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July 30, 2019

Via First Class Mail and Electronic Mail



Re: Request for Letter Ruling on behalf of [REDACTED] and
members; File No. LR-19-003

Dear [REDACTED]

This letter is in response to your letter to [REDACTED] dated May 20, 2019 (the "Request") in which you requested a letter ruling regarding the application of Oklahoma Historic Rehabilitation Tax Credits (the "SHTCs") codified at 68 O.S. § 2357.41 (the "SHTC Statute") to the transactions described below on behalf of [REDACTED] an Oklahoma limited liability company (the "Company"), and its members, [REDACTED] a Delaware limited partnership ("Developer Member"), [REDACTED] a Delaware limited liability company ("STCI Member"), and any prospective transferees of SHTCs (collectively, the "Requesting Parties"). The facts presented in your letter are as follows:

I. Background Information. The Company is an Oklahoma limited liability company. The Company has been formed to own and rehabilitate certain floors of the existing 1931 historic [REDACTED] located at [REDACTED] Oklahoma City, Oklahoma 73102 (the "[REDACTED]") into apartments and associated amenities (the "Phase III Project"). An affiliate of the Developer Member will own and rehabilitate the remaining floors of the [REDACTED] tower into a hotel and associated amenities (the "Phase II Project") and an affiliate of the Developer Member owns and is rehabilitating the existing 1957 and 1972 buildings of the [REDACTED] into a garage and associated amenities (the "Phase I Project" and together with the Phase II Project and Phase III Project, collectively the "Project").

The Developer Member and its affiliates expect to generate a substantial amount of federal historic rehabilitation tax credits and SHTCs throughout the course of the Project and hope to monetize the SHTCs for the purpose of funding a portion of the Project. The Developer Member and its affiliates have filed and will file a single Form 10-168 Historic Preservation Certification Application for the entire Project with the [REDACTED] (the "NPS"), consisting of three parts: Part 1 – Evaluation of Significance; Part 2 – Description of Rehabilitation; and, Part 3 – Request for Certification of Completed Work. On or about the time the Phase III Project described above is placed in service, it is expected that a Part 3 of Form 10-168 will be filed for the entire Project; provided, however, that the Company may instead file an Amendment/Advisory Determination request provided under Form 10-168 with the NPS requesting that the NPS certify the estimated qualified rehabilitation expenditures ("QREs") for the Phase III Project (the "Phase III Project QREs"). In that case, the NPS would then issue an NPS advisory determination (the "NPS Advisory Determination") certifying the amount of Phase III Project QREs on which the federal historic rehabilitation tax credits and associated SHTCs (the "Phase III Project SHTCs") can be claimed. NPS certification of QREs for any remaining phases of the Project would then occur through the filing of Part 3 of Form 10-168 for the entire Project.

II. Transition Rule for Timing of Claiming Credits. Section 47(a) of the Internal Revenue Code of 1986, as amended (the "Code") was amended by the Tax Cuts and Jobs Act, P.L. 115-97 (the "TCJA") to provide that "for any taxable year during the 5-year period beginning in the taxable year in which a qualified rehabilitated building is placed in service, the rehabilitation credit for such year is an amount equal to the ratable share for such year." The ratable share for any taxable year is the amount equal to 20 percent of the QREs with respect to the qualified rehabilitated building, as allocated ratably to each year during such 5-year period. As a result of this amendment, the 20% federal historic rehabilitation tax credit must be claimed at a rate of 4% per year during the 5-year period beginning in the taxable year in which the building is placed in service. Prior to the TCJA, the entire 20% federal historic rehabilitation tax credit was eligible to be claimed all in the year in which the qualified rehabilitated building is placed in service.

The TCJA amendment described above is generally applicable to amounts paid or incurred after December 31, 2017; however, Section 13402(c)(2) of the TCJA provides for a transition rule whereby QREs can continue to use the pre-TCJA provisions for claiming the entire 20% federal historic rehabilitation tax credit in the year in which the building is placed in service (the "Transition Rule"). In order to use the Transition Rule, (i) the taxpayer must own or lease the building during the entirety of the period after December 31, 2017 and (ii) the 24 month period (or 60 month period for phased rehabilitation) selected by the taxpayer under Section 47(c)(1)(B) of the Code must begin no later than 180 days after the enactment of the TCJA (June 20, 2018). If the foregoing requirements to qualify for the Transition Rule are satisfied, Section 47(a) of the Code as amended by the TCJA will only apply to QREs paid or incurred after the end of the taxable year in which such 24 month period (or 60 month period for phased rehabilitation) ends.

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Here, the Company has continuously owned the Phase III Project since December 29, 2017, and the Company and its affiliates expect to select a 60 month period under Section 47(c)(1)(B)(ii) which begins not later than June 20, 2018.

