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## MEMORANDUM

**To:** Interested Clients

**From:** Pappas Metcalf Jenks & Miller

**Date:** May 19, 2009

**Re:** Affordable Housing Changes by Senate Bill 360

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On May 1, 2009 the Senate and the House passed Senate Bill 360 (the “Bill”), which along with its alteration of growth management law contains provisions amending affordable housing law. The changes found in the Bill are an attempt to lessen the tax burden on certain affordable housing units, expand state and local government affordable housing programs, expand the affordable housing ad valorem tax exemption and allow surtaxes on infrastructure to be spent on affordable housing. These provisions were originally part of House Bills 161 and Senate Bill 1042, but were added to the Bill just prior to it being approved by both houses of the legislature.

An innocuous section of the Bill designed to create a floor on density changes to protect housing affordability is being interpreted by Department of Community Affairs Secretary Tom Pelham to create a density freeze on any zoning change in unincorporated areas.

### **I. Community Land Trusts**

Community Land Trusts (“CLTs”) provide affordable housing by; (i) buying property, (ii) building affordable housing on the property and (iii) selling the housing while leasing the land on which the house is located to the buyer for a low monthly fee. The ground lease to the buyer contains restrictions which ensure that the housing will stay affordable.

The CLT provisions in the Bill were passed because property appraisers are assessing the full value of the affordable housing built and sold by CLTs irrespective of the restrictions in the ground lease. This means the property is being assessed and taxed more than it is worth. The Bill corrects this by creating Fla. Stat. §193.018, which defines, regulates and creates new assessment methods for CLTs.

The Bill defines CLTs as, “a nonprofit entity that is qualified as charitable under §501(c)(3) of the Internal Revenue Code and has as one of its purposes the acquisition of land to be held in perpetuity for the primary purpose of providing affordable homeownership.”

The Bill states that CLTs may convey structural improvements, condominium parcels, or cooperative parcels, that are located on specific parcels of land that are identified by a legal description contained in and subject to a ground lease having a term of at least ninety-nine (99) years, for the purpose of providing affordable housing to natural persons or families who meet the extremely-low-income, very-low-income, low-income, or moderate income limits specified in Fla. Stat. §420.0004, or the income limits for workforce housing, as defined in Fla. Stat. §420.5095(3). The Bill specifies that the CLT has the first right to purchase when the buyer resells.

The Bill provides that in arriving at the valuation of structural improvements or improved parcels conveyed by a CLT, or land owned by the CLT, the property appraiser must assess based on the resale restrictions or limited uses contained in the 99-year or longer ground lease. Specifically, the Bill provides the following methods for assessment:

- The amount a willing purchaser would pay a willing seller for the land is limited to an amount commensurate with the terms of the ground lease restricting the use of the land as affordable housing in perpetuity.
- The amount a willing purchaser would pay a willing seller for resale-restricted improvements, condominium parcels, or cooperative parcels is limited to the amount determined by the formula contained in the ground lease.
- If the ground lease and all amendments and supplements thereto, or a memorandum documenting how such lease and amendments or supplements restrict the price at which the improvements, condominium parcels, or cooperative parcels may be sold, is recorded in the county's official public records where the leased land is located, the recorded lease and any amendments and supplements, or the recorded memorandum, shall be deemed a land use regulation during the term of the lease as amended or supplemented.

## **II. Ad Valorem Tax Exemption and Surtax use Expansion**

The Bill also expands the ad valorem tax exemption for affordable housing properties. It provides that property owned by an exempt organization qualified as charitable under §501(c)(3) of the Internal Revenue Code is used for a charitable purpose if the organization has taken affirmative steps to prepare the property for affordable housing to persons or families meeting the income restrictions for extremely-low, very-low, low, and moderate income families under Fla. Stat. §420.0004. The outcome of this change is that property set to become affordable housing can avoid ad valorem taxes, not just property which already contains affordable housing, the apparent goal is to make it easier for charitable organizations to develop affordable housing by allowing them to avoid the payment of taxes on the property prior to the actual construction of affordable housing.

