

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

In Re: EDISON TERRACES, LLC

FHFC Case No.: 2019-072VW

**ORDER GRANTING WAIVER OF RULE
67-21.027(6), FLORIDA ADMINISTRATIVE CODE**

THIS CAUSE came on for consideration and final action before the Board of Directors of the Florida Housing Finance Corporation (“Florida Housing”) on October 31, 2019, pursuant to an “Amended and Restated Petition for Waiver of Rule 67-21.027(6)” (“Amended Petition”). Florida Housing received the Amended Petition on October 15, 2019, from Edison Terraces, LLC (“Petitioner”). Petitioner previously filed its initial “Petition for Waiver of Rule 67-21.027(6)” (“Initial Petition”) on August 30, 2019. Notice of the Petition of the Initial Petition was published on September 4, 2019, in Volume 45, Number 172, of the *Florida Administrative Register*. No additional notice was required upon the Petitioner filing its Amended Petition. Florida Housing received no comments regarding the Petition. After careful review of the record and being otherwise fully advised in the premises, the Board of Directors (“Board”) of Florida Housing hereby finds:

1. The Board has jurisdiction over the subject matter of this case and the parties hereto.

FILED WITH THE CLERK OF THE FLORIDA
HOUSING FINANCE CORPORATION

Thomas Kearney DATE: 10/31/19

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 its Application Number 2015-518C for 4% non-competitive Credits with Florida Housing on or about August 31, 2015, and was issued a “comfort” letter by Florida Housing indicating that, upon submission of required cost certification documents, Petitioner would be allocated Credits in the approximate amount of \$624,459 annually.

3. Rule 67-21.027(6), Florida Administrative Code, (“Rule”) requires submission of the Final Cost Certification Application Package (“FCCAP”) in order to itemize all expenses incurred in association with the construction or rehabilitation of a housing credit development, including Developer’s and General Contractor’s fees. The FCCAP form is incorporated by reference into the Rule. The FCCAP must be submitted by the earlier of either the date 90 calendar days after the Development has been placed in service or the date that is 30 days before the end of the calendar year for which the Final Housing Credit Allocation is requested. Florida Housing may grant extension for good cause upon written request. The Final Housing Credit Allocation will not be issued until all required items are received and

processed by Florida Housing. Upon Florida Housing's acceptance and approval of the FCCAP and other administrative requirements, it will issue the IRS Low-Income Housing Credit Allocation and Certification Forms 8609 ("Forms 8609"), reflecting the Credit allocation.

4. Per the Rule, the FCCAP must include a General Contractor Cost Certification ("GCCC"), an unmodified¹ certified public accountant ("CPA") opinion letter for the GCCC, and an audit report by a CPA for the GCCC.

5. The FCCAP form includes instructions and forms for the GCCC. 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. In addition, per the FCCAP form, the general contractor and CPA must execute a General Contractor Costs Certification ("GC Certification") certifying the accuracy of the costs incurred by the general contractor.

6. Rehabilitation of the 120-unit affordable housing development, Edison Terraces Apartments ("Development"), has been completed and the construction loan has converted to permanent loan status. Pursuant to the

¹ Rule 67-21.027, Fla. Admin. Code, was amended July 11, 2019. The previous version of the Rule required an "unqualified" audit report for the DFCC and GCCC. The amended Rule requires an "unmodified" audit report. However, the FCCAP form, adopted and incorporated into the Rule, requires an "unqualified" audit report. For purposes of this Order, "unqualified" will be the terminology used when referring to the audit report for the GCCC.

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 Forms 8609 from Florida Housing. 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 Florida Housing.

7. Petitioner is in litigation with the general contractor regarding disputes over amounts owed under the construction contract. As a result, the general contractor is unwilling to execute the GC Certification and other certificates and affidavits that must be provided so that the CPA can complete and issue its opinion letter and audit report.

8. The Petitioner's accountants had access to the general contractor's records for audit purposes through April 2018. After that date, as a result of the litigation, the accountants not been able to obtain a limited number of subcontractor or vendor's names, obtain one or two confirmations from subcontractors, or verify that the final general contractor fees are within Florida Housing's permitted limits.

9. Petitioner requests that Florida Housing waive the required execution of the GC Certification by the general contractor, accept the CPA's qualified opinion letter and audit report for the GCCC, and accept the GCCC executed by only the CPA, which would allow Petitioner to receive its final tax credit equity financing that would otherwise be lost. Petitioner will submit the unqualified CPA opinion letter and unmodified audit report for the Development Final Cost Certification as required by the Rule.

