

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. FHFC 2018-048VW

QUARRY BIG COPPITT II, LTD.
Petitioner

vs.

FHFC APPLICATION: 2018-065CS
REQUEST FOR APPLICATIONS: 2018-065CS

FLORIDA HOUSING FINANCE
CORPORATION,
Respondent

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FINANCE CORPORATION 107

**PETITION FOR WAIVER OF RULE 67-21.026(13)(f) AND RULE 67-48.0072(17)(g)
TO ALLOW A SINGLE SUBCONTRACT FOR WORK IN EXCESS OF 20%
OF A DEVELOPMENT'S CONSTRUCTION COST**

Petitioner Quarry Big Coppitt II, Ltd., a Florida limited partnership ("Petitioner") submits its Petition to Respondent Florida Housing Finance Corporation (the "Corporation") for a waiver of the Corporation's general prohibition on subcontracting more than 20% of the construction costs of a development to one subcontractor, without the Corporation's approval. See Rules 67-21.026(13)(f) and 67-48.0072(17)(g), Florida Administrative Code (collectively, the "Rule").

In support of its Petition, Petitioner states:

A. THE PETITIONER

1. The name, address, telephone and facsimile numbers, and email address for Petitioner and its qualified representative for Petitioner's application (the "Application") in response to RFA 2017-107 SAIL Financing for the Construction of Workforce Housing in (the "RFA") are:

Quarry Big Coppitt II, Ltd.
c/o The Vestcor Companies
3030 Hartley Road, Suite 310
Jacksonville, FL 32257
Attention: Jason Floyd
Telephone: 904-288-7822

Facsimile: 904-260-9031
E-Mail: jfloyd@vestcor.com

2. The name, address, telephone and facsimile numbers for Petitioner's attorney are:

Brian J. McDonough, Esq.
Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A.
150 West Flagler Street, Suite 2200
Miami, Florida 33130
Telephone: (305) 789-3350
Facsimile: (305) 789-3395
E-Mail: bmcDonough@stearnsweaver.com

B. THE DEVELOPMENT

3. Petitioner timely submitted its Application for SAIL funding in response to the RFA for the development named the "Quarry II" (the "Development"). *See* Application No. 2018-065CS. On January 24, 2018, Petitioner accepted the Corporation's invitation to Credit Underwriting.

4. The proceeds of the SAIL financing will be used to partially finance the construction of 112 units in five three-story residential buildings. The Development will also be financed with equity raised through the allocation to the Development of 9% Housing Credits and a conventional construction loan. The Development will serve low-income households in Monroe County, Florida. Forty-five percent of the units will be set aside for occupants whose income is equal to or less than 60% of the Area Median Income.

5. The waiver being sought is permanent in nature.

C. RULES FROM WHICH WAIVER IS SOUGHT

6. Petitioner requests a waiver from Rules 67-21.026(13)(f) and 67-48.0072(17)(g), Florida Administrative Code (collectively, the "Rule"). Specifically, Petitioner is requesting that the Corporation exercise the discretion provided by the Rule to allow a subcontract that exceeds

20% of the construction costs for a specific development, upon consideration of the facts and circumstances of the request.

7. The Rule provides, in relevant part, as follows:

(13) The General Contractor must meet the following conditions:

...
(f) Ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, with the exception of a subcontractor contracted to deliver the building shell of a building of at least five (5) stories which may not have more than 31 percent of the construction cost in a subcontract, unless otherwise approved by the Corporation for a specific Development. With regard to said approval, the Corporation shall consider the facts and circumstances of each Applicant's request, inclusive of construction costs and the General Contractor's fees;

Rule 67-21.0026(13)(f), F.A.C. (emphasis added).

And

(17) The General Contractor must meet the following conditions:

...
(g) Ensure that not more than 20 percent of the construction cost is subcontracted to any one entity, with the exception of a subcontractor contracted to deliver the building shell of a building of at least five (5) stories which may not have more than 31 percent of the construction cost in a subcontract, unless otherwise approved by the Corporation for a specific Development. With regard to said approval, the Corporation shall consider the facts and circumstances of each Applicant's request, inclusive of construction costs and the General Contractor's fees

Rule 67-48.0072(17)(g), F.A.C. (emphasis added).

D. STATUTES IMPLEMENTED BY THE RULE

8. The applicable Rule for which a waiver is requested is implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),¹ the statute that created the SAIL loan program (*See* Section 420.5087, Florida Statutes), and the statute that designated the Corporation as the housing credit agency responsible for the allocation and administration of Low-Income Housing Tax Credits (*See* Section 420.5099, Florida Statutes). Further, pursuant to the

¹ The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.517 of the Florida Statutes.

RFA, "Proposed Developments funded under this RFA will be subject to the requirements of the RFA, the Application requirements outlined in Rule Chapter 67-60, F.A.C., the SAIL Loan requirements outlined in Rule Chapter 67-48, F.A.C., the ELI Loan requirements outlined in Exhibit D of the RFA, the MMRB and/or Non-Competitive HC requirements outlined in Rule Chapter 67-21, F.A.C., and the Compliance requirements of Rule Chapter 67-53, F.A.C."

