

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. 2019-045VW

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FLORIDA HOUSING
FINANCE CORPORATION

SAILBOAT BEND II, LTD.,

Petitioner,

vs.

FHFC Application No. 2018-284C
REQUEST FOR APPLICATIONS: 2017-113

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 (2016)**

Pursuant to section 120.542, Florida Statutes, and rule 28-104.002, Florida Administrative Code, Petitioner Sailboat Bend II, Ltd. ("Sailboat II" 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 Sailboat II's 2018 Housing Credits before the last quarter of 2020. Sailboat II 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 Sailboat II's placed-in-service date from December 31, 2020, until December 31, 2021. In support of this Petition, Sailboat II 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 Sailboat Bend II, Ltd., 3 Miami Central, 161 NW 6th Street, Suite 1020, Miami, FL 33136; 305-357-4725; lwong@apccommunities.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. Sailboat II submitted an application (No. 2018-284C) for Housing Credits (also known as tax credits) in response to Request for Applications (“RFA”) 2017-113. Sailboat II proposed to use equity raised from the Housing Credits to build a 110-unit, high-rise development in Broward County (City of Fort Lauderdale) called Sailboat Bend Apartments II to serve the elderly demographic.

4. On March 16, 2018, Florida Housing’s Board of Directors preliminarily selected

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

- Development Name: Sailboat Bend II, Ltd.
- Developer, including at least one natural person Principal: APC Sailboat Bend II Development, LLC; HEF-Dixie Court Development, LLC; Howard D. Cohen
- County of Development: Broward
- Number of Units: 110
- Type: High Rise
- Set Asides: 10% at 28% AMI; 81% at 60% AMI; 9% market rate
- Demographics: Elderly
- Funding Amounts: \$2,561,000 in 9% Housing Credits

Sailboat II for funding. Sailboat II was subsequently invited to enter credit underwriting and submitted a signed acknowledgement accepting the invitation on September 24, 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. Sailboat II and Florida Housing entered into the carryover allocation agreement on December 7, 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, substantial uncertainty exists as to whether the December 31, 2020, placed-in-service deadline can be met. Consequently, Sailboat II 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. Sailboat II's equity investor, Bank of America, has asked Sailboat II to make this request. Delays in development of the project site have occurred because the Archaeological and Historical Conservancy, Inc. ("AHC") has informed the City of Fort Lauderdale's Urban Design and Planning Division that "archaeological materials" have been found on the parcel where Sailboat II is to be constructed and that additional testing is needed. *See Exhibit A* (Letter to Trish Logan, City of Fort Lauderdale, from Robert S. Carr, Executive Director of the Archaeological and Historical Conservancy, Inc., March 20, 2019). More specifically, Sailboat II's site is less than 100 meters from a known prehistorical archaeological site, the Marina Lofts site. *Id.* In February of 2019, shovel testing by AHC on the Sailboat II site determined that one test location "was positive for prehistoric cultural materials (faunal bone)." The AHC executive director concluded that "[t]his preliminary testing confirms that archaeological materials occur within the subject parcel. The nature and extent of those deposits is unknown as the testing area is limited." The ARC recommended that additional testing occur following the demolition of an existing structure and concrete slab on the property." *Id.*

8. Given that additional archaeological testing on the site will delay other aspects of permitting and development of Sailboat II, the equity investor is concerned that 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, Sailboat II's equity investor will not participate in the transaction, as there is a risk that Housing Credits will not be available if the placed-in-service deadline is not met. Without the participation of the equity investor, Sailboat II will be unable to construct the Development.

9. The requested waiver is permanent in nature.

C. RULE FROM WHICH WAIVER IS SOUGHT

10. Sailboat II 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

11. 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

12. 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.*

13. Strict adherence to Subsection II.K. of the QAP would create a substantial hardship for Sailboat II, as its equity investor is unwilling to participate in the financing of the project without the requested exchange of Housing Credits. Without the participation of the equity investor, the Development cannot be completed, which would deprive low-income residents of Broward County of 110 units of much needed affordable housing.

14. 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 Sailboat II’s waiver request would recognize the fundamental fairness of granting the same relief to similarly situated Developments.

15. The statutes underlying the QAP and the rule will be served by the approval of Sailboat II’s 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 Sailboat II’s waiver request will permit the Development to ultimately be placed in service despite the challenging circumstances currently presented by the need for further archaeological testing, a factor that is beyond Sailboat II’s control.

