

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Appropriations

BILL: CS/SB 196

INTRODUCER: Appropriations Committee (Recommended by Appropriations Subcommittee on Transportation, Tourism, and Economic Development) and Senator Rodriguez

SUBJECT: Florida Housing Finance Corporation

DATE: March 2, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Hackett	Ryon	CA	Favorable
2.	Hrdlicka	Hrdlicka	ATD	Recommend: Fav/CS
3.	Hrdlicka	Sadberry	AP	Fav/CS

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 196 designates the Florida Housing Finance Corporation (Florida Housing) as the state fiscal agency authorized to make constitutional determinations of fiscal sufficiency in connection with their issuance of bonds. Currently, such determinations must be made by the State Board of Administration (SBA). To complement this change, the bill also removes a reference to SBA rules in the statute governing Florida Housing's Guarantee Program.

The bill amends definitions and regulations related to the qualified contract process by which Florida Housing seeks a purchaser for an affordable housing development. Additionally, the bill proscribes what happens to the affordable housing development's extended use period if a qualified contract does not close. If the reason is generally due to actions by the owner, then the extended use period continues. If contract does not close for other reasons, and Florida Housing is unable to find another purchaser within a 1-year period, then the extended use period ends.

The bill also repeals provisions that limit Elderly Housing Community Loan program loans to \$750,000 per housing community and the requirements for such loans.

The bill takes effect July 1, 2022.

II. Present Situation:

The Florida Housing Finance Corporation (Florida Housing) is a public corporation created by the Legislature to assist in providing a range of affordable housing opportunities for Florida residents. Florida Housing administers federal and state resources to make loans, guarantees of loans, and to issue bonds to finance the development and preservation of affordable homeowner and rental housing and assist homebuyers with financing and down payment assistance.¹

Florida Housing Bond Issuance

Florida Housing facilitates the issuance of bonds by serving in a conduit capacity. Each bond indenture is for a single purpose entity and the bonds are secured solely by the revenues, assets, and guarantees associated with each bond.² The bonds are not an obligation of the state as they are not secured by the full faith and credit of the state.³

Section 420.509, F.S., designates the State Board of Administration (SBA) as the state fiscal agency to make the determination required by s. 16, Art. VII of the State Constitution, in connection with the issuance of Florida Housing bonds. The required fiscal determination is that in no state fiscal year will the debt service requirements of the bonds proposed to be issued, and all other bonds secured by the same pledged revenues, exceed the pledged revenues available for such debt service requirements. This section also authorizes Florida Housing to bear interest on the bonds that are issued. However, the rate or rates may not exceed the interest rate limitation set forth in s. 215.84(3), F.S.,⁴ unless authorized by the SBA.⁵

Before a bond is issued, Florida Housing's Board of Directors approves the requirements for a bond financed development at a public meeting. Upon the Board's approval, a fiscal sufficiency report is prepared by a third party and submitted to the SBA for approval. The Governor and the Florida Cabinet, functioning as the SBA Board of Trustees, must place the report on the agenda for the next scheduled SBA Board of Trustees meeting, and only upon approval by the SBA Board of Trustees can the bond transaction proceed to closing.⁶ Florida Housing has stated that this mechanism can produce significant delays in bond issuance due to timing differences between the various board meetings.

¹ See Florida Housing Finance Corporation, *Overview of Florida Housing Finance Corporation*, (July 2017) available at <https://www.floridahousing.org/docs/default-source/aboutflorida/august2017/august2017/tab8.pdf>, (last visited January 20, 2022). See also part V, ch. 420, F.S.

² Affordable Housing Work Group, *Overview of the State's Implementation of Rental Programs*, (August 2017) available at <https://www.floridahousing.org/docs/default-source/aboutflorida/august2017/august2017/tab7.pdf> (last visited January 20, 2022). Chapter 2017-71, Laws of Fla., established the Workgroup to develop recommendations to address the state's affordable housing needs.

³ Sections 420.509 and 420.51, F.S., and s. 16, Art. VII, State Constitution.

⁴ This section prescribes a statewide maximum bond interest rate, which is flexible with the bond market. The rate is computed by adding 300 basis points to The Bond Buyer "20 Bond Index" published immediately preceding the first day of the calendar month in which the bonds are sold.

⁵ Section 420.509(4), F.S.

⁶ Florida Housing Finance Corporation, *SB 196 Talking Points*, (November 11, 2021) on file with the Senate Appropriations Subcommittee on Transportation, Tourism, and Economic Development.

