

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

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ROME YARDS PHASE 3A, LLC,  
a Florida Limited Liability Company,

Petitioner,

vs.

FHFC CASE NO. 2024-028VW  
Application No. 2023-106B/2023-  
547C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

**PETITION FOR WAIVER OF RULE 67-21.003(1)(b), F.A.C. (06/28/2023) AND  
NON-COMPETITIVE APPLICATION PACKAGE (REV. 06-2023)**

Petitioner, Rome Yards Phase 3A, LLC (“Petitioner”), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code (“F.A.C.”), hereby petitions Florida Housing Finance Corporation (“Florida Housing”) for a waiver from the provisions of Rule 67-21.003(1)(b), F.A.C. (06/28/2023) (the “Rule”) and Non-Competitive Application Package (Rev. 06-2023) (“NCA”) to allow it to utilize the 4% Housing Credits set-aside commitments made under the average income test as set forth in Internal Revenue Code section 42(g)(1)(C). *See* 26 U.S.C. § 42(g)(1)(c). In support, Petitioner states as follows:

**I. Petitioner**

1. The name, address, telephone, and facsimile numbers for Petitioner and its qualified representative are:

Alberto Milo, Jr.  
2850 Tigertail Ave., Suite 800  
Miami, FL 33133  
Telephone: (305)460-990  
Fax: N/A  
E-mail: amilo@relatedgroup.com

2. The name, address, telephone and facsimile numbers of Petitioner’s counsel are:

Brian J. McDonough, Esquire  
Stearns Weaver Miller Weissler  
Alhadeff & Sitterson, P.A.  
150 West Flagler Street  
Miami, Florida 33130  
Telephone: (305)789-3350  
Facsimile: (305)789-3395  
E-mail: [bmcdonough@stearnsweaver.com](mailto:bmcdonough@stearnsweaver.com)

Bridget Smitha, Esquire  
Stearns Weaver Miller Weissler  
Alhadeff & Sitterson, P.A.  
106 E. College Ave. Ste 700  
Tallahassee, Florida 32301  
Telephone: (850)329-4852  
Facsimile: (850)329-4864  
E-mail: [BSmitha@stearnsweaver.com](mailto:BSmitha@stearnsweaver.com)

## **II. The Development**

3. On April 18, 2024, Petitioner submitted non-competitive application number 2023-106B (“Application”), which was revised and resubmitted on April 23, 2024 and finalized on May 2, 2024, for the following development (“Development”):

- Development Name: Gallery at Rome Yards
- Address: North Rome Avenue, approximately 400 feet Northeast of the intersection of North Rome Avenue & West Beach Street, Tampa, FL 33607
- Developer: Rome Yards Phase 3A Developer, LLC
- County: Hillsborough
- Number of Units: 234 units (new construction)
- Type: High Rise
- Set Asides: 60 units at or below 20% AMI; 103 units at or below 80% AMI; and 71 market rate units
- Demographics: Family
- Funding Request: \$64,000,000 Corporation-issued MMRB; \$2,857,291 (annual amount) 4% Non-Competitive Housing Credit funding request

## **III. Type of Waiver**

4. The waiver being sought is permanent in nature.

## **IV. Rule and NCA Provision From Which a Waiver is Requested**

5. Petitioner seeks a waiver in relation to Rule 67-21.003(1)(b), F.A.C. (6/28/23),

which provides:

If the NC Award will not be 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. The Non-Competitive Application package or NCA (Rev. 06-2023) 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-15428>, which shall be completed and submitted to the Corporation in accordance with this rule chapter.

6. The Non-Competitive Application package (Rev. 06-2023) (the "NCA") is therefore part of the Rule. The NCA states in pertinent part at Part A.10.b.(2):

For Applicants committing to the Average Income Test

Complete the Set-Aside Breakdown Chart by listing the number of Set-Aside Units, stated in whole numbers, to be set aside at each selected AMI level.

The Average AMI of all Set-Aside units may not exceed 60 percent.

The Development Cost Pro Forma includes an Average Income Test worksheet to assist Applicants in this calculation, which may display the percentage of total units with numbers represented with decimal places instead of whole numbers. This is acceptable for the Average Income Test Calculation. Calculation of the average AMI of all Set-Aside Units for the Average Income Test:

- (i) First, calculate the total number of Set-Aside Units.
- (ii) Then, at each AMI commitment, multiply the number of Set-Aside Units by the AMI percentage (e.g., a commitment of 13 Set-Aside Units at 30 percent AMI would be calculated as 3.9).
- (iii) Repeat this calculation at each AMI level. Then add the results together.
- (iv) Divide the number calculated in (iii) by the total number of Set-Aside Units calculated in (i).
- (v) This number must be equal to or less than 60 percent to meet the requirement.

**For MMRB Developments, the Set-Aside commitment will be 40 percent of the total units at or below 60 percent AMI.**

*Id.* at Part A.10.b.(2) (emphasis added).

