

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

Denton Cove, Ltd., a Florida
limited liability company,

Petitioner,

FHFC CASE NO. 2017-081VW
Application No. 2015-088C/2016-001C

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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PETITION FOR WAIVER OF RULE 67-48.002 (95)

Petitioner Denton Cove, Ltd (the "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.") (the "Rule") pertaining to a tax credit exchange. In support, Petitioner states as follows:

A. THE PETITIONER

1. The address, telephone, facsimile numbers and e-mail address for Petitioner and its qualified representative are:

Denton Cove, Ltd, a Florida limited partnership
Attn: Jonathan L Wolf
1105 Kensington Park Drive, Suite 200
Altamonte Springs, FL 32714
Telephone: 407-333-3233
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2. The address, telephone and facsimile number and e-mail address of Petitioner's counsel is:

Brian J. McDonough, Esq.
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3. On January 20, 2015, Petitioner timely submitted its Application in response to RFA 2014-114 for Housing Credit Financing for Affordable Housing Developments Located in Medium and Small Counties (the “RFA”) to assist in the construction of a 52 unit development located in Franklin County, Florida (the “Development”). Petitioner requested housing tax credits in the annual amount of \$939,370. The Development received an allocation of 2016 Low-Income Housing Tax Credits (“Tax Credits”) and was invited to credit underwriting on May 13, 2015. On or about December 21, 2016, Petitioner entered into a Carryover Agreement for the allocation of its Tax Credits. Pursuant to 26 U.S.C. 42(h)(1)(E)(i), the Development must be placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made; in this case, the federally-mandated placed-in-service date would be December 31, 2018.

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 2018.

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. (2017) (the "Statute"). Per Section 420.5099(1),(2), Florida Housing acts as the State's housing credit agency and is authorized to establish procedures for allocating and distributing low-income housing tax credits.

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 tax credit exchange prior to the last quarter of 2018.

9. Petitioner committed to exploring the possibility of developing a tax credit financed project in Apalachicola to help meet the needs of families in Franklin County impacted by the BP oil spill, the collapse of the Apalachicola Bay oyster and seafood industry, and the downturn in the local and regional economy. The credits were awarded in March 2015 and the preliminary reviews for the Development by the Planning and Zoning Board and city staff were positive. However, the Development became the subject of significant NIMBY opposition, including litigation, in the second quarter of 2015. While Petitioner successfully resolved this litigation in August 2016, the delay in commencement significantly decreased the probability that the Development will be placed in service by December 31, 2018. In the interim, the equity markets unexpectedly suffered a significant pull-back. The result of this drop in equity pricing was felt not only by the Petitioner and this Development, but by many projects scheduled to close in the near future. Because of these changes (as well as a rising interest rate market) Petitioner needs more time for the transaction to be underwritten in order to move forward.

10. Petitioner's potential tax credit investors are concerned about the uncertainty of the credit swap if delayed until the last quarter of 2018 and are unwilling to close on the Development without assurance that tax credits will be available to the Development even though the Development will not be placed in service prior to December 31, 2018. Given the likelihood the Development will not meet the placed in service deadline, the potential tax credit investors are unwilling to invest millions of dollars in the Development if there is any chance

that it may not receive credits. Without the waiver request and current approval of the credit swap, the potential tax credit investors will not participate in the transaction, resulting in the inability for the Petitioner to construct the Development.

11. The Developer is actively working to obtain additional loan sources to close the substantial funding gap created by the circumstances described in this Petition.

12. As discussed above, the delays have been caused by circumstances outside the control of the Petitioner. The issues which ensued due to the tax credit industry's reaction to the proposed reduction in marginal corporate tax rates were not only unforeseen and unanticipated by the Petitioner, they were unforeseen and unanticipated by the entire tax credit industry. Accordingly, the delay in obtaining an investor commitment, coupled with the typical building period of approximately 18 months, make it unfeasible to meet the December 31, 2018 placed in service deadline.

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.* (2017).

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

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.* (2017)

or Florida Housing and will ensure that 52 affordable housing units will be preserved and made available for the target population in Franklin 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 construct the Development if a 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. Denying the waiver would deny Franklin County these much-needed affordable housing units.

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 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, it would increase the probability that a tax credit investor will commit to the Development and Florida Housing would recognize the goal of increasing the supply of affordable housing through private investment in persons of low-income, and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing. *See* § 420.5099(2), Fla. Stat. (2017).

F. ACTION REQUESTED

16. For the reasons set forth herein, Petitioner respectfully requests Florida Housing (i) grant the requested permanent 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 2018; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

