McCormack
Baron
Salazar

August 26, 2013

Mark Shelburne
North Carolina Housing Finance Agency
PO Box 28066
Raleigh, North Carolina 27611

RE: Comments on the Upcoming 2014 Low-Income Housing Tax Credit Qualified Allocation Plan

Dear Mr. Shelburne:

We are writing to urge the North Carolina Housing Finance Agency to consider adding certain provisions to the 2014 Low-Income Housing Tax Credit Qualified Allocation Plan, which we understand is now under development.

As you know, Section 42(h)(1)(E)(i) of the Internal Revenue Code of 1986, as amended (the Code) provides that buildings which have received a carryover allocation of low-income housing tax credits (Tax Credits) must be placed in service not later than the close of the second calendar year following the calendar year in which the allocation is made. Generally, this is sufficient time to complete the building and place it in service. Failure to meet this deadline will result in a loss of the Tax Credit allocation, a financial catastrophe for the sponsors and, most significantly, a loss of this affordable housing for the residents.

However, on rare occasions, circumstances beyond the control of the owner take place which prevent the property from being placed in service on this schedule, and, unlike a number of other states, North Carolina does not appear to have a procedure to deal with this situation in a manner that will allow the housing to continue to qualify for Tax Credits. In other states, the qualified allocation plan allows owners, under certain circumstances, to return the previously allocated Tax Credits in exchange for a new allocation of Tax Credits without the necessity of going through the competitive process again.

Under Section 42(h)(2)(C) of the Code, each state's housing credit ceiling includes Tax Credits that are returned by mutual consent of the housing credit agency and the allocation recipient. This means that such returned Tax Credits are available to the state for re-allocation, either in the year the Tax Credits are returned or, if the Tax Credits are returned after September 30th in any year, the allocation can occur in the following year (see Treas. Reg. 1.42-14(d)(2)(iii)). Accordingly, if an owner and a state agency mutually agree to a return of Tax Credits previously allocated because the property will not be placed in service within the required period, such Tax Credits can be re-allocated. Neither the Code nor Treasury Regulations or other published guidance of which we are aware speak to any particular procedure by which such Tax Credits are to be re-allocated and accordingly, there is nothing preventing the housing credit agency from re-allocating the returned

Tax Credits to the owner who returned them. A new allocation of Tax Credits would give the owner a placement in service deadline of not later than the close of the second calendar year following the year of the new allocation (or a shorter period if the housing credit agency so determined that the full amount of time was not needed).

As pointed out above, several other states have procedures for dealing with this issue. In each of these states, owners are permitted to return their previously allocated Tax Credits and receive a new allocation of Tax Credits without the necessity of going through the competitive process again where there are circumstances beyond the control of the owner which have prevented the property from being placed in service within the regular two-year deadline. Please see, for example, the qualified allocation plans for Pennsylvania, Ohio, Michigan, Georgia and New Hampshire. Certain of these states provide examples of such circumstances but the common theme is that the circumstances which lead to the inability to meet the placed in service deadline are beyond the owner's control. The housing credit agency must make a determination on a case-by-case basis and the owner must submit a request for such relief in writing.

We believe the best approach, based on our review of other states' qualified allocation plans, would be to permit a return of previously allocated Tax Credits and a re-allocation of these returned Tax Credits to the owner who returned the Tax Credits when the owner is able to demonstrate to the satisfaction of the NCHFA that it is unable to place the buildings in service within the required deadline due to circumstances beyond the control of the owner, which would have to be demonstrated by clear and convincing evidence submitted in writing to the Agency. We believe the Agency should be allowed to charge a reasonable fee for the processing of this request. Should the Agency determine that the buildings can be placed in service sooner than the normal end of the second year following the re-allocation year, it could provide a placed in service deadline that is shorter than this period. This relief should only be allowed once per development. The amount of Tax Credits re-allocated should not exceed the amount originally allocated (unless the owner wishes to submit a new application and go through the regular competitive process). Finally, consistent with Section 42(m)(2) of the Code, the Agency should determine that its evaluation of the project's feasibility, made at the time of the original allocation, remains valid.

We would welcome the opportunity to discuss these proposed changes with you and your colleagues. Our counsel, Richard Goldstein of Nixon Peabody LLP in Washington, DC, who assisted us in the drafting of this letter, is also available to discuss these recommendations with you.

We very much appreciate your consideration of our views on this matter. Thank you very much.

Sincerely,

Karl Schlachter

Karl Schlachter
Sr. Vice President

cc: Richard S. Goldstein, Esq., Nixon Peabody LLP