The Bill defines affirmative steps as, “environmental or land use permitting activities, creation of architectural plans or schematic drawings, land clearing or site preparation, construction or renovation activities, or other similar activities that demonstrate a commitment of the property to providing affordable housing.”

If property granted the tax exemption is transferred for purposes other than affordable housing, or the property is not actually used as affordable housing within five (5) years after the exemption is granted, the property appraiser of the county where the property is located must record a tax lien

against the property, and the property owner is subject to taxes otherwise due plus fifteen (15) percent interest per annum, as well as, pay a fifty (50) percent of the taxes due as a penalty.

If the organization which owned the property is no longer the owner the property appraiser shall record in any county in the state where the organization owns property a notice of tax lien identifying the property owned by such organization in such county which shall become a lien against the identified property. Before this out of county lien can be filed, the organization must be given thirty (30) days notice to pay the taxes, penalties, and interest.

The five (5) year limitation may be extended if the property owner continues to take “affirmative steps” to develop the property for affordable housing.

Amends Fla. Stat. §196.1978, to extend the affordable housing property ad valorem tax exemption to property that is held for the purpose of providing affordable housing to persons and families meeting the income restrictions in Fla. Stat. 159.603(7) and Fla. Stat. 420.0004. The Bill explains that in order to qualify, the property must be owned by a Florida-based limited partnership of which the sole general partner is a not-for-profit corporation, or be owned by a nonprofit entity that is a not-for-profit corporation. The not-for-profit corporation must qualify as charitable under §501(c)(3) of the Internal Revenue Code and in compliance with Rev. Proc. 96-32, 1996-1 C.B. 717. The Bill provides that any property owned by a limited liability company or a limited partnership which is disregarded as an entity for federal income tax purposes pursuant to Treasury Regulation 301.7701-1466 3(b)(1)(ii) will be treated as if owned by its sole member or sole general partner.

The Bill also amends Fla. Stat. §212.055, by redefining the term “infrastructure” to allow the proceeds of a local government infrastructure surtax to be used to purchase land for purposes related to construction of affordable housing. Specifically it expands the definition of infrastructure to include, “Any land-acquisition expenditure for a residential housing project in which at least thirty (30) percent of the units are affordable to individuals or families whose total annual household income does not exceed 120 percent of the area median income adjusted for household size, if the land is owned by a local government or by a special district that enters into a written agreement with the local government to provide such housing. The local government or special district may enter into a ground lease with a public or private person or entity for nominal or other consideration for the construction of the residential housing project on land acquired pursuant to this sub-subparagraph.”

### **III. Florida Housing Finance Corporation**

Documentary stamp taxes fund both the state and local housing trust funds, which are administered by the Florida Housing Finance Corporation (the “FHFC”). The state trust fund receives thirty (30) percent of the allocated funding for affordable housing while the local trust fund receives seventy (70) percent. The local governments, in using this money for affordable housing, must create a plan under FHFC’s State Housing Initiatives Partnership Act Program (the “SHIP Program”), which must be consistent with the local comprehensive plan. FHFC also has the State Apartment Incentive Loan Program (the “SAIL Program”), which provides low interest loans to affordable housing developers.

The Bill changes some of the legal definitions under the SHIP Program and alters some of the provisions of the SAIL Program to expand loans under the program to be used on less deteriorated projects than current law allows.

**A. FHFC Mortgage Bond Program Funding and Funding Distribution**

The Bill clarifies the statutory section for the funding of the FHFC receives from the Mortgage Revenue Bond Program, directs FHFC to develop criteria for awarding contracts and changes FHFC's timing for fund distribution.

- The Bill amends Fla. Stat. §159.807(4), which deals with the allocation of funding from the State's Mortgage Revenue Bond Program, by limiting the FHFC's access to the State's allocation pool for private activity bonds issued by the state to the amount of their initial allocation under Fla. Stat. §159.804, and to provide that after the initial allocation has been provided, the corporation may not receive more than eighty (80) percent of the amount remaining in the state allocation pool on November 16th of each year.

