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Mr. Ken Reecy  
Interim Executive Director  
Florida Housing Finance Corporation  
227 N. Bronough Street, Suite 5000  
Tallahassee, Florida 32301-1329

*Via email only to [Ken.Reecy@floridahousing.org](mailto:Ken.Reecy@floridahousing.org)*

Re: *Comments for Feb. 20, 2017 Rule Development Workshop – Rule Chapters 67-60, 67- 21 and 67-48, F.A.C.*

Dear Mr. Reecy:

This firm represents Beneficial Communities. Please treat this letter as Beneficial's general comments regarding the above-referenced rules.

Each year, the Florida Housing Finance Corporation ("FHFC") allocates Low Income Housing Tax Credits ("LIHTC") to owners/developers of existing or proposed apartment communities through a competitive process. The private capital generated from the LIHTC program is the single largest source of private capital for affordable housing. Since 2013, FHFC has used a request for applications ("RFA") to solicit information on proposed developments from owners/developers, with the scoring of this information leading to the selection and award of LIHTC funding in small, medium and large counties.

As you know, the LIHTC allocation process is highly competitive. The most critical item in the RFA is the requirement to demonstrate the local government's tangible economic support of a project in the form of a financial contribution. Qualifying contributions are typically in the \$50,000 range and may take the form of a grant, a below-market interest rate loan, or a fee waiver.

This FHFC requirement effectively sets a threshold for whether a project can compete for funding or not. The effect of this requirement is to shift the decision on the types and locations of affordable housing developments to local governments, beyond the scope of their traditional zoning powers and beyond independent market factors. This can and has led to the restriction of development to specific locations and specific developers. My client, and its prospective residents, has been harmed by this process in Sarasota County, and the cities of Jacksonville, North Port, and Daytona Beach.

There are a number of problems with requiring a local government's financial support to a specific development. First and foremost, it is inconsistent with the requirement that FHFC affirmatively

further fair housing goals and opportunities. The FHFC “local government contribution” requirement limits the freedom of choice for potential tenants that would otherwise exist if developers were given the ability to select sites based on market desirability, superior locational factors, and the availability of ancillary tenant benefits such as employment, schools, low crime, and transportation.

Instead, FHFC’s local government contribution requirement steers affordable housing developments in specific limited directions dictated by the priorities of local government, which are frequently at odds with the best interests of low-income tenants, creating a much higher likelihood of discrimination.

Giving local government’s effective control of site selection effectively allows local governments to perpetuate patterns of discrimination, by concentrating poverty and limiting options for individual and family improvement. *See Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937-8 (2d Cir.1988), *aff’d in part*, 488 U.S. 15 (1988). Last year the United States Supreme Court upheld a judgment against the Texas Housing Finance Corporation based upon the disparate impact its siting decisions had in perpetuating patterns of discrimination. *Tex. Dep’t of Hous. and Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). The very actions behind this court case were generated by this type of local governmental “steering” of affordable housing in opposition to an open and opportunity-driven process.

Further, even if FHFC has no intention to discriminate,<sup>1</sup> FHFC’s effective mandate for local governments to make financial contributions to specific developments entrenches the incentive for local governments to discriminate, allowing local governments to perpetuate past patterns of discrimination by using arbitrary and subjective location and developer criteria to determine project selection for local government contributions.

Beneficial submits to you that elimination of the local government contribution requirement from FHFC’s development selection process for LIHTC funding is long overdue.

The ills discussed above are exemplified by Beneficial’s recent experience in responding to RFA 2016-110 for developments in small and medium counties. In response to the local government contribution requirement in this RFA, Beneficial made repeated attempts to secure such a contribution from Sarasota County and the City of Sarasota for a proposed Beneficial development.

The City and County refused to provide any local government contribution to this development, or to any other affordable housing developments in their jurisdictions, in furtherance of an avowed policy to assist only projects sponsored by their local public housing authorities. These actions by the City and County were contrary to their legal duty to affirmatively further fair housing, not to

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<sup>1</sup> *Hallmark Developers, Inc. v. Fulton County, GA*, 466 F.3d 1276, 1284 (11th Cir. 2006) (government officials are generally held to act with discriminatory intent, regardless of their personal views, when they implement the discriminatory desires of others); *Horizon House Dev. Servs., Inc. v. Twp. of Upper Southampton*, 804 F. Supp. 683, 696 (E.D. Pa. 1992), *aff’d. mem.*, 995 F.2d 217 (3d Cir. 1993) (“In order to prove intentional discrimination it is not necessary to show an evil or hostile motive. It is a violation of the FHAA to discriminate even if the motive was benign or paternalistic.”).

discriminate on the basis of race by perpetuating patterns of segregation in housing, and to reasonably accommodate persons with disabilities.

