

# ALTERNATIVE STRUCTURES FOR DEVELOPING LOCAL GOVERNMENTALLY-OWNED AFFORDABLE HOUSING IN CITIES AND COUNTIES

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# WHY HOUSING?

Although the Texas market continues to create a lot of new supply, the affordable housing segment has not been able to keep pace with the strong demand



# TEXAS ECONOMIC FORECAST

- According to HUD, Texas has a deficit of 626,192 housing units for very low income residents (30% AMI)

<u>Metro Area</u>	<u>Deficit in Units</u>
Austin	48,449
Dallas	173,297
Houston	185,197

- City of San Antonio has targeted the creation of 860 new rental units at or below 50% AMI for each of the next four years.
- To accomplish this, we estimate it will take \$6,000 new tax credit units a year or 20 deals each year.

**As Texas grows, an affordable housing crisis looms.**

Texas Has 'Significant Shortages' Of Low-Income Rentals, Study Finds

**Lack of affordable housing fuels a Dallas crisis that will take guts to fix**

***As Affordable Housing Crisis Grows, HUD Sits on the Sidelines***

Gunsolley: The near-drowning of affordable housing in Houston

**Local workforce struggles to find affordable housing**



# TWO TYPES OF OWNERSHIP

- Governmental Housing
  - “Public Housing” owned by Housing Authority
  - Other governmentally-owned housing operated by a unit of state or local government
- Privately-Owned Housing
  - Qualified 501(c)(3) Affordable Housing
  - Private-Activity Exempt Facilities Affordable Housing



# GOVERNMENTAL HOUSING – GOVERNMENTALLY OWNED & OPERATED

- Multifamily Housing – Apartment Complex/Scattered Sites
  - Public Housing – owned by local housing authority under “Declaration of Trust” from HUD & operated by local housing authority under authority of state law and management agreement with HUD
  - Other “governmentally-owned” Housing – owned & operated by unit of state or local government
    - Housing Authority
    - City – owned and operated by a city for a municipal purpose
    - County – owned and operated by a county for a county governmental purpose
    - Hospital District – owned and operated for medical staff
    - Base Development Authority – owned and operated for a development purpose
    - School District – owned and operated by school district as a “teacherage”
    - College or University – owned and operated for staff or students



# PRIVATELY-OWNED AFFORDABLE MULTIFAMILY HOUSING

- Multifamily Housing – Apartment Complex/Scattered Sites
  - 501(c)(3) Affordable Housing – owned and operated in furtherance of the charitable purposes of a privately created non-profit corporation recognized by the IRS as a charitable exempt organization under Section 501(c)(3) of the Internal Revenue Code
    - Financed with “qualified 501(c)(3) bonds”
    - No requirement for award of “private activity bond” reservation from State
  - Private-Activity Exempt Facilities Affordable Housing – owned & operated by private for-profit organization as a “qualified residential rental project”
    - Financed with “private activity bonds” awarded a reservation of a portion of the State’s private activity bond cap
    - Requires application to and award from the Texas Bond Review Board



# TAX EXEMPT BONDS

- **Governmental Bonds** – issued by or on behalf of unit of state or local government
  - project owned & operated by a unit of state or local government
  - payable from and secured by “governmental” revenues
  - can be operated on behalf of governmental unit by private party under a “qualified management contract” –
    - no sharing in profits by private operator/manager/lessee



# TAX EXEMPT BONDS

- Private Activity Bonds – issued by or on behalf of unit of state or local government
  - Issued in furtherance of a public purpose
  - to finance a project owned & operated by a private (non-governmental) party and
  - payable from and secured by “non-governmental” revenues
  - Can be issued as –
    - **“qualified 501(c)(3) bonds”** – without necessity of volume cap from State
      - ❖ can be operated on behalf of charitable organization by private party under a “qualified management contract”
    - **exempt facilities bonds** – requires “private activity” volume cap reservation from State
      - ❖ can be operated by or on behalf of private owner by private party without regard to “qualified management contract” rules





