

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

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DENTON COVE, LTD., a Florida
limited liability company,

Petitioner,

FHFC CASE NO. 2019-038VW
Application No. 2015-088C/2016-001C

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

PETITION FOR WAIVER OF RULE 67-48.002 (95), F.A.C. AND 2015 QAP

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 2015 Qualified Allocation Plan ("2015 QAP") as incorporated and adopted by Rule 67-48.002(95), Florida Administrative Code (10-18-14) ("F.A.C.") 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:

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
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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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.

4. Pursuant to 26 U.S.C. 42(h)(1)(E)(i), the Development is required to be placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made. Under the 2016 Carryover Agreement, the federally-mandated placed-in-service date would have been December 31, 2018. However, due to forces outside of its control (detailed in paragraph 14, below), Petitioner was required to seek a Petitioner for Rule Waiver for a credit swap on November 20, 2017. Florida Housing Granted that Petition on December 8, 2017, and allowed Petitioner to exchange its tax credits at that time, rather than waiting until the last calendar quarter of 2018. Petitioner then entered into a new Carryover Agreement under which the new deadline for the Development to be placed in service was December 31, 2019.

However, litigation again caused a delay that prevented Petitioner from meeting this deadline. Petitioner, therefore, submitted a second petition for waiver on November 26, 2018. Pursuant to Revenue Procedure 2014-49, which provides for extensions of deadlines similar to a credit swap, relief was granted at the staff level and the second petition was withdrawn.

5. Litigation has once again delayed the Development, requiring Petitioner to submit a third petition for waiver.

B. WAIVER IS PERMANENT

6. The waiver being sought is permanent in nature.

C. THE RULE FROM WHICH WAIVER IS REQUESTED

7. Petitioner requests a waiver of Subsection II.K. of the 2015 Qualified Allocation Plan (“QAP”). At the time the Application was submitted, Rule 67-48.002(95), F.A.C. (10-8-14) provided:

“QAP” or “Qualified Allocation Plan” means, with respect to the HC Program, the 2015 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-04614>.

Subsection II.K. of the 2015 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).

8. The process found in the 2015 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.

D. STATUTES IMPLEMENTED BY THE RULE AND THE 2015 QAP

9. The 2015 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. (2014) (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 2015 QAP

10. The Development will comprise 52 new construction garden style units designed to benefit families in Franklin County. The Development requested \$939,370 Housing Credits with 40% set aside at 60% AMI.

11. 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 around that time. Because of these changes (as well as a rising interest rate market) Petitioner requested – and was granted – more time for the transaction to be underwritten in order to move forward.

12. Petitioner entered into a second Carryover Agreement under which the placed in service date was extended to December 31, 2019. Petitioner diligently moved the Development forward, but was unfortunately side-tracked again by third-parties:

- In 2012, Petitioner began planning the Development. The City of Apalachicola’s (“City”) Planning and Zoning Board gave conditional approval for the Development on December 10, 2012.
- Around that time, Petitioner began negotiations with the School Board of Franklin County (“School Board”) and the City to purchase the property on which the Development would be built. Both the School Board and the City asserted that the School Board only owned the lots, while the City owned the real property that had originally been shown as streets and alleys that were never constructed (the “streets and alleys”).
- Thus, on December 11, 2014, the Petitioner entered into a purchase and sale agreement with the School Board (“School Board PSA”) with the express provision that Petitioner was to purchase the streets and alleys from the City.
- In recognition of the foregoing, Petitioner executed a purchase and sale agreement with the City (“City PSA”) for the streets and alleys.
- Based on School Board PSA, the City’s PSA, the City’s execution of all necessary verification forms, and the City’s commitment to support Petitioner’s Application, Petitioner submitted the Application.
- Despite the City’s prior agreement, and contractual obligation, to vacate the streets and alleys, the City declined to adopt the necessary resolution, frustrating Petitioner’s ability to develop the Development. In an effort to mitigate the circumstances causing the delay, Petitioner initiated a lawsuit in the United States District Court, Northern District of Florida (Case Number 4:15-cv-413) in August 2015. This litigation prevented Petitioner from closing on the property.

