LOWER DENSITY FOR LOWER SUGARLOAF, LLC

January 12, 2021

RECEIVED
JAN 12 2021 11:52 AM
FLORIDA HOUSING
FINANCE CORPORATION

Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, Florida 32301-1329

ATTN: Office of Clerk of Corporation

RE: Comments on Petition for Waiver of Rule 67-48.0072(21)(b), Waiver of the Qualified Allocation Plan's Requirement for Returning Housing Credit Allocations, and Waiver of Rule 67-48.002(96)

The Landings at Sugarloaf Key, LLC

FHFC Case No. 2021-002VW

Ladies and Gentlemen:

These comments are being submitted on behalf of Lower Density for Lower Sugarloaf, LLC. We are submitting these comments in accordance with F.S. 120.542(6) and Rule 28-104.003(1), F.A.C.

On January 6, 2021, The Landings at Sugarloaf Key, LLC (the "Petitioner") submitted a petition (the "Petition") to Florida Housing Finance Corporation (the "Corporation") for a waiver of Rule 67-48.0072(21)(b), F.A.C., to allow the Petitioner to extend the firm loan commitment deadline for the State Apartment Incentive Loan funding allocated to the Petitioner, a waiver of the Qualified Allocation Plan's prohibition from returning Housing Credit allocations prior to the last quarter of 2021, to allow the immediate return of the Petitioner's 2019 Housing Credit allocation, and to allocate new 2021 Housing Credits to the Petitioner with a later placed in service date, all pursuant to the Corporation's Request for Applications 2018-115. Notice of the Petition was published in the Florida Administrative Register on January 7, 2021.

The waiver requests in the Petition with respect to Housing Credits should be denied because the housing proposed to be built by the Petitioner will not qualify for Housing Credits under Section 42 of the U.S. Internal Revenue Code (the "IRC"). For nearly two years, our organization, its members, and the residents of Lower Sugarloaf Key have asserted to the Corporation that the housing will not qualify for Housing Credits because it will not satisfy the important requirement that the housing will be available for use by the general public (the "general public use requirement"). Our position is based on the fact that, under Monroe

County zoning laws, the housing is required to be "employee housing," which is defined as housing for "working households that derive at least 70 percent of their household income from gainful employment in Monroe County." Monroe County Land Development Code 130-93 and 101-1. Attached is a November 29, 2018 email from the Corporation's staff to Monroe County's Assistant County Administrator which concluded that "employee housing" as defined in Monroe County's zoning laws does not qualify for Housing Credits because such housing does not satisfy the general public use requirement.

Paragraphs 32 and 33 of the Petition refer to a 2019 amendment to the Florida Statutes which states that "[i]t is necessary to create a state housing finance strategy to provide affordable workforce housing opportunities to essential services personnel in areas of critical state concern ...." F.S. 420.502(8)(b). The Petition requests recognition by the Corporation of the importance of its proposed development in fulfilling state policy. The Petitioner seems to be taking the position that its development will qualify for Housing Credits pursuant to Section 42(g)(9) of the IRC, which provides in part that "[a] project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants ... (B) who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group ...."

It is clear that the Petitioner's proposed development will not come within the exception in Section 42(g)(9)(B) to the general public use requirement. As stated above, Monroe County zoning laws require that the housing be available only to persons who earn at least 70% of their income from employment in Monroe County. The occupancy restriction applicable to the development thus will be imposed under a county law and not under a "Federal program or State program or policy." Additionally, the state policy referred to in the Petition applies only to housing for "essential services personnel." For this purpose, the term "essential services personnel" is defined as "natural persons or families whose total annual income is at or below 120 percent of the area median income, adjusted for household size, and at least one of whom is employed as police or fire personnel, a child care worker, a teacher or other education personnel, health care personnel, a public employee, or a service worker." F.S. 420.503(18) (emphasis added). Therefore, the occupancy restriction applicable to the Petitioner's proposed development under the Monroe County zoning laws applies to a different group of persons than the state policy cited in the Petition.

