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A New Era for Housing Policy?

By Michael J. Novogradac, CPA

Last month I commented on how affordable housing industry leaders' were observing signs that the nation's housing policy appeared to be headed in a new direction — a pull-back from the last two administrations' focus on homeownership and a realization by the Obama Administration and a growing number of congressional leaders that many U.S. residents' circumstances are more in step with living in rental housing. This news in other times would have been cause for great industry celebration, but in today's economy, characterized by a dearth of investors and equity, it is a call to action.

Restoring access to capital is the highest legislative priority of the apartment industry in 2009, according to the National Multi Housing Council (NMHC) and National Apartment Association (NAA). That priority is shared throughout the full spectrum of the multifamily rental housing industry.

NMHC and NAA work together through a Joint Legislative Program and will focus their attention on ways to craft a more balanced federal housing policy in response to the excesses that occurred in the single-family mortgage market.

"Most of the financial problems our country now faces were caused by the excessive embrace of homeownership," said Douglas Culkin, CAE, president of the NAA. "We need a more balanced housing policy. Our country has serious housing needs right now that simply can't be met through a 'homeownership only' housing policy."

Checking in with other affordable rental housing industry experts, there was unanimous agreement that the health of the affordable rental housing industry hinges on attracting new investors and reawakening the equity market to help move stalled projects forward.

Jim Miller, who is a partner in the Washington, D.C. offices of Winston & Strawn LLP and legislative counsel for the Affordable Housing Tax Credit Coalition (AHTCC), says the direction for affordable rental housing this year will be to secure private equity investment, from current investors and from new investors or those who dropped out of the market. "Multifamily housing policy officials within the Obama Administration and key members of Congress agree that there is a significant need to address ways to increase private equity investment," Miller said. "They agree that Congress addressed the need to fund existing multifamily housing projects and did so through the exchange and the TCAP (Tax Credit Assistance program) and having addressed the 'public' side of the public-private partnership at the heart of the low-income housing tax credit (LIHTC), they now agree that they need to address the 'private' side. The AHTCC hopes to rally the industry around one or two proposals which address the issue."

The Environment for Multifamily Rental Housing

Perhaps the NMHC got to the heart of the matter when it titled its 2008 Annual Report: The End of the Ownership Society.

That report included support for the idea that the American Dream had become for many the American nightmare, using quotes from several housing leaders and journalists who proclaimed that the "bloom is off of homeownership," suggested that we "drop the obsession with ownership," and observed the nation's "unrelenting political fixation with homeownership" and the "high cost" of homeownership reaching historic highs.

With that in mind, many affordable rental housing leaders and organizations are mobilizing efforts that they hope

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will lead to the resuscitation of an industry weakened by a declining economy. On the front burner of those efforts is legislation that many hope will lead to the infusion of equity for much-needed new and stalled affordable rental housing.

"Equity was not addressed in the [Recovery Act] so we're looking at ways to do that at a greater level," said David Gasson, vice president and director of corporate communications at Boston Capital, and executive director of the Housing Advisory Group (HAG), noting that the LIHTC is in a cycle where everyone is chasing deals and equity. "We have a couple of ideas on how we might make that happen," he said.

A Little Background

Early this year, Sen. Olympia Snow, R-Maine, attempted to establish a five-year carryback for net operating losses (NOLs) by including it in a proposal in the Senate-passed stimulus bill; however the provision was cut in House-Senate conference negotiations. The carryback provision would have indirectly benefited the LIHTC program and the New Markets Tax Credit program as well as other business credits by allowing investors with large NOLs to carryback those NOLs, and use them up, thereby creating a need for tax credits to offset tax liability in coming years. As it stands today, many former tax credit investors have large NOL carryforwards that are dampening their need for current year tax credits.

Then, last month on April 3, Senate Finance Committee member Snowe and committee chair Max Baucus, D-Mont., introduced S. 823, the Net Operating Loss Carryback Act. The proposal would allow businesses of any size to carry back for five years those losses incurred in 2008 and 2009. Snowe said this legislation would help any company that has losses from 2008 or 2009 carry back those losses to offset taxes paid in the previous five years when they were profitable. The most recently enacted Recovery Act allows qualifying small businesses (whose average annual gross receipts in a test period are $15 million or less) to choose a three- four-or five-year NOL carryback period for certain losses instead of the usual two-year period.

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Gasson says HAG and AHTCC are working on an industry proposal for a five-year carryback provision specifically targeted to LIHTCs. That proposal is highest on HAG's and the AHTCC's to-do list and the two organizations, along with the Affordable Housing Investors Council (AHIC), are "talking to a lot of other people" to make this happen, says Gasson.

