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September 13, 2011

Opinion No. 11-65

Preference in THDA's Qualified Allocation Plan for Developments in Qualified Census Tracts

QUESTION

Does Part VII-B-1-b of the Tennessee Housing Development Agency's 2011 Qualified Allocation Plan conflict with Section 42(m)(1)(B)(ii)(III) of the Internal Revenue Code, which requires "preference" be given to developments "located in qualified census tracts"?

OPINION

No. Pursuant to the federal statute, THDA may determine what the State's low-income housing needs are and create a plan that best suits those needs. Based on THDA's 2011 Plan, it appears that THDA has determined that those needs would best be addressed by ensuring that tax credits are not allocated solely to developments located in qualified census tracts.

ANALYSIS

Pursuant to Section 42 of the Internal Revenue Code of 1986, the Low-Income Housing Tax Credit ("LIHTC") program encourages the construction and rehabilitation of low-income rental housing by providing federal tax credits to the owners and developers of those properties. See Spring Hill, L.P. v. Tennessee State Bd. of Equalization, No. M2001-02683-COA-R3-CV, 2003 WL 23099679, at *1 (Tenn. Ct. App. Dec. 31, 2003). The federal statute requires the state agency administering the program to create a "qualified allocation plan" by which to allocate the tax credits each year. 26 U.S.C. § 42(m). The "qualified allocation plan" is a plan

> (i) which sets forth selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions, [and]
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> (ii) which also gives preference in allocating housing credit dollar amounts among selected projects to--
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> (I) projects serving the lowest income tenants,
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> (II) projects obligated to serve qualified tenants for the longest periods, and

> (III) projects which are located in qualified census tracts (as defined in subsection (d)(5)(C)) and the development of which contributes to a concerted community revitalization plan.

26 U.S.C. § 42(m)(1)(B). The statute also requires certain criteria to be used in the plan, including "project location" and "housing needs characteristics." 26 U.S.C. § 42(m)(1)(C).

The Tennessee Housing Development Agency ("THDA") administers the LIHTC program in Tennessee. The 2011 THDA LIHTC Qualified Allocation Plan sets forth the eligibility requirements an applicant's development must satisfy and provides points to the applicant for development characteristics that meet its selection criteria. *See* Tennessee Housing Development Agency, Low-Income Housing Tax Credit Qualified Allocation Plan (2011) *available at* http://www.thda.org/rentdev/lihtc/2011qapexhibits.pdf. For example, an applicant receives 1 point for each "neighborhood amenity" located within a certain distance of the development. 2011 Plan, at Part VII-B-1-a-i. The applicant must obtain at least 80 out of 181 available points to remain eligible to receive a tax credit allocation. 2011 Plan, at Part VII-B.

This opinion concerns the preference — or lack thereof — given to developments located in a "qualified census tract" ("QCT") by the 2011 Plan. A QCT is a "census tract . . . in which 50 percent or more of the households have an income which is less than 60 percent of the area median gross income . . . or which has a poverty rate of at least 25 percent." 26 U.S.C. § 42(d)(5)(B)(ii)(I). As shown in the excerpt of the federal statute above, qualified allocation plans must give preference to developments located in QCTs. 26 U.S.C. § 42(m)(1)(B)(ii)(III). The 2011 Plan provides one point to "[d]evelopments located completely and entirely within a [QCT], the development of which contributes to an approved concerted community revitalization plan" and five points to "[d]evelopments located completely and entirely within a census tract (other than a [QCT]) that is, itself, completely and entirely within an area covered by an approved community revitalization plan." 2011 Plan, at Part VII-1-b. That the 2011 Plan provides more points to the latter development does not mean that it conflicts with Section 42(m)(1)(B)(ii)(III). The federal statute does not state how a plan should give preference to a QCT-located development or over what developments it should be given preference. At the least, by receiving one point, the 2011 Plan does give preference to a QCT-located development over a development that is not located within a QCT or a community revitalization plan, because such a development would receive no points.

More importantly, the federal statute should not be read as automatically requiring qualified allocation plans to give a great preference to QCT-located developments. In fact, the housing needs of the community should carry more weight than the QCT preference. Before expressing the QCT preference, the federal statute defines a qualified allocation plan as a plan "which sets forth selection criteria to be used to determine ***housing priorities*** . . . ***which are appropriate to local conditions***." 26 U.S.C. § 42(m)(1)(B)(i) (emphasis added). A plan must also consider the location of the development. 26 U.S.C. § 42(m)(1)(C)(i). In other words, a housing credit agency such as THDA has the flexibility to ascertain the low-income housing needs of the State and create a plan that best suits those needs. In devising the 2011 Plan, THDA appears to have determined that the State's needs would be best served by not limiting

developments to QCTs. Not only does the 2011 Plan encourage developments in areas outside of QCTs that have community revitalization plans, it also limits the amount of tax credits for QCT-located developments to 50 percent of the total amount of tax credits available for allocation. 2011 Plan, at Parts IV-D-1 and VII-1-b-ii.

It should also be noted that giving too great a preference to QCT-located developments may raise other concerns for a housing credit agency. If the QCTs in a State have a large minority population, locating too many developments within them could be seen as perpetuating racial segregation and discrimination in violation of federal law. *See Inclusive Communities Project, Inc. v. Texas Dept. of Housing and Community Affairs*, 749 F. Supp. 2d 486 (N.D. Tex 2010). In *Inclusive Communities Project*, the court found that the plaintiff had standing to bring a discrimination claim and had established a prima facie case that the Texas Department of Housing and Community Affairs had violated the Fair Housing Act and 42 U.S.C. §§ 1982 and 1983 by, among other things, disproportionately approving tax credits for non-elderly developments in minority QCT neighborhoods and disproportionately denying tax credits for non-elderly developments in predominately Caucasian non-QCT neighborhoods. *Id*., at 496-500.

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