COMMUNITY AFFAIRS

NEW JERSEY HOUSING AND MORTGAGE FINANCE AGENCY

Low Income Housing Tax Credit Qualified Allocation Plan

Proposed Amendments: N.J.A.C. 5:80-33.9 and 33.12

Authorized By: New Jersey Housing and Mortgage Finance Agency, Charles A. Richman, Executive Director.

Authority: N.J.S.A. 55:14K-5.g and 26 U.S.C. § 42.

Calendar Reference: See Summary below for explanation of exception to calendar requirement.

Proposal Number: PRN 2019-049.

A **public hearing** on this notice of proposal will be held on the following date and time at the following location:

Wednesday, June 5, 2019, at 10:00 A.M.

New Jersey Housing and Mortgage Finance Agency

637 South Clinton Avenue

Trenton, New Jersey 08611

Please call the Division of Tax Credit Services at (609) 278-7629 if you wish to be included on the list of speakers.

Submit written comments by July 5, 2019, to:

Jim Peasco

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Or by email to: jpeasco@njhmfa.gov

The agency proposal follows:

Summary

The New Jersey Housing and Mortgage Finance Agency ("NJHMFA" or "Agency"), pursuant to its statutory authority, serves as an advocate for increasing the supply of adequate, safe, and affordable housing in the State of New Jersey (State). To fulfill its statutory mandate, the Agency acts as a mortgage lender by providing financing to housing sponsors who wish to construct, rehabilitate, or improve housing for low- and moderate-income residents of the State. The Agency also provides mortgage loans for home buyers and serves as the housing credit agency for the State.

The rules of the Agency, codified at N.J.A.C. 5:80, were adopted and have been amended periodically pursuant to the authority of the New Jersey Housing and Mortgage Finance Agency Law of 1983, N.J.S.A. 55:14K-1 et seq. (Act), to establish procedures for, and terms and conditions of, mortgage loans made by the Agency and the means of administering the Federal program of low-income housing tax credits (LIHTC), pursuant to Section 42 of the Internal Revenue Code (IRC), 26 U.S.C. § 42. As mandated by 26 U.S.C. § 42(m)(1)(B), each state housing credit agency must create a plan, known as the Qualified Allocation Plan (QAP), that sets forth the selection criteria to be utilized to allocate tax credits to eligible applicants. The rules codified at N.J.A.C. 5:80-33 represent the QAP for the State.

The Agency proposes to amend the QAP and to include proposed amendments at N.J.A.C. 5:80-33.9(b)1 through 4 to codify legislation that was passed by the State Legislature and enacted into law in 2008. This legislation, often referred to as "A500," is codified, in part, in the Fair Housing Act at N.J.S.A. 52:27D-321.1. The A500 legislation (section 19 of P.L. 2008, c. 46) provides, in relevant part, as follows:

> Notwithstanding any rules of the . . . Agency to the contrary, the allocation of low income tax credits shall be made by the [A]gency to the full extent such credits are permitted to be allocated under federal law, including allocations of 4 percent or 9 percent federal low income tax credits, and including allocations allowable for partial credits. *The affordable portion of any mixed income or mixed use development that is part of a fair share housing plan approved by the [Council on Affordable Housing (COAH)], or a court-approved judgment of repose or compliance, including, but not limited to, a development that has received a density bonus, shall be permitted to receive allocations of low income tax credits, provided that the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units, and the affordable units are developed contemporaneously with the commercial or market rate residential units.* (Emphasis added.)