Attached is a letter dated February 11, 2019 from our counsel, Andrew Tobin, to the Executive Director of the Corporation which explains why the Petitioner's proposed development does not qualify for Housing Credits. We subsequently sent Mr. Tobin's letter to the Corporation's Board of Directors (the "Board") and to the Corporation's credit underwriting firm. We again raised the Housing Credit issue in our comments of July 14, 2020 in which we asked the Corporation to deny the Petitioner's previous waiver request. Also attached is our September 29, 2020 email to the Corporation's Executive Director, other staff members, and the credit underwriting firm, with an attached memorandum from our tax counsel, McDermott Will & Emery, which concludes that the Petitioner's development will not qualify for Housing Credits. The memorandum takes into account the 2019 amendment to the Florida Statutes cited in the

Petition. We have never received a substantive reply from anybody at the Corporation to any of our previous correspondence on the Housing Credit issue.

The interests of the development of much-needed multifamily affordable housing in Monroe County would be best achieved if the Housing Credits that were preliminarily awarded to the Petitioner were to be awarded to another development that will actually meet the requirements for Housing Credits. The Corporation would not be well-served if it were to award Housing Credits to a development with respect to which the tax equity investors ultimately will be denied the benefit of the credits by the Internal Revenue Service, in which case the credits will end up never being used. For these reasons, the Corporation's denial of the requests in the Petition with respect to Housing Credits would achieve the statutory purposes of F.S. 420.5099 and Section 42 of the U.S. Internal Revenue Code by making the Housing Credits that were preliminarily awarded to the Petitioner's development available to another low-income housing project that will contain housing that satisfies the general public use requirement, as mandated by Federal law and regulations and Florida law.

For the reasons discussed above, we hereby ask that the Board deny the requests in the Petition with respect to Housing Credits because the Petitioner's proposed development will not qualify for Housing Credits. We further ask that, in the event the Corporation's staff recommends to the Board that those requests in the Petition be approved, the Board direct staff to provide a written explanation to the Board and to the public of why staff believes that the Petitioner's housing will qualify for Housing Credits. Finally, we ask that the Board's consideration of the Petition be included as an action item, rather than as a consent item, in the agenda for the January 22, 2021 Board meeting in order to promote a discussion of the issues we have raised in these comments.

Respectfully submitted:

LOWER DENSITY FOR LOWER SUGARLOAF, LLC

By: _____

Stuart Schaffer,
On behalf of Sugarloaf Shores Property Owners Association, Inc., as managing member of Lower Density for Lower Sugarloaf, LLC

****
Emily Schemper, AICP, CFM
Acting Senior Director of Planning & Environmental Resources
Monroe County | Planning & Environmental Resources Department
2798 Overseas Highway, Suite 400, Marathon, FL 33050
305.453.8772
****

From: Nancy Muller <Nancy.Muller@floridahousing.org>
Sent: Thursday, November 29, 2018 2:30 PM
To: Hurley-Christine <Hurley-Christine@MonroeCounty-FL.Gov>
Cc: Jones-Juanita <Jones-Juanita@MonroeCounty-FL.Gov>; Cioffari-Cheryl <Cioffari-Cheryl@MonroeCounty-FL.Gov>; Schemper-Emily <Schemper-Emily@MonroeCounty-FL.Gov>; Laura Cox <Laura.Cox@floridahousing.org>; Marisa Button <Marisa.Button@floridahousing.org>
Subject: County Workforce Housing Preferance in LIHTC and Other Housing Programs

Christine and Juanita,

I've made slight revisions to this intro to ensure that the County understands that, while Florida Housing has provided guidance below on whether it's possible to have a county workforce housing preference in Low Income Housing Tax Credit (LIHTC) properties, for other funding, we have suggested that it MAY be possible to have such a preference – see below. This information comes via Laura Cox, our Director of Asset Management, and it's important to differentiate between funding sources – in this case, LIHTC financing vs CDBG-DR funding.

