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# In the Appeal of Summer Vista (OPA-PA-25-001) Interested Party's Comments to Agency Report

**R. Marsil Johnson** <rmarsjohnson@bsjmlaw.com> Thu, Mar 6, 2025 at 5:00 PM
To: Jerrick Hernandez <jhernandez@guamopa.com>
Cc: "Eliseo M. Florig, Jr." <emflorig@ghura.org>, Dean Manglona <dmanglona@civilletang.com>

Dear Mr. Hernandez:

Please see attached **Interested Party's Comment on Agency Statement re OPA-PA-25-001** for e-filing in the above-referenced matter.

Should you have any questions or concerns, please let us know. Kindly confirm receipt via return e-mail.

Thank you.

Regards,

R. Marsil Johnson

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**IN THE OFFICE OF PUBLIC ACCOUNTABILITY**
**PROCUREMENT APPEAL**

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| **In the Appeal of** | ) | Docket No. OPA PA-25-001 |
| | ) | |
| **SUMMER VISTA II DE, LLC AND SUMMER VISTA III DE, LLC** | ) | **INTERESTED PARTY COMMENT ON AGENCY REPORT** |
| | ) | |
| **Appellants.** | ) | |
| | ) | |

Comes now, **FLORES ROSA GARDENS L.L.C.** ("Flores Rosa") and, through undersigned counsel, submits this Interested Party Comment on Agency Statement in response to the Agency Statement submitted by Procuring Agency Guam Housing and Urban Renewal Authority ("GHURA") on February 24, 2025.

## I. THE LOW-INCOME HOUSING TAX CREDIT ("LIHTC") PROGRAM IS A PROGRAM THAT INVOLVES THE ALLOCATION AND DISTRIBUTION OF FEDERAL TAX CREDITS WHICH ARE NOT MONEY AND HAVE NO INHERENT VALUE

The Low-Income Housing Tax Credit ("LIHTC") program was created by Congress as part of the Tax Reform Act of 1986. Pub.L. No. 99–514, 100 Stat. 2085 (1986). It offers developers tax credits to subsidize the acquisition, construction, and rehabilitation of affordable rental housing for low- and moderate-income tenants. See *Williams v. The Muses, Ltd. 1*, 2016-0250 (La. App. 4 Cir. 10/19/16), 203 So. 3d 558, 566, *writ denied sub nom. Williams v. The Muses, Ltd.*, 2016-2034 (La. 1/13/17), 215 So. 3d 254 ("As part of the Tax Reform Act of 1986, Congress created the federal

LIHTC program. 26 U.S.C. § 42. The purpose of the LIHTC program is "to encourage the private sector to develop affordable rental housing.").

"Each state receives an annual allotment of low income housing tax credits. Tax credits equate to a dollar-for-dollar reduction of the holder's federal tax liability, which can be taken for up to ten years if the project satisfies governmental requirements each year." *Holly Ridge Ltd. P'ship v. Pritchett*, 936 So. 2d 694, 695 (Fla. Dist. Ct. App. 2006).

Tax credits are not money and are not equivalent to money. See *State Bldg. & Constr. Trades Council of California v. Duncan*, 76 Cal. Rptr. 3d 507, 525 (Ct. App. 2008), *as modified on denial of reh'g* (May 16, 2008) ("There is, moreover, an impressive body of authority, much of which was cited by the Director in his coverage decision, that excludes tax credits from the category of goods and services that amount to public assets or are treated as the equivalent of money.").

As noted by the United States Supreme Court:

> Unlike payments in cash or property received by virtue of ownership of a security—such as distributions or dividends on stock, interest on bonds, or a limited partner's distributive share of the partnership's capital gains or profits—**the "receipt" of tax deductions or credits is not itself a taxable event, for the investor has received no money or other "income" within the meaning of the Internal Revenue Code**. See 26 U.S.C. § 61.

*Randall v. Loftsgaarden*, 478 U.S. 647, 657 (1986). Tax credits "have no value in themselves; the economic benefit to the investor—the true 'tax benefit'—arises because the investor may offset tax deductions *against* income received from other sources or use tax credits to reduce the taxes otherwise payable on account of such income." *Randall*, 478 U.S. at 657.

Thus, the LIHTC program, a program which involves the allocation and distribution of tax credits, does not allocate or distribute money, income, or anything that is considered of value. The only benefit of the tax credits is in their potential to reduce tax liability.

