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Alert | State & Local Tax (SALT)

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Live Local Act 'Glitch Bill' Highlights Property Tax Exemption Risk

On Feb. 28, 2024, the Florida Legislature passed Senate Bill (SB) 328, the Live Local Act "glitch bill," amending and clarifying 2023's Live Local Act affordable housing law,[1] and the bill is on its way to Gov. DeSantis' desk for signature. If signed into law, SB 328 would, among other changes, make three modifications to the property tax exemption for affordable multifamily middle-income rental units, one of which – although necessary to comply with requirements under Florida's constitution – could make it more difficult to obtain the exemption.

The requirements for the property tax exemption (more than 70 units dedicated to affordable housing for at least three years) are different from the requirements for an affordable housing project to preempt local land use and zoning rules (40% of the units dedicated to affordable housing for 30 years). The requirements for the Live Local Act middle-market tax exemption are as follows: (1) The building must be "newly constructed," meaning that it must have been substantially completed within five years before the date of the first request for certification; (2) 71 or more units must be leased to middle-income or lower-income tenants (families with a household income of 120% or less of median income); (3) the rent charged may not exceed the lower of (i) the rate posted by the Florida Housing Finance Corporation (FHFC), or (ii) 90% of the fair market rental value (Rental Cap); (4) the landlord must commit to rent the affordable units at these rental rates for at least three years; and (5) the units may not receive another property tax exemption or a subsidy from the FHFC. If the project satisfied these requirements, the

[1] See our August 2023 GT Alert for additional details on the Live Local Act.

apartments leased to families earning 80% to 120% of median income would be eligible for a 75% exemption, and apartments leased to families earning less than 80% of median income would be eligible for a 100% exemption. There would be no exemption for apartments leased to families earning more than 120% of median income, or for units leased for more than the Rental Cap.

There is a two-step process to obtain the exemption. First, the owner must apply for certification from the FHFC no later than Dec. 31 by identifying the affordable units, the income of the tenants occupying the affordable units, the rent being charged for each affordable unit, and fair market rental value of each affordable unit. Once the FHFC has issued its certification, the owner must file a Form DR-504 AFH exemption application with the county property appraiser no later than March 1 for the year the exemption is desired.

The property tax exemption portion of SB 328 (1) clarifies that the proportionate value of the land and common areas attributable to an exempt affordable unit would also be exempt; (2) relaxes the 71 affordable unit minimum requirement for projects in the Florida Keys (reduced to a minimum of 10 affordable units); and (3) gives the county property appraiser full authority to grant and enforce the exemption, replacing the original law's apparent joint responsibility between the property appraiser and the FHFC. This third change may put some projects at risk of losing some or all of their Live Local Act tax exemption if the owner cannot prove household income of their affordable housing tenants is no more than 120% of median income or that the unit was rented for no more than the Rental Cap.

The tax exemption provisions in last year's Live Local Act implies that if the FHFC certifies the affordable units in a project, the critical income verification and Rental Cap requirements would be satisfied and the property would receive the exemption. The language in the original law (Sec. 196.1978(3)(e) Fla. Stat.) prior to the glitch bill reads as follows:

> To receive an exemption under this subsection, a property owner must submit an application on a form prescribed by the department by March 1 for the exemption, accompanied by a certification notice from the corporation [FHFC] to the property appraiser.

The glitch bill modifies the above provision by adding the underscored language:

> To <u>be eligible to</u> receive an exemption under this subsection, a property owner must submit an application on a form prescribed by the department by March 1 for the exemption, accompanied by a certification notice from the corporation to the property appraiser. <u>The property appraiser shall review the application and determine whether the applicant meets all of the requirements of this subsection and is entitled to an exemption. A property appraiser may request and review additional information necessary to make such determination. A property appraiser may grant an exemption only for a property for which the corporation has issued a certification notice and which the property appraiser determines is entitled to an exemption.</u>

