

LOWER DENSITY FOR LOWER SUGARLOAF, LLC

July 14, 2020

Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

ATTN: Office of Clerk of Corporation

RE: Comments on Petition for Waiver of Rule 67-48.0072(21)(b)

Dockside at Sugarloaf Key, LLC

FHFC Case No. 2020-042VW

Ladies and Gentlemen:

These comments are being submitted on behalf of Lower Density for Lower Sugarloaf, LLC, a Florida limited liability company whose sole members are the Sugarloaf Shores Property Owners Association, Inc. ("SSPOA") and South Point Homeowners, LLC ("SPHLLC"). The members of SSPOA and SPHLLC are the owners of properties on Lower Sugarloaf Key. We are submitting these comments in accordance with F.S. 120.542(6) and Rule 28-104.003(1), F.A.C.

On June 30, 2020, Dockside at Sugarloaf Key, LLC (the "Petitioner") submitted a petition (the "Petition") to Florida Housing Finance Corporation (the "Corporation") for a waiver of Rule 67-48.0072(21)(b), F.A.C. (the "Rule"), to allow the Petitioner to extend the firm loan commitment deadline for the State Apartment Incentive Loan funding allocated to the Petitioner pursuant to the Corporation's Request for Applications 2018-115. Notice of the Petition was published in the Florida Administrative Register on July 1, 2020.

The original firm loan commitment deadline with respect to the Petitioner's project was January 1, 2020. At Petitioner's request, the Corporation extended the firm loan commitment deadline to July 1, 2020 in accordance with the Rule (the "One-Time Extension").

THE PETITIONER'S DELAYS DO NOT JUSTIFY A WAIVER OF THE DEADLINE

The Rule does not allow any extensions of the firm loan commitment deadline for the Petitioner's project other than under the One-Time Extension. In the Petition, the Petitioner is seeking a waiver of the Rule from the Corporation in order to further extend the deadline of the firm loan commitment to January 31, 2021. The Petitioner offers three excuses for its failure to meet the July 1, 2020 deadline, relating to (1) feedback from neighboring homeowners, (2) the parcel being located in a VE zone under new FEMA flood maps, and (3) the COVID-19 pandemic. The discussion below explains why these purported reasons for the Petitioner's delays do not justify the Corporation's granting the Petitioner a waiver of the July 1, 2020 firm loan commitment deadline under the One-Time Extension.

Feedback from neighboring residents. The feedback received from nearby residents at two public meetings hosted by the Petitioner was the sole reason given by the Petitioner in its November 13, 2019 letter to the Corporation for its request for the One-Time Extension. That letter referred to "unexpected opposition" from nearby residents. Prior to the two public meetings, there had already been multiple meetings between representatives of the neighboring homeowners and Joe Walsh, who owns the subject parcel and is one of the owners of the Petitioner, in which the homeowners' objections to the project were clearly communicated to Walsh. Therefore, the Petitioner misled the Corporation in its November 13, 2019 letter when it requested the One-Time Extension based on "unexpected opposition" from the nearby residents.

More importantly, the Petitioner did not disclose in the Petition that the two public meetings held by the Petitioner occurred on May 21, 2019 and July 23, 2019. While the Petitioner's determination to incorporate feedback from the neighboring homeowners (notwithstanding that the objections should not have been "unexpected" to the Petitioner) may have justified the granting of the One-Time Extension, it certainly does not justify a further extension. The deadline under the One-Time Extension, July 1, 2020, was nearly one year after the later of the

two public meetings. The Petitioner had more than enough time to incorporate the public comments by January 2, 2020, much less by July 1, 2020.

Draft FEMA flood maps. Again, the Petitioner has not shared with the Corporation facts signifying its own slowfootedness in developing the project. The Petition states that the draft FEMA flood maps were issued through a series of public meetings beginning January 27, 2020. What the Petitioner has not disclosed is that the draft FEMA flood maps were actually issued on August 27, 2019. These draft flood maps showed that a portion of the parcel is located in a VE zone. The flood maps that the Petitioner is referring to in the Petition are the preliminary FEMA flood maps which were issued on December 27, 2019. The flood zone lines on the preliminary flood maps were identical to those on the earlier draft flood maps and continued to show that a portion of the parcel is located in a VE zone.

Revisions to the site plan to accommodate the proposed change in the flood zone designation should have been begun by the Petitioner shortly after the draft flood maps were issued in August 2019. Again, the Petitioner had plenty of time – more than 10 months – to incorporate the site plan changes by July 1, 2020.

COVID-19 pandemic. The business activities of the types of service providers that have been engaged by the Petitioner in the Keys and in South Florida have continued virtually unabated in spite of the pandemic. Meetings proceed in virtual formats. Monroe County's moratorium on development applications lasted only from March through June. It is inconceivable that the COVID-19 pandemic has caused the Petitioner to be unable to meet the July 1, 2020 deadline under the One-Time Extension.