## V. Statutes Implemented by the Rule

7. The Rule implements sections of the Florida Housing Finance Corporation Act; specifically:

- § 420.502 (Legislative findings)
- § 420.507 (Powers of the corporation)
- § 420.508 (Special powers; multifamily and single-family projects)
- § 420.509 (Revenue bonds)
- § 420.5099 (Allocation of the low-income housing tax credit)

#### **VI. Justification for Granting Waiver of the Rule and NCA**

8. During its 2018 session, the United States Congress passed the “Consolidated Appropriations Act, 2018” (“H.R. 1625”), which was signed into law on March 23, 2018. H.R. 1625 created a new subsection C within Section 42(g)(1) of the IRC, which states as follows:

##### (C) Average income test

###### (i) In general

The project meets the minimum requirements of this subparagraph if 40 percent or more (25 percent or more in the case of a project described in section 142(d)(6)) of the residential units in such project are both rent-restricted and occupied by individuals whose income does not exceed the imputed income limitation designated by the taxpayer with respect to the respective unit.

###### (ii) Special rules relating to income limitation

For Purposes of clause (i)—

###### (I) Designation.

The taxpayer shall designate the imputed income limitation of each unit taken into account under such clause

###### (II) Average test

The average of the imputed income limitations designated under subclause (I) shall not exceed 60 percent of area median gross income

###### (III) 10-percent increments

**The designated imputed income limitation of any unit under subclause (I) shall be 20 percent, 30 percent, 40 percent, 50 percent, 60 percent, 70 percent, or 80 percent of area median gross income.**

Section 42(g)(1)(C), I.R.C. (2018) (emphasis added). This subsection remains in effect today. *See* 26 U.S.C. § 42(g)(1)(c).

9. Rule 67-21.027(1), F.A.C., was revised on July 8, 2018 to incorporate the new subsection 42(g)(1)(C) of the IRC. At present, Rule 67-21.027(1), F.A.C., continues to provide: “Each Housing Credit Development shall comply with the minimum Housing Credit Set-Aside provisions, as specified in Section 42(g)(1) of the IRC. Further, each Housing Credit Development shall comply with any additional Housing Credit Set-Aside chosen by the Applicant in the Application.” As a result, any applications for housing tax credits submitted to Florida Housing after July 8, 2018 are allowed to use the average income test provisions of the IRC.

10. At Section 10.b(2) of the Application, Petitioner indicated that it will use the “Average Income Test” to calculate the set-aside commitment, and completed the Average Income Test Chart electing 60 Units @ or below 20% AMI, 103 Units @ or below 80% AMI, and 71 Market Rate Units. Though this election is permitted by Internal Revenue Code section 42(g)(1)(C) for Housing Credits, it does not comply with the NCA requirement that “For MMRB Developments, the Set-Aside commitment will be 40 percent of the total units at or below 60 percent AMI.” *See* NCA, Part A.10.b.(2), as the Bond Program under Section 142 of the IRC does not recognize Average Income set-aside. Accordingly, Petitioner is in need of a waiver of the Rule and NCA requirement to allow for the MMRB set-aside commitment to instead be 20 percent of the total units at or below 50 percent AMI.

11. It would violate principles of fairness and put Petitioner at a competitive disadvantage with other developments if it is not allowed to use the average income test permitted by Section 42(g)(1) of the IRC and Rule 67-21.027(1), F.A.C.

12. Under Section 120.542(1), Florida Statutes, Florida Housing has the authority to grant waivers to, or variances from, its requirements when strict application of the requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

Variations and waivers shall be granted when the person subject to the rule demonstrates that the purpose of the underlying statute will be or has been achieved by other means by the person and when application of a rule would create a substantial hardship or would violate principles of fairness. For purposes of this section, "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.

13. Granting the requested waiver in this instance would allow Petitioner to utilize the average income test as permitted pursuant to the Internal Revenue Code and Rule 67-21.027(1), F.A.C. The controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results.

14. Additionally, by granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing and recognize the economic realities and principles of fundamental fairness in developing affordable rental housing. The purpose of the underlying statute, which is to "encourage development of low-income housing in the state" as identified in §420.5099(2), Fla. Stat., would still be achieved if the waiver is granted.

15. In this instance, Florida Housing has jurisdiction to grant a waiver of the Rule and Petitioner meets the standards for a waiver of the Rule.

**VII. Action Requested**

16. WHEREFORE, Petitioner respectfully requests that Florida Housing:
- a. Grant this Petition and all relief request therein;
  - b. Grant a waiver from Rule 67-21.003(1)(b), F.A.C. (6/28/23) and NCA (Rev. 06-2023) at Part A.10.b.(2) and allow for the MMRB set-aside commitment of 20% of the total units at or below 50% AMI to allow utilization of the set asides committed to based on the average income test for the 4% Housing Credits; and
  - c. Grant such further relief as may be deemed appropriate

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER  
ALHADEFF & SITTERSON, P.A.  
*Counsel for Petitioner*  
150 West Flagler Street, Suite 150  
Miami, Florida 33131  
Tel: (305) 789-3350  
Fax: (305) 789-3395  
E-mail: bmcdonough@swmwas.com

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

**CERTIFICATE OF SERVICE**

This Petition is being served via e-mail for filing with the Corporation Clerk for the Florida Housing Finance Corporation, CorporationClerk@FloridaHousing.org, with a copy served by U.S. Mail on the Joint Administrative Procedures Committee, Pepper Building, Room 680, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 11th day of June, 2024.

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