- In relation to the litigation, the School Board agreed – upon payment of extension fees over and above the School Board PSA – to extend the closing of the School Board PSA to July 31, 2018.
- During the course of the lawsuit, the City extinguished all of its rights to the streets and alleys, thus vesting the School Board with unencumbered legal ownership of the entirety of the Property.
- On July 18, 2018, the School Board sued Petitioner seeking declarations that the School Board is only obligated to convey the lots to Petitioner, and is not obligated to convey the streets and alleys under the School Board PSA. *See School Board of Franklin County, Florida v. Denton Cove, Ltd.*, Case No. 2018-CA-0188 (2nd Judicial Circuit, Franklin County).
- On August 13, 2018, Petitioner filed its answer and counterclaims for specific performance, reformation, unjust enrichment, and breach of the implied covenant of good faith and fair dealing, which the School Board has sought to have dismissed.

Because it was highly unlikely that the Development would be placed in service by December 31, 2019, due to the foregoing events, Petitioner sought – and was granted – an extension of the placed in service date to December 31, 2020.

13. Unfortunately, an additional extension is necessary because litigation remains a barrier to Petitioner moving forward with the Development.

14. Petitioner’s efforts to resolve the litigation without a trial have not succeeded. For example, the School Board voted against accepting Petitioner’s settlement offer, which was agreed to by the School Board’s representatives during mediation. Because of numerous factual

disputes between the parties, it is unlikely the case will be resolved without a trial. The trial date will not be scheduled until discovery is completed, yet discovery remains active. Indeed, requests for admissions were just served on April 4, 2019, to which responses are not due until May 6, 2019. Similarly, notices of taking deposition were served as recently as April 2, 2019.

15. Despite Petitioner's best efforts to resolve the dispute, it is unlikely the issue will be resolved until the litigation terminates. Because Petitioner cannot begin construction unless or until the School Board conveys the streets and alleys – and because the School Board has refused to date to convey the streets and alleys unless or until directed to by the Court – the litigation remains a bar to construction. Petitioner lacks control over when the litigation will terminate – as evidenced by the fact the School Board voted against accepting the settlement offer that was negotiated and agreed to by School Board representatives during mediation. Once the litigation ends, construction of the Development will take at least another 12 – 18 months to complete before it can be placed in service. Accordingly, Petitioner files this third Petition.

16. Petitioner's efforts to resolve the litigation without a trial have not succeeded. For example, the School Board voted against accepting Petitioner's settlement offer and the Court denied Petitioner's motion for summary judgment. Because no other means exist for Petitioner to seek termination of the litigation, it is unlikely the case will be resolved without a trial. The trial date will not be scheduled until discovery is completed. Discovery remains active. Indeed:

- requests for admissions were just served on April 4, 2019, to which responses are not due until May 6, 2019.
- Similarly, notices of taking deposition were served as recently as April 2, 2019.
- Lastly, an amended notice of hearing was filed on April 4, 2019.

17. Despite Petitioner's best efforts to resolve the dispute, it is unlikely the issue will be resolved until the litigation terminates. Because Petitioner cannot begin construction unless or until the School Board conveys the streets and alleys – and because the School Board has refused to date to convey the streets and alleys unless or until directed to by the Court – the litigation remains a bar to construction. Petitioner lacks control over when the litigation will terminate – as evidenced by the fact the School Board voted against accepting the settlement offer. Once the litigation ends, construction of the Development will take at least another 12 – 18 months to complete before it can be placed in service. Accordingly, Petitioner files this third Petition.

18. Petitioner's potential tax credit investors are concerned about the uncertainty of the credit swap if delayed until the last quarter of 2020, and are unwilling to close on the Development without assurance that tax credits will be available to the Development even if the Development will not be placed in service prior to December 31, 2020. 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.

19. Petitioner, therefore, requests a waiver of the timing requirements found in the 2015 QAP to permit Florida Housing to approve a tax credit exchange prior to the last quarter of 2020.

20. As outlined in paragraphs 14-15, above, Petitioner has acted diligently to resolve the circumstances causing the delay, but remains unable to secure the property upon which the Development will be built.

21. 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.

22. 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. (2014).

23. In this instance, Petitioner meets the standards for a waiver of the Rule and timing limitations in the 2015 QAP. The requested waiver will not adversely impact the Development 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 2015 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

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.

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.

24. As set forth 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.

F. ACTION REQUESTED

25. For the reasons set forth herein, Petitioner respectfully requests Florida Housing (i) grant the requested permanent waiver of the timing requirements found in the 2015 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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By: /s/ 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 Clerk for the Florida Housing Finance Corporation at CorporationClerk@FloridaHousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 15th day of April, 2019.

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