Florida Affordable Housing Guarantee Program

The Florida Affordable Housing Guarantee Program was created in 1992 to work in concert with federal, state, and local government financing sources to effectively lower the overall cost of borrowing capital for the construction and rehabilitation of affordable multifamily rental housing.⁷ These cost savings were achieved by the Guarantee Program guaranteeing the payment of mortgages that secure multifamily mortgage revenue bonds, thus raising the loan's rating and reducing the overall cost of borrowing. In 2009, Florida Housing's board of directors officially suspended the Guarantee Program due to continually low interest rates, which prompted developers to refinance properties outside of the Guarantee Program. Currently, just one multifamily rental property holds an outstanding guarantee from this program.⁸

State Apartment Incentive Loan (SAIL) Program

The SAIL Program is administered by Florida Housing and provides low-interest loans on a competitive basis to multifamily affordable housing developers.⁹ These funds often serve to bridge the gap between the development's primary financing and the total cost of the development. SAIL dollars are available for developers proposing to construct or substantially rehabilitate multifamily rental housing.¹⁰

Elderly Housing Community Loan (EHCL) Program

During the first six months of funding availability each year, program funds are made available for developers who provide set-asides for certain tenant groups. Included among these are elderly persons. The EHCL program offers up to \$750,000 in loans to make substantial life, safety, or security related improvements to existing affordable rental housing for the elderly. Unused funds designated for EHCL return to the SAIL program.¹¹

Loans made through this program must meet several statutory requirements. Recipients must commit to matching at least 5% of the loan amount and have the primary mortgagee review and approve the developer's application for this loan. The Florida Housing establishes the interest rate, which may not exceed 3 percent, and the loan term, which may not exceed 15 years¹² and is based on a credit analysis of the applicant. The corporation may forgive indebtedness for a share of the loan attributable to the units in a project reserved for extremely-low-income elderly by nonprofit organizations where the project has provided affordable housing to the elderly for 15 years or more. A nonprofit organization or sponsor may not use the proceeds of the loan to pay for administrative costs, routine maintenance, or new construction.

⁷ Section 420.5092, F.S.

⁸ Florida Housing Finance Corporation, 2020 Annual Report, p. 19, available at <https://www.floridahousing.org/data-docs-reports/annual-reports> (last visited January 20, 2022).

⁹ Section 420.5087, F.S.

¹⁰ See Florida Housing Finance Corporation, *State Apartment Incentive Loan*, available at <https://floridahousing.org/programs/developers-multifamily-programs/state-apartment-incentive-loan> (last visited February 3, 2022).

¹¹ Section 420.5087(3)(e), F.S.

¹² Unless the Florida Housing's lien under the loan would be subordinate to another mortgage lien, in which case the term may be the same as the longest term of the superior lien.

Qualified Contract Process

Of the affordable housing financing options provided by the federal government, Low Income Housing Tax Credits (LIHTC)¹³ are among the most commonly used. When a property is financed using LIHTC the federal government typically requires the property be utilized for affordable housing for at least 30 years.¹⁴ This time period is divided into the first 15 years, the “initial compliance period,” and the rest, an “extended use period.”

After 14 years the owner of an affordable housing development may request that the Florida Housing seek a purchaser who will continue to operate the affordable portions of the development as affordable housing – this is referred to as the “qualified contract process.” Many developments, particularly those that receive the most lucrative LIHTC, waive the right to enter this process when contracting with the Florida Housing for the credits and must remain affordable housing for the duration of the agreed upon time. After a developer requests a qualified contract, if the Florida Housing is unable to present a buyer during the subsequent 1-year period, the extended use period of the property as affordable housing will end and the property can be utilized for market-rate housing.¹⁵

This “qualified contract process” relies on the Florida Housing marketing the property and returning to the owner with a “bona fide contract,” showing that the Florida Housing has found a buyer in order to maintain the affordable housing requirement. The “bona fide contract” is an offer to purchase an affordable housing development for a price equal to or exceeding the qualified contract amount (or purchase price) that is made by a purchaser with the intent that the offer will result in the execution of a valid and binding contract.¹⁶ The price for the affordable housing portion of the sale is set according to a formula designed to give the owner an inflation-adjusted return on its original equity contribution.¹⁷ This calculation may result in a price that exceeds the market price of the development as affordable housing.

The bona fide contract, as provided by Florida administrative rule is, a contract for sale that:¹⁸

- Is signed by the purchaser;
- Provides that the acceptance of the contract is contingent upon approval by the Florida Housing;
- Requires an initial earnest money deposit from the purchaser of \$50,000 to be made with an escrow agent; and

¹³ Low Income Housing Tax Credits are provided by the federal government to rental housing developers in exchange for a commitment to provide affordable rents and are usually sold to investors to raise project equity. The LIHTC program is governed by the U.S. Department of Treasury and Florida’s allocation is administered by the Florida Housing. Under the LIHTC program, successful applicants are provided with a dollar-for-dollar reduction in federal tax liability in exchange for the development or rehabilitation of units to be occupied by very low- and low-income households. See Florida Housing Finance Corporation, *Housing Credits*, available at <https://www.floridahousing.org/programs/developers-multifamily-programs/low-income-housing-tax-credits> (last visited February 3, 2022).

