From: Gary J. Cohen [mailto:GCohen@shutts.com]
Sent: Mon 1/21/2008 1:33 PM
To: Steve Auger
Subject: RE: SAIL allocation/Miami-Dade County

Steve, I took another look at the issue after receiving your e-mail. The conceptual underpinning of your approach (and that advanced by others) is that 201.0205 and 201.15(9) and (10) must be read so as to create two "fictional and separate" SAIL programs, one funded in part by $ from Dade County (201.15(10)) and one not funded by Dade (201.15(9)). Once you "buy" this argument, it's the next logical step to conclude that both "fictional" programs must run the "waterfall" of 420.5087(1). As a result, the Large County Set-Aside winds up with 56% of 100% of the total SAIL funds (as explained below, the Large County Set-Aside would get approximately 56% of 77% of the SAIL program funds from the "first dime fictional program", and 56% of 23% of the SAIL program funds from the "second dime fictional program"). Dade would only be allowed to participate in the "second dime fictional program" (56% of 23% of total SAIL funds), and would be even further limited by the Instruction that no one county in the Large County Set-Aside can receive more than 50% of the SAIL funds allocated to the Large County Set-Aside.

I do not believe that Section 201.0205 mandates or even contemplates this "fictional two program" approach, or that 201.0205 requires that FHFC award the $ as though there were two separate programs. The legislators knew there were two "pots" of $ funded by doc stamp receipts when they enacted 201.0205 (that is, 201.15(9) and (10) or their predecessor sections were already in place at that time). The legislators knew (in passing 201.0205) that programs such as SAIL were funded under both "pots", yet said (in 201.0205) that Dade couldn't participate in a program funded out of the "first pot" but could participate in a program funded from the "second pot". The statute is clearly contradictory, since SAIL is funded from both "pots". A literal reading of 201.0205 both prohibits and requires that Dade participate in the SAIL program.

The most reasonable interpretation of 201.0205 given the contradictory nature of that section (indeed, the interpretation followed by FHFC for some time) is to take a "blended" approach to reach an overall cap on Dade's participation under 201.0205, since 201.0205 must be read to allow some degree of Dade participation. The "blended" approach acknowledges that SAIL is funded both under 201.15(9) and 201.15(10) and therefore the most reasonable interpretation is to figure out how much of the "total pot" was funded under 201.15(10) (22.33% by your calculation; I get 24.11% using the actual funding figures/amounts rather than the percentages) and allow Dade to participate to that extent. This approach reconciles the contradictory nature of 201.0205 by effectively barring Dade from participating in that portion of the total SAIL funds funded from the "first dime" but allowing Dade to participate in that portion of the SAIL funds funded from the "second dime". No further reduction in Dade's participation under the SAIL program is required or contemplated by this approach, since there's only one SAIL program that runs through 420.5087(1).

Yes, it is true that the "blended" approach results in Dade

participating in a program (the SAIL program) funded under 201.15(9) (which is prohibited by 201.0205), but it is also true that the "fictional two program" approach suffers from the same shortcoming, because SAIL is in fact by statute a single program and a portion of its proceeds will potentially go to Dade even under the "fictional two program" approach. 420.5087(1) refers to a single SAIL program and mandates that all program funds be allocated pursuant to market study; it is not possible to read any reference to separate programs into a plain reading of 420.5087. Therefore you are still (under the "fictional two program" approach) funding Dade in a program (SAIL) funded (partially) under 201.15(9); you cannot escape this conclusion by internally fictionalizing two programs. Granted, you could formalize (by rule) two separate SAIL programs, but I don't think there's statutory support for that. Given the inherently contradictory nature of 201.0205 and the lack of specific statutory support for two separate programs, the "blended approach" is the better (and more supportable by statute) approach.

It's no one's interpretation that Dade be totally shut out due to 201.0205 stating that Dade cannot participate in a program (SAIL) funded under 201.15(9); therefore, the only conclusion left is that 201.0205 (by permitting Dade to participate under programs funded under 201.15(10); i.e., the SAIL program) contemplated the above-described "blended" approach. Once you accept that the "blended" approach is the proper interpretation, there is no longer any way to read 201.0205 as further limiting 420.5087(1) (at that point, they both refer to a singular program, all of the proceeds of which are allocated pursuant to rental market study, subject to an overall Dade County cap/limit of 22.33% (or 24.11%).

