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Locke Lord QuickStudy: Public Facility Corporation Compliance ?Monitoring: Texas Department of Housing and ?Community ?Affairs Proposes Rules

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Texas House Bill 2071 (the “**Bill**”), which took effect on June 18, 2023 to modify Chapter 303 of the Texas Local Government Code (the “**Code**”) with respect to the ownership of a multifamily residential development (a “**Development**”) by a public facility corporation (a “**PFC**”), requires annual submission of a compliance audit (an “**Audit Report**”) to the Texas Department of Housing and Community Affairs (the “**Department**”) and the chief appraiser of the appraisal district in which the Development is located. The Bill requires the Department to adopt rules to implement its new authority under § 303.0426 of the Code by no later than January 1, 2024.

On November 10, 2023, the Department published its proposed rules for PFC compliance monitoring (the “**Proposed Rules**”) in the Texas Register. Full text of the Proposed Rules can be [found here](#).

Public comment on the Proposed Rules is now open and can be submitted until 5:00 p.m. central time on December 11, 2023. This QuickStudy provides a brief summary of the Proposed Rules, with notations where we believe clarification or correction may be appropriate. We encourage you to review the Proposed Rules and provide public comment to the Department by the deadline.

Application of the Proposed Rules: It appears the Department intends to apply the compliance monitoring requirements to Developments that are not grandfathered under the law that was in effect prior to HB 2071. The language of the Proposed Rules would benefit from clarification on this point.

The Audit Report: The Department will promulgate forms for the completion of the Audit Report and its accompanying documentation. The Proposed Rules provide parameters for the Auditor’s review, including the sample size for household files to be reviewed. Contents of the Audit Report include:

- Verification that the Development has a properly recorded Regulatory Agreement with a term of at least 10 years.
- Confirmation that the Development complies with the rent and income restrictions in the Regulatory Agreement, through review of initial tenant files and annual tenant recertifications.
- Assurance that the rent and income restricted units are dispersed across various unit types.
- Evidence the Development is affirmatively marketed to households with housing choice vouchers, within the

parameters set forth in the Bill.

- Confirmation that the form of tenant lease includes the tenant protections required by the Bill.
- Calculation showing the annual rental savings associated with the rent restrictions, as compared to the market rate rents that would otherwise be charged for the units, equals at least 60% of the estimated ad valorem taxes that would have been paid for the year, but for the exemption.

The Proposed Rules omit certain requirements in the Bill that relate to a PFC's acquisition of an occupied Development. Further, they would benefit from further guidance regarding affirmative marketing requirements and selection of rent and income standards, among various versions published by HUD.

The Auditor: Qualifications for the auditor include the following, which should be documented in the Audit Report:

- The auditor has experience with housing compliance matters, which may be evidenced by a current Certificate Occupancy Specialist (COS) certification or an equivalent certification and/or a resume.
- The Auditor cannot be affiliated with or related to the Texas Comptroller of Public Accounts, the PFC, the operator of the Development (the "**Operator**"), or certain related governmental bodies or officials.
- Any current or former property manager with oversight of the Development will not qualify as an Auditor under the Proposed Rules.
- The Development can engage the same Auditor for up to three consecutive years. After the third consecutive audit, the PFC must engage a new auditor for at least two reporting years before re-engaging with a prior Auditor.

The Proposed Rules would benefit from clarification as to the party responsible for engaging the auditor.

Timing

- The Operator must submit the Audit Report to the Department by June 1 of each year following the first anniversary of either (1) the date of the PFC's acquisition of the Development or (2) the date the newly constructed Development is first occupied by a tenant.
- The first set of Audit Reports will be due on June 1, 2024.
- Within 60 days after receipt of an Audit Report, the Department will post it on its website.

Noncompliance; Correction:

- If the Department identifies noncompliance in the Audit Report, it will send out a notification within 45 days of its receipt of the Audit Report. The Development will then have 60 days to cure the noncompliance.
- If the noncompliance is not cured within the 60-day correction period, the Development is subject to loss of the ad valorem tax exemption.
- Disputes regarding noncompliance in an Audit Report can be addressed with the Auditor, in a meeting with Department staff, or through the Department's rules regarding alternative dispute resolution.

Given the severity of the penalty, the Proposed Rules could benefit from further clarification regarding the timing and contents of the various notifications and the procedures by which a loss of tax exemption could be implemented.

Public Comment

Written comments may be submitted by anyone with an interest, in hard copy or electronic formats to:

Texas Department of Housing and Community Affairs

Attn: Wendy Quackenbush

P.O. Box 13941

Austin, Texas 78711-3941

Email: wendy.quackenbush@tdhca.state.tx.us

The deadline for submission is December 11, 2023 at 5:00 p.m. central time.

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