These type of preferences fall under federal Fair Housing guidelines, and Florida Housing doesn't have jurisdiction over Fair Housing. That jurisdiction ultimately rests with the Department of Housing and Urban Development (HUD). The guidance below does not constitute legal advice and does not offer any assurance as to what position HUD would take on a workforce housing preference. Our Director of Asset Management recommends contacting the Fair Housing folks at HUD to discuss your approach and gain approval. This then will set you up to be protected over time.

At this time, since the CDBG-DR funds for Monroe County are separate from LIHTC, this apparently gives the county the ability to apply a preference properly vetted by HUD for developments funded through the disaster recovery RFA.

Hope this helps.

FHFC Opinion on the Tax Credit

Preference Allowance when Using LIHTC

As part of the Housing Assistance Act of 2008, the Internal Revenue Code §42(g) was amended to add a clarification of the general public use requirements. Owners of Low Income Housing Tax Credit developments must rent their units in a manner consistent with the general public use requirements of Treasury Regulation §1.42-9. Residential

rental units must be for use by the general public and all of the units in a development must be used on a non-transient basis. Residential rental units are not for use by the general public, for example, if the units are provided only for members of a social organization or provided by an employer for its employees. Currently, the only permitted preferences are for tenants (1) with special needs, (2) who are members of a specified group under a Federal program or state program or policy that supports housing for such a specified group, or (3) who are involved in artistic or literary activities. We believe that the only way we would be able to allow this approach would be if there was a federal regulation (there is none) or state statute (currently none) that would allow such a preference.



Preference Allowance when Using Other Housing Funding, including CDBG-DR

The federal Fair Housing Act states, "it is illegal for anyone to advertise or make any statement that indicates a limitation or preference based on race, color, national origin, religion, sex, familial status, or handicap." Based on existing case law, preferences based on where a person works are allowed, subject to conditions detailed below. Special preferences for "protected classes" such as homeless and disabled are permitted.

The "disparate impact" test would first look at demographics. Does a public employee preference provide housing primarily to a certain racial/ethnic demo as compared to the overall county's racial/ethnic profile. Does the preference reinforce historical discrimination (was there a pattern of job discrimination in the past that helped to create that distribution, i.e., were only Conchs historically employed therefore preference would serve to perpetuate discrimination.)

The county should seek HUD's approval if it intends to establish such a preference. The county would want to provide specifics about median income & housing prices vs. the salaries of their public employees. HUD approved a similar plan for the city of Sunnyvale California's 2000-2005 ConPlan. Their plan stated:

> The City of Sunnyvale deems it a compelling and legitimate interest in having local public school district employees, city employees and child care center teachers live in or near Sunnyvale to enhance the quality of our residents' and children's lives in the community, to participate and be actively involved in community activities and events to benefit residents and children and to provide valuable local resources for residents and children in Sunnyvale.
>
> The City of Sunnyvale Consolidated Plan 2000-2005 approved by the U.S. Department of Housing and Urban Development (HUD) identifies a high priority need for affordable housing for low and moderate income renters and homeowners.
>
> HUD's endorsement: The preference for school district employees, city employees and child care center teachers that serve Sunnyvale is narrowly tailored and based on the acute housing crisis for which there are no feasible alternatives other than to implement preferences.

Please let us know if you have questions,
Nancy

<!--[if !vml]--><!--[endif]-->Nancy

Muller | Director of Policy and Special Programs
227 N. Bronough Street, Suite 5000, Tallahassee, FL 32301 | p. 850.488.4197
nancy.muller@floridahousing.org | Visit our website at www.floridahousing.org

Florida has a broad and inclusive public records law. This e-mail and any responses to it should be considered a matter of public record.

Disclaimer

Florida has a broad and inclusive public records law. This e-mail and any responses to it should be considered a matter of public record."

children's lives in the community, to participate and be actively involved in community activities and events to benefit residents and children and to provide valuable local resources for residents and children in Sunnyvale.