Additionally, we note that, in its letter requesting the One-Time Extension, the Petitioner stated that it planned to submit its site plans, as revised to take into account feedback from the neighboring homeowners, to County planning staff "on or about January 2020." It seems that the Petitioner was misleading the Corporation in making that statement back in November 2019. Once again, there was ample time for the Petitioner to meet the deadline under the One-Time Extension, with or without the impact of COVID-19. It is an affront to those that have been truly impacted, both personally and professionally, by COVID-19 for the Petitioner to latch onto the pandemic as a justification for another extension of the deadline.

The Corporation's denial of the Petitioner's waiver request would achieve the purpose of the underlying statute, F.S. 420.5099, which is to support the development of affordable housing in Florida. For the reasons discussed above, it is clear that the Petitioner has not been proceeding diligently in its development of the project and has not been forthcoming in its efforts to justify one extension after another. The funding benefits that were preliminarily awarded to the Petitioner by the Corporation would best be offered instead to another developer of multifamily affordable housing in the Florida Keys that could achieve funding commitment in a more reasonable timeframe and without finding it necessary to mislead the Corporation in its efforts to seek extensions.

THE PETITIONER'S PROJECT WILL NOT QUALIFY FOR HOUSING TAX CREDITS

There is another important reason why the Petitioner's waiver request should be denied. Attached is a letter dated February 11, 2019 from our counsel, Andrew Tobin, to the Executive Director of the Corporation which explains why it is clear that the Petitioner's project does not qualify for the LIHTC tax credits that have been preliminarily awarded to the project by the Corporation. The zoning applicable to the parcel requires that all residents of the housing earn at least 70% of their income from employment in Monroe County. As Mr. Tobin's letter explains, this means that the housing would not meet the requirement of the U.S. Treasury Regulations that LIHTC housing be "for use by the general public." Also attached to this letter are emails between the Corporation's staff and Monroe County staff in which the Corporation's staff confirmed that housing in the zoning district in which the project would be located does not qualify for the tax credits. We subsequently sent Mr. Tobin's letter and the staff emails to the Corporation's board of directors and to the credit underwriter for the project. It is inconceivable to us that, in spite of this obvious disqualification, the Petitioner certified in its original application to the Corporation for the funding that the housing would qualify for the tax credits.

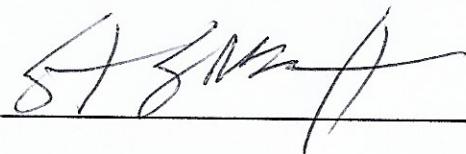
The interests of the development of much-needed multifamily affordable housing in Monroe County would be best achieved if these tax credits were awarded to another project that will actually meet the LIHTC nondiscrimination requirements. The Corporation would not be well-served if it were to award tax credits to a project with respect to which the tax equity investors ultimately will be denied the benefit of the credits by the Internal Revenue Service, in which

case the credits will end up never being used. For these reasons, the Corporation's denial of the Petitioner's waiver request would achieve the statutory purposes of F.S. 420.5099 and Section 42 of the U.S. Internal Revenue Code by making the tax credits that were preliminarily awarded to the Petitioner's project available to another low-income housing project that will contain housing that is available to members of the general public, as required by federal regulations and Florida law.

For all of the foregoing reasons, we ask that the Board of Directors of the Corporation deny the waiver requested by the Petitioner.

Respectfully submitted:

LOWER DENSITY FOR LOWER SUGARLOAF, LLC

By:  _____

Stuart Schaffer,

On behalf of Sugarloaf Shores Property Owners Association, Inc., as managing member
of Lower Density for Lower Sugarloaf, LLC

ANDREW M. TOBIN, PA

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February 11, 2019

Mr. Harold "Trey" Price
Executive Director
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Re: Dockside at Sugarloaf Key and The Landings at Sugarloaf Key
Monroe County, Florida
Application Numbers 2019-008CS and 2019-010CS

Dear Mr. Price:

I am writing to you on behalf of the Sugarloaf Shores Property Owners Association, Inc. and South Point Homeowners, LLC.

On December 14, 2018 the Board of Directors of the Florida Housing Finance Corporation (FHFC) selected the applications of the above referenced two projects for funding and invited the applicants to enter credit underwriting. Specifically, the Projects were allocated a total of \$4,900,400 in SAIL financing and \$18,506,880 in low-income housing tax credits (tax credits) under Section 42 of the Internal Revenue Code (IRC). Presumably the credit underwriting processes for the Projects are now underway.