According to the staff analysis of the original House bill, Fla. Stat. §159.807(4) governs the state allocation pool of the Mortgage Bond Program. Recently, according to the staff analysis, the way the statute has implemented bond allocations for the FHFC for the past fifteen (15) years has been "called into question." The staff analysis further states, "The change in language is intended to make clear that the current implementation procedure used by FHFC is correct."

- The Bill creates Fla. Stat. §420.507(47), which directs the FHFC to develop and administer rules, in connection with any FHFC competitive program, establishing a preference for developers and general contractors based in Florida and for developers and general contractors, regardless of their home-state, that have substantial experience in developing or building affordable housing through the corporation's programs.
- The Bill allows the FHFC to distribute funds on a quarterly basis rather than a monthly basis. Fla. Stat. §420.9073 (1-2).

**B. SHIP and SAIL Programs**

The Bill amends certain laws to allow for the expansion of FHFC's SAIL Program, which provides low interest loans to affordable housing developers. Specifically, the Bill:

- Creates a new definition for "moderate rehabilitation", under Fla. Stat. §420.503, to allow SAIL Program funds to be used to preserve units that are less deteriorated than those requiring "substantial rehabilitation.." Specifically, the Bill defines "moderate rehabilitation" to mean the repair or restoration of a dwelling unit when the value of such a repair or restoration is not more than 40 percent of the value of the dwelling unit but not less than \$10,000.
- Under Fla. Stat. §420.5087(6)(c)(16), adds green building principles, storm resistant construction, or other elements that reduce long-term costs related to maintenance, utilities, or insurance as criteria to be considered by the FHFC in its scoring and competitive evaluation of applications for funding under the SAIL Program.
- Under Fla. Stat §420.5087(6)(c)(17), adds the home state of the developer and general contractor as criteria to be considered by FHFC in its scoring and competitive evaluation of applications for funding under the SAIL Program.

The Bill also amends the FHFC's definitional section of the SHIP Program. The SHIP Program provides funds to local governments on a population-based formula as an incentive to produce and preserve affordable housing. To be eligible to receive funding under the SHIP program, a county or an eligible city must submit a local housing assistance plan to the FHFC, and within twelve (12) months of adopting the plan, incorporate local housing incentive strategies. The local housing incentive strategies must be implemented by amending land development regulations or establishing local policies and procedures. Also, the local government must adopt an ordinance to create a local housing assistance trust fund, implement a local housing assistance plan through a local housing partnership, designate responsibility for the local housing assistance plan, and create an affordable housing advisory committee. To be eligible to participate, the governing board of a city must execute an inter-local agreement with the governing body of the county in which the city is located. The Bill does not appear to change any of the fundamentals of the SHIP Program but instead expands and streamlines local government's ability to use it. Fla. Stat. §420.9071 is the statutory section dealing with the implementation of the SHIP Program.