The City of Sunnyvale Consolidated Plan 2000-2005 approved by the U.S. Department of Housing and Urban Development (HUD) identifies a high priority need for affordable housing for low and moderate income renters and homeowners.

HUD's endorsement: The preference for school district employees, city employees and child care center teachers that serve Sunnyvale is narrowly tailored and based on the acute housing crisis for which there are no feasible alternatives other than to implement preferences.

Nancy

On Nov 14, 2018, at 4:08 PM, Hurley-Christine <Hurley-Christine@MonroeCounty-FL.Gov> wrote:

Hi Stuart. I do not know the answer specifically; however, I'm copying my contact at Florida Housing Finance Corporation. Nancy Muller.

Nancy: I'm going to reword Stuart's question.

I believe FHFC has been asked,this question in the past.

This is the question that the Hyatt opinion was in response to

If the County conditions the receipt of ROGO allocations to LIHTC project applicants, so that the occupants must be members of our workforce (for example, not retirees), and the

County defines workforce households as those living in Monroe County who earn at least 70% of their income from employment in Monroe County, would that disqualify a project from being awarded LIHTC funding?

Christine Hurley, AICP
Monroe County
Assistant County Administrator
305.289.2517

From: Stuart <sfschaffer@gmail.com>
Sent: Wednesday, November 14, 2018 12:36 PM
To: Hurley-Christine <Hurley-Christine@MonroeCounty-FL.Gov>
Subject: Fwd: LIHTC

Hi, Christine. I haven't heard back from Lisa yet on my email below. Do you know the answer to my question?

Stuart

Begin forwarded message:

From: Stuart <sfschaffer@gmail.com>
Date: November 12, 2018 at 10:52:17 AM EST
To: tennyson-lisa@monroecounty-fl.gov
Subject: LIHTC

Hi, Lisa. It's Stuart from Sugarloaf. Just a shot in the dark here. Do you know whether there have been any recent developments on the Low Income Housing Tax credit, especially in regard to whether there is now a better chance of a project qualifying for the credit when it is limited to workforce housing (which I had thought was a no-no)

ANDREW M. TOBIN, PA

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Attorney at Law
Post Office Box 620
Tavernier, Florida 33070

Telephone 305-852-3383

Land Use & Zoning Law
Environmental Law
Administrative Law
Appellate Practice
Real Estate Closings

February 11, 2019

Mr. Harold "Trey" Price
Executive Director
Florida Housing Finance Corporation
227 North Bronough Street, Suite 5000
Tallahassee, FL 32301

Re: Dockside at Sugarloaf Key and The Landings at Sugarloaf Key
Monroe County, Florida
Application Numbers 2019-008CS and 2019-010CS

Dear Mr. Price:

I am writing to you on behalf of the Sugarloaf Shores Property Owners Association, Inc. and South Point Homeowners, LLC.

On December 14, 2018 the Board of Directors of the Florida Housing Finance Corporation (FHFC) selectad the applications of the above referenced two projects for funding and invited the applicants to enter credit underwriting. Specifically, the Projects were allocated a total of $4,900,400 in SAIL financing and $18,506,880 in low-income housing tax credits (tax credits) under Section 42 of the Internal Revenue Code (IRC). Presumably the credit underwriting processes for the Projects are now underway.

According to the applications that were submitted to FHFC by the developers of the Projects, the Projects will consist of 88 affordable housing units on Lower Sugarloaf Key along US 1 on either side of South Point Drive. Each of the applications included an Application Certification and Acknowledgement Form in which the Applicant certified that (1) it will comply with IRC Section 42 and all related regulations (Paragraph 1) and (2) during the credit underwriting process, it will demonstrate that the development meets the requirements of IRC Section 42 (Paragraph 15).

Both of the parcels on which the Projects will be developed (the Parcels) are located in the Suburban Commercial land use (zoning) district. According to the Monroe County Land Development Code (LDC), the only housing that is permitted to be developed in the Suburban Commercial zoning district is either commercial apartments that serve as housing for the commercial use or employee housing,

defined as "housing for working households that derive at least 70% of their household income from gainful employment in Monroe County (Employee Housing)." See LDC Section 130-93; Sections 101-1 and 139-1(a)(1)b.

