



Production & Preservation Committee Meeting July 17, 2019, 1:00–2:30 p.m.

Notes

- **Welcome & Introductions**
- **Bid Protest Discussion**

The organization, the [Foundation for Fair Contracting of Massachusetts](#) (FFCM), filed bid protests at the Attorney General's Office (AGO) - Fair Labor Division against two affordable housing developments in Holyoke and Springfield alleging that public construction bidding laws should apply to these projects.

Holyoke Case: On June 20, 2019, the AGO released a decision in the Holyoke case, which involved the redevelopment of Lyman Terrace, development of the Holyoke Housing Authority. The housing authority entered into an agreement with The Community Builders (TCB) to redevelop Lyman Terrace. TCB did not follow public bidding laws nor did it seek a home rule petition to exempt the project from these laws.

FFCM challenged the project claiming that it should have followed public bidding requirements because, among factors, the land involved public housing property. The AGO decided in favor of FFCM and said public bidding laws should have been followed for the project.

In reaching its decision, the AGO used the *Brasi* Analysis, which is a series of factors to consider when deciding whether public bidding laws should apply. Please see the slide-deck at the end of this document for more on the analysis and factors.

For a copy of the decision in the Holyoke Housing Authority case, please [CLICK HERE](#) to visit the AGO bid decision page and download the decision from 6/20/2019.

The factors used to decide the Holyoke case suggested that developments that involve public funds could be subject to public bidding laws. This potentially leaves all affordable housing developments open for challenging whether they are subject to public bidding laws.

Springfield Case: FFCM has also filed a bid protest against a privately-owned affordable housing development in Springfield, Chestnut Park Apartments. The organization FFCM alleges that Chestnut Park required to follow public construction bidding laws because, among other factors, the development has received public subsidies, financing agencies like MassHousing and DHCD retain a certain level of control of the project, and the development is subject to Chapter 40T.

If AGO finds that this development is subject to public bidding laws, this could potentially have implications for every affordable housing development in the state. Public construction bidding can add up to 30% or more to the cost of a project.

There is a public hearing on this case on July 25, 2019. Testimony is due to the AGO by Tuesday, July 23.

There was support for CHAPA to submit testimony to the AGO in opposition to the bid protest. Suggestions of points for CHAPA to include in its testimony included:

- Focusing on the two separate affordable housing delivery systems - (1) public housing and (2) privately-owned affordable housing development - emphasizing that Chestnut Park is a strictly private development compared to the Lyman Park decision which involved public housing.
- Discuss the impact on affordable housing development if public bidding requirements were to apply to all projects.
- Clarify that Chapter 40T reinforces the private-ownership aspect of affordable housing development.

There was also support for further discussion of legislative and other policy solutions.

- **QAP Discussion**

The 2020-21 QAP was discussed and Sean Tierney provided a review of the QAP Working Group meeting that was held in June. CHAPA will be sending comments to DHCD in anticipation for the public release of the draft QAP in early fall 2019.

For a review of the QAP Working Group meeting, please see the Update document included at the end of these notes.

- **Legislative & Budget Updates**

- **State: Budget & Legislative Priorities**

Budget: The conference committee has still not released its final budget proposal. However, the committee is expected to finish its negotiations soon.

Legislative Priorities: Several of CHAPA's production-related legislative priorities have received hearings:

CHAPA Housing Production Bill (H.1288/S.775) & Housing Choice (H.3507): The Housing Committee has still not acted on Housing Choice. It's expected that it will wait until after the state budget is resolved before reporting anything out.

Abutter Appeal Reforms (H.3397): The legislation filed by Rep. McGonagle had a hearing before the Judiciary Committee on July 16.

- **Federal: Affordable Housing Credit Improvement Act**

CHAPA will be circulating a letter in support of the Affordable Housing Credit Improvement Act of 2019. CHAPA will ask members to sign-on their organization and then CHAPA will send to the entire Massachusetts federal delegation asking for their co-sponsorship and public support of the bill. See the end of this document for a copy of the letter.

- **Member Updates**

Next Meeting: Wednesday, September 18, 2019, 1:00–2:30 p.m.



