Tennessee Housing Development Agency

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Bill Lee
Governor

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MEMORANDUM

TO: Tennessee Housing Development Agency Board of Directors

FROM: Eric Alexander, Director, Multifamily Programs
Don Watt, Chief Programs Officer

SUBJECT: Proposed Amendment to 2025 QAP re: "Aggregators"

DATE: September 20, 2024

Recommendation

Presently, this is for information only. A subsequent amendment will be presented to the Board for consideration in November after staff has had adequate time to share the proposed draft language with partners and solicit appropriate feedback.

Background:

The Tennessee Housing Development Agency ("THDA") is committed to the long-term affordability of Housing Credit Developments for the benefit of tenants and full compliance by applicants and principals with the provisions of Section 42 of the Internal Revenue Code, the extended use agreement, and other program requirements. THDA similarly has an interest in preserving the right of first refusal by a qualified nonprofit organization at the close of the compliance period, as authorized in Section 42(i)(7) of the Code. There has unfortunately been a development in the Low-Income Housing Tax Credit Program ("LIHTC") arena, which has recently come to staff's attention, whereby certain "aggregators" are seeking to undermine the long-term affordability of Housing Credit Developments and the right of first refusal. This has resulted in a spate of lawsuits across the country, with one right here in Tennessee.

Originally "aggregators" were not the original syndicator or investor involved in the initial transaction establishing the LIHTC partnership or Housing Credit Development, but instead were an entity new to the general partner or managing member. However, attorneys are now reporting that traditional tax credit investors are starting to adopt the tactics of an aggregator. The aggregators view the partnership and development as a financial instrument versus an affordable housing investment.

The aggregators' modus operandi is generally the same, including, but not limited to, obtaining control of the investor interest, or taking advantage of the investor interests they already hold in a Housing Credit Development, and frustrate the bargained for post-Compliance Period transfer rights and/or buyout price for limited partner ownership interests by demanding unwarranted financial gain not provided for by the partnership agreement or other contracts between the original parties, often times through costly meritless and frivolous lawsuits brought for the purpose of financially pressuring the general partner/managing member/project sponsor(s) to succumb to the unreasonable demands. Another tactic of the aggregator is removal of general partner/managing member/project sponsor(s) to obtain complete control and attempt to remove the property from the LIHTC Program. .

Therefore, THDA is proposing the following actions and its Legal division has drafted the following proposed revision to the 2025 QAP to protect our partners. Once staff has received feedback from the Board and its partners concerning the proposed revisions, an amendment to the QAP will be presented to the Board at the 2024 Board Meeting for approval.

Actions:

- First, known aggregators will not be allowed to be part of an application.
- Second, THDA will require certain provisions in the partnership agreement or operating agreement that will protect the general partner or managing member against transfers to aggregators and from being pushed out. There will also be provisions put in place to preserve the right of first refusal. THDA will require that it approves certain transfers to protect against transfers to aggregators.
- Lastly, THDA will help protect funds in the operating deficit reserve(s) from aggregators.

Proposed QAP Revisions:

Add a new Section 5.B.9. Other Ineligibility, which states:

> Housing Credit Initial Applications are ineligible if any of the following apply:
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> *"THDA deems any individual involved in the Initial Application, individually or as part of a limited partner, syndicator, or investor entity, as having been part of an "aggregator" activity in Tennessee, which includes, but is not limited to: (i) seeking a lawsuit to remove a general partner or managing member from a Housing Credit Development, absent clear evidence of fraud or serious mismanagement on the part of the general partner or managing member; (ii) refusal to honor a Section 42 right of first refusal or right of first option in favor of a nonprofit sponsor executed with the initial tax credit equity closing for a Housing Credit Development; or (iii) filing a lawsuit against a general partner, managing member, or a nonprofit sponsor of a Housing Credit Development challenging the exercise of the Section 42 right of first refusal/right of first option."*

Add a new Section 9.B.13**.** THOMAS Final Application Submission Requirements, which states:

> The Final Application must include, without limitation, the following items:

"An executed copy of the most recent partnership agreement or operating agreement, if not already provided. The partnership agreement or operating agreement must contain ALL of the following provisions, as applicable. If the partnership agreement or operating agreement is missing any of the requisite provisions, THDA will require the Owner to amend such agreement and will not issue IRS from 8609 until the agreement is properly amended, executed, and provided to THDA.

