December 2011 | Volume XXIII No. 12

Tax Credit Advisor

PUBLISHED IN ASSOCIATION WITH THE NATIONAL HOUSING & REHABILITATION ASSOCIATION

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Taking Stock of Our Journey

Thom Amdur

As we close out the year I'd like to take a moment to reflect on where we have been and where we are going.

After two years of uncertainty in the equity market, our investors came back in a big way in 2011, infusing much-needed capital back into the affordable housing, historic rehabilitation, and new markets tax credit marketplace.

NH&RA members closed some of the most creative and innovative transactions that I have ever seen, and our sector led the way as one of the few areas of growth in a stalled economic recovery.

All the while we continued to serve a clientele bearing the brunt of the economic downturn in ever greater need of the affordable housing that we provide.

For all of the success that we have seen, we did it in a time of great uncertainty and adversity. We narrowly averted a disruptive government shutdown.

We are an industry of friendly competitors who come together at events such as NH&RA's Fall Developers Forum to learn from and inspire one another and to collaborate on a wide range of areas, including advocacy, education, and future transactions and opportunities.

Today we are fighting for our livelihoods, and, more importantly, for the lives of our residents – to defend our programs in the deficit reduction debate in a declining budgetary environment.

We all know that the future is uncertain. Soft financing will be increasingly difficult to come by. It is unclear if or when important tax extenders will be addressed by the Congress. It is anybody's guess as to how the unraveling European sovereign debt crisis will impact the economic recovery here at home.

I am writing this month's column in mid-November as I return from Boston after an exciting NH&RA Fall Developers Forum. Over two days of discussion, with many of the industry's most successful and innovative developers and affordable housing professionals, I was reminded that we are uniquely positioned to succeed in challenging times.

We are fortunate to work in an industry led by people with unique vision and creativity. This year we honored HUD Assistant Secretary Sandra Henriquez as well as Reznick Group principal and past NH&RA Chairman John Mackey with our Affordable Housing Vision Award. As we celebrated Sandra's and John's leadership, I looked around the room and realized that I was in the midst of more than 200 professionals spanning three generations who have been innovators and visionaries in their own right and will help guide us through these uncertain days.

We are an industry of friendly competitors who come together at events such as NH&RA's Fall Developers Forum to learn from and inspire one another and to collaborate on a wide range of areas, including advocacy, education, and future transactions and opportunities. When we work together we all succeed. It will take all of this and more to see our way through the challenges that we will face in 2012 and beyond.

I want to thank everyone who has supported NH&RA and our industry over the past year. We hope to share much more success in 2012, and ask that you continue to advocate, innovate, and share with us in 2012. We will be tested in 2012 and your leadership is needed.

From everyone at NH&RA and *Tax Credit Advisor* we wish you a safe and happy holiday season and a successful new year.

Thom Amdur is Associate Publisher of the Tax Credit Advisor *and Executive Director, National Housing & Rehabilitation Association.*

Tax Credit Advisor
December 2011
Vol. XXIII No. 12

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Subscriptions are $329 per year.
Special rates are available for community-based nonprofit groups; call 202-939-1790.

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Low-Income Housing Tax Credit

Historic Rehabilitation

Correction

An article in the November 2011 issue of *Tax Credit Advisor* (p. 6) stated the incorrect deadline for non-federally subsidized buildings to be placed in service in order to qualify for the minimum or "fixed" 9 percent rate for the 70% present value low-income housing tax credit. Buildings must be placed in service before December 31, 2013.

Columns

Departments

Reseeding the Neighborhood

New Affordable Apartments Rise from Demolished Retail Site in Hoosier State

Rendering of Lafayette Landing at Kessler
Rendering by Herman Kittle Properties

In much of America, vacant or underutilized retail shopping centers are dragging down surrounding neighborhoods.

That's the case in parts of Indianapolis, Indiana's largest city. Yet here, in a $10.1 million transaction, a public-private partnership is drawing a line in the sand to demolish a vacant retail strip center and build 72 attractive new affordable apartments for seniors 55 and older, using federal low-income housing tax credits and Neighborhood Stabilization Program dollars.

The project, called Lafayette Landing at Kessler, is being developed by the Partnership for Affordable Housing, Inc. (PAH), a local nonprofit, and Herman & Kittle Properties, Inc., a locally based for-profit company that develops, builds, owns, and manages affordable rental housing properties in eight states. Including Lafayette Landing, PAH has developed six affordable rental housing properties in Indiana since 1992, all using housing tax credits.

Federal, state, and city resources are helping to fund the development.

"Public-private partnerships are transforming Indianapolis neighborhoods, and Lafayette Landing is a prime example of this," Indianapolis Mayor Greg Ballard said at the groundbreaking in late July. "Strategic re-use of this site will support area revitalization efforts and help meet the needs of a growing senior population."

When completed, Lafayette Landing will contain 56 one-bedroom and 16 two-bedroom apartments with initial monthly rents ranging from $265 to $575. Some units will be rented to tenants making 30% or less of the area median income (AMI), and some rented to tenants at or below 40, 50, and 60 percent of AMI, said PAH President Julian P. Rodgers III. The annual income limit for a one-person household at 60% of AMI is $27,720.

Rodgers said the four-story building will be LEED certified, containing social rooms on the first floor, a computer room, an activity room, and an exercise room. Herman & Kittle will manage the development.

"We're extremely excited about it: about the design, the management, our partners, and about the services we're going to be able to provide to the residents," says Rodgers. "We're adding some housing stock that is well needed in this neighborhood."

Timothy J. Shafer

"It's going to be a real attractive addition to the neighborhood," adds Timothy J. Shafer, Secretary to the Board of PAH.

Neighborhood on the Edge

Lafayette Landing is being constructed in a neighborhood described as on the "edge" by city economic

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Former Shopping Center
Photo by Herman Kittle Properties

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development official Jennifer Fults. "There's been probably quite a bit of disinvestment over the past 10 years or so in that area," she says. "It's one of those areas that's on the tipping point. If investment doesn't happen it could tip…We're making some investment here, hoping to spur other investment so that it doesn't get to the point of mass disinvestment."

Located along a major corridor on the city's west side, the site was occupied by a 47-year-old small retail shopping center – Ayr-Way Mall – that once thrived but fell on hard times many years ago. It was originally anchored by the Ayr-Way department store, which became a Target in the 1980s. But it eventually became an eyesore as storefronts shuttered and disrepair mounted. The last tenant was a few years ago, when a church occupied some of the space.

NSP Funding, Strategy

Lafayette Landing is one of a handful of projects that the city is assisting with federal dollars received in the third funding round of the Neighborhood Stabilization Program (NSP3). Established in 2008 and administered by the U.S. Department of Housing and Urban Development, the NSP program is designed to help states and localities revitalize distressed neighborhoods ravaged by high rates of home foreclosures and vacant properties. While grantees have used the lion's

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Lafayette, continued from page 3

share of funds for single-family housing activities, such as renovating and re-selling foreclosed homes to lower-income families, some have used monies for rental housing projects as well. These have usually been acquisition/rehab, though new construction is permitted under certain conditions. Grantees must spend at least 25% of their NSP dollars to house people making 50% or less of AMI.

The City of Indianapolis has earmarked its NSP3 funds for demolition and rental housing development, unlike its NSP1 allocation split between owner-occupied and rental housing. For NSP3, the city decided to invest the funds in the areas of greatest need, developing a numerical neighborhood score and numerical neighborhood health indicator score for each neighborhood (census block group); categorizing neighborhoods (in decline, stable to declining, stable, stable to improving, and improved); and then ranking them to determine those with the greatest need. The 11 data indicators used for scoring were education level, income, poverty, unemployment, demolition permits, vacant/boarding orders, repair orders, long-term utility disconnects, foreclosures, new building permits, and assessed violations. The higher the neighborhood health indicator score, the greater the need.

The city's twofold strategies were to invest NSP3 in areas (1) that have the highest need to impact the current housing market and improve quality of life for residents, and, (2) that are beginning to decline and that are adjacent to declining neighborhoods, to stem the weakening housing market, slow down the deterioration, and increase private investment.

The city's NSP3 application indicated that roughly 10% of the 336 residential addresses in the neighborhood where Lafayette Landing is being built had been vacant for 90 or more days. In addition, 13.9% of the housing units were 90 days or more delinquent in their mortgage payments or in foreclosure, and a large share of the single-family housing units were bought with a high-cost mortgage during 2004-2007.

Funding Sources

Rodgers said the deal came together after PAH and Herman & Kittle discovered their mutual interest in developing a new affordable housing project in Indianapolis, they found that the owner of the retail commercial property was willing to sell, and the city and state expressed support for the project and for the revitalization of the neighborhood.

Julian P. Rodgers III

The city provided a grant of $900,000 in NSP3 funds and a grant of $275,000 in federal HOME program funds that were loaned to the project partnership. The Indiana Housing & Community Development Authority (IHCDA) allocated $8 million in 9% low-income housing tax credits, which were syndicated by Raymond James Tax Credit Funds, Inc. to raise roughly $7 million in tax credit equity. Other funding sources included a conventional first mortgage from KeyBank, a second mortgage from IHCDA, a deferred developer fee, and a note from the seller of the property. KeyBank is also the construction lender.

Fulton said the city feels Lafayette Landing is a good use of the city's funds. "It does something with a vacant dilapidated property that's been in that condition for quite some time. It also provides affordable housing options in an area where there may not be as many options for some individuals." TCA

Source and Uses Summary

SOURCES

9% Low-Income Housing Tax Credit Equity (Raymond James)	$7,006,302
Seller Contribution	$162,500
Deferred Developer Fee	$486,364
1st Mortgage (KeyBank)	$900,000
2nd Mortgage (Indiana Housing & Community Development Authority)	$400,000
HOME Program Funds	$275,000
Neighborhood Stabilization Program 3 Funds	$900,000
Total Sources	**$10,130,166**

USES

Acquisition Costs	$847,900
Construction Costs	$6,194,037
General Development Costs	$1,211,912
Capitalized Interest	$470,000
Financing Costs	$456,630
Reserves	$661,364
Soft & Hard Cost Contingency	$288,323
Total Development Cost	**$10,130,166**

President Obama Signs 'Minibus' Appropriations Bill, Hope Dims for Super Committee Package

On November 18, President Obama signed into law a "minibus" appropriations bill (H.R. 2112) that provides funding for the fiscal year (FY) that began October 1 for the U.S. Departments of Agriculture and Housing and Urban Development (HUD) and several other departments and agencies. The measure also provides stopgap funding for the rest of the federal government through December 16.

Meanwhile, at press time, with just days to go before its November 23rd deadline, prospects were dimming that the Congressional "Super Committee" would approve a package of recommendations to cut the federal deficit by at least $1.2 trillion over 10 years. If the panel fails to do so, or it adopts a package but Congress doesn't approve it by December 23, automatic across-the-board federal spending cuts of $1.2 trillion over 10 years will be imposed.

Appropriations Legislation

The minibus appropriations act includes funding for federal housing and economic development programs administered by HUD and USDA's Rural Housing Service. It makes sharp cuts, compared to FY 2011 levels, to HUD's HOME, Community Development Block Grant, and public housing capital fund and operating subsidy programs, but boosts funding for rental assistance. It also includes $120 million for the Choice Neighborhoods Initiative program and authorizing language for the new Rental Assistance Demonstration program, which will provide for voluntary conversions of subsidies for public housing properties and certain other multifamily projects to long-term project-based rental assistance. The act also provides funding for RHS rural rental housing programs.

(Appropriations act, http://tinyurl.com/88hj67v ; conference report: http://tinyurl.com/cfz9lqr)

Letters to Lawmakers, Advocacy Actions

In November, advocates wrote and lobbied Congressional members and staffs to gain or solidify support for their tax credit programs.

