3. Viability Analysis to Determine How to Provide Recapitalization/Rehabilitation Financing after Year 30

Concept: To assist Housing Credit properties reaching Year 30 to remain financially viable and in good physical condition. This approach may not be useful in lower income census tracts where getting maximum rents at or above 60 percent of area median income (AMI) could be difficult.

Timeline: For immediate Implementation

This approach includes two options for properties post-Year 30:

- **Option 1:** Allow properties to use income averaging, now available for new developments through the Housing Credit program, which would allow a range of incomes up to 80% AMI to be served as long as the average income served does not exceed 60% AMI. While providing additional operating income, this approach would allow the property to come back in for Housing Credits for recapitalization. This approach is available to any Housing Credit property reaching Year 30 that undertakes recapitalization.

- **Option 2:** A viability analysis may be requested by the property owner or initiated by Florida Housing starting at Year 28. This analysis will include a capital needs assessment, market study/review and analysis of other information as required by FHFC, as well as underwriting operations for the final 20 years of the affordability period. The purpose of this analysis will be to evaluate the viability of completing rehabilitation and recapitalization of the property for the next 20 years with new financing. If the analysis shows that the property is unable to remain viable for the remainder of the restricted use period, Florida Housing may amend the set-aside restrictions to include a portion of total units, not to exceed 80 percent, to increase to 80% of AMI, as required by the needs identified in the analysis. In any case, a minimum of 10 percent of the units shall be affordable at extremely low-income AMI levels, and the other 10 percent must be restricted to at or below 60% of AMI. This approach is available only to Family or Elderly 9% Housing Credit properties that undertake recapitalization. Note that, even if the extended use agreements are modified to allow a portion of set-aside units to be increased from 60% of AMI to 80% of AMI at Year 30, a qualified low-income person has rights as third party beneficiaries to enforce the extended use restrictions within the original extended low-income housing commitment.[1]

[1] The Internal Revenue Code provides independent enforcement rights to third parties. Specifically, 26 U.S.C. (42(h)(6)(B)(ii)) requires the extended low-income housing commitment contain an agreement "which allows individuals who meet the income limitation ... the right to enforce in any State court ..." Furthermore, the court in Nordbye v. BRCP/GM Ellington, 266 P.3d 92 (Or. Ct. App. 2011) affirmed this position when stating that the "release agreement" did not override a qualified low-income person's right to enforce the extended use agreement as created under Section 42(h)(6)(B)(ii) of the Code. The appeals court also rejected an argument that a Chevron deference (see below) should apply to the Oregon agency's interpretation of federal statutory requirements. The court said such deference only applies to a federal agency's administrative interpretation of

- o To implement this approach, determine whether rule revisions are needed in the regular rule update in 2019.

4. Limited Rehabilitation or Full Recapitalization Using SAIL (with or without bonds and 4% LIHTC)

Concept:
Option 1 – Provide $5,000-$10,000/unit in rehab targeted to older SAIL properties which require some capital investment based on a CNA, with no or very limited developer fee.
Option 2 – Provide SAIL with 4% LIHTC/bonds for full recapitalization for much older properties (~25 years and older).

<u>Timeline</u>: To be developed after 2019

- o Develop priority matrix to determine which types of properties have priority for these options, based in part on which properties need these options.
- o Once priority matrix is completed, then develop this strategy.
- o Evaluate the type of properties that will be targeted for full recapitalization and the timing necessary to assist properties based on their age; based on this, develop timeline.
- o Begin development of limited rehabilitation approach, and complete necessary rule revisions with a goal to implement possibly starting September 2019.

5. Full Recapitalization Using 9% LIHTC

Concept: Provide financing for specifically identified properties aged 30+ years old based on a priority matrix and based on which properties need 9% LIHTC for recapitalization.

<u>Timeline</u>: Not to be developed at this time

- o Develop approach only after priority matrix is developed, other program options above are in place, and most of the infrastructure strategies below are completed. Timing 2020 or after. The initial focus should be to get the other strategies moving first.
- o Recommend that the preservation plan approved by the Board acknowledge this strategy, but that any development of this strategy be put off.
- o Competitive Housing Credits should be used rarely for portfolio preservation.

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federal laws, not to interpretation by a state agency. Several circuits have held either that state agency interpretations are not entitled to Chevron deference, or that they are only entitled to Chevron deference if the interpretation is expressly approved by a federal agency. (Chevron, USA, Inc v Natural Resources Defense Council, Inc, 467 US 837 (1984) – holding that where Congress's intent is not unambiguously expressed in a statute in light of common canons of construction, courts should give deference to a reasonable interpretation of the statute by the federal agency in charge of administrating the statute at issue).