

STATE OF FLORIDA  
FLORIDA HOUSING FINANCE CORPORATION

In re: Marathon Key Housing Partners, LP

FHFC CASE NO. 2019-006VW  
Application No. 2018-305CS

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**PETITION FOR VARIANCE FROM FLORIDA  
ADMINISTRATIVE CODE RULE 67-48.023(2)**

Petitioner, Marathon Key Housing Partners, LP (“Petitioner”), pursuant to Section 120.542, Florida Statutes, and Chapter 28-104, Florida Administrative Code, hereby petitions Florida Housing Finance Corporation (“Florida Housing”) for a Variance from the provisions of Rule 67-48.023(2) (2017) to allow it to utilize the Average Income Test to calculate its Minimum Set-Aside Commitment as allowed by the Internal Revenue Code section 42(g)(1)(C). In Support of this Petition, Petitioner states as follows:

**I. Petitioner and the Development**

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

Robert G. Hoskins  
800 N. Point Parkway, Suite 125  
Alpharetta, GA 30005  
Telephone: 770-552-8070  
Fax: 770-552-8748

2. The name, address, telephone number, fax number and email of Petitioner’s counsel is:

Tana D. Storey, Esq.  
Rutledge Ecenia, P.A.  
119 S. Monroe Street, Suite 202  
Tallahassee, Florida 32301  
Telephone: 850-681-6788  
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3. On or about February 13, 2018, Petitioner submitted Application No. 2018-305CS in response to RFA 2018-107 (Housing Credit and SAIL Financing for Affordable Housing For Hurricane Recovery in Monroe County) to assist in the construction of a 46 unit development located in Monroe County, Florida, known as Residences at Marathon Key (the “Development”).

**II. Type of Waiver**

4. The waiver being sought is permanent in nature.

**III. Rule For Which a Variance is Requested**

5. Rule 67-48.023(2) (2017) required that each Development comply with the minimum Housing Credit Set-Aside provisions as specified in the version of Section 42(g)(1) of the Internal Revenue Code (IRC) that was in effect at the time the rule was adopted. Prior to March 23, 2018, this section of the IRC did not allow income averaging, and, therefore, Rule 67-48.023(2) also did not allow income averaging.

**IV. Statutes Implemented by the Rule**

6. The Rule implements, among other sections of the Florida Housing Finance Corporation Act (the “Act”), the statutes relating to the allocation of Low-Income Housing Tax Credits contained in Section 420.5099, Florida Statutes.

**V. Justification for Granting Waiver of the Rule**

7. 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.

See Section 42(g)(1)(C), I.R.C. (2018).

8. Rule 67-48.0023(2) F.A.C. was revised on July 8, 2018, to incorporate the new subsection 42(g)(1)(C) of the IRC. As a result, any applications for housing tax credits submitted to Florida Housing after July 8, 2018, are allowed to use the income averaging provisions of the IRC.

9. Petitioner's application was submitted prior to the July 8, 2018 rule revisions and was, therefore, not allowed to take advantage of the average income test. It would violate principles of fairness and put Petitioner at a competitive disadvantage with other developments if it was not allowed to use the average income test solely because of when its application was submitted.

10. 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:

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.

11. Granting the requested variance in this instance would allow Petitioner to utilize the average income test as allowed by the Internal Revenue Code. 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.

12. 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” (§420.5099, Fla. Stat.), would still be achieved if the variance is granted.

13. 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.

## **VI. Action Requested**

WHEREFORE, Petitioner respectfully requests that Florida Housing:

- A. Grant this Petition and all relief requested herein;
- B. Grant a variance from Florida Admin. Rule 67-48.023(2) (2017) and allow for calculation of the minimum set aside percentage based on income averaging; and
- C. Grant such further relief as may be deemed appropriate.

Respectfully submitted this 5th day of February, 2019.

/s/ Tana D. Storey  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing Petition was filed by HAND DELIVERY with copies also served by electronic mail this 5th day of February, 2019:

Florida Housing Finance Corporation,  
Attn: Corporation Clerk  
227 North Bronough Street, Suite 5000  
Tallahassee, Florida 32301  
[CorporationClerk@floridahousing.org](mailto:CorporationClerk@floridahousing.org),

Joint Administrative Procedures Committee  
680 Pepper Building  
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/s/ Tana D. Storey  
Tana D. Storey, Esq.