Based on the SHTC Statute and Oklahoma Administrative Code ("OAC") regulations, the requirements for qualification for and claiming of the SHTCs are tied to the requirements for the federal historic rehabilitation credits under IRC § 47. Specifically, the SHTC Statute provides that the amount of the SHTC shall be one hundred percent (100%) of the federal rehabilitation credit provided for in IRC § 47 and that all requirements with respect to qualification for the credit authorized by IRC § 47 shall be applicable to the SHTCs. *See* 68 O.S. § 2357.41(B)-(C). Further, OAC § 710:50-15-108(e) provides that generally, the first year the SHTC is eligible to be claimed is the first tax year that the federal rehabilitation credit provided for in IRC § 47 is eligible to be claimed.

III. Capital Structure and Transactions. The Company intends to monetize the Phase III Project SHTCs being generated in connection with the Phase III Project by allocating 100% of the Phase III Project SHTCs to one of its members, STCI Member.

The Company will be owned by its two members: Developer Member and STCI Member. Developer Member will own 95% of the Company's membership interests and STCI Member will own 5% of the Company's membership interests. The members will contribute capital to the Company in the following approximate amounts: Developer Member - \$22,312,376 and STCI Member - \$12,250,439. The relative capital contributions of the Developer Member and STCI Member could vary significantly depending on the final amount of Phase III Project QREs and other economic factors.

STCI Member will have a 5% interest in the Company's operating profits, losses, and cash flow. The Company will allocate 100% of the Phase III Project SHTCs generated by the Phase III Project to STCI member pursuant to an operating agreement among the members in return for a capital contribution of approximately \$12,250,439. Thus, the allocation of the Phase III Project SHTCs by the Company to STCI Member will not be made on a *pro rata* basis to the Company's members.

The STCI Member may utilize the Phase III Project SHTCs itself; however it is also contemplated that STCI Member may transfer all or a portion of the Phase III Project SHTCs to one or more third parties.

The Requesting Parties have requested a letter ruling on the eight specific issues as described below.

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Issue 1: *Whether the Company may claim the Phase III Project SHTCs in the year in which the Phase III Project QREs are placed in service and upon receipt of either the NPS Advisory Determination certifying the Phase III Project QREs through the filing of OTC Form 511-CR with the Oklahoma Tax Commission (the "Commission") or the Part 3 certification for the entire Project.*

After obtaining a certificate of occupancy or other document that is a precondition to applicable use of the building or structure issued by the relevant local governmental body, a taxpayer may claim an amount of SHTCs that are equal to "one hundred percent (100%) of the federal rehabilitation credit provided for in Section 47 of Title 26 of the United States Code." 68 O.S. § 2357.41(B). "Generally, the first year the [SHTC] is eligible to be claimed is the first tax year that the federal rehabilitation credit, provided for in Section 47 of Title 26 of the United States Code, is eligible to be claimed." OKLA. ADMIN. CODE ("OAC") § 710:50-15-108(e). Based on the facts presented in the Request, the Company may claim the Phase III Project SHTCs for the year the Phase III Project QREs are placed in service if a certificate of occupancy or other document that is a precondition to applicable use of the building or structure is issued as to Phase III and provided the QREs related to Phase III qualify for federal historic rehabilitation tax credits in the same year. The Company is not required to wait until receipt of the NPS Part 3 Certification for the entire Project in order to claim the Phase III Project SHTCs.

Issue 2: *Whether the Company may claim all Phase III Project SHTCs in the year in which the Phase III Project QREs are placed in service if the Company satisfies the Transition Rule requirements under the Code as amended by the TCJA.*

Under the SHTC Statute and OAC regulations, the requirements for qualification for and claiming of the SHTCs are tied to the requirements for the federal historic rehabilitation credits under IRC § 47. As stated in the response to the preceding Issue, after obtaining a certificate of occupancy or other document that is a precondition to applicable use of the building or other structure issued by the relevant local governmental body, a taxpayer may claim an amount of SHTCs that are equal to "one hundred percent (100%) of the federal rehabilitation credit provided for in Section 47 of Title 26 of the United States Code." 68 O.S. § 2357.41(B). "Generally, the first year the [SHTC] is eligible to be claimed is the first tax year that the federal rehabilitation credit, provided for in Section 47 of Title 26 of the United States Code, is eligible to be claimed." OAC § 710:50-15-108(e). The foregoing is also applicable to IRC § 47 as amended by the TCJA and the Transition Rule set forth in the TCJA. Accordingly, based on the facts presented in the Request, if the Company satisfies the requirements described in the response to Issue 1 above, and if the Company satisfies the requirements of the Transition Rule under the Code, as amended by the TCJA, the Company may claim all of the Phase III project SHTCs for the year the Phase III Project QREs are placed in service and the Company would not be required to claim the Phase III Project SHTCs at a rate of 4% per year during the 5-year period beginning in the taxable year in which the building is placed in service.

