule 67-48.002(96)(2021)) provides that Housing Credits may be returned **only** after the second calendar quarter of the year in which a development is required to be placed in service:

> ...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..."

QAP at Section II.K.

15. The applicable Rules for which waivers are requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),[1] the statute that created the Housing Credits Program. *See* § 420.5099, Fla. Stat. (2022). The Act designates FHFC 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, FHFC is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits ("Allocation Procedures"). §§ 420.5099(1) and (2), Fla. Stat. (2022). Accordingly, the Rules subject to Petitioner's waiver requests are implementing, among other sections of the Act, the

[1] The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.55 of the Florida Statutes (the "Act").

statutory authorization for the Corporation's establishment of Allocation Procedures for the HC Program. §§ 420.5099(1) and (2), Fla. Stat. (2022).

16. The requested waivers will ensure the availability of Housing Credits which might otherwise be lost as a consequence of development delays described herein.

17. The facts set forth in Sections 9 through 14 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for Rule waiver.

18. As demonstrated above, the requested waiver serves the purposes of Section 420.5099 and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to low-income persons and households by ensuring:

> The maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.

§ 420.5099(2), Fla. Stat. (2022).

19. Further, by granting the requested waiver, FHFC would recognize principles of fundamental fairness in the development of affordable rental housing. In addition, grant of the requested waiver will permit the construction of much needed housing for low-income and very low-income elderly tenants. Finally, grant of the request to waiver will enable Petitioner to utilize (and not lose) its significant investment in due diligence expenses that cannot be recouped if the requested waiver is not granted.

20. The requested waiver will not adversely impact the Development or the Corporation.

21. The waiver being sought is permanent in nature.

Should the Corporation require additional information, Petitioner is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver.

WHEREFORE, Petitioner Pinnacle at La Cabana, LLLP, respectfully requests that the Corporation:

A. Grant the Petition and all the relief requested therein;

B. Waive the provisions of the Qualified Allocation Plan (incorporated by Rule 67-48.002(96)(2021) prohibiting Petitioner from returning Housing Credit Allocations prior to the third quarter of 2024;

C. Allow the immediate return of Petitioner's 2022 Housing Credit Allocation;

D. Immediately allocate new Housing Credits to Petitioner with a later placed in service date, in an amount equal to the amount of its 2022 Housing Credit Allocation; and

E.. Award such further relief as may be deemed appropriate.



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ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

The Original Petition is being served by email and overnight delivery for filing with the Corporation Clerk of the Florida Housing Finance Corporation, 227 North Bronough Street, City Centre Building, Room 5000, Tallahassee, Florida 32399, with copies served by overnight delivery on the Joint Administrative Procedures Committee, Room 680, Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400 this 17th day of May 2023.

GARY J. COHEN