When Beneficial reminded the City and County of their legal obligations in this regard, the City and County responded as follows:

Sarasota County and the City of Sarasota have pledged millions of dollars to rehabilitate its public housing developments. The commissions have stated that they do not want to have other projects compete with these applications. As such, they have established a policy that a local contribution will only be provided to the two housing authorities. They do not provide local contributions to other applicants.

In response, Beneficial pointed out the following:

Because the majority of your existing public housing developments are in areas where the population is predominantly non-white, your stated policy of pledging millions of dollars to your two housing authorities to rehabilitate existing public housing developments and not providing local contributions to other applicants such as my client perpetuates existing racial residential segregation. *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

Notwithstanding the above, Sarasota County and the City of Sarasota took no corrective action.

Of course, FHFC is itself subject to the same legal duty as local governments to affirmatively further fair housing, not to discriminate on the basis of race by perpetuating patterns of segregation in housing, and to reasonably accommodate persons with disabilities.

Eliminating the local government contribution requirement from future RFA's would be entirely consistent with actions taken by many other state housing agencies in response to similarly egregious local government conduct, as documented in the recent GAO-16-360 Low-Income Housing Tax Credit Report, which noted:

**“... Some agencies also imposed an additional requirement of local letters of support that have raised fair housing and other concerns.** For example, some allocating agencies give points to developers that have letters of local government support as part of their application. These agencies require a signed letter of support (from a chief elected or administrative official of the community in which the project would be sited) that specifically endorses the proposed project.

Based on our review of 58 QAPs, we found that 12 agencies noted that their review or approval of applications was contingent on letters of support from local officials. . . **However, the officials also said that an applicant could be awarded credits without a letter if all other threshold and scoring requirements were met.** . .

Four of the allocating agencies we visited that used letters of support as scoring criteria in 2013 (Nevada, Rhode Island, Virginia, and Washington, D.C.) had concerns with this additional requirement and took steps or were planning to change how the letters were used for LIHTC projects. For example, **officials from Virginia’s allocating agency noted that they stopped awarding points for the letters after being notified that local officials were choosing developments they wanted to support based on personal preferences.** As of 2014, Virginia stopped awarding points for local letters of support but began deducting up to 25 points for negative letters if, after further analysis, the state determined the claims of negative effect were valid. **Additionally, officials from Nevada said that they changed their requirements because they became aware of the difficulties developers in rural areas faced in receiving letters of support (due to local officials’ fear of losing elections if affordable housing were built in their districts).** As of 2015, Nevada no longer required letters of local support; instead the agency notifies local jurisdictions and provides them with an opportunity for comment. . .

**There is also ongoing litigation about the requirement for letters of local support that alleges that Treasury did not issue any regulations to prevent state actions that contribute to perpetuating racial segregation of LIHTC units and that this is a violation of its obligation to affirmatively further fair housing under the Fair Housing Act. The litigation specifically alleges that in 2013 the Texas legislature enacted two statutes that give substantial control over the location of LIHTC projects to local municipal and county government, one of which requires the allocating agency to provide a high number of points to developers that receive the explicit approval of the relevant municipal or local government. According to the lawsuit, Section 42 gives Treasury the authority to regulate such local government restrictions, but the agency has not issued regulations or otherwise prevented states from enacting such policies. . .**

**Moreover, research conducted by HUD and others has analyzed how scoring criteria (like letters of local support) can influence project location and HUD officials have expressed fair housing concerns about these letters. Specifically, officials from HUD’s Office of Fair Housing and Equal Opportunity and Office of General Counsel have cited fair housing concerns in relation to any preferences or requirements for local approval or support because of the discriminatory influence these factors could have on where affordable housing is built. . . Furthermore, a report by the Poverty and Race Research Action Council found that local approval requirements beyond the required Section 42 notification provide municipalities with an opportunity to “opt out” of developing LIHTC projects.”**

(Emphasis added).

In conclusion, in light of the clear legal obligations of FHFC, as well as the entirely immaterial and *de minimis* value of the typical “local government contribution” to a proposed LIHTC development, Beneficial urges you to eliminate the local government contribution requirement

from all future RFA's. FHFC's failure to do so can only serve to facilitate and sanction the discriminatory conduct undertaken by numerous local governments in this state -- designed as it is to thwart the development of equal opportunity housing in desirable locations for tenants.

Unless the FHFC local government contribution requirement enabling these abusive practices by local governments is eliminated, the previous patterns of discrimination will only be reinforced and grow larger in scope with each passing year.

Thank you for your consideration.

Sincerely,

/s/ James K. Green

cc. Brantley.Henderson@floridahousing.org