

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

MALIBU BAY PRESERVATION, LTD.,
a Florida limited partnership,

Petitioner,

FHFC CASE NO. 2020-061VW
Application No. 2019-532C

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

PETITION FOR WAIVER OF RULE 67-21.003(1)(b), F.A.C. (07/11/2019)

Malibu Bay Preservation, Ltd. (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of the requirement that 15% of equity be paid in at the closing of construction financing per the Non-Competitive Application Package NCA (Rev. 04-2019) ("NCA") adopted and incorporated by reference into Rule 67-21.003(1)(b), Florida Administrative Code ("F.A.C.") (eff. 07/11/2019) (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:

Malibu Bay Preservation, Ltd.
Attn: Jeremy Bronfman
Lincoln Avenue Capital
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Santa Monica, CA 90401
Telephone: (424)222-8258
Email: jeremy@lincolnavecap.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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B. WAIVER IS PERMANENT

3. The waiver being sought is permanent in nature.

C. DEVELOPMENT BACKGROUND.

4. Petitioner provides the following background information related to its Application submitted on June 9, 2020 and revised on July 1, 2020:

- Development Name: Malibu Bay Apartments
- Development Address: 750 Malibu Bay Drive, West Palm Beach, FL
- County: Palm Beach
- Developer: Malibu Bay Developer LLC
- Number of Units: 264 rehab
- Type: Garden Apartments
- Set Asides: 100% of units at 60% AMI or less
- Demographics: Family
- Funding: \$1,676,697 Non-Competitive HC funding request (annual amount)

D. THE RULE FROM WHICH WAIVER IS REQUESTED

5. Petitioner requests a waiver of the NCA, adopted and incorporated by reference by the Rule. The Rule provides:

If the NC Award will not be in conjunction with other Corporation funding made available through the competitive solicitation funding process outlined in rule chapter 67-60, F.A.C., the Applicant shall utilize the Non-Competitive Application Package in effect at the time the Applicant submits the Application. The Non-Competitive Application Package or NCA (Rev. 04-2019) is adopted and incorporated herein by reference and consists of the forms and instructions available, without charge, on the Corporation's website under the Multifamily Programs link labeled Non-Competitive Programs or from <http://www.flrules.org/Gateway/reference.asp?No=Ref-10774>, which shall be completed and submitted to the Corporation in accordance with this rule chapter.

See Rule 67-21.003(1)(b), F.A.C. (7/11/19) (emphasis added).

6. The NCA provides, in pertinent part:

14. Applicant Certification:

By completing, executing and submitting this Application form and all applicable exhibits, the Applicant certifies and acknowledges that:

k. The proposed equity amount to be paid prior to or simultaneous with the closing of construction financing is at least 15 percent of the total proposed equity to be provided (the 15 percent criteria), subject to the following: . . .

See Non-Competitive Application Form (NCA (Rev. 04-2019), pp. 14-15 (the "15% Criteria").

E. STATUTES IMPLEMENTED BY THE RULE.

7. Rule 67-21.003, F.A.C., implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"):

- Section 420.502, Legislative findings.

- Section 420.507, Powers of the corporation.
- Section 420.508, Special powers; multifamily and single-family projects.
- Section 420.509, Revenue bonds.
- Section 420.5099, Allocation of the low-income housing tax credit.

8. 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.

F. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE.

9. Petitioner requests a waiver of the 15% Criteria.

10. Petitioner closed on its construction financing on August 28, 2020 with the full intention of complying with all FHFC Rules, including the 15% Criteria.

11. Petitioner learned in the post-closing review that – due to a mistake caused by multiple moving variables at the last minute leading up to closing (including final equity numbers) – only 14.16% of equity was contributed. The 0.84% discrepancy will be noted in the credit underwriting report. The next scheduled installment is expected to be completed within 12 months (*i.e.*, August 28, 2021).

12. Due to this inadvertent oversight, Petitioner is in need of a waiver from the Rule requiring compliance with the 15% Criteria.

13. If the requested waiver is not granted, Petitioner will not be able to apply for housing credits and will lack the funds necessary to complete the Development.

14. 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.

15. If the 15% Criteria is imposed, Petitioner will suffer a substantial and unnecessary economic and operational hardship. Absent the waiver, Petitioner will not be able to secure the benefits of the tax-exempt financing necessary to complete rehabilitation of the Development.

16. In this instance, Petitioner meets the standards for the requested waiver. The requested waiver will not adversely impact the Development or Florida Housing and will ensure that 264 affordable housing units will be preserved and made available for the target population in Palm Beach County, Florida. The strict application of the Rule will create a substantial hardship for Petitioner because it will not be able to rehabilitate the Development if it is ineligible to apply for housing tax credits. 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. Denying the waiver would deny Palm Beach County the preservation of these much-needed affordable housing units.

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.

G. ACTION REQUESTED

17. For the reasons set forth herein, Petitioner respectfully requests Florida Housing: (i) grant the requested permanent waiver of the 15% Criteria such that Petitioner is not required to pay 15% of the equity at the construction loan closing; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.
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Counsel for Petitioner

By: /s/ Brian J. McDonough
BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

This Petition is being served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation, 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 28th day of September, 2020.

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