The New Markets Tax Credit Coalition collected signatures from organizations and firms for a *Dear Colleague* letter going to members of Congress urging them to support legislation to reauthorize the federal new markets tax credit program to extend it beyond December 31, 2011. Separately, more than 1,500 organizations and companies signed a November 9 letter urging Congress to pass legislation before year-end to extend critical federal tax provisions set to expire on December 31. Meanwhile, Rental Housing A.C.T.I.O.N. and its supporters continued to urge lawmakers to protect the low-income housing tax credit program and support legislative amendments to extend the minimum 9 percent rate for the 70% present value housing credit and to establish a minimum 4 percent rate for the 30% present value housing credit for acquisition costs only. TCA

Enacted FY 2012 Appropriations for Certain HUD, RHS Programs

HUD Programs	FY 2011 Enacted	FY 2012 Enacted
Project-Based Rental Assistance	$9,264,563,000	$9,339,672,000
Tenant-Based Rental Assistance *	$18,378,872,624	$18,914,369,000
Public Housing Capital Fund	$2,040,111,600	$1,875,000,000
Public Housing Operating Fund	$4,616,748,000	$3,961,850,000
HOME Investment Partnerships	$1,606,780,000	$1,000,000,000
HOPE VI/Choice Neighborhoods	$165,000,000	$120,000,000
Community Development Block Grants	$3,500,984,000	$2,948,090,000
Supportive Housing for the Elderly (Section 202)	$399,200,000	$374,627,000
Supportive Housing for Persons With Disabilities (Section 811)	$149,700,000	$165,000,000
Homeless Assistance Grants	$1,901,190,000	$1,901,190,000
Housing Opportunities for Persons With AIDS	$334,330,000	$332,000,000

USDA Rural Housing Service Programs	FY 2011 Enacted	FY 2012 Enacted
Section 515 Rural Rental Direct Loans	$69,372,000	$64,478,000
Section 538 Guaranteed Rural Rental Loans	$30,898,080	$130,000,000
Section 521 Rural Rental Assistance	$953,723,000	$904,653,000,000

** Includes $75 million for VASH vouchers for veterans*

Oregon Court Enforces Former Tenant's Right to Enforce LIHTC Extended Use Commitment

In what is believed to be the first judicial ruling of its type, the Court of Appeals for the State of Oregon has reversed a lower court decision and held that a former tenant has the right to enforce the extended use agreement for a project despite a "release agreement" between the state housing credit agency and owner to terminate it early. The decision underscores the risks from early termination of the extended use commitment in LIHTC projects on grounds other than those explicitly permitted in federal statute or IRS guidance.

The victorious plaintiff-appellant in the case was Sarah Nordbye, "individually and on behalf of all others similarly situated," according to the appeals court opinion. *(Sarah Nordbye v. BRCP/GM Ellington and Oregon Housing and Community Services Department, October 26, 2011)*

The appeals court remanded the case to the Multnomah County Circuit Court for additional fact finding and to determine what remedies are appropriate and what other action should be taken.

The appeals court remanded the case to the Multnomah County Circuit Court for additional fact finding and to determine what remedies are appropriate and what other action should be taken.

Lisa Joyce, a spokesman for Oregon Housing and Community Services (OHCS), said "we're disappointed. We disagree with the ruling." She added, "We're still evaluating what the next steps will be." Joyce said the state Justice Department could ask the Oregon Court of Appeals to reconsider its decision, if an internal committee decides to go that route, or the decision could be appealed to the Oregon Supreme Court.

Under the LIHTC program, an extended use commitment is an agreement to lease a project's tax credit units at restricted rents to low-income tenants for 30 years.

Series of Owners

According to the opinion, the original owner entered into a LIHTC reservation and extended use agreement with OHCS, the state housing credit agency, in December 1990. Under this, the owner agreed to maintain 100% of the project as low-income housing for 30 years and to record a declaration of land use restrictive covenants. In this declaration, the owner acknowledged specific obligations and restrictions imposed by the extended use agreement.

The project – not identified in the opinion – later ran into compliance problems. In trying to remedy these, OHCS learned that the original owner had transferred ownership of the property in 2002 or 2003 to a new owner without notifying the agency and in violation of the terms of the declaration.

OHCS later concluded that, while the second owner had made progress, the project couldn't be brought into full compliance with LIHTC program requirements.The agency notified the IRS of this conclusion and of its decision to remove the project from the LIHTC program. It filed multiple IRS 8823 forms, and the IRS ultimately recaptured a portion of the housing credits previously claimed with respect to the project.

Release Agreement

In 2005, the owner and OHCS signed an agreement in part releasing "one another from all claims, causes of action, and other liabilities, actual or potential, arising out of or related to the allocation and subsequent rescission of the low-income housing tax credits and the execution and recording of the related Declaration referenced above..." This release agreement terminated the extended use commitment, but continued, for the next three years, the LIHTC rent restrictions for current tenants and a prohibition by the owner or any subsequent owners against evicting or terminating the tenancy of low-income tenants except for good cause.

In 2006, the second owner sold the project to a third owner, BRCP/GM Ellington (BRCP), an Oregon limited liability corporation and co-defendant in the current case. Prior to year end, BRCP issued a 30-day no cause eviction notice to Sarah Nordbye, among other tenants. She ultimately moved. According to the opinion, BRCP did not screen tenants for income eligibility nor rent exclusively to low-income tenants.

Nordbye sued to enforce the original commitment to maintain the property as low-income housing for the

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remainder of the declaration's 30-year term. BRCP and OHCS moved for summary judgment, arguing that that the release agreement providing for early termination of the 30-year extended use commitment was "valid and enforceable against plaintiff and other current and future tenants." The county court ruled in favor of the defendants, but was overturned on appeal by the state appeals court.

Arguments Supporting Reversal

In its opinion, the appeals court noted that federal statute explicitly states that the extended low-income housing commitment for a LIHTC project is "binding on all successors" of a taxpayer, and that individuals meeting the income limit for the building (whether prospective, present, or future occupants of the building) have the right to enforce the extended low-income housing commitment in any state court. The appeals court indicated that this right was not extinguished by the release agreement between OHCS and the second owner.

The court noted that the federal tax code explicitly permits early termination of the extended use period in only two situations – neither which applied in the current case. These include foreclosure and the failure for a state agency to find a qualified buyer (i.e., qualified contract) for the purchase of the low-income portion of a building after the 15-year compliance period.

The court also indicated that an IRS employee's oral advice to OHCS that the specific project could be kicked out of the LIHTC program for noncompliance did not have official weight, nor did an argument to rely on the IRS' so-called 8823 Guide.

The appeals court also rejected an argument that a *Chevron* deference applied to the Oregon agency's interpretation of federal statutory requirements. The court said such deference only applies to a federal agency's administrative interpretation of federal laws, not to interpretation by a state agency.

Reaction to Opinion

"I think it's a very important decision," said Washington, D.C. tax attorney Anthony Freedman, a partner in Holland & Knight who works on LIHTC transactions and advises a number of client state housing finance agencies. "It reminds owners, it reminds lenders, and it reminds agencies that the [Internal Revenue] Code requires that third parties have the right to enforce these extended use agreements. And they have the right to enforce them under state real estate law."

He continued, "That means that it's not simply a decision to be made by the housing credit agency and the borrower, the project owner. But that other people can look at and disagree with that decision. And that's something that state agencies in particular have to take into account."

Freedman suggested that early terminations of the extended use commitment for LIHTC projects other than for reasons of foreclosure or qualified contract could be open to challenge, though some situations may have a stronger legal basis than others.

For instance, he noted that IRS Revenue Ruling 95-49 permits an early termination of the extended use commitment because of the exercise of a right of first refusal by a tenant or tenants to purchase the building after the 15-year compliance period in order to convert it from low-income rentals to low-income homeownership. This revenue ruling notes that no federal tax benefits will be disallowed to the owner merely because of the existence of such a right of first refusal, and that the availability of low-income housing beyond the compliance period is continued by permitting low-income tenants to be homeowners rather than renters.

Of the requests he is aware of to state agencies for modification or early termination of the extended use agreement, Freedman said the most common reason – other than for foreclosure or qualified contract – has been for conversion to homeownership. Yet while believing that situations relying on Revenue Ruling 95-49 have a stronger legal basis than the situation in the Oregon case, Freedman noted that any early termination other than those explicitly permitted by statute may be open to challenge by an eligible third party seeking to enforce the extended use agreement, as occurred in the Oregon case.

Freedman suggested there may be risk as well for parties that have patterned transactions after the facts in IRS Private Letter Ruling No. 200703024, based upon Rev. Rul. 95-49, which permitted the early termination of the extended use commitment in a project where the low-income tenants had the right to purchase their units as affordable condominiums after the end of the compliance period.

(Opinion: http://tinyurl.com/cxlfg8o) TCA

Commonwealth Dairy, Brattleboro, Vermont

Raison d'être

The New Markets Tax Credit and Commonwealth Dairy

Commonwealth Dairy, a startup operation in Brattleboro, Vt., is just the kind of business that the federal new markets tax credit was designed to spur, in just the location the program was meant to boost.

In operation for six months now, the newly constructed, $22 million, 38,500-square-foot facility produces yogurt for private-label brands sold in supermarkets and other retailers primarily east of the Mississippi, and sold under the company's own brand name, Green Mountain Creamery, in Vermont and other parts of New England.

In addition to 65 employees, a sizable number of jobs in this small rural town, the company supports numerous local dairy farmers by buying their milk through a co-op, and supports other local businesses as well.

"We're going full steam," says Thomas Moffitt, president of Commonwealth Dairy. "We're running night and day."

The Path to Fruition

However, "but for" the new markets tax credit, the dream of Moffitt and his business partner Ben Johnson to launch Commonwealth Dairy probably wouldn't have played out.

"We explored every type of financing," without success, says Moffitt, who started the firm with Johnson and a joint venture financial partner – a family-run international yogurt company based in Germany with plants abroad. "Dairy plants tend not to be a particularly sexy area of business. It tends to be low margin, high infrastructure, high asset investment-type projects."

Unfortunately, the partners were looking for funding right after the collapse of the credit and housing mar-

Dairy, continued on page 14

Waiting and Wondering

New Markets Tax Credit Industry Participants Hope for Reauthorization of Program

"Reauthorization is at the top of everyone's mind," says Matthew Philpott, of U.S. Bancorp Community Development Corporation (USBCDC), when asked his biggest current challenge or concern as an investor in the federal new markets tax credit (NMTC) program.

"The program expires at the end of December if Congress doesn't approve legislation by year-end to extend it," Philpott notes. "There's only one more round of allocation authority that will be made available. The concern would be that if the program is not reauthorized on a timely basis, we could see people leaving the industry, shrinking their financing activity."

Photo by Tim Parker Photography

Matthew Philpott

Philpott is "optimistic" that the NMTC program will be extended, adding, "It would be preferable from our standpoint if there was more permanency to the program and it could get reauthorized for another five years. The most important thing about investing anywhere is predictability."

Virtually all program participants interviewed identified the authorization of the NMTC as their top concern or challenge, including Donna Gambrell, Director of the Community Development Financial Institutions (CDFI) Fund *(see article on p. 16)*.

A year ago, in November 2010, the industry was in a similar pickle. Congress hadn't yet passed an extension – authorization lapsed on December 31, 2009 – but the CDFI Fund still opened a new NMTC application round in 2010 anticipating the program's renewal with fresh funding. Not until mid-December 2010 did Congress pass and President Obama sign a tax bill extending the NMTC program though 2011 with $3.5 billion apiece for new funding rounds in 2010 and 2011.

This year the industry is assured of at least one more round of NMTC allocation awards, expected to be announced in late winter 2012. But muddying the outlook a bit is nervousness about whether Congress, in its deficit-cutting mindset these days, might try to cut back the NMTC program, either as the result of recommendations by the "Super Committee" or through future tax reform legislation.

