



NEW YORK  
CITY BAR

March 5, 2013

Mr. Andrew Reicher  
Executive Director  
Urban Homesteading Assistance Board  
120 Wall Street, 20th floor  
New York, NY 10005

**Re: Comments on the Task Force on City-Owned Property's Proposed Amendments to Article XI of the New York Private Housing Finance Law to Improve Regulation and Operations of HDFC (Affordable) Cooperatives**

Dear Mr. Reicher:

In its December meeting, the Housing and Urban Development Committee (“HUD Committee”) of the New York City Bar Association heard a presentation and reviewed a memo submitted by the Task Force on City-Owned Property (“the Task Force”). The memo proposes various amendments to Article 11 of the New York Private Housing Finance Law (“the Statute”) aimed at preserving and more effectively monitoring a form of low-income cooperatives known as housing development fund companies (“HDFCs”). At the heart of the proposal is a real estate tax exemption that would be offered to HDFCs in exchange for entering into a regulatory agreement with resale restrictions and other requirements that are more stringent than those that currently apply to them. The HUD committee collectively agreed that it should express its interest in the proposal to the Task Force but send along a number of suggestions as presented below:

- 1. Will the promise of \$0 taxes be enough to convince most low-income cooperatives to sign onto new regulatory agreements? And how will violations of the regulatory agreement be identified? What will the fiscal impact be for the City?**

The HUD Committee is concerned that the Department of Finance is not equipped to monitor individual unit sale prices to ensure that there are no violations of the regulatory agreement. Therefore, it is particularly important to examine this approach and consider whether some sort of pre-approval by a monitoring or supervisory agency would be a better way to guard against violations. The potential burden of pre-approval has to be weighed against the possible ineffectiveness of Department of Finance or Department of Housing and Urban Development oversight.

The HUD Committee noted that the proposed tax abatement is a key provision that should be highlighted earlier in the Task Force memo. It isn't mentioned until pg. 5 of the memo.

The HUD Committee offers the following suggestions:

- The HUD Committee suggests that more detail be added to the discussion of the plan's fiscal impact. For example, the dollar amount of the real estate tax loss if 90% of the HDFCs sign regulatory agreements was not calculated. The Task Force might also consider adding the cost of rescuing failed HDFCs into the calculations. In addition, the memo is not clear on how much of the \$37,352,000 in savings that would result from the creation of new affordable housing could be attributable to the proposed statutory amendment to any one year. The Task Force might expand that discussion, perhaps by looking to Governor Cuomo's ten-year plan and its housing production goals.
- The HUD Committee suggests that the Task Force examine the possibility of whether the DAMP tax cap currently enjoyed by most buildings can be removed if an HDFC fails to agree to the new regulatory agreement.
- The Task Force is assuming that 90% of HDFCs will agree to a new regulatory agreement, but the HUD Committee felt that even if the number is lower and more buildings pass on the proposal, a lower number of participating HDFCs would still have a significant impact on preserving affordability. The Task Force should consider, however, whether it's possible that a lower percentage of buildings will agree to the new restrictions while many forgo the opportunity. The Task Force memo currently assumes that if a building forgoes the opportunity to enter into a new regulatory and receive tax benefits, it will then be taxed at a full amount; this doesn't account for buildings that cease to carry out their corporate purpose of providing low-income housing while maintaining their current DAMP tax caps.
- The HUD Committee also discussed whether other incentives could be added to the Statute such as capital improvement funds and water/sewer tax exemptions. Article 8-A of the Private Housing Finance Law already allows for rehabilitation loans, but it contains a \$35,000 per unit limit and doesn't allow any borrowing for tax arrears. Perhaps amendments to this section could be considered.

## **2. Provisions in the proposed regulatory agreement**

### *Price cap of \$30,000 per room with a 3% per year increase*

The Committee discussed whether a set price in the Statute could, at various times, be unrealistic and out of touch with the market. However, the HUD Committee concluded that the set amount would be easier to monitor by HPD or the Department of Finance and thought that the Task Force should discuss this idea with HPD program staff to determine if it's feasible in light of the numerous programs HPD administers. If a set per unit amount is the most feasible way of framing the price cap, the Statute could provide that the monitoring agency regularly review the price cap and potentially have the power to amend it if necessary. With regard to the

mandatory 3% increase on an annual basis, another possibility the Task Force could consider is to modify the 3% proportionately to any increase in the consumer price index for any subsequent year over the year in which the agreement was signed.

#### 80% of AMI as the income limit

The HUD Committee is in favor of using Area Median Income ("AMI") to determine income eligibility as opposed to the current definition under Section 576 of the Statute. However, the Committee believes that the Task Force should be willing to consider higher AMI's since HDFCs are used to create affordable housing for individuals and households up to 195% of the AMI. One option would be to have a standard AMI, which can only be changed pursuant to the terms of a Regulatory Agreement.

#### Determining income

In addition to adding the use of federal tax returns to examine pension funds as part of income, the HUD Committee thought the Task Force should consider how to eliminate applicants with trust funds or significant support from parents. For example, purchasers could be required to meet an asset test as well as an income test.

#### Selection process for new residents

The Task Force memo doesn't provide for a selection process other than income eligibility. The HUD Committee suggests that a waitlist or lottery be considered. This might be a complicated process, especially for small buildings, and a waitlist system might be open to potential abuse, but the Task Force should examine this issue.

### **3. Clarifying different types of low-income cooperatives**

The Task Force memo mentions that development companies, rental HDFCs and HDFC co-ops are lumped together in the Statute and should not be. However, the ways in which they should be treated differently are not specified. The Committee suggests discussing this issue in greater detail with HPD and coming up with a solid mechanism to distinguish between HDFCs that are used solely for interim development purposes versus HDFCs that are incorporated to own and operate a low-income coop for its members.

### **4. Sale of property and dissolutions**

The Committee agrees that the approval process for the transfer, sale or dissolution of all or substantially all of the assets of an HDFC should be the same for all HDFCs, whether they are formed as a not-for-profit or a business corporation. In the event the Statute is amended to clarify that all HDFCs must seek both court approval and Attorney General approval for such transactions, it would be beneficial to have an expedited process to handle the transactions.

The HUD Committee also suggests that the Task Force examine whether there are other ways to record the restrictions in addition to recording the regulatory agreement: stricter requirements for legends on shares or recording proprietary leases, for example.

## 5. Enforcement Powers

The HUD Committee suggests that the Task Force consider whether the Attorney General should have both the power to bring legal actions and to appoint board members when directors have failed to cure regulatory agreement violations or otherwise breached their fiduciary duties.

The Task Force should also consider whether the situations leading to appointment of new directors by the supervisory agency and possibly the Attorney General should be further specified to include, for example, when: a) no shareholders are eligible to vote for directors, b) no shareholder is eligible to be a director, or c) mortgage payments or payments of municipal charges are unpaid or in danger of being unpaid.

The Task Force should also consider whether the monitoring agent should have the power to appoint directors after consultation with the supervisory agency.

\* \* \*

Thank you for your consideration.

Sincerely,

Housing and Urban Development Committee  
New York City Bar Association

Contact: Benjamin Flavin  
212-729-4266 ext 102  
[bflavin@patellawlp.com](mailto:bflavin@patellawlp.com)