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April 11, 2018

Mr. Trey Price, Executive Director
Ms. Marisa Button, Director of Multifamily Allocation
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301

Re: Draft Revisions to FHFC Rule 67-48.031, F.A.C., Qualified Contracts

Dear Trey and Marisa:

On behalf of my clients, The CED Companies and Atlantic Housing Partners, and their related entities who are providers of affordable housing, we are pleased to be able to provide comments on draft revisions to the "Qualified Contract" rule, 67-48.031.

To focus our comments, we have separated the draft changes into sections of a sentence or related sentence, followed by our comments and suggestions.

COMMENTS ON DRAFT REVISIONS TO RULE 67-48.031

(2) In submitting a qualified contract request, and in keeping with the intent of this rule and the governing law, the owner of the Development is presumed to do so with good faith intent to sell the Development when presented with a qualified contract. While the qualified contract request may ultimately result in the termination of the Extended Use Agreement should the Corporation fail to present the owner with a qualified contract during the one-year period (as same may be suspended from time to time), that is the default position and not the intended purpose of a qualified contract request.

COMMENT A: This statement of intent is not consistent with Federal law. Under the applicable federal regulations, an Owner is entitled to termination of the extended use period (the period during which the property must be operated as affordable housing), unless the property is acquired in foreclosure, or unless the state housing credit agency provides a qualified contract within one year. An Owner is entitled to choose not to sell the property even if presented with a qualified contract, but assuming the contract was a bona fide qualified contract the Owner choosing not to sell accepts the consequence of continued operation as affordable housing. There should be no implication that an Owner who chooses not to sell is acting in bad faith. We suggest deletion of these two sentences.

Mr. Trey Price, Executive Director
Ms. Marisa Button, Director of Multifamily Allocation
April 11, 2018
Page 2

To that end, for purposes of this rule and processing a qualified contract request, the Corporation shall be deemed to have fulfilled its responsibility to present the owner with a qualified contract by presenting the owner with a contract that meets the requirements of subsection (3) below.

COMMENT B: We assume that this statement that the Corporation “shall be deemed to have fulfilled its responsibility,” which is repeated several times in the proposed rules, is intended to mean the Owner is not entitled to a release of the affordability restrictions if the contract does not close. This ignores the reality that there are situations where a facially “bona fide” contract does not close because of subsequent bad faith actions by a purchaser. For example, as recently occurred, a prospective purchaser presented a contract offer on a property shortly before the close of the one year period, but then refused to proceed to actually execute a negotiated contract unless he could also purchase an adjacent separate property owned by the same Principals, which was not for sale, and at a substantially reduced price. The rules must take into consideration such subsequent occurrences, after a contract is presented or even entered into, that show lack of a “bona fide” contract. Unless language is included to recognize the situations where other facts or subsequent occurrences render the facially “bona fide” contract an illusory offer, we suggest deletion of this sentence.

It shall be the owner’s responsibility to negotiate with the purchaser, in good faith and with the intent to sell the development, the specific terms of the contract, and the owner’s rejection of the contract or failure to act on the contract because of terms other than those required in subsection (3) below shall in no way affect the status of the contract as a qualified contract.

COMMENT C: While we do not object to “good faith” negotiation with potential purchasers, the requirement that it be “with the intent to sell the development” again ignores the Owner’s right to choose not to sell, and to live with the consequences of that choice. Further, as discussed, in Comment B above, there indeed may be situations where a purchaser’s insistence on other terms, or on entry into a separate contract, render the purchaser’s offer to be a bad faith offer and thus not a bona fide qualified contract offer.

The Corporation shall have no duty and is not responsible to either the owner or the purchaser for negotiating the details of the contract following its submission to the owner.

COMMENT D: We agree that negotiation of the contract details is best left to the Owner and the purchaser.

(3) Qualified contract means a bona fide contract (as defined herein) to acquire the development (within a reasonable period after the contract is entered into) for the qualified contract amount (also referred to as the qualified contract price). Bona fide contract means a certain and unambiguous offer to purchase the Development for an amount which equals or exceeds the qualified contract amount (the qualified contract purchase price) made by a purchaser with the intent that such offer result in the execution of an enforceable, valid and binding contract to purchase.

Mr. Trey Price, Executive Director
Ms. Marisa Button, Director of Multifamily Allocation
April 11, 2018
Page 3

COMMENT E: We support the creation of a definition of “bona fide contract,” and we generally support this language as a very good start. However, we believe additional language is needed to address situations such as those pointed out in Comment B. For discussion purposes, we would suggest: “A purchaser shall be deemed to have lacked the intent to execute an enforceable, valid, and binding contract when the purchaser withdraws its offer; seeks other consideration from the owner in order to sign the contract or withdraw the offer; rejects commercially, reasonable and customary terms in the contract negotiation process; or otherwise demonstrates an intent to misuse the Qualified Contract process.”