Pending Legislation

NMTC bills pending in Congress include:

- **H.R. 2655/S. 996**, to extend the NMTC program through 2016 and provide $5 billion in allocation authority each year (with the annual amount adjusted for inflation after 2012), and to permit the NMTC to offset federal alternative minimum tax (AMT) liability for pre-2017 qualified equity investments (QEIs). H.R. 2655, introduced by Rep. Jim Gerlach (R-Pa.), had 46 co-sponsors as of mid-November; S. 996, introduced by Sen. John D. Rockefeller IV (D-W.V.), 19. A recent bill, **H.R. 3244**, by Rep. Brian Higgins (D-N.Y.), is the same as the two others but would provide $10 billion in allocation authority each year.
- **H.R. 2718/S. 1456**, to provide an extra $250 million in NMTC authority each year for award to CDEs making QEIs in federally declared disaster areas.
- **H.R. 2740**, to treat, as qualified low-income communities (LICs), census tracts adjoining two or more LICs for which there is not available information to qualify such tracts as an LIC.

Investor Pool, Leveraged Loan Funds

As the NMTC program prepares to begin effectively its tenth year (while authorized in 2000 the first funding round wasn't until 2002), there appears to be an ample supply of equity available from investors for new transactions, but a continuing shortage of leveraged loan funds from conventional third parties such as banks, sources noted.

"From the equity side I think the market is healthy," says Washington, D.C. tax attorney Jerry Breed, a partner

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NMTC, continued from page 13

at Bryan Cave LLP. He added, "The volume of transactions has increased and is very high."

Sources said there are still just a small number of major active investors in the NMTC program, headed by USBCDC, the community development investment arm for Midwest-based U.S. Bank, and including JPMorgan Chase, Wells Fargo, and Bank of America Merrill Lynch.

Breed, though, noted that some insurance companies have entered the market. Baltimore CPA Ira Weinstein, of Reznick Group, said some sponsors are pursuing insurance companies and smaller banks.

Ira Weinstein

Philpott expected USBCDC, which he estimated has about a 40% market share, to make about $2 billion in QEIs in 2011 by year-end, about the same volume as 2010 and the volume anticipated for 2012. U.S. Bank also has a CDE, which didn't receive a new NMTC allocation in the last funding round but has applied for $125 million in the current round. Philpott said the CDE only has about $5 million in allocation authority left, in reserve for a potential transaction.

Philpott estimated that current pricing for new markets tax credits is generally from the high 60s (in cents per dollar of credit) to the mid-70s, "depending on a lot of different factors." Weinstein said pricing is generally 70 to 74 cents.

Wide Variety of Projects

Sources said they are seeing,

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kets. "A lot of the banks that we were dealing with went away because they were bought out or put in a position where they were seeking help from the federal government," Moffitt recalls.

Eventually, though, socially progressive Wainwright Bank, a Boston-based lender that has funded affordable housing and new markets tax credit projects, introduced Moffitt and Johnson to folks at the Massachusetts Housing Investment Corporation, a mission-oriented tax credit syndicator that also operates a community development entity (CDE) under the NMTC program. MHIC and a second CDE operated by Coastal Enterprises, Inc., Wicasset, Me., each committed NTMC allocation authority to help finance the Commonwealth Dairy project. The NMTC financing was provided as a seven-year subordinated low-interest loan of about $7 million, and primarily used to cover the costs of constructing the building and buying equipment. U.S. Bancorp Community Development Corporation was the NMTC investor.

Moffitt says the new markets tax credit was the lynchpin that made the project possible. "It was the necessary capital that helped to convince our strategic partner to make this investment. That was pretty critical from a capital standpoint. The secondary benefit was credibility. It opened up a whole bunch of other doors to other forms of financing...Once they understood or heard that new markets tax credits were involved in the project, people were much more interested in being involved as well."

In addition to the NMTC financing and the equity from the financial partner, Wainwright Bank provided a loan for the project and there were other loans and grants. In fact, the town of Brattleboro, which has just 12,500 people, committed $100,000 in federal community development block grant funds to match a similar $700,000 grant from the state.

Eligible Low-Income Community

Brattleboro was picked as the site for the dairy plant, Moffitt notes, because of its sizable local milk supply, handy access to interstate highways, and local infrastructure capacity. Moreover, he says, Brattleboro is the only area in Southern Vermont eligible under the NMTC program, qualifying as a low-income community. In 2009 the median household income was around $32,500.

More than just a taker, Commonwealth Dairy gives back to the community. In addition to providing jobs, the company returns 5% of its net profits to the dairy farmers that supply its milk, provides grants to Vermont university and college students studying dairy sciences or related fields, and sponsors community events, including the famous annual local fair, "The Strolling of the Heifers," where locals walk their cows down Brattleboro's Main Street.

Peering ahead, Moffitt says Commonwealth Dairy is doing quite well and indicates that the new markets tax credit could be in the firm's plans down the road. "The company has grown quite quickly, and we're evaluating the opportunity of expanding the plant. We're looking at whether we could put together another round of financing." TCA

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working on, or investing in a wide variety of NMTC projects still, including both real estate projects, community facilities, and operating businesses.

A diversity of missions and projects is evident among CDEs.

In Arizona, the Phoenix Community Development & Investment Corporation (PCDIC), a tax-exempt corporation and CDE created by the City of Phoenix in 2002, has received three allocation awards totaling $263 million to date, provides NMTC financing only for commercial real estate projects in distressed neighborhoods in the Phoenix area. President & CEO Robert Franco says PCDIC is currently exploring providing allocation authority to help finance a $50 million biomedical science project in the downtown area that would generate higher-paying jobs. CDEs affiliated with four major banks have expressed interesting in participating, he noted.


Roberto Franco

Franco said PCDIC, which provides NMTC financing as seven-year below-market loans with a balloon payment, has made loans to nonprofits and to for-profit developers, and has financed two hotels. One is a four-star Kimpton Hotel in downtown Phoenix that will create 225 jobs. PCDIC and Kimpton have developed a customized job training program to train people for mid-level and senior management jobs as well as lower-paying positions.

CEI Capital Management, LLC, a

NMTC, continued on page 17

CDFI Fund Expects to Announce New Markets Allocation Awards This Winter, Proceed With 2012 Funding Round

The Community Development Financial Institutions (CDFI) Fund expects to announce its ninth round awards of new markets tax credit allocation authority in "late winter" of 2012, and proceed with a tenth round next year even if the program hasn't yet been reauthorized, according to CDFI Fund Director Donna Gambrell.


Donna Gambrell

Gambrell and NMTC Program Manager Robert Ibanez, in a November 9 interview, reported that the first phase of reviewing the applications seeking NMTC allocation awards in the ninth funding round has been completed, and the second and final phase is about to begin. In Phase 1, external reviewers evaluate and rank the applications that were received, while in the second CDFI staff conduct analysis to make award determinations. "At this point our staff is doing the additional due diligence that is needed on the applications that have been deemed highly qualified that have come out of that Phase 1 review process, and preparing" for the Phase 2 review and award determinations, Gambrell noted.

The CDFI Fund received a record 314 applications – 26% more than in 2010 – requesting a total $26.7 billion in allocation authority. Just $3.5 billion is available.

CDFI Fund Seek Suggestions for Program Improvements

On November 7, the CDFI Fund published a *Federal Register* notice that asks the public for suggestions on ways to improve the new markets tax credit program. The notice solicits responses to numerous specific questions about: defining low-income communities and areas of higher distress; the treatment of certain businesses; community accountability by CDEs; transaction costs; evaluation of financial products; and the use of federally subsidized financing in conjunction with NMTCs.

(Notice: http://tinyurl.com/cg4g547) TCA

Optimistic About Reauthorization

Gambrell said her No. 1 issue today is the reauthorization of the NMTC program beyond its scheduled sunset date of December 31, 2011. She is "optimistic" that Congress will ultimately pass legislation to reauthorize the program. "Clearly we have gone through some really tough economic times," she says. "When you look over the economic experience over the last few years, what you've seen time and time again – what I hear time and time again – is that the new markets tax credit program continues to successfully raise the equity from investors. And they are then able to invest that capital into some really high-impact projects in our nation's low-income communities."

Even if the program isn't reauthorized by year-end, Gambrell noted, "we

Gambrell, continued on page 17

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long-time CDE affiliated with Wiscasset, Me.-based Coastal Enterprises, Inc., has a much different focus – geographically and in project types. "We've done 46 projects so far," says CEO Charlie Spies. "We have a focus on rural, non-metro areas, mostly natural resource-based [projects]." The CDE, which has a national service area, has received seven awards of NMTC allocation authority totaling $683 million, and typically provides NMTC financing for businesses, such as the construction of a building and the purchase of equipment.

Charlie Spies

"One example is a zinc recycling facility in South Carolina where they process arc furnace dust (a hazardous waste) from steel recycling mills and turn it into zinc oxide," says Spies. Other projects have included an extruded wood processing facility in Oregon, an ethanol production facility in Michigan, and a dairy facility in Vermont *(see sidebar on p. 12 on dairy project)*. "Our strategy," says Spies, "is to put a third [of our NMTC projects] in Maine, a third in the Northeast, and then another third out nationally." He said projects have generally ranged from $2 million to $32 million.

The Columbus, Ohio-based Finance Fund, a nonprofit financial intermediary that operates a CDE as one of many activities, has clients that include nonprofit organizations and for-profit businesses serving low-income communities statewide. It forms public-private partnerships

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Gambrell, continued from page 16

will plan for the 2012 funding round." NMTC funding rounds typically open in the spring.

There is precedent for opening a funding round absent authorization. The CDFI Fund opened the eighth funding round in the spring of 2010 even though the program's authorization had lapsed on December 31, 2009. The NMTC program was renewed on December 17, 2010, when President Obama signed legislation passed by Congress in December to continue the program through 2011.

Gambrell expressed hope that the NMTC program will not be eliminated or cut back as the result of any recommendation by the Congressional "Super Committee" or by future tax reform legislation.

Improvement of Program

Gambrell said her No. 2 priority is "continuing our efforts to make the program work better."

On November 7, the CDFI Fund published a notice that asks the public for suggested improvements to the NMTC program through responses to a series of specific questions *(see sidebar on p. 16)*. "We're anticipating that we're going to get some really great comments," Gambrell says.

Gambrell indicated that the CDFI Fund, IRS, and U.S. Treasury Department Office of Tax Policy are also reviewing public comments received to an IRS proposed rule and advanced notice of rulemaking issued

Gambrell, continued on page 18

CDFI Fund Issues New Data on Cumulative NMTC Investments

The CDFI Fund has released data on all of the projects and businesses financed by new markets tax credit investments since the start of the program in 2002 through September 30, 2010, the end of FY 2010.

During this period, community development entities (CDEs) disbursed a total $20,901,020,746 in qualified equity investment (QEI) proceeds to 3,060 Qualified Active Low-Income Community Businesses (QALICBs), financing both real estate projects and operating businesses in low-income communities.

Other characteristics:

- 2,534 QALICBs (82.8% of the total) were located in metropolitan areas, receiving $18,292,660,951 in NMTC financing (87.5% of total). 526 QALICBs (17.2%) were in non-metropolitan areas, receiving $2,608,359,795 (12.5%);
- 1,405 QALICBs (45.9%) were "real estate QALICBs," where the principal activity is the development or leasing of real estate. These received $12,516,513,081 in NTMC financing (59.9%). 1,553 QALICBs (50.8%) were "non-real estate QALICBs," or operating businesses, receiving $7,672,600,485 (36.7%);
- 97 QALICBs (3.2%) were loans or investments made through other CDEs, totaling $675,283,443 in NMTC financing (3.2%).

The CDFI Fund has posted an Excel spreadsheet containing details of all the NMTC investments and QALICBs.

(Data, spreadsheet: http://tinyurl.com/43w9qrq) TCA

NMTC, continued from page 17

with financial institutions, investors, charitable foundations, community organizations, and governments to provide funding for clients.