## II. GUAM PROCUREMENT LAW DOES NOT APPLY TO GHURA'S ADMINISTRATION OF THE LIHTC PROGRAM BECAUSE GUAM PROCUREMENT LAW ONLY APPLIES TO EXPENDITURE OF PUBLIC FUNDS AND TAX CREDITS ARE NOT PUBLIC FUNDS

Guam's procurement law only applies only to the expenditure of public funds irrespective of their source. This is explicitly stated in 5 GCA § 5004(b), which provides that:

> (b) Application to Guam Procurement. This **Chapter shall apply to every expenditure of public funds irrespective of their source**, including federal assistance funds except as otherwise specified in § 5501[1] of this Chapter, by Guam, acting through a governmental body as defined herein, under any contract, except that this Chapter shall not apply to either grants or contracts between Guam and another government. Nothing in this Chapter or in regulations promulgated hereunder shall prevent any governmental body or political subdivision from complying with the terms and conditions of any grant, gift, bequest, or cooperative agreement.

5 GCA § 5004 (emphasis added).

Guam's procurement law and Guam's procurement regulations do not define the term "public funds." There also does not appear to be a definition of the term "public funds" anywhere in Gaum statutes, regulations, or case law. Furthermore, the ABA Model Procurement Code that this section was based on also provides no guidance on what the term "public funds" means.

Black's Law Dictionary defines the term "public fund" as:

> 1. The revenue or money of a governmental body. • The term includes not only coins and paper but also bank deposits and instruments representing investments of public money. 2. The securities of a state or national government.

FUND, Black's Law Dictionary (12th ed. 2024). Tax credits are not revenue nor are they money. Tax credits also are not securities. This distinction was noted by the United States Supreme Court in *Randall*, as quoted above:

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[1] Title 5 GCA § 5501 provides that:

> Where a procurement involves the expenditure of federal assistance or contract funds, or other federal funds as defined by Section 20 of the Organic Act of Guam, all persons within the government of Guam shall comply with such federal law and regulations which are applicable and which may be in conflict with or may not be reflected in this Chapter.

> **Unlike payments in cash or property received by virtue of ownership of a security**—such as distributions or dividends on stock, interest on bonds, or a limited partner's distributive share of the partnership's capital gains or profits—the "receipt" of tax deductions or credits is not itself a taxable event, for **the investor has received no money or other "income" within the meaning of the Internal Revenue Code**. See 26 U.S.C. § 61.

*Randall*, 478 U.S. 647, 657 (1986) (emphasis added).

Looking to other jurisdictions, the question about whether LIHTC program tax credits constitute "public funds" has been addressed by the California Court of Appeals in *Duncan*, 76 Cal. Rptr. 3d 507 (2008). In *Duncan*, the court held that LIHTC program tax credits could not be considered "public funds." The issue arose in the context of the California prevailing wage law.

In California, "[t]he conditions of employment on construction projects financed 'in whole or in part by public funds' are governed by California's 'prevailing wage law.'" Miller and Starr California Real Estate 4th ed. § 31:13. Overview and purpose, 9 Cal. Real Est. § 31:13 (4th ed.). Thus, in *Duncan*, the court was charged with determining if LIHTC program tax credits were "public funds", at least as the term is defined by California's prevailing wage law.

In reaching its ultimate opinion, the court made several relevant holdings along the way. It recognized that the fact LIHTC program tax credits may be transferable and marketable did not mean they held any monetary worth to the government before they were allocated to a developer. See *Duncan*, 76 Cal. Rptr. 3d at 527 ("The fact that LIHTCs may indeed be marketable *by others, after* they have been allocated by the state, does not establish that they have a realizable monetary worth *to the state before* they are allocated." (emphasis in original)). The court also held that allocation of LIHTC program tax credits are not property, they do not amount to the "payment of money or the equivalent of money", and they do not constitute the transfer of an asset of value for less than fair market value." Specifically, the court held that:

> We simply hold the converse—that in this context LIHTCs when allocated to a proposed project likewise entail no actual diminution of the state's economic resources. It bears emphasis that the operative event here is the allocation of LIHTCs to a project not yet completed. There is nothing in our record that shows allocation is anything more than a promise or an administrative assignment, the mere movement of figures from one column to another. Nothing tangible, such as certificates evidencing ownership of a property interest in the project, is transferred or delivered to the developer. Any movement of LIHTCs is purely abstract, a matter at best of bureaucratic bookkeeping. **LIHTCs are not property.** Allocated LIHTCs represent only the possibility of future benefit that may be realized after construction or rehabilitation of the proposed project. (See *Randall*, *supra*, 478 U.S. 647, 656–657, 106 S.Ct. 3143, 92 L.Ed.2d 525; *Griffin*, *supra*, 324 F.3d 330, 355.) **We therefore hold that they do not amount to either the "payment of money or the equivalent of money"** within the scope of subdivision (b)(1) **or the transfer of "an asset of value for less than fair market value"** within the scope of subdivision (b)(3).

See *Duncan*, 76 Cal. Rptr. 3d at 529-30.