¹⁴ Internal Revenue Code Section 42(h)(6)(A).

¹⁵ 26 U.S.C. 42(h)(6)(E)(i)(II).

¹⁶ Fla. Admin. Code R. 67-48.031(3).

¹⁷ 26 U.S.C. 42(h)(6)(F).

¹⁸ Fla. Admin. Code R. 67-48.031(3).

- Obligates the purchaser to make a second earnest money deposit equal to 3 percent of the qualified contract price to be deposited within 15 business days of the end of the due diligence period.

The initial and second earnest money deposits are not refundable unless the seller fails to deliver insurable title or defaults. A contract that meets these terms is deemed a qualified contract and the Florida Housing is deemed to have met its responsibility to present the owner with a qualified contract.¹⁹

If the Florida Housing is able to procure a purchaser and present the owner with such a bona fide contract within the 1-year period, regardless of whether the owner accepts, rejects, or fails to act upon the contract, the property will continue to be subject to its extended use agreement as affordable housing. If the owner accepts the offer, the property will be sold to the purchaser. If the owner rejects the offer or fails to act upon the offer, the owner will continue to be subject to the extended use agreement and cannot submit another qualified contract request for the development.²⁰

III. Effect of Proposed Changes:

Qualified Contract Process

The bill changes the process for qualified contracts for affordable housing projects.

Section 1 amends s. 420.503, F.S., to define the terms “bona fide contract” and “qualified contract”. These definitions exist currently only in administrative rule.

Generally under current law, the “bona fide contract” is an offer to negotiate the purchase of a development in order to maintain its affordable housing status. The bill changes this administrative definition to mean “a certain and unambiguous offer to purchase the development, for an amount equaling or exceeding the qualified contract purchase price which is made in good faith by the qualified purchaser with the intent that such offer results in the execution of an enforceable, valid, and binding contract.”

The bona fide contract must include:

- Requiring an initial, *nonrefundable* earnest money deposit from the purchaser of \$50,000 to be made with an escrow agent, *unless waived by the seller*; and
- Obligating the purchaser to make a second, *nonrefundable* earnest money deposit equal to 3 percent of the qualified contract price to be deposited within 15 business days of the end of the due diligence period, *unless waived by the seller and subject to rights reserved by the purchaser in the event of seller failure to deliver insurable title or default*.

¹⁹ Fla. Admin. Code R. 67-48.031.

²⁰ Fla. Admin. Code R. 67-48.031(11).

Under the bill, similar to the administrative rule, the initial and second earnest money deposits are nonrefundable. However, under the bill the bona fide contract can include a provision that allows the initial and second earnest money deposits to be refundable:

- If the seller fails to deliver insurable title at closing;
- If the seller terminates a fully executed contract due to a reason other than default of the purchaser (it is unclear if the “fully executed contract” refers to the bona fide contract or another contract, like the qualified contract discussed below);
- As provided in the contract; or
- If the owner defaults.

The changes from current administrative definitions also allow the waiver of the requirements to place the initial and second earnest money deposits in escrow and allow such deposits to be refunded for additional reasons.

The bill defines “qualified contract” as having “the same meaning as in 26 U.S.C. s. 42(h)(6)(F) in effect on the date of the preliminary determination certificate for the low-income housing tax credits for the development that is the subject of the qualified contract request, unless the Internal Revenue Code requires a different statute or regulation to apply to the development.” The definition requires the Florida Housing to deem a bona fide contract to be a qualified contract at the time the second earnest money deposit is deposited in escrow in accordance with the terms of the bona fide contract and, in such event, the Florida Housing is deemed to have fulfilled its responsibility to present the owner with a qualified contract.

The terms created by the bill are circular, in that the term “bona fide contract” means an offer to purchase the development for a certain amount related to a “qualified contract”; and the term “qualified contract” includes within the meaning that a bona fide contract is deemed a qualified contract when certain actions occur.

Section 4 amends s. 420.5099, F.S., related to allocation of low-income housing tax credits, to determine what happens to the extended use agreement, that is the affordability period, in the event that a qualified contract does not close.

Under the bill, if a qualified contract fails to close due to (1) a default of the owner, (2) the termination by the owner due to a reason other than the purchaser’s default, or (3) as otherwise provided for in the bona fide contract, then the development must remain subject to the extended use agreement and the owner is considered to have waived all rights to a qualified contract request. If a qualified contract fails to close for any other reason, the qualified contract process continues and the Florida Housing must continue to seek valid offers through the 1-year period. If no other qualified contract is presented to the owner during the 1-year period, the project must be treated as if no qualified contract had been presented, and the extended use period is terminated. In effect, this would end the affordability of the housing and allow the units to be provided at market rate.

