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STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FLORIDA HOUSING
FINANCE CORPORATION

2019-057VW

IN RE: SP PARK LLC

FHFC CASE NO.: ~~2019-XXXX~~

PETITION FOR WAIVER OF RULE 67-21.027(6) AND THE FINAL COST CERTIFICATION APPLICATION PACKAGE REQUIREMENT TO CONFIRM CERTAIN ITEMS WITH THE THREE LARGEST DOLLAR SUBCONTRACTORS

Petitioner, SP Park LLC (“SP Park”), a Florida limited liability company, pursuant to section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions respondent, Florida Housing Finance Corporation (“Florida Housing”), for a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, which in turn incorporates by reference the Final Cost Certification Application Package (“Form FCCAP”). Specifically, SP Park seeks a variance from the Form FCCAP’s requirement that the certified public accountant auditing the General Contractor Cost Certification confirm certain items with the general contractor’s three largest dollar subcontractors. Because one of these three subcontractors is no longer in business, SP Park asks for a variance from this requirement so that the certified public accountant may instead confirm items with the fourth largest dollar subcontractor. In support of this request, SP Park states:

The Petitioner

1. The name of the petitioner is SP Park LLC. For purposes of this petition, SP Park’s address, telephone number, fax number, and email address are that of SP Park’s undersigned counsel.

The Development

2. The requested background information concerning SP Park’s application is as follows:

Application Number:	2016-388S
RFA Number:	2016-109
Development name:	Cedar Park Apartments
Applicant/Borrower:	SP Park LLC
Developer/Principal:	Southport Development, Inc., a WA corporation doing business in FL as Southport Development Services, Inc./J. David Page
Number of Units:	72
County of Development:	Columbia
Development/Type:	Acquisition/Rehabilitation/Garden Apartments
Set Asides:	70% at 60% AMI, 30% at 45% AMI
Demographic:	Family
Funding:	<ul style="list-style-type: none">• SAIL: \$3,200,000• ELI: \$272,300• MMRB: \$6,000,000• Annual Tax Credits: est. \$404,000

3. The Cedar Park Apartments development in Columbia County consists of 72 total units and was developed and continues to operate as an affordable housing community. The development serves low-income individuals and families.

4. In 2016, SP Park’s application for the Cedar Park Apartments development was selected under RFA 2016-109—SAIL Financing of Affordable Multifamily Housing

Developments to be used in Conjunction with Tax-Exempt Bond Financing and Non-Competitive Housing Credits.

The Rule For Which Waiver Or Variance Is Sought

5. SP Park requests a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, which adopts and incorporates the Form FCCAP. Specifically, SP Park requests a waiver of or variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification request confirmation of certain cost-related items by the general contractor's three largest dollar subcontractors.

6. As a condition for receiving housing credits, each applicant must use the Form FCCAP to itemize all expenses incurred in association with construction or rehabilitation of a housing credit development, including expenses associated with the general contractor's use of subcontractors. *See* Fla. Admin. Code R. 67-21.027(6). As part of the Form FCCAP, each applicant must submit, among other things, a General Contractor Cost Certification and an unqualified audit report prepared by an independent certified public accountant for the General Contractor Cost Certification. *Id.* The General Contractor Cost Certification is used to establish the actual total costs incurred by the general contractor in the delivery of the development and assists Florida Housing in determining certain development costs and the amount of subsidy to be allocated to the development. Form FCCAP, General Contractor Cost Certification Form and Instructions ("GCCC"), p. 1. Florida Housing will not issue a final housing credit allocation until all required items in the Form FCCAP are received and processed. Fla. Admin. Code R. 67-21.027(6). Rule 67-21.027(6) adopts and incorporates the Form FCCAP by reference. *Id.* ("The Final Cost Certification Application Package (Form FCCAP) is adopted and incorporated herein by reference, effective 05-2018 . . .").

