

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

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FLORIDA HOUSING  
FINANCE CORPORATION

**FAIR OAKS, LLC,**  
a Florida limited liability company,

Petitioner,

CASE NO. 2019-084VW

vs.

Application No. 2018-077C

**FLORIDA HOUSING FINANCE  
CORPORATION,**

Respondent.

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**PETITION FOR WAIVER OF RULE 67-48.002 (95) (2017)**

Fair Oaks, LLC, a Florida limited liability company (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.") May 24, 2017 (the "Rule") pertaining to a tax credit exchange. This request was necessitated by circumstances outside of Petitioner's control that were unforeseen at the time Petitioner submitted its application in response to RFA 2017-112 Housing Credit Financing For Affordable Housing Developments Located In Miami-Dade County. Absent the requested waiver, Petitioner will not be able to close on the funding needed to construct the development. 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:

Fair Oaks, LLC  
3050 Biscayne Boulevard

Suite 300  
Miami, FL 33137  
Attn: Francisco Rojo  
Telephone: (305)538-9552 x 103  
Facsimile: (305)538-9553  
E-Mail: Francisco@landmarkco.net

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.  
150 West Flagler Street  
Suite 2200  
Miami, Florida 33130  
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Fax: 305-789-3395  
Email: Bmcdonough@stearnsweaver.com

**B. THE DEVELOPMENT**

3. On December 13, 2017, Petitioner timely submitted its Application in response to RFA 2017-112 for the development named "Fair Oaks Apartments" (the "Development"). *See* Application No. 2018-077C. The Development will be constructed in Miami-Dade County using housing credit funding of \$2,400,000.

4. Petitioner's application for housing credits reflected a total of 120 units, with a Total Set-Aside-Breakdown of 100%, as follows: 108 units (90%) at 60% AMI; 12 ELI set-aside units (10%) and 0% market-rate units.

5. Petitioner submitted, and was granted on June 21, 2019, a petition for Rule waiver allowing it to reduce the Total Set-Aside Percentage from 100% to 96% and to add four additional units at market rate. Accordingly, the ELI set-aside units increased from 12 to 13 units and the units at 60% AMI decreased from 108 to 107 units, maintaining a total of 120 set-aside units.

6. The Development received an allocation of the 2018 Housing Credit dollar amount meeting the requirements of Section 42(h)(1)(E) and (F) of the Internal Revenue Code of 1986 as amended (“Tax Credits”) and was invited to credit underwriting on July 30, 2018. On December 7, 2018, Petitioner entered into a Carryover Allocation 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 no 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, 2020.

**C. WAIVER IS PERMANENT**

7. The waiver being sought is permanent in nature.

**D. THE RULE FROM WHICH WAIVER IS REQUESTED**

8. Petitioner requests a waiver of Rule 67-48.002(95), F.A.C. (May 24, 2017), which defines “QAP” with reference to the 2016 QAP and which adopts and incorporates the 2016 QAP by reference. Petitioner further requests a waiver of 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).

9. 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 2020.

**E. STATUTES IMPLEMENTED BY THE RULE AND THE 2016 QAP**

10. The Rule and the 2016 QAP 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. (the “Statute”).

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

11. 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 2020.

12. It is not possible for Petitioner to meet the required placed-in-service date (presently December 31, 2020) for the following reasons that are outside of Petitioner’s control:

- At the time Petitioner submitted its application, Petitioner did not anticipate the need for federal funding.

- Since submitting the application, the constructions costs for the Development have increased by approximately \$2.5 million due to unforeseeable events; e.g.: (1) continued tightness of the construction labor force and subcontractors in South Florida; (2) higher than anticipated costs for off-site water and sewer improvements due to poor local infrastructure; (3) the impact of recent import tariffs on construction materials; and (4) design requirements disclosed in the site planning and development approval process regarding offsite work and increasing the building height from five to six stories.
- The only source of funding made available by Miami-Dade County in late 2018 to cover the increased costs was through the HOME Investment Partnerships Program. Miami-Dade issued a HOME RFA on October 1, 2018, with a due date of November 16, 2018. Petitioner applied for, and was awarded, funding in conjunction with that HOME RFA. However, Miami-Dade County took longer than usual to make recommendations under the HOME RFA because the County received a high number of applications, and in an effort to fund as many requests as possible, the County re-allocated funding from other projects/activities that had not met their commitments. The re-allocation process took several months. Ultimately, the Miami-Dade Board of County Commissioners awarded the Development \$2.1 million in HOME and Housing Development Action Grants (“HODAG”) funds on July 23, 2019. The County issued Petitioner a commitment for said funds on September 5, 2019.
- The delay in the County’s award of funding to the Development delayed the commencement of the County’s HUD-compliant environmental review (“ER”) process. Since the HOME and HODAG funds are federally sourced, Miami-Dade County’s Department of Public Housing & Community Development (“PHCD”) is performing a