According to the applications that were submitted to FHFC by the developers of the Projects, the Projects will consist of 88 affordable housing units on Lower Sugarloaf Key along US 1 on either side of South Point Drive. Each of the applications included an Application Certification and Acknowledgement Form in which the Applicant certified that (1) it will comply with IRC Section 42 and all related regulations (Paragraph 1) and (2) during the credit underwriting process, it will demonstrate that the development meets the requirements of IRC Section 42 (Paragraph 15).

Both of the parcels on which the Projects will be developed (the Parcels) are located in the Suburban Commercial land use (zoning) district. According to the Monroe County Land Development Code (LDC), the only housing that is permitted to be developed in the Suburban Commercial zoning district is either commercial apartments that serve as housing for the commercial use or employee housing,

defined as "housing for working households that derive at least 70% of their household income from gainful employment in Monroe County (Employee Housing)." See LDC Section 130-93; Sections 101-1 and 139-1(a)(1)b.

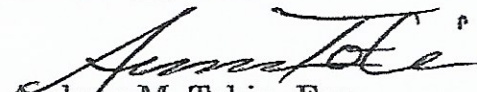
In connection with a filing made with the Monroe County Planning and Environmental Resources Department in order to derive a reservation of ROGO allocations for the Projects, the owner of the Parcels stated that all of the dwelling units in the Projects would be designated as Employee Housing.

An affordable housing project will qualify for tax credits only if the units are "for use by the general public." Treasury Regulations Section 1.42-9(a). This means that the units must be rented in a manner consistent with housing policy governing nondiscrimination pursuant to HUD regulations. *Id.* Based on these regulations, we believe that Employee Housing, which is limited to residents who earn at least 70% of their household income from employment in Monroe County, clearly does not qualify for tax credits because the housing is not available for use by the general public. More importantly, FHFC's own staff is also of the opinion that Employee Housing does not qualify for tax credits. Attached to this letter is a copy of an email dated November 29, 2018 from Nancy Muller, FHFC's Director of Policy and Special Programs, to Monroe County which states that Employee Housing is not considered by FHFC to be available for use by the general public and thus does not qualify for tax credits. Therefore, FHFC would be in violation of state rules if it were to allocate tax credits to the Projects. See, Rule 67-48.023(4), Fla. Adm. Code

Because the housing in the Projects will not be available for use by the general public, not only in our opinion but in the opinion of FHFC's staff, this housing will not comply with the requirements of IRC Section 42. Under state rules, allocations of tax credits by FHFC are contingent on the Applicant complying with the requirements of IRC Section 42. Rule 67-48.023(3), Fla. Adm. Code

For the reasons set forth above, we request that FHFC's credit underwriting processes result in a determination by FHFC that the Projects do not qualify for tax credits and thus will not receive the requested tax credit allocations. We hope that you will determine that these valuable tax credits should be awarded by FHFC to one or more truly deserving affordable housing developments in Monroe County.

Sincerely yours,


Andrew M. Tobin, Esq.

cc: Stuart Schaffer
Jack Marchant

Emily Schemper, AICP, CFM
Acting Senior Director of Planning & Environmental Resources
Monroe County | Planning & Environmental Resources Department
2798 Overseas Highway, Suite 400, Marathon, FL 33050
305.453.8772

From: Nancy Muller <Nancy.Muller@floridahousing.org>
Sent: Thursday, November 29, 2018 2:30 PM
To: Hurley-Christine <Hurley-Christine@MonroeCounty-FL.Gov>
Cc: Jones-Juanita <Jones-Juanita@MonroeCounty-FL.Gov>; Cioffari-Cheryl <Cioffari-Cheryl@MonroeCounty-FL.Gov>; Schemper-Emily <Schemper-Emily@MonroeCounty-FL.Gov>; Laura Cox <Laura.Cox@floridahousing.org>; Marisa Button <Marisa.Button@floridahousing.org>
Subject: County Workforce Housing Preference in LIHTC and Other Housing Programs

Christine and Juanita,

I've made slight revisions to this intro to ensure that the County understands that, while Florida Housing has provided guidance below on whether it's possible to have a county workforce housing preference in Low Income Housing Tax Credit (LIHTC) properties, for other funding, we have suggested that it MAY be possible to have such a preference – see below. This information comes via Laura Cox, our Director of Asset Management, and it's important to differentiate between funding sources – in this case, LIHTC financing vs CDBG-DR funding.

These type of preferences fall under federal Fair Housing guidelines, and Florida Housing doesn't have jurisdiction over Fair Housing. That jurisdiction ultimately rests with the Department of Housing and Urban Development (HUD). The guidance below does not constitute legal advice and does not offer any assurance as to what position HUD would take on a workforce housing preference. Our Director of Asset Management recommends contacting the Fair Housing folks at HUD to discuss your approach and gain approval. This then will set you up to be protected over time.