In connection with a filing made with the Monroe County Planning and Environmental Resources Department in order to derive a reservation of ROGO allocations for the Projects, the owner of the Parcels stated that all of the dwelling units in the Projects would be designated as Employee Housing.

An affordable housing project will qualify for tax credits only if the units are "for use by the general public." Treasury Regulations Section 1.42-9(a). This means that the units must be rented in a manner consistent with housing policy governing nondiscrimination pursuant to HUD regulations. Id. Based on these regulations, we believe that Employee Housing, which is limited to residents who earn at least 70% of their household income from employment in Monroe County, clearly does not qualify for tax credits because the housing is not available for use by the general public. More importantly, FHFC's own staff is also of the opinion that Employee Housing does not qualify for tax credits. Attached to this letter is a copy of an email dated November 29, 2018 from Nancy Muller, FHFC's Director of Policy and Special Programs, to Monroe County which states that Employee Housing is not considered by FHFC to be available for use by the general public and thus does not qualify for tax credits. Therefore, FHFC would be in violation of state rules if it were to allocate tax credits to the Projects. See, Rule 67-48.023(4), Fla. Adm. Code

Because the housing in the Projects will not be available for use by the general public, not only in our opinion but in the opinion of FHFC's staff, this housing will not comply with the requirements of IRC Section 42. Under state rules, allocations of tax credits by FHFC are contingent on the Applicant complying with the requirements of IRC Section 42. Rule 67-48.023(3), Fla. Adm. Code

For the reasons set forth above, we request that FHFC's credit underwriting processes result in a determination by FHFC that the Projects do not qualify for tax credits and thus will not receive the requested tax credit allocations. We hope that you will determine that these valuable tax credits should be awarded by FHFC to one or more truly deserving affordable housing developments in Monroe County.

Sincerely yours,

Andrew M. Tobin, Esq.

cc: Stuart Schaffer
Jack Marchant

From: Stuart sfschaffer@gmail.com
Subject: LIHTC Issue - Sugarloaf Key Projects
Date: Sep 29, 2020 at 2:13:30 PM
To: Trey Price Trey.Price@floridahousing.org
Cc: Hugh Brown Hugh.Brown@floridahousing.org, Marisa Button Marisa.Button@floridahousing.org, Nancy Muller Nancy.Muller@floridahousing.org, Bill Metler bmetler@firsthousingfl.com, Philip Tingle ptingle@mwe.com, Ben Haas ben.haas@comcast.net, Brian Moore Bmoore@mwe.com, Jack Marchant jackmarchant@reagan.com, ana.mcglamory@floridahousing.org

Dear Mr. Price:

I am writing you again in regard to the proposed multifamily affordable workforce housing projects known as Dockside at Sugarloaf Key and The Landings at Sugarloaf Key, FHFC application numbers 2019-008CS and 2019-010CS pursuant to RFA 2018-115, to be located on Sugarloaf Key in Monroe County (the Projects). The Projects were preliminarily awarded LIHTC tax credits by the FHFC board of directors in December 2018 and entered credit underwriting in January 2019.

We have taken the position that the housing in the Projects will not qualify for LIHTC because it will not be available for use by

the general public. The Projects will be located in a zoning district which, under the Monroe County Land Development Code, requires that the housing be occupied by persons who earn at least 70% of their income each year from gainful employment in Monroe County. This "employee housing" restriction means that the housing will not meet the general public use requirement to qualify for LIHTC. Not only has this consistently been our position, it has also been the position of FHFC staff as set forth very clearly in an email from Nancy Muller of FHFC to Christine Hurley, Monroe County's Assistant County Administrator, on November 29, 2018.

