How the Legislature Can Fix the Middle-Income Affordable Housing Exemption in Fla.'s Live Local Act

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The state Legislature passed the Live Local Act in 2023 to encourage developers to build affordable housing in Florida. One of the ways it seeks to do this is by offering a property tax exemption for middle-income, multifamily developments—a type of housing designed to be affordable for renters who earn between 80% and 120% of local median income. While potentially beneficial, the middle-income tax exemption has several problems that—if not addressed by the Legislature—could make it of little value to many developers statewide.

The Basics of the Middle-Income Exemption

The middle-income exemption provides either a partial or full exemption on a per-unit basis if the project is five years old or newer and has at least 71 units dedicated for tenants earning no more than 120% of median income for at least three years. In addition, the exemption requires the development to charge rent below the rates posted for the county by the Florida Housing Finance Corp., or 90% of the fair market rental value. It also requires that the Florida Housing Finance Corp. issue a certification letter for the affordable units, and that the owner apply for an exemption with the county property appraiser by March 1 of the tax year. If the county property appraiser is satisfied that the conditions have been met, the units leased to tenants earning between 80% and 120% of median income would be eligible for a 75% exemption. For example, if such a unit is valued at $100,000, 75% would be exempt from tax, so tax would be paid on only $25,000. For units leased to tenants earning less than 80% of median income, the unit would be 100% exempt. It's important to note that the Legislature this year added a provision allowing local taxing jurisdictions to opt out of the exemption if a determination has been made that the county has an adequate supply of affordable housing.

Potential Problems and Legislative Fixes

The exemption statute creates uncertainties that could lead to multiple problems. If many owners encounter problems threatening their eligibility for the exemption, developers might simply lose interest and retreat from pursuing multifamily middle-income projects, ultimately making the exemption irrelevant. The Legislature can amend the statute to clear up these uncertainties.

The statute does not specifically say what evidence is required to confirm that an affordable tenant's household income does not exceed 120% of median income. As a result, the county property appraiser could demand copies of the affordable tenant's federal income tax returns. Unless the owner had the foresight to require tenants to provide copies of their tax returns as part of their lease, the owner might not be able to obtain proof of income. If the county property appraiser demands to see the tax returns, but the owner cannot produce them, the appraiser might deny the unit's exemption. One potential solution to this income verification problem is already on the books for a similar unit-by-unit exemption for senior

living facilities. That statute simply requires the tenant to certify their income on a Form DR-504S affidavit under penalty of perjury. The Legislature should likewise allow the owner of a multifamily, middle-income project to prove an affordable tenant's household income with an affidavit from the tenant.

As previously noted, the exemption requires that rent not exceed the lower of the amount posted by Florida Housing or 90% of the unit's market rate. It also requires the owner to provide a market rental study to support the declared market rate of each affordable unit. This creates a potential problem because the county property appraiser could argue that the owner's market rental rate is too low, and that therefore the rent being charged is too high, making the unit ineligible for exemption. As an example, assume that the rental limit posted by Florida Housing for a unit is $1,200, and the owner's market rental study shows a market rent of $1,400, so 90% of the market rate is $1,260. As a result, the owner charges the tenant $1,200 in rent. What if the county property appraiser asserts that the actual market rate is $1,300? In that case, the county property appraiser could bar the exemption for the unit, because 90% of $1,300 is $1,170, and the owner would be charging $30 in excess rent. Since the eligibility date for the exemption is Jan. 1 of the tax year, it would be too late for the owner to fix the problem by reducing the rent by $30. As a potential solution, the Legislature could amend the law to allow the owner to adjust the rent retroactively and refund the overpaid rent to the tenant.

Additionally, the exemption requires that a multifamily project have 71 or more units dedicated to affordable housing. This can cause a problem if an owner dedicates exactly or close to 71 units for affordable housing. For example, assume the owner of a 200-unit multifamily projects dedicates 72 units for affordable housing and, in good faith, leases two units to tenants who assure the owner that their income does not exceed 120% of median income. If these two tenants were being untruthful and earned income over 120%, the two units would not be eligible for exemption. Even more problematic, the total number of units leased to affordable housing tenants would fall below the 71-unit threshold, and none of the project's affordable units would be exempt. The Legislature could fix this by amending the law to provide flexibility in the 71-unit minimum if an owner can show it acted in good faith when it rented to tenants who misrepresented their income as being no more than 120% of median income.

A multifamily project that has received the middle-income exemption before a local jurisdiction in a county that has opted out because it has an adequate supply of affordable housing would be grandfathered in and continue to be eligible for the exemption. Here's the rub: The grandfather provision does not run with the land but is personal to the owner. If the project is sold, the new owner would not be eligible for the exemption for the opting-out jurisdiction's share of taxes. The law currently implies that if the owner instead sells its interest in the company that owns the project, the project would then be grandfathered. However, this is subject to interpretation, and the county property appraiser might assert that if the entity is sold (rather than the property), the project would no longer be grandfathered in under the opt-out rule. The Legislature should amend the law to clarify whether a project would continue to be grandfathered if the entity that owns the project is sold.

The intent of the statute is that a project owner rent affordable units on an affordable basis to middle-income tenants for at least three years, and once the three-year period has passed, the developer can discontinue renting the units on an affordable basis. However, the literal language requires the owner to agree to rent the unit to tenants earning no more than 120% of median income when it applies each year for certification from Florida Housing. As part of the annual certification process, the owner is required to represent under penalty of perjury that the unit will be rented to middle-income tenants for three years. There is no credit for prior years in which the unit was leased to middle-income tenants. Consequently, when the owner decides to remove the unit from the affordable housing exemption, it is still required to

lease the unit to middle-income tenants for a two-year trailing period. A simple legislative fix would be to clarify that owners can receive credit for prior years in which they leased the unit to middle-income tenants.

The penalty for inappropriately receiving a middle-income tax exemption can be steep. The owner likely would have to pay the taxes saved, plus a 50% penalty, and 15% interest, with a 10-year look-back period. The county property appraiser is required to record a lien on the public record when a project is found to have received the exemption without qualification. There is no hearing or due process before the county property appraiser records a lien. The recording of such a lien would be an event of default under most commercial mortgages. As a result, the recording of such a lien could have catastrophic consequences, even if the county property appraiser was mistaken about the project's eligibility for the exemption. The Legislature could fix this by providing for a due process hearing before the recording of a lien, allowing an owner to rebut a property appraiser's assertion of ineligibility.

Conclusion

The multifamily, middle-income affordable housing property tax exemption under the Live Local Act serves a noble goal—to incentivize the development of affordable housing so that middle-income families can afford to live near their workplaces. However, uncertainties in the law might cause some developers trepidation. These proposed changes would help alleviate some of their concerns about this exemption.

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