

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2018-058VW
RFA NO. 2017-034C

BDG BANYAN COVE, LP,

Petitioner

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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FLORIDA HOUSING
FINANCE CORPORATION

PETITION FOR WAIVER OF RULE 67-48.002(95)

Petitioner, BDG BANYAN COVE, LP, a Florida limited partnership ("Petitioner"), by and through its undersigned counsel, hereby petitions Respondent, FLORIDA HOUSING FINANCE CORPORATION ("Florida Housing") for a waiver of the timing provisions of the 2016 Qualified Allocation Plan ("2016 QAP") as incorporated and adopted by Rule 67-48.002(95), Florida Administrative Code ("F.A.C.") (2017) (the "Rule") pertaining to a tax credit exchange. In support, Petitioner states as follows:

A. THE PETITIONER

1. The address, telephone number, and facsimile number for Petitioner and its qualified representative are:

BDG Banyan Cove, LP
Attention: Jeff Kiss
501 N. Magnolia Avenue
Orlando, Florida 32801
Telephone: (407) 233-3335
Facsimile: (404) 257-5418
Email: jeffkiss.jk@gmail.com

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

Yisell Rodriguez, Esq.
Broad and Cassel LLLP
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4200
Facsimile: (407) 425-8377
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3. On December 1, 2016, Petitioner timely submitted its Application in response to the RFA 2016-110 – Housing Credit For Affordable Developments Located in Medium Counties (the “RFA”) requesting \$1,510,000 in housing credits to provide financing for acquisition and construction of a 100-unit development in Volusia County, Florida (the “Development”). The Development received an allocation of 2017 Low-Income Housing Tax Credits (“Tax Credits”) and Petitioner accepted an invitation to enter credit underwriting on August 9, 2017. On November 8, 2017, Petitioner entered into a Carryover Agreement for allocation of 2017 Tax Credits. Per the Carryover Agreement, the “placed in service” date for the Development was November 30, 2019. On June 25, 2018, Florida Housing approved an extension of the “placed in service” date for the Development, which is now December 31, 2019.

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 of Rule 67-48.002(95), F.A.C. and Subsection II.K. of the 2016 QAP, which provides as follows:

“K. Notwithstanding any other provision of this QAP, where a Development has not been placed in service by the date required or it is apparent that a Development will not be placed in service by the date required, and such failure is due to circumstances beyond

the Applicant's control, **and the Applicant has returned its Housing Credit Allocation in the last calendar quarter of the year in which it was otherwise required to be placed in service,** the Corporation may reserve allocation in an amount not to exceed the amount of Housing Credits returned, and may allocate such Housing Credits to the Applicant for the year after the year in which the Development was otherwise required to be placed in service, 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) the Executive Director must find and determine that the delay was caused by circumstances beyond the Applicant's control, that the sponsor exercised due diligence in seeking to resolve the circumstances causing delay, 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."

(emphasis added).

6. The process found in the 2016 QAP requires an applicant to return its allocation of housing tax credits in the last 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 Florida Housing. 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 Florida Housing, at this time rather than in the last calendar quarter of 2019.

D. STATUTES IMPLEMENTED BY THE RULE AND THE 2016 QAP

7. The 2016 QAP and the Rule implement, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes. *See* § 420.5099, *Fla. Stat.* (2018) (the "Statute").

**E. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE AND
SUBSECTION II.K. OF THE 2016 QAP**

8. As mentioned above, Petitioner requests a waiver of the timing requirements found in the 2016 QAP to permit Florida Housing to approve the credit exchange prior to the last quarter of 2019.

9. Through no fault of the Petitioner, the Development has suffered unforeseen events that make it clear that the Development will not be placed in service by the required date—December 31, 2019. First, the permitting process with the City of Deland (“City”) and Volusia County (“County”) is taking longer than expected. Petitioner submitted the plans for approval on November 20, 2017 and the City did not approve site plan approval until February 19, 2018. Subsequent to the City's approval, Volusia County has required the Petitioner to submit additional plans to the County for a turn lane or similar traffic safety improvement to the entrance of the Development. Petitioner has been in contact with the City and County and continues to work with them; however, final building permits are not expected until August 1, 2018.

10. Moreover, Petitioner recently engaged a new general contractor due to the construction and labor cost increases over the last several months. Petitioner previously received bids that exceeded its development budget. Petitioner’s new general contractor was able to provide bids that were much closer to Petitioner’s initial estimates for the development budget. Additionally, due to the City’s requirement that Petitioner construct two similar fifty (50) unit mid-rise buildings, rather than one 100-unit residential structure, Petitioner continues to employ and has improved value engineering to better manage and minimize the recent cost increases for materials under the new contract. The change in general contractor has enabled Petitioner to achieve better pricing for materials such as flooring, plumbing and electrical. However, the

change in general contractors caused significant delays in the closing timeline. Additionally, tax reform has caused a decrease in credit pricing that has affected the Development. The permitting delays, combined with the change in general contractors, rising costs of construction materials and labors coupled with a decrease in credit pricing, have caused significant delays to the closing of the financing.

11. Furthermore, the equity investor has advised Petitioner that its internal policies require the Development to be completed ninety (90) days prior to the placed in service deadline. As such, for the equity investor to move forward with this financing, the Development would have to be completed no later than October 1, 2019. The construction period for the Development is anticipated to be sixteen (16) months, which would not be feasible at this point given that closing has not yet occurred. The closing is anticipated to occur on or about July 31, 2018, and even commencing construction immediately and barring any delays (*e.g.*, hurricanes and severe rain), the Development would not be completed by October 1, 2019.

12. Accordingly, given that it is now known that the Development will not be completed by the equity investor's required date of October 1, 2019, and the uncertainty to the investor if the credit exchange is delayed until the last calendar quarter of 2019, the investor is requiring the Petitioner to seek a waiver of the Rule and swap the tax credits now. Otherwise, the equity investor will not be able to provide equity financing to the Development, and the Development would not be constructed.

13. 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,¹ 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.* (2018).

14. In this instance, Petitioner meets the standards for a waiver of the Rule and timing limitations in the 2016 QAP. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 100 affordable housing units will be constructed and made available for the target population in Volusia County, Florida. The strict application of the 2016 QAP and the timing limitation on the credit swap will create substantial hardship for Petitioner because it will not be able to build the Development if the low-income housing tax credit investor does not participate. 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.

15. As mentioned above, the requested waiver serves the purpose of the Statute because one of the primary goals of the Statute is to facilitate the availability of decent, safe, and sanitary housing in the State of Florida for low-income households. Moreover, the Statute was enacted, in part, to encourage private and public investment in facilities for persons of low-income. By granting this waiver, the Corporation 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 rental housing. *See* § 420.5099(2), *Fla. Stat.* (2018).

F. ACTION REQUESTED

¹ "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. § 120.542(2), *Fla. Stat.* (2018).

16. For the reasons set forth herein, Petitioner respectfully requests Florida Housing (i) grant the requested waiver of the timing requirements found in the 2016 QAP and allow the requested credit exchange to be approved before the last calendar quarter of 2019; (ii) grant the Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,



Yisell Rodriguez, Esq.

Fla. Bar No. 117915

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COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

The original Petition is being served by overnight delivery, for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, with copies served by overnight delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 6 day of July, 2018.

By:



Yisell Rodriguez, Esq.
Fla. Bar No. 117915