

STATE OF FLORIDA

FLORIDA HOUSING FINANCE CORPORATION

EDISON TERRACES, LLC

Petitioner,

FHFC Case No.:

v.

APPLICATION NO. 2015-518C

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

AMENDED AND RESTATED
PETITION FOR WAIVER OF RULE 67-21.027(6)

Petitioner, Edison Terraces, LLC, a Florida limited liability company (the "Petitioner") submits its Petition to Respondent, Florida Housing Finance Corporation (the "Corporation"), for a waiver of Rule 67-21.027(6), F.A.C. (the "Rule"), to allow Petitioner to finalize the submission of its Final Cost Certification Application Package ("Form FCCAP") and submit same to the Corporation. In support of this Petition for Rule Waiver of Rule 67-21.027(6), F.A.C. (the "Petition"), Petitioner states as follows:

A. Petitioner and the Development.

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

Edison Terraces, LLC
675 NW 56th Street, Bldg. C
Miami, FL 33127
Attention: Carol Gardner, President
Telephone: (305) 757-3737
Facsimile: (305) 757-5856
Email: cgardner@tedcmiami.org

The name, address, telephone, and facsimile numbers of Petitioner's attorneys are:

Gary J. Cohen, Esq.
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2. On December 17, 2015, Petitioner closed on the equity financing/syndication of non-competitive low income housing tax credits ("Credits") associated with the issuance of tax-exempt bonds by the Housing Authority of Miami-Dade County. In connection therewith, Petitioner submitted an application for Credits with Corporation on or about August 31, 2015, and was issued a "comfort" letter by the Corporation indicating that, upon submission of required cost certification documents, Petitioner would be allocated Credits in the approximate amount of \$624,459.

3. The Rule requires submission of the Final Cost Certification Application Package ("Form FCCAP") in order to itemize all expenses incurred in association with the construction or rehabilitation of a housing credit development. Form FCCAP is incorporated by reference into the Rule. The Rule (and Form FCCAP) both require that a General Contractor Cost Certification ("GCCC") be included in this submission package, together with a certified public accountant ("CPA") opinion letter and audit report for the GCCC. The GCCC instructions contained within Form FCCAP reiterate the foregoing requirements. The GCCC instructions set forth requirements and audit procedures to be followed by the CPA when performing the audit of the general contractor's cost certification. Included within the cost certification package is a "General Contractor Costs Certification - GC Certification" form to be executed by the general contractor and the CPA ("GC Certification"), certifying the accuracy of the costs incurred by the general contractor.

4. The rehabilitation of the 120-unit affordable housing development (known as Edison Terraces Apartments) has been completed, and the construction loan has converted to

permanent loan status. Pursuant to the provisions of Petitioner's amended and restated operating agreement, receipt of the third and fourth capital contributions from the tax credit investor (totaling approximately \$1,370,000) is dependent upon finalization and submission of the audited cost certification, and receipt of Form 8609 from Corporation (issued after receipt and review of the Form FCCAP). Receipt of such remaining capital contributions by Petitioner is necessary in order to pay all expenses and obligations incurred in connection with the rehabilitation of the apartment complex, and to partially repay the SAIL loan from the Corporation.

5. Petitioner is in litigation with the general contractor regarding disputes over amounts owed under the construction contract. A summary of such litigation is attached as Exhibit "A". As a result, the general contractor is unwilling to execute the GC Certification, and other internal certificates and affidavits to be provided to the CPA in order to enable the CPA to issue its opinion letter and audit report.

B. Rule from Which the Waiver is Sought.

6. The relevant portion of the Rule for which this waiver is sought, provides as follows:

"(6) The Final Cost Certification Application Package (Form FCCAP) shall be used by an Applicant to itemize all expenses incurred in association with construction or Rehabilitation of a Housing Credit Development, including Developer's and General Contractor's fees as described in Rule 67-21.026, F.A.C. Such form package shall be completed, executed and submitted to the Corporation in both hard copy format and electronic files in Microsoft Excel spreadsheets for the HC Development Final Cost Certification (DFCC) and the General Contractor Cost Certification (GCCC) included in the form package, along with the executed Extended Use Agreement and appropriate recording fees, IRS Tax Information Authorization Form 8821 for all Financial Beneficiaries if requested by the Corporation, a copy of the syndication agreement disclosing the rate and all terms, the required certified public accountant opinion letter for both the DFCC and GCCC, an unmodified audit report prepared by an independent certified public accountant for both the DFCC and GCCC, photographs of the completed Development, the monitoring fee, and documentation of the placed-in-service

date as specified in the Form FCCAP instructions. The Final Housing Credit allocation will not be issued until such times as all required items are received and processed by the Corporation. The Final Certification Application Package (“Form FCCAP”) is adopted and incorporated herein by reference...”(emphasis added).