Consequently, if signed into law by Gov. DeSantis, the FHFC's certification would not be binding on the county property appraiser. Rather, property owners would need the certification as a prerequisite to be eligible to file an exemption application. Under SB 328, the property appraiser would have the authority to require the building owner to prove that the household income of the affordable tenants do not exceed the 120% of the median income maximum to receive the exemption for such tenant's unit. The property appraiser might require copies of the affordable unit tenant's federal income tax returns. The property appraiser might ask to see the tax returns because, although the Live Local Act statute does not define the term "household income," another property tax exemption (Sec. 196.075(1)(b) Fla. Stat.) defines the term as "adjusted gross income, as defined in s. 62 of the United States Internal Revenue Code of all members

of a household." This means income includes investment income and capital gains and is determined without any itemized deductions, and the income of all household members living in the home is considered. Some tenants may not wish to provide copies of their income tax returns unless their lease requires it. Consequently, building owners should consider including in the lease a tax return requirement for each year the affordable tenant will occupy the unit. Furthermore, even if the building owner does obtain tax returns, some tenants might not have filed their tax return for the prior year by the March 1 deadline to file the exemption application with the county property appraiser. If, once filed, a tenant's tax return reflects adjusted gross income in excess of 120% of median income, the property appraiser may not allow the exemption for the unit because tax exemptions are strictly construed.

In addition to requiring income verification, a county property appraiser may also challenge the fair market rental values for the affordable units as reflected in the fair market value (FMV) rental appraisal study that the building owner must submit along with the request for certification. Because the Rental Cap is the lower of the rental amount posted by the FHFC or 90% of FMV rental value, the property appraiser may assert the FMV rental appraisal study reflects a higher than actual FMV rental, and that therefore the Rental Caps were exceeded because the rent charged was more than 90% of FMV. For example, assume the Rental Cap for a unit posted by the FHFC is $2,000, and the FMV rental value study indicates a FMV rental of $2,400, so the affordable tenant is charged $2,000 rent; however, the property appraiser asserts the actual FMV rental is $2,200, so that 90% of the FMV rent is actually $1,980, and disallows the exemption because the Rental Cap in such case would be $1,980, and the tenant was charged $20 over the cap. Therefore, the appraiser should carefully prepare the required market value rental appraisal with the expectation that the person who prepared the market rental study might need to prove their findings to the county property appraiser. Prior to SB 328, it was assumed the FHFC certification provided a safe harbor against claims that Rental Cap requirements were not satisfied, but this may no longer be the case.

The income verification and FMV rental appraisal situations described above may be exacerbated if the project has only the minimum 71 units dedicated to affordable housing rentals. If the county property appraiser audits the application and determines that just one affordable tenant's income exceeds the 120% median household income threshold, the property appraiser could disallow the exemption for all of the affordable units, since the law requires a minimum of 71 units for the exemption to apply. Additionally, this exemption process must be repeated every year, making this an annual recurring risk. Thus, property owners applying for the exemption may wish to commit more than 71 units to affordable housing to provide a buffer in case the income earned by an affordable tenant is ultimately determined to exceed 120% of median income. That tenant's unit would lose its exemption, but it would not result in loss of the exemption for all of the project's affordable units.

The county property appraiser's authority derives from *Spooner v. Askew*, a 1977 Florida Supreme Court ruling that county property appraisers have primary responsibility for assessment functions under the Florida constitution. Accordingly, the original Live Local Act provision giving the FHFC authority to determine eligibility for the affordable housing exemption could have been struck down by the courts. Although the Live Local Act's property tax exemption provides an incentive for affordable housing so people can live near where they work, the constitution imposes constraints on the Legislature's ability to provide exemptions, and the glitch bill is a recognition of this limitation. Affordable housing projects that want to take advantage of the Live Local Act exemption should take steps to be able to prove the income of their affordable tenants and to prove the fair market rental value of the affordable units in the event the county property appraiser requires them to do so.

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