Guam's procurement law only applies to the expenditure of "public funds" and "public funds" essentially amount to public money in the sense that they are a thing of value exchanged by the government with private entities for goods and services. As shown above, tax credits are not "public funds" because they are not money, they are not the equivalent of money, they are not property, and they are not securities. They hold no inherent value in and of themselves. Their only benefit is in their potential to reduce tax liability. Since LIHTC program tax credits are not money, the equivalent of money, property, or securities, they are not public funds and Guam's procurement law does not apply to their allocation.

## III. SINCE GUAM'S PROCUREMENT LAW DOES NOT APPLY TO GHURA'S ADMINISTRATION OF THE LIHTC PROGRAM, THE PUBLIC AUDITOR HAS NO JURISDICTION OVER THIS DISPUTE

As an administrative agency, the Public Auditor is a creature of statute and is limited by its enabling act. The Supreme Court of Guam has construed enabling acts strictly to prevent Guam administrative agencies from overreaching.

Guam's procurement law limits the authority of the Public Auditor to matters properly submitted to him. *See* 5 GCA § 5703 ("The Public Auditor shall have the power to review and determine de novo any matter properly submitted to her or him.").

To determine what matters are "properly submitted" to the Public Auditor, it is important to understand that 5 GCA § 5703 is part of the Title 5 Chapter 5 and so application of 5 GCA § 5703 is limited by 5 GCA § 5004, which itself provides that "[t]his **Chapter** shall apply to every expenditure of public funds irrespective of their source", as described above. Since 5 GCA § 5703 and 5 GCA § 5004 are part of the same chapter of Guam law, the application of both provisions is limited to the expenditure of public funds irrespective of their source.

Therefore, if the program in question does not involve the expenditure of public funds or federal assistance funds, it follows that no section that is part of Title 5 Chapter 5 applies to the program and no dispute over how the program is administered can be "properly submitted" to the Public Auditor and the Public Auditor cannot have jurisdiction over the dispute.

As explained above, GHURA's administration of the LIHTC program does not involve the expenditure of public funds. Therefore, no section that is part of Title 5 Chapter 5 applies to GHURA's administration of the LIHTC program and thus no dispute over GHURA's administration of the LIHTC program can ever be "properly submitted" to the Public Auditor. Thus, the Public Auditor has no jurisdiction over disputes arising out of GHURA's administration of the LIHTC program.

Since the Public Auditor has no jurisdiction over disputes arising out of GHURA's administration of the LIHTC program, the Public Auditor has no choice but to dismiss the appeal filed by Summer Vista II and Summer Vista III.

Additionally, the only remedies the Public Auditor can impose in a procurement appeal are the remedies afforded under the Guam procurement law, specifically those provided for in 5 G.C.A. § 5452. Since Guam procurement law only applies to expenditure of public funds and not allocation of tax credits, none of the remedies the Public Auditor is statutorily empowered to award apply.

## IV. THE OFFICE OF THE ATTORNEY GENERAL LEGAL MEMORANDUM RELIED UPON BY SUMMER VISTA II AND SUMMER VISTA III IS PREMISED ON THE MISTAKEN ASSUMPTION THAT THE LIHTC PROGRAM IS A FEDERAL GRANT PROGRAM, WHICH IT IS NOT

Summer Vista II and Summer Vista III rely on at Office of the Attorney General of Guam legal memorandum dated December 17, 2012 (Ref: AG-12-0850), for the premise that all of GHURA's federal programs are subject to the Guam Procurement Law unless a specific federal statute or regulation provides otherwise. *See* Appellant's Procurement Appeal, Exhibit B (Protest, Ex. 24-OAG 12-0850, 12/17/2012 Opinion) (the "OAG Opinion").

The OAG Opinion does not really say anything. The OAG was asked to opine on whether GHURA is subject to Guam's Procurement Law. The answer provided was that GHURA is subject to Guam procurement law if the matter is a procurement issue. The memorandum addresses whether there are any federal laws that are inconsistent with GHURA's procurement law. The OAG reached the conclusion that there are no federal statutes (related to housing) that are inconsistent with Guam's procurement law and therefore the procurement law applies to GHURA. In doing so, the OAG mistakenly cited the LIHTC program as involving the expenditure of federal funds. Therefore, the assertion made by Summer Vista II and Summer Vista III that "the OAG issued a legal memorandum … confirming that LIHTC program together with other federal programs administered by GHURA are not exempt from the Guam Procurement law" is based on a mistaken assumption. As shown above, the LIHTC program is a program that allots federal tax credits. It is not a grant program.

