

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2019-097VW

RESIDENCES AT DR. KING BOULEVARD, LTD.,

Petitioner,

vs.

FHFC Application No. 2018-088C
REQUEST FOR APPLICATIONS: 2017-112

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

**PETITION FOR WAIVER OF THE QUALIFIED ALLOCATION PLAN'S
REQUIREMENT FOR RETURNING HOUSING CREDIT ALLOCATIONS AND RULE
67-48.002(95), FLORIDA ADMINISTRATIVE CODE (2017)**

Pursuant to section 120.542, Florida Statutes, and rule 28-104.002, Florida Administrative Code, Petitioner Residences at Dr. King Boulevard, Ltd. (“Residences” or “Petitioner”) submits this Petition to Respondent Florida Housing Finance Corporation (“Florida Housing”) for a waiver of Subsection II.K. of the 2016 Qualified Allocation Plan (“2016 QAP”), which was incorporated by reference in rule 67-48.002(95) (2017).¹ Subsection II.K. of the QAP prohibits the return of Residences’ 2018 Housing Credits before the last quarter of 2020. Residences proposes to return the 2018 credits now in exchange for an immediate allocation of 2019 Housing Credits. This exchange would have the effect of extending Residences’ placed-in-service date from December 31, 2020, until December 31, 2021. In support of this Petition, Residences states:

¹ The current version of the rule is numbered 67-48.002(96) (2018). The wording of the rules is identical with the exception of the version of the QAP that is incorporated by reference.

A. PETITIONER AND ATTORNEY

1. The name, address, telephone number, and email address for Petitioner is Residences at Dr. King Boulevard, Ltd., 3 Miami Central, 161 NW 6th Street, Suite 1020, Miami, FL 33136; 305-357-4725; lwong@apcommunities.com. For purposes of this proceeding, the contact information for Petitioner shall be that of the undersigned counsel.

2. The name, address, telephone number, and email address for Petitioner’s attorney is: Donna E. Blanton, Radey Law Firm, 301 South Bronough Street, Suite 200, Tallahassee, Florida 32301; 850-425-6654; dblanton@radeylaw.com.

B. BACKGROUND²

3. Residences submitted an application (No. 2018-088C) for Housing Credits (also known as tax credits) in response to Request for Applications 2017-112, Housing Credit Financing for Affordable Housing Developments Located in Miami-Dade County (the “RFA”). Residences proposed to use equity raised from the Housing Credits to build a 120-unit, high-rise development in Miami-Dade County to serve the family demographic. The proposed Development is an infill, scattered-site, high-rise located in Miami’s Liberty City neighborhood.

² The following background information regarding Residences is provided to facilitate staff’s preparation of a memorandum to the Florida Housing Board of Directors (“Board”):

- Development Name: Residences at Dr. King Boulevard, Ltd.
- Developer, including at least one natural person Principal: Residences at Dr. King Boulevard Development LLC; Howard D. Cohen
- County of Development: Miami-Dade
- Number of Units: 120
- Type: High Rise
- Set Asides: 20% at 30% AMI; 40% at 60% AMI; 30% at 80% AMI; and 10% market rate
- Demographics: Family
- Funding Amounts: \$2,436,070 in 9% Housing Credits

4. On May 4, 2018, Florida Housing's Board of Directors preliminarily selected Residences for funding. Residences was invited to enter credit underwriting on July 30, 2018.

5. Pursuant to rule 67-48.028(1), if an Applicant cannot complete its development by the end of the year in which the preliminary allocation of Housing Credits is issued, the applicant must enter into a "carryover allocation agreement" with Florida Housing by December 31 of the year in which the preliminary allocation is issued. Residences and Florida Housing entered into the carryover allocation agreement on December 10, 2018. The carryover allocation may (pursuant to Section 42 of the Internal Revenue Code) allow the Applicant until the end of the second year following the year in which the carryover allocation is issued to place the development in service. In this case, the carryover allocation agreement required that the Development be placed in service by December 31, 2020.