CEO James Klein said the Finance Fund, which has received six allocation awards totaling $160 million, has funded a variety of NMTC projects. A few have been to provide loans to home builders to enable them to construct modest for-sale single-family homes in distressed neighborhoods. He said most of the 45 NMTC projects done so far have been in urban areas in Ohio (e.g., Columbus, Cleveland, Cincinnati, Dayton), though there have been some in rural areas as well. An example of the latter was the expansion of a sand and gravel operation in Jackson County to begin selling drying sand – an industrial product, one use of which is for oil "fracking" in the Utica shale oil and natural gas field in Eastern Ohio. TCA

James Klein

Gambrell, continued from page 17

in July that outline possible regulatory changes to encourage greater NMTC investment in non-real estate businesses. The CDFI Fund's Advisory Board has also been interested in seeing the new markets tax credit focused more on small business investments.

Gambrell also noted the CDFI Fund, IRS, and Treasury are mulling whether to make possible changes to current NMTC regulations relating to several technical areas: the control issue; the related party test; and the reasonable expectations test.

Finally, she noted that the CDFI Fund has been talking to some other federal departments and agencies to explore whether there might be opportunities to link or create better synergies between some of their programs and the new markets tax credit. Gambrell said CDFI Fund staffer Rosa Martinez just finished a three-month detail at the U.S. Department of Agriculture and CDFI Fund and USDA officials are reviewing recommendations. TCA

INDUSTRY LEADERS in MULTIFAMILY
MORTGAGE LENDING, AFFORDABLE HOUSING, and ASSET MANAGEMENT





Centerline Capital Group provides real estate financing and asset management services, focused on affordable and conventional multifamily housing. Centerline offers both debt and equity financing to developers, owners, and investors. Centerline is structured to originate, underwrite, service, manage, refinance or sell through all phases of an asset's life cycle. A leading sponsor of Low-Income Housing Tax Credit (LIHTC) funds, Centerline has raised more than $10B in equity across 136 funds, and invested in more than 1,200 assets spanning 47 states. The firm's multifamily lending platform services more than $11B in loans.

Founded in 1972, Centerline is headquartered in New York City, with ten offices throughout the United States.

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Natural and political selection

"I have called this principle by the term of Natural Selection."
– Charles Darwin

Though evolution is all around us, at its core lies a great paradox: species and ecosystems evolve – individuals don't. Individuals are born at specific moments in time, swiftly take on a life of their own, and grow from babies into adults (and even crotchety old codgers writing essay columns). Those who are parents and family to individuals become enraptured of their unique virtues, while excusing, rationalizing, and eventually becoming unaware of their faults.

The same is true for housing and finance programs. Each one is unique, born via a dramatic conception and the messy process of legislative birth and regulatory infancy, and then growing into maturity, even complacency and sloth. These individual programs and their attendant entourages can become so enamored of their own ecosystem that they overlook the fact that – to a Congressional committee or a non-stakeholder – they all look somewhat alike and all are equally impenetrable.

So it is with tax credits. Though many of us think of the Low-Income Housing Tax Credit as *ne plus ultra* of this type of incentive *(see Guru column*, Tax Credit Advisor, *November 2010: A Different Kind of Money)*, one that has gone from babyhood in 1987 through formalization, permanence, and decades of annual QAP cyclic improvement, in point of fact it's one of a species – and neither the oldest nor the apple of Congress' eye.

David A. Smith

A panel of non-experts, such as those committees that write tax legislation or that score it for OMB or CBO, might collectively produce the following over-simplified comparative table of tax credits' progeny:

Comparison of features

Tax credits related to real estate investment

	Historic	LIHTC 9%	LIHTC 4%	Green energy [1]	New Markets
Tax expenditure [2]	$0.8	$5.1	$1.0	$1.4	$0.7
Beneficiary	Historic buildings	Poor people	Poor people	Green tech	Urban cores
Property type	Any use	New/sub-rehab	Acquisition-rehab	Any use	Non-housing
IR Code Section	47	42	42	48C	45D
Enacted	1976	1986	1986	1992	2000
Value / TDC	~ 20%	~ 55% [3]	~ 25%	~ 25%	~ 30%
Competed or not?	No; NPS approval	Yes	Yes	No	Yes; twice
Delivery years	1	10	10	5 or 10	5
Compliance years	5	15	15	1	7

[1] There are actually at least five different energy tax credits (some dating back to 1978), so I've chosen, as the best comparable, the credit for facilities that produce renewable energy.
[2] Estimated cost for 2011, in billions. Figures for annual tax expenditures for everything but 4% LIHTC come from Novogradac's *Journal of Tax Credits*, September, 2010; 4% LIHTC is my personal rough-justice guess.
[3] Clearly the deepest subsidy, even without including basis-boost properties, where the LIHTC equity can be as high as 80% of total development cost.

Guru, continued on page 21

Guru, continued from page 20

In listing these various tax credits' vital statistics, I've deliberately focused on their *political* relevance, and that means their comprehensibility. While practitioners can become lost in esoterica, anyone can grasp who or what we are seeking to help, what type of property gets into the glossy brochures, and when and how long the credit is paid out.

Just as one can always see the flaws in other people's children better than in one's own, retreating from the minutiae to the principal attributes helps us see the various credits' comparative advantages from the perspective of influential outsiders who are initially agnostic about credits. For example:

- **Corporate Director of Tax.** "Our company could have its name associated with historic buildings, poor people, green technology, or urban cores. If I invest in poor people, it'll take me ten years to realize the benefits, and five more years to be free of risk."
- **New Ways and Means Committee staffer.** "Which of these can I most easily and quickly explain to my boss? The ones with the shortest payback and the most comprehensible use, like green energy, or the most complicated and expensive?"
- **CBO analyst.** "The LIHTC program provides the deepest subsidy of all the credits and thus has the least external leverage of other resources."

Looked at in this light, it's hard to identify what might make LIHTC *politically* superior to the others – and therein lies an issue for us. If we're to have political durability, we need to claim and maintain political advantage *without* having to denigrate the other tax-credit children Congress has birthed.

We all know, but seldom vocalize and even less frequently advance, the ultimate form that we'd like LIHTC to evolve to, if only we could be confident of getting there.

Evolution works in unexpected ways. Candy bars and dinosaurs both got smaller, and dinosaurs changed from raptors into birds. And a good thing too: those that could not evolve to something smaller, faster, and more nimble…died out.

Legislation, like evolution, works in fits and starts. Long periods of stasis are followed by sudden cataclysms where previous dominance gives way to rapid emergence of an improved form. If we think change is in the wind, maybe we should develop a clear idea of what an evolved LIHTC program should be and how it should operate, just in case the choice is evolution or extinction. TCA

"I love fools' experiments.
I am always making them."
– Charles Darwin

David A. Smith is Chairman of Recap Real Estate Advisors, a Boston-based real estate services firm that optimizes the value of clients' financial assets in multifamily residential properties, particularly affordable housing. He also writes Recap's free monthly essay State of the Market, *available by emailing dsmith@recapadvisors.com.*

NH&RA News

Information on NH&RA and its Councils is available online at http://www.housingonline.com

NH&RA's 2011 Fall Developers Forum Is a Success

More than 200 people attended sessions and events at the National Housing & Rehabilitation Association's 2011 Falls Developer Forum in Boston, held on November 14-15. Conference highlights included presentations of NH&RA's Affordable Housing Vision Award on November 14 and of NH&RA's 2011 J. Timothy Anderson "Timmy" Awards for Excellence in Historic Rehabilitation on November 15.

Upcoming Conferences

To register, and for more information, go to http://www.housingonline.com

National Housing & Rehabilitation Association
2012 Annual Meeting
February 22-25, 2012
The Breakers, Palm Beach, Fla.

National Housing & Rehabilitation Association
2012 Winter New Markets Tax Credit Symposium
February 22, 2012
The Breakers, Palm Beach, Fla.

National Council of Affordable Housing Market Analysts
2012 Spring Affordable Housing Policy & Underwriting Forum
March 29-30, 2012
Four Points Hotel, Washington, D.C.

National Housing & Rehabilitation Association
2012 Spring Developers Forum
May 21-22, 2012
The Ritz-Carlton Marina del Rey, Marina del Rey, Calif.

National Housing & Rehabilitation Association
2012 Summer New Markets Tax Credit Symposium
July 25, 2012
Harbor View Hotel, Edgartown, Martha's Vineyard, Mass.

National Housing & Rehabilitation Association
2012 Summer Institute
July 25-29, 2012
Harbor View Hotel, Edgartown, Martha's Vineyard, Mass.

The Vision Award, made annually to recognize individuals for their outstanding career contributions to the cause of affordable housing, was presented to Sandra Henriquez, Assistant Secretary for Public and Indian Housing at the U.S. Department of Housing and Urban Development (HUD), and to CPA John Mackey, a principal in the Boston office of Reznick Group. *(For details on recipients, see* Tax Credit Advisor, *October 2011, pp. 24-25).*


Sandra B. Henriquez


John Mackey

The 2011 Timmy Awards recognized 10 remarkable historic rehabilitation projects from throughout the country *(see article on p. 35.)* See the video from this year's awards presentation on NH&RA's YouTube Channel.

HOPE VI-Mixed Finance Council Advocacy Saves Funding for Choice Neighborhoods

Joined by other key stakeholders, NH&RA's HOPE VI-Mixed Finance Development Council has succeeded in securing funding for the Choice Neighborhoods Initiative. The Council signed on to a November 7 industry letter to the Congressional conferees for a pending Fiscal Year 2012 appropriations bill (H.R. 2112) urging them to provide $120 million for the Choice Neighborhoods Initiative program administered by HUD. On November 17, Congress approved the "minibus" appropriations bill (H.R. 2112), providing $120 million for CNI in FY 2012.

In their letter, the nonprofit and for-profit organizations noted, "CNI builds on the bipartisan successes of the HOPE VI program and incorporates an innovative, holistic approach to solving the dire needs of distressed HUD-assisted housing, by leveraging private resources to address not only the distressed housing but also the community blight that often surrounds failed housing developments. Choice Neighborhoods creates jobs and results in a ripple effect, attracting new private investment in the revived communities."

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(For details on NH&RA's Councils, go to http://www.housingonline.com/Councils.aspx)

Legislative Leadership Committee Achieves Advocacy Victory for RAD Initiative

NH&RA's Legislative Leadership Committee was active during November seeking to persuade Congressional conferees to include language authorizing HUD's Rental Assistance Demonstration (RAD) initiative in the final version of a "minibus" appropriations bill (H.R. 2112) providing funding for HUD and numerous other federal departments and agencies in FY 2012. RAD authorizing language was included in the Senate-passed version of the FY 2012 Transportation/HUD appropriations bill. On November 17, Congress approved the minibus appropriations bill and conference report containing authorizing language for RAD, which will provide a pathway for testing approaches to converting public housing developments to project-based subsidies and to recapitalize certain types of federally assisted housing projects. The Leadership Committee had also sought to persuade lawmakers to expand the RAD initiative to include HUD's "orphan" rental assistance programs (e.g., Rent Supplement and Section 8 Moderate Rehabilitation programs).

NCAHMA Working Group to Hold MAP Underwriting Symposium

An FHA Working Group of NH&RA's National Council for Affordable Housing Market Analysts (NCAHMA) is developing the details for a one-day "MAP" symposium to be held on March 28, 2012 in Washington, D.C., the day before the start of NCAHMA's 2012 Affordable Housing Underwriting & Policy Forum. The session will educate attendees about the latest version of HUD's Multifamily Accelerated Processing (MAP) Guide for FHA multifamily housing mortgage lenders and explore opportunities about how the underwriting process can be improved for this important HUD program. Details will be issued in the near future.

In a related development, NCAHMA recently surveyed local HUD offices and MAP lenders on a wide array of market study issues.

