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ATTORNEY GENERAL

March 2, 2022

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300-C Outlet Pointe Blvd.
Columbia, South Carolina 29210

Dear Ms. Easton:

We received your letter requesting an opinion of this Office regarding South Carolina Housing Tax Credits ("State Tax Credits"). In your letter, you explained the South Carolina Housing Finance and Development Authority ("SC Housing") currently provides support for the administration of federal housing tax credits. In 2020, South Carolina implemented its own State Tax Credit with the adoption of section 12-6-3795. In your letter, you state:

SC Housing would like an opinion from your office, as Section 12-6-3795 currently exists, as to: (1) whether SC Housing is authorized to create a competitive process to receive the State Tax Credit or if SC Housing's only discretion is related to rules establishing the issuance of an eligibility statement and not eligibility for the credit; (2) whether SC Housing can set a ceiling on the amount of State Tax Credits available in any given year; and (3) whether SC Housing can decline to provide State Tax Credits to an applicant that has otherwise received an allocation of federal credits, can show local support for a project and has a financial need or shows tenant benefit.

Law/Analysis

As you mentioned in your letter, section 12-6-3795 of the South Carolina Code (Supp. 2021) entitles taxpayers meeting certain qualifications to claim a State Tax Credit.

(B)(1) A state tax credit pursuant to this section may be claimed against income taxes imposed by Section 12-6-510 or 12-6-530, bank taxes imposed pursuant to Chapter 11, Title 12, corporate license fees imposed pursuant to Chapter 20, Title 12, and insurance premium and retaliatory taxes imposed pursuant to Chapter 7, Title 38, to be termed the South Carolina housing tax credit, and is allowed with respect to each qualified project placed in service after January 1, 2020, and before December 31, 2030, in an amount equal to the federal housing tax credit allowed with respect to such qualified project. In computing a tax

payable by a taxpayer pursuant to Section 38-7-90, the credit allowed pursuant to this section must be treated as a premium tax paid pursuant to Section 38-7-20.

S.C. Code Ann. § 12-6-3795. Section 12-6-3795(A)(5) defines “qualified project” as “a qualified low-income building as that term is defined in Section 42 of the Internal Revenue Code of 1986, as amended, that is located in South Carolina and receives approval for tax credits from the South Carolina Housing and Finance Development Authority provided pursuant to this section.” Section 12-6-3795(C) specifies the authority given to SC Housing by stating:

(1) The authority shall promulgate rules establishing criteria upon which the eligibility statements are issued which must include consideration of evidence of local support for the project. The eligibility statement must specify the amount of the South Carolina housing tax credit allowed.

(2) The authority may not issue an eligibility statement until the taxpayer provides a report to the authority detailing how the state credit authorized by this section will benefit the tenants of the project, once placed in service including, but not limited to, reduced rent, or why the state credit authorized by this section is necessary to undertake the project.

Section 12-6-3795(A)(1) defines the “eligibility statement” as “a statement authorized and issued by the South Carolina Housing and Finance Development Authority certifying that a given project qualifies for the South Carolina housing tax credit.”

First, you inquire as to whether SC Housing is authorized to create a competitive process for those seeking to claim a State Tax Credit or whether its “only discretion is related to rules establishing the issuance of an eligibility statement and not eligibility for the credit.” To answer this question, we employ the rules of statutory construction the primary of which is to ascertain the intent of the Legislature. Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (“The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature.”).

Where the statute’s language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. Id. at 233, 509 S.E.2d at 262 (citing Paschal v. State Election Comm’n, 317 S.C. 434, 454 S.E.2d 890 (1995)). “What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature.” Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Looking at the text of section 12-6-3795, subsection (B)(1) allows the State Tax Credit for qualified projects. The definition of a qualified project not only includes its qualification under

section 42 of the Internal Revenue Code, but also requires approval by SC Housing. Thus, we believe by including SC Housing in the approval process, a project must not only meet the federal housing tax credit requirements, but also those required by SC Housing. This belief is bolstered by the fact that the Legislature gives SC Housing specific authority under subsection (C)(1) to promulgate rules to establish eligibility criteria beyond what is required for the federal tax credit. Due to the specific authority given to SC Housing by the Legislature to establish additional criteria, SC Housing's role goes beyond administrative approval. However, we do not believe SC Housing may arbitrarily deny the State Tax Credit to those taxpayers who meet the criteria established under the Internal Revenue Code and as promulgated in the rules set forth by SC Housing.

Next, you ask whether SC Housing can set a ceiling on the amount of the State Tax Credit available in any given year. Section 12-6-3795 does not speak to such a limit. In Chapman v. South Carolina Department of Social Services, 420 S.C. 184, 191, 801 S.E.2d 401, 405 (Ct. App. 2017), our Court of Appeals found that while a court must give difference to an agency's interpretation of a statute it is charged with administering, an agency may not add requirements to such a statute. As such, we do not believe SC Housing has the authority to set a limit on the amount of State Tax Credits available. Furthermore, in our research, we discovered during the passage of section 12-6-3795, a senator proposed an amendment to limit the credit in aggregate to two million dollars. S. Journal, 123rd Leg. Sess. at 52 (S.C. Mar. 4, 2020). The amendment was withdrawn, indicating the Legislature's intent not to set a limit on the amount of State Tax Credits available to taxpayers in a given year. Id.; see Gilstrap v. S.C. Budget & Control Bd., 310 S.C. 210, 216, 423 S.E.2d 101, 104 (1992) (finding by explicitly rejecting certain language, the Legislature indicates its intention not to adopt such language). Therefore, we do not believe SC Housing may impose a ceiling on the amount of State Tax Credits available during a given year.

Lastly, you inquire as to whether SC Housing may decline to provide a State Tax Credit to an applicant that received a federal housing tax credit, can show local support for a project, and has a financial need or shows tenant benefit. As noted above, section 12-6-3795(C) allows SC Housing to promulgate rules establishing criteria for eligibility for the State Tax Credit. While section 12-6-3795(C)(1) requires these eligibility criteria include "evidence of local support for the project" and section 12-6-3795(C)(2) requires taxpayers to submit a report to SC Housing detailing "how the state credit authorized by this section will benefit the tenants of the project," we believe the Legislature gave SC Housing general authority in section 12-6-3795(C)(1) to establish additional criteria upon which eligibility statements are issued. If the applicant does not meet these additional criteria, then we foresee a situation in which SC Housing may decline to issue an eligibility statement.

Conclusion

Section 12-6-3795(C) gives SC Housing authority to establish criteria, in addition to those stated by the Legislature, for the issuance of eligibility statements. Therefore, we believe SC Housing may establish additional criteria for the issuance of State Tax Credits. However, so long as a taxpayer meets such stated criteria along with the Internal Revenue Code requirements, we do not

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believe SC Housing may arbitrarily deny eligibility for State Tax Credits. Furthermore, we do not find the Legislature set a ceiling on the amount of State Tax Credits available in any given year. However, because we believe SC Housing may establish criteria in addition to that specified by the Legislature for the issuance of eligibility statements, it may deny a taxpayer's eligibility if such criteria are not satisfied.

Sincerely,



Cydney Milling
Assistant Attorney General

REVIEWED AND APPROVED BY:



Robert D. Cook
Solicitor General