

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

FHFC CASE NO. 2017-001VW
Application No. 2009-092C; 2010-026CX

EHDOC PEPPER TOWERS LIMITED PARTNERSHIP, LTD.

Petitioner,

vs.

FLORIDA HOUSING FINANCE CORPORATION,

Respondent.

**PETITION FOR WAIVER OF SECTION III.B.2.e.(4) OF THE 2009 UNIVERSAL
APPLICATION, SECTION FOUR OF RFP 2010-04 AND CHAPTER 67-48**

Pursuant to Section 120.542, Fla. Stat., and Rule 28-104.001 through 28-104.006, F.A.C., EHDOC Pepper Towers Limited Partnership, a Florida limited partnership (“Petitioner”), petitions Respondent Florida Housing Finance Corporation (“Florida Housing”) for a waiver of the requirement to provide a radiant-barrier roof with an insulation “R”-rating of 19 (the “Original Roof”) at the Mildred and Claude Pepper Towers, in order to earn one Application point towards energy conservation under the heading of “Optional Features and Amenities” in the Petitioner’s 2009 Application for Housing Credits, as reiterated in Petitioner’s response to RFP 2010-04. In lieu thereof, Petitioner requests that it be allowed to use a roof featuring a PVC membrane providing an R-28.25 insulation rating (the “New Roof”).

A. THE PETITIONER

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

EHDOC Pepper Towers Limited Partnership
1580 Sawgrass Corporate Parkway
Ft. Lauderdale, FL 33323
Attn: Robert Agus
Telephone: 954-835-9200
Facsimile: 954-835-0888
E-mail: robert.agus@verizon.net

2. The name, address, telephone and facsimile numbers, and e-mail address of Petitioner's attorney, for purposes of this Petition, are:

Brian J. McDonough, Esquire
Stearns Weaver Miller Weissler
Alhadeff & Sitterson, P.A.
150 West Flagler Street
Miami, Florida 33130
Telephone: 305-789-3350
Facsimile: 305-789-3395
E-mail: bmcdonough@stearnsweaver.com

B. THE DEVELOPMENT AND ITS FINANCING

3. In 2009, Petitioner applied for low-income housing tax credits from Florida Housing pursuant to the 2009 Universal Cycle. *See* Application No. 2009-092C. The Universal Application package was adopted and incorporated into Chapter 67-48 by Rule 67-48.004(1)(a), F.A.C. (2009). Pursuant to such Application, Petitioner received an allocation of low income housing tax credits from Florida Housing.

4. The 2009 financial crisis resulted in some difficulty for developers in securing investors willing to purchase allocated housing tax credits. Through the American Recovery and Reinvestment Act, Florida Housing was able to monetize certain previously-awarded housing tax credits, in the form of Tax Credit Exchange Program ("TCEP") funds, which were loaned by Florida Housing to developers. In the instant case, the Petitioner closed on a blended source of funds that included \$2,300,000 in TCEP funds, as well as syndication proceeds from certain

allocated housing credits that were not exchanged for TCEP funds. Other sources included a \$4,175,000 HUD-insured Section 221(d) (4) loan from Wells Fargo Bank, and seller financing (from an affiliated entity) in the amount of \$7,095,350. Collectively, the financing and housing credit syndication provided funds for the renovation of 150 units intended to serve low-income persons in Miami-Dade County, Florida, known as Mildred and Claude Pepper Towers (the “Development”).

5. The provisions of the 2009 Universal Cycle Application allowed for the scoring of one point under “Optional Features and Amenities” in exchange for Petitioner’s selection of the Original Roof, which included a radiant-barrier with an R-19 rating for insulation. However, in the course of pre-development planning, it was discovered that the Original Roof was not permitted for this type of building under the Miami-Dade County Building Code, so plans for the Original Roof were replaced with plans incorporating the New Roof, which has a PVC membrane providing an R-28.25 insulation rating, which is in fact an enhancement of the energy-conservation aspects of the Development.

6. The requested waiver will not adversely affect the Development. However, a denial of this Petition (a) would put the Petitioner in the position of having no ability to provide a legally-approved roof without jeopardizing one Application point, (b) could subject the Petitioner to recapture as a result of the loss of said Application point, and (c) would violate principles of fairness¹. § 120.542(2), Fla. Stat. (2011).

7. The waiver being sought is permanent in nature.

¹“Substantial hardship” means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. “Principles of Fairness” are violated when 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.