7. To assist the certified public accountant in completing an audit of the General Contractor Cost Certification, each applicant's general contractor must provide a list of all subcontractors to be used on the job, with amounts paid or to be paid. GCCC, p. 2. The certified public accountant must ask the three largest dollar subcontractors to confirm the following:

- 1) Confirm the construction contract amount;
- 2) Confirm any change orders;
- 3) Confirm what additional costs were incurred outside of the contract, if any;
- 4) Confirm the type of services provided (trade breakdown);
- 5) Confirm amounts paid to date and balance(s), if any, to be paid;
- 6) Request to clarify if it is related to the General Contractor; and
- 7) Request to clarify if it is related or affiliated to any other subcontractor used on the job.

Id., pp. 2-3. In addition, the certified public accountant must randomly select other subcontractors sufficient in number (but in no event less than five) that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total construction cost, and review certain documentation to verify the amounts paid to each subcontractor. *Id.*, p. 3.

8. SP Park requests a waiver of or variance from the requirement in the Form FCCAP, incorporated by reference into Rule 67-21.027(6), that the certified public accountant send the required confirmation requests to the three largest dollar subcontractors. One of the three largest dollar subcontractors proposed to be used for the Cedar Park Apartments development, Green Lantern Services, is no longer in business. Thus, the certified public accountant cannot send the required confirmation requests to this entity and seeks to send these confirmation requests instead to the fourth largest dollar subcontractor.

Statutes Implemented By The Rule

9. Rule 67-21.027(6) and the Form FCCAP implement the statutes governing the allocation of low-income housing tax credits. *See* § 420.5099, Fla. Stat. Florida Housing is designated as the State of Florida's housing credit agency, and as the State's designated agent, Florida Housing is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits and to request certain information as a condition of receiving such credits. § 420.5099(1), (2), (3), Fla. Stat.

Justification For The Requested Waiver Or Variance

10. SP Park requests a waiver of or variance from the Form FCCAP's requirement that the certified public accountant auditing the General Contractor Cost Certification send confirmation requests on certain cost-related items to the three largest dollar subcontractors used by the general contractor on the project.

11. As required by the Form FCCAP, SP Park's general contractor submitted a list of all subcontractors used on the job, with amounts paid or to be paid. The three largest dollar subcontractors (with the associated amounts paid or to be paid) are J Miles Contracting (\$639,730), Bozarth Contractors (\$338,874), and Green Lantern Services (\$369,375). Thus, under the rule, the certified public accountant was required to send confirmation requests to J Miles Contracting, Bozarth Contractors, and Green Lantern Services.

12. The certified public accountant performing the audit of SP Park's General Contractor Cost Certification was able to confirm those items outlined in the Form FCCAP with two of the three largest dollar subcontractors, J Miles Contracting and Bozarth Contractors. However, when the certified public accountant attempted to send the required confirmation requests to the third subcontractor, Green Lantern Services, she learned that this company is no

longer in business. The certified public accountant sent the confirmation requests to the address included in Green Lantern Services' subcontract three times over the course of three months. When Green Lantern Services did not respond, the certified public accountant called the phone number provided on the subcontract and learned that this number had been disconnected. The certified public accountant found a cell phone number for the owner of Green Lantern Services and called that number. The person who answered that phone number is not someone associated with Green Lantern Services. When the certified public accountant could not reach the subcontractor by two different phone numbers, the certified public accountant contacted the general contractor, Vaughn Bay Construction, Inc., and spoke with its controller. The controller indicated that they believed Green Lantern Services had gone under and the owner had skipped town. Consequently, the certified public accountant cannot perform the required confirmation procedure with Green Lantern Services.

13. The certified public accountant did, however, include Green Lantern Services in her review of subcontractors under the Form FCCAP's requirement to select other subcontractors that, when taken together with the three largest dollar subcontractors, account for at least 40 percent of the total contract construction cost, and verify the amounts paid to each subcontractor by reviewing check copies, contract documents, change orders, and other supporting information to verify amounts included within the cost certification for each subcontractor listed. Consequently, despite the fact that Green Lantern Services is no longer in business, the certified public accountant did verify the amounts paid to this subcontractor in support of the project.

