

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

VILLA CAPRI II ASSOCIATES, LTD.,
a Florida limited partnership,

2019-068VW

Petitioner,

FHFC CASE NO.

v.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

PETITION FOR WAIVER OF RULE 67-21.026(10)

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner, Ltd., (the "Petitioner") by and through its undersigned counsel, hereby petitions Respondent, Florida Housing Finance Corporation ("Florida Housing") for a waiver of Rule 67-21.026(10), Florida Administrative Code ("F.A.C.") (the "Rule"), which no longer allows for the use of a stipulated sum contract in contracting with general contractors. 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:

Villa Capri II Associates, Ltd., a Florida limited partnership
2100 Hollywood Boulevard
Hollywood, FL 33020
Telephone: (786) 709-2300
Fax: (305) 443-9339
Email: lenny.wolfe@cornerstonegrp.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.
150 West Flagler Street
Suite 2200
Miami, Florida 33130
Telephone: 305-789-3350
Fax: 305-789-3395
Email: Bmcdonough@stearnsweaver.com

B. THE RULE FROM WHICH WAIVER IS REQUESTED

3. Petitioner requests a waiver of Rule 67-21.026(10), F.A.C. (2015), which provides:

The Corporation's assigned Credit Underwriter shall require a guaranteed maximum price construction contract, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant's sole expense, and review a pre-construction analysis for all new construction units or a physical needs assessment for rehabilitation units and review the Development's costs.

C. STATUTE IMPLEMENTED BY THE RULE

4. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the "Act"), the statute relating to the allocation of the Low-Income Housing Tax Credits contained in Section 420.5099 of the Florida Statutes. *See* § 420.5099, Fla. Stat. (2017) (the "Statute").

D. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE AND REASONS THE WAIVER WOULD SERVE THE PURPOSES OF THE UNDERLYING STATUTE

5. In December 2014, Petitioner acquired and began constructing a 117-unit development in Miami-Dade County known as Villa Capri II (the "Project"). The financing included tax-exempt bond financing from the local bond issuer in Miami-Dade County. In October 2015, Petitioner submitted a non-competitive application for the allocation of four percent low-income housing tax credits, in connection with which it must provide a cost certification in support of its

final tax credit allocation. The Project has no subsidy from the Florida Housing Finance Corporation.

6. In the course of the cost certification process, Florida Housing determined that Petitioner utilized a stipulated sum contract, as opposed to a Guaranteed Maximum Price Construction Contract.

7. Petitioner entered into the stipulated sum contract on May 28, 2014 (the “Stipulated Sum Contract”). At that time, Rule 67-21.026(10), F.A.C., read: “The Corporation’s assigned Credit Underwriter shall require a guaranteed maximum price or stipulated sum construction contract, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant’s sole expense, and review a pre-construction analysis for all new construction units or a physical needs assessment for rehabilitation units and review the Development’s costs.”

8. After execution of the Stipulated Sum Contract, Rule 67-21.026(10), F.A.C., was revised to require a guaranteed maximum price contract as opposed to, alternatively, also allowing the use of a Stipulated Sum Contract. Villa Capri II applied for non-competitive credits on October 30, 2015, after the Rule 67-21.026(10), F.A.C. was revised.

9. The work contracted for under the Stipulated Sum Contract has been completed, rendering it impossible to retroactively having the work performed under a guaranteed maximum price contract. All construction under the Stipulated Sum Contract was completed in accordance with the Plans and Specifications and approved by all stakeholders (*i.e.*, the lenders, investor, underwriter and County).

10. Because the Stipulated Sum Contract complied with the Rule at the time of execution, and because the work thereunder has already been completed, Petitioner respectfully requests a waiver of the Rule.

11. 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 rules demonstrates that the application of the rules 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. (2017).

12. In this instance, Petitioner meets the standards for a waiver of the Rule. The requested waiver will not adversely impact the Project or Florida Housing and will ensure that 117 affordable housing units will be preserved and made available for the target population in Miami-Dade County, Florida. The strict application of the Rule will create substantial hardship for Petitioner because the work contemplated by the Stipulated Sum Contract has already been completed. If the requested waiver is denied, Petitioner would have to incur the cost of undoing the work provided for under the Stipulated Sum Contract and entering into a new guaranteed maximum price contract. Avoiding this unnecessary cost would ensure the housing costs at the Project are as low as possible. The waiver will therefore 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 low-cost housing in the State.

13. Rule 67-21.026(12) (b) provides: “The General Contractor’s fee shall be limited to a maximum of 14 percent of the actual construction costs.” The General Contractor has acknowledged and agreed that notwithstanding anything to the contrary in the Stipulated Sum Contract or the documents related to the Stipulated Sum Contract, that its fee shall be limited to the amount permitted under Rule 67-21.026(12) (b), F.A.C. *See* Affidavit attached hereto as Exhibit “A.”