The Agency issued its Developer Bulletin 2018-3: Inclusionary Policy dated October 23, 2018 (Inclusionary Policy Bulletin), to "clarify and refine the Agency's policy with respect to the financing of inclusionary developments seeking [LIHTC]." An "inclusionary development" is defined in the Fair Housing Act as "a residential housing development in which a substantial percentage of the housing units are provided for a reasonable income range of low- and moderate-income households." N.J.S.A. 52:27D-304.f. The Inclusionary Policy Bulletin quotes that portion of the A500 legislation emphasized above, then states that in order for an applicant to "conclusively demonstrate" a need for LIHTC, an "initial presumption" will be made that the municipally approved inclusionary zoning alone creates a realistic opportunity for construction of the affordable units in a development and that such zoning is sufficient to internally subsidize the units required to be built under the Fair Share Plan/Judgment of Repose or Compliance. The Inclusionary Policy Bulletin places the burden on the applicant to overcome that presumption by demonstrating, to the satisfaction of the Agency, that (i) LIHTC are needed to subsidize any affordable units in excess of the municipal obligation; (ii) economic conditions have changed so dramatically that the zoning, taking any density bonus received into account, no longer creates sufficient internal subsidy to construct the required affordable units; or (iii) the municipally approved zoning erroneously determined that the internal subsidy provided by the market-rate units would be sufficient to construct the affordable units (collectively, the "three overriding circumstances"). The Inclusionary Policy Bulletin provides that "[s]uitable documentation" is required to demonstrate each of these overriding circumstances and includes an itemization of the information and documentation required to be submitted by an applicant.

The Agency proposes to promulgate the content of the Inclusionary Policy Bulletin into the QAP. Accordingly, the Agency proposes amendments to N.J.A.C. 5:80-33.9(b), which deals with the issuance of LIHTC from volume cap to inclusionary developments, and to N.J.A.C. 5:80-33.12(a), which governs eligibility requirements for the admission of inclusionary developments into.tax-credit cycles. Specifically, the Agency would delete, in both N.J.A.C. 5:80-33.9(b) and 33.12(a), a sentence that states: "In evaluating these criteria [that is, whether the market rate residential or commercial units are unable to internally subsidize the affordable units and the affordable units are developed contemporaneously with the commercial or market rate residential units], NJHMFA shall apply the standards as promulgated by the DCA [Department of Community Affairs] for similar types of projects seeking Balanced Housing Funds." These deletions would be consistent with the Agency's proposed new N.J.A.C. 5:80-33.9(b)1 through (b)4, which is also proposed, by cross-reference, at N.J.A.C. 5:80-33.12(a).

The amendments include the presumption, the procedure for overcoming that presumption, and the documentation required to be submitted in support of an applicant's demonstration of any of the three overriding circumstances. Among the required documentation is "[a] description and the documentation of any business arrangements regarding additional components of the market-rate development" at proposed N.J.A.C. 5:80-33.9(b)4iii. This provision is to encompass any relevant contractual, legal, or municipal obligations with respect to components of a project other than the market-rate and affordable units, in recognition of the reality that some inclusionary projects are more complex than simply one market-rate and one affordable component. For example, in one instance, the affordable project was fulfilling the affordable obligation for multiple market-rate projects. Also, while there may be a phase of the market-rate component running concurrently with the affordable component, there may also be other components (for example, additional phases or commercial components) that are relevant in determining the amount of internal subsidy.

The effect of the proposed amendments would be to codify the Agency's standards as currently set forth in the Inclusionary Policy Bulletin. Those standards would be applicable, as under existing practice, to applicants for both volume-cap (noncompetitive four-percent) tax credits and competitive nine-percent tax credits. The proposed amendments provide, as does the Inclusionary Policy Bulletin, that in determining whether an applicant has "conclusively demonstrate[d]" a need for LIHTC, an "initial presumption" will be made that the municipally approved inclusionary zoning alone creates a realistic opportunity for construction of the affordable units in a development and that such zoning is sufficient to internally subsidize the units required to be built under the fair share plan/judgment of repose or compliance. The burden is placed on the applicant to overcome that presumption by demonstrating, to the satisfaction of the Agency, that LIHTC are needed to subsidize any affordable units in excess of the municipal obligation; economic conditions have changed so dramatically that the zoning, taking any density bonus received into account, no longer creates sufficient internal subsidy to construct the required affordable units; or the municipally approved zoning erroneously determined that the internal subsidy provided by the market-rate units would be sufficient to construct the affordable units (collectively, the "three overriding circumstances"). Consistent with the content of the Inclusionary Policy Bulletin, the proposed amendments require that "sufficient documentation" be presented to demonstrate any one or more of these overriding circumstances and sets forth an itemization of the information and documentation required to be submitted, including basic development information; a description and the documentation of any financial ties and/or subsidies; a description and the documentation of any business arrangements regarding additional components of the market-rate development; information about the market-rate components linked to the affordable component; a description and the amount of all subsidy requests; terms and conditions of the land purchase and the current market value of land proposed to be utilized in the development; the documentation of municipal approvals; information on market conditions that support anticipated revenue streams; pro formas for both the market-rate and affordable components of the development; a feasibility analysis conducted by an independent third party; and any additional information deemed necessary to conduct the analysis.

This notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5 because a 60-day comment period is being provided.

Social Impact

The proposed amendments are to codify the Agency's current policy as set forth in, and as applied prior to issuance of, the Inclusionary Policy Bulletin. The Agency anticipates a positive social impact in that the finite amount of LIHTC allotted to the State may, by application of the detailed submission and review policy now provided for by the Inclusionary Policy Bulletin, be stretched to reach more projects in more municipalities.

Economic Impact

The Agency does not anticipate a fiscal impact to the State. This proposed rulemaking seeks to incorporate the existing content of the Inclusionary Policy Bulletin into the QAP – it does not seek to change existing policy or standards. The amount of LIHTC allotted to the State is a fixed amount for any given year; while the standards to be applied to inclusionary-project applicants (as currently set forth in the Inclusionary Policy Bulletin and sought to be codified) may impact the allocation of tax credits among individual applicant projects, it will not affect the total amount of credits that will ultimately be awarded (which amount is determined by the Federal government). There is, thus, not expected to be a fiscal impact to the State.

The Agency anticipates that it will retain the services of a planner to help evaluate applicants' submissions pursuant to the proposed amendments. The cost of the planner, which is to be determined, will be borne by the Agency.

For inclusionary-project LIHTC applicants, the Agency estimates it will cost approximately $15,000 (the cost of an expert outside consultant) for each affected housing sponsor to comply with the proposed amendments. However, the Agency notes that because the proposed amendments codify current practice, as applied both before issuance of and under the Inclusionary Policy Bulletin, this cost would not be "imposed" by the rule but would rather be a continuation of a cost already required for inclusionary projects.

Federal Standards Statement

The proposed amendments and new rule do not contain any standards or requirements that exceed the standards or requirements imposed by applicable Federal law.

Jobs Impact

The proposed amendments are not expected to create or result in the loss of any jobs.

Agriculture Industry Impact

The proposed amendments are not expected to have any impact on the agriculture industry in the State of New Jersey.

Regulatory Flexibility Analysis

The proposed amendments will continue in effect the existing reporting, recordkeeping, and compliance requirements of the Inclusionary Policy Bulletin, which was prepared to lay out the Agency's policy with respect to the financing of inclusionary developments seeking LIHTC. The reporting requirements that would be required for submission under the proposed amendments include basic development information; a description and the documentation of any financial ties and/or subsidies; a description and the documentation of any business arrangements regarding additional components of the market-rate development; information about the market-rate components linked to the affordable component; a description and the amount of all subsidy requests; terms and conditions of the land purchase and the current market value of land proposed to be utilized in the development; the documentation of municipal approvals; information on market conditions that support anticipated revenue streams; pro formas for both the market-rate and affordable components of the development; a feasibility analysis conducted by an independent third-party; and any additional information deemed necessary to conduct the analysis.

Typically, the Agency receives applications for LIHTC from approximately two inclusionary projects, containing a total of approximately 150 rental units, per year, the housing sponsors of which projects are small businesses as defined in section 2 of the Regulatory Flexibility Act, N.J.S.A. 52:14B-17. The proposed amendments were drafted to minimize the adverse economic impact on small businesses, while being consistent with the stated objective of the A500 legislation (that is, to award inclusionary projects allocations of low income housing tax credits, provided that the applicants can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units). The Agency's contemplated implementation of the rule is consistent with that approach, since the Agency will bear the to-be-determined cost of the planning consultant rather than passing that cost on to inclusionary-project applicants. The determination of whether inclusionary-project applicants have overcome the presumption that the municipally-approved inclusionary zoning alone creates a realistic opportunity for construction of the affordable units is an extremely complex matter, often involving multiple parties, intricate financing modules, and possibly crossing municipal boundaries. In order to properly make this determination, the Agency deems it will be necessary – as it has been both before and since issuance of the Inclusionary Policy Bulletin – to retain the assistance of an outside consultant (in addition to a planner) at the approximate cost of $15,000. The cost of the consultant, as is the current practice, will be passed on to each applicant.

