



STATE OF NEW YORK

DEPARTMENT OF LAW

REAL ESTATE FINANCE BUREAU

M E M O R A N D U M

**Re: Guidance on Housing Development Fund
Corporations Seeking to Transfer
Or Sell Property for, or Otherwise
Convert Property to Market-Rate Use**

Date: July 16, 2015

The Department of Law publishes this memorandum as a guidance document pursuant to State Administrative Procedure Act § 102(14).

Introduction

The Real Estate Finance Bureau of the Department of Law has received requests for guidance on whether Housing Development Fund Corporations (“HDFC”) formed pursuant to Article XI of the Private Housing Finance Law (“PHFL”) and the Business Corporation Law (“BCL”) for the purpose of providing low-income housing (hereinafter “BCL HDFCs”) may convert the real property that they own into market-rate cooperative or condominium housing, either by amending their certificates of incorporation or by transferring and/or selling the property to a different type of entity. This guidance document provides the position of the Department of Law, the City of New York Department of Housing Preservation and Development (“HPD”), and the New York State Division of Housing and Community Renewal (“DHCR”), who serve as the supervising agencies for most BCL HDFCs that own real property in New York State on the requirements of the PHFL as it relates to such potential transactions.¹

Key Legislative Provisions

For the purposes of this memorandum the relevant sections of the PHFL are as follows:

¹ The legal interpretation of the Private Housing Finance Law set forth in this memo reflects the views of the Department of Law, the City of New York Department of Housing Preservation and Development (“HPD”) and the New York State Division of Housing and Community Renewal (“DHCR”), all of which have reviewed and contributed to this memo.

PHFL § 573(3)(a) requires that the certificate of incorporation of any HDFC shall provide “that the company has been organized exclusively to develop a housing project for persons of low income;”

PHFL § 573(3)(b) requires that the certificate of incorporation of any HDFC shall provide “that all income and earnings of the corporation shall be used exclusively for corporate purposes, and that no part of the net income or net earnings of the corporation shall inure to the benefit or profit of any private individual, firm, corporation or association;” and

PHFL § 573(5) provides, *inter alia*, that “[t]he secretary of state shall not file the certificate of incorporation of any such corporation or any amendment thereto unless the consent or approval of the commissioner or the supervising agency, as the case may be, is affixed thereon or attached thereto.”

Requirements of the Private Housing Finance Law

Pursuant to the PHFL, an HDFC’s sole corporate purpose is to develop a housing project for persons of low-income. PHFL § 573(3)(a) requires every HDFC’s certificate of incorporation to provide “that the company has been organized exclusively to develop a housing project for persons of low income.” Therefore, to develop or operate the real property that is owned by the HDFC as something other than a housing project for persons of low income, the HDFC would need to be dissolved, and the real property of the HDFC transferred to a non-HDFC entity that does not have the sole corporate purpose required by the PHFL.

Unlike Article II of the PHFL, which authorizes Mitchell-Lama housing companies to dissolve and reconstitute as other types of entities, thereby removing themselves from the restrictions set forth in the statute, Article XI does not authorize the reconstitution of an HDFC. The New York State Department of State will not accept for filing an amendment to an HDFC certificate of incorporation that seeks to remove the requirements of PHFL § 573(3)(a), or any other amendment that purports to convert an HDFC into another type of entity.

PHFL § 573(5) provides that “[t]he Secretary of State shall not file the certificate of incorporation or any such amendment thereto unless the consent or approval of the commissioner or the supervising agency, as the case may be, is affixed thereon or attached thereto.” Neither HPD nor DHCR will consent to such an amendment, unless the dissolution of the HDFC would be in furtherance of affordable housing (*e.g.*, the supervising agency may consent to the sale of a 10-unit building to a developer who agrees to build 15 permanently affordable units on the building lot where the property currently exists).

Because an HDFC certificate of incorporation cannot be amended to remove the statutorily required corporate purpose of developing a housing project for persons of low income, a BCL HDFC attempting to “convert” property to market-rate ownership must

transfer or sell its real property to an unrestricted entity. This practice presents numerous statutory hurdles, as discussed below.

The proceeds of any sale, like all other assets of the HDFC, must be used exclusively for the corporate purpose of developing a housing project for persons of low income, as the statute explicitly prohibits any net income or earnings of the corporation to inure to the benefit or profit of any private individual, firm, corporation, or association. *See* PHFL § 573(3)(b). The board of a BCL HDFC, in conjunction with the supervising agency, must ensure that the proceeds of sale, if any, will be distributed in accordance with the requirements of the PHFL. If any proposed sale involves distributing the proceeds of the sale to a BCL HDFC's shareholders, such distribution is prohibited by law.

Requirements for any Proposed Transfer or Sale of Property

Pursuant to the PHFL, in order to transfer the real property owned by a BCL HDFC, it must:

- 1) Obtain explicit written approval from the BCL HDFC's supervising agency of two amendments of the certificate of incorporation: the first, authorizing the sale of the real property (to be filed with the Secretary of State before the BCL HDFC executes a contract or delivers a deed) and the second, the post-disposition dissolution of the BCL HDFC (to be filed with the Secretary of State after the conveyance); and
- 2) Obtain agreement from the supervising agency as to how the proceeds of the sale, if any, shall be distributed for low-income housing purposes in accordance with the requirements of the PHFL.

Required Filing Under the Martin Act

In the event that a BCL HDFC obtains the consent of the supervising agency to effectuate the transfer or sale of its real property for the purpose of offering new real estate securities, a new offering plan must be submitted pursuant to the Martin Act, along with compliance with the applicable regulations governing the form of conversion. *See East Midtown Plaza Hous. Co., Inc. v. Cuomo*, 20 N.Y.3d 161 (2012).

Conclusion

Any BCL HDFC considering amending its sole corporate purpose or transferring and/or selling its property must first consult with and obtain particular approvals from its supervising agency, which must be specified in its certificate of incorporation. Because the law severely limits the ability of a BCL HDFC to convert its property to a free-market cooperative or condominium, shareholders and board members may wish to seek legal advice.