(For details on NCAHMA, go to http://www.housingonline.com/Councils.aspx)

Registration Now Open for March 2012 NCAHMA Conference

Registration is now open for the NH&RA/NCAHMA 2012 Affordable Housing Policy & Underwriting Forum, scheduled for March 29-30, 2012 at the Four Points Hotel in Washington, D.C.

Registration remains open for NH&RA's 2012 Winter New Markets Tax Credit Symposium, set for February 22, and NH&RA's 2012 Annual Meeting, to be held on February 22-25. Both will be at The Breakers in Palm Beach, Fla. NH&RA has issued a call for presentations to solicit suggestions for panel topics and speakers for the NMTC Symposium. Contact NH&RA Executive Director Thom Amdur, 202-939-1753, tamdur@housingonline.com

(To register for upcoming conferences and for details, go to http://www.housingonline.com/Events.aspx)

CEFAH Meetings With Senior HUD Official on Energy-Related Issues

Representatives of NH&RA's Council for Energy Friendly Affordable Housing (CEFAH) met recently with Carol Galante, Acting Assistant Secretary for Housing/Federal Housing Commissioner at HUD. Energy-related technical issues were discussed, including sub-metering in the HUD-assisted portfolio, ways to improve HUD's method for computing utility allowances for affordable multifamily housing projects to remove a disincentive to energy efficiency in HUD-assisted and low-income housing tax credit properties, and modifying HUD rules to permit the energy cost savings resulting from energy retrofits of projects to be reflected in adjustments to HUD Housing Assistance Payment (HAP) contract payments. NH&RA will be providing follow-up materials to HUD.

(For details on NH&RA's Councils, go to http://www.housingonline.com/Councils.aspx)

New Markets Tax Credit Council Resubmits Comments

NH&RA's New Markets Tax Credit Council has resubmitted comments containing recommended changes to federal tax regulations governing the new markets tax credit program to the U.S. Treasury Department. The comments propose improvements in several technical areas, including original issue discount, non-qualified financial property, and redemption. The Council previously submitted the comments to the IRS. TCA

LISC Launches $24 Million Loan Fund to Finance LIHTC Projects

The Local Initiatives Support Corporation (LISC), a national nonprofit financial and technical assistance intermediary, has launched a new $24 million loan fund to offer favorable early financing for low-income housing tax credit projects sponsored by nonprofit or for-profit developers. The fund is expected to support at least $100 million of project development costs.

LISC established the Neighborhood Revitalization Loan Fund by leveraging a $5 million grant it received from the federal Capital Magnet Fund program, plus a $19 million loan from Morgan Stanley.

The Loan Fund offers:

- Pre-development and acquisition loans of up to two years with a fixed interest rate of 6% and balloon payment at the end.
- Construction loans of up to two years with a fixed interest rate of 6% and balloon payment at the end.
- A "backstop" guarantee from LISC for nonprofit developers.

Greg Maher, LISC Senior Vice President for Lending, said the Loan Fund will probably place a "high priority" on providing loans to LIHTC projects that receive tax credit equity from the National Equity Fund, Inc., a LISC affiliate. He explained that this would facilitate access by the Loan Fund to the kinds of information needed to comply with the Capital Magnet Fund program's reporting requirements, which include tracking the incomes of assisted households for 10 years.

Maher anticipated that the maximum loan size and loan-to-value ratio will be $4 million and 100% respectively. He noted that loans, depending on the circumstances, may also provide bridge funding briefly into the post-construction period, such as to fill the gap until an expected funding source is received. LISC will originate the loans made by the Loan Fund.

LISC's backstop guarantee will cover the construction period for a project and support nonprofit developers that may not have the financial strength or liquidity to fully meet underwriting or guarantee requirements of construction lenders or equity providers. LISC's guarantee, for instance, could be tapped if needed to fulfill the sponsor's obligations under various types of guarantees, such as completion of construction, tax credit adjusters, etc., Maher noted.

It's expected that the LIHTC projects assisted by the Loan Fund will be located in geographic areas served by LISC's 30 local programs (http://tinyurl.com/7f4zkma) or 50-plus partner rural community development corporations (http://tinyurl.com/7gdzjf8).

Loan repayments received by the Loan Fund will be recycled to make additional loans.

The Loan Fund's first loan, in the amount of $3.6 million, will bridge local tax increment funds for Zapata Apartments, a 61-unit project under development by local nonprofit Bickerdike Development Corporation in Chicago's Logan Square neighborhood. TCA

In Brief

Community Leaders Receive Innovation Award

Developer Marc Slotnick, President of New England Communities, Inc.; Vincent O'Donnell, Vice President of Preservation for the Local Initiatives Support Corporation; and attorney Jonathan Klein, a partner at Klein Hornig, were recently presented with the 2011 KPM Innovation Award at the Affordable Housing Forum in Boston held by Kevin P. Martin & Associates, P.C. KPM's award recognized the innovative community leaders for their hard work, dedication, and contributions in the affordable housing industry, especially on the Salem Towers development, a transaction they worked on that rehabilitated and preserved an "old law" HUD Section 202 elderly housing project using a creative financing structure. *(For article on project, see* Tax Credit Advisor, *April 2011, p. 4.)*

New Bipartisan Housing Commission Formed

On October, 26, the Bipartisan Housing Center, a Washington, D.C. think tank, announced a new bipartisan Housing Commission that will draft recommendations for national housing policy and solutions to the nation's housing problems, including the huge overhang of home foreclosures. The 18-member commission will issue its recommendations in the first quarter of 2013. Co-chairs are former U.S. Senators George Mitchell (D-Me.), Kit Bond (R-Mo.), and Mel Martinez (R-Fla.), and former HUD Secretary Henry Cisneros. The remaining commission members will be named later this year. The group will hold regional forums around the U.S. to gather input; the first is March 2012 in San Antonio.

(http://tinyurl.com/6cvwhbz) TCA

States Move Forward on 2012 LIHTC Programs

State housing credit agencies are moving ahead with plans and schedules for their 2012 low-income housing tax credit (LIHTC) application cycles. Some have already committed anticipated 2012 and 2013 credits.

A recent survey by *Tax Credit Advisor* drew responses from 45 states and the District of Columbia about the status of their 2012 qualified allocation plans, their 2012 application deadlines, and other information *(see pp. 28-29 for responses)*. Of the state HCAs responding to the survey, 26 reported that their 2012 QAP has either been signed by the governor and is final, is awaiting the governor's signature, or has been approved. Numerous others indicated that they have issued a draft QAP; only a few hadn't started the process

Most states' application deadlines for 2012 housing credits are in the future. Only seven states, as of the date of their survey response, had one or more application deadlines that had already passed.

States have forward committed a larger amount of their anticipated future housing credit authority than a year ago. Twenty-three noted they have already forward committed some or all of their 2012 housing credits, and a few additional states planned to do so by year-end. Five states have already forward committed some 2013 credits, and a few others were definitely or possibly going to do so by year-end or in 2012.

Fourteen states plus D.C. reported remaining 2011 housing credits, generally in small amounts and totaling less than $25 million. A few states were reviewing applications with plans to award their 2011 housing credits soon.

States reporting they have a state housing tax credit are Arkansas, California, Connecticut, Georgia, Hawaii, Illinois, Massachusetts, Missouri, New Mexico, New York,

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States, continued from page 26

North Carolina, North Dakota, Oregon (lender's credit), Utah, and Vermont. State historic tax credit: Arkansas, Connecticut, Delaware, Georgia, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, New York, North Carolina, South Carolina, Vermont, and Wisconsin. State new markets tax credit: Arkansas, Connecticut, Minnesota, and Missouri. Michigan abolished its state historic credit last year to switch to a new mechanism for direct funding. TCA

People In the News

President Obama recently announced his intention to nominate **Carol Galante** to be Assistant Secretary for Housing/Federal Housing Commissioner, at the U.S. Department of Housing and Urban Development. She currently holds these positions on an acting basis. Meanwhile, **Marie Head** has been appointed as Deputy Assistant Secretary in the Office of Multifamily Housing Programs, and is expected to start in December. A long-time HUD employee years ago, Head most recently served as President of Prudential Huntoon Page, the FHA lending business of Prudential Mortgage Capital Company.

Barb Sporlein is the new Deputy Commissioner of the Minnesota Housing Finance Agency. She most recently served as Director of Planning for the City of Minneapolis.

Mary Dorn has joined First Sterling, a low-income housing tax credit syndication firm based as in Manhasset, N.Y. as an Acquisitions Associate. She will focus on tax credit equity originations nationwide with a primary focus on the Midwest. TCA

State 2012 Low-Income Housing Tax Credit Programs

Status of Qualified Allocation Plan, Application Deadlines

State	Survey Response Date	Status of QAP for 2012	2012 Credit Application Deadline(s)	Estimated 2012 Credit Ceiling	2012 Credits Credits Committed to Date	2013 Credits Committed
Alabama	10/31/11	Draft issued for public comment by 11/7/11	TBD	$10.5 million	$3.9 million	$0
Alaska	10/28/11	Final	11/17/11	$2,819,198	$0	$0
Arizona	10/31/11	Draft issued for public comment.	3/1/12	$13 million	TBD	NA
Arkansas	11/15/11	Approved by board, under legislature for review.	2/3/12	$6,895,000	$0	$0
California	NR	Dec. 2011 (anticipated) – public hearings on proposed regulation changes. Adoption in Feb. 2012.	3/22/12, 7/11/12 (proposed)	NA	NA	NA
Colorado	10/31/12	Draft issued; board vote on approval 12/15/11, then to governor.	Round 1: letters of intent due 2/1/12, applications due 3/1/12; Round 2: letters of intent, 6/1/12, applications 7/2/12.	$11,388,566	$10,280,414	$0
Connecticut	11/10/11	In draft form, pending Board's approval for public comment.	Next round for 9% credits likely in 3rd Q 2012. 4% credits have open application process.	$7,684,309	$7,684,309	$2,286,791
Delaware	10/31/11	Internal drafting stage; hope to issue draft in mid-November.	4/13/12 (tentative)	$2,525,000	$600,000	$0
District of Columbia	11/10/11	In review process.	TBD	$2,525,000	$0	$0
Florida	11/15/11	Final	12/6/11	$49,086,780 (1)	$0	$0 (1)
Georgia	11/14/11	Draft issued for public comment.	6/7/12	$21 million	$0 (2)	$0
Hawaii	11/1/11	Approved by board, awaiting final approval by executive director.	2/29/12 (projected, pending approval by board)	$2,992,662	$0	NR
Idaho	10/28/11	Have received public comments. Board and governor approval expected before year-end.	Round 1 (75% of credit ceiling available): 9/3/11; Round 2, 2/10/12.	$3,448,680	$179,062	$0
Illinois (IHDA only)	11/10/11	Approved by board.	(3)	$22 million	NR	NR
Ill.-Chicago	NR	NA	11/17/11	$6 million	NA	NA
Indiana	10/31/11	Final	9% credits: 11/1/11. 4% credits: applications accepted 3/12-6/8/12.	$14 million	$0	$0
Iowa	11/1/11	Draft issued for public comment.	2/3/12	$6.6 million	$0	$0
Kansas	10/28/11	At governor's office for signature.	2/3/12	$6,276,860	$6,276,860	Small amount
Kentucky	11/10/11	Final, 2011-2012 QAP	10/3/11	$9,547,000	$1,587,256	$0 (4)
Louisiana	NR	NA	NA	NA	NA	NA
Maine	10/28/11	Final	11/17/11	$2,900,000	$450,000	$0
Maryland	11/15/11	Haven't started process.	TBD	$12,701,814	$9,749,636	$0
Massachusetts	11/10/11	Haven't started process.	1/19/12 (tentative)	$14,404,784	$13,873,561	$13,219,036
Michigan	11/7/11	Final	8/15/11, 2/15/12	$21.7 million	$11.8 million (anticipated)	$0
Minnesota	11/3/11	Final	Round 1: 6/14/11; Round 2: 1/31/12 (tentative).	$11.4 million	$11,058,879 on 11/17/11	NA

Source: Responses by state housing credit agencies to Tax Credit Advisor survey. Information as of the date of the agency's response to survey. Information for non-responding state agencies gathered from state agency Web sites. Precise amount of each state's 2012 per capita credit cap won't be official until IRS transmits official 2011 state population estimates, probably in early 2012.