HUD-compliant ER of the Development. Certain parts of the PHCD's ER cannot be completed until the Miami-Dade County Department of Environmental Resource Management ("DERM") issues its approval of certain site environmental remediation measures for the Development. This DERM submittal and review process is presently ongoing. Additionally, certain advertising periods and HUD approval requirements must be satisfied before the Development obtains ER clearance. Petitioner estimates the Development will obtain ER clearance by January 2020.

- HUD rules prohibit commencement of construction until the Development obtains ER clearance. Even if ER clearance is obtained in January 2020, the construction contract provides for a 14-month construction period (resulting in a March 2021 estimated placed-in-service date).

Because Petitioner knows that it will not be able to meet the December 31, 2020 placed-in-service date, Petitioner requests the credit swap now as opposed to waiting until the last quarter of 2020.

13. Petitioner exercised due diligence in seeking to commence construction:

- Petitioner closed on the land purchase for the Development on December 17, 2018.
- Landmark Development Corp and its affiliates have spent approximately \$3.3 million to date moving the Development towards the construction phase.
- The Development satisfied the 10% Housing Credit Test in June 2019.
- Miami-Dade County granted site plan approval for Fair Oaks in March 2019.
- Petitioner submitted building and civil plans to the applicable permitting agencies in April 2019.

- The Development has obtained Department of Health and Water and Sewer approvals and anticipates obtaining all development approvals and permit approvals in the Fall of 2019. Impact fees and permit fees are anticipated to be paid in January 2020, after issuance of the HUD-compliant ER, discussed above.

14. Petitioner attempted remedial measures to mitigate the delay:

- Site plan approval for the Development took approximately five (5) months (October 2018 through March 2019), which is common in Miami-Dade County.
- In order to accelerate the Development's overall development approval process, Petitioner authorized the architect in January 2019 to commence design of the building plans even though the site plan approval was not granted until March 27, 2019. The building plans were submitted to the Miami-Dade County Building Department on April 5, 2019.
- Similarly, Petitioner authorized the civil engineer to commence design of civil plans in February 2019, even though site plan approval was not yet granted. The first submittal of civil plans occurred on April 26, 2019 – within one month of site plan approval.
- Because Petitioner is prohibited from commencing construction prior to completion of the HUD-compliant ER process, Petitioner cannot take further remedial measures to mitigate the delay.

15. The Development in all respects, except time placed in service, still meets the conditions upon which the Housing Credits were originally allocated, and the Development is still desirable in terms of meeting affordable housing needs.

16. Despite Petitioner's diligence and progress, even if Petitioner is able to obtain ER clearance by January 2020, it would have only about 11-12 months to construct and place in

service a 124 unit (of which 120 are set-aside units) six-story building. The construction contract for the Development calls for a 14-month construction period. At this time, it is known that there is insufficient time to meet the December 31, 2020 placed-in-service deadline.

17. Without the waiver request and current approval of the credit swap, Petitioner will be unable to construct the Development and will lose the \$3.3 million it invested to date.

18. As discussed above, the delays have been caused by circumstances outside of the Petitioner's control and despite Petitioner's diligent efforts to move towards the construction phase.

19. 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,<sup>1</sup> and (2) the purpose of the underlying statute has been or will be achieved by other means by the person. *See* § 120.542(2), *Fla. Stat.*

20. 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 120 affordable housing units will be preserved and made available for the target population in Miami-Dade County, Florida. The strict application of the 2016 QAP and the timing limitation on the credit swap will create substantial hardship for

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<sup>1</sup> "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. *See* § 120.542(2), *Fla. Stat.*



Petitioner because it will not be able to construct the Development if the 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.

21. 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, Florida Housing 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 housing. *See* § 420.5099(2), Fla. Stat.

**G. ACTION REQUESTED**

22. 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 2020; (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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*Counsel for Petitioner*

By: *Brian J. McDonough*  
BRIAN J. MCDONOUGH, ESQ.

**CERTIFICATE OF SERVICE**

The Petition For Rule Waiver is being served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation at [Corporation.Clerk@FloridaHousing.org](mailto:Corporation.Clerk@FloridaHousing.org) and a hard copy is being mailed via U.S. Mail to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 3rd day of October, 2019.

By: *Brian J. McDonough*  
Brian J. McDonough, Esq.