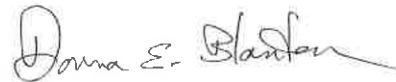
16. The requested waiver will not adversely affect any party, including any other party that applied to receive an allocation of Housing Credits in RFA 2017-113, or Florida Housing. A denial of the requested waiver, however, would result in substantial economic hardship to Sailboat II, as it may be unable to complete the Development, which would only contribute further to the shortage of affordable housing in Broward County. Additionally, denial of the waiver request would violate principles of fairness, as other similarly situated Developments have been granted waivers to Subsection IIK. of the QAP and the rule that incorporates it by reference.

F. ACTION REQUESTED

17. For the reasons expressed, Sailboat II 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 Sailboat II's 2018 Housing Credit Allocation;
- Immediately allocate new Housing Credits to Sailboat II with a later placed-in-service date; and that
- No further fees be imposed in connection with the requested Housing Credit exchange, given that significant fees already have been paid for the extension of various dates under the carryover allocation agreement, and the delays are out of the control of Sailboat II.

Respectfully submitted,



Donna E. Blanton, FBN 948500
Radey Law Firm
301 South Bronough, Suite 200
Tallahassee, Florida 32301
Telephone: (850) 425-6654
E-mail: dblanton@radeylaw.com
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Counsel for Petitioner

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document was filed by email to Ana McGlamory, the Florida Housing Finance Corporation Clerk, at corporationclerk@floridahousing.org and Ana.McGlamory@floridahousing.org and with a copy served by hand delivery to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 West Madison Street, Tallahassee, Florida 32399-1400, this 17th day of May, 2019.



Donna E. Blanton



Archaeological and Historical Conservancy, Inc.
4800 S.W 64th Ave, Suite 107 Davie, FL 33314
Phone: 954-792-9776 Fax: 954-792-9954
Email: archlgcl@bellsouth.net Web: www.flarchaeology.com

March 20, 2019

Trisha Logan
City of Fort Lauderdale
Urban Design and Planning Division
700 NW 19th Avenue
Fort Lauderdale, Florida 33311

Re: Sailboat Bend South parcel - Interim shovel test report and management plan (2019.32)

Dear Ms. Logan:

This is provided as an interim report on testing at the Sailboat Bend South parcel, at 425 SW 4th Avenue. The parcel encompasses a small single story structure, concrete slab parking area, and peripheral landscaped grounds. A known prehistoric archaeological site, the Marina Lofts site (8BD4878), is located less than 100 meters from the subject parcel, also on the south side of the New River.

In February, 2019 the AHC conducted shovel testing within the accessible parts of the property. As a result of this testing, four shovel tests were dug, one of which was positive for prehistoric cultural materials (faunal bone). This preliminary testing confirms that archaeological materials occur within the subject parcel. The nature and extent of those deposits is unknown as the testing area is limited.

Per the preliminary DRC approval, dated October 5, 2018, additional testing is required. Since much of the parcel is covered and inaccessible to testing, trenching through the parking lot would provide uneven coverage of the property. It is our recommendation that the additional testing (i.e. shovel tests conducted on an approximate 10m grid) be conducted following the demolition of the structure and demolition and removal of the concrete slab.

If you concur with the above recommendation, then we propose that all of the ground-disturbances associated with the demolition should be monitored by an archaeologist and executed in such a way as to minimally disturb the natural sediments on the property. Initial ground-disturbances should be limited to this demolition and should be followed by the completion of the shovel testing assessment.

If a significant feature or cultural deposit is encountered your agency will be alerted within 72 hours of that find with a written notice and the feature or cultural deposit will be fully documented. Any significant archaeological materials that are collected will be analyzed and described in the final report. All archaeological materials will repose at the Fort Lauderdale Historical Society.



If human remains are encountered then they will be subject to the provisions of Florida Statute 872.05. A final written report will be provided to your agency within 20 business days of completion of field monitoring.

Sincerely,

A handwritten signature in cursive script, appearing to read "Robert S. Carr".

Robert S. Carr
Executive Director



2017 color aerial orthophotograph of the Sailboat Bend South parcel showing shovel test locations.

- = POSITIVE SHOVEL TEST
- = NEGATIVE SHOVEL TEST