I hope this clarifies my previous e-mail.

From: Steve Auger [mailto:Steve.Auger@floridahousing.org]
Sent: Friday, January 18, 2008 1:04 PM
To: Gary J. Cohen
Cc: Wellington Meffert; Debbie Blinderman; Gayle White
Subject: RE: SAIL allocation/Miami-Dade County

Thanks for your perspective, Gary. It's helpful in ensuring we've really thought through this issue. One clarification I'd like to make, though, is that I am not aware of any instance when we've really addressed this issue in our SAIL rule before (I think you indicated that we addressed it in years past). Also, your argument is good, but it didn't really address the analysis that we are actually looking at. I've taken a shot at laying out the argument below and would appreciate your perspective.

I agree with your analysis that Section 201.0205 limits the amount of SAIL funding that Miami-Dade can receive because that county has chosen to keep a portion of doc stamp tax revenues for its own local housing programs, instead of sending those dollars to the state to fund the programs that Florida Housing administers. Miami-Dade County opted not to impose the initial Sadowski Act doc stamp increase (the "first

dime"), which represents 77.67% of the total SAIL money today, so it is ineligible to participate in the proceeds of that first dime. The county is, however, eligible to participate in funding from the "second dime" that was later allocated to the state-level housing programs. That second dime accounts for the remaining 22.33% of today's SAIL funding.

Section 201.0205 says that, "Each such county and each eligible jurisdiction within such county shall not be eligible to participate in programs funded pursuant to s. 201.15(9) [the first dime]. However, each such county and each eligible jurisdiction within such county shall be eligible to participate in programs funded pursuant to s. 201.15(10) [the second dime]." (emphasis added) This seems to say that section 201.0205 envisions two sets of State Housing Trust Fund programs: those funded from the first dime and those funded from the second. Florida Housing distributes State Housing Trust Fund dollars pro rata to each program. This creates two identical sets of programs with different funding levels, one funded from the first dime and the other funded from the second dime.

From an administrative perspective, nothing in the statutes seems to require Florida Housing to actually run two application and funding cycles for the two sets of programs funded from each of the two dimes. The law only seems to require that we award the money as though there were two separate programs and ensure that counties that opted out of the first dime do not get money from the programs funded from that first dime.

So what it looks like is that Miami-Dade is not allowed to participate in the first dime SAIL program that represents 77.67% of the total SAIL funding, but is allowed to participate in the second dime SAIL program that represents the other 22.33% of the total SAIL funding. That seems to lead to the conclusion that under no circumstance may Miami-Dade receive more than 22.33% of the total SAIL funding.

The next question is whether the 22.33% SAIL program has to comply with section 420.5087. It seems that the only logical reading is that each of the two dimes' SAIL programs has to comply with all of the applicable SAIL statutes. If the law requires two conceptually separate sets of programs, I think that both would have to comply with the laws that govern the respective programs. That means that we have to apply the geographic distribution mandated by 420.5087(1) to both the 77.67% SAIL program and the 22.33% SAIL program, so that as to each dime the Large County set-aside would be 56% (as determined by the 2007 Shimberg rental market study).

So in initial ranking, the most that Florida Housing would be allowed to award to Miami-Dade would be 100% of the 56% Large County set-aside in the 22.33% SAIL program (which comes out to 12.50% of the overall available SAIL funding). If, after ranking (when we put all of the eligible unfunded applications on one list per our ranking instructions), there are still eligible, unfunded Miami-Dade applications and we still have SAIL funds remaining, we could then fund those Miami-Dade applications up to 100% of the 22.33% SAIL program in which the county's applications are eligible to participate.

I'd be interested to hear your take on this. Again, thanks a

lot.

S-

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From: Gary J. Cohen [mailto:GCohen@shutts.com]

Sent: Thursday, January 17, 2008 4:00 PM
To: Debbie Blinderman; Gayle White; Steve Auger
Cc: Wellington Meffert
Subject: SAIL allocation/Miami-Dade County

I understand that an issue has arisen as to the construction of certain Florida Statutes as they pertain as to the limitation/cap on SAIL funds allocable to Miami-Dade County. Specifically, that Florida Statute Section 420.5087(1) somehow overrides or modifies Florida Statutes Sections 201.15 and 201.0205 so as to further decrease/limit the amount of SAIL funds available to Miami-Dade County. I disagree with this position.