NA = Not Available. TBD = To Be Determined. NR = No Response to Survey.

(1) Florida: Will be awarding $60 million in 2012 cycle including 2012 and 2013 credits; (2) Georgia: Essentially all 2012 credit authority will be forward committed by 12/31/11; (3) Illinois: 9% credits: Prelim. project assessments deadline (Round 1, 9/22/11, Round 2, TBD). Application deadline (Round 1, 12/19/11, Round 2, TBD); (4) Kentucky: Considering forward committing all or a portion of 2013 credits; (5) South Dakota: Estimate will forward commit $2,442,260 in 2013 credits during 2012 application cycle.

State	Survey Response Date	Status of QAP for 2012	2012 Credit Application Deadline(s)	Estimated 2012 Credit Ceiling	2012 Credits Credits Committed to Date	2013 Credits Committed
Mississippi	11/16/11	Proposed changes to QAP for 2012 issued for public comment by 11/14/11.	5/4/12 (proposed)	$6.5 million	$0	$0
Missouri	11/3/11	Approved	11/14/11	$13 million	$0	$0
Montana	11/1/11	Submitted to govenor for approval	1/20/12	$2,534,920	$0	$0
Nebraska	11/10/11	Final	Round 1: threshold 1/9/12, final application 2/6/12; Round 2: threshold 3/26/12, application 4/23/12.	$4 million	$500,000	$0
Nevada	11/10/11	Final public hearing on 11/15/11; should be finalized and adopted shortly afterwards.	5/4/12	$5,072,000	$1,827,072	$0
New Hampshire	11/1/11	Final	11/4/11	$2.9 million	Expect to reserve full amount by 1/1/12.	$0
New Jersey	11/1/11	Drafting	April/May 2012 (estimated)	$18 million (2013 credits)	100% of 2012 credits expected to be reserved before Thanksgiving	$0
New Mexico	11/4/11	Submitted to governor for signature.	1/31/12	$4,427,235	$282,415	$0
New York SHCR	10/31/11	Recently initiated revision process, held two roundtable discussions in October.	11/4/11	$42.5 million	$42.5 million	$12 million
North Carolina	11/10/11	3rd draft issued, not yet signed by governor.	1/13/12	$21 million	$0	$0
North Dakota	11/3/11	Draft to be available for public comment around 11/20/11; public hearing 12/5/11.	1/31/12 and (if needed) 4/30/12	$2,525,000	$599,966	$0
Ohio	NR	Final	7/19/12 for final application deadline; earlier deadlines for submission of experience and capacity application, market study	NA	NA	NA
Oklahoma	11/1/11	Final	1/12/12, 7/3/12	$8.4 million	$0	$0
Oregon	11/8/11	Draft issued for public comment by 11/4/11. Expect governor's signature early spring 2012.	3/30/12 (tentative)	$8,512,646	$8,278,838	$0
Pennsylvania	10/31/11	Final	10/12/11	$27,300,000	$4 million	$0
Rhode Island	10/28/11	Final	10/7/11	$2,525,000	$990,000	$0
South Carolina	10/28/11	Public hearing 10/31/11. Proposed final QAP to be presented to board on 11/15/11 and to governor on 11/16/11.	3/23/12	$10.3 million	$0	$0
South Dakota	11/2/11	Final (2011-2012 QAP)	2/29/12	$2,640,000	$2,327,260	$0 (5)
Tennessee	11/14/11	Draft issued for public comment through 11/15/11.	TBD	$13,500,000	$11,500,000	$0
Texas	11/1/11	Draft to go to board on 11/10/11 for final approval, then to governor for signature by 12/1/11.	Pre-applications, 1/8/12; full applications, 3/1/12.	$54 million	$10.5 million	$0
Utah	10/28/11	Final	10/1/11	NR	NR	NR
Vermont	11/11/11	Public hearing planned for Dec. 2011.	No deadlines; open application window.	$2,525,000	$2,525,000	$110,000
Virginia	NR	Final	3/16/12	NA	NA	NA
Washington	11/10/11	Final	12/15/11	$14,793,988	$526,165	$0
West Virginia	11/10/11	Final	April 2012 (9%) and June 2012 (4%)	$4,076,586	$0	$0
Wisconsin	11/10/11	Final (2011-2012 QAP)	2/3/12	$12,511,369	$0	$0
Wyoming	NR	Draft issued	1/31/12, additional round if needed	NA	NA	NA

The Vero Green Story

Repositioning Affordable Housing Without Tax Credits

By Allen Feliz, TCAM

Vero Green Apartments, Vero Beach, Florida
Photo by Gary Russ

Vero Green Apartments, a multifamily rental development in Vero Beach, Fla., is a former low-income housing tax credit property that was purchased out of foreclosure by R.J. Finlay & Co., a real estate company, in March 2010.

A recent refinancing concludes the turnaround of this formerly distressed property that is now providing dramatically upgraded housing to residents as well as positive cash flow for the owner. While the property is no longer in the LIHTC program, residents still enjoy affordable rents and this preservation effort was achieved without a fresh batch of housing tax credits.

The Vero Green story demonstrates how a property's operations can be improved in a challenging environment and how affordable rental housing can be preserved, at least temporarily, without housing tax credits.

Constructed as LIHTC Property

Vero Green Apartments (formerly Walker Avenue Club Apartments) was built in 2002 as a LIHTC property in this small city (pop. 15,000) on the Atlantic Coast about 190 miles south of Jacksonville. The 172-unit development consists of two- and three-bedroom apartments in 11 two-story walk-up and wood-framed garden-style buildings.

The property was originally financed by tax-exempt bonds and 4% housing credits, subject to a land use restriction agreement (LURA) requiring at least 40% of the units to be rented to tenant households earning 60% or less of the area median income (AMI).

Allen Feliz

Disaster Strikes

Vero Beach, like many other communities across the country, suffered greatly in the recent recession. The unemployment rate in Indian River County nearly tripled from January 2007 to January 2010 (from 4.5% to 13.3%), and hasn't improved (13.9% in August 2011).

Rental occupancy levels dropped throughout the market as well. A 2009 appraisal report for Vero Green Apartments noted an average countywide vacancy rate of more than 15% for affordable and subsidized rental housing developments and above 20% for many projects.

Vero Green Apartments suffered, too. Occupancy and rents dropped, operating deficits mounted, and more and more maintenance was deferred, further depressing occupancy levels. The property's occupancy rate consistently declined, from 90% in July 2006 to 68% in July 2007, 50% in July 2008, and 47% in February 2009.

In 2009, the owner defaulted on the mortgage and the lender foreclosed, resulting in the removal of the property from the LIHTC program. R.J. Finlay & Co. purchased the property from the lender in March 2010 for approximately 62% of the outstanding mortgage bal-

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ance, with the intent to reposition the development and restore it to profitability.

Capital, Management, and Marketing Improvements

Upon acquiring Vero Green Apartments, R.J. Finlay & Co. initiated capital improvements and management and marketing upgrades to turn around the property's operations. At the outset, the property had 30 idle apartments, dated exterior painting, missing outdoor signage, and poorly kept grounds. Common area amenities were inferior to those of competing local market-rate developments charging similar or lower rents.

Working with TCAM, R.J. Finlay & Co. invested in a $440,000 capital plan that resulted in restoring the down units to service, improving the landscape and signage, and adding amenities including a new fitness area and business center.

To implement its management and marketing plan, R.J. Finlay & Co. hired a new property management company – Finlay Management, Inc. – in December 2010. This firm marketed the property to prospective tenants both online and in print advertisements, and carefully monitored the effectiveness of its advertising campaign, making adjustments as necessary. R.J. Finlay & Co. revamped the existing Web site for the property. And Finlay Management kept a close watch on the market and competitors, constantly adjusting rents and concessions in line with changing market conditions.

Operational Success

The capital, management, and marketing improvements have yielded strong results at Vero Green Apartments:

- Occupancy increased from 76% in December 2010 to 96% in August 2011, even though the unemployment rate has not improved.
- Resident satisfaction has improved dramatically, as demonstrated by tenant surveys at apartmentsratings.com from 2010 and 2011. Comments posted online throughout this transition period reveal higher tenant satisfaction with the turnaround time for routine maintenance requests and the quality of maintenance work, the courtesy and knowledge of management staff, and the quality of site amenities.

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- Annual operating expenses decreased from $5,366 per unit in 2009, the last year before R.J. Finlay & Co. took over, to $4,166 per unit (annualized) as of August 2011. Operating improvements have allowed lower advertising costs, while capital improvements have reduced maintenance expenses. In addition, the refinancing of the property reduced annual debt service costs.
- Revenues rose by approximately 45% from December 2010 to August 2011. The primary reason was increased occupancy due to improved tenant satisfaction and retention, improved marketability (from capital improvements), and the removal of the LIHTC tenant income restrictions.
- A substantial increase in value. While the property was purchased for $5.3 million in March 2010, in the spring of 2011 it appraised at $12 million.

Lessons Learned

While the LIHTC tenant income and rent restrictions no longer apply to Vero Green Apartments, effective monthly rents have barely changed, after rent concessions are considered. In August 2011, the average effective rent for apartments was $705 per month, compared to $695 per month in March 2010. While just 32% of the tenants as of March 2010, in 46 of the 142 occupied units at the time, have remained, factors other than affordability were the likely reasons why many of the others moved out.

The absence of LIHTC restrictions has permitted a wider range of tenant incomes, boosting occupancy. Households with incomes above 60% of AMI can now rent at the property. Before, for example, three-person working families earning more than $25,080 a year couldn't qualify for the two-bedroom apartments. As a result, families of workers down the street in the service industry making $26,000 to $43,000 were shut out of Vero Green Apartments when it was a tax credit property.

Admittedly, removing LIHTC income restrictions is not an ideal remedy for struggling affordable properties. Absent long-term affordability protections, "low-income" housing is not assured, especially as owners are able and motivated to charge higher rents as markets improve. But the Vero Green experience suggests modest ways to improve the LIHTC program.

Vero Green Apartments Operational Improvement

	August 2010	August 2011	% Change
Occupancy Level	73%	96%	+23%
Net Operating Income	$211,326	$545,557	+158%
Physical Upgrades	• New site signage • 30 formerly down-units brought on line • Newly landscaped grounds • Newly painted building exterior • Resurfaced parking lot • New washers and dryers • Refurbished clubhouse • New fitness area and business center • Energy efficiency upgrades – replacement of incandescent light bulbs with fluorescent light bulbs.		

For instance, a more flexible set-aside requirement allowing LIHTC properties in certain markets to rent to a wider income band would help such communities provide much-needed housing to low-income tenants, and assist owners and operators in managing occupancy and overall operations. President Obama's FY 2012 budget proposal, in fact, recommends an amendment to the LIHTC program that would allow a property to qualify for housing credits if at least 40% of the units are occupied by tenants with incomes that average no more than 60% of AMI. Some tax credit units could be occupied by households with higher incomes, up to 80% of AMI, provided a similar number of units are occupied by tenants with incomes below 60% of AMI, such that the average income for all tax credit unit tenants doesn't exceed 60%.