C. RULE FROM WHICH RELIEF IS REQUESTED AND STATUTE IMPLEMENTED BY THE RULE

8. Petitioner realleges and incorporates Paragraphs 1 through 7 as though fully set forth herein.

9. Petitioner requests a waiver of Section III.B.2.E.(4) of the 2009 Universal Application, which provides as follows, in relevant part:

In addition, Applicant may select only one of the following two items:

Attic insulation of R-30 or better (1 point)

Insulation of R-19 with radiant barrier on top floor only (1 point)

Petitioner selected the second of the two options, thereby committing to provide the Original Roof, to earn one Application point.

10. The Florida Housing Finance Corporation Act² designates Florida Housing as the State of Florida's housing credit agency within the meaning of Section 42(h)(7)(A) of the Internal Revenue Code of 1986. As the designated agency, Florida Housing is responsible for and is authorized to establish procedures for the allocation and distribution of low-income housing tax credits. § 420.5099(1) and (2), Fla. Stat. The allocation procedures were established in Rule Chapter 67, Florida Administrative Code. Accordingly, the Application that is the subject of Petitioner's waiver request is implementing, among other sections of the Act, the statutory authorization for Florida Housing's establishment of allocation procedures for Housing Credit Programs. § 420.5099(1) and (2), Fla. Stat.

² The Florida Housing Finance Corporation Act is set forth in Sections 420.501 through 420.516 of the Florida Statutes (the "Act"). See also, Rule 67.40.020(1), F.A.C. (" 'Act' means the Florida Housing Finance Corporation Act, section 420.501 through 420.516 of the Florida Statutes")

D. JUSTIFICATION FOR PETITIONER'S REQUESTED WAIVER

11. Petitioner realleges and incorporates Paragraphs 1 through 10 as though fully set forth herein.

12. 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 these rules would lead to unreasonable, unfair and unintended consequences in particular instances. Waivers shall be granted when the person who is subject to the rule demonstrates that the application of the rule would (1) create a substantial hardship or violate principles of fairness, 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.

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

14. Prior to the commencement of renovations to the Development, Florida Housing's construction inspection consultant (then New Perspective Florida, LLC) made note of the discrepancy in the type of roof and R-value insulation planned for the Development. The Development's architect provided the requested information to New Perspective (*see* letter dated August 24, 2010, from the architect to New Perspective attached hereto as Exhibit "A", itemizing responses to each of New Perspective's report findings). New Perspective then signed off on the plans including the New Roof, allowing renovations to proceed. This sign-off was a required portion of due diligence to be completed before closing on financing and the commencement of renovations. It evidences New Perspective's analysis and certification of construction methods and plans for the Development as consistent with applicable Miami-Dade County building codes and permit approvals.

15. As completion of the renovations approached, Florida Housing's then-current construction consultant (Due Diligence Associates, or "DDA") once again raised the discrepancy between the Original Roof and the New Roof as a matter to be explained in the course of a comprehensive construction review. Such review was a condition to deeming renovations to be completed and construction requirements to be fulfilled. DDA accepted the information provided and again signed off on the plans which included the New Roof.

16. In reliance on the acceptance of the New Roof by Florida Housing's various consultants, the Developer was unaware of any need to further address the issue with Florida Housing. Any discussion of the substituted roof would have included the fact that a number of optional features included in the plans for the Development would have garnered points in the Application, but the Petitioner did not need to identify them as "point items", because its Application otherwise earned the maximum possible points. Nonetheless, these additional features were installed and remain in place at the Development. Therefore, any potential loss of one Application point due to substituting the Original Roof with the New Roof should be offset by these other optional amenities provided to residents at the Development.

17. The Development is a 12-story high rise building with a low-pitched roof comprised of a concrete deck that also serves as the interior ceiling. In order to function properly, a radiant barrier roof system needs to be installed on a steep pitch and have an air space beneath it. See letter from Structural Waterproofing Company dated April 3, 2012, attached hereto as Exhibit "B", in which details are provided as to the unsuitability of the Original Roof for a low-pitched structure such as the Development. Further, the New Roof system yields an R-value of R-28.25 as opposed to the R-19 Original Roof upon which one Application point was awarded.

See the calculation dated March 14, 2012, by Structural Waterproofing Company, attached hereto as Exhibit "C", as to the enhanced structural and energy-efficient value of the New Roof.

