

**STATE OF FLORIDA
FLORIDA HOUSING FINANCE CORPORATION**

**FHFC CASE NO. 2017-060VW
RFA NO. 2015-100B**

PHOENIX APARTMENTS VENTURE LP,

Petitioner

vs.

FLORIDA HOUSING FINANCE
CORPORATION,

Respondent.

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FINANCE CORPORATION

**PETITION FOR WAIVER OF RULE 67-21.027(6) OF
THE FLORIDA ADMINISTRATIVE CODE**

Petitioner, PHOENIX APARTMENTS VENTURE LP, a Florida limited partnership (“Petitioner”), by and through its undersigned counsel, hereby petitions Respondent, FLORIDA HOUSING FINANCE CORPORATION (the “Corporation”) for a waiver of Rule 67-21.027(6), Florida Administrative Code (“F.A.C.”) (Feb. 2, 2015) (the “Rule”), which requires Petitioner to utilize the Final Cost Certification Application Package 2014 (the “2014 Cost Certification”), so that Petitioner may use, in the alternative, the Final Cost Certification Package 2016 (the “2016 Cost Certification”). Specifically, Petitioner seeks to utilize the 2016 Cost Certification because the calculation of the General Contractor’s fee changed to provide for a fair calculation of the actual construction costs; to include, as prior Final Cost Certification Packages did, the costs of certain fixtures, equipment, appliances, artwork, carpet, blinds and shades in the calculation. In support, Petitioner states as follows:

A. THE PETITIONER

1. The address, telephone number, facsimile number and e-mail address for Petitioner and its qualified representative are:

Phoenix Apartments Venture LP
c/o MRK Partners Inc.
Attention: Sydne M. Garchik
2711 N. Sepulveda Blvd, #526
Manhattan Beach, CA 90266
Telephone: (310) 545-2587
Facsimile: (484) 210-0671
Email: sgarchik@mrkpartners.com

2. The address, telephone number, facsimile number and e-mail address of Petitioner's counsel is:

Hollie A. Croft, P.A.
Broad and Cassel LLP
390 N. Orange Avenue, Suite 1400
Orlando, FL 32801
Telephone: (407) 839-4200
Facsimile: (407) 425-8377
Email: hcroft@broadandcassel.com

3. On September 4, 2015, Petitioner successfully applied for an aggregate allocation of \$10,500,000 Tax-Exempt Multifamily Mortgage Revenue Bonds (the "Bonds") and \$687,441 per annum in 4% Non-Competitive Housing Tax Credits (the "Tax Credits"). On March 2, 2016, Petitioner and the Corporation completed the credit underwriting report with respect to the Development (as defined below). On April 29, 2016, Petitioner closed on the financing and housing tax credit syndication that will provide the needed funds for the acquisition and rehabilitation of one hundred sixty-four (164) units throughout thirteen (13) buildings intended to serve low-income individuals and families in the City of Homestead, Miami-Dade County, Florida and known as the Phoenix Apartments (the "Development"). The developer of the Development is MRK Partners Inc., of which Sydne M. Garchik is a principal. The Development is an acquisition/rehabilitation of a garden-style apartment complex that will serve a family demographic with one hundred percent (100%) of the units being set aside for low-income households; and to be more specific, 40% of the units will be set aside for households at

or below 50% of the area median income (“AMI”) and 60% of the units will be set aside for households at or below 60% of the AMI.

B. WAIVER IS PERMANENT

4. The waiver being sought is permanent in nature.

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

5. Petitioner requests a waiver of the Rule and use of the 2016 Cost Certification in lieu of the 2014 Cost Certification.

6. The Rule provides:

“(6) 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. . . . The [FCCAP] is adopted and incorporated herein by reference, effective October 2014, and is available on the Corporation’s Website. . . .”

D. STATUTES IMPLEMENTED BY THE RULE

7. The Rule implements, among other sections of the Florida Housing Finance Corporation Act, Florida Statutes, Section 420.501, *et seq.* (the “Act”), the statute that created the Housing Tax Credit Program and the Multifamily Mortgage Revenue Bonds Program. *See* Fla. Stat. § 420.5099 (the “Statute”).

E. JUSTIFICATION FOR GRANTING WAIVER OF THE RULE

8. The Rule requires the use of the 2014 Cost Certification, which calculates the actual construction costs upon which the General Contractor’s fee is based by excluding the costs of certain fixtures, equipment, appliances, artwork, carpet, blinds and shades (collectively, the

“Personal Property Costs”). The exclusion of the Personal Property Costs is not consistent with past or current market practices, as demonstrated below.

9. Petitioner’s construction contract with its contractor requires the Personal Property Costs be included in the computation of the General Contractor’s fee that Petitioner is required to pay. Indeed, the 2016 Cost Certification, published by the Corporation and incorporated by reference into Rule 67-21.027(6), (F.A.C.) (Sept. 15, 2016), modifies the calculation of total actual construction costs to clarify that Personal Property Costs are included in total actual construction costs. Furthermore, prior to 2014, the Corporation permitted Personal Property Costs to be included within total actual construction costs. This means that prior to the 2014 year, and after the 2015 year, the Personal Property Costs are permitted to be included in total actual construction costs; however, such Personal Property Costs are not permitted to be included in total actual construction costs for the 2014 and 2015 years. This result violates the principles of fairness because this Development is required to reduce the General Contractor’s fee, in contradiction to Petitioner’s construction contract, when transactions and developments prior to the 2014 year, and after the 2015 year, are not required to do the same.