9. Therefore, Petitioner seeks a waiver from Rule 67-21.027(6), Florida Administrative Code, which in relevant part provides:

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 of the 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 time as all required items are received and processed by the Corporation. The Final

Cost Certification Application Package (Form FCCAP) is adopted and incorporated herein by reference, effective 04-2019... (emphasis added)

9. To support its request, Petitioner asserts that the CPA has nearly completed the accounting work necessary for its FCCAP but the general contractor refuses, because of the pending litigation, to execute the GC Certification and other certificates and affidavits that the CPA needs. The CPA has advised the Petitioner that any differences noted as a result of its audit are immaterial and would not change the results of the report. The CPA has further advised the Petitioner that it cannot issue an unqualified opinion letter or audit report since the general contractor will not provide the requested documentation.

10. In addition, Petitioner's indicates that the costs that are included in its DFCC will not change nor be affected by the litigation. A portion of the general contractor's costs that are at issue in the litigation will be classified as ineligible costs due to the uncertainty of the litigation and will be reported as such on the DFCC. The remaining portion of the general contractor's costs at issue will not be included on its FCCAP since the Petitioner disputes the general contractor's change orders for these costs and its liability for such costs. The additional costs incurred by the Petitioner that are issue in the litigation will not be included on its FCCAP or otherwise affect the eligible

basis or amount of credits because these costs were incurred after the December 31, 2018 cut-off date for cost certification purposes.

11. Petitioner states that in order to finalize the cost certification process and issuance of the Forms 8609, it does not want to keep the cost certification process open until the resolution of the litigation and is willing to forgo the ability to qualify for additional credits or claim any eligible costs that it may be awarded upon resolution of the litigation.

12. To further support its request, Petitioner asserts that it believes that amounts reflected in the DFCC and GCCC are sufficient to permit completion of the cost certification process and issuance of the Forms 8609 due to its conservative approach in preparing the cost certification documents.

13. Petitioner alleges that the rule waiver is necessary to avoid economic hardship and that strict application of Rule 67-21.027(6), Florida Administrative Code, would lead to unreasonable, unfair and unintended consequences as Petitioner would lose its final tax credit equity financing installment because it cannot complete the cost certification process due to the general contractor's refusal to cooperate as a result of the pending litigation.

14. By allowing the rule waiver, Petitioner asserts that the purposes of Sections 420.501-420.55, Florida Statutes, to facilitate the availability of decent, safe and sanitary housing in Florida to low income persons and

households would be met because Petitioner would lose funding which may prevent the Petitioner from increasing the supply of affordable housing.

15. Section 120.542(2), Florida Statutes provides in pertinent part:

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.

16. Granting the requested waiver would not have any impact on other participants in funding programs administered by Florida Housing, nor would it have a detrimental impact on Florida Housing.

17. Petitioner has demonstrated that the waiver is needed because of it may lose its final tax credit equity financing because the general contractor will not allow access to its books and will not execute the necessary documents to complete final cost certification thereby preventing Florida Housing from issuing Forms 8609.

18. Petitioner has also demonstrated that the purpose of the underlying statute, which is to “encourage development of low-income housing in the state” (§420.5099, Fla. Stat.), would still be achieved if the waiver is granted.

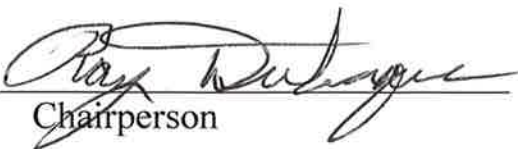
IT IS THEREFORE ORDERED: Petitioner’s request for a waiver of Rule 67-21.027(6), Florida Administrative Code, is hereby **GRANTED** so

that Petitioner may submit its FCCAP without the GC Certification being executed by the general contractor and with a qualified CPA opinion letter and audit report of the GCCC.

DONE and ORDERED this 31st day of October, 2019.



Florida Housing Finance Corporation

By: 
Chairperson

Copies furnished to:

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Joint Administrative Procedures Committee
Attention: Ms. Yvonne Wood
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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTIONS 120.542(8), 120.569, AND 120.57, FLORIDA STATUTES. SUCH PROCEEDINGS ARE COMMENCED PURSUANT TO CHAPTER 67-52, FLORIDA ADMINISTRATIVE CODE, BY FILING AN ORIGINAL AND ONE (1) COPY OF A PETITION WITH THE AGENCY CLERK OF THE FLORIDA HOUSING FINANCE CORPORATION, 227 NORTH BRONOUGH STREET, SUITE 5000, TALLAHASSEE, FLORIDA 32301-1329.