

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2015-034VW

ARBOURS AT TUMBLIN CREEK,  
LLC

Petitioner,

v.

FLORIDA HOUSING FINANCE  
CORPORATION

Respondent.

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**PETITION FOR WAIVER OF THE QUALIFIED ALLOCATION PLAN'S  
REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS, AND FOR  
AN IMMEDIATE ALLOCATION OF 2015 HOUSING CREDITS**

Petitioner Arbours at Tumblin Creek, LLC, a Florida limited liability company (“Arbours”) submits its Petition to Respondent Florida Housing Finance Corporation (the “Corporation”) for a waiver of the 2014 Qualified Allocation Plan’s (a) prohibition from returning its 2014 Housing Credit Allocation prior to the last quarter of 2016, and (b) requirement that a housing credit allocation can be reserved only for the year after the year in which the development is required to be placed in service (“Placed-in-Service Date”). The return of these Housing Credits is required before the Corporation may reserve an allocation of 2015 Housing Credits that Arbours requests be immediately allocated. *See* Rule 67-48.002(94), Florida Administrative Code (the “Rules”), and Qualified Allocation Plan Section II.K.

1. Pursuant to Section 120.542, Fla. Stat. (2015) and Rules 28-104.001 through 28-104.006, F.A.C., Arbours requests a waiver of Rule 67-48.002(94), Florida Administrative Code, and of Section II.K of the Qualified Allocation Plan (“QAP”) to allow the immediate return of its 2014 Housing Credit Allocation, and an immediate allocation of 2015 Housing Credits.

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

Arbours at Tumblin Creek, LLC  
33 Inverness Center Parkway, Suite LL130  
Birmingham, AL 35242  
Attention: Samuel T. Johnston  
Telephone 205-981-3300  
Telecopier 205-991-9674  
E-Mail: [sam@arbourvalley.com](mailto:sam@arbourvalley.com)

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

Gary J. Cohen, Esq.  
Shutts & Bowen LLP  
201 S. Biscayne Blvd., Ste. 1500  
Miami, Florida 33131  
305-347-7308 (telephone)  
305-347-7808 (telecopier)

4. Pursuant to RFA 2013-001, Arbours timely submitted its application for competitive Housing Credits under the Low Income Housing Tax Credit program ("LIHTC Program" or "HC Program"). *See* Application Number 2014-046C.

5. Equity raised from Housing Credits will be used for new construction of 64 low-income housing tax credit units to be known as Arbours at Tumblin Creek (the "Development"). The Development will serve low-income elderly tenants in Gainesville, Florida.

6. On December 13, 2013, Arbours' application was preliminarily selected for funding by FHFC. However, due to appeals filed by other competitors in RFA 2013-001, the award to Arbours was not finalized until the June 13, 2014 Corporation Board of Directors meeting.

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. The carryover allocation allows 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. As such, an applicant receiving a preliminary allocation of 2014 housing credits must enter into a carryover allocation agreement with FHFC by December 31, 2014 and must place the development in service by December 31, 2016. On December 17, 2014, Arbours and the Corporation entered into a carryover allocation agreement for the Development. The carryover allocation agreement required that Arbours satisfy the “10% test” by June 30, 2015, commence construction and close tax credit financing by September 30, 2015, and place the Development in service by December 31, 2016.

8. Pursuant to requests submitted by Arbours, the Corporation extended the date for commencement of construction, satisfaction of the “10% test” and closing of the tax credit financing until December 17, 2015. Neither of these two extensions affected the required placed in service deadline, which continued to be December 31, 2016. As explained more fully below, the Development will not be able to meet the above deadlines, and as such is requesting an exchange of Housing Credits (2015 for 2014).

9. The investor partner of the project is unwilling to close the tax credit financing and wait until the fourth quarter of 2016 (as is required by Section II.K. of the QAP) to find out whether or not the 2014 Housing Credits can be exchanged for 2015 Housing Credits (with extended dates for placement in service and other requirements in the carryover allocation agreement). They will only close with the certainty of an allocation of 2015 Housing Credits (and corresponding later dates for satisfaction of requirements in the new carry over allocation agreement).

10. The reason for the delay in closing the tax credit financing and commencement of construction is as follows. Applicant was invited to credit underwriting in June 2014, immediately after the final award of 2014 Housing Credits. Applicant had submitted its application for housing credits in late 2013 and initial rankings were completed in early 2014; however, due to appeal litigation filed against the Applicant, the final award was not received until June 13, 2014, approximately four months later than would have been the case had such appeal litigation not been filed against Applicant. Since that date, the Development has experienced a number of interrelated delays that have impacted the anticipated construction commencement date, as explained more fully below. Given the conservative build time of 14 to 16 months, Arbours will be unable to meet the December 31, 2016 placed in service deadline.