Housing Affordability Impact Analysis

The Agency finds that the proposed amendments would impose an insignificant impact on the affordability and average cost of housing, both because the scope of the proposed amendments is narrow (being applicable to only an estimated 150 prospective multiple-family rental housing units, some of which may be rehabilitations of existing units) and, for the same reason, because there is an extreme unlikelihood that the proposed amendments would evoke a change in the average costs associated with housing.

Smart Growth Development Impact Analysis

The Agency finds that the proposed amendments would impose an insignificant impact on smart growth, both because the scope of the proposed amendments is narrow (being applicable to only an estimated 150 prospective multifamily rental housing units per year, some of which may be rehabilitations of existing units) and, for the same reason, because there is an extreme unlikelihood that the proposed amendments would evoke a change in the housing production within Planning Area 1 or 2, or within designated centers, under the State Development and Redevelopment Plan.

Racial and Ethnic Community Criminal Justice and Public Safety Impact

The Agency has evaluated the proposed amendmens and determined that it will not have an impact on pretrial detention, sentencing, probation, or parole policies concerning juveniles and adults in the State. Accordingly, no further analysis is required.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 33. LOW INCOME HOUSING TAX CREDIT QUALIFIED ALLOCATION PLAN

5:80-33.9 Volume cap credits

(a) (No change.)

(b) A mixed-income or mixed-use project that is part of a municipal fair share housing development plan or a court-approved judgment of repose or compliance, including, but not limited to, developments that have received a density bonus, may not receive volume cap credits unless the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units and the affordable units are developed contemporaneously with the commercial or market rate residential units. [In evaluating these criteria, NJHMFA shall apply the standards as promulgated by the DCA for similar types of projects seeking Balanced Housing funds.] This subsection shall not be evaded by failing to apply all or any portion of the subsidy to the low- or moderate-income units, by diverting all or any portion of the subsidy to other uses, or by using any other device in which all or any portion of the subsidy is not used to benefit low- or moderate-income housing.

1. In determining whether an applicant has conclusively demonstrated that the market rate residential or commercial units are unable to internally subsidize the affordable units, the Agency shall make an initial presumption that the municipally approved inclusionary zoning, in and of itself, creates a realistic opportunity for the affordable units to be built and that such zoning is sufficient to support the internal subsidization of the affordable units required to be built under the fair share plan or the judgment of repose or compliance applicable to the municipality in which the project is situated.

2. The presumption set forth in (b)i above may be overcome if the applicant demonstrates, to the satisfaction of the Agency, the existence of any one or more of the circumstances in (b)2i, ii, or iii below:

i. Tax credit equity is necessary to subsidize any affordable units to be built in excess of the municipal obligation;

ii. Economic conditions have changed since approval of the municipally approved inclusionary zoning to such an extent that the zoning, taking into account any density bonus

awarded, no longer supports sufficient internal subsidization to sustain construction of the requisite affordable units; or

iii. The municipally approved zoning erroneously determined that the internal subsidy would be sufficient to sustain building the affordable units.

3. It is the responsibility of the applicant to provide sufficient documentation to support the existence of any of the circumstances in (b)2i, ii, or iii above. Any analysis submitted by the applicant shall expressly take into consideration the possibility of a partial award of low-income housing tax credits (LIHTC), taking into account the internal subsidy provided by the market-rate units.

4. The sponsors of all inclusionary developments seeking tax-credit financing shall submit the information in this paragraph to enable the Agency to determine the need, if any, for tax credits. The Agency shall determine the amount of tax credits, if any, to be awarded to a project as part of the needs analysis required pursuant to 26 U.S.C. § 42(m)(2).

i. Basic development information, including, but not limited to, the following:

(1) A site plan for both the affordable and market-rate components; and

(2) A timetable for the affordable and market-rate components, which shall include the timing of any phased development and the availability of units for rent or sale;

ii. A description and the documentation of any financial ties and/or subsidies, including, but not limited to, the sale or transfer of land, shared infrastructure improvements, and financing, between the affordable and market-rate components;

iii. A description and the documentation of any business arrangements regarding additional components of the market-rate development;

iv. Information on all market-rate components linked to the affordable component;

v. A description and the amount of all subsidy requests, including, but not limited to, the following:

(1) Any density bonus, payment in lieu of taxes (PILOT) agreement, affordable housing trust fund contribution, State or Federal grant, and low-income housing tax credit application; and

(2) Copies of any Form 10 submission(s) for the affordable component;

vi. Terms and conditions of the purchase of land and the current market value of land proposed to be utilized in the development, including, but not limited to, the following:

(1) Documentation of any prior land purchase and/or current land purchase agreement, including date(s) of sale, price, acreage, parcel boundaries, and any terms or conditions of sale; and

(2) An estimate of the current market value of the land, with justification as to how the estimate was derived (for example, appraisal, recent sale, sale of comparable parcels of land, alternative uses, etc.);

vii. Documentation of municipal approvals, including, but not limited to, the following:

(1) Fair Share Plan and/or judgment of repose or compliance applicable to the municipality in which the project is situated;

(2) Local planning board approvals for the affordable units and any associated market-rate or commercial units; and

(3) Land use approvals for the affordable units and any associated market-rate or commercial units;

viii. Information on market conditions in support of anticipated revenue levels, including, as applicable, comparable properties, market-level pricing information, and market studies;

ix. A pro forma for both the market-rate and the affordable components of the development, including, but not limited to, the information in (b)4x(1) through (4) below for both. All calculations are to be provided electronically, with live Excel sheets:

(1) Development costs;

(2) Development financing, including equity and/or loans, with amounts and anticipated interest rates;

(3) Operating/sales costs; and

(4) Anticipated revenue from rentals or sales, including ancillary sources and/or unit upgrades;

x. A feasibility analysis conducted by an independent third-party skilled in market and financial analysis, certified to the Agency, and including, but not limited to, the information in (b)4x(1) through (3) below. All calculations are to be provided electronically, with live Excel sheets:

(1) The calculated internal rate of return (IRR) for both the market-rate project and the combined project, with and without the requested LIHTC;

(2) A narrative explanation, signed by the applicant, of the reason(s) for the insufficiency of the combined project returns absent the requested LIHTC. The narrative shall explain the basis for the insufficiency and shall be tied to the financial analysis; and

(3) Any other financial analyses used to support the narrative explanation.

(4) The feasibility analysis must reflect and be consistent with the pro formas referenced at (b)4ix above.

xi. The Agency reserves the right to request any additional information from the applicant as deemed necessary to conduct the needs analysis.

(c) (No change.)

5:80-33.12 Application to a cycle/eligibility requirements

(a) A mixed-income or mixed-use project that is part of a municipal fair share housing development plan or a court-approved judgment of repose or compliance, including, but not limited to, developments that have received a density bonus, may not compete for tax credits (ceiling tax credits), unless the applicant can conclusively demonstrate that the market rate residential or commercial units are unable to internally subsidize the affordable units and the affordable units are developed contemporaneously with the commercial or market rate residential units. [In evaluating these criteria, NJHMFA shall apply the standards as promulgated by the DCA for similar types of projects seeking Balanced Housing funds.] This subsection shall not be evaded by failing to apply all or any portion of the subsidy to the low- or moderate-income units, by diverting all or any portion of the subsidy to other uses, or by using any other device by which all or any portion of the subsidy is not used to benefit low- or moderate-income housing. For example, if a site was originally zoned at four units per acre and a rezoning resulted in six units per acre with a 20 percent set-aside for low- and/or moderate-income units, then the site would be the recipient of a density bonus. If the developer built at six market units per acre, subdivided a portion of the acreage and donated that land to a for-profit or nonprofit developer, then the new owner may not compete for ceiling tax credits if the market rate residential units were able to subsidize the affordable units. Alternatively, if on the same site the number of low- and moderate-income units is increased without a corresponding increase in density, then the additional affordable units would be eligible to compete for ceiling tax credits. **In determining whether an applicant has conclusively demonstrated that the market rate residential or commercial units are unable to internally subsidize the affordable units, the Agency shall apply the standards set forth at N.J.A.C. 5:80-33.9(b)1 through 4.**

(b)-(c) (No change.)