In the end, however, changes to LIHTC set-aside requirements and restrictions are no substitute for focused and experienced ownership and management. As Vero Green reminds us, the critical steps to repositioning an aging multifamily development under challenging market conditions include (a) improvements to enhance the property's marketability and competitiveness; (b) strong management and a consistent marketing plan; and (c) a focus on tenant retention and satisfaction. TCA

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Dealing With Casualty Losses in the Low-Income Housing Tax Credit Program

By A. J. Johnson

A. J. Johnson

This year the Internal Revenue Services has issued a number of notices to permit existing low-income housing tax credit projects in certain states, with the approval of the state allocating agency, to rent vacant units temporarily to families displaced by floods, tornadoes, and other natural disasters without regard to certain normal LIHTC program restrictions such as tenant income limits.

Natural disasters and other events can destroy or significantly damage housing credit properties, putting them partly or entirely out of operation. Today there continues to be confusion about how the "casualty loss" of a LIHTC building impacts the owner's ability to claim housing credits. There are ways, however, to mitigate the loss of credits due to a casualty loss.

Definition of Casualty Loss

Under the LIHTC program, a casualty loss is defined as the damage, destruction, or loss of property resulting from an identifiable event that is sudden, unexpected, or unusual.

Casualty losses may result from a number of different "casualty events," such as fire, flooding, tornadoes, hurricanes, government-ordered demolitions, car accidents, mine cave-ins, sonic booms, or vandalism. Property damage is not a casualty loss if it is due to normal use, if the owner willfully caused the damage or was willfully negligent, or if the damage has been progressive (e.g., deterioration caused by termites).

According to the IRS' *8823 Guide*, physical damage caused by casualty events that render LIHTC residential units or buildings (or common areas) unsuitable for occupancy must be reported by housing credit agencies (HCAs) as noncompliance with habitability standards on Form 8823.

Guidance Relating to Casualty Loss

The most detailed guidance on casualty losses and the treatment of them is in IRS Revenue Procedure 2007-54, which grants temporary relief from certain LIHTC program requirements to properties in areas declared by the President as major disaster areas. This relief does not extend to state or locally declared disaster areas.

RP 2007-54 provides the following relief for LIHTC projects in Presidentially declared disaster areas:

- If a project owner receives a carryover credit allocation during the year in which the area is declared a disaster area, the owner may be given an additional six months to meet the 10% expenditure test;
- The HCA may extend the placed-in-service deadline for buildings with carryover allocations by up to 12 additional months, instead of the normal deadline of no later than the end of the second year after the year in which the credit allocation is received;
- If a building has already claimed credits by the time of the disaster (i.e., is beyond the first year of the credit period), tax credit recapture will not occur if the building's qualified basis is restored before 24 months after the end of the calendar year in which the disaster was declared. In other words, as long as the building is restored to service by the stated deadline, tax credits may be claimed even while the building is out of service. (Note: Credit agencies may stipulate a deadline shorter than 24 months.) If the casualty loss is not in a Presidentially declared disaster area, the same two-year deadline applies to restoring a building to service, and there is no recapture. However, the owner may not claim credits for years in which the building is out of service;
- HCAs may delay by up to one calendar year their first review of the LIHTC property;
- If a building is damaged during the first year of the tax credit period, the HCA may approve a delay of the start of the first year of the credit period until after the project has been restored to service. This delay may not exceed 24 months beyond the end of the calendar year in which the disaster was declared;
- HCAs may permit owners of LIHTC properties to

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provide temporary emergency housing after a major disaster to displaced individuals that were living in the agency's jurisdiction at the time of the disaster. Units may be provided for up to four months after the disaster declaration.

Additional IRS Guidance

For owners and managers of LIHTC properties, the major tax-related concern in the event of a casualty loss is the ability to claim credits. The best guidance here is in IRS Chief Counsel Memorandum (CCM) 200913012. This provides:

- Confirmation of the relief from recapture in the event of casualty loss if a building is restored within two years after the end of the year in which the casualty event occurred;
- That credits may not be claimed for any year in which a building is out of service on the last day of the tax year, unless the building is in a Presidentially declared disaster area;
- That if a building is not restored and restored to service within the two-year period, tax credit recapture shall occur, with the recapture occurring in the year during which the casualty event occurred. If the building is in a Presidentially declared disaster area, credits claimed for the year in which the disaster occurred and during the subsequent reconstruction period are disallowed; and,
- That if the casualty event and full restoration occur in the same tax year, there is no recapture or loss of tax credits if the units were restored within a reasonable period, and (1) each unit is occupied by low-income tenants by December 31 of the year, or (2) the owner initiated continual and verifiable measures to rent restored vacant units to low-income tenants immediately upon the restoration of the building.

This CCA is significant because it confirms that – other than for the first year of the credit period – there is no statutory authority for the disallowance of credits on a monthly basis. By inference, this also means that there is no authority to claim tax credits on a monthly basis except during the first year of the credit period.

Example of Casualty Loss

Following is an example that illustrates how housing credits would be claimed (or lost) after a casualty loss:

- Building Y is operated as low-income housing during 2011 until December 28, when a fire knocks the building out of service. If the building is not restored to service by December 31, 2011, all credits for 2011 are lost. However, there is no recapture of tax credits claimed in prior years if the building is restored by December 31, 2013 or by such earlier deadline stipulated by the housing credit agency.

Quick action by owners to restore damaged LIHTC buildings and units to service following a casualty loss can significantly mitigate the loss of tax credits. Accordingly, owners and property managers need to be aware of the timing issues regarding correction and to act swiftly to restore buildings. TCA

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Crème de la Crème

Outstanding Historic Rehabilitation Projects Are Honored With NH&RA 2011 'Timmy' Awards

The National Housing & Rehabilitation Association (NH&RA), in association with the National Trust Community Investment Corporation, a subsidiary of the National Trust for Historic Preservation, presented its 2011 J. Timothy Anderson ("Timmy") Awards for Excellence in Historic Rehabilitation at an awards ceremony in Boston on November 15 as part of the NH&RA 2011 Fall Developers Forum conference.

Nine winners plus an honorable mention were selected by a panel of judges from 17 finalist projects. Thirty-five total entries were received in the competition.

The 2011 categories, and the name, location, developer(s), and architect of each winning project receiving a Timmy Award, are:

- **Best Historic Rehabilitation Utilizing Low-Income Housing Tax Credits**
  (Large/Over $5 Million Development Cost)
  Appleton Mills, Phase I, Lowell, Mass.
  Developer: Trinity Financial, Boston, Mass.
  Architect: ICON architecture, inc., Boston, Mass.

- **Best Historic Rehabilitation Utilizing Low-Income Housing Tax Credits**
  (Small/Up to $5 Million Development Cost)
  Oliver School Apartments, Winchester, Ky.
  Developer: AU Associates, Inc., Lexington, Ky.
  Architect: Brandstetter Carroll, Inc., Lexington, Ky.

- **Most Innovative Adaptive Reuse**
  CASA de Maryland Multicultural Center, Langley Park, Md.
  Developer: CASA de Maryland, Inc., Hyattsville, Md.
  Architect: Bucher / Borges Group PLLC, Easton, Md.

- **Best Historic Rehabilitation Involving New Construction**
  Mercy Corps Global Headquarters, Portland, Ore.
  Developer: Mercy Corps International, Portland, Ore.
  Architect: THA Architecture, Inc., Portland, Ore.

Photo by Rick Bostick

Metro 67 Apartments

- **Best Market-Rate or Mixed-Income Residential**
  Metro 67 Apartments, Memphis, Tenn.
  Developer: EFO Residential Partners, LTD, Dallas, Texas
  Architect: Hnedak Bobo Group, Memphis, Tenn.

- **Best Historic Rehabilitation Utilizing New Markets Tax Credits**
  Crown Square, St. Louis, Mo.
  Developer: Regional Housing and Community Development Alliance, St. Louis, Mo.
  Architect: Rosemann & Associates, P.C., St. Louis, Mo.

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Timmy Winners, continued from page 35

- **Best Commercial/Retail/Non-Residential Project**
  Renovation of Philadelphia Main Post Office, Philadelphia, Pa.
  Developer: Brandywine Realty Trust, Radnor, Pa.
  Architect: Bohlin Cywinski Jackson, Philadelphia, Pa., and BNIM (Associated Architect & LEED Coordinator), Kansas City, Mo.

- **Most Advanced Financial Structure**
  Hayes at Railroad Square, Haverhill, Mass.
  Developer: Planning Office for Urban Affairs, Roman Catholic Archdiocese of Boston, Boston, Mass.
  Architect: The Architectural Team, Inc., Chelsea, Mass.

- **Achievement in Sustainability**
  Ghost Ranch Lodge, Tucson, Ariz.
  Developer: Atlantic Development & Investments, Inc., Scottsdale, Ariz.

Photo by Andy Ryan

Hayes at Railroad Square

- **Honorable Mention**
  Leavenworth Building 19, Leavenworth, Kan.
  Developer: Pioneer Group, Inc., Topeka, Kan.
  Architect: Treanor Architects, Topeka, Kans.

(For descriptions of the projects and all finalists, see the Tax Credit Advisor, *October 2011, p. 2.)* TCA

Justice Department Files Brief in IRS Appeal of Tax Court Decision in Historic Boardwalk Hall Case

A brief filed on behalf of the Internal Revenue Service in its appeal of an early 2011 U.S. Tax Court decision has some tax credit industry participants nervous that an appeals court ruling favoring the Service could adversely affect the future structure of transactions utilizing federal historic rehabilitation tax credits – and perhaps other kinds of federal tax credits as well.

The U.S. Department of Justice filed the brief October 27 with the U.S. Court of Appeals for the Third Circuit, which is hearing the appeal by the IRS of the January 2011 decision by the Tax Court that upheld the taxpayer *(Historic Boardwalk Hall, LLC, New Jersey Sports and Exposition Authority v. Commissioner of Internal Revenue Service).*

In its appeals brief, the Justice Department reiterates the IRS' previous arguments and asks the Third Circuit Court to reverse the Tax Court decision and remand the case for consideration of penalties.

Background of Case

In its decision, the Tax Court ruled against the Service in its challenge of the structure of a transaction involving the historic rehabilitation of the former convention center in Atlantic City, N.J. The IRS had asserted that the transaction was a sham and sought to impose tax adjustments and penalties against the limited liability company (LLC) formed in 2000 to own, rehabilitate, and operate the renovated convention center (East Hall).

The members of Historic Boardwalk Hall LLC (HBH), were the New Jersey Sports and Exposition Authority (NJSEA), a state entity, and PB Historic Renovations, LLC (PBHR). During tax years 2000, 2001, and 2002 – the years of the tax returns under challenge – the sole member of PBHR was Pitney Bowes Credit Corp., the tax credit investor.

NJSEA subleased its leasehold interest in East Hall to HBH for 87 years, and transferred and assigned to HBH ownership of all prior rehabilitation work and licensing and operating agreements. HBH became the owner of East Hall for federal tax purposes and assumed responsibility for completing the renovation of it. HBH placed the rehabilitated property in service and claimed the historic tax credits and other tax benefits. It allocated 99.9% of the tax credits and other benefits to PBHR and the remainder to NJSEA.

In February 2007, the IRS issued a notice to the partnership and to NJSEA, proposing adjustments to the tax benefits claimed on the partnership's federal tax returns for tax years 2000-2002, plus proposed tax penalties. NJEA and the partnership challenged this in U.S. Tax Court in May 2007 and eventually won. The Tax Court held that the transaction was legitimate and had economic substance, and that Pitney Bowes was a bona fide partner that bore financial risk despite various guarantees and protections.

Arguments in Appeal

In its appeals brief, the Justice Department reiterates the IRS' previous arguments and asks the Third Circuit Court to reverse the Tax Court decision and remand the case for consideration of penalties.