18. AmeriNat, as Florida Housing's current compliance consultant, recently flagged the absence of the Original Roof as a compliance issue. In response, Petitioner reiterates the statements above evidencing the fact that (a) the Original Roof would not have been permissible under the applicable Building Code, (b) the New Roof is in compliance with the Building Code, (c) the New Roof provides a far superior R-value rating for insulation compared to the Original Roof, and (d) even if the Original Roof were legally permissible, the New Roof would be impossible to replace without undue expense to the Petitioner and disruption of the Development's peaceful living environment for its residents.

E. CONCLUSION

19. Controlling statutes and Florida Housing's Rules are designed to allow the flexibility necessary to provide relief from rule requirements when strict application, in particular circumstances, would lead to unreasonable, unfair, or unintended results. Waivers should be granted when the applicant subject to the rule demonstrates that strict application would create a substantial hardship or violate principles of fairness, and the purpose of the underlying statute has been or will be achieved by other means. §120.542(2), Fla. Stat.

20. The requested waiver will not adversely impact the Development or Florida Housing. The goal of incorporating the most appropriate, legally available energy-enhancing roof into the Development will be achieved through the approval of the New Roof, with no detriment to any party.

21. A denial of the requested waiver could result in a substantial hardship for Petitioner, which has no legal ability to install the roof which was called for in the Application.

As a consequence, Petitioner might have to sacrifice one Application point, potentially subjecting its TCEP loan and housing tax credits to recapture.

22. Finally, by granting the requested waiver, Florida Housing would recognize the economic realities and principles of fundamental fairness in the development of affordable rental housing. This recognition would promote participation by experienced developer entities in meeting the purpose of the Act through providing legally available and structurally appropriate features and amenities within residential units developed for low-income residents.

23. Should Florida Housing 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 Florida Housing provide the following relief:

- A. Grant this Petition and all relief requested herein;
- B. Waive the requirement for the use of the Original Roof in order to retain the Application points awarded to the Development, and approve the use of the New Roof in its stead; and
- C. Grant such further relief as may be deemed appropriate.

Respectfully submitted,

STEARNS WEAVER MILLER WEISSLER
ALHADEFF & SITTERSON, P.A.

Counsel for Petitioner

150 West Flagler Street, Suite 150

Miami, Florida 33131

Tel: (305) 789-3350; Fax: (305) 789-3395

E-mail: bmcdonough@swmwas.com

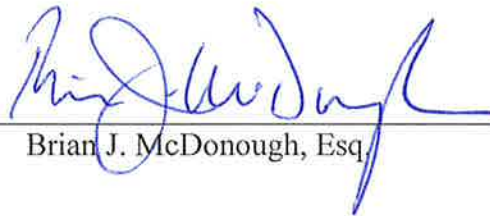
By: 

BRIAN J. MCDONOUGH, ESQ.

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 10 day of January, 2017.

By: _____


Brian J. McDonough, Esq.

TC Architects, Incorporated

755 White Pond Drive, Suite 407
Akron, Ohio 44320
330-867-1093
FAX 330-867-4198
www.tcarchitects.com

Robert C. Chordas, AIA
Susan B. Allen, AIA, ASID
Todd M. Westover, AIA

August 24, 2010

New Perspective Florida, LLC
708 South Church Avenue
Tampa, Florida 33609

Attention: Mr. Dennis Jones

Regarding: MC Pepper Tower
TC Project No.: 52-A-07

Mr. Jones,

The following responses address items listed as non-compliant in the Plan and Cost Review/Physical Needs Assessment prepared by New Perspective Florida, LLC.

VIII. Outstanding Items (p. 3)

3. Geotechnical Report

Response: A geotechnical report was completed by Giles Engineering Associates, Inc. on 7/16/10 and distributed electronically on 7/19/10.

IV. Universal Application Review Construction Features and Amenities Review (p. 15)

3. Termite prevention and pest control throughout the entire affordability period.

Response: A note has been added to A101 stating that termite prevention and pest control will be conducted through the affordability period.

21. Computer lab on-site with minimum one computer per 50 units, with basic word processing, spreadsheets and assorted educational and entertainment software programs and at least one printer

Response: The Owner will provide 3 computer terminals, 1 printer, and the agreed upon software. This information has been noted on A304.