Section 6 amends s. 420.628, F.S., to correct a cross reference.

Elderly Housing Community Loan Program

Section 2 amends s. 420.5078(5)(e), F.S., to repeal the requirements for these loans. The bill preserves the requirement that a certain amount of money be set aside for loans related to building preservation, health, life safety, and sanitation repairs and improvements, but removes statutory guidelines for the terms and requirements related to those loans.

Bond Issuance

Section 3 amends s. 420.509, F.S., to designate Florida Housing as the state fiscal agency to make the determination required by s. 16, Art. VII of the State Constitution, in connection with the issuance of Florida Housing bonds and removes the authority of the SBA to authorize an interest rate in excess of the maximum.

The section also allows, where applicable, Florida Housing to use the interest rate limitation on bond issuance set forth in ss. 159.825 or 215.84, F.S., as applicable. This change allows Florida Housing to bear higher interest on taxable bonds without seeking SBA approval.

Section 5 amends s. 420.5092, F.S., to remove the requirement for the Florida Housing Guarantee Program, now suspended, that the program's fund's financial rating remain consistent with rules adopted by the SBA. This is a technical change to conform to the bill's removal of the SBA from oversight responsibility.

Effective Date

Section 7 provides that the bill takes effect July 1, 2022.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill defines "qualified contract" to mean the same as in federal law "in effect on the date of the preliminary determination certificate..." Generally, the legislature may not

delegate its power to another branch of government, including the federal government.²¹ “Where a statute generally incorporates a federal law or regulation, to avoid holding the subject statute unconstitutional, Florida courts interpret the statute as incorporating only the federal law in effect on the date of adoption of the Florida Statute.”²² It is unknown what changes, if any, that Congress may make to the federal law cited in the bill.

Further, the definition of qualified contract created in the bill is tied to the definition in federal law, “unless the Internal Revenue Code requires a different statute or regulation to apply to the development.” It is unclear what other statutes or regulations that may include and therefore what the definition of qualified contract may include.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The effect of repealing the requirements for the EHCL program is unclear because it is unknown what administrative rules the Florida Housing will adopt, if it changes existing rules based on the current law. By repealing the limit on the amount of the loan, it is possible that larger loans could be made leading to more repairs for this type of housing; however the size of the loans may in turn limit the number of developments that can be repaired in any given year. The effect on the repair and improvement of current developments with set-asides for the elderly is unknown.

The change of the definitions and application of the bona fide contract and the qualified contract may benefit owners of affordable housing developments that are at their 14-year periods of affordability. The provisions may make it easier for the owner to divest itself of an affordable housing development. This may limit the amount of affordable housing units available in the future.

C. Government Sector Impact:

According to the Florida Housing, the current multi-layer review process can cause unpredictable delays and subject transactions to market volatility. This bill would ameliorate that concern and positively impact Florida Housing’s ability to reliably issue bonds.²³

²¹ See s. 3, Art. II, Florida Constitution.

²² *Abbott Lab's v. Mylan Pharms., Inc.*, 15 So. 3d 642, 655 (Fla. Dist. Ct. App. 2009). “...the Legislature may adopt provisions of federal statutes and administrative rules made by a federal administrative body, ‘that are in existence and in effect at the time the legislature acts, but it would be an unconstitutional delegation of legislative power for the legislature to adopt in advance any federal act or the ruling of any federal administrative body that Congress or such administrative body might see fit to adopt in the future.’” *Freimuth v. State*, 272 So. 2d 473, 476 (Fla. 1972)

²³ Florida Housing Finance Corporation, *SB 196 Talking Points*, (November 11, 2021) on file with the Senate Appropriations Subcommittee on Transportation, Tourism, and Economic Development.

The changes in the bill to the bona fide contract and qualified contract process may result in more owners entering the process, requiring Florida Housing to incur additional administrative costs in order to find purchasers and eligible offers.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The definition of “qualified contract” requires Florida Housing to deem a bona fide contract to be a qualified contract at the time the second earnest money deposit is deposited in escrow in accordance with the terms of the bona fide contract. However, the bill appears to create a conflict with the definition of “bona fide contract” which allows the waiver of the earnest money deposits. If the deposit is waived, then it is unclear when the Florida Housing must deem a bona fide contract to be a qualified contract.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 420.509 and 420.5092.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Appropriations on February 28, 2022:

The committee substitute repeals provisions that limit Elderly Housing Community Loan Program loans to \$750,000 per housing community and the provisions related to how such loans can be made.

The committee substitute also amends definitions and regulations related to the qualified contract process, by which the Florida Housing seeks a purchaser for an affordable housing development. The changes affect when such a contract is entered and the operation of deposits related to the purchase.

B. Amendments:

None.