## PRIVATE ACTIVITY BOND LIMITATIONS – APPLICABLE TO ALL PABs



- maturity – average maturity cannot 120% of useful life of facility
- land acquisition – land cost cannot > 25% of proceeds; no farmland
- costs of issuance – COI paid from proceeds cannot > 2%
  - 4% tax credit (“LIHTC”) projects use tax credit funds to cover COI above 2%
  - “qualified 501(C)(3) bonds” projects use “taxable tail” to cover COI above 2%
- depreciation – must use 40-year straight line depreciation
- Rehab Project – rehabilitation costs > 15% of land acquisition
- No use of proceeds for airplanes, skyboxes, health club gambling
- Tax Equity Fiscal Responsibility Act (“TEFRA”) public approval required –
  - Publish notice of TEFRA Public Hearing at least 7 days in advance
  - Conduct TEFRA Public Hearing
  - Obtain approval from highest elected official in Issuer and Project jurisdiction



# PABs – “QUALIFIED RESIDENTIAL RENTAL PROJECTS”


- 2 Types of Deals
  - Exempt Facility Bond – under Section 142(d) Internal Revenue Code
    - must meet either the “20-50 test” or the “40-60 test”
      - “20-50 test” – at least 20% of units occupied by persons at or below 50% AMFI
      - “40-60 test” – at least 40% of units occupied by persons at or below 60% AMFI
  - Qualified 501(c)(3) Bond – under Section 145(d) Internal Revenue Code
    - must meet either the “20-50 test” or the “40-60 test”
      - “20-50 test” – at least 20% of units occupied by persons at or below 50% AMFI
      - “40-60 test” – at least 40% of units occupied by persons at or below 60% AMFI
- Both Types Subject to PAB Limitations



## PRIVATE ACTIVITY BOND LIMITATIONS – APPLICABLE TO ALL PABs



- maturity – average maturity cannot 120% of useful life of facility
- land acquisition – land cost cannot > 25% of proceeds; no farmland
- costs of issuance – COI paid from proceeds cannot > 2%
  - 4% tax credit projects use tax credit funds to cover COI above 2%
  - “qualified 501(C)(3) bonds” projects use “taxable tail” to cover COI above 2%
- depreciation – must use 40-year straight line depreciation
- Rehab Project – rehabilitation costs > 15% of land acquisition
- No use of proceeds for airplanes, skyboxes, health club gambling
- Tax Equity Fiscal Responsibility Act (“TEFRA”) public approval required –
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# **RENTAL ASSISTANCE DEMONSTRATION PROJECTS (RAD)**



## RENTAL ASSISTANCE DEMONSTRATION PROJECTS (RAD)

RAD authorizes the conversion of “**public housing**” to

- *Section 9 – governmentally owned*

“**Rental Assistance**”

- *Section 8 – privately owned*

Available for rehabilitation and reconstruction of “public housing units”

- Owned by HUD
- Operated by local housing authority



# RENTAL ASSISTANCE DEMONSTRATION PROJECTS (RAD)

## HOUSING AUTHORITY OF CITY OF EL PASO (HACEP)

### Projects Complete – 4% LIHTC

- 16 deals closed since 4/2015
- 45 properties rehabilitated
- 4,676 units financed
- Regulatory and legislative services
- Bonds Issued: \$470,000,000
- Total Investment with LIHTC > \$1 B

### Projects Anticipated

- 1 deal anticipated in 2024
  - 1 rehab
- 1 RAD Property to be rehabilitated
  - 64 units to be financed
- Bonds to be issued: \$12,000,000



# **RENTAL ASSISTANCE DEMONSTRATION PROJECTS** (Sources of Funding)



# LOW INCOME HOUSING TAX CREDITS (LIHTCs)





# LIHTCs – “COMPETITIVE” AND “NON-COMPETITIVE”

- 2 Types of Sources
  - 9% LIHTC – Competitive
    - awarded by Texas Department of Housing and Community Affairs (“TDHCA”)
      - awards based upon competitive criteria established and evaluated by TDHCA
      - applicant can be a private developer on behalf of the tax credit provider
      - applicant can be housing authority on behalf of a “to be formed entity”
  - 4% LIHTC – Non-Competitive
    - awarded by Texas Department of Housing and Community Affairs (“TDHCA”)
      - awards **NOT** based upon competitive criteria established and evaluated by TDHCA
      - requires that at least 50% of the “eligible” rehab costs funded with tax exempt bonds
      - applicant can be a private developer on behalf of the tax credit provider
      - applicant can be housing authority on behalf of a “to be formed entity”
      - therefore, **limited only** by the availability of private activity volume cap from BRB