The Justice Department, as did the IRS earlier, contends that the formation of HBH was a sham transaction; that Pitney Bowes was not a bona fide partner; and that the transfer by the Authority of its leasehold interest in East Hall was not a sale for federal income tax purposes because there was no transfer of the burdens and benefits of ownership. The IRS described its position as rejecting a sale of tax credits where the purchaser of the credits did not share in the entrepreneurial risks of the partnership's business, and that the federal historic tax credits were property that was sold, and not tax credits that were allocated to a partner in exchange for a capital contribution to a common venture. This argument is consistent with the result reached by the U.S. Court of Appeals for the Fourth Circuit in a 2011 ruling in favor of the IRS that reversed a different Tax Court decision involving Virginia state historic tax credits. In that decision, a panel of the appeals court held that the exchange of Virginia state historic tax credits from investment funds to investors in return for money was not an allocation of tax credits in return

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for capital contributions but rather a sale of property by the funds to the investors that triggered taxable income for the funds for federal income tax purposes. In the transactions, the federal and Virginia historic tax credits were allocated to different investors. *(For details, see* Tax Credit Advisor, *May 2011, p. 34.)* The characterization of the transaction as a "sale" rather than an allocation of federal historic rehabilitation credits has not been raised before since federal tax credits have never been characterized as property.

The Justice Department brief also asserts a narrow reading of a court's position in the *Sacks* decision, arguing that just because Congress has authorized certain federal tax credits (e.g., historic rehabilitation) to encourage specific types of activities and transactions that might not be profitable, this does not mean that such tax credit transactions are exempt from having to demonstrate economic substance or that Congress authorized any specific transactional structure through which credits can be delivered to a taxpayer.

In its *Historic Boardwalk Hall* decision against the IRS, the Tax Court had held that there was an economic benefit to Pitney Bowes from the transaction in addition to the tax benefits, including an annual 3% priority return. The Justice Department brief, though, argues that Pitney Bowes was not a bona fide partner because it had no meaningful stake in the success or failure of the enterprise. It was protected against financial losses or the loss of the tax credits by various guarantees and safeguards, and it had no or little opportunity for additional financial upside from any successful operation of the renovated convention center due in part by an option by the Authority to purchase the investor's interest, even during the initial five-year tax credit compliance period in the event that Pitney Bowes did not consent to an action proposed by the Authority. The brief also notes that the Authority, not HBH, was responsible for covering any construction cost overruns and certain other financial obligations, and was liable for real estate taxes and utility costs for the facility.

Amicus Brief Planned, Reaction

The National Trust for Historic Preservation, in collaboration with the Historic Tax Credit Coalition, an industry group, plans to file an amicus brief by December 22 rebutting the arguments in the Justice Department brief and supporting the taxpayer's position, said John Leith-Tetrault, chairman of the Coalition and president of the National Trust Community Investment Corporation, an arm of the National Trust that syndicates transactions utilizing federal historic, low income housing and new markets tax credits. The National Trust will be inviting other preservation organizations to sign onto the amicus brief; one that plans to do so is the National Housing & Rehabilitation Association's Historic Preservation Development Council.


Jerry Breed

Washington, D.C. tax attorney Jerry Breed, a partner at Bryan Cave LLP, disputed the arguments made by the Justice Department in its appeals brief, characterizing the Historic Boardwalk Hall transaction as legitimate and noting that many of the traits of the deal structure (e.g., guarantees, priority returns) are typical in historic tax credit transactions. He portrayed as a stretch and as faulty the Justice Department's view that federal tax credits should be treated as property just as Virginia historic tax credits were treated as property by the Fourth Circuit decision. Finally, he assailed the Justice Department's narrow interpretation of the *Sacks* decision, explaining that Congress authorized historic tax credits and certain other federal tax credits with the clear intent to encourage transactions promoting certain types of worthwhile activities (e.g., rehabilitation of historic buildings, development of affordable low-income rental housing) that might not be economically viable otherwise without the tax credits and tax benefits.


John Leith-Tetrault

Leith-Tetrault described the Justice Department appeals brief and its arguments as "worrisome." Both he and Breed noted that an ultimate Third Circuit decision favoring the IRS could force changes to the structure of future historic tax credit transactions, and perhaps also transactions utilizing other kinds of federal tax credits, such as new markets tax credits.

If the taxpayer loses the appeal, says Leith-Tetrault, the extent of the impact will depend on which IRS/Justice arguments that the court agrees with. "If the [court] embraces a lot of those arguments, it could seriously constrain the future use of the federal historic credit," he says. TCA

State Roundup

Alaska Agency Establishes Public Housing Subsidiary

On November 3, the Alaska Housing Finance Corporation (AHFC) announced the formation of a subsidiary called the Corporation for Affordable Housing (CAH). Its primary purpose is to enable AHFC to take advantage of a variety of financing options for the expansion of public housing. The subsidiary corporation enables AHFC to access a federal funds not currently being fully utilized, such as tax-exempt bond financing and 4% low-income housing tax credits. In May, Gov. Sean Parnell signed legislation that authorizes AHFC to acquire, develop, manage, and operate affordable housing.

(http://tinyurl.com/cysjkx)

Iowa Releases Draft 2012 Qualified Allocation Plan

The Iowa Finance Authority has released a draft qualified allocation plan (QAP) for its 2012 low-income housing tax credit program for public comment through November 22, plus a summary of proposed changes. One funding round is planned with an application deadline of February 3, 2012.

(http://tinyurl.com/5wualdw)

Arkansas Publishes Final 2012 QAP

The Arkansas Development Finance Authority has published a final qualified allocation plan for its 2012 low-income housing tax credit program, along with a summary of major changes. One funding round is planned with an application deadline of February 3, 2012.

(http://tinyurl.com/5rvok7d)

Massachusetts Doubles Amount of State Housing Credits

On October 27, Massachusetts Gov. Deval Patrick signed a supplemental appropriations bill that raises the volume cap on available state housing tax credits to $10 million in 2013 and to $10 million in 2014. This doubled the amount previously available.

California Releases Schedule for LIHTC Program

The California Tax Credit Allocation Committee recently issued an updated proposed timeline for its 2012 low-income housing tax credit program, including critical dates and deadlines. Two funding rounds are planned with proposed application deadlines of March 22 and July 11, 2012.

(http://tinyurl.com/67o7r7h)

Arizona Seeks Applications for Housing Funds

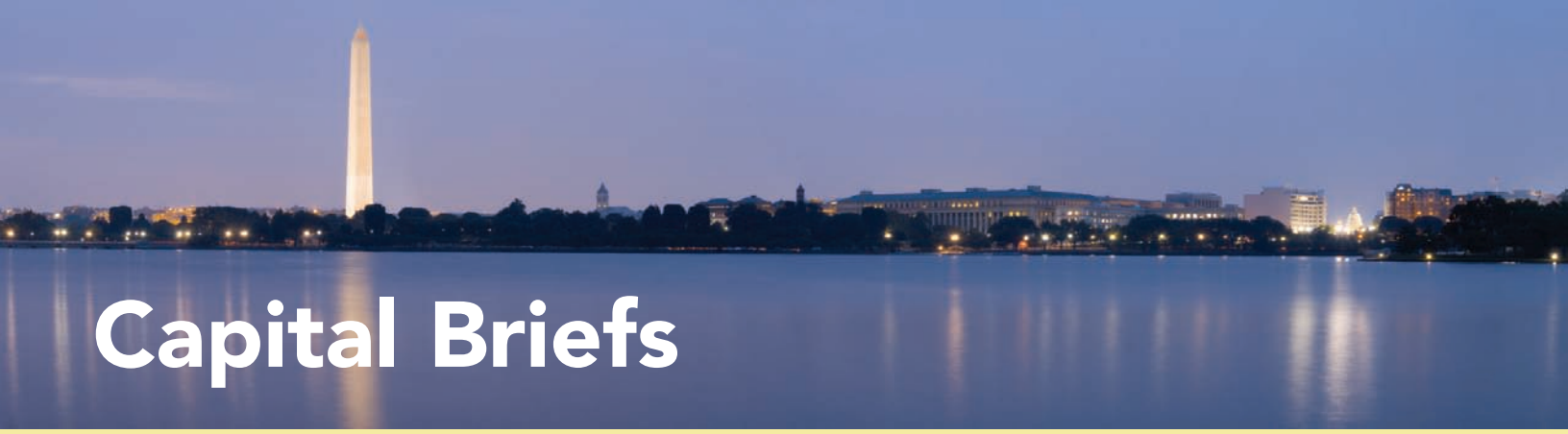
The Arizona Department of Housing has announced the availability of funds for the preservation of existing affordable multifamily rental housing properties and is soliciting applications by January 13, 2012. Roughly $6 million is available for award.

(http://tinyurl.com/3qpq6pw)

Arizona Publishes Draft 2012 Allocation Plan

The Arizona Department of Housing has released a draft 2012 qualified allocation plan for its LIHTC program. The agency plans one funding round with an application deadline of March 1, 2012.

(http://www.azhousing.gov) TCA



Capital Briefs

IRS Announces 2012 Credit, Bond Volume Caps

New IRS Revenue Procedure 2011-52 provides that the annual volume cap for each state in 2012 for per capita low-income housing tax credits will be the greater of $2.20 times the state's population or $2,525,000. Each state's 2012 volume cap for tax-exempt private activity bonds will be the greater of $95 times the state's population or $284,560,000. The precise amount of each state's credit and bond caps won't be known until the IRS transmits updated state population estimates in early 2012.

The revenue procedure also raises the minimum amount of rehabilitation expenses that must be incurred to treat rehab expenses as a separate new LIHTC building to $6,200 per low-income unit.

(http://tinyurl.com/4xkj7tx)

HUD Announces 2012 Difficult Development Areas

The U.S. Department of Housing and Urban Development (HUD) has published a notice identifying the geographic areas that will be designated as difficult development areas (DDAs) under the low-income housing tax credit program in 2012. Projects in DDAs may have their eligible basis amount increased by up to 30%. The notice, which solicits comments by December 27, 2011, also invites public input about whether HUD should use Small Area Fair Market Rents (FMRs) rather than metropolitan-wide FMRs for future designations of metropolitan DDAs.

(http://tinyurl.com/3pksa72)

HUD Issues 2012 Adjustment Factors

HUD has issued operating cost adjustment factors for project-based rental assistance contracts with anniversary dates on after February 11, 2012. OCAFs are annual factors used to adjust Section 8 rents renewed under Section 524 of the Multifamily Assisted Housing Reform and Affordability Act of 1997.

(http://tinyurl.com/4xc3lzl)

IRS Grants Relief for New York LIHTC Projects

New IRS Notice 2011-87 permits existing low-income housing tax credit projects in New York State, with the approval of the state housing credit agency, to lease units temporarily to persons displaced by recent Hurricane Irene or Tropical Storm Lee, without regard to the program's usual income limits, non-transient requirement, and certain other standards.

(http://tinyurl.com/6l3nypx)

HUD Announces Proposal to Revise HOME Program Rules

On November 4, HUD Secretary Shaun Donovan announced that the Department is proposing changes to the regulations for the HOME Investment Partnerships program. These would generally strengthen compliance and reporting requirements under the program, which has been the subject of critical *Washington Post* articles and Congressional hearings. The proposed rule would require state and local governments to: adopt policies and procedures to improve their oversight of projects; develop a system for assessing the relative risk of projects, and more closely monitor their HOME-funded sub-recipients; assess a capacity of a developer and the long-term viability of their project before committing HOME funds to the project; and make other changes.

(http://tinyurl.com/4x7mx4q)

HUD Issues Notices on Multiple Topics

Recent notices issued by HUD include: H 2011-30, Use of Reserve for Replacement Accounts in Restructured Mark-to-Market (M2M) Properties; H 2011-29, Implementation of Tenant Participation Requirements; PIHN 2011-55, Public Housing Operating Subsidy Calculations for Calendar Year 2012; and H 2011-26, transmitting various items relating to the Section 202 and 811 supportive housing programs.

(http://tinyurl.com/3dbrpt3) TCA

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The Ritz-Carlton Marina del Rey
Marina del Rey, Calif.

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