

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

WARLEY PARK, LTD., a Florida
Limited Partnership,

Petitioner,

FHFC CASE NO. 2018-072VW
Application No. 2017-258CSN

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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FLORIDA HOUSING
FINANCE CORPORATION

PETITION FOR WAIVER OF RULE 67-48.002 (95), F.A.C. AND 2016 QAP

Petitioner Warley Park, 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.") (9-15-16) pertaining to a tax credit exchange (collectively, the "Rule"). 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:

Warley Park, Ltd, a Florida limited partnership
Attn: Jonathan L Wolf
1105 Kensington Park Drive, Suite 200
Altamonte Springs, FL 32714
Telephone: 407-333-3233
Fax: 407-333-3919
Email: jwolf@wendovergroup.com

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

Brian J. McDonough, Esq.
Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
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Miami, Florida 33130
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3. On April 19, 2017, Petitioner timely submitted its Application in response to RFA 2017-103 for Low Income Housing Tax Credits and State Apartment Incentive Loan funding (the "RFA") to develop housing in medium and large counties for homeless households and persons with a disabling condition (the "Development"). The Development received an allocation of 2017 Low-Income Housing Tax Credits ("Tax Credits") and Petitioner received an Invitation to Enter Credit Underwriting - At Risk on October 30, 2017. On or about December 20, 2017, 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, 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 Subsection II.K. of the 2016 Qualified Allocation Plan ("QAP"). At the time the Application was submitted, Rule 67-48.002(95), F.A.C. (9-15-16) provided:

(95) "QAP" or "Qualified Allocation Plan" means, with respect to the HC Program, the 2016 Qualified Allocation Plan which is adopted and

incorporated herein by reference, effective upon approval by the Governor of the state of Florida, pursuant to Section 42(m)(1)(B) of the IRC and sets forth the selection criteria and the preferences of the Corporation for Developments which will receive Housing Credits. The QAP is available on the Corporation's website under the Multifamily Programs link or by contacting the Housing Credit Program at 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, or from <http://www.flrules.org/Gateway/reference.asp?No=Ref-07355>.

Subsection II.K. of the 2016 Qualified Allocation Plan provided:

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. (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 IL.K OF THE 2016 QAP

8. The Development will comprise 85 new construction garden style units designed to benefit homeless persons in Seminole County. The Development requested \$2,825,000 SAIL, \$1,510,000 Housing Credits, and \$1,273,600 National Housing Trust Fund with 9% set aside at 22% AMI (NHTF), 10% at 40% AMI (SAIL & HC) and 90% at 60% AMI (SAIL & HC).

9. Pursuant to the Carryover Allocation Agreement, the Credit Underwriting Report must be submitted to Florida Housing by August 31, 2018 and a copy of the recorded Notice of Commencement and a copy of the executed partnership agreement must be delivered by September 30, 2018. Due to circumstances beyond Petitioner’s control, Petitioner will not be able to meet these deadlines. Specifically, Petitioner’s diligent efforts to get on the City of Sanford’s Planning and Zoning Commission’s agenda were impeded by third-parties for nine months. Due to this excessive delay, Petitioner will not be able to place the buildings in service by December 31, 2019, as required by the Carryover Allocation Agreement. Accordingly, in addition to seeking an extension of the deadlines for the Credit Underwriting Report, Notice of

Commencement, and executed partnership agreement, Petitioner must obtain the requested Rule Waiver to allow for a tax credit exchange. Upon receiving approval for a credit swap, Petitioner will enter into a new Carryover Allocation Agreement that will extend the foregoing deadlines.

10. Petitioner therefore requests a waiver of the timing requirements found in the 2016 QAP to permit Florida Housing to approve a tax credit exchange prior to the last quarter of 2019.

11. Petitioner acted diligently to resolve the circumstances causing the delay. Specifically, the following remedial measures were attempted by Petitioner to mitigate the delay:

- On January 4, 2018, Petitioner submitted the Preapplication Conference Form, Warley Design Constraints, Warley Park Concept Plan, SCPA Parcel View 35-19-30-300-0370-0000, SCPA Parcel View 35-19-30-300-0380-0000 and SCPA Parcel View 35-19-30-300-0390-0000 for the preapplication meeting.
- On January 9, 2018, Petitioner met with city staff who indicated for the first time that they believed the Development would potentially be considered a Community Resource Facility and not for multifamily use. Additionally, staff mentioned that a portion of the site bordered single family which would potentially affect allowable density. This was not mentioned during the preliminary site plan stage, nor during zoning confirmation for the application.
- On February 8, 2018, a Citizens Awareness and Participation Plan (“CAPP”) meeting was held with no opposition from local residents.
- On February 12, 2018, Petitioner submitted a CAPP meeting summary.
- On March 26, 2018, Petitioner submitted an application for conditional use, including a signed application for Eman Gadalla, a signed application for Nassim

Abdelsayed, a signed Affidavit of Ownership for Eman Gadalla, a signed Affidavit of Ownership for Nassim Abdelsayed, a check in the amount of \$750.00, a Written Explanation/Justification Memo, 24" x 36" Site Plans, 11" x 17" Landscape Plans and a CD with PDFs.

- On April 2, 2018, Petitioner received notice of the denial of its application for conditional use. The denial used the "Community Resource Facility" terminology again, which the City later determined to be erroneous.
- On April 12, 2018, Petitioner submitted a response letter to the conditional use denial.
- On April 18, 2018, Petitioner participated in a conditional use denial meeting.
- On April 24, 2018, the City reversed its conditional use denial. The denial and reversal caused delay in Petitioner's ability to apply for the next available Planning and Zoning meeting.
- On May 10, 2018, Petitioner received Design Review Team ("DRT") comments, and responded with sufficient time to be placed on the June agenda. All previously received comments were addressed. However, new comments and requirements were added that had not been previously disclosed, including a requirement for traffic and environmental studies.
- On June 5, 2018, Petitioner submitted its response to the DRT comments, including 24" x 36" revised site plans, 11" x 17" revised site plans, a CD with PDFs, a Trip Generation Letter, and a Parking Ratios Memorandum.
- On July 5, 2018, Petitioner received DRT's second round of comments.

- Although Petitioner completed and submitted all of the studies and required information per the City's instructions, Petitioner was informed that the August agenda had already been issued and the earliest date for Petitioner was on the September 6, 2018 agenda.

12. Aside from the time placed in service, the Development still meets in all respects the conditions upon which the Housing Credits were originally allocated. The Development remains necessary to meet affordable housing needs.

13. Petitioner's potential tax credit investors are concerned about the uncertainty of the credit swap if delayed until the last quarter of 2019 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, 2019. 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.

14. The delay in appearing before the Planning and Zoning Commission, coupled with the time necessary to complete the due diligence prerequisites before construction may begin and the typical building period of approximately 12 months, make it unfeasible to meet the December 31, 2019 placed in service deadline.

15. 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).

16. 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 85 affordable housing units will be preserved and made available for the target population in Seminole 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 Seminole County these much-needed affordable housing units.

17. 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

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).

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

18. 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 2019; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

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

CERTIFICATE OF SERVICE

This Petition is being served by hand-delivery, with a copy served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by hand-delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 27th day of September, 2018.

By: /s/ Brian J. McDonough
Brian J. McDonough, Esq.