# LIHTCs – EXAMPLES

- 2 Examples of \$20,000,000 Project Total Cost
  - 9% LIHTC – Competitive
    - $9\% \times \$20,000,000 = \$1,800,000$  per year
      - LIHTC sold for approximately 7%
      - $\$1,400,000 \times 10 = \$14,000,000$
      - $\$6,000,000$  covered by taxable loan debt (about 50/50 short term & long term)
        - ❑ Some short term debt during construction period
        - ❑ Some long term debt
  - 4% LIHTC – Non-Competitive
    - $4\% \times \$20,000,000 = \$800,000$  per year
      - LIHTC sold for approximately 3.1%
      - $\$620,000 \times 10 = \$6,200,000$
      - $\$13,800,000$  covered by tax exempt debt (about 50/50 short term & long term)
        - ❑ Some short term debt during construction period
        - ❑ Some long term debt



# TAX EXEMPT PRIVATE ACTIVITY BONDS



# TAX EXEMPT – “PRIVATE ACTIVITY BONDS”

- 2 Step Process

- 1. Induce Project

- a) Housing Authority Board adopts a “Sponsor Inducement Resolution” as the Project Sponsor
- b) Housing Authority’s PFC Bond Issuer Board adopts an “Inducement Resolution” as the Bond Issuer, expressing its intent to finance the project with tax exempt bonds
  - Identifies the name, address and nature of the project
  - Identifies maximum amount of tax exempt bonds to be issued
  - Authorizes submission of a private activity bond reservation application to Texas Bond Review Board
- c) Housing Authority Board adopts a “Sponsor Inducement Resolution” as the Project Sponsor
  - Submit Application for private activity bond reservation to Texas Bond Review Board
  - Await notice of Reservation and Docket Number form BRB
  - Close within 180 days of award of Reservation



# TAX EXEMPT – “PRIVATE ACTIVITY BONDS”

- 2 Step Process
  - 2. Issue Bonds and Close
    - a) Housing Authority Board adopts a “Consent Resolution” as the Project Sponsor – consenting to the issuance of Bonds by its subsidiary
    - b) Housing Authority’s PFC Bond Issuer Board adopts an “Authorizing Resolution” as the Bond Issuer – authorizing issuance of the Bonds for the Project to be loaned to the Borrower
      - Identifies the name, address and nature of the project
      - Identifies maximum amount of tax exempt bonds to be issued
      - Identifies the nature of the financing documents
      - Await notice from HUD of its requirements
      - Close within 45 days of HUD approval
      - Await approving opinion of Texas Attorney General

# “PRIVATE ACTIVITY BOND” LIMITATIONS ON AFFORDABLE HOUSING

- Qualified Residential Rental Projects are one category of “exempt facilities” that can be financed with tax-exempt private activity bonds
  - must meet either the “20-50 test” or the “40-60 test”
  - must receive a reservation for a portion of the state’s private activity volume cap
- Since 2019 volume cap applications in Texas have been oversubscribed
- Two types of affordable housing projects do not need volume cap reservation
  - Qualified 501(c)(3) Bonds
    - Issued to finance facilities owned, used, and operated by a 501(c)(3) charitable organization
    - must meet either the “20-50 test” or the “40-60 test”
  - Governmental Bond
    - Issued to finance facilities that are owned, used, and operated by a unit of state or local government



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# HOUSING AUTHORITY GOVERNMENTAL HOUSING

- Housing Authority Law (1937) – Chapter 393, Local Government Code
  - “Housing Project”
    - Decent, safe and sanitary urban or rural housing for “persons of low income”
    - “Persons of Low Income” – families or persons who lack income the authority considers necessary to live without financial assistance without overcrowding
  - “Residential Development” – as defined in Chapter 394, Local Government Code – Housing Finance Corporation Act
    - Available to Housing Authority only if it creates a Public Facility Corporation
    - Decent safe, and sanitary housing for persons of low and “moderate income” defined as:
      - Income that does not exceed maximum income adopted by Board of Housing Finance Corporation
      - Legal standard of review – “is income limit arbitrary and capricious” hence an “abuse of discretion”