E. JUSTIFICATION FOR WAIVER

9. Petitioner requests a waiver of the Rule, to allow its general contractor to engage a shell contractor the cost of whose work will exceed 20% of the construction costs for the Development. Each of the five residential buildings in the Development will be fewer than five stories in height, and therefore the language of the Rule which would allow the cost of the shell contractor's work to be more than 20% (but no more than 31%) of the construction costs does not apply.

10. Petitioner has entered into a guaranteed maximum price construction contract for the construction of the Development (the "GC Contract"). One component of the GC Contract is the total concrete for the Development. Several factors have increased the cost of concrete such that it now exceeds the 20 percent limitation, such as the site being located in the lower keys, and the increase in prices since Hurricane Irma.

11. Due to the size and scope of the shell work, the general contractor sought bids from three shell subcontractors. In response to the request for bids, the general contractor received three bids. All bids exceeded the amount equal to 20% of the construction costs in the GC Contract. The subcontractor selected for the shell work has a base subcontract that will be approximately 29.7% of the GC Contract, and was the lowest bid. In order to proceed with the construction of the Development, Petitioner will need the Corporation to waive the requirements of the Rule, or Petitioner will not be able to move forward with the construction of the Development.

12. It is not uncommon for development changes to occur after submission of an application to the Corporation. Under Section 120.542(1), Florida Statutes, and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its rule requirements when strict application of these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers must be granted when: (1) the person who is subject to the rule demonstrates that the application of the rule would create a substantial hardship or violate principles of fairness, and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. *See* Section 120.542(2), Florida Statutes. Indeed, the specific language of the Rule provides the Corporation with the flexibility to permit subcontracts in excess of the 20% limitation after considering the facts and circumstances of an applicant's request.

13. Petitioner's general contractor sought multiple bids for the shell work, and all bids received exceeded the 20% limitation. Given the results of the bid process, Petitioner seeks the Corporation's approval, in accordance with the Rule, to allow the cost of the work to be performed by the shell subcontractor to exceed the 20% limitation in the Rule. Failure to grant Petitioner's request for a Rule waiver will result in a substantial hardship to Petitioner, in that it will not be able to proceed with the construction of the Development in a timely manner, if at all, since the shell work is fundamental to the overall construction of the Development.

14. The requested waiver will not adversely affect Petitioner, the Development, any other party that applied to receive SAIL funding in the RFA, or the Corporation. A denial of this Petition, however, would (a) result in substantial economic hardship to Petitioner, as it has incurred approximately \$6,676,142 in costs to date toward ensuring that the Development proceeds to completion; (b) deprive Monroe County of essential affordable rental units set aside for persons of limited means who desperately need the housing, as well as other amenities and services which

the Development will offer; and (c) violate principles of fairness². *See* Section 120.542(2), Florida Statutes.

15. If this Petition is not granted, the equity provider that has committed to serve as the Petitioner's investor member and to syndicate the Low-Income Housing Tax Credits will likely withdraw from the transaction and the Development will fail to be constructed.

16. A waiver of the Rule's limitation on single-provider construction costs would serve the purposes of Section 420.5099, Florida Statutes, and the Act as a whole, because one of the Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means 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.

Section 420.5099(2), Florida Statutes.

17. By granting the waiver, the Corporation would recognize the principles of fundamental fairness in developing affordable rental housing by encouraging the development of attractive, secure and affordable housing.

F. CONCLUSION

²"Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. "Principles of Fairness" are violated when 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. *See* Section 120.542(2), Florida Statutes.

18. The facts set forth in Sections 9 through 17 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for a Rule waiver; that is, the loss of a substantial sum of money should the transaction not go forward, and the loss of critical housing for households of limited means.

19. Controlling statutes and the Corporation's rules are designed to allow the flexibility necessary to provide relief from requirements when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results. As demonstrated above, the requested waiver serves the purposes of Section 420.5087 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. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable housing.

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

WHEREFORE, Petitioner Quarry Big Coppitt II, Ltd, respectfully requests that the Corporation:

- a. Grant the Petition and all the relief requested therein; and
- b. Award such further relief as may be deemed appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WESSLER
ALHADEFF & SITTERSON, P.A.
Counsel for Petitioner
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Miami, Florida 33131
Tel: (305) 789-3350
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E-mail: bmcdonough@swmwas.com

By: s/ Brian J. McDonough
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The Petition is being served by hand-delivery, with a copy served by electronic transmission, for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, with copies served via hand delivery on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 29th day of May, 2018.

s/ Brian J. McDonough
BRIAN J. MCDONOUGH, ESQ.

STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A.

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May 29, 2018

Legal Analyst/Corporation Clerk
Florida Housing Finance Corporation
227 N. Bronough Street
Suite 5000
Tallahassee, Florida 32301

RE: Petition for Rule Waiver

Dear Clerk:

Enclosed is a Petition for Waiver of Rule 67-21.026(13)(f) and Rule 67-48.0072(17)(g), F.A.C., submitted on behalf Quarry Big Coppitt II, Ltd., for consideration by the Board at its next meeting. I have sent a duplicate copy to the Joint Administrative Procedures Committee.

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Bridget Smitha

Bridget Smitha