14. SP Park asks that Florida Housing grant a variance and allow the certified public accountant to submit the required confirmation requests to the fourth largest dollar subcontractor instead of Green Lantern Services. The fourth largest dollar subcontractor is ACE Electrical

Service of N. Florida (\$337,746). There is a relatively modest difference in costs for the two subcontractors, around \$31,000. With the substitution of ACE Electrical Service of N. Florida for Green Lantern Services, the certified public accountant will still confirm the various cost-related items outlined in the Form FCCAP with subcontractors representing a similar percentage of the total construction cost (37.3 percent as compared to 38.2 percent of the total construction cost when including Green Lantern Services). In addition, in accordance with the Form FCCAP's requirement to verify the amounts paid to the subcontractors accounting for at least 40 percent of the total construction cost, the certified public accountant has still been able to verify a substantial portion (more than 64 percent) of the costs for subcontractors for the project, including amounts paid to Green Lantern Services.

15. Without the grant of a waiver or variance, the certified public accountant will not be able to complete the required audit and SP Park will not be able to submit a complete Form FCCAP, jeopardizing its housing credit allocation and its ability to move forward with rehabilitating the development.

16. Under section 120.542(1), Florida Statutes, and Chapter 28-104, Florida Administrative Code, Florida Housing has the authority to grant waivers to or variances from its rule requirements when strict application would lead to unreasonable, unfair, and unintended consequences in particular instances. A waiver or variance shall be granted when the person who is subject to the rule demonstrates that application of the rule would: (1) 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. § 120.542(2), Fla. Stat.

17. Here, SP Park meets the requirements for a waiver or variance. The requested variance will not adversely impact the development or Florida Housing and will ensure that 72

affordable family housing units will be preserved and made available for the target population in Columbia County. The strict application of the rule and Form FCCAP will create substantial hardship for SP Park because completion of the Form FCCAP is a condition for receiving a final housing credit allocation.

18. The variance will still serve the underlying purposes of the rule. Even with substituting the fourth largest dollar subcontractor for Green Lantern Services in her review, the certified public accountant will be able to confirm the required cost-related items under the Form FCCAP with subcontractors whose costs represent a similar percentage of the total construction cost. The requested waiver or variance will also not hinder the certified public accountant in verifying the costs of subcontractors representing more than 60 percent of the total construction cost.

19. Further, the waiver or variance will serve the purposes of the statute and the Florida Housing Finance Corporation Act because one of the Act's primary purposes is to facilitate the availability of decent, safe, and sanitary housing in this state. *See* § 420.5099(2), Fla. Stat. Denial of the waiver would deprive Columbia County of essential and affordable housing units.

Petitioner Requests A Permanent Waiver Or Variance

20. SP Park requests a permanent waiver or variance.

Action Requested

WHEREFORE, SP Park respectfully requests that Florida Housing:

- A. Grant this petition and all of the relief requested herein;
- B. Grant a waiver of or variance from Rule 67-21.027(6), Florida Administrative Code, and the requirement of the Final Cost Certification Application Package, incorporated by reference, which requires that the certified public accountant

performing the audit of the General Contractor's Cost Certification send confirmation requests to the general contractor's three largest dollar subcontractors, and authorize sending those confirmation requests to the general contractor's first, second, and fourth largest dollar subcontractors instead; and

C. Grant such further relief as it may deem appropriate.

Respectfully submitted on July 2, 2019.

/s/Tiffany A. Roddenberry
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Attorneys for Petitioner, SP Park LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing petition for waiver was filed by email with Ana McGlamory, Agency Clerk, ana.mcglamory@floridahousing.org; that a true and correct copy was provided by email to Hugh Brown, hugh.brown@floridahousing.org, General Counsel, Florida Housing Finance Corporation 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301, and that a true and correct copy was provided to the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, all on July 2, 2019.

/s/Tiffany A. Roddenberry
Tiffany A. Roddenberry