6. As discussed below, the December 31, 2020, placed-in-service deadline cannot be met because of delays that are beyond the control of the Applicant. The proposed Development's completion date has been pushed into 2021 because of changing interpretations from the local permitting authorities regarding how to resolve a previous subdivision of the development site and because of delays in receiving gap financing commitments for the project, which resulted in delays in the receipt of the credit underwriting report. Consequently, Residences proposes to exchange its 2018 Housing Credits for an allocation of 2019 Housing Credits now, rather than wait until the last quarter of 2020, which would effectively extend the placed-in-service date of the Development until December 31, 2021. This exchange will require a waiver of Subsection II.K of the QAP, which provides:

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 supplied).

7. The development site issues stem from the discovery that a piece of the property awarded to Residences by the City of Miami for the proposed Development is, in fact, owned by Miami-Dade County. The City awarded Residences the parcels for the proposed Development in a competitive process just days before the Applicant's response to RFA 2017-112 was due. During the predevelopment process, it was discovered that the County retains ownership of a 30-foot strip of land fronting NW 62nd Street as a result of a previous subdivision of the lots. Many years ago the County conveyed the lots to a private landowner while retaining the 30-foot strip of land. The County did not replat the lots at the time. The City later took title to the property but was not aware of the strip of land retained by the County. Early in the predevelopment process, the affected local governments determined that the County-retained strip of land had been used as a public, pedestrian right-of-way and that, pursuant to state law, the land consisted of legally subdivided lots and no additional formal conveyance would be required in order for Residences to proceed

with the development process. However, in September of 2019, the City's Public Works Department modified its previous determination that the land had been used as a public right-of-way and advised that the property was an illegal subdivision, which would require re-platting of the land.

8. Following discussions among Residences and both local governments, the parties have agreed that the most efficient means of resolving the issue is for the County to convey the 30-foot strip of land to Residences for incorporation into the proposed Development as open green space. This would return the lots to their originally platted configuration, thereby avoiding the need to replat the land. The proposed conveyance requires approval by the Miami-Dade County Commission. Residences is working with County staff to have this matter placed on the Commission agenda in either December or January.

9. Additionally, Residences has experienced delays in receiving commitments for the gap financing necessary to make the proposed Development viable. Like most high-rise affordable housing developments in Miami-Dade County, this proposed Development requires significant gap financing. In 2018 Residences requested \$4,800,000 in Surtax funds from the Miami-Dade Public Housing and Community Development Department ("PHCD") in order to fund the development. In November of 2018, PHCD provided a Conditional Loan Commitment for only \$2,053,447 of the required \$4,800,000 in gap financing. This reduced funding allocation prompted Residences to seek funding from other sources from both Miami-Dade County in the form of HOME funds and from the City of Miami in the form of a loan from the Forever Bond Program. An allocation and commitment of these additional funds, which are needed to fill the remaining gap to allow for closing on the construction financing on the Development, has taken longer than

anticipated. The HOME commitment was received on October 15, 2019, and the Forever Bond commitment letter was received on September 30, 2019. Both of these commitments were needed to finalize Residences' credit underwriting report, which must be approved by Miami-Dade County. Although the credit underwriting report has now been completed, the delays in receiving the commitments have resulted in further delays in closing of the financing, as the lender and tax credit investor will not close financing unless the HOME and Surtax funds are closed concurrently. Consequently, Residences does not anticipate being in a position to close these funds until 2020.

10. Both the permitting challenges and the delays in obtaining the gap financing have resulted in the need for Residences to request a credit swap.

11. Given the unanticipated delays described above, there is insufficient time to complete construction before the December 31, 2020, placed-in-service deadline. Pursuant to Subsection II.K. of the QAP, an extension of the deadline can only be achieved through a requested exchange of 2018 Housing Credit allocations for subsequent credits. Without this waiver request and approval of the credit swap, the Housing Credits will not be available if the placed-in-service deadline is not met. Without the Housing Credits, Residences will be unable to construct the Development.

12. The requested waiver is permanent in nature.

C. RULE FROM WHICH WAIVER IS SOUGHT

13. Residences seeks a waiver from Subsection II.K. of the 2016 QAP, which was incorporated by reference into rule 67-48.002(95) (2017). The current version of the rule, incorporating a later QAP, is numbered as 67-48.002(96).