## DETERMINING “LOW AND MODERATE INCOME” AMOUNTS

- Internal Revenue Code allows “moderate income” to be:
  - 140% of the greater of:
    - Area median gross income where the project is located
    - Statewide median gross income for the state where the project is located
- El Paso Housing Authority Proposal to Texas Attorney General
  - 140% of the statewide average, which is greater than El Paso AMFI
  - Permitted by Internal Revenue Code, therefore, not arbitrary and capricious
- Texas Attorney General’s Office
  - 140% of statewide average makes “moderate income” 200% of local AMFI
  - Will accept 180% of local AMFI in El Paso
  - 180% of El Paso local AMFI = \$106,000

## LOW AND MODERATE INCOME “WITH A TWIST”

- El Paso Housing Authority has “A1” Bond Rating
- Inquired about Authority “Guarantee” of Debt Service on Project
  - §392.066 – permits Authority that uses a PFC for a Project to
    - Enter into agreement to promising to make a contribution or loan to PFC
    - Transfer, convey, pledge money, a right or benefit to PFC to secure payment of indebtedness
  - §392.066(f) – requires if funds are provided authority must ensure project benefits families at or below 60% of AMFI in same proportion as funds provided as funds bear to overall cost of the project
  - Created a Funding Agreement between housing authority and its PFC promising to provide funds to cover debt service shortfall and set aside proportional units for 60% AMFI families



# USING PUBLIC FACILITY CORPORATIONS FOR RAD CONVERSIONS

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# WHAT IS A PUBLIC FACILITY CORPORATION (“PFC”)?

- It is a quasi-governmental corporation created by the City, County, Housing Authority to finance, own and operate “public facilities”, including multifamily housing
- **WHAT IS IT’S PURPOSE?**
  - PFC’s are another tool to create high quality multifamily housing
    - A public instrumentality partners with a private developer
    - Without additional investment by the City
    - Utilizing a statutorily granted property tax exemption
    - By causing a private developer to finance, construct and assume the risk of a multifamily development through private equity

# AUTHORITY

**Chapter 303 of the Texas Local Government Code enables a City to create a non-profit PFC to own and finance public facilities:**

- Enter into leasehold partnerships to build and own public facilities
- PFCs have been used to develop mixed income housing, student housing, conference facilities, hotels, parking garages, parks, and downtown developments
- Own, acquire, construct, rehabilitate, renovate, repair, equip, furnish or place in service public facilities
- A public non-profit corporation acting on behalf of the City
- Used to shift the risk of development away from the City
- Property owned by PFC is tax-exempt; this helps fill the financing gap in a project
- It is anticipated that this entity would own the Project and lease it to the development entity

# BOARD

- This is a separate legal entity from the HA, with a Board appointed by the HA
- Board may be HA Commissioners or who ever you choose
- Board meetings must be properly noticed and open to the public
- Board Members will have same immunity under Texas law as a HA Commissioner who acts in good faith
  - Not liable for discretionary acts within your authority and made in good faith
- Annual Board meeting; otherwise on an as needed basis
- We would recommend that three HA members serve as the incorporators and Board members
  - No liability associated with incorporators, it just shows HA supported the creation of entity

# OPERATING PROCEDURES

- Meetings may be separate from HA Commissioners meetings and separately posted or if the HA Commissioners are the Board, may be posted on a HA Commissioners agenda and at the time the item is reached, HA Commissioners meeting is recessed and PFC meeting is opened; once finished, HA Commissioners is resumed
- HA Staff will serve as staff of Corporation; key staff are recommended to be appointed as Assistant Secretary
- Added to HA's Annual Audit as constituent entity

## Next Steps:

- Develop recommendation from Staff
- Forward recommendation to HA Board of Commissioners
- If HA Board of Commissioners recommends creation of PFC, engage professionals
- If HA Board of Commissioners recommend, draft authorizing resolution and incorporation documents for HA Board of Commissioners approval



USING PUBLIC FACILITY  
CORPORATIONS OR  
HOUSING FINANCE  
CORPORATIONS TO  
DEVELOP A REGIONAL  
STRATEGY FOR REHAB AND  
CONSTRUCTION HOUSING

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## AREA OF OPERATION OF HOUSING AUTHORITY

**Chapter 392 of the Texas Local Government Code authorizes the creating of city, county and regional housing authorities:**

- Section 392.014 identifies the area of operation of a municipal housing authority to be the city limits of the city and its ETJ
- Section 392.015 identifies the area of operation of a county housing authority to be the county excluding the parts within a city
- Section 392.016 identifies the area of operation of a regional housing authority to be the counties creating it excluding the parts within a city