C. Statute Implemented.

7. The Rule for which a waiver is requested is implementing, among other sections of the Florida Housing Finance Corporation Act (the “Act”), the statute that governs the allocation of federal low-income housing tax credits. See §§ 420.5099, Florida Statutes (2018).

8. Pursuant to Chapter 120.542(1), Florida Statutes, “[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.” Therefore, under Section 120.542(1), Florida Statutes and Chapter 28-104, F.A.C., the Corporation has the authority to grant waivers to its requirements when strict application of these requirements would lead to unreasonable, unfair, and unintended consequences in particular instances. Specifically, Section 120.542(2) states:

“Variances 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.” Section 120.542(2), Florida Statutes.

9. In this instance, Petitioner meets the standards for a waiver.

D. Justification for Petitioner's Requested Waiver

10. Petitioner's CPA has completed nearly all of the work necessary for submission of Form FCCAP and advises that any missing information would not change the results of its report, but is unable (due to the litigation described above) to obtain the signature of the general contractor to the GCCC Certification and to certain other certificates and affidavits required by the CPA of the general contractor. However, the CPA has advised Petitioner that nearly all accounting work necessary for submission of Form FCCAP (including the GCCC) has been completed, and that any differences noted as a result of its audit are immaterial. However, CPA cannot issue an unqualified or opinion letter audit report with respect to the GCCC at this time, due to its inability to obtain requested documentation from the general contractor (who is, as noted above, in litigation with Petitioner).

11. The litigation described in Exhibit "A" will not affect costs included in the DFCC, as more fully explained herein. The general contractor has made two primary claims; first, that it is owed approximately \$309,000 for work it performed but has not been paid for (and with respect to which funds are being held in retainage); and second, that it is entitled to payment for requested change orders totaling approximately \$870,000 (Petitioner has not agreed to these change orders and disputes that it owes the general contractor such amounts). Petitioner has counterclaimed against the general contractor for approximately \$778,000 for its costs in completing and correcting the general contractor's defective work.

None of the foregoing amounts will affect the amount of Credits ultimately allocated to Petitioner's development. Petitioner's accountants have determined that the general contractor's claim for approximately \$309,000 should be classified as an "ineligible cost" on the DFCC worksheets due to uncertainty as to resolution of the above-described litigation; as such, such amounts will not be includable in eligible basis for purposes of generating additional Credits.

With respect to the approximately \$870,000 of unapproved change orders, Petitioner's accountants have not reflected such amounts in the cost certification worksheets because Petitioner has advised its accountants that it disagrees with such change orders and whether such amounts are in fact owed. Finally, with respect to the approximately \$778,000 of additional expenses incurred by Petitioner in correcting general contractor's defective work (with respect to which Petitioner has filed a counter claim against general contractor), resolution of such counterclaim will not affect either eligible basis or the amount of Credits, since such amounts fall outside of the December 31, 2018 cut-off date for cost certification purposes.

In each of the foregoing instances, Petitioner (and its accountants) have determined to take the most conservative approach available with respect to the disputed costs, either by reflecting such costs as ineligible or by excluding such costs from the final cost certification package. Had Petitioner determined to keep the cost certification process open until resolution of the litigation, and if the outcome of such litigation had been such that Petitioner was determined to owe additional amounts to the general contractor, such additional costs could have been included in the cost certification and generated additional Credits. However, Petitioner has determined to forego the ability to claim Credits with respect to such potentially increased costs. Similarly, with respect to Petitioner's counterclaim against the general contractor for reimbursement of expenses attributable to the general contractor's defective work, if Petitioner is ultimately successful in recouping such amounts, there would be no effect on eligible basis (nor on the amount of Credits) since all such amounts were incurred and paid after the December 31, 2018 cut-off date and would not be eligible for inclusion in basis for purposes of Credit calculation.

12. Petitioner's accountants had full access to the general contractor's records for audit purposes through April 2018. Until that time, the accountants were able to visit the general contractor's office and test payments and invoices in such office. As a result of the litigation described herein, the accountants have been unable to obtain a limited number of subcontractor and/or vendor names, and have been unavailable to obtain one or two confirmations from subcontractors of the general contractor. In addition, the accountants have been unable (as described herein) to obtain the general contractor's signature to the GC Certification. Finally, the accountants had been unable to verify (due to limits on access to general contractor records) that the final general contractor fees (limited to 14% of hard construction costs) are within permitted Corporation limits.