EHDOC – MC Pepper Tower
TC Project No.: 52-A-07
August 24, 2010
Page 1 of 4

EXHIBIT A

23. Heat pump with a minimum HSPF of 8.5 instead of electric resistance
Response: *Heat Pumps will replace the existing rooftop condensing units and will meet or exceed the HSPF of 8.5. This information has been added to M501.*

24. Wall insulation a minimum of R-7
Response: *The rigid insulation was changed to 1" in order to exceed R-7 value. In addition, R-11 batt insulation was added at the ceiling rafters for the following conditioned spaces: Gathering 151 and Vestibule 152. This information has been added to 2/A501.*

27. Insulation of R-19 with radiant barrier on top floor only
Response: *2.5" of Polyisocyanurate Insulation will be placed underneath the new roofing membrane. Polyisocyanurate Insulation has an R-value of 6/per inch (2.5" = R-15) and the existing roof assembly has a minimal estimated R-value of 4.5, which will exceed the R-19. This information has been added to specification 075300 Elastomeric Membrane Roofing.*

28. All windows single-pane with minimum solar heat gain coefficient of .58 or better.
Response: *All exterior window glazing will have a solar heat gain coefficient of .58 or less.*

Exhibit "B" – Description of Features and Amenities

G.

1. Programmable thermostats in each unit
Response: *A note has been added to sheet M501 indicating that all thermostats are programmable.*
3. Showerheads that use less than 2.5 gallons of water per minute.
Response: *All showerheads use less than 1.75 gallons per minute. See Type BT-1 and SH-1 in the Plumbing Fixture Schedule on sheet P501.*
4. Faucets that use 2 gallons of water per minute or less in the kitchen and all bathrooms.
Response: *All kitchen and bathroom faucets use less than 2 gallons of water per minute. See Plumbing Fixture Schedule on sheet P501.*

6. Energy Star qualified lighting in all open and common areas
Response: All lighting is either energy efficient or energy star rated. Commercial or architectural lighting is not available with an Energy Star rating. It is however equivalent to or more energy efficient than residential fixtures that are Energy Star rated. Lighting in the apartments and in all corridors (12 floors) serving as access to the apartments is Energy Star rated. All other lighting serving the common areas are commercial grade with electronic ballast and either T8 lamps or PL lamps of various sizes.
8. Low VOC paint (less than 50 grams per gallon) in all units and common areas.
Response: All paint used in project is low. See specification 016116 VOC Content Restriction and specification 099000 Painting and Coating.
9. Reduced Heat-Island Effect paving (use light colored or porous paving materials).
Response: All existing asphalt paving is being replaced with either new concrete paving (light colored) or pervious pavers. See sheet C004.
10. Energy Star rating for all refrigerators, dishwashers and washing machines that are provided by the Applicant.
Response: All appliances used in residential units are energy star rated. See specification 113100 Residential Appliances, 2.01 Kitchen Appliances.
11. Energy Star rating for all windows in each unit
Response: The windows we are required to use to meet Miami/Dade County design requirements for this 12 story building are a commercial grade window. The Energy Star Program is only for residential grade products and buildings up to 4 stories. There are a total of 476 windows and 66 sliding glass in the building. 301 windows and the 66 sliding glass doors will have a SHGC of less than .27 which is the ENERGY STAR standard. The remaining 175 windows are required to be laminated glass to meet code requirements. They would have an SHGC of .58 or less which is the standard which we indicated we would meet for all the windows in the apartments on line 28 of the Universal Application Construction Features and Amenities. Where possible and not superseded by building code requirements, the majority of the windows and all of the sliding glass doors exceed the .27 SHGC that is the Energy Star standard. This information has been added to specification 088000 Glazing.
12. Carpet and Rug Institute Green Label certified carpet and pad for all carpeting provided.
Response: All carpet and padding used are Carpet and Rug Institute Green Label Certified. See specification 096800 Carpeting and specification 016116 Volatile Organic Compound Content Restriction.

14. Install daylight sensors or timers on all outdoor lighting.

Response: All site lighting uses daylight sensors. See sheets E100, E102 and E301 for more detail.

Please contact me with any question you may have.

Sincerely,

TC ARCHITECTS, INC.

Susan B. Allen, AIA, ASID, LEED AP
Vice President, Partner

SBA/kt



P.O. BOX 140
WINTER PARK, FLORIDA 32780
TELEPHONE (407) 645-2021
FAX (407) 645-4426

COMPANY, INC.

April 3, 2012

Mr. Macky,

I am writing this letter in reference to Mildred and Claude Pepper Towers newly installed roofing system located at 2350 NW 54th Street in Miami, Florida.

We understand that the question about the installation of a radiant barrier for the roofing system has been asked, and after much research and review of the bidding and construction documents we feel the following will answer any questions that maybe posed.

- 1) Review of the bidding documents requirements revealed solar reflectance and thermal emittance levels for the roofing membrane (section 075300) which are much less than the requirements for a true radiant barrier.
- 2) No other reference to a radiant barrier was observed in the bidding documents.
- 3) The roofing membrane was changed from ethylene-propylene-diene-terpolymer (EPDM) to a polyvinyl chloride (PVC) to meet the requirements of the specification and the Florida Building Code (FBC) for a building of this type and height.
- 4) The contract documents were written using the PVC membrane.
- 5) The submittal process supported use of all items associated with this system along with the notice of acceptance (NOA) as required by the FBC.

Radiant Barrier systems comprise airspace with one or more of its boundaries functioning as a radiant barrier. Radiant barriers are materials that restrict the transfer of far-infrared radiation across airspace. They do this by reflecting the radiation that strikes them and at the same time by not radiating energy. Any material that has this capability is said to have a very low emissivity.


Radiant barriers are generally used in residential housing with steep sloped roofs and placed on the underside of the roof trusses or over the ceiling insulation exposed to the air space generally associated with attics.

On low sloped roofs such as Mildred and Claude Pepper Towers no airspace is present, from the roofing membrane to the concrete roof deck which also is the interior ceiling.

In order for a true radiant barrier on this roof to be installed, an air space would have to be present. This would require furring the substrate a minimum of 3/4" and then installing the radiant barrier followed by rigid insulation and the roofing membrane. However, with this design the building height creates an attachment problem meeting the cladding requirements. No existing NOA using this method is currently approved. To install the roofing system this way it would require additional engineering and testing for NOA approval which could take up to 3-years in order to meet the FBC requirements.

Sarnath S327 60mil Energy Smart White roofing membrane used on this roof meets and exceeds the original bidding documents for solar reflectance and thermal emittance. Sarnath S327 60mil Energy Smart White meets ENERGY STAR, LEED, Green Globes and California's Title 24 criteria.

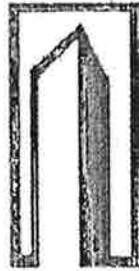
In conclusion, with the existing building construction, Florida building codes and ASCE-7 (used to calculate building cladding and attachment requirements) a radiant barrier is not applicable to this roofing system.



Sincerely;

Gary Yaeger, CSI, CDT

Structural Waterproofing Co, Inc.



Structural Waterproofing Co. Inc.
PO Box 140
Winter Park, FL 32790
407-645-2021
407-645-4428 fax

March 14, 2012

MC PEPPER TOWERS CALCULATED COMPLETED ROOFING SYSTEM R-VALUE

	R-Value
S327 roofing membrane	0.0
Dens-Deck Primed 1/4"	.28
Energyguard Ultra Polyiso 2"	12.1
BUR existing	.24
LWIC existing 7" to 14" tapered (7" value used)	12.6
Concrete deck 4" existing	1.8
Inside Air Film	<u>1.23</u>
TOTAL CALCULATED MINIMUM R-VALUE	28.25

STRUCTURAL WATERPROOFING COMPANY INC.
STATE OF FLORIDA CERTIFIED ROOFING CONTRACTOR
CCC033712

Gary J. Yaeger, CSI, CDT

Gary Yaeger

EXHIBIT C

STEARNS WEAVER MILLER
WEISSLER ALHADEFF & SITTERSON, P.A.

Patricia K. Green
150 West Flagler Street, Suite 2200
Miami, FL 33130
Direct: (305) 789-3345
Fax: (305) 789-2621
Email: pgreen@stearnsweaver.com

January 10, 2017

Via FedEx

Ms. Kate A. Flemming
Legal Analyst/Corporation Clerk
Florida Housing Finance Corporation
227 N. Bronough Street
Suite 5000
Tallahassee, Florida 32301

RE: Petition for Rule Waiver

Dear Ms. Flemming:

Enclosed is a Petition for Rule Waiver, submitted on behalf of EHDOC Pepper Towers Limited Partnership, for consideration by the Board at its next meeting. I have sent a duplicate copy to the Joint Administrative Procedures Committee. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Patricia K. Green

PKG/zs
Enclosure

cc: Joint Administrative Procedures Committee (with Enclosure)