D. STATUTES IMPLEMENTED BY THE RULE

14. Pursuant to section 420.5099(1), Florida Statutes, Florida Housing is designated as the “housing credit agency” for Florida within the meaning of section 42 of the Internal Revenue Code. Florida Housing is responsible for the allocation and distribution of Housing Credits and is required by federal law to adopt an allocation plan that includes priorities and selection criteria. Section 420.5099(2) also requires Florida Housing to “adopt allocation procedures that will ensure the maximum use of available tax credits in order to encourage development of low-income housing in the state, taking into consideration the timeliness of the application, the location of the proposed housing project, the relative need in the area for low-income housing and the availability of such housing, the economic feasibility of the project, and the ability of the applicant to proceed to completion of the project in the calendar year for which the credit is sought.” Thus, the rules subject to this waiver request implement sections 420.5099(1) and (2), Florida Statutes, as well as other provisions of Part V of chapter 420, Florida Statutes, the Florida Housing Finance Corporation Act.

E. JUSTIFICATION FOR REQUESTED WAIVER

15. Section 120.542(1), Florida Statutes, provides that “[s]trict application of uniformly applicable rule requirements can lead to unreasonable, unfair, and unintended results in particular instances. The Legislature finds that it is appropriate in such cases to adopt a procedure for agencies to provide relief to persons subject to regulation.” That procedure requires those seeking a variance of, or waiver from, a particular rule to demonstrate that application of the rule would create a substantial hardship or would violate principles of fairness. § 120.542(2), Fla. Stat. Petitions for variances and waivers also are required to demonstrate the purposes of the underlying

statute will be achieved. *Id.*

16. Strict adherence to Subsection II.K. of the QAP would create a substantial hardship for Residences. Without the requested credit swap, the previously awarded Housing Credits will be unavailable, which means the Development cannot be completed. That would deprive low-income residents of Miami-Dade County of 120 units of much needed affordable housing. As illustrated above, issues relating to the development site and obtaining the necessary gap financing for the proposed Development were beyond the Applicant's control.

17. Strict adherence to Subsection II.K. of the QAP also would violate principles of fairness, as Florida Housing has granted similar waivers to other Developments facing similar circumstances. *See, e.g.*, Consent Agenda for the September 18, 2018, Florida Housing Board of Directors Meeting, Item C. In Re: Shull Manor REH, Ltd. – FHFC Case No. 2018-062VW (App. 2017-191C); Item D. In Re: Pinnacle at Peacefield, Ltd. – FHFC Case No. 2018-067VW (App. 2017-211C); Item E. (In Re: Verbena, Ltd. – FHFC Case No. 2018-068VW (App. 2017-161C). Granting Residences' waiver request would recognize the fundamental fairness of granting the same relief to similarly situated Developments.

18. The statutes underlying the QAP and the rule will be served by the approval of Residences' waiver request. Section 420.502(4), Florida Statutes, states that Florida faces “a serious shortage of decent, safe, and sanitary housing in the state available to persons and families of low, moderate, and middle income” One of the primary purposes of the Act is to facilitate the availability of affordable housing. Granting Residences' waiver request will permit the Development to ultimately be placed in service, despite the challenging circumstances relating to funding and permitting, factors that are beyond the control of Residences.

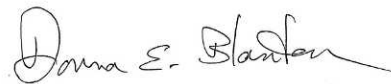
19. The requested waiver will not adversely affect any party, including any other party that applied to receive an allocation of Housing Credits in RFA 2017-112, or Florida Housing. A denial of the requested waiver, however, would result in substantial economic hardship to Residences, as it will be unable to complete the Development, which would only contribute further to the shortage of affordable housing in Miami-Dade County. Additionally, denial of the waiver request would violate principles of fairness, as other similarly situated Developments have been granted waivers to Subsection I.K. of the QAP and the rule that incorporates it by reference.

F. ACTION REQUESTED

20. For the reasons expressed, Residences at Dr. King respectfully requests that the Florida Housing Board of Directors:

- Grant the requested waiver of Subsection II.K of the 2016 QAP and rule 67-48.002(95);
 - Allow the immediate return of Residences at Dr. King's 2018 Housing Credit Allocation;
- and
- Immediately allocate new Housing Credits to Residences at Dr. King with a later placed-in-service date of December 31, 2021.

Respectfully submitted,



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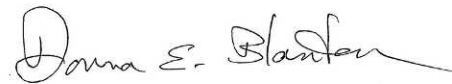
CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document was filed his 19th day of November, 2019, by

electronic delivery to:

Florida Housing Finance Corporation
Attn: Corporate Clerk
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301
Corporationclerk@floridahousing.org
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