- The Bill amends the definition of “annual gross income” under Fla. Stat. §420.9071(4) to provide that “annual gross income” may be defined by the standard practices used in the lending industry as detailed in the local housing assistance plan and approved by the FHFC. The change would allow FHFC to approve additional income verification methods consistent with verification methods currently utilized in the lending industry.
- The Bill creates Fla. Stat. §420.9071(29) to define “assisted housing” and “assisted housing development” as rental housing developments, including rental housing in a mixed use development, that received or currently receives funding from any federal or state housing program.
- The Bill creates Fla. Stat. §420.9071(30) to define “preservation” as efforts taken to keep rents in existing assisted housing or assisted housing development affordable for income-qualified persons while ensuring that the property stays in good physical and financial condition for an extended period. This definition and the two previous definitions were created because the Bill encourages local governments under the SHIP Program to, “[D]evelop a strategy within its local housing assistance plan which provides program funds for the preservation of assisted housing.”
- The Bill amends the definition of “eligible housing” under Fla. Stat. §420.9071(9) to include manufactured housing installed in accordance with the installation standards for mobile and manufactured homes contained in rules of the Department of Highway Safety and Motor Vehicles. Following the Hurricane Housing Work Group's recommendation in 2005, the FHFC used Hurricane Housing Recovery Program funds for manufactured housing assistance. Since 2006, the Community Workforce Housing Innovation Pilot Program has included identical language defining “eligible housing.”
- The Bill amends the definition of “local housing incentive strategies” under Fla. Stat. §420.9071(16) to allow the local affordable housing advisory committees to propose local housing incentive strategies in the triennial evaluation of how local governments are implementing affordable housing. The idea behind this change is to allow the local committees to propose additional incentive strategies for local housing assistance plans.
- The Bill amends the definition of "recaptured funds" under Fla. Stat. §420.9071(25) to be “funds that are recouped by a county or eligible municipality in accordance with the

recapture provisions of its local housing assistance plan pursuant to Fla. Stat. §420.9075(5)(h)(g) from eligible persons or eligible sponsors, which funds were not used for assistance to an eligible household for an eligible activity, when there is a default on the terms of a grant award or loan award.”

We believe this means that funds would only be designated as recaptured when no eligible unit is assisted with the funds being recaptured. The distinction is important because recaptured funds get sent back to FHFC and redistributed to other localities under the SHIP Program. This clarifies that funds retaken by a locality are only recaptured and subject to being sent back to FHFC if they are not used at all, not simply returned because of a default. According to the sponsors of the original bill in the House, this will allow FHFC to track the use of funds more accurately.

#### **IV. Miscellaneous**

The Bill contains various provisions which amends everything from regulations on residential density to the amount of funding a local government may use, including:

- The Bill amends the state law on local government land development regulations with regards to residential density. The Bill specifically adds to Fla. Stat. 163.3202 a new subsection (h) which states that local land development regulations shall as a minimum, “Maintain the existing density of residential properties or recreational vehicle parks if the properties are intended for residential use and are located in the unincorporated areas that have sufficient infrastructure, as determined by a local governing authority, and are not located within a coastal high hazard area under Fla. Stat. 163.3178.” Department of Community Affairs head Tom Pelham has spoken about this section and how it may have the affect of freezing residential densities for comprehensive plan amendments. This would have significant negative implications.
- The Bill amends Fla. Stat. §420.622, to allow money granted by the State Office on Homelessness to be used to acquire transitional or permanent housing for homeless persons.
- The Bill amends Fla. Stat. §1001.43, to expand the purposes for which a district school board in an area of critical state concern may use specified properties and surplus lands to include affordable housing for essential services personnel, as defined by local affordable housing eligibility requirements.
- The Bill allows local governments to expend a portion of the local housing distribution to provide a one-time relocation grant to persons who meet the income requirements of the SHIP Program and who are subject to eviction from rental property due to the foreclosure of the rental property.
- The Bill allows, under Fla. Stat. §420.9075(3)(d), the local housing assistance plans of counties and cities can include strategies to assist persons and households with annual incomes of not more than 140 percent of the area median income.
- The Bill states that not more than 20 percent of funds made available in each county and eligible city may be used for manufactured housing in the local housing assistance plan.

- The Bill requires local governments, under Fla. Stat. §420.9075(3)(d), to state in their local housing assistance plans how they plan to address green building, storm resistant construction and other elements that reduce long term costs. This change requires that local governments consider how current and emerging building and design techniques should be integrated into affordable housing strategies both for sustainability and to promote greater affordability.
- The Bill adds “persons with disabilities” to the list of demographics that must be tracked by the local government as part of their local affordable housing programs.
- The Bill creates Fla. Stat. §420.628, which qualifies children and young adults leaving foster care as eligible for consideration for affordable housing assistance