Miller says the AHTCC believes that Congress should consider and pass such a proposal, to carry back the credit for five years with respect to credits allocated to projects placed in service in 2009, 2010 and 2011, so long as the tax benefits realized from carrying back the credits will be invested in new projects within a period of one or two years. "In addition, with respect to projects placed in service in 2009, 2010 and 2011, we believe investors should have the ability to carry back credits for five years at any point during the 10-year credit period," he said.

Gasson agrees with the idea that the proceeds of a carryback would go back into the program. "[It's] the most logical solution at this time," he said.

AHIC too supports the five-year carryback provision, and its president, Patrick Nash of JPMorgan Capital Corporation, says the reinvestment requirements are vital to investors. "We think it's important for existing and new investors because one of the fallouts of the [economic] crisis is that it's difficult for corporations to plan and anticipate their tax position 10 to 15 years out," he said. "The carryback provides flexibility."

"This proposal will give investors who cannot anticipate their future tax liabilities greater certainty as to the utility of the credits and the value of the investment," said Miller.

Miller says AHTCC is working with Congress and the Administration on the carryback idea and will work with the tax writing committees to find a place in upcoming tax legislation for the proposal. He says the most likely current legislative vehicle could be the tax portion of the budget reconciliation legislation that will start to move in late April and May.

Carried Interest and Other Concerns

On April 3, Congressman Sander Levin, D-Mich., reintroduced legislation to tax compensation received from carried interests. The proposal would tax any income from an investment services partnership interest at ordinary rates, and it would tax any gains from the dispositions of such interests at ordinary income rates also. The bill would, under certain circumstances, provide an exception from ordinary income treatment for a reasonable allocation of partnership income loss and cash flow to invested capital, as opposed to allocated to a partnership interest received for services.

There is concern in the multifamily housing community that the proposed change in the taxation of carried interests will prove disruptive to the real estate industry. While the original focus of this tax change was the Wall Street hedge funds, opponents warn that an increase in the taxation rate of carried interests could adversely affect a number of industries, including real estate.

Among the proposal's opponents is NMHC, which warns that the bill could have numerous unintended consequences, including exacerbating the nation's affordable housing shortage. If enacted, NMHC says the changes in the taxation of carried interests could be particularly damaging to properties located in underdeveloped areas and could prevent much of the proposed new affordable housing from being built.

In addition to the Levin sponsored bill, a proposal to change the taxation of carried interests was also included in President Obama's 2010 budget.

However, in an encouraging sign, both Baucus and Ranking Member Charles Grassley, R-Iowa, expressed their belief that the current economic climate will make passage of the proposal in 2009 less likely.

On other issues that may be addressed yet this year, Gasson says he still likes the idea of an accelerator but the problem now is that the exchange proposal and gap financing contained in the Recovery Act make it diffi-

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cult to get an accelerator. "So we're devoting ourselves to making the carryback work with the exchange and gap programs." But until the U.S. Department of Housing and Urban Development, and Treasury release their regulations on the exchange and gap proposals, the industry is limited somewhat in any actions it might take. Other issues confronting the industry include preservation, green building and energy efficiency, and mark-to-market. "The front burner issue is equity," Gasson said. "It takes precedence over everything else."

Changing the Paradigm

In an interview on National Public Radio, Columbia University professor Edmund Phelps was asked if he thought that there was a way to change the housing paradigm in this country that owning a home is the American dream and if you have the material means you ought to buy a house.

His response was that he hoped the Administration and other thought leaders will succeed eventually in bringing the country back to the older idea that the American dream is having a career, getting a job and getting involved in it, and doing well. "That was the core of the good life. That's what we have to get back to, and get away from this mystique that the most important thing in your life that could ever happen to you is to be a home owner," Phelps said.

All this is not to say that home ownership is not a worthy goal, a valuable investment and a vital piece of this nation's economy, because under the right circumstances it can be all of those things. Rather, we suggest that for those for whom homeownership is not the best option, that we in the affordable rental housing industry have a mandate to continue to push for federal support for those who would invest in, produce and maintain safe, decent and affordable housing.

Unfortunately, home ownership and rental housing have sometimes been pitted as competitors in terms of public and political support. But now, as individuals, communities, financial institutions and political leaders are all working together to address the cause of—and road to recovery from—the recent financial fallout, we are faced with the unique opportunity to adjust that dynamic. This is a chance to begin anew with the more productive perspective that home ownership and affordable rental housing should be supported as complementary and equally valuable pieces of the puzzle.

This article first appeared in the May 2009 issue of the Novogradac Journal of Tax Credit Housing.

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