13. Petitioner has submitted a draft of the cost certification documents to Corporation, and such draft points out the procedures which were unable to be completed due to the general contractor's lack of cooperation, and the verifications that were unable to be obtained as a result thereof. Due to the conservative approach employed by the accountants in preparing the cost certification documents (such that the ultimate resolution of the litigation described herein will not affect the eligible basis or amount of Credits generated by the development), Petitioner believes that the amounts reflected in the DFCC and GCCC are sufficient to permit completion of the cost certification process and issuance of Forms 8609. As noted above, the deficiencies resulting from the general contractor's lack of cooperation (and from the litigation) only serve to potentially understate the eligible costs and Credits. In order to achieve completion of the cost certification process and issuance of Form 8609 in order to facilitate receipt of otherwise owed capital contributions from the tax credit investor, Petitioner is willing to forego any potential increase in Credits to which it may be entitled in order to finalize the foregoing process.

14. Petitioner is requesting that Corporation waive the required execution of the GC Certification by the general contractor, and accept the CPA's qualified opinion letter with disclaimers and draft audit report for the GCCC. Petitioner will submit the GCCC executed by the CPA. Petitioner will submit the unqualified CPA opinion letter and unmodified audit report for the DFCC.

15. The requested waiver will ensure the availability of tax credit equity financing which will otherwise be lost as a consequence of the delays and difficulties described herein.

E. Conclusion

16. The facts set forth in Sections 10 through 13 of this Petition demonstrate the hardship and other circumstances which justify Petitioner's request for a Rule waiver; that is, the inability to obtain the general contractor's execution of the GC Certification and other documentation necessary in order for the CPA to issue its unqualified opinion letter and audit report with respect to the GCCC, and as a result Petitioner's inability to obtain the final equity installments from the tax credit investor which are dependent upon submission of the Form FCCAP and the issuance of Form 8609 by the Corporation.

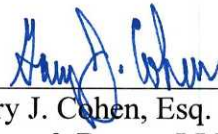
17. As demonstrated above, the requested waiver serves the purposes of Section 420.5099, Florida Statutes, and the Act, as a whole, because one of their primary goals is to facilitate the availability of decent, safe, and sanitary housing in the State of Florida to low income persons and households. Further, by granting the requested waiver, the Corporation would recognize principles of fundamental fairness in the development of affordable rental housing.

18. The waiver being sought is permanent in nature. Should the Corporation require additional information, a representative of Petitioner is available to answer questions and to provide all information necessary for consideration of this Petition.

WHEREFORE, Petitioner respectfully requests that the Corporation:

- A. Grant this Petition and all the relief requested therein;
- B. Grant a waiver of the Rule to permit submission of Form FCCAP without the GC Certification executed by the general contractor, and with a qualified certified public accountant opinion letter with disclaimers and draft audit report with respect to the GCCC; and
- C. Award such further relief as may be deemed appropriate.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The original Petition is being served by overnight delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by overnight delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 15th day of October, 2019.



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EXHIBIT A

Edgewater Construction Group, Inc., v Edison Terraces, LLC, Great American Insurance Company Anillo Toledo Lopez, Eleventh Judicial Circuit

Summary of Litigation

Edgewater Construction Group, Inc. ("Edgewater") claims it was not paid for work it performed. Specifically, Edgewater has a lien in the amount of \$308,497.50 (which has been transferred to a bond pursuant to Florida Statute 713.24). Edison Terraces LLC ("Edison") disputes that it owes Edgewater this amount because Edison had to hire a new contractor to finish the project.

Edgewater also claims it is entitled to payment for the following requested changes orders.

Disputed Change Order # 83 \$72,110.28
Disputed Change Order # 88 \$27,904.50
Disputed Change Order # 89 \$97,403.53
Disputed Change Order #96 \$48,886.05
Disputed Change Order #97 \$14,146.79
Disputed Change Order #98 \$51,145.81
Disputed Change Order #99 \$555,734.37

Edison did not agree to the above change orders and disputes that it owes Edgewater these amounts. Edison claims that the windows and sliding glass doors were improperly installed. As a result, Edison has remediated all the windows and sliding glass doors. Additionally, Edison claims that there are defects in Edgewater's work related to the air conditioning units. Edison has incurred approximately \$778,409.00 thus far in completing and correcting Edgewater's work. Edison has a counter claim against Edgewater to recover damages for the construction defects.

The parties have exchanged documents and many subpoenas for documents have been issued to nonparties who worked on the project. Several depositions have been taken and several additional depositions will be taken in October. Fact discovery closes on October 30, 2019. The parties have disclosed expert witnesses and expert reports.

Recently, Edgewater amended its complaint to add the architect on the project as a defendant. Mediation is set for November 5, 2019 and trial is set to begin on February 24, 2020.