Issue 3: *Whether the Company can allocate the Phase III Project SHTCs within a “pass through entity” to one or more of its members, and if so, whether such allocation is considered a transfer that requires the Company or its members to file an OTC Form 569.*

It has generally been the Commission’s policy that pass-through entities—i.e., limited liability companies, partnerships and subchapter S-corporations—may allocate income tax credits to their members, partners or shareholders. The Oklahoma Income Tax Act requires that taxpayers report all transfers and allocations of income tax credits to the Commission. *See* 68 O.S. § 2357.1A-2(A). OAC § 710:50-3-55(c) requires an entity transferring or allocating a tax credit to report such transfer and/or allocation on OTC Form 569. The Company may allocate the Phase III Project SHTCs to its members, so long as it reports its allocations in conformance with 68 O.S. § 2357.1A-2(A) and OAC § 710:50-3-55(c).

Issue 4: *Whether the Company is required to allocate the Phase III Project SHTCs to its members on a pro-rata basis in accordance with their ownership interests.*

It has generally been the Commission’s policy that a pass-through entity is not required to allocate income tax credits on a pro-rata basis, so long as the pass-through entity: (1) allocates the income tax credits in accordance with a written agreement between its members, partners, or shareholders as to how credits are to be allocated; (2) allocates no more than the available amount of income tax credits; and (3) allocates the income tax credits only to its members, partners, or shareholders. Based on the facts presented in the Request, the Company will not be required to allocate the Phase III Project SHTCs resulting from the Phase III Project on a pro-rata basis.

Issue 5: *Whether it is permissible for the Company to allocate 100% of its Phase III Project SHTCs to STCI Member so long as the Company and STCI Member file OTC Form 569 with the Commission to evidence the allocation.*

The ability of the Company to allocate the Phase III Project SHTCs to its members, partners, or shareholders is addressed in the responses the preceding Issues. The Company may allocate 100% of its Phase III Project SHTCs to STCI Member, so long as the Company and STCI Member comply with the allocation requirements as described in the responses to the two preceding Issues, which include the Company and STCI Member timely filing OTC Form 569 with the Commission.

Issue 6: *Whether it is permissible for STCI Member to transfer all or a portion of the Phase III Project SHTCs allocated to it by the Company to one or more third parties so long as STCI Member and such third party transferees file OTC Form 569 and OTC Form 572 with the Commission to evidence the transfer.*

Under the SHTC Statute and OAC § 710:50-15-108(g), the SHTCs are freely transferable within five (5) years following the year of qualification so long as the parties to the

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transfer jointly file a copy of a written transfer agreement with the Commission within thirty (30) days of the transfer. *See* 68 O.S. § 2357.41(F); *see also*, OAC § 710: 50-15-108(g)-(h). Any written transfer agreement must include:

the name, address, and taxpayer identification number of the parties to the transaction, the amount of credit being transferred, the year the credit was originally allowed to the transferring entity, and the tax year or years for which the credit may be claimed as well as a representation by the transferor that the transferor has neither claimed such credits for its own behalf nor conveyed said credits to any other transferee.

OAC § 710:50-15-108(h).

In addition to the timely filing of OTC Form 569 to report the transfer of the Phase III Project SHTCs, any transferee of Phase III Project SHTCs must include OTC Form 572 with any tax return on which it is claiming the Phase III Project SHTCs. *See* OAC § 710:50-15-108(i). Based on the facts presented in the Request, STCI Member may transfer all or a portion of the Phase III Project SHTCs to one or more third parties, so long as STCI Member and such transferee(s) comply in all respects with the transfer requirements detailed in 68 O.S. § 2357.41(F) and OAC § 710:50-15-108(g)-(h).

Issue 7: *Whether there is a minimum denomination of the Phase III Project SHTCs that must be transferred in order for such transfer to be respected.*

The SHTC statute and OAC do not state that there is any minimum denomination of SHTCs that must be transferred by a party holding the SHTCs in order for the transfer to be recognized by the Commission. A transfer of the Phase III Project SHTCs to one or more third parties may be made in any denomination so long as the transaction meets all of the other transfer requirements detailed in 68 O.S. § 2357.41(F) and OAC § 710:50-15-108(g)-(h).

Issue 8: *Whether the Requesting Parties may rely on this letter ruling.*

A letter ruling “may generally be relied upon only by the taxpayer to whom it is issued.” *See* OAC § 710:1-3-73(e). The Office of the General Counsel is issuing this letter ruling to the Company, Developer Member, and STCI Member. Therefore, the Company, Developer Member, and STCI Member may rely on this letter ruling. No prospective transferees of the Phase III Project SHTCs may rely on this letter ruling.

This letter ruling applies only to the circumstances set forth in your letter dated May 17, 2019, and may generally be relied upon only by the taxpayers to whom it is issued (Company, Developer Member, and STCI Member) provided that all facts have been accurately and completely stated, and that there has been no change in applicable law. *See* OAC § 710:1-3-73(e). Please be advised that this letter ruling does not preclude the Commission from conducting an audit or examination under 68 O.S. § 206 of any report or return claiming a credit

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for the transactions outlined in this letter ruling. The Commission reserves the right to issue any assessment, correction or adjustment authorized under 68 O.S. § 221.

Respectfully,



Shane M. Riddles-Hill
Assistant General Counsel

APPROVED:



Joe Gappa
General Counsel