# EFFECT OF COOPERATION AGREEMENT ON AREA OF OPERATION OF HOUSING AUTHORITY

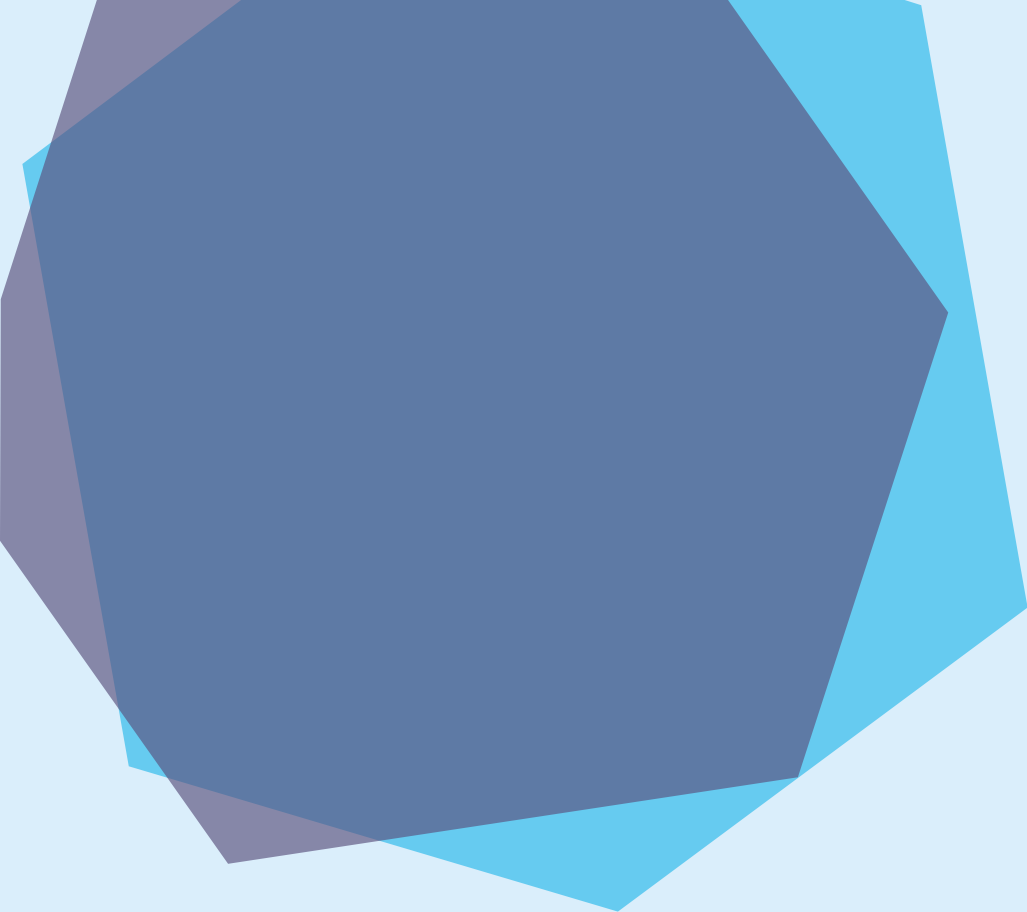
## **Section 392.019 provides as follows:**

- Regardless of Sections 392.015, 392.016, and 392.0161, the area of operation of a municipal housing authority, a county housing authority, a regional housing authority, or a merged housing authority may extend to and include another municipality, county, or other political subdivision of this state, under the terms of a cooperation agreement made under Section 392.059.

# EFFECT OF COOPERATION AGREEMENT ON AREA OF OPERATION OF HOUSING AUTHORITY

## Section 392.059 provides as follows:

- (a) An authority may cooperate with a municipality, a county, another political subdivision of this state, or the state in action taken in connection with the problems of clearing, replanning, and reconstructing slum areas and of providing housing for persons of low income in the area of operation of the authority or within the boundaries of the cooperating political subdivision.
- (b) Housing authorities may cooperate in the exercise of a power conferred by this chapter to **finance**, **plan**, **undertake**, **construct**, or **operate** a housing project in the area of operation of one or more of the cooperating authorities.



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