11. In the fall of 2014, rising construction costs precipitated a change from concrete to wood construction. Arbours requested permission for this change on October 16, 2014 and received approval from the Corporation on October 24, 2014. Arbours made a request to the Corporation to replace a number of two-bedroom units with one-bedroom units, which was approved by the Corporation on December 5, 2014. These building design and unit mix changes at the end of 2014 delayed the preparation of architectural drawings and plans until the first quarter of 2015. The preparation of the plans was further delayed by having to wait for the City of Gainesville's determination of where utility connections for the Development were to be located. This caused delay in requesting bids for site work as Applicant did not have a set of plans to put out for bid. Due to the high level of construction activity in Gainesville, Applicant could not obtain qualified site contractor pricing as several site contractors declined to bid.

12. On March 19, 2015, with newly revised architectural plans and completed underwriting, Arbours submitted its "firm" 221(d)(4) application to the U.S. Department of

Housing and Urban Development (“HUD”) for construction/permanent loan financing. HUD’s loan committee approved the Project in September 2014; however, HUD is requiring Arbours to complete an “8-step” notification process prior to issuing a firm commitment. The “8-step” process” will be completed on October 12, 2015, after which time HUD will issue its commitment (anticipated to be issued by the end of October 2015). It typically takes 45-60 business days to close a 221(d)(4) loan after receiving a firm commitment. Given an end of October 2015 delivery of the HUD firm commitment, coupled with the necessary time to close such financing, Arbours’ construction commencement date would come too late to meet a December 31, 2016 placed in service deadline and the other deadlines contained in the current carryover allocation agreement.

13. All of the above items were and are outside of Arbours’ control, starting with the delay in the allocation of 2014 Housing Credits due to appeals filed in RFA 2013-001 and the other delays described herein.

14. As set forth more fully below, Arbours seeks to return its 2014 Housing Credit allocation now, rather than wait for the last calendar quarter of 2016, as required under the QAP, and obtain from the Corporation an immediate allocation of 2015 Housing Credits, instead of an allocation in 2017, the year after the current Placed-in-Service Date.

15. 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 Arbours; (b) deprive Gainesville and Alachua County of essential affordable rental units set aside for low-income and very low-income tenants; and (c) violate principles of fairness. The Development is the first new construction affordable housing development in the City of Gainesville since the 1980’s and will provide sorely needed housing for seniors.

16. 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.

17. The 2014 QAP (Section II.K) provides that Housing Credits may be returned **only** in the last calendar quarter of the year in which a development is required to be placed in service, and an allocation may only be made for the year after the Placed-in-Service Date:

...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 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..."

2014 QAP at Section II.K (emphasis added).

18. The applicable Rules for which waivers are requested are implementing, among other sections of the Florida Housing Finance Corporation Act (the "Act"),<sup>1</sup> the statute that created the Housing Credits Program. *See* § 420.5099, Fla. Stat. (2014). 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. (2014). Accordingly, the

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<sup>1</sup> The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.517 of the Florida Statutes, (the "Act").

Rules subject to Arbours' waiver requests are implementing, among other sections of the Act, the statutory authorization for the Corporation's establishment of Allocation Procedures for the HC Program. §§ 420.5099(1) and (2), Fla. Stat. (2014).

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

20. The facts set forth in Sections 10 through 12 of this Petition demonstrate the hardship and other circumstances which justify Arbours' request for Rule waiver; that is, the initial delay in the award of 2014 Housing Credits and the subsequent delays described herein.

21. As demonstrated above, the requested waivers serve 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. (2014).

22. Further, by granting the requested waivers, FHFC would recognize principles of fundamental fairness in the development of affordable rental housing. This recognition would promote participation by experienced developer entities, such as Arbour Valley Development, LLC, in meeting the purposes of the Act, regardless of the possible delays from factors outside of its control.


23. The requested waivers will not adversely impact the Development or the Corporation.

24. The waivers being sought are permanent in nature.

Should the Corporation require additional information, Arbours is available to answer questions and to provide all information necessary for consideration of its Petition for Waiver of the Qualified Allocation Plan's Requirement for Returning Housing Credit Allocations, and for an immediate Allocation of 2015 Housing Credits.

WHEREFORE, Petitioner Arbours at Tumblin Creek, LLC, respectfully requests that the Corporation:


- A. Grant the Petition and all the relief requested therein;
- B. Waive the 2014 Qualified Allocation Plan's prohibition from returning Housing Credit Allocations prior to the last quarter of 2016;
- C. Allow the immediate return of the Arbours' 2014 Housing Credit Allocation;
- D. Waive the 2014 Qualified Allocation Plan's requirement that a Housing Credit Allocation cannot be reserved until the year after the Development's Placed-in-Service Date;
- E. Immediately allocate 2015 Housing Credits to Arbours, in an amount not to exceed the amount of its 2014 Housing Credit Allocation; and
- F. Award such further relief as may be deemed appropriate.

  
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GARY J. COHEN  
Shutts & Bowen LLP  
201 S. Biscayne Blvd., Suite 1500  
Miami, Florida 33131  
(305) 347-7308  
ATTORNEYS FOR PETITIONER



**CERTIFICATE OF SERVICE**

The Original Petition is being served by facsimile 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 2<sup>nd</sup> day of October, 2015.

  
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GARY J. COHEN

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