QAP Working Group

Update

- Met on June 14th. Would like to submit a letter to DHCD by the end of July.
 - **ELI Requirements and Incentives.**
 - General consensus: without additional subsidy, anything beyond the 10-15% Threshold Requirement would not be feasible.
 - Can DHCD make it easier to use income averaging if a developer is committed to providing ELI beyond the minimum threshold requirement.
 - **Disqualification for Expiring Use.**
 - Support for disqualifying a developer from an allocation if in the past the developer/owner allowed a use restriction to lapse.
 - Technical questions about who is the owner.
 - **Violence Against Women Act (VAWA) in the QAP.**
 - All LIHTC properties are already required to comply.
 - Put this requirement into the QAP.
 - Where? Appendix? Threshold?
 - Language in the Cantwell bill.
 - **Smoke free housing.**
 - Applicants should at least explain why they cannot require it.
 - **Sustainability and building technology.**
 - Support and bolster other groups leading on this.
 - **Build list of non-QAP issues to work on.**

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July 17, 2019

RE: The Affordable Housing Credit Improvement Act of 2019 (S.1703 & H.R. 3077)

Dear Massachusetts Congressional Delegation:

On behalf of Citizens' Housing and Planning Association (CHAPA), we urge you to co-sponsor and support S.1703 and H.R. 3077, The Affordable Housing Credit Improvement Act of 2019. This bipartisan legislation makes key improvements to the Low Income Housing Tax Credit (LIHTC) to increase production and preservation of affordable homes across the country. Since its inception in 1986, LIHTC has financed over 3.2 million apartments, providing approximately 7.4 million low-income families, seniors, veterans and persons experiencing a disability a home they can afford.

The Commonwealth has had great success with LIHTC. In total, from 1986-2017, the credit helped develop or preserve 55,988 homes statewide. Yet the need for long-term affordable housing remains a pressing issue for residents. Nearly 250,000 renter households in Massachusetts pay more than half of their monthly income on rent, cutting into household budgets for health care, transportation, nutritious foods, and other essential expenses. Each year, tax credit funding rounds are oversubscribed and many well deserving projects must wait a year or more for funding. H.R. 3077 is a critical federal response to the need for additional affordable units and the preservation of the valuable affordable housing stock that already exists. We hope you will consider co-sponsoring and publically supporting this critical legislation.

Here are a few key provisions in the bill that are particularly relevant to Massachusetts:

- **50% Increase in Allocation to States (Section 101):** The amount of credit each state can allocate per year is the result of a calculation based on state population. The bill provides a phased-in 50% increase to the Housing Credit Authority over current levels. This increase would boost affordable housing production by an additional 384,000 homes over the next ten years across the country, including 5,384 new homes in Massachusetts.

- **Provide Flexibility for Existing Tenants' Income Eligibility (Section 202):** Not all affordable housing restrictions are permanent. Sometimes the expiration of a rent restriction can result in the conversion of units to market rate housing, putting residents at risk of displacement. This is particularly challenging in Greater Boston where the average monthly rent for a market rate apartment is \$3,087. We are fortunate in Massachusetts to have the resources and commitment from state agencies, local officials, owners, and advocates to preserve as many of these units as possible by investing new resources and creating new affordability restrictions. Last year, the Massachusetts affordable housing community was able to preserve the affordability of more than 3,750 homes, with over 1,900 of these homes receiving support from LIHTC.

This bill addresses a key challenge in LIHTC preservation deals where an existing tenant who qualified for income restricted housing many years ago now has an income higher than LIHTC allows. Section 202 addresses this issue by qualifying these now over-income tenants as “low-income” if their household income was 60% of AMI or below when they first moved in and their income has not increased beyond 120% of AMI. Moreover, this provision would apply to not only tenants living in LIHTC units, but to tenants living in units restricted by *any* federal, state, or local program.