We have engaged the Miami office of the international law firm of McDermott Will & Emery to advise us on this LIHTC issue. Recently we received MWE's opinion, which is attached to this

email, concluding that "employee housing" as defined in Monroe County's Land Development Code does not qualify for LIHTC. It is a well-reasoned, unqualified opinion that takes into account the 2019 amendments to the Florida Statutes relating to state financing of certain workforce housing in the Florida Keys.

We ask that FHFC make a final decision not to award LIHTC tax credits to the Projects. The housing in the Projects simply will not qualify for LIHTC. If FHFC were to decide to award the tax credits to the Projects, once construction is completed and the properties are placed in service, the IRS will surely deny the use of the credits by the tax equity investors. This would not reflect well on FHFC. We implore FHFC to instead award these tax credits to a deserving project or projects in Monroe County that

actually qualify for the credits.

As for the developers of the Projects, they were surely aware of the "employee housing" zoning requirement when they entered into the contracts to purchase this land. There are numerous zoning districts within Monroe County, and several municipalities in the Florida Keys, that do not require affordable housing to be for the local workforce. The developers should have chosen to locate their project in one of those other locations.

Respectfully submitted:

Stuart Schaffer
President, Sugarloaf Shores Property Owners Association

MEMORANDUM

Date: September 29, 2020

To: Stuart Schaffer,
Sugarloaf Shores Property Owners
Association, Inc.

From: McDermott Will & Emery LLP

Re: Public Use Requirement for the Low Income Housing Tax Credit

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One of the requirements for projects financed by Low-Income Housing Tax Credits ("LIHTCs") is that the project is for general public use. The Monroe County Land Development Code requires that all housing built in certain zoning districts is used to house working households earning 70% or more of their income from employment in Monroe County. As discussed in this memorandum, a housing project in such a zoning district would not satisfy the general public use requirement and therefore would not be eligible for the LIHTC.

I. Background and Facts

The Florida Housing Finance Corporation ("FHFC") is considering two proposed housing projects to be constructed on either side of South Point Drive on Sugarloaf Key in Monroe County, Florida (the "Projects"). The Projects have been allocated approximately $18.5 million in LIHTCs under section 42.[1]

Both parcels for the Projects are zoned in the Suburban Commercial land use zoning district. As such, the only housing permitted to be built for these projects is a category of affordable housing called "employee housing," which is defined as "housing for working households that derive at least 70% of their household income from gainful employment in Monroe County."[2] All dwelling units in the Projects would be designated as employee housing and the occupants would therefore need to be working households that earn at least 70% of their income from gainful employment within Monroe County.

II. Discussion

A. Overview of the Public Use Requirement

The LIHTC was enacted as part of the Tax Reform Act of 1986. Legislative history to the Act explains that:

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[1] Except as otherwise provided or when clear from context, all references to "section" shall be to sections of the Internal Revenue Code of 1986, as amended (the "Code"), all references to "Treas. Reg. §" shall be to the Treasury Regulations promulgated thereunder, and all references to "Prop. Reg. §" shall be to the Proposed Regulations promulgated thereunder.

[2] See Monroe County Land Development Code Section 130-93; Sections 101-1 and 139-1(a)(1)b.

> Residential rental units must be for use by the general public and all of the units in a project must be used on a non-transient basis. Residential rental units are not used by the general public, for example, if the units are provided only for members of a social organization or provided by an employer for its employees. Generally, a unit is considered to be used on a non-transient basis if the initial lease term is six months or greater. Additionally, no hospital, nursing, sanitarium, life care facility, retirement home providing significant services other than housing dormitory, or trailer park may be a qualified low income project. Factory-made housing which is permanently fixed to real property may be a qualified low-income building.[3]