In years past (including last year), there has been no confusion. Under Florida Statutes Section 201.15(9) and (10) and 201.0205, it has been the position of FHFC that operation of these statutes results in an overall cap on the amount of funds allocable to Miami-Dade County equal to roughly 22.33% of the total. I'll spare you a recitation of the methodology necessary to reach this percentage, other than to say it's approximately equal to the ratio of the amount available under the "second dime" (201.15(10)) to the amount available under the sum of the second dime and the "first dime" (201.15(9)), since under 201.0205 Dade is only eligible to participate in doc stamp revenues available to FHFC under the "second dime".

Note that 201.0205 was enacted in 1992, at the same time as the 10 cent tax increase in doc stamps was enacted. The purpose of 201.0205 was clear; any county that had previously enacted a local surtax ordinance (such as Dade County) as permitted by 201.031 (enacted in 1983; Dade quickly enacted its local surtax ordinance in 1983 under the guidance of attorney Martin Fine of Holland & Knight) was given a choice in 1992; either eliminate your local surtax ordinance and charge the extra $.10 increase and fully participate in all FHFC funding programs, or keep your surtax ordinance, do not collect the extra $.10 and only participate under 201.15(10) and not under 201.15(9). Note that 201.0205 was "cleaned up" in 2007 to correct the references to the correct subsections of 201.15.

When 201.0205 was enacted in 1992, Florida Statute Section 420.5087(1) was already in place (since 1988), and the operative section thereof (mandating that SAIL funds be distributed pursuant to a rental

housing market study) has not been changed since 1988. My understanding is that the most recent rental housing market study has resulted in an allocation of 56% of SAIL funds to Large County, 34% to Medium County and 10% to Small County. I understand that the position of certain persons now is that Dade County is only eligible to receive 22.33% of the SAIL funds allocable to the Large County Set-Aside (56% of the total SAIL funds), rather than 22.33% of all SAIL funds.

This position is illogical and not supported by general concepts of statutory construction. When the limit on the amount of SAIL funds available to Dade County (201.0205) was enacted in 1992, it would have been a simple matter for the drafters to take 420.5087(1) into account, as 420.5087(1) was already in existence for four years at that time. The drafters could've specifically limited the amount available to Dade by incorporating 420.5087(1) into 201.15 and 201.0205, but they did not do so Their intent was clear; by not revoking its local surtax ordinance, the language of 201.0205 makes it clear that Dade was deciding to limit its participation to a percentage of the total amount of FHFC funds available under the State Housing Trust Fund under 201.15(9) and (10). 201.0205 limits Dade's ability to "participate in programs funded pursuant to 201.15(9) and (10)" (201.0205); the reference to programs funded by 201.15(9) and (10) (SAIL is funded under both such subsections) is a reference to the total amount of funds available under such programs, and is not a reference to the amounts available under such programs as further suballocated (by program rule) to various geographic set-asides (as is being urged by some). 201.0205 was clearly intended to limit Dade's participation in the "entire pot" of money, not Dade's suballocated share of the total amount under 420.5087(1).

FHFC's own interpretation is clear. See page 100 of the most recent draft Instructions (also in the 2007 Cycle Instructions) whereby FHFC limits the amount of SAIL funds in the Large County Set-Aside so that no one county in the large county set-aside (i.e., Dade) can receive more than 50% of the funds available in the Large County Set-Aside. If FHFC thought that Dade was limited to 22.33% of the 56% of SAIL funds available to Large County Set-Aside, there would have been no need to enact this Instruction for the 2007 Cycle, since the 50% limits (for SAIL and housing credit allocations) were specifically directly at the large number of deals being awarded to Dade County.

The interpretation being urged by some also flies in the face of the most recent rental study. The study acknowledges the large need in Dade County, yet adopting the position urged by some would result in only 12.5% of the total SAIL funds being available for Dade (22.33% times the 56% allocated to Large County Set-Aside); assuming a $50 million SAIL amount (as reflected in the recent NOFA) and combined with the rule that Dade SAIL jobs can't be partially funded, this results in one Dade SAIL job (assuming a $4 million SAIL loan request). Given that Dade homeless jobs frequently prevail and come first in the funding hierarchy and receive SAIL funds, this effectively locks out Dade from any SAIL funds; clearly this cannot be the intended result.

Plese do not hesitate to contact me regarding this matter if you like.

"SHUTTS-LAW.COM" made the following annotations.

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