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Alert | State & Local Tax (SALT)

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Florida's Live Local Act Middle-Income Affordable Housing Exemption Has 2-Year No-Exemption Exit Trap

A problem with Florida's Live Local Act property tax exemption statute for multifamily middle-income affordable units has been revealed: there's a two-year trailing loss of the exemption after the owner removes the affordable units from this program, even though the units will still need to be rented to middle-income tenants during this two-year period. For example, if a developer would like to take advantage of the exemption for three years (years one through three), then there would be no exemption for years four and five, yet the owner would still be required to lease the units to middle-income tenants. Furthermore, the county property appraiser potentially might assert that the rent charged to the middle-income tenants must continue at the discounted monthly rental rates.

Developers using the Live Local Act's preemption of local land-use and zoning rules should not be affected for 28 years, because to take advantage of the preemption, the developer must commit to leasing the affordable units at discounted rental rates for a 30-year period. On the other hand, if the developer does not need to rely on the preemption of local land-use rules to build the project (or the project is already in place), then the developer must only commit to leasing more than 70 units on an affordable basis for three years. It is a glitch in the statutory language describing this three-year commitment that results in the two-year no-exemption problem. Greenberg Traurig has corresponded about this problem with the Florida Housing Finance Corporation (Florida Housing), the quasi-governmental agency that issues the certification required to obtain the property tax exemption. A discussion of this problem follows.

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The first step in obtaining the property tax exemption is to apply for a certification from Florida Housing. The three-year commitment is a requirement to obtain the certification. The intent of the statute is that the affordable units must be committed to be rented on an affordable basis for a three-year minimum, and once the three-year period has passed, the developer can discontinue renting the units on an affordable basis. The statute provides that the following information must be provided to Florida Housing to obtain the certification:

> A sworn statement, under penalty of perjury, from the applicant restricting the property for a period of not less than 3 years to housing persons or families who meet the income limitations under this subsection.

Florida Housing's certification application form for the 2024 tax year (the first year that this affordable housing exemption is available) provides the following language regarding this three-year commitment:

> I understand that if issued an exemption under 196.1978(3), the submitted property is restricted under penalty of perjury, for a period of no less than 3 years to housing persons or families who meet the income limitations under this subsection. If the property at any point during these three years fails to meet the statutory requirements, the property owner and property may be subject to fines and liens issued by the local property appraiser.

The problem is that the certification must be renewed every year for the owner to be eligible for the exemption (not every three years), yet the representation commits the owner to rent the units on an affordable basis for three years. Using our example above regarding an owner who desires to take advantage of the exemption for three years (years one through three), under the language of the current three-year affordable housing commitment above, when it is time to request the certification for year three, the owner would be committing to lease the units on an affordable basis for an additional three years, covering years three, four, and five.

Greenberg Traurig reached out to Florida Housing to ask if they would modify this three-year representation language to clarify that once the units have been leased on an affordable basis for the initial three-year term, the owner of the project can opt out of this program and rent the units at market value rents. However, Florida Housing responded as follows:

> The commitment pursuant to 196.1978(3)(f)4., is that in exchange for a certification, income set asides continue for three years, regardless of whether the applicant seeks a subsequent certification in years 2 or 3.
>
> The certification itself is only good for one year, as pursuant to 196.1978(3)(e), it is a certification for the rent and income limits for that particular year, which makes the property eligible for the exemption request to the property appraiser. **Accordingly, each year an owner intends to seek an exemption, they are required to seek a certification, and that certification is only relevant to the year for which the certification is sought. Each certification begins a new three-year commitment**. [Emphasis added]

In other words, each year a project applies for the certification required to obtain the affordable housing property tax exemption, a new three-year commitment must be made to lease more than 70 units to middle-income families. Consequently, if the owner desires to remove the units from the affordable housing exemption program, the owner must continue to lease the affordable units to middle-income tenants for a two-year trailing period. However, if the owner does not re-up by committing to a new three-year period, the units will not be eligible for the property tax exemption.

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Florida Housing recently revised its FAQs on its certification website to discuss this issue, by adding Question 16 in the "General Questions" section:

> ***16) What happens if the applicant only seeks the exemption for one year?***
> If the applicant seeks the exemption for one year and does not seek the exemption for the following two years, the applicant is still required to restrict the units to housing persons meeting the income limitations set forth in s. 196.1978(2)(d)(1), F.S. and s. 196.1978(2)(f)(4), F.S., for those two years.

As a result, the owner will be required to lease the affordable units to middle-income tenants for two years after exiting the program without the advantage of the property tax exemption. If the owner does not do so, the county property appraiser can look back and assess the taxes saved, plus a 15% penalty for the year the exemption was granted but the certification was not obtained (years two and three in this case).

There is an argument to be made that although the affordable unit must be rented to middle-income tenants for the trailing two-year "no-exemption" period, the rent charged during this period may exceed the restricted affordable rental rates (the lower of the amount posted by Florida Housing or 90% of the unit's fair market rental value). This is because the statutory language requires the landlord to represent that the affordable units will be used "for housing persons or families who meet the income limitations of this subsection." This representation does not address the rental rate charged. However, the county property appraisers – not Florida Housing – have the sole authority to enforce the exemption, and there is a chance that a property appraiser might assert that when the landlord makes this three-year commitment to rent to middle-income tenants, the legislature intended that the units would also be rented at the affordable restricted rental rates. In such a case, the property appraiser might disallow the exemption for the prior years for which this three-year commitment was made in the certification request on the grounds that the representation was false, and assess the taxes that should have been paid, plus a 50% penalty and interest at 15%.

Florida Housing may find a workaround or ask for a technical opinion from the Department of Revenue to clarify this issue so that it can modify the representation language on the certification application to clarify that once the initial three-year affordable housing commitment has been satisfied, then the owner can renew on an annual basis. The alternative fix would be a legislative clarification, but that would be unlikely to happen until the 2025 legislative session. Any such clarification might be too late for multifamily projects to apply for the certification with Florida Housing and then apply for the property tax exemption with the county property appraiser by the March 1 exemption application deadline for the affordable units to be exempt for 2025.

This glitch in the statutory language demonstrates how any property tax exemption, including this affordable housing exemption, is tied to the precise language of the statute because tax exemptions are strictly construed by the courts (and Florida Housing's interpretation follows the language of the statute). Since case law holds that the county property appraisers have the sole authority to assess real property under the Constitution, the enforcement of this issue is up to them unless the legislature clarifies this question. Although the Live Local Act affordable housing exemption has a noble social purpose, it appears to be running into unanticipated legal barriers.

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