## V. THE UNDERLYING PROTEST AND APPEAL MADE APPELLANTS IS LARGELY BASED ON FALSE ASSUMPTIONS AND MISSTATEMENTS OF GUAM LAW

Appellants claim Flores Rosa and Rosewood LLC failed to comply with Guam law 11 GCA §70130(a) requiring businesses to have business licenses. However, a business license is only required for businesses that are actively engaging in business. If a business has not yet started operations, it does not need a business license:

> (a) It is the policy of the government of Guam that all persons **engaging in, transacting, conducting, continuing, doing, or carrying on a business** have business licenses.
> (b) Unless otherwise specifically exempted by law, no person shall **engage in, transact, conduct, continue, do, or carry on a business** in Guam until it obtains a business license. The requirement to obtain a business license shall be independent of and in addition to a requirement for a certificate of authority from the Director of Revenue and Taxation or other applicable regulating agency or board, pursuant to applicable Guam laws, including, but not limited to, 22 GCA § 15307, 22 GCA § 15102, 18 GCA § 7102 and 11 GCA § 106213.

11 G.C.A. § 70130 (emphasis added). Flores Rosa and Rosewood LLC were not engaging in, transacting, conducting, continuing, doing, or carrying on a business at the time the QAP applications were filed, so they did not need business licenses.

Appellants claim Flores Rosa was required but failed to provide evidence of site control because they have not executed a lease with the property owner Robert P. Salas, Sr. Appellants also argue that even if Flores Rosa LLP intends on executing a lease with the property owner, Robert P. Salas Sr., does not possess a service license to rent or lease undeveloped real property (see p. 13 of Appeal). Robert Salas Sr. has not leased the property to Flores Rosa LLC yet, so he did not need a service license at the time of the application. *See* 11 G.C.A. § 76101 ("Any person who rents or leases unimproved real property to another party shall be required to obtain a service license annually.") He can still apply for and obtain any necessary licenses by the time the lease is executed. Also, Robert P. Salas has been identified in the application as a member representative of Flores

Rosa so there is no doubt as to whether he will permit the Flores Rosa to use the property for the proposed project.

Appellants claim Flores Rosa's Phase 1 Environmental Assessment Report does not comply with QAP threshold requirements that the report address lead-based paint and asbestos. Here, the report excluded matters relating to lead-based paint and asbestos, and the report was not signed and certified by the environmental engineer who conducted the assessment. It is true that the Environment Assessment Report ("EAP") does not address asbestos or lead-based paint. However, the QAP at p. 7 only requires the EAP to address lead-based paint and asbestos for "acquisition/rehabilitation" projects. Flores Rosa's proposed development falls under the "new construction" category, not the "acquisition/rehabilitation" category. *See* Criteria 14 Justification (p. 41 of Application); Loan documentation (p. 52 of Application ("Acquisition - $0"). As such, it does not need to address asbestos/lead-based paint.

As for the lack of signature, it is true that that Chris Rodes ("Rhodes") did not signed page 315 of Application. However, Rodes signed the EAP on the cover page (see. P. 295 of Application). The signature was dated October 2024. As such, there is no real dispute that the report was issued by a licensed environmental professional.

Appellants argue that the IRS tax exemption letter cannot be relied upon because it was issued by the IRS before The Children's Ark amended its articles to include "fostering low income housing" as an exempt purpose. This argument is flawed because there is no question that "fostering of low income housing" is an exempt purpose. *See* 26 CFR § 42(h)(5)(C) (For purposes of this paragraph, the term "qualified nonprofit organization" means any organization if (iii) one of the exempt purposes of such organization includes the fostering of low-income housing.") Because the IRS letter certifies that all of the other exempt-purposes listed in The Children's Ark's Articles are

indeed exempt purposes, the addition of "fostering low income housing", which is also an exempt purpose by law, does not affect Children's Ark's status as a qualified nonprofit organization.

Appellants also argue that The Children's Ark and the other members of Flores Rosa do not have a business license. Criteria 9 requires the non-profit to "exist in and be qualified to do business in Guam." *See* QAP at 18. Non-profit organizations do not need business licenses to conduct business in Guam. The Appellant's argument based on a false premise.

Appellants also claim that GHURA's evaluation of the five (5) LIHTC applications was critically flawed and compromised because the evaluators failed to follow the objective criteria from scoring which resulted in unfair, flawed and incorrect scoring and that points were improperly and wrongfully allocated to Flores Rosa and Rosewood LLC. The evaluation committee was created specifically to provide an unbiased analysis of the application. The evaluation committee acted within its rights and discretion to allocate points and score the applications as they see fit, within the criteria set froth in the QAP. It is improper for Appellants and anyone else to second guess the decisions made by an evaluation that was specifically constituted to provide an unbiased evaluation of the applications that were submitted.

**CONCLUSION**

Flores Rosa respectfully requests that the Public Auditor dismiss Appellant's procurement appeal for the reasons set forth above.

**DATED** this 6th day of March, 2025.

**BLAIR STERLING JOHNSON & MARTINEZ**
A PROFESSIONAL CORPORATION

BY: _____
**R. MARSIL JOHNSON**
*Attorneys for Interested Party Flores Rosa Gardens L.L.C.*

**ATTACHMENTS:** NONE