The bona fide contract shall be in the form of a contract for sale signed by the purchaser, which states that acceptance of the contract is contingent upon approval by the Corporation, and must provide for an initial non-refundable earnest money deposit (the initial deposit) from the purchaser in the minimum amount of \$50,000 and obligate the purchaser to make a second non-refundable earnest money deposit (the second deposit) equal to five (5) percent of the qualified contract price as follows:

COMMENT F: We support the Corporation’s establishment of both an earnest money deposit, and a second earnest money deposit of at least five percent of the QC price.

The initial deposit must be deposited with an escrow agent designated by the owner at the time of submission of the qualified contract request, or if no such escrow agent is designated, with a nationally recognized title insurance company offering escrow services, contemporaneously with the submission of the contract to the owner;

COMMENT G: We support these provisions.

and, by its terms, the contract must obligate the purchaser to deposit the second deposit with the escrow agent within 5 business days following the end of the due diligence period (subject to any rights reserved by the purchaser to cancel or terminate the contract during such period) which period shall end no later than 90 Calendar Days following execution of the contract by the owner.

COMMENT H: We support these provisions, as long as it is understood that if the purchaser cancels or terminates the contract before depositing the second deposit, then it was by definition not a bona fide contract. See, discussion in Comment E above.

A contract submitted to the owner which otherwise meets the requirements of this subsection (3), including the deposit of the initial deposit with the escrow agent, which is accepted by owner within 5 business days after its submission, shall be deemed a qualified contract for purposes of this rule and the qualified contract regulations at such time as the second deposit is deposited with the escrow agent in accordance with the terms of the contract, as same may be amended from time to time, unless waived in writing by the owner.

COMMENT I: We support these provisions, except as to the short time (5 days) within which an offered contract must be accepted by Owner. A reasonable time to accept the offer would be 15 days, especially if the offer comes from a prospective purchaser who has done little or no due

Mr. Trey Price, Executive Director
Ms. Marisa Button, Director of Multifamily Allocation
April 11, 2018
Page 4

diligence. Terms of access to the property and to the financial records of the Development and other standard terms for a \$15 to \$20 million purchase must be negotiated before entry of the contract, and that often takes longer than 5 days. And, as discussed in Comment E above, there should be language recognizing the situation of an uncooperative or bad faith purchaser.

And, in such event, the Corporation shall be deemed to have fulfilled its responsibility to present the owner with a qualified contract.

COMMENT J: See Comment B above on the “fulfilled its responsibility” language.

A contract submitted to the owner which otherwise meets the requirements of this subsection (3), including the deposit of the initial deposit with the escrow agent, which is not accepted by owner within 5 business days after its submission, shall be deemed a qualified contract for purposes of this rule and the qualified contract regulations at such time as the 5-day period expires. And, in such event, the Corporation shall be deemed to have fulfilled its responsibility to present the owner with a qualified contract

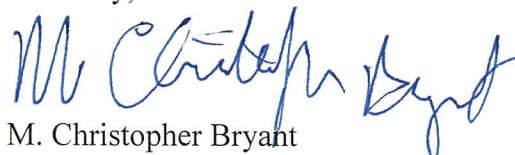
COMMENT K: See Comments B and I above on both the 5 day time period and the “fulfilled its responsibility” language.

(11)(9) The owner shall cooperate with the Corporation and its agents, real estate brokers and prospective buyers in connection with the processing of the owner’s qualified contract request and the marketing of the Development to prospective buyers. The owner shall exercise good faith in acting upon a qualified contract as may be presented within the one-year period. If the Corporation provides a qualified contract within the one-year period (it being understood that the Corporation shall be deemed to have fulfilled its responsibility to present the owner with a qualified contract by presenting the owner with a contract that meets the requirements of subsection (3) above). If the Corporation provides a qualified contract to and the owner within the one-year period, regardless of whether the owner accepts, rejects or fails to act upon the contract, the Development shall remain subject to the Extended Use Agreement, and the owner shall be deemed to have waived any right or option to submit another qualified contract request for the Development.

COMMENT L: See Comment B above on the “fulfilled its responsibility” language.

Thank you again for the opportunity to comment on these proposed rules.

Sincerely,



M. Christopher Bryant