

**SC Diamond Associates, L.P.**

**VIA CERTIFIED MAIL, RETURN RECEIPT**

December 1, 2014

Mr. Mark Shelburne  
North Carolina Housing Finance Agency  
3508 Bush Street  
Raleigh, NC 27609-7509

RE: Comments in Second Draft QAP Regarding Project Team Disqualifications Section (IV.D.3)

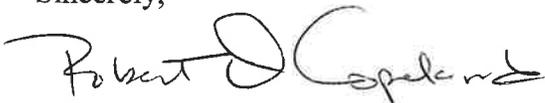
Dear Mr. Shelburne:

I take exception to the draft QAP comment which allows the authority to eliminate a developer from consideration of future tax credit allocation if that developer has "requested a qualified contract on a North Carolina Property" and respectively request that it be deleted from the final 2015 QAP.

I have asked Nixon Peabody to address the proposed QAP change from a legal prospective and their interpretation is enclosed with this letter. I would like to further comment from a business prospective. The proposed draft language changes the rules under which the property was developed and managed for the past 15+ years. As an owner I have faithfully and successfully followed all of the compliance documents. The changing of the rules for a Qualified Contract at this point appears to be a retaliatory action for utilizing options allowed in these compliance documents and explicitly authorized within Section 42(h)(6) of the Internal Revenue Code of 1986. Additionally, if I pursue a Qualified Contract and am subsequently barred from future tax credit allocations in North Carolina, this may affect my ability to do tax credit deals in other states, since most states now require a disclosure related to the ability to do tax credit deals in other states.

Thank you for the opportunity to comment on the QAP. If you have any questions, please do not hesitate to call me at 757-473-3706.

Sincerely,



Robert Copeland

cc: Governor Pat McCrory, Governor of North Carolina  
**Mr. A. Robert Kucab, Executive Director, NCHFA**  
Mr. Stancil Barnes, Chairman, NCHFA  
Mr. James E. Nance, Vice Chairman, NCHFA  
Ms. Christine L. Myatt, Nexsen Pruet, LLC

Enclosure



NIXON PEABODY LLP  
ATTORNEYS AT LAW  
NIXONPEABODY.COM  
OXFORDPEABODYLLP

**Richard S. Goldstein**  
T 202-585-8730  
rgoldstein@nixonpeabody.com

401 9th Street NW  
Suite 900  
Washington, DC 20004-2128  
202-585-8000

December 2, 2014

Mr. Robert Copeland  
SC Diamond Associates, LP  
168 Business Park Drive, Suite 200  
Virginia Beach, VA 23462

Re: North Carolina Qualified Allocation Plan

Dear Robert:

You have asked us to advise you with respect to the proposed provisions contained in Section IV.D.3 of the second draft of the North Carolina 2015 qualified allocation plan ("QAP") for low-income housing tax credits that would give the North Carolina Housing Finance Agency (the "Agency") the right to disqualify any applicant for low-income housing tax credits ("Tax Credits") if the proposed owner, Principal (as defined therein) or management agent has "requested a qualified contract for a North Carolina tax credit property".

In our view, such a provision is contrary to the letter and spirit of Section 42(h)(6) of the Internal Revenue Code of 1986, as amended (the "Code"). Section 42 in general provides for the allowance of Tax Credits and the cited sub-section provides that no Tax Credits shall be allowed unless an "extended low-income housing commitment" is in effect with respect to the buildings in question. Such a commitment must be in effect for a minimum of 30 years (i.e., 15 years following the end of the Credit "compliance period"). However, Code Section 42(h)(6)(E)(i)(II) provides that the extended use period "shall terminate" if the housing credit agency is unable, within a period specified in subparagraph (I), to present a "qualified contract" for the acquisition of the low-income portion of the building by a person who will continue to operate that portion as a qualified low-income building. Subparagraph (I) states that the period in which the qualified contract must be presented is the one year period (commencing no earlier than the 14<sup>th</sup> year of the compliance period) after the owner submits a request to the housing credit agency to find a buyer for the low-income portion of the building. A "qualified contract," which is defined in Section 42(h)(6)(F), means a bona fide contract to acquire the building for a formula-based price that was designed by Congress to provide what it believed was a fair return to the owners.

In enacting Section 42(h)(6), as part of the Omnibus Budget Reconciliation Act of 1989 (Public Law 101-239), Congress attempted to balance competing policy objectives. On the one hand, Congress wanted to preserve low-income occupancy in properties receiving Tax Credits for at least 30 years; prior to the enactment of this law, low-income occupancy could have terminated after 15 years. On the other hand, Congress wanted not to discourage investment in Tax Credit eligible properties and it was concerned that mandating low-income tenancies for 30 years in all circumstances could make such an investment unattractive by making it highly improbable that there would be any appreciation in the property's value due to the restricted rent levels. Thus, the concept of the qualified contract was adopted as a compromise between these two valid policy objectives. In general, properties would be required to stay as low-income for at least 30 years, but owners were given the right either to sell the property under a qualified contract for a price determined by a formula or to terminate the low-income restrictions after 15 years (subject to transition period of three years) if the agency did not present a qualified contract within the specified period.

Many housing credit agencies, including the Agency, have determined to reward owners who elect to waive their right to proceed under the qualified contract process by providing more points in the application process or, as is the case in North Carolina under the draft 2015 QAP, by requiring owners to forego this process as part of the extended low-income housing commitment. We have no objection to provisions of that type—owners who agree to forego their qualified contract rights at the time they apply for Tax Credits do so knowingly and recognize that their chances of obtaining Tax Credits are greatly enhanced (or in the case of North Carolina, made possible) by making that election.

What is objectionable with respect to the proposed disqualification provision in the draft Agency QAP is that owners who applied years ago under prior North Carolina QAPs had the right to exercise their rights under the qualified contract process, as provided by the Congress in Code Section 42(h)(6), and are now being told, years later, that they are subject to punishment for exercising the very right that Congress gave them and that, when they applied, the Agency allowed them to exercise. This amounts to a retroactive penalty and in our minds, extremely unfair, changing of the rules.

When an owner applied under prior QAPs that did not prohibit the qualified contract process, it did so with the understanding that it would have an opportunity, if it elected, to avail itself of the qualified contract process in a way that was perfectly consistent with congressional intent, which provided that the extended use period "shall terminate" if no qualified contract was presented. By subjecting such an owner to possible disbarment from future Credit allocations, the Agency is effectively altering that owner's contractual rights, based upon statute, in a retroactive manner. In our view, that is fundamentally unfair and could have the effect of discouraging developers from doing business in North Carolina for fear that the Agency will retroactively change other rules to their detriment. While we understand the Agency's desire to preserve affordable housing, it should not do so in a manner which is unfair to the owner and development community.

Mr. Robert Copeland  
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If the Agency wants to discourage or prohibit the qualified contract process in QAPs going forward, it is free to do so. What it should not do is to change the rules retroactively in a way that undermines the rights that Congress provided owners, in enacting the qualified contract provisions 25 years ago. We hope that the Agency will amend the draft 2015 QAP to eliminate this proposed provision.

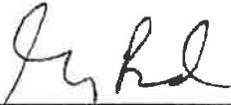
Please let us know if we can be of further assistance.

Sincerely,

Nixon Peabody LLP

By: 

Richard S. Goldstein, Partner

By: 

Gary A. Band, Partner