a. *Consent of the general partner or managing member must be obtained before there is any sale, transfer, or assignment of all or any part of partnership or membership interests (including any transfers or assignments of any partnership and/or membership interests in any member or partner);*
b. *Such consent must not be unreasonably withheld, but may be withheld where the sale, transfer, or assignment is to a person, entity, or affiliate thereof that: (i) has a record of seeking litigation to remove a general partner or managing member, absent clear evidence of fraud or serious mismanagement on the part of the general partner or managing member; (ii) is deemed by the general partner or managing member in its sole discretion as having a reputation of an "aggregator" by developing contentious relationships with managing members or general partners; or (iii) takes other actions detrimental to the continued provision of affordable housing. "Serious Mismanagement" does not include actions taken to preserve the affordability of the Housing Credit Development or further the charitable mission of a non-profit sponsor; and,*
c. *If the allocation is pursuant to the Nonprofit Set Aside, there must be: (i) acknowledgment and agreement from the investor that the right of first refusal is not conditioned upon the consent of the investor and may be triggered by the Owner receiving any third-party offer; (ii) a provision that if Section 42 is amended by Congress to permit a nonprofit to hold a purchase option after year 15, the terms of the Nonprofit Right of First Refusal agreement will be converted to a purchase option permitting a transfer through acquisition of partnership interests, including all partnership assets for an amount equal to the statutory minimum purchase price; and (iii) the executed Section 42 Nonprofit Right of First Refusal will be for a term of at least 24 months from the end of the Section 42 Compliance Period and have a purchase price equal to the minim statutory purchase price under Section 42."*

Revise Section 10.O., under the Compliance Requirements and Monitoring Process Section, to protect against transfer to aggregators, as follows:

"Sale, Transfer, Exchange, or Assignment of a Housing Credit Development or All or Any Part the Partnership or Membership. With the exception of transfers to affiliates of a limited partner or investor member of an Owner acknowledged and approved by the general partner or managing member of such Owner, in the event of any sale, transfer, exchange, or assignment of a Housing Credit Development or any change with respect to the general partner/managing member or any other interest of the partnership or the ownership entity (including, without limitation, sale of any or all limited partner interests (or interests in such limited partner) to a non-affiliated person, removal of any general partner/managing member, or admission of any general partner/managing member), the Owner shall:

1. *Obtain THDA's permission before such action occurs;*

2. *Complete THDA's Organizational Breakdown Form;*
3. *Provide a new Organizational Chart;*
4. *With respect to changes of the general partner or managing member, provide notarized THDA Disclosures Forms for every new individual added to the structure;*
5. *THDA may require the proposed new Owner or proposed new general partner/managing member of the ownership entity to meet with THDA staff. This is in addition to the training requirements above;*
6. *Depending on the change (change in the Ownership Entity, general partner, or managing member), attend compliance training. These requirements do not apply when a development is sold following the completion of the QCP when THDA has not identified a purchaser; and*
7. *If the change is a change in the Ownership Entity, execute and record an Assignment & Assumption Agreement for the LURC (and all loan documents for TCAP and 1602).*

THDA's consent will not be unreasonably withheld, but may be withheld where the sale, transfer, or assignment is to a person, entity, or affiliate thereof that: (i) has a record of seeking litigation to remove a general partner or managing member, absent clear evidence of fraud or serious mismanagement on the part of the general partner or managing member; (ii) is deemed by THDA as having a reputation of an "aggregator" by developing contentious relationships with managing members or general partners; or (iii) takes other actions detrimental to the continued provision of affordable housing. "Serious Mismanagement" does not include actions taken to preserve the affordability of the Housing Credit Development or further the charitable mission of a non-profit sponsor."

Add new Section 10.P., under the Compliance Requirements and Monitoring Process Section, which states:

"Disposition of Operating Deficit Reserves. THDA may restrict the disposition of any funds remaining in any operating deficit reserve(s) after the term of the reserve's original purpose has terminated or is near termination. Authorized disposition uses are limited to payments towards any unpaid costs incurred in the completion of the Housing Credit Development (i.e., deferred developer fee), the capital replacement reserve account (provided, however, that any operating deficit reserve funds deposited to the replacement reserve account will not replace, negate, or otherwise be considered an advance payment or pre-funding of the Owner's obligation to periodically fund the replacement reserve account), the reimbursement of any loan(s) provided by a partner, member or guarantor as set forth in the organizational agreement (i.e., operating or limited partnership agreement whereby its final disposition remains under this same restriction). The actual direction of the disposition is at the Owner's discretion so long as it is an option approved by THDA."