10. As such, requiring Petitioner to use the 2014 Cost Certification, and not allowing Petitioner to use the 2016 Cost Certification, will result in the unreasonable, unfair and unintended consequence of materially reducing the amount of allowable actual construction costs, in direct opposition to Petitioner’s construction contract. Allowing Petitioner to utilize the 2016 Cost Certification will permit the total actual construction costs and, in turn the General Contractor’s fee, to be accurately reflected within the cost certification, which will reflect the standard now adopted and implemented by the Corporation.

11. Under Section 120.542(1), Florida Statutes (2016), and Chapter 28-104, F.A.C., the Corporation has the power and 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 rule demonstrates that the application of the rule 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. *See* Fla. Stat. § 120.542(2) (2017).

12. In this instance, Petitioner meets the standard for a waiver of the Rule.

13. The requested waiver will not adversely impact the Development or the Corporation.

14. In this case, strict application of the Rule, and the use of the 2014 Cost Certification, will violate principles of fairness and create a substantial hardship for Petitioner because Petitioner will not be able to accurately certify the actual General Contractor's fee that Petitioner is required to pay pursuant to its construction contract. Thus, Petitioner is not able to effectively claim 14% of actual construction costs for the General Contractor's fee without utilizing the 2016 Cost Certification. The Rule does not contemplate the materially different dollar amounts resulting from a calculation of actual construction costs including Personal Property Costs versus excluding such Personal Property Costs.

15. In summary, the 2014 Cost Certification does not adequately calculate actual construction costs, while the 2016 Cost Certification does adequately calculate actual construction costs.

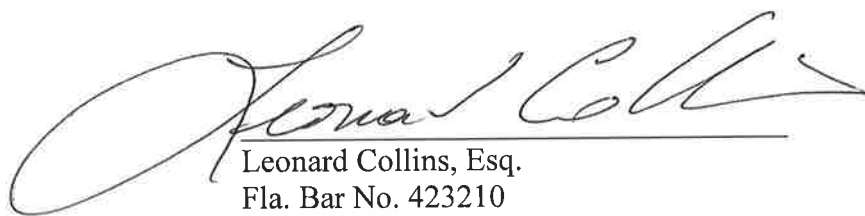
¹ "Substantial hardship" means a demonstrated economic, technological, legal or other type of hardship to the person requesting the variance or waiver. Further, "principles of fairness" are violated when the literal application of a rule affects a particular person in a manner significantly different from the way it affects other similarly situated persons who are subject to the rule. *See* Fla. Stat. § 120.542(2) (2016).

16. As outlined 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 of Florida for low-income households. Moreover, the Statute was enacted, in part, to encourage private and public investment in facilities for persons and families of low-income. By granting this waiver, the Corporation would recognize the goal of increasing the supply of affordable housing through private investment in persons and families of low-income, and would also recognize the economic realities and principles of fundamental fairness in the construction and development of affordable rental housing. *See Fla. Stat. § 420.5099(2) (2017).*

F. ACTION REQUESTED

17. For the reasons set forth herein, Petitioner respectfully requests the Corporation (i) to grant the requested waiver so that Petitioner may utilize the 2016 Cost Certification and include the costs of the Personal Property Costs within the calculation of actual construction costs to compute the General Contractor's fee, and (ii) grant such further relief as the Corporation may deem appropriate.

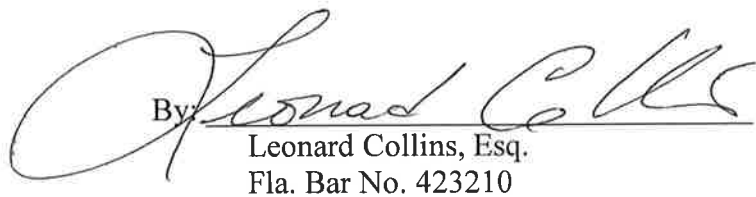
Respectfully submitted,



Leonard Collins, Esq.
Fla. Bar No. 423210
Hollie A. Croft, P.A.
Fla. Bar No. 886181
BROAD AND CASSEL LLP
390 N. Orange Avenue, Suite 1400
Orlando, Florida 32801
Telephone: (407) 839-4200
Facsimile: (407) 425-8377
Email: hcroft@broadandcassel.com
COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

The original Petition is being served by hand delivery, for filing with the Clerk for the Florida Housing Finance Corporation, 227 North Bronough Street, Suite 5000, Tallahassee, Florida 32301-1329, with copies being served by hand delivery on the Joint Administrative Procedures Committee, 680 Pepper Building, 111 W. Madison Street, Tallahassee, Florida 32399-1400, on this 18th day of August, 2017.

By 
Leonard Collins, Esq.
Fla. Bar No. 423210