- **Clarify Protections for Victims of Domestic Violence (Section 205):** The reauthorization of the Violence against Women Act (VAWA) in 2013 provided protections for victims living in LIHTC properties but VAWA did not amend IRC Section 42, the statute that governs LIHTC. This bill would make technical changes to Section 42 to align with VAWA, including a requirement that all LIHTC long-term use agreements include VAWA protections.
- **Establish a Permanent Minimum 4% Housing Credit Rate (Section 301):** When Congress created LIHTC it set tax credit rates (9% and 4%) to determine how much equity can go into a particular project. The credit rates, however, were not permanent and have fluctuated according to a formula related to federal borrowing rates. Consequently, there is currently 15-20% less housing equity available than the original rates provided. To address this issue, Congress set a minimum 9% credit rate in 2015. This bill would make a corresponding change to establish a minimum 4% rate. In Massachusetts, this change could result in an additional 2,764 affordable homes over the next ten years.
- **Boost for Developments Serving Extremely Low-Income Tenants (Section 309):** Most LIHTC units generally have rents affordable to residents earning 60% of AMI. To help meet the tremendous need for housing that is affordable to Extremely Low-Income (ELI) households, Massachusetts requires all LIHTC developments to set-aside 10% of the units for households earning less than 30% AMI. Because rents are much lower for ELI restricted units, it is challenging to provide more ELI units than required. This bill would incentivize the creation of

additional ELI units by allowing states to provide up to a 50% basis boost to the calculation of credit for developments serving at least 20% ELI households.

- **Boost for Developments in Rural Areas (Section 501):** LIHTC rents are based on AMI. Generally, median incomes are lower in rural areas than in metropolitan areas. As a result, rents collected by LIHTC property owners are lower in rural areas. Lower monthly rents means there is less cash flow for the owner to leverage to access other forms of financing (e.g. debt). This bill would allow states to give rural developments a boost to the calculation of their credit award by designating them “Difficult to Develop Areas.” The effect of this change would result in more up-front equity investment, thereby increasing financial feasibility. This is important in rural areas of Massachusetts and throughout New England.
- **Modification and Clarification of Rights Relating to Building Purchase (Section 303):** As housing credit properties reach the end of their compliance period, the tax code provides a critical preservation tool by allowing a nonprofit general partner to obtain full ownership of the property through a “right of first refusal” (ROFR). This right came under dispute last year in Massachusetts when a Cambridge nonprofit developer sought to exercise this right to acquire an apartment building along the Charles River.¹

The investors in the partnership claimed the ROFR was not triggered because 1) the investors did not agree to the sale and 2) the third party offer was not a bona fide offer. Ultimately, the Supreme Judicial Court ruled in favor of the nonprofit in a narrow decision that examined the rights expressed in the partnership agreement, noting that the ROFR is a matter of contract law and “we must enforce the language they chose.” This bill would clarify in statute that the ROFR or purchase option may be exercised without approval of the investor and in response to *any* offer to purchase the property.

- **Expand Multifamily Housing Bond Recycling (Section 601):** Multifamily Housing Bonds (Housing Bonds) are a type of tax-exempt private activity bond (PAB) used by state and local housing finance agencies for the development of affordable housing. Developments are only eligible to receive the 4% credit if they also receive financing from Housing Bonds. However, the federal government limits the amount of PAB that can be issued by each state. Massachusetts typically reaches this cap without funding every deserving project. The bill would expand a practice known as “bond recycling” to allow states to reinvest bond proceeds back into multifamily development and homeownership, effectively increasing the Massachusetts annual bond cap and increasing the number of affordable homes.

We hope you will consider co-sponsoring and publicly supporting this important legislation. To co-sponsor, please contact Victoria Honard in the Office of

¹ For additional background on this decision: <https://www.chapa.org/housing-news/mass-supreme-judicial-court-rules-for-nonprofit-developer-in-lihtc-dispute>

Congresswoman Delbane (Victoria.Honard@mail.house.gov) or Lara Muldoon in Senator Maria Cantwell's office (Lara_Muldoon@Cantwell.Senate.Gov). Please contact Rachel Heller at CHAPA with any questions.