This legislative history forms the basis for the public use requirement. Additionally, Treasury regulations promulgated in 1994 impose the public use requirement. Treas. Reg. § 1.42-9(a) provides: "If a residential rental unit in a building is not for use by the general public, the unit is not eligible for a section 42 credit. A residential rental unit is for use by the general public if the unit is rented in a manner consistent with housing policy governing non-discrimination, as evidenced by rules or regulations of the Department of Housing and Urban Development." The regulations further elaborate that "if a residential rental unit is provided only for a member of a social organization or provided by an employer for its employees, the unit is not for use by the general public and is not eligible for credit under section 42. In addition, any residential rental unit that is part of a hospital, nursing home, sanitarium, lifecare facility, trailer park, or intermediate care facility for the mentally and physically handicapped is not for use by the general public and is not eligible for credit under section 42."[4] As the preamble explains, "[t]he legislative history of section 42 provides that residential rental units must be for use by the general public. Residential rental units are not for use by the general public, for example, if the units are provided only for members of a social organization or provided by an employer for its employees."[5] These regulations, combined with the legislative history, reveal a policy concern that narrow, private interests could appropriate the LIHTC instead of creating housing projects that broadly benefit the public.

In 2008, Congress codified the general public use requirement and created a few narrow exceptions to the requirement in Section 42(g)(9). That provision provides:

> A project does not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants—
>
> (A) — with special needs,
>
> (B) — who are members of a specified group under a Federal program or State program or policy that supports housing for such a specified group, or
>
> (C) — who are involved in artistic or literary activities.[6]

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[3] General Explanation of the Tax Reform Act of 1986.
[4] Treas. Reg. § 1.42-9(b).
[5] TD 8520, (Mar. 3, 1994).
[6] Section 42(g)(9).

The Joint Committee on Taxation summarized the state of the general public use requirement following the codification of the exceptions as follows:

> In order to be eligible for the low-income housing credit, the residential units in a qualified low-income housing project must be available for use by the general public. A project is available for general public use if: (1) the project complies with housing non-discrimination policies including those set forth in the Fair Housing Act (42. U.S.C. 3601), and (2) the project does not restrict occupancy based on membership in a social organization or employment by specific employers. . . . [A] project which otherwise meets the general public use requirements above shall not fail to meet the general public use requirement solely because of occupancy restrictions or preferences that favor tenants: (1) with special needs; or (2) who are members of specified group under a Federal program or State program or policy that supports housing for such a specified group; or (3) who are involved in artistic and literary activities.[7]

The IRS Market Segment Specialization Program Audit Techniques Guides for the LIHTC further elucidates the public use requirement. As one example states, a program is non-compliant with the general public use requirement if: "[t]he taxpayer is renting low-income units to members of a specified group allowable under IRC § 42(g)(9)(B), but cannot document association with or participation in a federal program or state program or federal/state policy that supports housing for such a specified group as required under IRC § 42(g)(9)(B)." Further, it is helpful to compare a compliant scenario with a non-compliant scenario as provided in the Audit Techniques Guide. A housing project would comply with the general public use requirement where: "IRC §42 housing is likely to be used (exclusively or predominantly) by a specific group not otherwise allowable under IRC § 42(g)(9), but there is no evidence that the taxpayer is discriminating in violation of the Fair Housing Act." In contrast, a housing project would fail to comply with the general public use requirement if "[a] taxpayer restricts low-income units to student households, even if the student households meet one of the exceptions under IRC §42(i)(3)(D) for households comprised entirely of full-time students. The student households are not a qualified group under IRC § 42(g)(9) and the General Public Use Requirement has precedence over the exceptions under IRC §42(i)(3)(D)." These examples show that unless specifically authorized by Section 42(g)(9), occupancy restrictions will violate the general public use requirement. The general public use requirement would not be violated merely because all tenants in a housing development are members of a specific group, such as the workforce in a county, provided there is no requirement that the tenants be members of that group. Rather, the general public use requirement is violated if the landlord selects tenants based on impermissible criteria such as group membership. For this purpose, it does not matter whether the impermissible limitation is imposed by applicable government rules or by the landlord itself.

B. Application to the Proposed Projects

[7] Technical Explanation Of Division C Of H.R. 3221, The "Housing Assistance Tax Act Of 2008," JCX-63-08 (Jul. 23, 2008).