At this time, since the CDBG-DR funds for Monroe County are separate from LIHTC, this apparently gives the county the ability to apply a preference properly vetted by HUD for developments funded through the disaster recovery RFA.

Hope this helps.

Preference Allowance when Using LIHTC

As part of the Housing Assistance Act of 2008, the Internal Revenue Code §42(g) was amended to add a clarification of the general public use requirements. Owners of Low Income Housing Tax Credit developments must rent their units in a manner consistent with the general public use requirements of Treasury Regulation §1.42-9. Residential

*FHFC Opinion
on the
Tax Credit*



rental units must be for use by the general public and all of the units in a development must be used on a non-transient basis. Residential rental units are not for use by the general public, for example, if the units are provided only for members of a social organization or provided by an employer for its employees. Currently, the only permitted preferences are for tenants (1) with special needs, (2) who are members of a specified group under a Federal program or state program or policy that supports housing for such a specified group, or (3) who are involved in artistic or literary activities. We believe that the only way we would be able to allow this approach would be if there was a federal regulation (there is none) or state statute (currently none) that would allow such a preference.



Preference Allowance when Using Other Housing Funding, Including CDBG-DR

The federal Fair Housing Act states, "it is illegal for anyone to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or handicap." Based on existing case law, preferences based on where a person works are allowed, subject to conditions detailed below. Special preferences for "protected classes" such as homeless and disabled are permitted.

The "disparate impact" test would first look at demographics. Does a public employee preference provide housing primarily to a certain racial/ethnic demo as compared to the overall county's racial/ethnic profile. Does the preference reinforce historical discrimination (was there a pattern of job discrimination in the past that helped to create that distribution, i.e., were only Conchs historically employed therefore preference would serve to perpetuate discrimination.)

The county should seek HUD's approval if it intends to establish such a preference. The county would want to provide specifics about median income & housing prices vs. the salaries of their public employees. HUD approved a similar plan for the city of Sunnyvale California's 2000-2005 ConPlan. Their plan stated:

The City of Sunnyvale deems it a compelling and legitimate interest in having local public school district employees, city employees and child care center teachers live in or near Sunnyvale to enhance the quality of our residents' and children's lives in the community, to participate and be actively involved in community activities and events to benefit residents and children and to provide valuable local resources for residents and children in Sunnyvale.

The City of Sunnyvale Consolidated Plan 2000-2005 approved by the U.S. Department of Housing and Urban Development (HUD) identifies a high priority need for affordable housing for low and moderate income renters and homeowners.

HUD's endorsement: The preference for school district employees, city employees and child care center teachers that serve Sunnyvale is narrowly tailored and based on the acute housing crisis for which there are no feasible alternatives other than to implement preferences.

Please let us know if you have questions,
Nancy

<!--[if !vml]--><!--[endif]-->Nancy



**Muller | Director of Policy and
Special Programs**

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www.floridahousing.org.

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and any responses to it should be considered a matter of public
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Nancy

On Nov 14, 2018, at 4:08 PM, Hurley-Christine <Hurley-Christine@MonroeCounty-FL.Gov> wrote:

Hi Stuart. I do not know the answer specifically; however, I'm copying my contact at Florida Housing Finance Corporation. Nancy Muller.

Nancy: I'm going to reword Stuart's question.

I believe FHFC has been asked, this question in the past.

If the County conditions the receipt of ROGO allocations to LIHTC project applicants, so that the occupants must be members of our workforce (for example, not retirees), and the

This is the question that the FHFC opinion was in response to

County defines workforce households as those living in Monroe County who earn at least 70% of their income from employment in Monroe County, would that disqualify a project from being awarded LIHTC funding?

Christine Hurley, AICP
Monroe County
Assistant County Administrator
[305.289.2517](tel:305.289.2517)

From: Stuart <sfschaffer@gmail.com>
Sent: Wednesday, November 14, 2018 12:36 PM
To: Hurley-Christine <Hurley-Christine@MonroeCounty-FL.Gov>
Subject: Fwd: LIHTC

Hi, Christine. I haven't heard back from Lisa yet on my email below. Do you know the answer to my question?

Stuart

Begin forwarded message:

From: Stuart <sfschaffer@gmail.com>
Date: November 12, 2018 at 10:52:17 AM EST
To: tennyson-lisa@monroecounty-fl.gov
Subject: LIHTC

Hi, Lisa. It's Stuart from Sugarloaf. Just a shot in the dark here. Do you know whether there have been any recent developments on the Low Income Housing Tax credit, especially in regard to whether there is now a better chance of a project qualifying for the credit when it is limited to workforce housing (which I had thought was a no-no).