Sincerely,



Rachel Heller
Chief Executive Officer
Citizens' Housing and Planning Association

Production & Preservation Committee Meeting

July 17, 2019



Agenda

- WELCOME & INTRODUCTIONS
- BID PROTEST DISCUSSION
- QAP DISCUSSION
- LEGISLATIVE & BUDGET UPDATES
 - STATE: BUDGET & LEGISLATIVE PRIORITIES
 - FEDERAL: AFFORDABLE HOUSING CREDIT IMPROVEMENT ACT
- MEMBER UPDATES



You are cordially invited to join
Governor Charlie Baker
Secretary Mike Kennealy
and
Undersecretary Janelle Chan

for an
Affordable Housing Funding Announcement

Thursday, July 18, 2019
9:30 AM

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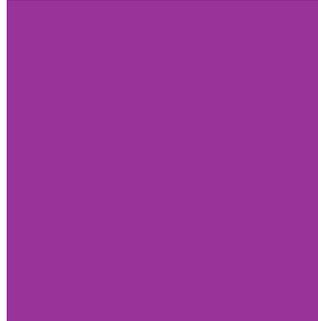
Jackson Park (adjacent to Swampscott High School)
200 Essex Street
Swampscott, MA

Please join Governor Charlie Baker, Secretary Mike Kennealy, Undersecretary Janelle Chan, and other state and community leaders for a state-wide announcement relative to affordable housing.

Please RSVP with Ryan Ambrose at ryan.ambrose@mass.gov.



Public Bid Protests



Affordable Housing & Public Construction Bidding

June 20, 2019

In re:

Holyoke Housing Authority
Rehabilitation of Lyman Terrace

Protestor:

The Foundation for Fair Contracting
of Massachusetts

Attorney General's Office

Fair Labor Division

Bid Protest Decision

In re: Holyoke Housing Authority

Issue:

“Whether the public bidding law apply when a private entity undertakes construction on a housing project that was initially owned by a public housing authority...”

AGO found that public construction bidding requirements apply to redevelopment of public housing developments by public-private partnerships

In re: Holyoke Housing Authority

Broader Implications – Public bidding requirements apply to, *“Every contract for the construction...of any building by a public agency estimated to cost over \$150,000.”*

M.G.L. ch.149, § 44A

AGO writes that this applies to any building – not just public buildings

Question becomes – *can this be applied to any publicly funded affordable housing development?*

In re: Holyoke Housing Authority

The Brasi Analysis – *Totality of the Circumstances*

Brasi Development Corp. v. Attorney General, 456 Mass. 684 (2010)

- Extent of control retained by the agency
- Length of the proposed leases
- **Whether the source of money is public funds**
- Whether payments made under the agreement cover costs of construction
- Whether state agency retains an option to purchase
- Whether the agency initially owned the land and then sold or leased it
- Whether the facility is of a specialized nature that would render it unsuitable for another commercial purpose without significant renovations

In re: Holyoke Housing Authority

PUBLIC MONEY FACTOR

“A finding of public money is not essential to a finding that the public bidding law apply.” – *In re: Holyoke Housing Authority*

However, for the Holyoke Housing Authority project,
“the entire project would not exist but for substantial federal, state and local monies earmarked for the project. This indicates that the public bidding laws do apply.”

Chestnut Towers - Springfield

- The Foundation for Fair Contracting is also challenging Chestnut Towers in Springfield – a 489-unit project by Related Beal, with \$10.2 million public investment.
 - Includes \$500,000 from Springfield
 - Subject to 40T
 - Consulted with City of Springfield on the project
- **Public Hearing on Bid Protest:**
Thursday, July 25, 2019, at 10:00 a.m.
100 Cambridge Street, 12th Floor, Faherty Hearing Room, Boston, MA

Discussion & Action Items



- Attend & testify at hearing on July 25
- Submit comments (due July 23)
- Gather sign-ons
- Gather data – highlighting cost implications; labor information
- Meet with the Attorney General
- Engage with Baker Administration
- Come up with legislative solution
- Engage with FFCM
- Prevailing wage implications
- Others...

QAP Discussion



Legislative & Budget Updates



Thank you!

Next Meeting:
September 18, 2019