The Projects would violate the general public use requirement for the LIHTC. The Monroe County Land Development Code restricts occupancy in dwelling units to workers who earn at least 70% or more of their income within Monroe County. A specific population of workers is not the general public as it excludes retirees, non-workers and the disabled, and workers from outside of Monroe County. Therefore, unless a specific exception applies, the Projects would not satisfy the general public use requirement.

The only specific exception that may apply is section 42(g)(9)(B), the exception for tenants who are members of specified group under a Federal program or State program or policy that supports housing for such a specified group. The Monroe County zoning ordinance is a creation of local, not state or federal, law. Thus, the requirement that workers earning at least 70% of their income from within Monroe County occupy the units is not pursuant to a federal or state program. This conclusion is not affected by the fact that, under state statute, Monroe County's Land Development Code and any amendments thereto are required to be approved by a state agency and accepted and adopted by the Governor and the Governor's cabinet before they can be effective.

The only potentially relevant state statute is Florida Statutes 420.502(8). The provision includes two parts, but neither part applies to the Monroe County zoning ordinance. First, Florida Statutes 420.502(8)(a) is a legislative finding that "[i]t is necessary to create new programs to stimulate the construction and substantial rehabilitation of rental housing for eligible persons and families." "Eligible persons" is defined under Florida Statutes 420.503(17) to mean:

> one or more natural persons or a family, irrespective of race, creed, national origin, or sex, determined by the corporation pursuant to a rule to be of low, moderate, or middle income. Such determination shall not preclude any person or family earning up to 150 percent of the state or county median family income from participating in programs. Persons 62 years of age or older shall be defined as eligible persons regardless of income.

The Monroe County zoning ordinance is not compliant with the state statute. An eligible person under the state statute includes persons earning up to 150 percent of the state or county median income. The Monroe County ordinance restricts occupancy to those earning more than 70 percent of their income from within the county, even if the worker's income is less than 150 percent of the state or county median income. Additionally, persons over age 62 are eligible persons under the state statute, while persons over age 62 would not be eligible under the zoning ordinance unless they meet the specified income requirements. Thus, the program in Florida Statutes 420.502(8)(a) is inconsistent with the Monroe County zoning ordinance.

Second, Florida Statutes 420.502(8)(b) is a legislative finding that:

> It is necessary to create a state housing finance strategy to provide affordable workforce housing opportunities to essential services personnel in areas of critical state concern designated under s. 380.05, for which the Legislature has declared its intent to provide affordable housing, and areas that were designated as areas of critical state concern for at least 20 consecutive years before removal of the

> designation. The lack of affordable workforce housing has been exacerbated by the dwindling availability of developable land, environmental constraints, rising construction and insurance costs, and the shortage of lower-cost housing units. As this state's population continues to grow, essential services personnel vital to the economies of areas of critical state concern are unable to live in the communities where they work, creating transportation congestion and hindering their quality of life and community engagement.

Monroe County has been designated as an area of critical state concern under Florida Statutes 380.05. Therefore, there is a state policy to create housing for essential services personnel in Monroe County. Florida Statutes 420.503(18) defines essential services personnel to include: "natural persons or families whose total annual household income is at or below 120 percent of the area median income, adjusted for household size, and at least one of whom is employed as police or fire personnel, a child care worker, a teacher or other education personnel, health care personnel, a public employee, or a service worker." This definition does not encompass workers earning more than 70 percent of their income from within the county. The Monroe County ordinance would permit workers who do not qualify as "essential workers" to live in the Project. Moreover, households earning below 120% of the area median income that include an essential service worker would not be an eligible tenant for the Project unless the household also derives more than 70 percent of its income from within Monroe County. Thus, the program in Florida Statutes 420.502(8)(b) is inconsistent with the Monroe County zoning ordinance.

Therefore, the Monroe County zoning requirement is not pursuant to a state program and does not satisfy the general public use exception for a state program or policy. Thus, the Project would not be compliant with the general public use requirement for the LIHTC.