14. The purposed of Rule 67-21.026(1) has been met because, as stated in Exhibit A, no cost savings were or will be billed/paid under the construction contract, and the General Contractor Fee will be limited to the maximum 14%. The General Contractor will not be paid more under the stipulated sum contract than if it had performed the work under a guaranteed maximum price contract. The cost that have been billed/paid are the actual costs incurred plus a fee.

15. As mentioned above, the requested waiver serves the purpose of the Statute because one of the primary goals of the Statute is to facilitate the availability of decent, safe, and sanitary housing in the State for low-income households. By granting this waiver, Florida Housing would recognize the goal of increasing the supply of affordable housing to persons of low-income, and recognizing the economic realities and principles of fundamental fairness in developing affordable rental housing. *See* § 420.5099(2), Fla. Stat. (2017).

E. WAIVER IS PERMANENT

16. The waiver being sought is permanent in nature.

F. ACTION REQUESTED

17. For the reasons set forth herein, Petitioner respectfully requests Florida Housing:

(i) grant the requested waiver of the Rule and approve of the use of the aforescribed Stipulated Sum Contract; (ii) grant this Petition and all of the relief requested herein; and (iii) grant such further relief as it may deem appropriate.

18.

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. (2017).

Respectfully submitted,

VILLA CAPRI II ASSOCIATES, LTD.
2100 Hollywood Boulevard
Hollywood, Florida 33020
Tel: (786) 709-2231
Fax: (305) 443-9339
Email: mara.mades@cornerstonegrp.com

A handwritten signature in black ink, appearing to read "Mara S. Mades", written over a horizontal line.

By: _____
Mara S. Mades, Vice President

CERTIFICATE OF SERVICE

The Petition For Rule Waiver is being served by electronic transmission for filing with the Florida Housing Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Tallahassee, Florida 32301.

STATE OF FLORIDA)

) ss:

COUNTY OF MIAMI-DADE)

Mara S. Mades, being duly sworn, says:

1. I am a General Partner of M.S. Mades Family Limited Partnership, which is a manager of CSG Construction, L.L.C. (“CSG”) which has a principal place of business located in Hollywood, Florida.

2. I make this affidavit based on my personal knowledge of the facts stated herein, or the facts as they may appear in the CSG’s records or data compilations made at or near the time of the occurrence of the facts or events by or from persons with knowledge of facts, whose regular practice it was to make and keep such records in the course of the CSG’s regularly conducted business. I routinely rely on such records in the usual course of my business.

3. I submit this affidavit in support of the Petition For Waiver Of Rule 67-21.026(10) submitted by Villa Capri II Associates, Ltd. (“VC II”) which is the owner of a 117 unit affordable housing development known as Villa Capri II.

4. Rule 67-21.026(10), F.A.C. (2016), provides:

The Corporation’s assigned Credit Underwriter shall require a guaranteed maximum price construction contract, acceptable to the Corporation, which may include change orders for changes in cost or changes in the scope of work, or both, if all parties agree, and shall order, at the Applicant’s sole expense, and review a pre-construction analysis for all new construction units or a physical needs assessment for rehabilitation units and review the Development’s costs.

5. CSG was the general contractor for Villa Capri II which began construction of Villa Capri II in December 2014 pursuant to a Standard Form of Agreement between Owner and

Contractor Where the Basis of Payment Is a Stipulated Sum as of May 28, 2014 (“Construction Contract”). At that time, Rule 67-21.026(10), F.A.C., read, in pertinent part “The Corporation’s assigned Credit Underwriter shall require a guaranteed maximum price or stipulated sum construction contract,…”

6. The General Contractor’s fee was limited to a maximum of 14 percent of the actual construction costs as permitted under Rule 67-21.026(12)(b).

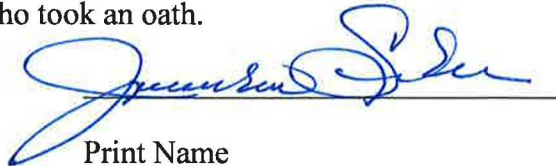
3. There were no cost savings billed or paid under the Construction Contract, and the only costs that have been (or will be billed) and paid under the Construction Contract are actual costs incurred.

FURTHER AFFIANT SAYETH NAUGHT.



Mara S. Mades

SWORN TO AND SUBSCRIBED before me this 13th day of August 2019 by Mara S. Mades, who is personally known to me and who took an oath.



Print Name

Notary Public, State of Florida at Large

Jacqueline Silva

My Commission Expires:

