

STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION

CASE NO. _____

WEST LAKE I, LTD.

Petitioner,

vs.

FHFC APPLICATION: 2016-184BS
REQUEST FOR APPLICATIONS: 2015-112

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

_____ /

**PETITION FOR WAIVER OF RULE 67-21.013 FOR A CHANGE TO
ALLOW THE PURCHASE OF BONDS BY A FREDDIE MAC MULTIFAMILY
TARGETED AFFORDABLE HOUSING LENDER AND
SELLER/SERVICER PRIOR TO A SALE TO FREDDIE MAC**

Pursuant to Section 120.542, Florida Statutes, and Rule 28-104.002, Florida Administrative Code, Petitioner West Lake I, Ltd., a Florida limited partnership, submits its Petition to Respondent Florida Housing Finance Corporation (“Florida Housing”) for a waiver or variance of Florida Housing’s requirement that “Any issuance of non-Credit Enhanced revenue Bonds¹ shall be sold only to a Qualified Institutional Buyer”, and that “an investment letter satisfactory to the Corporation and its counsel shall be obtained from each initial purchaser of the Bonds . . . to the effect that, among other things, such purchaser is a Qualified Institutional Buyer. . . .” See Rule 67-21.013, Florida Administrative Code (the “Rule”). Freddie Mac qualifies as a Qualified Institutional Buyer under the Rule.² However, Freddie Mac’s charter does not allow Freddie Mac to purchase Bonds directly from the issuer, but instead requires that

¹ The obligation in this case is a note. The definition of “Bond” in Rule 67-21.002(13), Florida Administrative Code, incorporates the definition of Bond in Section 420.503, Florida Statutes, as amended, which specifically includes notes.

² The definition of “Qualified Institutional Buyer” is set forth in Exhibit “A” attached to this Petition.

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FINANCE CORPORATION

Freddie Mac purchase Bonds from a Freddie Mac Multifamily Targeted Affordable Housing Lender and Seller/Service (a “TAHL”), approved and designated under the Freddie Mac Tax-Exempt Loan Program (the “TEL Program”), pursuant to a written commitment executed by Freddie Mac and accepted by the TAHL.

In support thereof, Petitioner states:

A. THE PETITIONER

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

Matthew Rieger
West Lake I, LTD
3225 Aviation Ave.
Suite 602
Coconut Grove, FL 33133
Tel: 305-537-4704
Fax: N/A
E-mail: MattR@htgf.com

2. The name, address, telephone and facsimile numbers for Petitioner’s attorney are:

Brian J. McDonough
Stearns Weaver Miller Weissler Alhadeff & Sitterson
150 West Flagler Street
Suite 2200
Miami, FL 33130
bmedonough@stearnsweaver.com
Tel: (305) 789-3350
Fax: (305) 789-3395

B. THE DEVELOPMENT AND ITS FINANCING

3. Petitioner timely submitted its Application in response to the RFA for the development named “West Lake Apartments” (the “Development”). *See* Application No. 2016-184BS. The application included a Freddie Mac financing plan under its TEL Program. Essentially, a “Project Loan” to provide funds to Petitioner to build its multifamily affordable

Development will be funded from a loan (the "Funding Loan") incurred by Florida Housing pursuant to a Funding Loan Agreement among U.S. Bank National Association, as the construction lender, Florida Housing, and a fiscal agent. The Funding Loan to Florida Housing is funded by the sale of the Bonds to U.S. Bank National Association, as the construction lender (the "Construction Lender"). Florida Housing, in turn, loans the proceeds of the Funding Loan to the Borrower as the Project Loan. Upon construction completion, the Funding Loan (and the associated Bonds) will be sold/assigned to Walker & Dunlop, LLC ("W&D"), an approved TAHL. Pursuant to a written commitment of Freddie Mac and accepted by W&D at the time or the making of the loans and issuance of the Bonds, W&D will immediately thereafter sell/assign the Funding Loan and Bonds to Freddie Mac.

4. Petitioner was invited to Credit Underwriting for the Development. The Freddie Mac TEL Program financing term sheet was submitted to the credit underwriter. As the parties to the financing began loan commitment and document production, they determined that Freddie Mac was not permitted under its federal regulatory provisions to buy the Bonds directly, but rather must purchase the Bonds only after W&D, as the Multifamily Seller/Service, has acquired the Bonds. As the TAHL, W&D is not a Qualified Institutional Buyer, as defined under Rule 67-21.002(89). However, the ultimate owner of the Bonds (Freddie Mac) is a Qualified Institutional Buyer under the Rule. Because Freddie Mac's charter prevents Freddie Mac from directly purchasing the Bonds,³ a Rule Waiver is necessary to allow the interim purchase by an entity that is not a Qualified Institutional Buyer (W&D) prior to the committed sale of the Bonds to Freddie Mac. Petitioner therefore petitions Florida Housing for a waiver of its requirement that privately placed (*i.e.*, non-credit enhanced) Bonds must be purchased by

³ Section 305(a)(5) of the Federal Home Loan Mortgage Act, Public Law No. 91-351, 84 Stat. 450, approved July 24, 1970 and codified at 12 U.S.C. s. 1451 et seq.

Qualified Institutional Buyers, since the initial buyer of the Bonds is a TAHL, under the TEL Program and has accepted a signed commitment from Freddie Mac to purchase the Bonds for resale to Freddie Mac.

5. The requested rule waiver will not adversely affect the Development. However, a denial of this Petition: (a) will result in a substantial economic hardship to Petitioner, (b) could deprive Miami-Dade County of desperately needed affordable housing units, and (c) would violate principles of fairness.⁴ See Section 120.542(2), Fla. Stat.

6. The requested waiver is permanent in nature.

C. RULES FROM WHICH WAIVER IS SOUGHT

7. Petitioner requests a waiver from Rule 67-21.013, F.A.C. Specifically, Petitioner requests a waiver of the requirement that privately placed (*i.e.*, non-credit enhanced) Bonds must be purchased by Qualified Institutional Buyers, when the “interim” buyer is a TAHL under the TEL Program and has accepted a signed commitment from Freddie Mac to purchase the Bonds for resale to Freddie Mac.

8. Rule 67-21.013 provides, in relevant part, as follows:

Any issuance of non-Credit Enhanced revenue Bonds shall be sold only to a Qualified Institutional Buyer or a Freddie Mac Multifamily Targeted Affordable Housing Lender. Such non-Credit Enhanced revenue Bonds may only be utilized for financings where the Applicant has demonstrated that the issuance produces a substantial benefit to the Development not otherwise available from Credit Enhancement structures. The analysis of the substantial benefit must be provided in a format acceptable to the Corporation and shall include the initial issuer cost of issuance, underwriter’s discount or placement agent fee, annual debt service, total debt service and any other factors necessary and appropriate to demonstrate that the issuance produces a substantial benefit to the Development. This analysis must be provided both prior to the review of the method of Bond sale conducted by the Corporation’s IRMA, and again prior to the pricing of the Bonds, showing any changes affecting the original estimated substantial benefit. The Corporation

⁴ “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. See Section 120.542(2), Florida Statutes.

shall engage the Investment Banker with respect to such Bonds. The Corporation, in its discretion, will allow only one of either an underwriting discount or a placement agent fee, but not both. Unless such Bonds are rated in one of the four highest rating categories by a nationally recognized rating service, such Bonds shall not be held in a full book-entry system (but may be Depository Trust Company (DTC)-Eligible) and shall comply with at least one of the following criteria:

(2) The Bonds shall be issued in minimum denominations of \$250,000 (subject to reduction by means of redemption) and an investment letter satisfactory to the Corporation and its counsel shall be obtained from each initial purchaser of the Bonds (including any purchaser purchasing such Bonds in an immediate resale from an underwriter), but shall not be required of subsequent purchasers of the Bonds, to the effect that, among other things, such purchaser is a Qualified Institutional Buyer or a Freddie Mac Multifamily Targeted Affordable Housing Lender, is purchasing such Bonds for its own account and not for immediate resale to a purchaser other than a Qualified Institutional Buyer or a Freddie Mac Multifamily Targeted Affordable Housing Lender, and has made an independent investment decision as a sophisticated or institutional investor,

Rule 67-21.013, F.A.C.

D. STATUTES IMPLEMENTED BY THE RULE

9. The Rule is implementing, among other sections of the Florida Housing Finance Corporation Act, the statute that grants Florida Housing the power to issue revenue bonds. *See* Section 420.509, Fla. Stat.

E. JUSTIFICATION FOR REQUESTED WAIVER

10. Petitioner requests a waiver from Rule 67-21.013, F.A.C. to obtain permanent financing from Freddie Mac. Because Freddie Mac's charter prevents Freddie Mac from purchasing the Bonds directly, the Bonds must be purchased from a TAHL (W&D) that will acquire the Bonds for a brief period before the sale to Freddie Mac.

11. Under Section 120.542(l), 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: (1) the person who is subject to the rule demonstrates that the application of the rule would 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.

12. The following facts demonstrate the circumstances which justify Petitioner's request for waiver:

- a. Petitioner timely submitted its Application to Florida Housing in response to the RFA, for financing through Freddie Mac's TEL Program in which Freddie Mac would be the ultimate long term owner of the Bonds issued by Florida Housing.
- b. Petitioner obtained a commitment for the Project Loan from Florida Housing in the amount of \$9 million in Tax Exempt Bonds, \$5 million in SAIL funds and \$294,000 in ELI gap funding using the privately placed non-credit enhanced bond structure described herein.
- c. Freddie Mac will issue a forward commitment to W&D for the purchase of the Bonds, in which Freddie Mac agrees to facilitate the financing of the Project's permanent phase by purchasing the Funding Loan and Bonds from W&D following conversion of the Project Loan from its construction phase to its permanent phase. The permanent loan amount is anticipated to be \$3.8 million. In order to complete this transaction, W&D must first acquire the Funding Loan from the Construction Lender at loan conversion.
- d. W&D is an experienced lender and loan servicer/seller specializing in the multifamily sector of the market. Behind W&D's loan origination business sits a \$64.4 billion servicing portfolio with over 5,900 mortgages, predominantly on

multifamily properties with high debt service coverage. W&D's experience includes closing a \$49 million Freddie Mac refinance loan.

- e. Despite W&D's expertise and experience, it does not fit into the categories listed in Rule 67-21.002(89), in which "Qualified Institutional Buyer" is defined, although it has satisfied Freddie Mac's criteria as an approved TAHL under the TEL Program.
- f. W&D will acquire the Funding Loan and immediately assign it to Freddie Mac. W&D's ownership of the Funding Loan will be brief. Freddie Mac, the ultimate owner of the Funding Loan and the Bonds is a Qualified Institutional Buyer under the Rule.
- g. There are no points associated with this aspect of the Application. Nor does this change adversely impact any other applicant in the RFA.

13. If this requested waiver is not granted, Petitioner will suffer a substantial and unnecessary economic and operational hardship. A commitment for permanent financing for the Development is required in order to close on the Bonds and all other debt as well as equity sources, and without Freddie Mac's commitment to purchase the Funding Loan from W&D, closing on the Development will fail to occur. W&D has already performed a complete underwriting analysis of the Development and its feasibility, at substantial cost to Petitioner. The economics of the Development cannot support the engagement of a new TAHL to perform new underwriting; further the Development's schedule for closing and construction could not accommodate the resulting delay and inevitable associated costs.

14. A waiver of the Rule's requirements pertaining to Qualified Institutional Buyers would serve the purposes of Section 420.509, F.S., and the Act as a whole, because one of the

Act's primary purposes is to facilitate the availability of decent, safe and sanitary housing in the State of Florida to households of limited means.

15. 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.

F. ACTION REQUESTED

16. Petitioner requests the following:

- a. That Florida Housing: (i) grant Petitioner a waiver from Rule 67-21.013, Florida Administrative Code, allowing Walker & Dunlop, LLC, an approved Freddie Mac Multifamily Targeted Affordable Housing Lender and Seller/Service, to purchase the Funding Loan and Bonds prior to resale to Freddie Mac, which is a Qualified Institutional Buyer, and (ii) waive the requirement that the investor letter provided by the initial purchaser of the Bonds state that such purchaser is a Qualified Institutional Buyer.
- b. That Florida Housing grant the Petition and all the relief requested therein; and
- c. That Florida Housing grant such further relief as may be deemed appropriate.

Respectfully submitted,

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

Counsel for Petitioner

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E-mail: bmcdonough@swmwas.com

/s/ Brian J. McDonough

BRIAN J. MCDONOUGH, ESQ.

CERTIFICATE OF SERVICE

The original Petition is being served by hand delivery, with a copy served by electronic transmission for filing with the Corporation Clerk for the Florida Housing Finance Corporation, CorporationClerk@floridahousing.org, 227 North Bronough Street, Tallahassee, Florida 32301, with copies served by hand delivery to the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, this 23rd day of June, 2017.

/s Brian J. McDonough

Brian J. McDonough, Esq.

EXHIBIT "A"
DEFINITION OF QUALIFIED INSTITUTIONAL BUYER

67-21.002 Definitions.

(89) "Qualified Institutional Buyer" is sometimes called a "sophisticated investor" and specifically includes the following:

(a) Any of the following entities, acting for its own account or the accounts of other Qualified Institutional Buyers that, in the aggregate, own and invest on a discretionary basis at least \$100 million in securities of issuers that are not affiliated with the entity:

1. Any insurance company as defined in section 2(13) of the Securities Act of 1933,
2. Any investment company registered under the Investment Company Act of 1940 or any business development company as defined in section 80a-2(a)(48) of that Act,
3. Any Small Business Investment Company licensed by the U.S. Small Business Administration under section 301(c) or (d) of the Small Business Investment Act of 1958,
4. Any plan established and maintained by a state or state agency or any of its political subdivisions, on behalf of their employees,
5. Any employee benefit plan within the meaning of Title I of the Employee Retirement Income Security Act of 1974,
6. Trust funds of various types, except for trust funds that include participants' individual retirement accounts or H.R. 10 plans,
7. Any business development company as defined in section 80b-2(a)(22) of the Investment Advisors Act of 1940,
8. Any organization described in section 501(c)(3) of the Internal Revenue Code, corporation (except a bank or savings and loan defined in section 3(a)(2) or 3(a)(5)(A) of the Securities Act of 1933, or a foreign bank or savings and loan or similar institution), partnership, Massachusetts or similar business trust, or any investment adviser registered under the Investment Advisors Act.

(b) Any dealer registered under section 15 of the Securities Exchange Act of 1934, acting on its own behalf or on the behalf of other Qualified Institutional Buyers who in the aggregate own and invest at least \$10 million of securities of issuers not affiliated with the dealer (not including securities held pending public offering).

(c) Any dealer registered under section 15 of the Securities Exchange Act of 1934 acting in a riskless principal transaction on behalf of a Qualified Institutional Buyer.

(d) Any investment company registered under the Investment Company Act that is part of a family of investment companies that together own at least \$100 million in securities of issuers, other than companies with which the investment company or family of investment companies is affiliated.

(e) Any entity, all of whose equity owners are Qualified Institutional Buyers.

(f) Any bank or savings and loan defined in section 3(a)(2) or 3(a)(5)(A) of the Securities Act of 1933 or foreign bank or savings and loan or similar institution that, in aggregate with the other Qualified Institutional Buyers, owns and invests in at least \$100 million in securities of affiliates that are not affiliated with it and that has an audited net worth of at least \$25 million as demonstrated during the 16 to 18 months prior to the sale.